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LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 115**

**Date of Decision: 2021-05-31**

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

**Sim & McBurney**

**Requesting Party**

**and**

**New Yorker S.H.K. Jeans  
GmbH & Co. KG**

**Registered Owner**

**TMA652,977 for  
NEW YORKER Design**

**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. TMA652,977 for the trademark NEW YORKER Design (the Mark), shown below:

The trademark 'NEW YORKER' Design is displayed in a large, bold, sans-serif font. Each letter is filled with a dense, irregular pattern of small black dots, creating a textured, stippled effect. The letters are closely spaced and have a slightly irregular, hand-drawn appearance.

[2] The Mark consists of the words NEW YORKER in block capitals, dipping in the middle to accentuate an enlarged, central Y. It is currently registered for use in association with the following goods:

- (1) Bags namely tote bags, handbags, backpacks, purses, school bags, carry-on bags, sport bags, duffel bags, hunting bags, sacks, haversacks, specialty sport and shopping bags, key cases.
- (2) Clothing, footwear, headgear, outerwear for gentlemen and ladies namely blouses, shirts, t-shirts, sport shirts, tank tops, sweatshirts, polo shirts, pullovers, sweaters, jerseys, aprons, vests, waistcoats, tops, bustiers, suits, dresses, gowns, skirts, overalls, coveralls, dungarees, trousers, trouser suits, jeans, bermuda shorts, pants, sweatpants, shorts, leotards, tunics, blazers, dressing gowns, pyjamas, night-gowns, night - shirts, longjohns, boxer shorts, slacks, bathing suits, corsetry, hosiery, tights, stockings, socks, legwarmers, gaiters, suspenders, jackets, anoraks, parkas, coats, scarves, shawls, gloves, mitts, ties, cravats, wrist bands, headbands, sweatbands, ear muffs, shoes, boots, sandals, casual shoes, clogs, athletic shoes, sneakers, hats, caps, tams, berets, helmets; barrettes, clothing for babies, underwear; undergarment, belts; hosiery; belts, scarves, gloves; bathing fashion for gentlemen and ladies namely bathing trunks, bikinis, bathing caps, beach robes; leisure and city shoes for gentlemen and ladies; clothing, footwear and headgear for inline-skating, skateboarding, roller-skating, cross-country skiing and snowboarding namely jerseys, shirts, pants, shorts; jackets, boots, snow boots, snowboard boots, hats, woollen hats, caps, sweat bands, head bands, gloves, long underwear, ski shoes; clothing for babies, underwear; undergarment.
- (3) Bags namely fishing bags; sporting articles for snowboarding, in-line skating and skateboarding namely elbow and knee pads, protective wrist, ankle and joint cuffs, and supports, body pads; sporting articles for snowboarding, inline skating, skateboarding namely snowboards and parts, in line skates and parts, skateboards and parts.

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

#### THE PROCEEDINGS

[4] At the request of Sim & McBurney (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on September 27, 2017, to the registered owner of the Mark, New Yorker S.H.K. Jeans GmbH & Co. KG (the Owner).

[5] The notice required the Owner to furnish evidence showing that it had used the Mark in Canada, in association with the registered goods, at any time within the three-year period immediately preceding the date of the notice, which in this case is between September 27, 2014, and September 27, 2017 (the Relevant Period). If the Mark had not been used within the

Relevant Period, the Owner was required to furnish evidence providing the date when the Mark was last in use and the reasons for the absence of use since that date.

[6] 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.

[7] 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)]. Although the threshold for establishing use in a section 45 proceeding 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)], 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.

[8] In response to the Registrar's notice, the Owner furnished the affidavit of Friedrich Knapp, sworn on April 27, 2018, in Germany (the Affidavit), to which were attached Exhibits A to D.

[9] Only the Owner submitted written representations, but both parties attended an oral hearing.

#### THE EVIDENCE

[10] In the Affidavit, Mr. Knapp identifies himself as a director of the Owner's U.S. subsidiary NEW YORKER Fashion Retail New York LLC (the Licensee), a position he has held since 2015, and confirms that he is authorized by the Owner to make the Affidavit. Mr. Knapp also confirms that, as a director of the Licensee, he is responsible for financial and management reporting—including analysis of distribution by product, country and customer—and is familiar

with sales, promotion and marketing of products branded with the Mark in Canada. He also has access to the business records of the Owner relating to the business activities of the Licensee.

