



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2017 TMOB 48**  
**Date of Decision: 2017-04-28**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**Jensen & Company**

**Requesting Party**

**and**

**Aspen Global Incorporated**

**Registered Owner**

**TMA176,735 for SEPTRA**

**Registration**

[1] At the request of Jensen & Company (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on January 12, 2015 to Aspen Global Incorporated (the Owner), the registered owner of registration No. TMA176,735 for the trade-mark SEPTRA (the Mark).

[2] The Mark is registered for use in association with “pharmaceutical preparations”.

[3] 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 goods 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 for showing use is between January 12, 2012 and January 12, 2015.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) of the Act:

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

[5] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of Jacobus Johannes Van Zyl, sworn on September 2, 2015 in Grand Bay, Mauritius. Only the Owner filed written representations; a hearing was not requested.

#### The Owner’s Evidence

[7] In his affidavit, Mr. Van Zyl states that he is Legal Counsel of the Owner. He sets out that the Owner manages and maintains the intellectual property rights of the Aspen Group of companies which together form the world’s fifth largest supplier of branded and generic pharmaceutical products. He attests that during the relevant period, the Owner used the Mark in Canada in association with pharmaceutical preparations.

#### *Licensing*

[8] Mr. Van Zyl attests that between 2012 and October 31, 2014, the Owner had a License and Distribution Agreement with Aspen Healthcare FZ LLC, which in turn had a License and Distribution agreement with Triton Pharma Inc. Commencing on November 1, 2014, the Owner entered into a License and Distribution Agreement with Aspen Pharmacare Canada Inc., which in turn entered into a Distribution Agreement with Aspri Pharma Canada Inc. Mr. Van Zyl attests that at all times during the relevant period the Owner retained and exercised control over the character and quality of the SEPTRA pharmaceutical products that Triton Pharma Inc. and Aspri Pharma Canada Inc. distributed in Canada.

[9] In support, he attaches to his affidavit the following:

- Exhibit A – consists of (i) a copy of the License and Distribution Agreement between the Owner and Aspen Healthcare FZ LLC covering SEPTRA which includes provisions relating to quality and inspections and (ii) a copy of the Distribution Agreement between Aspen Healthcare FZ LLC and Triton Pharma Inc. covering SEPTRA which includes provisions relating to quality and inspections. Mr. Van Zyl explains that in the agreement with Triton, SEPTRA is identified by its international name SEPTRIN as this is the name it is marketed worldwide under, in contrast to SEPTRA which is only used in Canada.
- Exhibit B – consists of a copy of a Technical Quality-GMP Agreement between the Owner and Triton Pharma Inc. concerning the distribution of the Owner’s pharmaceutical products including SEPTRIN. This Agreement takes the form of a detailed checklist which outlines the quality control measures to be carried out by Triton Pharma Inc.
- Exhibit C – consist of (i) a copy of the License and Distribution Agreement between the Owner and Aspen Canada covering SEPTRA which includes provisions relating to quality and inspections and (ii) a copy of the Distribution Agreement between Aspen Pharmacare Canada Inc. and Aspri Pharma Canada Inc. covering SEPTRA which includes provisions relating to inspections. As in Exhibits A and B, the License and Distribution Agreement between the Owner and Aspen Canada references the international name of SEPTRIN as opposed to the Canadian name SEPTRA.

[10] It has been held that there are three main methods by which a trade-mark owner can demonstrate the requisite control pursuant to section 50(1) of the Act: first, by clearly attesting to the fact that it exerts the requisite control; second, by providing evidence demonstrating that it exerts the requisite control; or third, by providing a copy of the license agreement that provides for the requisite control [*Empresa Cubana Del Tabaco Trading v Shapiro Cohen*, 2011 FC 102, aff’d 2011 FCA 340]. Further, in the context of sub-licensing, the Federal Court has held that what is required is that the owner is able to control product quality *vis-à-vis* the intermediary, who is entitled to control product quality under contract with a sublicensee [*Tucumcari Aero, Inc v Cassels, Brock & Blackwell LLP*, 2010 FC 267].

[11] In view of Mr. Van Zyl’s clear statements regarding control and the exhibited licensing agreements, I am satisfied that any evidenced use of the Mark by the licensees enures to the

benefit of the Owner. I do not find the reference to SEPTRIN in some of the agreements inconsistent with Mr. Van Zyl's statements that the agreements cover use of the SEPTRA trade-mark in Canada. I accept his explanation at para 8 of his affidavit:

... These references are inadvertent stemming from the fact that SEPTRIN is the brand name used for the product in most countries, except Canada, and that such license and distribution agreements often cover multiple international jurisdictions. I confirm that the product that was the subject of the agreements annexed to this Affidavit is indeed the SEPTRA-brand pharmaceutical preparation sold in Canada during the relevant period.

#### *Use of the Mark*

[12] Mr. Van Zyl attests that, during the relevant period, the trade-mark SEPTRA was prominently displayed on packaging of pharmaceutical preparations sold to Canadian doctors, hospital and clinics. With respect to sales, Mr. Van Zyl states that between 2012-2014 approximately 50,000 packages of SEPTRA brand pharmaceutical preparations were sold in Canada; with over 16,000 packages being sold in 2012; 12,000 packages being sold in 2013; and over 22,000 packages being sold in 2014.

[13] In support, Mr. Van Zyl provides the following exhibits attached to his affidavit:

- Exhibit D is a list of well over 100 Canadian doctors, hospitals and clinics to which the Owner's then authorized distributor and licensee, Triton Pharma Inc., sold SEPTRA-brand pharmaceutical preparations between January 1, 2014 and October 31, 2014.
- Exhibit E consists of three photographs of boxes containing 10 x 5 mL ampoules of sulfamethoxazole + trimethoprim, BP, sterile solution for the preparation of intravenous infusions which features the SEPTRA trade-mark prominently. Mr. Van Zyl attests that this packaging was used in Canada during the relevant period.
- Exhibit F consists of three invoices issued by the Owner's licensed distributor, Aspri Pharma Canada Inc., to a health authority and two hospitals in Canada. Mr. Van Zyl describes the invoices as "representative samples". These invoices are all dated in December 2014 and provide a description of the goods "SEPTRA INJECTION 10 x 5 mL" along with an indication of the quantity ordered.

### Analysis

[14] Mr. Van Zyl clearly attests to use of the Mark in association with pharmaceutical preparations and provides representative evidence of sales and product packaging. In this respect, the Owner has filed photographs of representative packaging prominently featuring the SEPTRA trade-mark, sample invoices and identified over a hundred Canadian customers who purchased SEPTRA brand pharmaceutical preparations during the relevant period.

[15] In view of the foregoing and in the absence of representations from the Requesting Party, I am satisfied that the Owner has demonstrated use of the Mark in association with the registered goods within the meaning of sections 4 and 45 of the Act.

### Disposition

[16] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

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Natalie de Paulsen  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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No Hearing Held

**AGENTS OF RECORD**

Clancy Professional Corporation

For the Registered Owner

Jensen & Company

For the Requesting Party