

BETWEEN:

REDSAND, INC.

Appellant

- and -

DYLEX LIMITED  
(formerly Thrifty Riding and Sports Shop Limited)

- and -

THE REGISTRAR OF TRADE-MARKS

Respondents

**REASONS FOR ORDER**

**MacKAY J.:**

This is an appeal pursuant to section 56 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the "*Act*") from a decision of the Chairman of the Trade-Marks Opposition Board (the "TMOB"), dated December 22, 1995 which, pursuant to s-s. 38(8) of the *Act*, rejected the appellant's opposition to the application by the respondent to register its "HOT SAND" trade-mark.

The appellant appeals the decision on the grounds that the TMOB erred in fact and in law in rejecting the opposition. In particular, the appellant alleges that the TMOB:

- (a)erred in fact and in law in rejecting the appellant's grounds of opposition to registration of the trade-mark applied for by the respondent Dylex Limited ("Dylex") and;
- (b)erred in fact and in law in rejecting the evidence of Mr. Lusitana as to use and advertising of the its REDSAND trade-mark in Canada.

By way of relief, the appellant seeks an order, in effect setting aside the decision of the TMOB and directing that the application by Dylex for registration of its HOT SAND trade-mark be rejected.

**Facts**

The appellant, Redsand Inc. ("Redsand"), is a company incorporated under the laws of the State of California. Since at least as early as 1988 the appellant has produced and distributed a variety of sport-related clothing and other wares bearing the REDSAND and REDSAND AND DESIGN trade-marks, principally in California and Florida. In its Statement of Opposition to registration of Dylex' HOT SAND trade-mark, Redsand alleges its REDSAND trade name and its trade-marks and design have been used and are very well known in Canada since before the date of the Dylex application.

The respondent, Dylex Limited (formerly Thrifty Riding and Sports Shop Limited, which made the original application for registration of the HOT SAND trade-mark) ("Dylex"), is a Canadian company engaged in the retail clothing business which operates "Thrifty's" clothing stores, a retail chain with approximately 143 outlets located across Canada. For the record, I note that the Registrar of Trade-marks, though named a respondent in the style of cause in this appeal, took no part in the appeal proceedings.

On June 14, 1989, the respondent applied to the Registrar of Trade-marks to register the trade-mark HOT SAND (No. 634,431) based upon the proposed use of the trade-mark in Canada with the following wares:  
men's, women's and children's wearing apparel, namely shirts, shorts, pants, sweaters, sweatpants, sweatshirts, tops, blouses, coats, jackets, scarves, ties, socks, pullovers, cardigans, T-shirts, vests and jeans.

Four months later, on October 18, 1989, the appellant applied to register its REDSAND trade-mark in Canada (application no. 642 951) for use with:  
(1) T-shirts, tank tops, shorts, volleyballs, and caps. (2) Sweatshirts. (3) Banners stickers and decals. (4) Hip packs, beach chairs, sun block lotion, visors, volleyball knee sleeves, volleyball nets and volleyball lines.

The appellant's application, claiming use in Canada in association with certain wares since June 1988, was approved and its REDSAND trade-mark and Design were registered as No. TMA 432,607 on September 2, 1994, for use with the wares listed above as applied for in relation to items listed as (1), (2), (3), and for hip packs in category (4).

Before the appellant's mark was registered, the respondent's trade-mark application, for registration of HOT SAND, was advertised for possible opposition purposes in the February 14, 1990 issue of the *Trade-marks Journal*.

On June 14, 1990, the appellant filed a statement of opposition challenging the HOT SAND trade-mark application principally on the grounds that the trade-mark is not registerable and the respondent is not entitled to registration since the appellant's trade-marks and trade-name have been used extensively and are well known in Canada in association with wares including many of those for which Dylex sought registration of its mark. In particular, the grounds of the appellant's opposition were as follows:

(i)The respondent is said not to be a legal entity and therefore is not entitled to apply for registration under s.30 of the *Trade-marks Act*;

(ii)At the date of filing, the respondent was aware or ought to have been aware of the appellant's trade-marks REDSAND and REDSAND & Design, and its trade-name REDSAND previously used in Canada, and therefore could not have been satisfied of its entitlement to use the proposed mark pursuant to s.30(i) of the *Act*.