[11] Mr. Knapp asserts use of the Mark in association with only some of the registered goods. In particular, Mr. Knapp states that, during the Relevant Period, the Mark was used in association with the following goods “sold and offered for sale” to customers in Canada:

Bags namely tote bags, handbags, backpacks, purses, sport bags, specialty sport and shopping bags, clothing, footwear, headgear, outerwear for gentlemen and ladies namely shirts, t-shirts, sport shirts, tank tops, sweatshirts, polo shirts, pullovers, sweaters, bustiers, dresses, skirts, trousers, jeans, pants, sweatpants, shorts, bathing suits, corsetry, hosiery, socks, jackets, anoraks, shawls, gloves, ties, cravats, headbands, sweatbands, shoes, boots, sandals, casual shoes, athletic shoes, sneakers, hats, caps, underwear; undergarment, belts; bathing fashion for gentlemen and ladies namely bathing trunks, bikinis; leisure and city shoes for gentlemen and ladies.

[12] Mr. Knapp explains that the Mark was used under licence, by the Licensee, by being displayed on the packaging and labelling of the goods as well as on the invoices and packing slips accompanying the shipments of the goods. Mr. Knapp confirms that at all times the Owner had direct or indirect control of the character and quality of the goods.

[13] As Exhibit A, Mr. Knapp attaches photographs showing how the Mark was displayed in association with the goods that were sold in or shipped to distributors in Canada for resale during the Relevant Period. The Mark appears directly on the goods, on their labels, or on their hangtags. However, Mr. Knapp does not correlate any of the depicted items to any of the registered goods.

[14] As Exhibit B, Mr. Knapp produces partially-redacted copies of the initial pages of seven packing slips and three corresponding invoices, all but one of which are dated during the Relevant Period. The packing slips identify the sender as “NEW YORKER” and Mr. Knapp confirms that the two recipients named on the packing slips and invoices are distributors in Canada. Furthermore, he states that the “invoices/packing slips” accompanied the goods included in Exhibit A shipped to distributors in Canada for resale during the Relevant Period. Although this statement could have been clearer, I am prepared to accept that, in each case, either the packing slip or the corresponding invoice, if not both, accompanied the goods. On all the invoices and packing slips, the Mark is displayed at the top of the page.

[15] As Exhibits C and D, Mr. Knapp attaches multiple screen captures of the Owner's website and Facebook page, featuring the Mark. I note that on one of the furnished webpages, the Owner describes itself as a European fashion business with stores in 40 countries and a clothing range featuring "jeans, sportswear and streetwear fashions for a young, trend-conscious target group – supplemented by a wider range of accessories and underwear". On other webpages, the Owner advertises its sponsoring campaigns, including sponsorship of two sports teams, whose logos cobrand some of the articles depicted in Exhibit A. These screen captures are not dated and Mr. Knapp does not identify when they were taken or if they are representative of the website and the Facebook page during the Relevant Period. In any event, Mr. Knapp does not refer to the possibility of purchasing any goods on the Owner's website or Facebook page.

#### PRELIMINARY MATTER

[16] The Requesting Party submits that Mr. Knapp has not established knowledge of the facts to which he attests, given that he does not define his responsibilities and that he does not precisely disclose the date in 2015 when he became a director of the Licensee. However, I find that the information given by Mr. Knapp concerning his position is sufficient. More particularly, I accept that, as a director of the Licensee responsible for reporting on distribution "by product, country and customer", Mr. Knapp would be familiar with the sale, promotion and marketing of NEW YORKER branded products in Canada, as he attests. Furthermore, Mr. Knapp attests that he has access to the Owner's business records regarding the Licensee's activities, and there is no reason to doubt that such business records extend to the Relevant Period. Accordingly, I accept Mr. Knapp's statement that the affidavit is made based on his personal knowledge and access to records made in the usual and ordinary course of business.

#### ANALYSIS AND REASONS FOR DECISION

[17] At the hearing, the Owner conceded that there was no use of the Mark during the Relevant Period in association with any of goods (3) and the following from goods (1) and (2):

- (1) [Bags namely] school bags, carry-on bags, duffel bags, hunting bags, sacks, haversacks, key cases.
- (2) [Clothing, footwear, headgear, outerwear for gentlemen and ladies namely] jerseys, aprons, vests, waistcoats, suits, gowns, overalls, coveralls, trouser suits, bermuda shorts,

leotards, tunics, blazers, dressing gowns, pyjamas, night-gowns, night - shirts, longjohns, boxer shorts, tights, stockings, legwarmers, gaiters, suspenders, parkas, scarves, mitts, wrist bands, ear muffs, clogs, tams, berets, helmets; barrettes, clothing for babies; hosiery; scarves, gloves; [bathing fashion for gentlemen and ladies namely] bathing caps, beach robes.

