



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 53**

**Date of Decision: 2021-03-25**

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

**Nexus Law Group LLP**

**Requesting Party**

**and**

**Beaumarche Inc.**

**Registered Owner**

**TMA492,154 for AVIVA**

**Registration**

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to Registration No. TMA492,154 for the trademark AVIVA (the Mark), which is owned by Beaumarche Inc. (the Owner).

[2] The Mark is registered for use in association with the following goods: “Men’s, women’s and children’s wearing apparel, namely jogging sets, track suits, sweat-shirts, sweat-pants, short sleeve and long sleeve t-shirts, tank tops, polo shirts, bathing suits, shorts, jackets, sport socks, sport hats and head bands.”

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

## THE PROCEEDINGS

[4] At the request of Nexus Law Group LLP, the Registrar of Trademarks issued a notice to the Owner under section 45 of the Act on November 22, 2018.

[5] The notice required the Owner to show whether the trademark 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 November 22, 2015 to November 22, 2018.

[6] The relevant definition of “use” in this 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.

[7] In the absence of use as defined above, a trademark is liable to be expunged unless the absence of use is due to special circumstances that excuse the absence of use [section 45(3) of the Act].

[8] 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. As such, the evidentiary threshold that the registered owner must meet is quite low [*Lang Michener, Lawrence & Shaw v Woods Canada* (1996), 71 CPR (3d) 477 (FCTD) at para 9] and “evidentiary overkill” is not required [*Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD) at para 3]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the mark was used 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) (*Rainier Brewing*) at para 14].

[9] In response to the Registrar's notice, the Owner furnished the affidavit of Alan Svarc, President of the Owner, sworn on January 17, 2019. Only the Owner submitted written representations. Neither party requested an oral hearing.

#### THE EVIDENCE

[10] With respect to the Owner's normal course of trade, Mr. Svarc explains that the Owner is a wholesale distributor of clothing for men, women and children (para 1). He states that the Owner sells its clothing to retail stores across Canada, including independent and chain stores and sporting goods stores (para 1).

[11] Mr. Svarc attests that the Mark has been used in Canada since 1985 (para 7). He states that the Owner has continuously used the Mark in association with swim/sport shorts, nylon jackets, nylon pants, socks, lined pants, T-shirts, sweat pants, sweat shirts, hoodies, turtlenecks, and polo shirts (para 10).

[12] Regarding display of the Mark, Mr. Svarc provides photographs of clothes bearing the Mark and labelled with style/item numbers (Exhibit D). The photographs appear to show T-shirts, sweat shirts, hoodies, sweat pants, a track suit, jackets, shorts, a hat, and socks.

[13] With respect to transfer of the registered goods, Mr. Svarc indicates that the Owner's total approximate annual sales were "\$2,200,00.00" [*sic*] in 2017 and 2018 (para 13); however, there is no breakdown by brand or product. He also includes invoices that are dated during the relevant period and made out to entities in Canada (Exhibit E). The invoices include product descriptions and style/item numbers that match with the photographs and the information provided by Mr. Svarc in his affidavit (paras 9 and 10; Exhibits D and E). Most of the items identified by Mr. Svarc in his affidavit (and their corresponding item/style numbers) are described as being for men in the invoice product descriptions, namely sweat-shirts, sweat-pants, polo shirts, and jackets (Exhibit E, Invoice Nos. 179436, 179003, 178958 / Items 9000\*, 1001\*P, 1809, 668FZ).

[14] In addition, Mr. Svarc provides undated screenshots of the Owner's website as well as a screenshot of a promotional email for the Owner's goods that was sent out to customers in June 2018, all of which display the Mark alongside photographs of clothing (paras 11 and 14; Exhibits

F and G). All of the material shown in the screenshots only refers to men's clothing, namely tops and shorts.

#### ANALYSIS AND REASONS FOR DECISION

##### **Use of the Mark for Some Goods is Shown**

[15] For some of the registered goods, Mr. Svarc provides photographs showing how the Mark is displayed on the goods as well as invoices showing transfer of the goods to retailers in Canada during the relevant period. Although the photographs are undated, I accept that this is how the goods appeared during the relevant period, given Mr. Svarc's clear statement that the Owner continuously used the Mark in association with such goods. For ease of reference, each such registered good corresponds to the following invoice and item numbers:

- sweat-shirts (Invoice No. 179436 / Item 9000\*);
- sweat-pants (Invoice No. 179003 / Item 1001\*P);
- short sleeve and long sleeve t-shirts (Invoice No. 179436 / Item 458);
- polo shirts (Invoice No. 179003 / Item 1809);
- bathing suits (Invoice No. 179048 / Item 360019);
- shorts (Invoice No. 179048 / Item 660019);
- jackets (Invoice No. 178958 / Item 668FZ);
- sport socks (Invoice No. 179003 / Item 270).