(iii)Because of the prior use in Canada of the appellant's trade-marks and trade-name, pursuant to s-s.16(3) of the *Act* the respondent is not entitled to register the proposed mark in Canada in association with the wares for which the REDSAND marks and name were used;

(iv)That the use of the respondent's proposed mark will result in actual, and the likelihood of, confusion in the marketplace in Canada, and therefore the Dylex HOT SAND mark is not distinctive or capable of becoming distinctive.

On August 7, 1990, the respondent filed a counter-statement in which it denied each of the appellant's grounds of opposition, and put the appellant to strict proof thereof.

**Decision of the TMOB**

An oral hearing was held before Chairman G.W. Partington of the TMOB, with both parties represented, and based on affidavit evidence filed on behalf of both parties. Evidence of the appellant was comprised of the two affidavits of Robert Lusitana, one filed in chief and one in reply, as well as the reply affidavit of Henry Lue. The respondent filed three affidavits, one each by Mickey Maklin, Janis E. Caruana and Karen Messer. Mr. Maklin was cross-examined on his affidavit, and his responses to undertakings form part of the record before the TMOB. Written arguments were filed on behalf of the appellant.

By decision dated December 22, 1995, the TMOB rejected the appellant's opposition on the basis that it had failed to meet the initial evidential burden upon it to adduce sufficient evidence to support the grounds of its opposition.

With respect to the appellant's allegation that the respondent is not a legal entity, the TMOB found that the appellant had failed to provide any evidence, and moreover, to the extent the allegation was intended to question the name of respondent, that matter had been addressed by amendment of the respondent's application in order to provide its proper name.

Similarly, the TMOB found that the appellant had failed to adduce evidence that the respondent was aware or ought to have been aware, prior to filing its application, of the appellant's use of the REDSAND trade-mark or trade-name in Canada.

The TMOB also dismissed the appellant's allegation that pursuant to s-s. 16(3), the respondent's trade-mark was not registerable or entitled to registration because it would result in confusion with the appellant's trade-mark, alleged to be previously used or made known in Canada. According to the TMOB, s-ss. 16(3) and 17(1) of the *Act* place an initial burden on the opponent to establish: (i) its use of its trade-marks and trade-names in Canada in association with similar wares prior to the applicant's filing date (here, June 14, 1989); and (ii) that it has not abandoned its trade-mark and trade-name in association with these wares as of the date of advertisement in the *Trade-marks Journal* (February 14, 1990). According to the TMOB, the appellant failed to

meet these evidential burdens in that the evidence adduced was either insufficient or constituted inadmissible hearsay.

Commenting on the failure of the appellant to adduce sufficient evidence to support its claims of prior use in Canada and of resulting confusion pursuant to s. 16(3) of the *Act*, the TMOB concluded as follows:

... I am not satisfied that the transactions covered by the three invoices constitute evidence of use of the opponent's trade-marks REDSAND and REDSAND & Design in association with clothing in Canada within the scope of Section 4(1) of the *Trade-marks Act* in that the transfer of property in or possession of the wares to Westbeach Surf Company appears to have taken place in the United States. Accordingly, and in order to conclude that the opponent has used his trade-marks in Canada prior to the applicant's filing date, I must infer that wares bearing the opponent's trade-marks REDSAND and REDSAND & Design and trade-name REDSAND were brought into Canada by Westbeach Surf Company and were subsequently sold in this country prior to the applicant's filing date. However, the meeting of the burden on the opponent under s.16(5) is not a matter to be left to inference. Rather, the burden on the opponent is to adduce evidence from which I can conclude that the opponent used its trade-marks or trade-name in this country prior to the filing date of the present application and, further, that the opponent had not abandoned such trade-marks or trade-names in this country as of the date of advertisement of the present application in the *Trade-mark Journal*. As the opponent has failed to meet this burden, I have rejected the non-entitlement ground of opposition.

