



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2014 TMOB 12**  
**Date of Decision: 2014-01-21**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Coastal Trademark Services against  
registration No. TMA631,670 for the trade-mark  
ULTIMATE in the name of Purepharm Inc.**

[1] At the request of Coastal Trademark Services (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on October 11, 2011 to Purepharm Inc. (the Registrant), the registered owner of registration No. TMA631,670 for the trade-mark ULTIMATE (the Mark).

[2] The Mark is registered for use in association with the following wares: Pharmaceutical preparation, namely glucosamine containing products, namely loose powders, tablets, capsules, oral liquids, hot and cold beverage mixes, medicinal drinks, nutritional drinks, food and meal replacement bars.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares 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 between October 11, 2008 and October 11, 2011.

[4] The relevant definition of “use” is set out in section 4(1) of the Act:

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.

[5] 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 and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[6] In response to the Registrar’s notice, the Registrant filed the affidavit of Willem Wassenaar, President of the Registrant, sworn on April 19, 2012. Both parties filed written representations; only the Registrant was represented at an oral hearing.

[7] In his affidavit, Mr. Wassenaar attests that the Registrant sold approximately \$1,346,000 of glucosamine powder in association with the Mark during the relevant period. In support, he provides the following exhibits attached to his affidavit:

- Exhibit A is a photograph, which Mr. Wassenaar attests is “a plastic tub of glucosamine powder displaying the ULTIMATE Registration on the label and this is how [the Registrant’s] glucosamine powder was sold in Canada during the Relevant Period”. The design mark depicted on the label is shown below:



- Exhibit B is a copy of a sheet of labels that Mr. Wassenaar attests are adhered to the plastic tubs. The same design mark reproduced above appears on the labels. Supportive of the statement of wares with respect to “...hot and cold beverage mixes...”, I note that the label states that the powder “may be taken as a sweetener in tea, coffee or other hot or cold beverage or sprinkled over food”. The following information also appears on the

labels: “Distributed by Wellesley Therapeutics Inc.” and “Trade mark: Owned by PurePharm Inc, used under license”.

- Exhibit C is a box labelled as “6 units/unites” of “Ultimate Glucosamine®”, that Mr. Wassenaar attests is used for shipping the plastic tubs to retailers such as pharmacies, for resale to consumers. Mr. Wassenaar explains that the Registrant’s glucosamine powder was also distributed to retailers in 12 and 24 packs.
- Exhibit D consists of ten representative invoices evidencing sales of various quantities of glucosamine powder from the Registrant’s distributor, Wellesley Therapeutics Inc., to various customers in various provinces, all dated within the relevant period.

[8] As corroborative evidence, Mr. Wassenaar also attaches to his affidavit an “Ultimate Glucosamine” brochure (Exhibit E), coupons (Exhibit F), a magnet (Exhibit G) and employee business cards (Exhibits M and N), all displaying the design mark above and which Mr. Wassenaar attests were distributed during the relevant period to the Registrant’s consumers and potential retailers. I note the brochure indicates that the Registrant’s glucosamine powder is for “joint health”, though at the oral hearing the Registrant noted that the powder is used for other ailments as well.

[9] At the oral hearing, the Registrant conceded that the evidence did not support use of the Mark in association with “...tablets, capsules, oral liquids, ... medicinal drinks, nutritional drinks, food and meal replacement bars”. As no evidence of special circumstances was furnished, the registration will be amended accordingly.

[10] In its written representations, the Requesting Party submits that it is “not possible” to understand what would be deemed to be the Registrant’s normal course of trade. On the contrary, however, it is clear that the Registrant sold its product through its distributor to various Canadian retailers during the relevant period. Mr. Wassenaar’s statements in combination with the aforementioned invoices are sufficient to establish that such sales were in the normal course of trade.

[11] The Requesting Party also submits that the evidence does not support use of the Mark in association with the wares as registered, indicating that there was no evidence that the Registrant's product is a "pharmaceutical preparation". In this respect, the Requesting Party submits that "a pharmaceutical preparation is a medical product which requires government approval to sell and then requires a prescription to obtain". However, the Requesting Party provides no authority for such a limited definition of "pharmaceutical preparation" and I agree with the Registrant that, for purposes of the Act, "pharmaceutical preparation" can reasonably be considered an ordinary commercial term for the product in question.

[12] Similarly, the Requesting Party submits that the evidence does not support use of the Mark in association with "glucosamine *containing* products". In this respect, the Requesting Party notes that the exhibited labels state that the plastic tub ingredients are "100% N-Acetyl-D-glucosamine" with no other ingredients listed. Again, the Requesting Party provides no authority for such a limited definition of "containing", and I agree with the Registrant that this is a frivolous argument in that "it is obvious that 100% N-Acetyl-D-Glucosamine *contains* glucosamine".

[13] Lastly, the Requesting Party submits that the design mark reproduced above and displayed throughout the evidence does not constitute use of the Mark as registered. Even where ULTIMATE is displayed without the background design element, such as on the packaging at Exhibit C, the Requesting Party notes that the ® symbol appears after the word GLUCOSAMINE, rather than the word ULTIMATE. However, in applying the principles as set out in *Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull, SA* (1985), 4 CPR (3d) 523 (FCA) and *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA), I consider the addition of the word GLUCOSAMINE, being descriptive of the product, to be a minor deviation from the Mark. In my view, the dominant feature in this case is the first portion, ULTIMATE. As such, the identity of the mark is preserved and the deviation would not, in my opinion, mislead an unaware purchaser.

[14] In view of the foregoing, I am satisfied that the Registrant has demonstrated use of the Mark in association with "glucosamine containing products, namely loose powders ... hot and

cold beverage mixes” during the relevant period within the meaning of sections 4 and 45 of the Act.

Disposition

[15] 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 the following from the statement of wares: “... tablets, capsules, oral liquids, ... medicinal drinks, nutritional drinks, food and meal replacement bars.

[16] The amended statement of wares will be as follows: “Pharmaceutical preparation, namely glucosamine containing products, namely loose powders and hot and cold beverage mixes.”

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Andrew Bene  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office