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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 99

Date of Decision: 2021-05-25

IN THE MATTER OF A SECTION 45 PROCEEDING

MLT Aikins LLP

Requesting Party

and

**Nutribiotic, A Division of Nutrition
Resource Inc.**

Registered Owner

TMA465,060 for NUTRIBIOTIC

Registration

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA465060 for the trademark NUTRIBIOTIC (the Mark), currently owned by Nutribiotic, A Division of Nutrition Resource Inc.

[2] All references are to the Act as amended June 17, 2019 (the Act), unless otherwise noted.

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

(1) Nutritional supplements, namely rice protein, vitamins, grapefruit liquid extract, nutritional supplements made from botanicals; first-aid skin sprays; first-aid skin

ointments; skin cleansers; dental gels; bubble baths; shower gels; nasal sprays; ear drops; foot powders; and personal hygiene deodorants.

(2) Nutritional supplements, namely minerals, vitamin and mineral combinations, nutritional drink powders, vitamin powders, herbal extracts, botanical extracts, herbal tablets, algae tablets; tanning sprays; and mouth rinses.

(3) Anti-septic liquid and an antiseptic powder.

(the Goods).

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

THE PROCEEDINGS

[5] At the request of MLT Aikins LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on October 18, 2018 to Nutribiotic, A Division of Nutrition Resource Inc (the Owner), the registered owner of the Mark.

[6] The notice required the Owner to show whether the trademark 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 October 18, 2015 to October 18, 2018 (the Relevant Period).

[7] The relevant definition of use in the present case is set out in section 4(1) of the Act as follows:

4(1) A trademark 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] 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 removing “deadwood” from the register. As such, the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448 at para 68] and “evidentiary overkill” is not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63

CPR (2d) 56 (FCTD) at para 3]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the mark was used in association with the goods.

[9] In the absence of use as defined above, pursuant to section 45(3) of the Act, a trademark is liable to be expunged, unless the absence of use is due to special circumstances.

[10] In response to the Registrar's notice, the Owner furnished the affidavit of Kenny Ridgeway sworn on May 17, 2019 to which were attached Exhibits A to J inclusive.

[11] Only the Owner filed written representations and no hearing was held.

THE EVIDENCE

[12] Mr. Ridgeway describes himself as the Owner's General Manager for over three years and has been employed by the Owner for over 26 years. As such, he declares that he has personal knowledge of the matters sworn, save and except for matters to be based upon information and belief.

[13] Mr. Ridgeway affirms that the Owner is engaged in the manufacturing and selling nutritional supplements in the United States since around 1980 and then expanded its business to include the manufacturing and selling of personal health care products.

[14] Mr. Ridgeway declares that the Owner commenced selling nutritional supplements to consumers in Canada since at least as early as August 1991 and personal health care products shortly thereafter.

[15] Mr. Ridgeway affirms that, during the Relevant Period, products bearing the Mark were sold to Canadian retailers through the Owner's Canadian authorized distributors namely, Ecotrend Ecologics Ltd.(Ecotrend) and Promedics Nutraceutical Ltd (Promedics). He adds that Ecotrend sold the Owner's NUTRIBIOTIC products to over 500 Canadian retailers and Promedics sold the Owner's NUTRIBIOTICS products to over 300 Canadian retailers such as grocery stores, pharmacies, natural health product stores and health care professionals.

[16] Mr. Ridgeway affirms that the Owner sold the following goods in Canada during the Relevant Period:

Nutritional supplements, namely rice protein, vitamins, grapefruit liquid extract, nutritional supplements made from botanicals; first-aid skin sprays; skin cleansers; bubble baths; shower gels; foot powders; personal hygiene deodorants; nutritional supplements, namely minerals, vitamin and mineral combinations, nutritional drink powders, vitamin powders, herbal extracts, botanical extracts, herbal tablets; anti-septic liquid.

[17] To support such contention, Mr. Ridgeway attached to his affidavit as Exhibit D representative labels (numbered 1 to 14 inclusive. I shall refer to them as Exhibits D-1 to D-14) affixed to the packaging of those goods sold in Canada during the Relevant Period, and as Exhibit E representative invoices issued by the Owner to its Canadian distributors Ecotrend and Promedics. As mentioned above, those distributors resold the goods to Canadian retailers.

[18] Mr. Ridgeway provides a breakdown of the approximate volume and value of sales for each of those goods sold in Canada by its Canadian distributors during the Relevant Period.

