



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 130

Date of Decision: 2022-07-11

IN THE MATTER OF A SECTION 45 PROCEEDING

Smart & Biggar IP Agency Co.

Requesting Party

and

Bio Organic Solutions Corp.

Registered Owner

TMA943,218 for BIORGANIC

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. TMA943,218 for the trademark BIORGANIC (the Mark).

[2] The Mark is registered for use in association with the following goods and services:

Cleaning preparations, namely, pot & pan detergents, cream cleansers, multipurpose cleaners; chlorine & destainer, dish detergent, carpet care products, namely soil release carpet cleaner & carpet spot remover; degreaser multi-purpose cleaner, high & low temperature rinse aids, disinfectant & fungicide cleaner, glass cleaner, PH neutral cleaners, foaming & lotion soaps, hand sanitizer, & anti bacterial soap.

Providing a retail & wholesale store for the following and manufacturer of industrial cleaning preparations, namely, pot & pan detergents, cream cleansers, multipurpose cleaners; chlorine & destainer, dish detergent, carpet care products, namely soil release carpet cleaner & carpet spot remover; degreaser multi-purpose cleaner, high & low

temperature rinse aids, disinfectant & fungicide cleaner, glass cleaner, PH neutral cleaners, foaming & lotion soaps, hand sanitizer, & anti bacterial soap.

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

THE PROCEEDING

[4] At the request of Smart & Biggar IP Agency Co. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on March 15, 2021 to the registered owner of the Mark, Bio Organic Solutions Corp. (the Owner).

[5] The notice required the Owner to show whether the Mark was used in Canada in association with each of the goods and services listed 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 March 15, 2018 to March 15, 2021 (the Relevant Period).

[6] The relevant definitions of use are set out in section 4 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.

4(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[7] Bare statements that the Mark was in use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the Mark in association with each of the goods and services listed in the registration during the Relevant Period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[8] Pursuant to section 45(3) of the Act, in the absence of use, the registration is liable to be expunged unless the absence of use is due to special circumstances.

[9] In response to the Registrar's notice, the Owner furnished the Statutory Declaration of Ashok Sood, declared on June 10, 2021, to which were attached Exhibits A to D (the Sood Declaration).

[10] Only the Requesting Party submitted written representations. No hearing was held.

THE EVIDENCE

[11] Ashok Sood is a director of the Owner, which he describes as a manufacturer and distributor of organic cleaning products located in Ontario.

[12] Mr. Sood asserts that the Mark was used during the Relevant Period by being prominently displayed on labels and on packaging for the goods listed in the registration. He also asserts that such goods were continuously sold in Canada.

[13] As Exhibit A, Mr. Sood provides representative photographs showing how the Mark "is displayed" on Big Red dish detergent, Big Yellow chlorine and destainer, Lemonshine pot and pan detergent and Softtouch hand soap. Exhibit A also includes photographs of a product catalogue (while some products are visible, overall the photographs of the product catalogue are of poor resolution).

[14] Mr. Sood states that all of the goods listed in the registration are sold and can be found on the Owner's websites at *www.biorganiccolutions.com* and *www.bioorganicsolutions.com* and that every product sold has the Mark on the label and packaging. To be clear, the content of the two websites is not in evidence before me and does not form part of the record.

[15] Mr. Sood also states that the Owner is a vendor for Champion Products Corp (Champion) and that the Owner's products bearing the Mark were sold and are sold through the Champion website.

[16] As Exhibit D, Mr. Sood provides copies of seven invoices from the Owner to Champion in Windsor, Ontario, all dated within the Relevant Period. He states that “some” of the products displayed the Mark. The Mark is displayed in the top centre of each invoice.

[17] Specifically, Exhibit D contains the invoices described below (because Mr. Sood did not correlate the products listed in the invoices with the goods listed in the registration, the correlations to the registered goods in square brackets below are mine):

- Invoice No. 437 for the sale of HDX-99 Heavy Duty Degreaser [degreaser multi-purpose cleaner] and Big Blue High Temp Rinse Aid [high temperature rinse aids]. The HDX-99 product is visible in the product catalogue and the label displays the Mark. I am not able to identify the Big Blue product in Exhibit A.
- Invoice No. 438 for the sale of Neutra Natural Cleaner (for use on counters, walls and floors) [PH neutral cleaners]. The Neutra product is visible in the product catalogue and the label displays the Mark.
- Invoice No. 439 for the sale of Soft Foam Foaming Hand Soap [foaming & lotion soaps] and Big Red Dishwasher Detergent [dish detergent]. A photograph of the Big Red product has been provided in Exhibit A and the label displays the Mark. I am not able to identify the Soft Foam product in Exhibit A.
- Invoice No. 440 for the sale of Big Yellow Warewash Sanitizer [chlorine and destainer]. A photograph of the Big Yellow product has been provided in Exhibit A and the label displays the Mark.
- Invoice No. 441 for the sale of Lemonshine Lemon Dish Detergent [pot and pan detergent]. A photograph of the Lemonshine product has been provided in Exhibit A and the label displays the Mark.
- Invoice No. 444 and Invoice No. 445 for the sale of Sanatouch Hand Sanitizer [hand sanitizer]. I am not able to identify the Sanatouch product in Exhibit A.

