

SECTION 45 PROCEEDINGS  
TRADE-MARK: DUAL  
REGISTRATION NO.: 358.1 15

On January 9, 2003 at the request of EKG Agricultural Solutions Inc., the Registrar forwarded a Section 45 notice to Syngenta Crop Protection Canada Inc., the registered owner of the above-referenced trade-mark registration.

The trade-mark DUAL is registered for use in association with the wares: "herbicides".

Section 45 of the Trade-marks 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 and/or services listed on 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 use since that date. The relevant period in this case is any time between January 9, 2000 and January 9, 2003.

In response to the notice the affidavit of Gregg Wilson Allan together with exhibits has been furnished. Each party filed a written argument and was represented at the oral hearing.

In his affidavit, Mr. Allan states that he has been employed by Ciba-Geigy Canada Ltd. for seventeen years. He indicates that such a company merged with Sandoz becoming Novartis Crop Protection Canada Ltd. which then merged with Zeneca becoming Syngenta Crop Protection Canada Inc. I would note here that the trade-mark registration page identifies Novartis Crop Protection Canada Inc.

as owner from 1997 to July 15, 2002 and that the trade-mark was assigned on July 15, 2002 to Syngenta Crop Protection Canada Inc. (hereinafter "the registrant"). Mr. Allan is Marketing Manager for the registrant.

He explains that the registrant uses the trade-mark DUAL in association with herbicides for agricultural use the product being sold through a distribution network of retail sales outlets which, in turn, sell the product to corn and soybean growers across Canada.

He states that the trade-mark was in 1982 and continues to be on labels which are affixed to containers of herbicide when sold.

He adds that since 1982 the trade-mark has been continuously and extensively used and advertised in Canada and as Exhibit A to I he provides copies of promotional materials.

He also provides yearly sales figures for DUAL herbicides for the years 1992 to 2002. Further he indicates the amount spent on advertising for the DUAL product for the years 1995 to 2002. As Exhibit J he provides a copy of an invoice dated December 21, 2000.

The requesting party has raised several arguments concerning the evidence furnished. It argues that it is insufficient to show use during the relevant period of the trade-mark DUAL as registered and that it contains ambiguities.

Having considered the evidence, I find that it shows sales of the wares in Canada during the relevant period. Concerning the sales in Canada, as Mr. Allan has explained that the product is sold through a distribution network of retail sales outlets which, in turn, sell the product to corn and soybean growers across Canada, I accept that the sales figures provided represent sales made in Canada. Further, as the approximate amount of sales was given for each of the years 2000, 2001 and 2002 this confirms that sales of the wares were made during the relevant period.

As for the manner the trade-mark was associated with the wares at the time of their transfer during the relevant period, Mr. Allan has stated that the trade-mark DUAL appeared on labels affixed to containers of herbicide. However, Mr. Allan has failed to provide a copy of a label showing the manner the trade-mark appeared in association with the wares during the relevant period. He did, however, provide copies of technical information pocket books which it seems were inserted into the product case in the year 2001 (Exhibit E to the Allan affidavit) and which bear the trade-mark with additional matter. Considering that these technical information pocket books were inserted with the product and provide information on the product as well as describe the product, I am prepared to conclude on a balance of probabilities that these books probably show the trade-mark the way it appeared on the container for the product. Further, contrary to the requesting party's argument, I am satisfied that the trade-mark appearing thereon would be perceived by the public as use of DUAL "per se".

However, I note that the technical pocket books inserted with the products in 2001 refer to "Syngenta Crop Protection Canada Inc." the current registrant. As I indicated at the oral hearing "Syngenta"

was not the owner of the trade-mark in 2001. From the information on the trade-mark registration page "Syngenta" became owner through assignment only on July 15, 2002. Thus, it seems the use of the trade-mark in 2001 was by an entity who was not the owner of the trade-mark at the time as the registered owner in 2001 was Novartis Crop Protection Canada Inc. As for the sales made after July 15, 2002, Mr. Allan has not furnished any evidence showing how the trade-mark DUAL appeared with such wares.

As the evidence fails to show the manner the trade-mark appeared in association with the wares after July 15, 2002 I cannot determine if the use that was made by Syngenta after July 15, 2002 was of the trade-mark DUAL "per se". It would have been easy for Mr. Allan to have provided clear evidence of the manner the trade-mark appeared on the labels affixed to the containers of herbicide or any other manner the trade-mark appeared in association with the wares sold after July 15, 2002. However, he chose not to do so.

As I have found that the use prior to July 15, 2002 did not accrue to the owner at the time and as there is no evidence to permit me to conclude that the trade-mark as registered was the trade-mark being used by Syngenta after July 15, 2002, I conclude that the trade-mark registration ought to be expunged.

Registration No. 358,115 will be expunged in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 22ND DAY OF DECEMBER 2005.

D. Savard  
Senior Hearing Officer  
Section 45 Division