

**In the matter of Section 45 proceedings against Registration
No. TMA566,886 for the trade-mark GARDEN TREASURE**

[1] On November 27, 2007, at the request of Stikeman Elliot LLP (the Requesting Party), the Registrar forwarded the notice prescribed by s. 45 of the *Trade-marks Act* R.S.C 1985, c. T-13 (the Act) to Absorbent Products Ltd. (Absorbent), the registered owner of Registration No. TMA566,886 for the trade-mark GARDEN TREASURE (the Mark). The statement of wares in the registration reads as follows: “(1) Organic Soil. (2) Lava Rock. (3) Peat Moss. (4) Bark Mulch. (5) Landscape Rock (6) Fertilizer. (7) Leonardite. (8) Diatomaceous Earth. (9) Weed and Feed.”

[2] Pursuant to the provisions of s. 45 of the Act, the registered owner of a trade-mark must show, with respect to each of the wares and/or services specified in the registration, whether the trade-mark was in use in Canada at any time during the three-year period immediately preceding the date of the notice and, if not, the date on which it was last used and the reason for the absence of use since that date. The relevant period in this case is anytime between November 27, 2004 and November 27, 2007. What qualifies as use of a trade-mark is defined in s. 4 of the Act.

[3] In response to the Registrar’s notice, Absorbent filed the affidavit of Peter Aylen together with Exhibits A-1 through B-4. Mr. Aylen has been President and Chief Executive Officer of Absorbent since December 2004.

[4] Both Absorbent and the Requesting Party have filed written representations and were represented at an oral hearing.

[5] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing deadwood from the register. Mere assertions of use are insufficient to demonstrate use [see *Aerosol Fillers Inc. v. Plough (Canada) Ltd.* (1979), 45 C.P.R. (2d) 194 (F.C.T.D.); aff’d 53 C.P.R. (2d) 62 (F.C.A.)]. A recipient of a notice pursuant to s. 45 of the Act must put forward evidence showing how it has used the trade-mark so that the Registrar may assess if the facts qualify as use of the trade-mark pursuant to s. 4 of the Act. However, it has also been held that evidentiary overkill is not required when use can be

shown in a simple, straightforward fashion [see *Union Electric Supply Co. v. Registrar of Trade Marks* (1982), 63 C.P.R. (2d) 56 (F.C.T.D.)]. Ambiguities in the evidence are to be interpreted against the registered owner's interests [see *Aerosol Fillers Inc.*, *supra*].

[6] According to the Aylen affidavit, Absorbent carries on the business of manufacturing and distributing industrial absorbents, agricultural products, mineral products and cat litter products. Absorbent ships its products directly to the public and to retailers in Canada and the United States for resale to the public [paragraph 4]. Western Industrial Clay Products Ltd. (Western Industrial), a subsidiary of Absorbent, is licensed to use the Mark in association with organic soil, lava rock, peat moss, bark mulch, landscape rock, fertilizer, leonardite, diatomaceous earth, and weed and feed in Canada and the United States. Mr. Aylen specifically states that pursuant to the license, Absorbent "controls and has controlled at all material times the character or quality of the wares" with which the Mark has been used [paragraph 5].

[7] At paragraphs 6 and 7 of his affidavit, Mr. Aylen deposes as follows:

6. *During the Relevant Period, Absorbent Products has used the trade-mark GARDEN TREASURE in association with organic soil and fertilizer (the "GARDEN TREASURE Wares"). Absorbent Products has used the trade-mark GARDEN TREASURE by prominently marking it on the packaging of GARDEN TREASURE Wares distributed and sold in Canada. Now shown to me and attached as Exhibit "A-1" to my affidavit is a representative specimen of this packaging as used during the Relevant Period. Now shown to me and attached as Exhibit "A-2" to my affidavit is a pamphlet which illustrates the manner in which the trade-mark GARDEN TREASURE was used during the Relevant Period.*