[18] Mr. Sood goes on to assert that the Mark was used during the Relevant Period by being prominently displayed in association with the services of “providing a retail & wholesale store and Manufacturer of industrial cleaning preparations”. However, he does not specify which industrial cleaning preparations are manufactured and sold by the Owner. Again, he refers to the use of the Mark on the Owner’s websites but the content of those websites is not in evidence before me and does not form part of the record.

[19] Finally, Mr. Sood states that the Owner prepares goods such as detergent and hand sanitizer bearing the Mark for Champion Products Corp to sell, as shown in the invoices attached as Exhibit D.

[20] The Mark, as shown in the Exhibits, is in a logo format together with the word SOLUTIONS. No issue was raised by the Requesting Party as to the way in which the Mark is displayed but, to be clear, I accept that the manner in which the Mark is used constitutes an acceptable variation of the Mark. As a matter of first impression, the public would perceive the mark as being used *per se* [*Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB)]. The Mark remains recognizable despite the additional matter.

PRELIMINARY ISSUE

[21] As a preliminary issue, the Requesting Party submits that the Sood Declaration, which was declared in Windsor, Ontario, is inadmissible because the signature of the person who administered the declaration is illegible and there is no rubber stamp, seal or other means to identify the individual, “making it impossible to confirm their identity and status”. Further, the Requesting Party submits that, since the Sood Declaration was not submitted by a law firm, it cannot be presumed that the individual is automatically a commissioner by virtue of their occupation.

[22] The Requesting Party relies on the decision of Master Sandler of the Ontario Supreme Court in *Vinski v Lack*, 1987 CarswellOnt 490 at para 14, where he stated as follows:

In my view, when a person authorized by the *Commissioners for taking Affidavits Act* is performing his/her duty thereunder by administering an oath or declaration in signing the jurat, it is important that his/her signature be legible, or can be made out by reference to

some other addition immediately below the signature (such as a typed or rubber-stamped name of the person), so as to give strangers notice of who purported to take the oath or declaration, and so that paras. 10, 11, 12 and 13 of the Act are not rendered nugatory.

[23] The Master did not cite any Canadian authority in support of his position. Instead, the Master adopted as the correct position in Ontario the following statements from *English Annual Supreme Court Practice*:

The jurat of every affidavit should contain the full address of the place where the affidavit was sworn, sufficient for identification. Affidavits should never end on one page with the jurat following overleaf. The jurat should follow immediately after the end of the text. The signature of the Commissioner for Oaths should be written immediately below the words 'Before me'. ... It is most desirable that there should be no ambiguity about the place where an affidavit is sworn.

In a case before Vaisey, J., the Judge said that his attention had been drawn by various officials of the High Court to the fact that in many cases the signature of the Commissioner on documents was indecipherable. It was desirable that in every case it should be possible to identify the Commissioner and, unless his signature as written was plainly legible, it should be further elucidated by means of a rubber stamp or otherwise. [emphasis added]

[24] It is important to note that the *English Annual Supreme Court Practice* says that it is “desirable” that it should be possible to identify the Commissioner but the passage relied upon by the Master does not go so far as to say that an illegible signature renders an affidavit or declaration inadmissible. Nonetheless, the Master went on to dismiss the motion in front of him because of a “defectively sworn affidavit”.

[25] It is worth noting that neither the *Commissioners for Taking Affidavits Act*, RSO 1990, Chapter C 17, nor the regulations made pursuant to it, require that a Commissioner provide information so as to confirm his / her identity. That said, I note a decision of the Nova Scotia Court of Appeal in *R v Nickerson*, 1991 CarswellNS 250, dealing with section 14 of the *Nova Scotia Notaries and Commissioners Act*, which provides as follows:

A person before whom an oath, affidavit, declaration or affirmation is administered, taken or received shall cause his name to be typewritten or printed below or adjacent to his signature.

[26] It is interesting to note that the Court of Appeal had this to say at para 9:

We would only add, since the issue is raised by the appellant and should be put to rest so we do not have a repeat of what has taken place in this case, that the provisions of Section 14 of the *Notaries and Commissioners Act* are merely directory and do not invalidate or render an affidavit inadmissible if not complied with by the person swearing the deponent.

