SECTION 45 PROCEEDINGS
TRADE-MARK: WINDRIVER WEATHER SYSTEM
REGISTRATION NO.: TMA490,884

On July 21, 2004, at the request of Perley-Robertson, Hill & McDougall LLP, the Registrar issued the notice prescribed by section 45 to Mark's Work Wearhouse Ltd., the registered owner of the above-mentioned registration.

Section 45 of the *Trade-marks Act* requires the registered owner of a trade-mark to indicate whether the mark has been used in Canada in association with each of the wares and services listed in the registration at any time during the three years preceding the date of the notice and, if not, the date on which it was last used and the reason why it has not been used since that date. The relevant period in this case is any time between July 21, 2001 and July 21, 2004. What qualifies as use of a trade-mark is defined in s. 4 of the Act, which is reproduced below:

> 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.
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> (2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.
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> (3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

The trade-mark WINDRIVER WEATHER SYSTEM is registered in association with clothing namely, mens' outerwear namely, jackets and shirts; handwear namely, gloves and mitts; headwear namely, hats and caps of all kinds.

In response to the s. 45 notice, the registered owner filed the affidavit of its General Merchandise Manager, Dale Trybuch. Only the requesting party filed a written argument. It has taken the position

that the evidence does not show use of the mark during the relevant time period, or prior to that time period, and that no special circumstances exist that justify the lack of use. I agree with the requesting party, for the reasons set out below.

Mr. Trybuch has not provided any evidence that shows use of WINDRIVER WEATHER SYSTEM in accordance with s. 4 of the Act in association with any of the registered wares during the relevant three-year period. Instead, Mr. Trybuch has stated, "WINDRIVER WEATHER SYSTEM brand clothing consists of layered pieces of outerwear that can be worn separately or together, allowing the wearer to adjust the jacket to suit the weather and temperature" and "during the period between July 21, 2001 and July 21, 2004, my company sold layered outerwear systems." [Note that he does not say that his company sold WINDRIVER WEATHER SYSTEM outerwear systems between July 21, 2001 and July 21, 2004.] As Exhibit D, Mr. Trybuch has provided sample hangtags representative of those attached to the aforementioned outerwear, but those hangtags do not display the WINDRIVER WEATHER SYSTEM trade-mark. Instead the following marks or words appear on the tags: WINDRIVER, WindRiver Outfitting System, and "MOTHER NATURE no longer controls THE PLANET'S fastest changing WEATHER SYSTEM".

Mr. Trybuch states that his company first began selling and advertising outerwear under the WINDRIVER WEATHER SYSTEM brand in 1998. He states that sales figures for 1998 and 1999 are no longer available but he provides, as Exhibit F, a "guide" that he says was given to purchasers of WINDRIVER WEATHER SYSTEM brand clothing in 1998 and 1999. I do not see WINDRIVER WEATHER SYSTEM anywhere in the guide.

Based on Mr. Trybuch's evidence, I find that the registered owner has not shown use of its mark at any time prior to the issuance of the s. 45 notice. The question therefore becomes whether special circumstances have been shown that justify the non-use.

Mr. Trybuch attests that his company "de-emphasized" the WINDRIVER WEATHER SYSTEM brand after 1999. Mr. Trybuch further attests that his company recently decided to "re-emphasize" the

WINDRIVER WEATHER SYSTEM brand of outerwear and that "discussions began several months ago, and it was decided that the mark should be used on a new series of outerwear planned for Fall 2004." I think that the normal interpretation of "several months" would be less than six months and, since Mr. Trybuch signed his affidavit on January 17, 2005, I am not prepared to interpret his statement as meaning that the discussions that he refers to predated the s. 45 notice. Thus, we are left with a situation where we have no evidence that the registered owner ever used the registered mark in accordance with s. 4 prior to the issuance of the s. 45 notice and the only evidence regarding future plans to use the mark postdate the s. 45 notice.

I acknowledge that Mr. Trybuch provides copies of contracts that indicate a start date of June 8, 2004, which he says his company entered into, in keeping with its decision to re-emphasize WINDRIVER WEATHER SYSTEM brand of outerwear. This statement is inconsistent with his earlier statements that indicate that the decision to re-emphasize was made later than July 2004 and I prefer the requesting party's suggestion that it was decided to add a WINDRIVER WEATHER SYSTEM tag to wares that had already been contracted for. I note that the contracts themselves make no mention of the trade-mark. Furthermore, given the importance of the July 21, 2004 date, it seems to me that the affiant's failure to attest that the decision to re-emphasize the registered mark occurred prior to July 21, 2004 should in itself be taken as indicating that it did not. As an affiant in a s. 45 proceeding is not susceptible to cross-examination, it is trite law that any ambiguities in his statements should be interpreted against his interests. In the present case, there are many vague or ambiguous statements that are subject to interpretation against the interests of the registered owner.

As set out in *NTD Apparel Inc. v. Ryan* (2003), 27 C.P.R. (4th) 73 (F.C.T.D.) at 81, any determination of whether there are special circumstances excusing non-use involves consideration of three criteria:

1. the length of time during which the mark has not been in use;
2. whether the reasons for non-use were beyond the control of the registered owner;
3. and whether there exists a serious intention to shortly resume use.

The present registered owner has not provided any reasons for non-use that were beyond its control and

so it is not possible for it to successfully claim that special circumstances justified its non-use.

Disposition

For the foregoing reasons, registration No. TMA490,884 will be expunged in accordance with the provisions of s. 45(5) of the Act.

DATED AT TORONTO, ONTARIO THIS 26th DAY OF SEPTEMBER 2007.

Jill W. Bradbury
Member
Trade-marks Opposition Board