While the legal burden is also on the applicant to establish the distinctiveness of its trade-mark HOT SAND, there is an evidential burden on the opponent in respect of this ground to adduce sufficient evidence which, if believed, would support the truth of the allegations set forth in the statement of opposition relating to the alleged non-distinctiveness of the applicant's trade-mark. The material date with respect to this ground is that date of opposition, that is, June 14, 1990. In this regard, the opponent has not furnished any direct evidence relating either to the sale or distribution of clothing in Canada bearing the opponent's trade-marks or trade-name or the advertising and promotion of such clothing or other wares in association with its trade-marks REDSAND And REDSAND & Design and trade-name REDSAND. I have therefore rejected this ground for failure by the opponent to meet the evidential burden upon it.

In view of the above, I reject the opponent's opposition pursuant to s.38(8) of the *Trade-marks Act*.

On February 22, 1996, the applicant filed a notice of appeal pursuant to s. 56 of the *Act*. In support of its appeal from the TMOB decision, the appellant has filed new evidence by affidavits of Marco Allinott, Robert Lusitana, Steve Timmons and Christopher Burke, to establish that its trade-marks had been in use and were well known in Canada prior to the date of filing.

### *Submissions of the Parties*

#### *i) Submissions of the Appellant:*

The position of the appellant is essentially that the TMOB erred in concluding that the appellant failed to meet the initial evidentiary burden upon it, and that in the alternative, if the TMOB did not err, any evidentiary deficiencies have been fully remedied by the new affidavit evidence it has adduced on appeal. Moreover, the appellant submits that the respondent has failed to meet the continuing legal burden upon it to establish that it is entitled to registration on the basis that there is no likelihood of confusion.

According to the appellant, the TMOB erred in finding it had failed to satisfy the initial evidentiary burden upon it to establish use of its REDSAND mark in Canada prior to the date of the respondent's application for registration. It is urged that the appellant's affidavit evidence, adduced before the TMOB, clearly establishes that the appellant has used and promoted its REDSAND trade-marks and trade-name in Canada since June of 1988 and continuously to date.

The appellant submits that in an opposition proceeding, the legal burden remains on the applicant for registration (the respondent) to establish that it is entitled to registration in that there is no likelihood of confusion. This onus, the appellant submits, the respondent has failed to meet in that it has failed to establish no likelihood of confusion would arise from the registration of its trade-mark.

According to the appellant, where a mark is strong and distinct, the greater and broader the protection for that mark will be, and the more difficult it will be for the applicant for registration (the respondent) to discharge the onus that there is no likelihood of confusion. In the present case, the appellant submits that the appellant's REDSAND name and mark is novel, inherently distinctive, and comprised of a word uniquely coined for the trade-mark, without descriptive reference to the wares for which it is registered. Accordingly, the appellant submits the REDSAND mark is entitled to a broad ambit of protection, in that the use of the respondent's HOT SAND mark will lead to the inference by the public that the wares originate from the same source, with the result that there is, in fact, a reasonable likelihood of confusion. This likelihood, the appellant submits, is evidenced by the affidavit evidence of the respondent, which establishes that the two trade-marks are essentially the same mark, related to similar products, and addressed to the same target audience or market.