[27] *Nickerson* is consistent with the decision of the Registrar in *Brouillette, Kosie v Luxo Laboratories Ltd* (1997), 80 CPR (3d) 312 (TMOB) which dealt with the issue of illegible signatures at paras 4 and 5:

As a preliminary matter, the requesting party submitted that the affidavit of David Kaufman was inadmissible on the basis that it was impossible to determine from the jurat, the person who signed as "Commissioner for taking affidavits"; therefore, it submitted that it was impossible to determine whether the person who purported to take the oath of the affiant was a person authorized to do so.

I do agree with the requesting party that the Commissioner's signature as part of the jurat is indecipherable and that a Court insisting on a high level of procedural compliance and quality, could find Mr. Kaufman's affidavit to be defective. However, in my view, the fact that the Commissioner's name is not clearly spelled out is merely a technicality which should not render the affidavit inadmissible in the present proceeding. As the person who administered the oath of the affiant is identified as a "Commissioner for taking affidavits", I am prepared to infer that such person was a commissioner authorized to administer the oath. I find there is no clear basis to conclude otherwise.

[See also *Norton Rose Fulbright Canada LLP/SENCRL, srl. v Wubbies World International Incorporated*, 2017 TMOB 42.]

[28] In the present case, I agree that the signature of the person who administered the declaration is illegible, as is what appears to be the person's name written below the signature. As well, there appears to have been a seal applied below the signature, but that too is illegible, at least on the copy submitted to the Registrar. Finally, I note that the signatures on the exhibit jurats are also illegible, but they do appear over the words "A Commissioner etc".

[29] In the circumstances, I see no reason to depart from the approach taken in *Brouillette* and I am prepared to accept that the person before whom the declaration was made was a commissioner authorized to administer the declaration - there is no clear basis to conclude otherwise.

ANALYSIS AND REASONS FOR DECISION

[30] Having determined that the Sood Declaration is admissible, I now turn to the submissions of the Requesting Party with respect to the evidence before me.

[31] In assessing the evidence, I have kept in mind that evidence in a section 45 proceeding must be considered as a whole, and focusing on individual pieces of evidence in isolation is not the proper approach [see *Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB); and *Fraser Milner Casgrain LLP v Canadian Distribution Channel Inc* (2009), 78 CPR (4th) 278 (TMOB)]. As well, reasonable inferences can be made from the evidence provided [see *Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64]. Further, absent evidence to the contrary, an affiant's statements are to be accepted at face value and must be accorded substantial credibility in a section 45 proceeding [*Oyen Wiggs Green & Mutala LLP v Atari Interactive Inc*, 2018 TMOB 79 at para 25].

Goods

[32] Evidence of a transfer in the normal course of trade is necessary in a section 45 proceeding. Such evidence can be in the form of documentation like invoices or sales reports, but it can also be through clear sworn statements regarding volumes of sales, dollar value of sales, or equivalent factual particulars [see, for example, *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79].

[33] The Exhibit D invoices establish that there was a transfer of goods during the Relevant Period. However, Mr. Sood did not provide a correlation of the invoiced goods to the goods listed in the registration and, further, the Owner submitted no representations to assist in the interpretation of the exhibits. When a trademark owner leaves correlations between the evidence it provides and its registered goods to the Registrar, it takes a risk [*Vermillion Intellectual Property Corporation v Vermillion Energy Inc*, 2017 TMOB 24 at para 70].

[34] That said, based on my correlations above, I accept that the evidence shows transfers with respect to the following goods listed in the registration during the Relevant Period (the Invoiced Goods):

Cleaning preparations, namely, pot & pan detergents, chlorine & destainer, dish detergent, degreaser multi-purpose cleaner, high temperature rinse aids, PH neutral cleaners, foaming & lotion soaps, hand sanitizer.

[35] In the absence of further particulars or explanation from Mr. Sood, there is insufficient evidence from which to conclude that there were transfers of the remaining goods listed in the registration during the Relevant Period. Accordingly, I am not satisfied that the Owner has shown use of the Mark, within the meaning of sections 4(1) and 45 of the Act, in association with the remaining goods. As there is no evidence of special circumstances to justify non-use, the remaining goods will be deleted from the registration.

[36] Next, I must determine if the Mark was associated with the Invoiced Goods at the time of transfer.

