



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

Citation: 2019 TMOB 41

Date of Decision: 2019-04-30

IN THE MATTER OF A SECTION 45 PROCEEDING

Blake, Cassels & Graydon LLP

Requesting Party

and

Sequel Naturals ULC

Registered Owner

TMA767,158 for VIBRANCY

Registration

[1] This is a decision involving a summary expungement proceeding with respect to registration No. TMA767,158 for the trade-mark VIBRANCY (the Mark), owned by Sequel Naturals ULC.

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

(1) Natural food products, namely plant-based whole food snack bars.

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

THE PROCEEDINGS

[4] On March 22, 2017, the Registrar of Trade-marks sent a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) to Sequel Naturals ULC (the Owner). The notice was sent at the request of Blake, Cassels & Graydon LLP (the Requesting Party).

[5] The notice required the Owner to furnish evidence showing that it had used the Mark in Canada, at any time between March 22, 2014 and March 22, 2017, 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.

[6] 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.

[7] 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 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)].

[8] In response to the Registrar's notice, the Owner furnished the affidavit of Samantha Taylor, the Vice President of Marketing of the Owner, sworn June 22, 2017, together with Exhibits A and B.

[9] While both parties filed written representations, neither party requested an oral hearing in the matter.

THE EVIDENCE

[10] Ms. Taylor attests that the Owner began operating in 2001 via the corporate entity Sequel Naturals Ltd. She explains that, in 2015, Sequel Naturals Ltd. merged with Vega Acquisition Company (2015) ULC, which then became Sequel Naturals ULC. She uses the collective "Sequel Naturals" to refer to Sequel Naturals Ltd., Vega Acquisition Company (2015) ULC, and Sequel Naturals ULC.

[11] Ms. Taylor attests that Sequel Naturals used the Mark in Canada in association with the registered goods during the relevant period.

[12] Ms. Taylor summarizes how the Owner's goods are sold in the normal course of trade. Specifically, she describes sales of the registered goods to, and in, retail stores across Canada, including large grocery stores, warehouse club chains, big box retailers, health food stores, and stores specializing in dietary supplements. Additionally, she explains that the normal course of trade includes sales through retailer, third-party, and Owner websites, where the registered goods are shipped to, or within, Canada.

[13] With respect to notice of association of the Mark with the goods, Ms. Taylor attests that, during the relevant period, the Mark was displayed on the front of the packaging for the Owner's goods sold in Canada. In support, she provides, as Exhibit A to her affidavit, representative examples of packaging for the goods sold in Canada during the relevant period. The Mark clearly appears on the packaging of individually wrapped snack bars and on a box of snack bars. In addition, I note that the back of the box depicts the same name and address as that of the Owner on the Mark's registration.

[14] With respect to sales of the registered goods bearing the Mark in Canada during the relevant period as noted above, Ms. Taylor provides representative invoices at Exhibit B to her affidavit. The Mark appears in the body of the invoices together with a product description, and the invoices were issued in April 2014 by Sequel Naturals ULC. I note that Sequel Naturals ULC's address on the invoices is the same as the address on the boxes of bars shown in Exhibit A.

ANALYSIS AND REASONS FOR DECISION

[15] The Requesting Party submits that the Taylor affidavit fails to show use of the Mark in Canada in association with the Goods during the relevant period. Specifically, the Requesting Party submits that there is no evidence of sales of the Goods by the Owner or a duly authorized licensee during the relevant period.

[16] In this respect, the Requesting Party submits that Ms. Taylor's reference to Sequel Naturals ULC, Sequel Naturals Ltd., and Vega Acquisition Company (2015) ULC collectively as "Sequel Naturals" is ambiguous and creates uncertainty as to who owned the Mark and used it during the relevant period.

[17] Further to this, the Requesting Party submits that the only evidence showing sales of the Goods during the relevant period are invoices issued in the name of a company that was not the owner or licensee of the Mark at that time. Specifically, the Requesting Party notes that the Exhibit B invoices were issued in 2014 by Sequel Naturals ULC, and not Sequel Naturals Ltd., the registered owner of the Mark at that time (the Previous Owner). The Requesting Party submits that the merger which resulted in Sequel Naturals ULC becoming the Owner happened only in 2015, and as such, in 2014 when the invoices were issued, Sequel Naturals ULC was a third party unrelated to the Previous Owner.

[18] The Requesting Party further notes that there is no assertion that Sequel Naturals ULC was a licensee of Sequel Naturals Ltd; as such, it cannot be established that the use by Sequel Naturals ULC inured to the benefit of Sequel Naturals Ltd., the Previous Owner.

[19] Lastly, the Requesting Party submits that there are only bald assertions of use lacking corroborating facts or documentation. It submits that given that the 2014 invoices were not

issued by the Previous Owner, the invoices do not corroborate the affiant's statements asserting that sales of the Goods bearing the Mark were made during the relevant period by the Previous Owner.

[20] The Owner, on the other hand, submits that its evidence establishes a *prima facie* case of use and demonstrates that the Owner and its predecessor have used and continue to use the Mark.

[21] The Owner submits, and I agree, that the Taylor affidavit provides clear statements and corroborative evidence that the Goods bearing the Mark were sold in Canada during the relevant period by the Previous Owner.

[22] To begin with, the Owner submits that Ms. Taylor's reference to Sequel Naturals ULC, Sequel Naturals Ltd., and Vega Acquisition Company (2015) ULC collectively as "Sequel Naturals" is not ambiguous. The Owner asserts that since the Owner was created as a result of the merging of all the assets of Sequel Naturals Ltd. and Vega Acquisition Company (2015) ULC, the Mark was absorbed by the Owner.

[23] Moreover, I find that the 2014 invoices demonstrate sales of Goods bearing the Mark by the Previous Owner. The packaging of the Goods shown in Exhibit A clearly displays the Mark and Sequel Naturals Ltd.'s name and address. Additionally, while Sequel Naturals ULC appears on the 2014 invoices, the address displayed is the same address as that listed on the packaging, namely, that of Sequel Naturals Ltd. As such, I am prepared to infer that the invoices were issued on behalf of the Previous Owner, Sequel Naturals Ltd.

[24] In view of the above, there is no need to address the lack of evidence of a license agreement between Sequel Naturals Ltd. and Sequel Naturals ULC in 2014.

[25] Having regard to the evidence as a whole, I am satisfied that the Owner has demonstrated use of the Mark in association with the Goods, within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[26] 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 registration will be maintained.

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**

No hearing held.

AGENTS OF RECORD

Baker & McKenzie LLP

FOR THE REGISTERED OWNER

Blake, Cassels & Graydon LLP

FOR THE REQUESTING PARTY