[16] With respect to men's wearing apparel, given that most of the goods listed above are described as being for men in the invoice product descriptions and given that the screenshots of the Owner's website and promotional email only refer to men's clothing, I infer that the remaining items identified by Mr. Svarc and listed in the invoices (namely, t-shirts, and sport socks) are also for men [for similar findings, see *Dimock Stratton LLP v Canaday's Apparel Ltd*, 2011 TMOB 240 at para 18].

[17] With respect to children's wearing apparel, a swimsuit for boys appears alongside the Mark in an invoice product description (Exhibit E, Invoice No. 179048 / Item 360019). Although photographs of this item are not provided, Mr. Svarc states that the Owner has continually used the Mark in association with swim/sport shorts for children at para 10 of his affidavit.

[18] Accordingly, I am satisfied that the Owner has demonstrated use of the Mark in association with the following goods within the meaning of sections 4(1) and 45 of the Act:

Men's and children's wearing apparel, namely sweat-shirts, sweat-pants, short sleeve and long sleeve t-shirts, polo shirts, bathing suits, shorts, jackets, sport socks.

### **No Use of the Mark With the Remaining Goods**

[19] Unlike the products discussed in the previous section, Mr. Svarc does not mention jogging sets, track suits, tank tops, sport hats or head bands at all in his affidavit and no style/item number is provided for these items to match with the photographs or the invoices. Indeed, jogging sets, track suits, tank tops, sport hats and head bands are not listed in any of the invoices. While Mr. Svarc furnishes evidence for items that he identifies as "nylon pant", "lined pant", "hoody", and "turtleneck" at para 10 of his affidavit, no information is provided as to how any of these products correspond to any of the registered goods. Likewise, although photographs are provided (at Exhibit D) for additional clothing items other than those identified by Mr. Svarc in his affidavit, including what appears to be a track suit and a hat, these items do not correspond to any of the items listed in the invoices, and there is no other evidence to suggest that these items were sold during the relevant period.

[20] Additionally, none of the items enumerated by Mr. Svarc in his affidavit are described as being for women in the invoice product descriptions. Similarly, women's clothing is not shown in the screenshot of the Owner's website at Exhibit F or in the promotional email at Exhibit G. Although items other than those mentioned by Mr. Svarc in his affidavit are identified as being for women in the invoices (for example, Exhibit E, Invoice No. 178958 / Items C6502P, C691, C6650), I am unable to conclude that these items displayed the Mark, given that the Owner sells clothing with other trademarks (see para 4 of the Svarc affidavit and Exhibit B) and the Mark does not appear alongside these items in the invoices.

[21] Having distinguished between men's, women's and children's wearing apparel in the registration (and the specific goods contained thereunder), the Owner was obligated to furnish evidence with respect to each of the listed goods accordingly [*Rainier Brewing* at para 14]. Furthermore, the Registrar must be able to "rely on an inference from proven facts rather than on speculation" to satisfy every element required by the Act [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 11]. In this case, there is no factual basis to conclude that the Mark appeared on the remaining registered goods and that such goods were sold during the relevant period. As a result, in the absence of further information or evidence, I am unable to conclude that there was use of the Mark (within the meaning of sections 4(1) and 45 of the Act) in association with "women's ... wearing apparel", "jogging sets", "track suits", "tank tops", "sport hats and head bands". As the Owner has not provided any special circumstances excusing non-use of the Mark in association with these goods, they will be deleted from the registration accordingly.

#### DISPOSITION

[22] Based on the findings above, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, I conclude that the registration ought to be amended to delete "women's ... wearing apparel", "jogging sets", "track suits", "tank tops", "sport hats and head bands".

[23] The registration will now read as follows:

Men's and children's wearing apparel, namely sweat-shirts, sweat-pants, short sleeve and long sleeve t-shirts, polo shirts, bathing suits, shorts, jackets, sport socks.

---

Bradley Au  
Hearing Officer  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

---

**HEARING DATE** No Hearing Held

**AGENTS OF RECORD**

Selena Altro

For the Registered Owner

Nexus Law Group LLP

For the Requesting Party