[19] Mr. Ridgeway affirms that NUTRIBIOTIC products were also sold to a wholesaler during the Relevant Period, iHerb Inc. (iHerb) who in turn sold them on its website to Canadian consumers. Attached to his affidavit as Exhibit F is a screenprint of certain web pages from iHerb's website to show that it sells and ships products in Canada.

[20] Mr. Ridgeway affirms that iHerb sold first-aid skin ointments, dental gels, nasal sprays, ear drops, algaetablets and mouth rinses during the Relevant Period to Canadians. To support such contention, he attached as Exhibit G labels of these products (numbered 15 to 20 inclusive. I shall refer to them as Exhibits G-15 to G-20). He also attached as Exhibit J representative, partly redacted, invoices issued by iHerb evidencing the sale of certain goods in Canada during the Relevant Period in association with the Mark.

[21] Finally, Mr. Ridgeway provides a breakdown of the approximate volume and value of sales for each of those goods sold by the Owner to iHerb during the Relevant Period.

ANALYSIS AND REASONS FOR DECISION

[22] I note that Mr. Ridgeway did not refer to tanning sprays and antiseptic powder. There is no evidence of use of the Mark in Canada during the Relevant Period in association with those goods. There is no evidence of facts that could be considered as special circumstances within the meaning of section 45(3) of the Act that would explain the non-use of the Mark in association with those goods. Therefore, the registration will be amended accordingly.

[23] The following is a chart listing the goods, the invoices illustrating sales of those goods in Canada during the Relevant Period and reference to the label appearing on a particular product:

Goods	Invoices	Label
Rice protein	641037 & 643739 (exhibit E)	Exhibit D-1
Vitamins	712697, 720550 (exhibit E)	Exhibit D-2
Grapefruit liquid extract	643739 & 645119 (exhibit E)	Exhibit D-4
Nutritional supplements made from botanicals	645119 & 646333(exhibit E)	Exhibit D-5
First-aid skin sprays	686293 (exhibit E)	Exhibit D-9
First-aid skin ointments	638644A & 640375(exhibit I)	Exhibit G-15
Skin cleansers	641037 & 642475 (exhibit E)	Exhibit D-10
Dental gels	638644A & 640375 (exhibit I)	Exhibit G-16
Bubble baths	641037& 643739 (exhibit E)	Exhibit D-11
Shower gels	643878 & 646333 (exhibit E)	Exhibit D-12
Nasal sprays	666595 & 668438 (exhibit I)	Exhibit G-17
Ear drops	638644-A & 639772 (exhibit I)	Exhibit G-18)
Foot powders	641037 & 645119 (exhibit E)	Exhibit D-13
Personal hygiene deodorants	645119 & 646333 (exhibit E)	Exhibit D-14
Minerals	641037 & 643739 (exhibit E)	Exhibit D-3
Vitamin and mineral combinations	641037 &643739 (exhibit E)	Exhibit D-3

Nutritional drink powders	646333 & 648898 (exhibit E)	Exhibit D-6
Vitamin powders	652508 (exhibit E)	Exhibit D-7
Herbal extracts	652574 & 656312 (exhibit E)	Exhibit D-8
Botanical extracts	643739 & 645119 (exhibit E)	Exhibit D-4
Herbal tablets	652574 & 656312 (exhibit E)	Exhibit D-8
Algae tablets	641902 & 642699 (exhibit I)	Exhibit G-19
Mouth rinses	639772 & 641031 (exhibit I)	Exhibit G-20
Antiseptic liquid	686293 (exhibit E)	Exhibit D-9

[24] From this evidence I conclude that the Owner has established use of the Mark in Canada, within the meaning of section 4(1) of the Act, during the Relevant Period in association with each of the goods mentioned in the preceding paragraph.

DISPOSITION

[25] Pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be amended to delete the following: “tanning sprays and antiseptic powder” in compliance with the provisions of section 45 of the Act.

[26] The amended statement of goods will read as follow:

(1) Nutritional supplements, namely rice protein, vitamins, grapefruit liquid extract, nutritional supplements made from botanicals; first-aid skin sprays; first-aid skin ointments; skin cleansers; dental gels; bubble baths; shower gels; nasal sprays; ear drops; foot powders; and personal hygiene deodorants.

(2) Nutritional supplements, namely minerals, vitamin and mineral combinations, nutritional drink powders, vitamin powders, herbal extracts, botanical extracts, herbal tablets, algae tablets; and mouth rinses.

(3) Anti-septic liquid.

Jean Carrière
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE No Hearing Held

AGENTS OF RECORD

Oyen Wiggs Green & Mutala LLP

For the Registered Owner

MLT Aikins LLP

For the Requesting Party