[18] Furthermore, there is no evidence before me of special circumstances excusing the absence of such use. Accordingly, these goods will be deleted from the registration.

[19] Otherwise, the Requesting Party submits that the Owner's evidence does not show use of the Mark in association with the remaining registered goods during the Relevant Period for several reasons, which can be generally summarized as follows:

- There is no copy of the licence agreement for the Mark, nor any information concerning the licence agreement, such as its effective date or quality control provisions;
- The Affidavit does not describe the Owner's normal course of trade;
- The name of the Owner or Licensee does not appear on the invoices and packing slips;
- The photographs in Exhibit A are not correlated with the registered goods and the Owner is the one who should perform this correlation. Moreover, the photographs are not dated and there is no mention of where or how they were taken or whether they are representative of goods sold in Canada during the Relevant Period.

[20] Each of these submissions will be addressed below.

### **Licensed Use of the Mark**

[21] The Requesting Party submits that the simple mention of the licence agreement in the Affidavit is not sufficient to meet the requirements set out in section 50(1) of the Act.

[22] In this respect, pursuant to section 50(1) of the Act, for the Licensee's evidenced use of the Mark to enure to the Owner's benefit, the Owner must have maintained direct or indirect control of the character or quality of the subject goods.

[23] As stated by the Federal Court, there are three main methods by which a trademark owner can demonstrate the requisite control: 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 licence agreement that provides for the requisite control [*Empresa Cubana Del Tobacco Trading v Shapiro Cohen*, 2011 FC 102 at para 84]. In the present case, Mr. Knapp clearly asserts in paragraph 7 of the Affidavit that all use of the Mark is under licence from the Owner and that at all times the Owner “has direct or indirect control of the character and quality of the goods”. This is sufficient for the purposes of this proceeding.

[24] Accordingly, I accept that any use of the Mark by the Licensee in this case enures to the Owner’s benefit.

### **Normal Course of Trade**

[25] The Requesting Party submits that the Affidavit does not provide sufficient information to establish the Owner’s normal course of trade; for example, whether the Owner is a manufacturer, wholesaler, distributor and/or retailer. The Requesting Party submits that, without such information, use of the Mark cannot be determined to comply with section 4 of the Act.

[26] The Requesting Party also submits that the exhibited invoices and packing slips do not necessarily represent the normal course of trade, as only two different recipients are shown in such documentation, there is no price next to the items listed, and the quantity of items listed is low. Moreover, the Requesting Party submits that not every packing slip provided has a corresponding invoice and that these packing slips alone are not evidence that the goods were sold.

[27] However, there is no particular type of evidence that must be provided to show the normal course of trade in a section 45 proceeding and the evidence need not be perfect [see *Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)]. Indeed, in the words of the Federal Court, the burden of proof is “very light”; a registered owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act, by supplying facts from which a conclusion of use may follow as a logical inference [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at paras 2 and 9 (*Diamant*)].

[28] In the present case, even though Mr. Knapp does not use the expression “normal course of trade” in the Affidavit, he asserts that, during the Relevant Period, the Licensee used the Mark in association with certain registered goods which were “sold in or shipped to distributors in Canada for resale”. He confirms that the Owner controlled the character and quality of these goods and, as Exhibit C to his affidavit, he furnishes excerpts from the Owner’s website briefly describing the Owner’s main product line, which is consistent with the goods for which use is asserted.

[29] Moreover, Mr. Knapp provides, as Exhibit B, evidence of three invoices and six packing slips illustrating sales and shipments of multiple registered goods in association with the Mark to two distributors in Canada during the Relevant Period. The exhibited invoices and packing slips are consistent with the foregoing course of trade. Mr. Knapp does not specify whether these documents show the *only* transactions involving Canada during the Relevant Period or whether they are representative of a larger series of transactions. However, there is no minimum amount of commercial activity required in order to maintain a registration [see *Vogue Brassiere Inc v Sim & McBurney* (2000), 5 CPR (4th) 537 (FCTD) (*Vogue*); and *Coscelebre Inc v Canada (Registrar of Trade Marks)* (1991), 35 CPR (3d) 74 (FCTD)]. Even evidence of a single sale can be sufficient to establish use for the purpose of section 45, so long as it follows the pattern of a genuine commercial transaction and is not seen as being deliberately manufactured or contrived to protect the registration [see *Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 (FCTD) at para 12].

