

TRADUCTION/TRANSLATION

PROCEEDING UNDER SECTION 45
TRADE-MARK: OVIDE DESTREMPES & DESIGN
REGISTRATION NO.: TMDA42509

On October 2, 2001, at the request of Messrs. Borden, Ladner Gervais LLP, the Registrar issued the prescribed notice under section 45 of the *Trade-marks Act* to Honoré Destrempe, the registered owner of the registration referred to above.

The trade-mark OVIDE DESTREMPES & Dessin (reproduced immediately below) is registered in association with the following wares: ointment.



Section 45 of the *Trade-marks Act* requires that the registered owner of the trade-mark show whether the mark was in use in Canada in association with each of the wares or services specified in the registration at any time during the three-year period immediately preceding the date of the notice and, if not, the date when it was last so in use and the reason for the absence of such use since that date.

In reply to the notice, the affidavit of Victor Destrempe, with an appendix, was filed. Only the

requesting party produced written representations. No hearing was requested in this case.

I reproduce in full the contents of Mr. Victor Destrempe's affidavit:

The requesting party submits that the evidence submitted does not show use of the trade-mark as required by the *Trade-marks Act*. Further, it adds that the evidence does not demonstrate that the mark is used by the registered owner, specifically Honoré Destrempe.

I fully agree with the requesting party that the evidence does not establish the use in the manner required by sections 4(1) and 45 of the Act.

Under subsection 45(1) of the Act, the registered owner of the trade-mark must demonstrate that the mark has been used with each of the wares or services specified in the registration at any time during the three years preceding the date of the notice, in this case between October 2, 1998, and October 2, 2001.

Furthermore, the use in association with wares is defined in subsection 4(1) of the Act as follows:

4(1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

Thus, the owner had to demonstrate:

- (1) that there was a transfer of the wares sometime between October 2, 1998, and October 2, 2001;
- (2) in the normal course of trade; and
- (3) that at the time of the transfer the mark was so associated with the wares that notice of the association was then given to the person to whom the wares were transferred.

Although Mr. Destrempe has demonstrated the way in which the trade-mark is marked on the product, he has failed to show use of the trade-mark within the relevant period. His allegation that the mark has been used within the last three years, in particular on November 13, 2001, is a mere unsubstantiated allegation (see *Plough Canada Ltd. v. Aerosol Fillers Inc.*, 45 C.P.R. (2d) 194 (FCTD) and 53 C.P.R. (2d) 62 (FCA)) further, in no way does it demonstrate a use between October 2, 1998 and October 2, 2001. If the trade-mark was used on November 13, 2001, such use is after the date of the notice and therefore after the relevant period.

The evidence completely fails to describe the registrant's normal course of trade and fails to show that there was a transfer or sale of the ointment bearing the trade-mark between October 2, 1998 and October 2, 2001. Mr. Destrempe has produced no invoice or sales figures concerning the

ointment bearing the trade-mark, and therefore there is nothing that would allow me to conclude that the mark was used during that period.

Also, as noted by the requesting party, the affidavit is taken out by Mr. Victor Destrempe when the registered owner of the mark is Honoré Destrempe. No explanation is given concerning the affiant's relationship with the registered owner or his personal knowledge of the use of the trade-mark by the registered owner.

In view of the evidence furnished, I conclude that the trade-mark registration ought to be expunged.

Registration No. TMDA42509 will be expunged in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 22ND DAY OF MAY 2003.

D. Savard
Senior Hearing Officer
Section 45