7. *Absorbent Products distributed the GARDEN TREASURE Wares in Canada during the relevant period to the public and to retailers for sales to Canadian consumers. Now shown to me and attached as Exhibit "B" to my affidavit are copies from the Business Records of invoices evidencing sales of GARDEN TREASURE Wares in Canada during the Relevant Period to the public and/or to retailers. On these invoices, the "GT" under "Description" is an abbreviation for GARDEN TREASURE Wares. [...].*

[8] Exhibit A-1 consists of a 15-litre bag of a product called "All-Purpose Potting Soil". The Mark and the name and address of Western Industrial are displayed on the bag, which also describes the use and the ingredients of the product ("Special Blend of Canadian Peat Moss and

Naturally Mined Minerals”). Although the pamphlet appended as Exhibit A-2 displays the Mark, the Aylen affidavit does not allow me to conclude, or for that matter to infer, that the pamphlet accompanied the wares at the time of transfer of the property in or possession of the wares. That being said, the pamphlet shows what seems to be a photograph of a 9-litre bag of a product called “Worm Castings Soil”. The Mark is displayed on the bag. The name “ABSORBENT MARKETING a division of Western Industrial Clay Products Ltd.” is shown below the photograph of the bag.

[9] Exhibit B consists of four invoices [Exhibits B-1 through B-4] issued by Absorbent in May of 2005 for the sale of “GT WORM CASTINGS SOIL FINISHED GOOD”. While the invoices cannot be relied upon as evidence of use of the Mark, they corroborate Mr. Aylen’s allegations concerning the sales of wares bearing the Mark.

[10] Since the display of the Mark on packaging amounts to use of the Mark in association with wares pursuant to s. 4(1) of the Act, the next issue becomes whether the use of the Mark by Western Industrial during the relevant period accrued to the benefit of Absorbent pursuant to s. 50(1) of the Act.

[11] The Requesting Party submits that neither Exhibit A-1, nor Exhibit A-2 show Absorbent’s name. Suffice it to say that the absence of the name of the registered owner of the trade-mark on packaging is not relevant in s. 45 proceedings [see *Novopharm Ltd. v. Mosanto Canada, Inc.* (1997), 80 C.P.R. (3d) 287 (C.O.M.C.)]. The Requesting Party also noted the absence on the bag [Exhibit A-1] of a statement that the use of the Mark is a licensed use. This only means that Absorbent is not entitled to the presumption created by s. 50(2) of the Act. I agree with Absorbent’s submissions that Mr. Aylen’s sworn statements affirming the existence of a license as well as the control under the license are sufficient to satisfy the requirement of s. 50(1) of the Act for the purposes of s. 45 proceedings [see *Shapiro Cohen Andrews & Finlayson v. 1089751 Ontario Ltd.* (2003), 28 C.P.R. (4th) 124 (T.M.O.B.)]. The next issue becomes whether use of the Mark has been shown in association with the registered wares.

[12] In its written representations, the Requesting Party contended that all registered wares other than “organic soil” and “fertilizer” should be deleted from the registration. However, at the oral hearing, the agent for the Requesting Party contended that only “organic soil” should be maintained in the registration. In its written representations, Absorbent contended that the registration should be maintained at least in association with the registered wares “organic soil” and “fertilizers”. However, at the oral hearing, the agent for Absorbent contended that the registration should be maintained for “peat moss” and “weed and feed” as well. In other words, until the oral hearing, there was not any real debate between the parties concerning the registered wares that should be maintained in the registration. Following the oral hearing, there is still no debate between the parties that the registered wares “organic soil” should be maintained in the registration.

[13] At the oral hearing, Absorbent’s agent took the position that “organic soil”, “fertilizers”, “peat moss” and “weed and feed” make up a single category of wares and that evidence of use in association with any of these specific wares should serve to maintain the entire category. Absorbent’s agent more particularly referred to the decision *Westinghouse Air Brake Co. v. Moffat & Co.* (2001), 14 C.P.R. (4th) 257 (F.C.T.D.) in which the evidence of use was considered sufficient as the wares fell into a broad category and some were constituent parts of the others. By analogy, Absorbent’s agent argued that the evidence of use for “organic soil” is sufficient to maintain the registration for “fertilizers”, “peat moss” and “weed and feed” as all the wares fall into the same category and the evidence showed that “fertilizers”, “peat moss” and “weed and feed” are components of “organic soil”.

