



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

Citation: 2016 TMOB 114
Date of Decision: 2016-07-13

IN THE MATTER OF A SECTION 45 PROCEEDING

Maximum Human Performance, LLC **Requesting Party**

and

Paradime Ltd. Inc. **Registered Owner**

TMA572,849 for CARNIVORA **Registration**

[1] At the request of Maximum Human Performance, LLC (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 July 28, 2014 to Paradime Ltd. Inc. (the Owner), the registered owner of registration No. TMA572,849 for the trade-mark CARNIVORA (the Mark).

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

Pharmaceutical preparations, namely, preparations for the treatment of adult malignant tumors, ulcerative colitis, Crohn's disease, primary chronic polyarthritis, neurodermitis, multiple sclerosis, immune deficiency diseases, aids; dietetic supplements namely, vitamins and minerals and plant materials in the form of extracts containing amino acids in powder and in liquid form as a solution and as an emulsion, and in solid form as a paste, capsule, dragee, granules or powder, meal replacements in the form of bars, biscuits and beverages; sanitary preparations, namely, air, car, household and room deodorants, mouthwashes, lipsticks for medical purposes, preparations for pharmaceutical skin care.

[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 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 July 28, 2011 to July 28, 2014.

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

4(1) A trade-mark 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.

[5] 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 section 45 proceedings is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD) at 480], 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 trade-mark in association with each of the goods specified in the registration during the relevant period.

[6] In response to the Registrar’s notice, the Owner filed the affidavit of Richard Ostrow, President of the Owner, sworn on November 28, 2014 in Connecticut, U.S.A. Both parties submitted written representations; a hearing was not requested.

The Owner’s Evidence

[7] In his affidavit, Mr. Ostrow asserts use of the Mark in association with all of the registered goods during the relevant period. Although he does not describe the nature of the Owner’s business in any detail, he attests that the Owner’s sales of its CARNIVORA products in Canada occur through orders placed by telephone or through its website, *www.carnivora.com*. He attests to total sales of CARNIVORA products in Canada by year, amounting to a total of approximately \$150,000 during the relevant period.

[8] Although he does not break down such sales by registered good, Mr. Ostrow attaches seven invoices as Exhibit C to his affidavit. He attests that these invoices were issued by the Owner to Canadian customers for sales of CARNIVORA products during the relevant period. I note that the invoices show sales for three CARNIVORA products: “Carnivora Capsules (100 Vegi-caps)”, “Carnivora Liquid Extract”, and “Lymph Drainage”.

[9] These three invoiced products correspond to the photographs at Exhibit B, which Mr. Ostrow attests are pictures of CARNIVORA products sold in Canada. I note that the bottle labeled “100 VEGI-CAPS” identifies the product as a “dietary supplement” that “promotes a healthy immune system”. The bottle labelled “Pure Liquid Extract” also identifies the product as a “dietary supplement”. Finally, the “Lymph Drainage” product is described as “homeopathic”, and also appears to be in liquid form. The Mark appears on each of the bottles.

[10] Mr. Ostrow also attaches, as Exhibit A to his affidavit, two advertisements that he attests were distributed to the Owner’s customers during the relevant period. The advertisements depict the “Vegi-Caps” and “Pure Liquid Extract” bottles depicted at Exhibit B. The products are described as an “Immune Defense Nutraceutical from Germany” that provides “Multi-faceted Immune System Optimization through systemic Immune Modulation” and allows consumers to “Take advantage of 17 multi-dimensional nutrients in their natural state working synergistically to support the natural healing process”.

Analysis

[11] In its written representations, the Requesting Party submits that any use of the Mark shown in Mr. Ostrow’s affidavit is not by the Owner but, rather, by a “third party named Carnivora Research International”.

[12] Although Exhibits A and B refer to “Carnivora Research International”, I accept that this is merely a trade name of the Owner. Indeed, Mr. Ostrow clearly attests throughout his affidavit that all of the evidence relates to use of the Mark by the Owner.

[13] Nevertheless, I agree with the Requesting Party that the Owner furnished no evidence with respect to the various pharmaceutical, meal replacement and sanitary preparation products

set out in the registration. Notwithstanding Mr. Ostrow's broad assertion of use, the evidence is clearly limited to the three products described above, all of which appear to be in the nature of the registered "dietetic supplements". Indeed, the Requesting Party notes in its representations that the three products shown in the exhibits "refer only to dietetic supplements".

[14] Even so, the Requesting Party submits that the evidence with respect to "dietetic supplements" is further limited, in that it does not cover all of the "solid" forms specified in the registration, such as "dietetic supplements..." in "paste" or "powder" form.

[15] For its part, aside from indicating that the registration was not "deadwood", the Owner made no representations on which of the particular registered goods should be maintained.

[16] Where a registered owner specifies differences between goods in its registration, the implication is that one good is somewhat different from the other and, therefore, use must be shown with respect to each good [see *John Labatt Ltd v Rainer Brewing Co et al* (1984), 80 CPR (2d) 228 (FCA) and *Deeth Williams Wall LLP v Wutzke*, 2010 TMOB 91, CarswellNat 2555].

[17] Applied to this case, I note that the evidence is limited to the two supplements in liquid form and one supplement in capsule form. As the Owner furnished no evidence with respect to all of the forms of "dietetic supplement..." specified in the statement of goods, the registration will be limited accordingly.

[18] In view of the foregoing, I am only satisfied that the Owner has demonstrated use of the Mark in association with "dietetic supplements ..." in liquid and capsule form within the meaning of sections 4 and 45 of the Act.

[19] As the Owner furnished no evidence of special circumstances excusing non-use of the Mark, the registration will be amended to delete the remaining goods accordingly.

Disposition

[20] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, the registration will be amended to delete all of the registered goods with the exception of "dietetic supplements namely, vitamins

and minerals and plant materials in the form of extracts containing amino acids ... in liquid form as a solution and as an emulsion, and in solid form as a ... capsule”.

[21] The amended statement of goods will read as follows: “dietetic supplements namely, vitamins and minerals and plant materials in the form of extracts containing amino acids in liquid form as a solution and as an emulsion, and in solid form as a capsule”.

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

TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD

No Hearing Held

AGENTS OF RECORD

Riches, McKenzie and Herbert, LLP

For the Registered Owner

Norton Rose Fulbright Canada LLP/S.E.N.C.R.L., s.r.l.

For the Requesting Party