



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

**Citation: 2017 TMOB 9**  
**Date of Decision: 2017-01-26**

**IN THE MATTER OF SECTION 45 PROCEEDINGS**

**Blake, Cassels & Graydon LLP**

**Requesting Party**

**and**

**United Therapeutics Corporation**

**Registered Owner**

**TMA637,562 for REMODULIN**  
**TMA637,813 for REMODULIN**

**Registrations**

[1] This is a decision involving summary expungement proceedings with respect to registration Nos. TMA637,562 and TMA637,813 for the trade-mark REMODULIN (the Mark), owned by United Therapeutics Corporation (the Owner).

[2] The Mark is registered for use in association with pharmaceutical preparations used in the treatment of cardiovascular diseases, pulmonary and vascular diseases in the case of TMA637,562 and in association with pharmaceutical preparations used in the treatment of cardiovascular, pulmonary and vascular diseases in the case of TMA637,813. In the absence of evidence to the contrary and in view of the fact that both affiants identified below treated the goods for each registration as one and the same, I shall refer to them as the Goods.

[3] For the reasons that follow, I conclude that both registrations ought to be maintained.

## The Proceeding

[4] On September 25, 2014 the Registrar of Trade-marks sent a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) to the Owner of the Mark in each of these files. The notices were sent at the request of Blake, Cassels & Graydon LLP (the Requesting Party).

[5] The notices required the Owner to furnish evidence showing that it had used the Mark in Canada, at any time between September 25, 2011 and September 25, 2014 (the Relevant Period), in association with each of the registered goods. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[6] Section 4(1) of the Act sets out the relevant definition of “use” in association with goods 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.

[7] 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 clearing the register of “deadwood”. Mere statements of use are insufficient to prove use [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. The criteria for establishing use are not demanding [see *Woods Canada Ltd v Lang Michener et al* (1996), 71 CPR (3d) 477 (FCTD)] and an overabundance of evidence is not necessary [see *Union Electric Supply Co v Canada (Registrar of Trade-Marks)* (1982), 63 CPR (2d) 56 (FCTD)]. Nevertheless, sufficient evidence must still be provided to allow the Registrar to conclude that the Mark was used in association with each of the registered goods specified in the registrations [*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270].

[8] In response to the Registrar’s notices, the Owner filed, in each case, the affidavits of Andrew Fisher, Assistant Corporate Secretary of Unither Biotech Inc. (Unither), sworn on April

21, 2015 and Shaun Snader, Vice President and Associate General Counsel of the Owner, sworn on the same date.

[9] Neither parties filed written representations nor was a hearing requested.

### The Evidence

[10] Mr. Snader states that the Goods are manufactured in the United States for the Owner by Baxter Pharmaceutical Solutions LLC (Baxter). He explains the chain of distribution of the Goods sold in Canada such that Unither sells the Goods in Canada under its license with the Owner. Mr. Snader confirms that the Owner maintains direct control over the character and quality of such Goods sold in association with the Mark by Unither.

[11] Mr. Snader attests that the Goods are pharmaceutical preparations namely, vasodilators (i.e. treprostinil) used for the treatment of pulmonary arterial hypertension. In this respect, he confirms that this “is a disease that affects the vascular systems including pulmonary vascular and cardiovascular systems”.

[12] Mr. Snader states that, depending on the applicable dosage, the Goods were sold in Canada under different DIN Nos, which he lists, that were issued by Health Canada. He adds that, during the Relevant Period, the Mark appeared on the individual packaging and shipping boxes imported and distributed in Canada as well as on the invoices for the Goods from Unither to McKesson Canada, its Canadian distributor for the Goods.

[13] In support, Mr. Snader attaches as Exhibit A photographs of the Goods’ individual packaging and shipping boxes which are representative examples of how the Mark was used in association with the Goods during the Relevant Period in the normal course of trade in Canada. Furthermore, he attaches as Exhibit B a sample of monthly invoices obtained from Unither evidencing sales of the Goods in association with the Mark in Canada during the Relevant Period, all issued to McKesson Canada.

[14] In his affidavit, Mr. Fisher states that Unither is a wholly owned Canadian subsidiary and authorised licensee of the Owner for the use of the Mark in Canada in association with the Goods.

[15] Mr. Fisher states that, during the Relevant Period, Unither has imported and sold in Canada under its license from the Owner various dosages of pharmaceutical preparations used for the treatment of pulmonary arterial hypertension in association with the Mark.

[16] Mr. Fisher adds that the Mark appeared on the subject pharmaceutical preparations' individual packaging and shipping boxes imported and distributed in Canada as well as on the sales invoices for these pharmaceutical preparations. In support, Mr. Fisher attaches as Exhibit A photographs of these individual packaging and shipping boxes bearing the Mark which were used for these preparations in Canada during the Relevant Period. He also attaches as Exhibit B a sample of invoices, issued during the Relevant Period, evidencing sales from Unither to its distributor McKesson Canada of these pharmaceutical preparations in association with the Mark in Canada.

[17] I note that Exhibit B consists of numerous invoices for the sale of these pharmaceutical preparations totaling millions of dollars in sales.

#### Analysis

[18] Although there is a difference in the phrasing of the statement of goods for each registration, it is not clear to me that the difference should affect the outcome of these proceedings. Both affiants clearly equate the pharmaceutical preparations sold with the goods as registered. Moreover, Mr. Snader's explained what is "pulmonary arterial hypertension," as noted above. Finally, the Requesting Party did not file any written submissions nor was present at a hearing. Therefore, it is difficult to envisage the arguments that the Requesting Party could have put forward, given the evidence filed in the record.

[19] As described above, both Mr. Fisher and Mr. Snader have demonstrated that pharmaceutical preparations bearing the Mark on their packaging have been sold in Canada during the Relevant Period in the normal course of trade.

[20] Therefore, I am satisfied that the evidence shows use of the Mark in association with the goods as registered in each case, within the meaning of sections 4 and 45 of the Act.

#### Conclusion

[21] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, the registrations will be maintained.

---

Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

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

---

**NO HEARING**

**AGENT(S) OF RECORD**

Norton Rose Fulbright Canada

FOR THE REGISTERED OWNER

Blakes, Cassels & Graydon LLP

FOR THE REQUESTING PARTY