



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 263

Date of Decision: 2021-11-29

IN THE MATTER OF A SECTION 45 PROCEEDING

S.M.F. Special Metal Fasbricating Ltd.

Requesting Party

and

MetalBoss Technologies Inc.

Registered Owner

TMA509,868 for SECURE-FLOW

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. TMA509,868 for the trademark SECURE-FLOW (the Mark), currently owned by MetalBoss Technologies Inc. (the Owner).

[2] The Mark is registered for use in association with the following goods:

Measuring instruments namely ported nipples and suction valves as used as part of “A Truck Out Assembly” for spill prevention (the Goods).

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

THE PROCEEDING

[4] At the request of S.M.F. Special Metal Fabricating Ltd. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on February 13, 2020, to the Owner.

[5] The notice required the Owner to show whether the trademark has been used in Canada in association with 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 February 13, 2017 to February 13, 2020 (the Relevant Period).

[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 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. The evidence in a section 45 proceeding need not be perfect; indeed, a registered owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184]. This burden of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant*].

[8] In response to the Registrar’s notice, the Owner furnished the affidavit of John Andrew Wolthuis, the President of MetalBoss Technologies Inc., sworn on December 10, 2020, together with Exhibits A to D.

[9] No party submitted written representations and no oral hearing was held.

THE EVIDENCE

[10] Mr. Wolthuis explains that the Owner is a company incorporated in Alberta since 1980, specializing in the manufacturing of spill control units for the oil and gas sector [paras 4, 6 and 7].

[11] Mr. Wolthuis explains that, during the Relevant Period, the Goods were sold by distributors located in Canada through purchase orders. Once an order was received from a distributor, the Owner issued a Sales Order Acknowledgement, which also served as the invoice. The ordered products were then shipped by the Owner to the distributors [para 7].

[12] In support, Mr. Wolthuis attaches the following relevant exhibits to his affidavit:

- Exhibit “A”: Copy of product brochures displaying the Mark, which Mr. Wolthuis explains were circulated to customers and potential customers during the Relevant Period. The four brochures provide descriptions and images of a Custom Secondary Spill Control Unit, Ported Nipple Assembly (Standard and Retro Models), Retro Secondary Spill Control Unit, and Standard Secondary Spill Control Unit [para 6].
- Exhibit “B”: Photographs showing valves and ported nipples encased in metal boxes bearing a label displaying the Mark. Mr. Wolthuis states that these photographs are representative of how the Mark was displayed on products sold in Canada during the Relevant Period [para 8]. In addition to photographs, there is a one-page document featuring the Standard Secondary Spill Controls Unit shown in Exhibit “A” and describing the unit’s components namely the valve, suction line, ported nipple, security latch, ground bolt and metal box.
- Exhibit “C”: Three copies of Sales Order Acknowledgement displaying the Mark issued by the Owner during the Relevant Period and showing sales to customers in Canada [para 10]. The items sold are listed as: Secure-Flow Spill Containment System with 3” Load Line Clip Gate Valve, Pig Catcher Spill Containment System, and Secure-Flow Spill Containment System with 3” Load Line Stainless Steel Ball Valve.

[13] Mr. Wolthuis also states that from February 13, 2017 to January 18, 2018, the Owner sold more than 500 units of Secure-Flow products in Canada, generating revenue in excess of \$800,000 [para 9].

ANALYSIS AND REASONS FOR DECISION

[14] Given that no party has submitted written representations and based on the evidence described above, the only question left to determine is whether or not the evidence described above establishes that there has been use of the Mark in Canada during the Relevant Period in association with the goods within the meaning of section 4(1) of the Act.

[15] Given that the Owner has sold the Goods in Canada during the Relevant Period [para 9] and has shown that the Mark appeared on the Goods themselves as well as on invoices [Exhibits “A”, “B” and “C”], I am satisfied that the Owner has shown use of the Mark in Canada within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[16] In view of the above, 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.

Martin Béliveau
Chairperson
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

Moffat & Co.

For the Registered Owner

Bryan & Company LLP

For the Requesting Party