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

Citation: 2018 TMOB 78

Date of Decision: 2018-07-19

IN THE MATTER OF A SECTION 45 PROCEEDING

Ronald S. Ade

Requesting Party

and

Body Plus Nutritional Products Inc.

Registered Owner

**TMA793,076 for THE CLEANEST
PROTEIN POSSIBLE**

Registration

[1] This is a decision involving a summary expungement proceeding with respect to registration No. TMA793,076 for the trade-mark THE CLEANEST PROTEIN POSSIBLE (the Mark), owned by Body Plus Nutritional Products Inc.

[2] The Mark was registered on March 16, 2011 for use in association with the following goods:

Protein fortified foods in powdered drink mix form.

[3] The registration was amended on January 30, 2014 under the provisions of section 41 of the Act, extending the statement of services to include: Operation of a company which manufactures, distributes and sells natural health products and food products through wholesale,

retail and Internet channels. However, as these services had not been on the register for a period of at least three years prior to the section 45 notice, they are not subject to the current proceedings [see Section II.1.2 of the practice notice entitled *Practice in Section 45 Proceedings* and section 41(2) of the Act]. Consequently, only the registered goods are at issue for the purposes of this proceeding.

[4] For the reasons that follow, I conclude that the registration ought to be maintained.

THE PROCEEDING

[5] On June 6, 2016, the Registrar of Trade-marks sent a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) to Body Plus Nutritional Products Inc. (the Owner). The notice was sent at the request of Ronald S. Ade (the Requesting Party).

[6] The notice required the Owner to furnish evidence showing that it had used the Mark in Canada, at any time between June 6, 2013 and June 6, 2016, in association with the goods specified in the registration. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last in use and the reasons for the absence of use since that date.

[7] The relevant definition of use 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.

[8] Section 45 proceedings are considered to be summary and expeditious for clearing the register of non-active trade-marks. The expression “clearing deadwood” has often been used to describe such proceedings [*Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 (FCTD)]. While it is true that the threshold for establishing use in a section 45 proceeding is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD); *Austin Nichols & Co v Cinnabon, Inc* (1998), 82 CPR (3d) 513 (FCA)], 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 registered goods and services during the relevant period [*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270]. Mere statements of use are insufficient to prove use [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)].

[9] In response to the Registrar's notice, the Owner furnished the affidavit of Norm Danniels, sworn August 31, 2016, together with Exhibits A through E.

[10] Only the Owner filed written submissions and requested an oral hearing.

THE EVIDENCE

[11] Mr. Danniels is the President of the Owner.

[12] Mr. Danniels explains that the Owner distributes and sells natural health products in Canada. He further attests that the Owner manufactures the majority of its products in its own production facility in Toronto, Ontario.

[13] Mr. Danniels attests that during the relevant period, the Owner sold the registered goods in Canada under their PROGRESSIVE line of products, marked with the trade-mark HARMONIZED PROTEIN. He further attests that the Mark is a slogan that is and was also marked on the labels for these goods during the relevant period.

[14] In support, Mr. Danniels provides:

Exhibit A – a product label from 2014, which he states is representative of the manner in which the Mark was depicted on all of the labels of the registered goods sold during the relevant period. As per Mr. Danniels' attestations above, the trade-mark HARMONIZED PROTEIN appears on the product label. The Mark also clearly appears on the label above a listing of characteristics of the product, a powdered protein drink mix supplement.

[15] Mr. Danniels explains that the name Progressive Nutritional Therapies appearing on the labels, is a business name registered by the Owner in Ontario for the sale of these goods. He attests that the goods marked with the Mark were sold in Canada during the relevant period through "Canadian retailers such as Whole Foods, Nutrition House, Loblaw Inc., Popeye's Supplements, Vitamart and Alive Health Centres as well as through retailers such as Vita Health

Products Inc. and the Big Carrot in Eastern Canada and Planet Organics and Thrifty's Foods in Western Canada".

[16] Mr. Danniels then provides approximate sales figures for the registered goods bearing the Mark in terms of both unit quantities sold and dollar figure sales for each year of the relevant period.

[17] Lastly, Mr. Danniels provides under Exhibits B through E, examples of display of the Mark during the relevant period on product information sheets, a brochure, on the Owner's website at <http://www.progressivenutritional.com/products/harmonized-protein>, and in various third party advertisements for the registered goods.

ANALYSIS AND REASONS FOR DECISION

[18] I accept that the Owner has demonstrated use of the Mark in association with "*Protein fortified foods in powdered drink mix form*" in compliance with sections 4(1) and 45 of the Act. In this regard, Mr. Danniels has provided an image of a product label clearly bearing the Mark, which he states is representative of the manner in which the Mark was depicted on all of the labels of the registered goods sold during the relevant period. The label is for a powdered protein drink mix supplement, which I accept constitutes the registered goods.

[19] Further to the above, Mr. Danniels has clearly explained that the name Progressive Nutritional Therapies which appears as the source of the goods on the labels, is a business name registered by the Owner in Ontario for the sale of these goods. In addition, Mr. Danniels has provided details with respect to the Owner's normal course of trade in Canada during the relevant period, including a listing of Canadian retail customers of the Owner's registered goods. Lastly, Mr. Danniels has provided sales figures both in terms of quantity (units) sold, and dollar figures totals for the registered goods bearing the Mark for each year of the relevant period.

[20] Such aforementioned evidence is sufficient, to establish that sales were made of "*Protein fortified foods in powdered drink mix form*" bearing the Mark in the normal course of trade during the relevant period in Canada; in other words, the Owner has established a *prima facie* case of use with respect to the registered goods.

DISPOSITION

[21] Having regard to the aforementioned, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

Kathryn Barnett
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE 2018-06-21

APPEARANCES

Adam Falconi

FOR THE REGISTERED OWNER

N/A

FOR THE REQUESTING PARTY

AGENT(S) OF RECORD

Magyar, Bogle & O'Hara LLP

FOR THE REGISTERED OWNER

Ronald S. Ade Law Corporation

FOR THE REQUESTING PARTY