[14] I disagree with Absorbent’s contention that the wares “organic soil”, “fertilizers”, “peat moss” and “weed and feed” make up a single category of wares. The wares “fertilizers”, “peat moss” and “weed and feed” are separately designated in the statement of wares and thus they cannot be regarded in the same category of merchandise as “organic soil”. On this basis alone, the present case is distinguishable from *Westinghouse, supra*. Moreover, case law in line with *Westinghouse, supra*, generally relies on at least the presence of statements of use of the trademark for the wares in association with which use has not been demonstrated in the supporting evidence. Clearly, such is not the case here.

[15] In the end, I agree with the Requesting Party that the present case is more in line with *John Labatt Ltd. v. Rainier Brewing Co. et al* (1984), 80 C.P.R. (2d) 228 (F.C.A.). Thus, while I am satisfied that the Ayley affidavit permits me to arrive at the conclusion of use of the Mark in association with “organic soil” during the relevant period, I am not satisfied that it permits me to arrive at the conclusion of use of the Mark in association with “peat moss” and “weed and feed”. I shall now consider whether the Ayley affidavit shows use of the Mark in association with “fertilizers”.

[16] Although the Ayley affidavit introduces the evidence as relating to both “organic soil” and “fertilizer”, I have previously noted that the packaging shown by Exhibits A-1 and A-2 identify the product as “All-Purpose Potting Soil” and “Worm Casting Soil” respectively and the invoices relate to the sale of worm castings soil. It appears to me that references in the affidavit to both “organic soil” and “fertilizers” relate to a single product, namely organic soil. I will point out that this finding seems consistent with the arguments brought forth by Absorbent at paragraph 17 of its written representations where it submits: *The pamphlet clearly establishes that “worm casing [sic] soil” is fertilizer, as it is referred to as an [sic] “a non-burning, slow release, long lasting organic plant food source”, which “helps retain moisture and helps promote growth.* To be more specific, while Absorbent argued at the oral hearing that “organic soil” and “fertilizers” were wares falling into the same category, and thus not necessarily the same, it argues in its written representations that organic soil can be a fertilizer. In this sense, Absorbent contends that the terms “organic soil” and “fertilizers” may be used interchangeably and therefore the use shown with “organic soil” also supports use with “fertilizers”.

[17] Even if “organic soil” may be used as fertilizer, the wares “fertilizers” have been separately listed in the registration. Pursuant to the reasoning, as I understand it, in *John Labatt Ltd., supra*, the “fertilizers” identified in the registration do not encompass “organic soil”, but rather refer to fertilizers other than organic soil. I agree with the Requesting Party that use in association with “organic soil” does not support use in association with “fertilizers”. I would add that had Absorbent used the Mark in association with “fertilizers” other than organic soil, it would not have been overly burdensome for Absorbent to furnish evidence of such use.

[18] Having regard to the foregoing, I am satisfied that the Aylen affidavit is sufficient to show use of the Mark during the relevant period in association with “organic soil” in the manner required by the Act. However, I am not satisfied that the Aylen affidavit evidences use of the Mark in association with the remaining registered wares, nor does it put forward special circumstances to justify non-use of the Mark. Therefore, the wares “(2) Lava Rock. (3) Peat Moss. (4) Bark Mulch. (5) Landscape Rock (6) Fertilizer. (7) Leonardite. (8) Diatomaceous Earth. (9) Weed and Feed” will be deleted from the registration.

[19] In view of the above, and pursuant to the authority delegated to me under s. 63(3) of the Act, I find that Registration No. TMA566,886 should only be maintained in respect of “(1) Organic Soil”.

[20] Registration No. TMA566,886 will be amended in compliance with the provisions of s. 45(5) of the Act.

DATED AT MONTREAL, QUEBEC, THIS 15th DAY OF DECEMBER 2009.

Céline Tremblay
Member
Trade-marks Opposition Board