Finally, the appellant submits that even if the TMOB did not err, the new affidavit evidence, filed on appeal, serves to provide what the TMOB implied was lacking, that is, direct evidence of the appellant's prior use of its trade-mark in Canada. This evidence, the appellant submits, is provided in the affidavits of Marco Allinott, Robert Lusitana, and Christopher Burke, which clearly establish that at the time of the application date the REDSAND trade-mark had been used in Canada for over a year before the date of the respondent's application for registration of its mark, and since.

ii) Submissions of the Respondent:

The respondent submits that on appeal, the appellant bears the burden of showing that the TMOB erred. Where, as in the present case, the TMOB finds an opponent's evidence to be insufficient, the respondent submits the appellant is required to adduce sufficient credible facts on appeal to support its position. Absent adequate new evidence, the respondent submits, the Court is not entitled to disturb the findings of the TMOB.

The respondent submits that the appellant in the present case has failed to meet the onus upon it by failing to adduce sufficient new evidence to support its appeal. According to the respondent, the new affidavit evidence is either irrelevant or inadmissible, and thus it fails to provide sufficient evidence to substantiate the appellant's allegations. In particular, the respondent submits, the affidavit evidence of the appellant fails to adduce particulars regarding any use or sales of wares associated with the REDSAND trade-marks or trade-name in Canada prior to the relevant date, June 14, 1989, the date of filing the respondent's application for registration.

In particular the respondent submits, the appellant has failed to establish "adequate use" within the meaning of s.4 of the *Act* of its then unregistered REDSAND trade-mark in Canada by demonstrating use (i) within the ordinary course of trade; and/or (ii) so as to evidence a reputation of trade in Canada, or that, in accord with s. 5, its REDSAND trade-mark had become well-known throughout Canada. As the appellant has failed to meet its initial evidential burden to establish use and reputation of

the REDSAND trade-mark prior to the date of the respondent's filing, the latter submits it is not required to address the issue of confusion.

Moreover, the respondent submits that even assuming the appellant has met its initial evidential burden, the HOT SAND trade-mark is not likely to cause confusion with the REDSAND trade-mark. According to the respondent, to determine whether the two trade-marks are confusing, the Court is required to consider all the circumstances of the case, including the factors set out in s-s.6(5) of the *Act*. In the present case, the respondent submits, the criteria set out in s-s.6(5) favour registration

of the respondent's HOT SAND trade-mark on the basis of the following:

- (i) the trade-mark REDSAND is comprised of common words and is therefore entitled to a narrow range of protection and there is no evidence that the trade-marks or trade-name has been used or made known in Canada;
- (ii) The HOT SAND trade-mark has been used extensively throughout Canada since 1989. Conversely, the appellant's REDSAND trade-mark has not been used as extensively. Further, during the approximate 7 years the two trade-marks have co-existed in Canada, there is no evidence of any actual instances of confusion.
- (iii) The nature of the wares are different; the REDSAND trade-mark is used with a more specific class of clothing - beach volleyball wear and paraphernalia, calling for a higher degree of consumer selection than HOT SAND's trade-mark, which is used with a more general class of clothing wares.
- (iv) The channels of trade are very different, resulting in little chance of overlap or confusion; in that the respondent's products are sold exclusively in Thrifty's outlets throughout Canada, which do not sell the appellant's REDSAND products.
- (v) There is little resemblance between the two trade-marks in that they are visually and phonetically distinct, and convey very different ideas. The only common component is the word SAND - an ordinary English word not capable of monopoly - a word commonly used in relation to clothing items.

Based on these arguments, the respondent submits that the appeal should be dismissed and the decision of the TMOB allowing the registration of its trade-mark be upheld.

### Analysis



It is well-settled that in considering an appeal under s.56, while the decision of the TMOB carries considerable weight and is not to be set aside lightly, this Court has the responsibility to determine whether, in light of all the relevant circumstances, the decision of the TMOB is correct.<sup>1</sup> The appropriate standard of review in these circumstances was described by my colleague Mr. Justice Denault in *Mitac Inc v. Mita Industrial Co. Ltd.*<sup>2</sup> as follows:

...in cases such as these, the onus on the appellant is two-fold. Firstly, the appellant must establish that the hearing officer erred in his appreciation of the facts or in his interpretation of the law. It is well established that such a decision carries considerable weight and is not to be lightly set aside. Secondly, there remains the continuing onus on the appellant to establish its right to registration.

