**TRANSLATION/TRADUCTION**


**LE REGISTRAIRE DES MARQUES DE COMMERCE**

**THE REGISTRAR OF TRADE-MARKS**

**Citation: 2011 TMOB 49**
**Date of Decision: 2011-03-30**

IN THE MATTER OF A SECTION 45 PROCEEDING requested by Heenan Blaikie LLP against registration No. TMA367,282 for the trade-mark THE AQUAMASTER in the name of GROUPE D'ACHAT M.P. Inc.

[1] At the request of Heenan Blaikie LLP (the Requesting Party), the Registrar issued a notice under s 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13, (the Act) on May 7, 2009, to Groupe d'Achat M.P. Inc. (the Registrant), the registered owner of registration No. TMA367,282 for the trade-mark THE AQUAMASTER (the Mark) registered for use in association with the following services:

[TRANSLATION]

Wholesale and retail store operating service dealing in swimming pools, products and accessories; chemical products for swimming pool and lawn furniture maintenance and cleaning; and swimming pool and accessory repair (the Services).

[2] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and services specified in the registration at any time within the three-year period immediately preceding the date of the notice, and if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period is between May 7, 2006, and May 7, 2009.

[3] Use in association with services is described as follows at section 4 of the Act:

> (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.

[4] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing "deadwood" from the register and as such, the applicable threshold is quite low. I adopt here the observations by Justice Russell in *Performance Uvex Toko Canada Ltd. v. Performance Apparel Corp.* (2004), 31 C.P.R. (4th) 270 (F.C.):

> 86. We know that the purpose of s. 45 proceedings is to clean up the "dead wood" on the register. We know that the mere assertion by the owner that the trade mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade-mark owners' business and merchandising practices.

[5] Although the applicable threshold to show use in proceedings of this nature is low and there is no need for evidentiary overkill, sufficient facts must be provided to permit the Registrar to conclude that the trade-mark was used during the relevant period in association with each of the wares or each of the services specified in the registration. In addition, the entire burden of proof is on the registered owner [*88766 Inc. v. George Weston Ltd.* (1987), 15 C.P.R. (3d) 260 (F.C.T.D.)], and any ambiguities in the evidence are to be interpreted against the registered owner [See *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (2d) 62 (F.C.A.)].

[6] In response to the Registrar's notice, the Registrant produced the affidavit of Jean-Roch Perron, the Registrant's vice president and shareholder, sworn on July 17, 2009. No exhibits were attached to this affidavit. Both parties produced written representations; neither requested a hearing.

[7] As a preliminary remark, it bears noting that the Registrant appended various documents to its written representations (a copy of a photograph [TRANSLATION] "of the front of the warehouse" of the Registrant and excerpts from the Internet sites *www.yellowpages.ca*, *www.maitrepiscinier.com*, and *www.aquamastergroup.com*). None of these documents was produced in the manner prescribed. These documents should be produced as exhibits attached to an affidavit (such as the one sworn on July 17, 2009, by Mr. Perron), within the time limits for

the Registrant to submit evidence. Consequently, these various documents will not be taken into account in my analysis of the evidence. What is more, even if these documents had been properly adduced in evidence, I note that with the exception of the photograph, which is not dated, each of these documents dates from after the relevant period.

[8] I will now analyze Mr. Perron's very short affidavit against the applicable legal principles and the comments of the Requesting Party.

[9] Mr. Perron states at paragraph 2 of his affidavit that the [TRANSLATION] "[the Registrant] registered the [M]ark with the Canadian Intellectual Property Office on March 30, 1990, under number [TMA] 367,282". Mr. Perron states at paragraph 3 that [TRANSLATION] "[the Registrant] has always used and is still using the [Mark] in connection with the wholesale and retail store operating service dealing in swimming pool [*sic*], products and accessories; chemical products for swimming pool and lawn furniture maintenance and cleaning; and swimming pool and accessory repair".

[10] As the Requesting Party points out, those statements are inaccurate. The trade-marks register shows that the Mark was registered on March 30, 1990, in the name of Industries Vogue Ltée – Vogue Industries Ltd. The Mark was first transferred to 2679965 Canada Inc. on March 4, 1991, and that corporation transferred the Mark to the Registrant on March 3, 1998. As a result, it is not possible for the Registrant to have used the Mark since it was registered, as Mr. Perron asserts in his affidavit, unless this was a licensed use, which the affidavit in no way specifies.