[30] In the present case, the invoices and packing slips show repeated sales and shipments of clothing and accessories to distributors over the course of more than three years and, as such, appear to follow a pattern of genuine commercial transactions, even if some elements are redacted. In this respect, although the unit prices on the invoices have been redacted, the total price for each good remains visible and, in any event, the redaction of pricing information is not determinative. Overall, I agree with the Owner that the materials are consistent with a continuity of sales and see nothing in the evidence that would indicate the invoices or packing slips are for promotional goods or token sales. I am therefore satisfied that the invoices and packing slips demonstrate transfers made in the normal course of trade.



### **Owner’s or Licensee’s Name on Invoices and Packing Slips**

[31] The Requesting Party also raises the absence of the Owner’s or Licensee’s name on the invoices and packing slips. There is no indication of the sender on the invoices and the packing slips merely indicate that they are sent from “NEW YORKER”.

[32] However, the evidence in a section 45 proceeding must be considered as a whole, and focusing on individual pieces of evidence in isolation is not the proper approach [see *Kvas Miller Everitt v Compute (Bridgend) Limited (2005)*, 47 CPR (4th) 209 (TMOB)]. The exhibits should be read in conjunction with the information provided in the Affidavit. Reasonable inferences can be made from the evidence provided [see *Eclipse International Fashions Canada Inc v Shapiro Cohen (2005)*, 48 CPR (4th) 223 (FCA)].

[33] In the present case, the Affidavit is silent concerning who “NEW YORKER” is. However, Mr. Knapp states that it is *the Licensee* who used the Mark by display on invoices and packing slips. Therefore, for the purposes of this proceeding, I am prepared to accept that the name “NEW YORKER” on the packing slips refers to the Licensee, NEW YORKER Fashion Retail New York LLC. In any event, a registered owner is not required to provide evidence of use of the trademark along with its (or its licensee’s) name [see *Novopharm Ltd v Monsanto Canada, Inc (1998)*, 80 CPR (3d) 287 (TMOB); and *Vogue, supra*].

### **Correlation of the Owner’s Evidence to the Registered Goods**

[34] As previously indicated, unfortunately, Mr. Knapp does not correlate the goods listed in the registration with the items shown in the Exhibit A photographs or the Exhibit B invoices and packing slips.

[35] The Requesting Party submits that, absent such correlation, it is not possible to determine which, if any, of the registered goods correspond to the items shown in the photographs—with the exception of socks and underwear—or to the items listed in the invoices or packing slips.

[36] However, while it is not for the Registrar to speculate as to the nature of the registered goods [*Fraser Milner Casgrain LLP v Fabric Life Ltd*, 2014 TMOB 135 at para 13; *Wrangler Apparel Corp v Pacific Rim Sportswear Co (2000)*, 10 CPR (4th) 568 (TMOB) at para 12], and

Mr. Knapp's characterization of the depicted items would have been helpful, sufficient information can be obtained from the brief product descriptions in the invoices and packing slips and from some of the photographs to correlate certain products with specific registered goods.

[37] In making such correlations, I am mindful of the principle that, when interpreting a statement of goods in a section 45 proceeding, one is not to be "astutely meticulous when dealing with [the] language used" [see *Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654 at para 17].

Goods for which use has been demonstrated

[38] Upon reviewing the evidence as a whole, I am prepared to accept that the following registered goods referenced in Mr. Knapp's assertion of use are listed in the Exhibit B invoices and packing slips and are also represented in the Exhibit A photographs:

T-shirts, pullovers, trousers, shorts, jackets, shoes, caps, underwear.

[39] In this respect, I note that I consider the "TROUSERS WOMEN SYNTHETICAL CHEMICAL FIBRES KNITTED" listed in the packing slips to be in the nature of the grey pants depicted in the photographs and to correspond to the registered good "trousers". I also consider the listed "BRIEFS..." and "BRASSIERES..." to correspond to the registered good "underwear"; indeed, the photographs include images of briefs labelled "UNDER WEAR". In addition, on a fair reading of the affidavit as a whole, I find it reasonable to infer that the items sold under the invoice entry "ANKLE BOOTS – SHOES SOLES RUBBER/PLASTICS – UPPERS OF TEXTILE MATERIALS" were "shoes", in the nature of the shoes with rubber soles and textile uppers depicted in the photographs. (If the Licensee also sold "boots" under the "ANKLE BOOTS – SHOES" category, then that is not indicated in the affidavit.)