In the present case, I am not persuaded that the TMOB has committed any reviewable error. Nor am I persuaded that the new affidavit evidence adduced by the appellant in this appeal is sufficient in addressing the principal shortcoming found by the TMOB. In my view, grounds are not established that would justify interference with the decision of the TMOB.

In an opposition proceeding, prior to considering the specific grounds of opposition, the opponent to registration, in this case the appellant, is under an initial evidentiary burden to adduce evidence from which it may reasonably be concluded that the facts alleged to support the grounds of opposition exist.<sup>3</sup> This initial evidentiary burden, the TMOB concluded, the appellant had failed to meet, by failing to adduce sufficient evidence to support the grounds of its opposition. Despite the averment of Mr. Lusitana that its REDSAND trade-mark was used by sale of goods, bearing the mark, in Canada prior to the date of Dylex' application to register its mark, the only direct evidence offered was a single invoice for sale of product to a named corporation at a Washington State address. Though that company was said to have stores only in Canada, there was no direct evidence of movement of the goods to Canada or of sale of those goods in Canada.

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<sup>1</sup> *Labatt Brewing Co. v. Molson Breweries* (1996), 68 C.P.R. (3d) 216 (F.C.T.D.), (*Calumet Manufacturing Ltd. v. Mennen Canada Inc.* (1992), 40 C.P.R. (3d) 76, 50 F.T.R. 197 (F.C.T.D.) (at C.P.R. 84).

<sup>2</sup> (1992), 40 C.P.R. (3d) 387 at 391-392, 51 P.T.R. 281 at 284.

<sup>3</sup> *John Labatt Ltd. v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 at 298 (F.C.T.D.).

In my view, not only did the TMOB commit no error in so finding, but for the reasons which follow, I have concluded that the appellant has failed to adduce significant new evidence which would lead to a contrary conclusion.<sup>4</sup>

In this case, a principal ground of opposition which both counsel dealt with at some length is that, pursuant to s-s.16(3), the respondent is only entitled to registration of its trade-mark if it establishes there would be no confusion with the appellant's mark which, it is alleged, has been previously used in Canada. It is true that an applicant for registration of a mark has a continuing onus to establish that its proposed mark is not confusing with a registered mark or with another mark used in Canada prior to the date of the applicant's application for registration. Here the appellant's trade-mark was not registered at the relevant date. Thus, the appellant was under an initial evidentiary burden to establish: (i) use of its mark in Canada prior to the date of the respondent's filing and (ii) that it had not abandoned the mark, prior to date of advertisement in the *Trade-marks Journal*.

In the present case, the TMOB concluded that the appellant had failed to meet the initial evidentiary burden upon it. Before the TMOB, the only relevant evidence adduced by the appellant in relation to its alleged use of its REDSAND trade-mark in Canada was a single invoice, referring to a purchase of approximately \$2000 of the appellant's wares by Westbeach, which wares were shipped to an address in the United States. These wares, Mr. Lusitana averred in his second affidavit, were then sold by Westbeach in its stores in Canada, but that is the only reference to sales in Canada prior to the date of the respondent's filing, and no further detailed evidence of those reputed sales in Canada was proffered by the appellant.

While the submission of the appellant is that this invoice is evidence of sales of its wares with the REDSAND mark in Canada prior to the relevant date, I am not persuaded that this evidence does establish use or reputation of the appellant's trade-

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<sup>4</sup>*Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1987), 14 C.P.R. (3d) 133 at 135, 11 C.I.P.R. 1 (F.C.T.D.).

marks or trade-name in the normal course of trade in Canada. "Use" of a trade-mark is defined in sections 2 and 4 of the *Trade-marks Act* as follows:

2. ...

"use", in relation to a trade-mark, means any use that by section 4 is deemed to be a use in association with wares or services;

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

...

