

OPIC



CIPO

LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2020 TMOB 142**

**Date of Decision: 2020-12-23**

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

**Pitblado LLP**

**Requesting Party**

**and**

**Feroz Abdul Razak Allana and Shiraz  
Abdul Razak Allana doing business as  
INTERNATIONAL FOODSTUFFS  
CO. a legal entity**

**Registered Owner**

**TMA684,080 for ENERGIZER**

**Registration**

INTRODUCTION

[1] At the request of Pitblado LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on August 8, 2017, to Feroz Abdul Razak Allana and Shiraz Abdul Razak Allana doing business as INTERNATIONAL FOODSTUFFS CO. a legal entity (the Owner), the registered owner of registration No. TMA684,080 for the trademark ENERGIZER (the Mark).

[2] The Mark is registered for use in association with the goods “Animal feed”.

[3] For the reasons that follow, I conclude that the registration ought to be expunged.

[4] The notice required the Owner to show whether the Mark had been used in Canada in association with the registered goods 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 August 8, 2014, to August 8, 2017.

[5] The relevant definition of use in the present case is set out in section 4(1) of the Act as follows:

4(1) A trademark 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.

[6] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. The threshold for establishing use in these proceedings is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)]; however, sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with each of the goods specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA) (*John Labatt*)].

[7] In response to the Registrar's notice, the Owner furnished the affidavit of Sangeeta Dattaram Chavan, sworn February 7, 2018. Both parties submitted written representations and were represented at an oral hearing.

#### THE OWNER'S EVIDENCE

[8] I note that at the top of the affidavit, there is a heading that reads "IN THE MATTER OF a Opposition by [the Owner] to Application No. 1784305 for the trade-mark ENERGIZER filed by ATP Nutrition Ltd."

[9] The affidavit reads as follows:

I, SANGEETA DATTARAM CHAVAN of the City of Mumbai, India, MAKE OATH AND SAY:

1. I am the Constituted Attorney of International Foodstuffs Co. LLC (the “Opponent”) As a result of my position, which I have held since July 2009 I have access to the records of the Opponent and have personal knowledge of the facts set out below.
2. The Opponent has used the trade-mark ENERGIZER in Canada with animal feed since at least as early as 2007 and is the owner of Canadian trade-mark registration no. TMA684080. Attached as Exhibit “A” is a copy of the Opponent’s Canadian Registration.
3. Attached as Exhibit “B” are images of the animal feed packaging used by the Opponent in Canada.
4. Attached as Exhibit “C” is an image of the business card of one of the Opponent’s distributors of the ENERGIZER product in Canada. The Opponent’s animal feed product is also distributed in Canada by Nafico Distribution Inc. located in Levis, Quebec.

[10] I note that the Exhibit B photographs show packaging for a product displaying the Mark, along with the identification “Energizer RP10 Animal Feed”. Exhibit C is a copy of a business card for an individual, and includes the corporate identifier “Scothorn Nutrition” along with an address located in Nova Scotia. Next to the words “Scothorn Nutrition” are the words “Fresh feeding solutions” and the Mark.

#### ANALYSIS

[11] The Requesting Party makes the following submissions: that the Chavan affidavit should not be accepted as evidence in this proceeding, and that the Owner’s evidence does not show use of the Mark within the meaning of the Act. Each submission will be considered in turn.

#### Admissibility of the Chavan Affidavit

[12] The Requesting Party submits that because the Chavan affidavit appears to have been sworn in respect of a separate trademark opposition proceeding, it should not be accepted as evidence in this proceeding. In response, the Owner submits, and I agree, that the Chavan affidavit is properly sworn and notarized, and there is nothing within the affidavit that would bring into question the truth or accuracy of its contents. As noted by the Owner, it is well-

established that technical deficiencies in an affidavit or a statutory declaration should not stop a party from successfully responding to a section 45 notice [*Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FCTD)]. Accordingly, I accept the Chavan affidavit as evidence in this proceeding.

### Use of the Mark

[13] The Requesting Party submits that the Owner's evidence does not show use of the Mark as it does not provide evidence of a transfer of the goods in the normal course of trade during the relevant period, noting that the affiant's statement that the Owner has used the Mark "in Canada with animal feed since at least as early as 2007" does not refer to the relevant period. Further, the Requesting Party submits that there is no indication that the distributors identified in the affidavit distributed the goods during the relevant period.

[14] In response, the Owner submits that there is no particular type of evidence, such as invoice evidence, that is required to respond to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)], and that an affidavit must be considered as a whole [*Smart & Biggar v Time Warner Entertainment Co, LP* (2001), 19 CPR (4th) 564 (TMOB)]. In this case, the Owner submits that the Chavan affidavit provides sufficient evidence for the Registrar to conclude that the Mark has been used in Canada in the normal course of trade in association with animal feed. Further, at the hearing, the Owner cited the case of *Osler, Hoskin & Harcourt v Mario Valentino SPA*, 1998 CanLII 18490 (TMOB) [*Valentino*], in which the Registrar found that an affidavit containing numerous ambiguities, when considered in its entirety, could support use in association with a trademark. The Owner submits that the Registrar should similarly maintain the Mark, given that the Chavan affidavit contains fewer ambiguities than the affidavit in that case.

[15] I concur with the Owner that invoices are not mandatory in order to satisfactorily reply to a section 45 notice. However, some evidence of transfer in the normal course of trade in Canada is necessary [per *John Labatt*]. Such evidence can be in the form of documentation like invoices or sales reports, but can also be through clear sworn statements regarding volumes of sales, dollar value of sales, or equivalent factual particulars [see, for example, *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79]. The Owner has not provided such factual particulars in this

case. With respect to *Valentino*, the affiant in that case had provided a sworn statement that goods bearing the trademark had been sold in the two years prior to the date of the notice [at paras 13-14]. By contrast, the affiant in this case makes no statement that goods bearing the Mark were sold in Canada within a range of dates entirely within the relevant period; instead, the affiant asserts use of the Mark since 2007 and refers to two current Canadian distributors, but leaves it unclear whether such distribution was active during the relevant period. This is insufficient to establish that a transfer in the normal course of trade occurred during the relevant period [for similar conclusions, see *88766 Canada Inc v Monte Carlo Restaurant Ltd*, 2007 FC 1174 at para 9; *Grapha-Holding AG v Illinois Tool Works Inc*, 2008 FC 959 at para 22].

[16] As there is no evidence of special circumstances which would excuse non-use of the Mark, I am not satisfied that the Owner has shown use of the Mark in association with the registered goods within the meaning of the Act.

#### DISPOSITION

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

---

G.M. Melchin  
Hearing Officer  
Trademarks Opposition Board  
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

---

**HEARING DATE** 2020-12-07

**APPEARANCES**

Sanjukta Tole For the Registered Owner

Robert Watchman For the Requesting Party

**AGENTS OF RECORD**

Marks & Clerk For the Registered Owner

Pitblado LLP For the Requesting Party