[40] Even if Mr. Knapp did not specify when and where the Exhibit A photographs were taken, he states that these photographs are representative of how the Mark was displayed on the labelling of the registered goods that were sold in or shipped to distributors in Canada for resale during the Relevant Period. As the photographs demonstrate how the Mark was displayed in association with such goods during the Relevant Period, and the invoices and packing slips provide evidence of transfers of such goods in the normal course of trade during that period, I am

satisfied that the Owner has shown use of the Mark in association with these goods pursuant to section 4(1) of the Act.

[41] In addition, upon reviewing the evidence as a whole and taking into account the Owner's representations at the hearing, I accept that the following registered goods referenced in Mr. Knapp's assertion of use are represented in the Exhibit B invoices and packing slips, even though they do not seem to appear in the Exhibit A photographs:

Shirts, sweaters, dresses, skirts, dungarees, jeans, corsetry, shawls; undergarment.

[42] In this respect, I consider the listed "CARDIGANS..." to be "sweaters"; the listed "TROUSERS MEN DENIM WOVEN" to be "jeans"; and the listed "FASHIONABLE UNDERSHIRTS WOMEN COTTON KNITTED" to be "undergarments". Furthermore, although the registered good "dungarees" is not explicitly included in Mr. Knapp's assertion of use, he does assert use more generally with "pants" and the reference to "SHORT DUNGAREES WOMEN COTTON WOVEN" in the exhibited packing slips and invoices supports a conclusion that the Mark is not deadwood in respect of this specific type of pant.

[43] Mr. Knapp states that the Exhibit A photographs show the manner in which the Mark was displayed on the packaging and labelling of the goods sold in Canada or shipped to distributors in Canada for resale during the Relevant Period . Therefore, I am prepared to infer that the Mark was displayed in a similar way on these additional goods listed in the invoices and packing slips.

[44] Moreover, the Federal Court of Appeal has held that display of a trademark at the top of an invoice that accompanies goods at the time of transfer in the normal course of trade may, in some circumstances, constitute use of that trademark in association with the goods listed in the invoice [see *Hortilux Schreder BV v Iwasaki Electric Co*, 2012 FCA 321]. In the present case, similar to the *Hortilux* case, the Mark appears at the top of the invoices and packing slips. Furthermore, the Mark's display as a logo contrasts with the regular text used for the rest of the document and no other trademarks are mentioned; therefore, I am satisfied that the notice of association between the Mark and the goods is clear.

[45] The Requesting Party cites *Riches, McKenzie & Herbert v Pepper King Ltd* (2000), 8 CPR (4th) 471[*Pepper King*] at paragraph 24 for the proposition that an owner relying on display

of a trademark on invoices must establish, in a clear and unambiguous way, that the invoices provided a notice of association between the mark and the goods *at the time of transfer*. In this respect, the Requesting Party argues that, in the absence of particulars regarding *how* the invoices and packing slips accompanied the goods in question, it is not possible to assess whether these materials came to the recipients' attention in such a way as to provide the required notice.

[46] However, *Pepper King* is distinguishable. In that case, the affiant did not state that the invoices accompanied the goods at the time of transfer, and the Federal Court found that the Registrar should not have inferred that fact. That is not the present case. Mr. Knapp clearly states that the invoices/packing slips "accompanied" the goods included in Exhibit A shipped to distributors in Canada for resale during the Relevant Period, and I note that each invoice and packing slip includes at least one good of the type depicted at Exhibit A.

[47] In view of the foregoing, I am also satisfied that the Owner has shown use of the Mark in association with the additional invoiced goods pursuant to section 4(1) of the Act.

Goods for which the evidence is insufficient to show use

[48] Upon reviewing the evidence as a whole and taking into account the Owner's representations at the hearing, I am prepared to accept that the following additional registered goods with which Mr. Knapp asserts use *may* be represented in the Exhibit A photographs; however, they are not listed in the Exhibit B invoices or packing slips:

Tote bags, handbags, backpacks, purses, sport bags; tank tops, polo shirts, bathing suits, socks, belts, bikinis.

[49] Mr. Knapp attests that the photographs in Exhibit A show the *manner* in which the Mark was displayed on the packaging and labelling of the goods sold in or shipped to distributors in Canada for resale during the Relevant Period. However, it is not clear whether the photographs in Exhibit A are also meant to show *which* goods were sold or shipped.