In order for there to be "use" of a trade-mark within the meaning of the *Act*, that use must be continuous and in the ordinary course of trade.<sup>5</sup> In my opinion, the evidence before the TMOB simply does not satisfy these criteria, as the only activity which appears to have occurred before the relevant date was a single transaction, in which the appellant's wares were sent, not to Canada, but to an address in Washington state. Such a transaction, in my view, is neither continuous nor indicative of a normal commercial transaction in the ordinary course of trade.

Nor, in my opinion, did the TMOB err in determining that the appellant had failed to adduce sufficient evidence to establish that its trade-marks or trade-name enjoyed a reputation or were "made known" prior to the date of filing. The circumstances in which a trade-mark is deemed to have been made known in Canada are provided in s.5 of the *Act* which states:

5. A trade-mark is deemed to be made known in Canada by a person only if it is used by that person in a country of the Union, other than Canada, in association with wares or services, and

(a) the wares are distributed in association with it in Canada, or

(b) the wares or services are advertised in association with it in

(i) any printed publication circulated in Canada in the ordinary course of commerce among potential dealers in or users of the wares or services, or

...

and it has become well known in Canada by reason of the distribution or advertising.

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<sup>5</sup> *Labatt Brewing Co. v. Benson & Hedges (Canada) Ltd.* (1996), 67 C.P.R. (3d) 258, 110 F.T.R. 180 (F.C.T.D.) With respect to what constitutes in the "ordinary course of trade" see *The Molson Companies v. Halter* (1976), 28 C.P.R. (2d) 158 (F.C.T.D.) at 177; *Canadian Schenley Distillers Ltd. v. Molson Co* (1978), 47 C.P.R. (2d) 137 (T.M. Opp. Bd.); *Mr. Goodwrench v. General Motors Corp.* (1994), 55 C.P.R. (3d) 508 at 513 (F.C.T.D.).

In the present case, there was simply no evidence before the TMOB to suggest that the REDSAND trade-mark had become well known in Canada by virtue of magazine advertisements, in evidence, of the appellant's wares bearing the trade-mark. While Mr. Lusitana, in his second affidavit avers that these magazines listed Canadian prices, no direct evidence was presented to establish that these magazines were, in fact, circulated in Canada before the relevant June 14, 1989 date. Even presuming these magazines were so circulated, the appellant adduced no evidence to establish that the five issues alleged to be distributed in Canada in 1989 resulted in the mark being known in a substantial area, or even a particular area, of Canada. In short, there was simply no evidence to suggest that even if advertising did occur in Canada, it was substantial enough to have a noticeable impact in the Canadian market.<sup>6</sup>

In my view, the additional evidence filed by the appellant on appeal does not alter this picture as it was before the TMOB. As referred to above, the new evidence adduced by the appellant consists of the affidavits of Christopher Burke, Steve Timmons, Marco Allinott, and a third affidavit of Robert Lusitana. With respect, I am unable to agree with the appellant's submissions that the new affidavits meet the shortcomings in evidence found by the TMOB. In my opinion, that evidence adduced by the appellant is lacking in precision and does not enhance the position of the appellant. It fails to establish use or reputation of the appellant's trade-name or marks in Canada prior to the relevant date, June 14, 1989.

The affidavit of Christopher Burke, filed in this appeal proceeding, does not support the appellant's contention that magazines containing advertisements of REDSAND products were circulated in Canada prior to June 14, 1989. In his affidavit, Mr. Burke offers evidence of his efforts to determine the circulation in Canada of publications said to have contained advertising of REDSAND products in the period from 1990 to the present. The publisher of both magazines, "advised" him as to the date of commencement of publication and estimated monthly circulation of each of these two magazines in Canada.