[11] At paragraph 4 of his affidavit, Mr. Perron goes on to state that [TRANSLATION] "[i]n fact, [the Registrant] uses the [Mark] as a banner, and the [Mark] appears, without limitation to the following terms, on business cards, on the store sign, on an Internet site, in the yellow pages, Internet". As stated above and pointed out by the Requesting Party, these assertions are not corroborated by any exhibits showing the Mark as used in association with the Services.

[12] Mr. Perron's mere reference to an unspecified [TRANSLATION] "Internet site" and to the [TRANSLATION] "Internet" within the broad meaning of the word cannot be characterized as a detailed assertion of fact. The same observation applies to the reference to simply the [TRANSLATION] "yellow pages". Mr. Perron's assertions referring to [TRANSLATION] "business

cards" and a "sign" are ambiguous in that Mr. Perron does not specify whether these were used *during* the relevant period. Although paragraph 4 of Mr. Perron's affidavit must be read in relation to the preceding paragraph 3, the verb tense used by Mr. Perron creates ambiguity as to whether such material was indeed used during the relevant period. This is all the more uncertain given the inaccuracies shown in paragraphs 2 and 3 of his affidavit. What is more, although Mr. Perron refers to the [TRANSLATION] "Mark", there is nothing indicating that it was used as shown by the Registrant. Given the inaccuracies and lack of specifics revealed above, a modified version of the Mark could have been used.

[13] Mr. Perron concluded his affidavit by stating, at paragraph 5, that the Registrant is also [TRANSLATION] "currently in negotiations with business persons in Ontario and elsewhere in Canada to broaden the range and use of the [Mark]". As the Requesting Party noted, this final assertion is largely irrelevant in this case. The Registrant's plans for expansion are outside the relevant period. Furthermore, they were not submitted as special circumstances to justify any absence of use of the Mark in association with the Services during the relevant period.

[14] The Requesting Party argues that Mr. Perron's affidavit contains nothing more than vague assertions of use, which, in the circumstances, are insufficient to maintain the Mark's registration [to this effect, see *Aerosol Fillers Inc*., *supra*]. I agree.

[15] As my review, above, of Mr. Perron's affidavit shows, Mr. Perron's assertions of use are, in large part, either inaccurate or lacking in specifics, since they are not corroborated by any evidence showing the Mark as used or displayed in the performance or advertising of the Services during the relevant period. As stated by Justice Addy in *Saks & Co. v. Registrar of Trade Marks* (1989), 24 C.P.R. (3d) 49 (F.C.T.D.), an assertion that a trade-mark is used in Canada is a matter of fact and law:

> The jurisprudence has established as a general rule and it is undoubtedly well-founded, that it is not sufficient for an owner to merely state that the mark was in use in Canada at the relevant time in order to conform to s. 44(1). Some other evidence of use must be produced. This rule, which is evidentiary in nature, was instituted in order to prevent the owner of the mark to simply state that the mark was in use without giving any facts to substantiate the statement. To merely state, without more, that the mark is in use is to boldly declare as a fact the conclusion to which the Registrar (or the court on appeal from the latter) is called upon to arrive at. The statement that a mark is in use in Canada includes

> both fact and law as it comprises the actions which constitute use at law and the legal concepts which permit the tribunal to arrive at that conclusion.

[16] In light of the above and the fact that the ambiguities revealed in the evidence must be interpreted against the interests of the registered owner, I must conclude that the Registrant has failed to show use of the Mark in Canada in association with the Services during the relevant period.

[17] In closing, I would add that this is not a case involving special circumstances that warrant the absence of use of the Mark in association with the Services covered by the registration. The Registrant did not make any such argument, and there is no evidence to support it.

Disposition

[18] Thus, pursuant to the authority delegated to me under s. 63(3) of the Act, registration TMA367,282 for the trade-mark THE AQUAMASTER will be expunged in compliance with the provisions of s. 45 of the Act.

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Annie Robitaille
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

Certified true translation
Sarah Burns, Translator