[50] Invoices are not mandatory in order to satisfactorily reply to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)]. However, without them, a registered owner should be prepared to furnish evidence regarding volumes of

sales, dollar value of sales, or equivalent factual particulars, to allow the Registrar to conclude that transfers of the particular goods in question occurred in the normal course of trade [see *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79 and *Gowling Lafleur Henderson LLP v Wertex Hosiery Inc*, 2014 TMOB 193].

[51] In the present case, the Affidavit contains neither clear sworn statements nor sales reports or other exhibits demonstrating facts which would allow me to conclude that any of the additional depicted goods were transferred in the normal course of trade in Canada during the Relevant Period. In the circumstances, for the goods not represented in the exhibited invoices and packing slips, Mr. Knapp's statement that certain registered goods were "sold and offered for sale to customers in Canada" during the Relevant Period amounts to a bare assertion of use, which is insufficient to meet the requirements of section 45 of the Act.

[52] Thus, in the absence of evidence of transfers in the normal course of trade of the additional goods depicted in Exhibit A, or of any of the other registered goods in Mr. Knapp's assertion of use, I cannot conclude that the Owner has shown use of the Mark in association with these additional goods within the meaning of section 4 of the Act.

[53] Finally, I note that, at the hearing, the Owner attempted to correlate certain additional registered goods to the furnished evidence by connecting individual products with multiple registered goods, for example, by correlating T-shirts with additional registered goods such as "tops" or "clothing for inline-skating, skateboarding, roller-skating, namely shirts". However, having distinguished various goods in the subject registration, the Owner must furnish some evidence of use in respect of *each* of the specified goods [see *John Labatt, supra*]. In the present case, in the absence of evidence to the contrary, I am not satisfied that any of the individual products identified above for which use of the Mark has been demonstrated—or any other products that may be represented in the invoices or packing slips—correspond to any additional registered goods.

## Conclusion

[54] In view of all the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with only the following registered goods within the meaning of sections 4 and 45 of the Act:

Clothing, footwear, headgear, outerwear for gentlemen and ladies namely shirts, t-shirts, pullovers, sweaters, dresses, skirts, dungarees, trousers, jeans, shorts, corsetry, jackets, shawls, shoes, caps, underwear; undergarment.

[55] As the Owner furnished no evidence of special circumstances excusing non-use of the Mark within the meaning of section 45(3) of the Act, the registration will be amended to delete the remaining goods.

## DISPOSITION

[56] 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, the registration will be amended to delete all of goods (1) and (3) and the following from goods (2):

[Clothing, footwear, headgear, outerwear for gentlemen and ladies namely] blouses, ... sport shirts, tank tops, sweatshirts, polo shirts, ... jerseys, aprons, vests, waistcoats, tops, bustiers, suits, ... gowns, ... overalls, coveralls, ... trouser suits, ... bermuda shorts, pants, sweatpants, ... leotards, tunics, blazers, dressing gowns, pyjamas, night-gowns, night - shirts, longjohns, boxer shorts, slacks, bathing suits, ... hosiery, tights, stockings, socks, legwarmers, gaiters, suspenders, ... anoraks, parkas, coats, ... scarves, ... gloves, mitts, ties, cravats, wrist bands, headbands, sweatbands, ear muffs, ... boots, sandals, casual shoes, clogs, athletic shoes, sneakers, hats, ... tams, berets, helmets; barrettes, clothing for babies, ... [;]... belts; hosiery; belts, scarves, gloves; bathing fashion for gentlemen and ladies namely bathing trunks, bikinis, bathing caps, beach robes; leisure and city shoes for gentlemen and ladies; clothing, footwear and headgear for inline-skating, skateboarding, roller-skating, cross-country skiing and snowboarding namely jerseys, shirts, pants, shorts; jackets, boots, snow boots, snowboard boots, hats, woollen hats, caps, sweat bands, head bands, gloves, long underwear, ski shoes; clothing for babies, underwear; undergarment.

[57] The amended statement of goods will be as follows:

- (2) Clothing, footwear, headgear, outerwear for gentlemen and ladies namely shirts, t-shirts, pullovers, sweaters, dresses, skirts, dungarees, trousers, jeans, shorts, corsetry, jackets, shawls, shoes, caps, underwear; undergarment.

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Oksana Osadchuk  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

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**HEARING DATE** 2021-02-22

**APPEARANCES**

Donna White	For the Registered Owner
Kenneth McKay	For the Requesting Party

**AGENTS OF RECORD**

Osler, Hoskin & Harcourt LLP	For the Registered Owner
Marks & Clerk	For the Requesting Party