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<sup>6</sup>See *Robert C. Wian Enterprises Inc v. Mady*, (1965) 44 D.L.R. (2d) 65 at 81, 46 C.P.R. 147 at 170 (Ex.Ct.) Furthermore, in order for a trade-mark to be held to have become "well known" in Canada, a substantial area of Canada must know the mark: *Marineland Inc. v. Marine Wonderland & Animal Park Ltd.*, [1974] 2 F.C. 558 at 575-577 (F.C.T.D.).

In my view, this evidence is inadmissible on the grounds that it is both *prima facie* hearsay,<sup>7</sup> and it is, in any event, irrelevant for the purposes of the present appeal. The evidence of Mr. Burke, while providing hearsay evidence regarding the distribution of the two magazines, relied on as advertising the appellant's wares in Canada, offers no direct or relevant evidence of circulation prior to the relevant date.

The affidavit of Steve Timmons is also irrelevant for the purposes of the present appeal. The affidavit of Mr. Timmons chronicles his volleyball achievements and activities as founder of Redsand Inc. Interesting as this is, it offers no material evidence concerning the use and reputation of REDSAND name and mark in Canada prior to the relevant date.

The affidavit of Marco Allinott of the Westbeach Company, upon which the appellant heavily relies, is not directly supportive of particular sales or use of REDSAND products in Canada at the relevant time. In his affidavit, Mr. Allinott makes the following general statements:

3. ... During the period 1988 to 1991 and into early 1992 we purchased REDSAND clothing products from Redsand Inc. and resold it in all of the outlets in Canada on a continuous basis.
4. ...Exhibits A1 to A3 of the Lusitana affidavit reflect some of my company's purchases of Redsand clothing products. This product bearing the REDSAND trade-mark was in turn resold in Canada in the period after April, 1988. Further purchases of REDSAND clothing products were made in 1988 through and including 1991. The purchase of REDSAND product averaged \$8,000.00 to \$10,000.00 annually over that four year period.

Despite these broad statements, the only evidence provided by the appellant in support is that which was already before the TMOB, three sales invoices, only one of which indicates a sale prior to the relevant date, June 14, 1989. No further or specific evidence is offered concerning the actual dates of purchases said to have taken place "during the period 1988 to 1991", or the amount of these purchases, or more importantly the dates, if any, prior to June 14, 1989, on which wares bearing the REDSAND mark were resold in Canada.

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<sup>7</sup>For a discussion regarding the application of recent developments in the law of hearsay to Federal Court Rule 332(1) regarding admissible affidavit evidence, see *Labatt Brewing Co. v. Molson Breweries* (1996), 68 C.P.R. (3d) 216 at 221 to 225 (F.C.T.D.).

The third affidavit of Robert Lusitana, provided on this appeal proceeding, does not offer any new relevant evidence to support the appellant's allegation that its trade-mark or trade-name had been used in Canada prior to the date of the respondent's filing. Mr. Lusitana, in this affidavit, provides figures regarding world-wide sales of wares bearing the REDSAND trade-marks, from 1986 to April, 1995; as well as world-wide advertising and promotional expenditures for the same period; and estimated sales in Canada from 1991 to 1993. In my view, this evidence is irrelevant for the purposes of the present appeal. No new evidence is adduced regarding the use and reputation of the appellant's trade-marks or trade-name in Canada prior to the June 14, 1989 date, or regarding the Canadian advertising and promotional expenses associated with the appellant's trade-marks and name in Canada prior to that date.

**Conclusion**

For the reasons set out above, I am not persuaded that the TMOB committed any reversible error in finding that the appellant had failed to adduce sufficient admissible evidence to discharge the evidentiary onus upon it, that is, it did not establish use of its trade-marks or its trade name in the regular course of trade in Canada prior to June 14, 1989. Further, having carefully considered the additional affidavit evidence filed by the appellant in relation to this appeal, I am not persuaded that this initial evidentiary burden has been met by the appellant. Having so concluded, I do not find it is necessary to address the question of confusion.

The appeal from the decision of the TMOB is therefore dismissed.

OTTAWA, Ontario

June 10, 1997.