[37] The Requesting Party submits that the Sood Declaration does not establish that the Mark was associated with any of the goods listed in the registration at the time of sale within the Relevant Period because:

- (a) It cannot be concluded that the Invoiced Goods were associated with the Mark at the time of sale because Mr. Sood says that “some of the goods” listed in the invoices displayed the Mark and there is no way to confirm which of the sales were for goods which displayed the Mark.
- (b) There is no evidence that the invoices accompanied the goods at the point of sale or delivery and, in any event, to the extent that the Mark appears on the invoices, it is at the top of the invoice and would not provide a notice of association between the Mark and the Invoiced Goods.
- (c) As for the photographs in Exhibit A, Mr. Sood uses the present tense (“is displayed”) and there is no confirmation that the photographs are representative of the way in which the Mark was displayed during the Relevant Period.
- (d) As for the product catalogue in Exhibit A, it is undated and of poor resolution. Further, there is no evidence as to when it was distributed – it is therefore a mere advertisement and possibly falls outside the Relevant Period.

[38] With respect to the Invoiced Goods, as indicated above, some of them are visible in Exhibit A and the packaging displays the Mark. However, as noted by the Requesting Party, Mr. Sood uses the present tense in his declaration (“is displayed”) when describing the photographs in Exhibit A and does not provide a date for the product catalogue.

[39] While it would have been preferable if Mr. Sood had explicitly stated that the photographs in Exhibit A show how the Mark was displayed during the Relevant Period, he states in paragraph 2B:

The Mark ... is and was used during the relevant three year period by being prominently displayed on label and their package of all the goods under the registration. All the goods under registration are continuously sold in Canada. Representative photos showing how the Mark is displayed on goods ... were attached and their packaging as exhibit “A”. Our product catalogue is also included in Exhibit “A”.

[40] Based on a fair reading of this paragraph in the context of the declaration as a whole, I am satisfied that the evidence shows that the Mark was displayed on the following Invoiced Goods during the Relevant Period in the manner as shown in Exhibit A: Cleaning preparations, namely, pot & pan detergents, chlorine & destainer, dish detergent, degreaser multi-purpose cleaner, PH neutral cleaners.

[41] With respect to the display of the Mark on the invoices, display of a trademark on an invoice that accompanies the goods at the time of transfer may satisfy the requirements of section 4(1) of the Act, if it provides the requisite notice of association between the Mark and the Goods [see *Hortilux Schreder BV v Iwasaki Electric Co*, 2011 FC 967, aff’d 2012 FCA 321.

[42] That said, I am not satisfied that the display of the Mark on the invoices provided the requisite notice of association with the Invoiced Goods. First, it is not clear that all of the Invoiced Goods are the goods of only one manufacturer - Mr. Sood describes the owner as a manufacturer and distributor which suggest that it may distribute the goods of third parties. Secondly, as noted in my review of the invoices, other trademarks appear in association with the Invoiced Goods as listed in the invoices.

[43] With respect to the product catalogue, in the absence of further particulars or explanation from Mr. Sood, I am not prepared to infer that it accompanied the Invoiced Goods or was in any

other manner so associated with the Invoiced Goods so as to give the requisite notice of association at the time of any transfer.

[44] Accordingly, I am satisfied that the Owner has shown use of the Mark, within the meaning of sections 4 and 45 of the Act, in association with the following registered goods only:

Cleaning preparations, namely, pot & pan detergents, chlorine & destainer, dish detergent, degreaser multi-purpose cleaner, PH neutral cleaners.

Services

[45] With respect to the Services, the Requesting Party submits:

- (a) There is no evidence that Canadian consumers could make retail purchases through the Owner's website during the Relevant Period.
- (b) At best, the Exhibit D invoices appear to support the use of the Mark during the Relevant Period in association with manufacturing and wholesale of certain goods.

[46] The Requesting Party appears to accept, and I agree, that the evidence does show use of the Mark in association with the services of "providing a wholesale store for the following and manufacture of industrial cleaning preparations"

[47] With respect to the specific industrial cleaning preparations in question, the Requesting Party's correlation of the goods listed in the Exhibit D invoices differs slightly from my correlation of the Invoiced Goods in that the Requesting Party does not include high temperature rinse aids. However, as noted above, based on my assessment of the invoices, high temperature rinse aids were included within the Invoiced Goods.

[48] Unfortunately, Mr. Sood does not indicate the full range of products sold – he simply refers to "industrial cleaning preparations". He also states that the Owner "prepares goods such as detergent and hand sanitizer" for Champion. Given that the resolution of the product catalogue is of such poor quality, I am not able to ascertain the full range of products that might have been sold by the Owner. In the circumstances, and with no representations from the Owner to assist in the interpretation of the exhibits, I am not satisfied that the Owner has shown use of the Mark in

relation to the industrial cleaning preparations listed in the Services portion of the registration, except for the Invoiced Goods.

[49] The Requesting Party submits that the evidence does not show use of retail store services. I agree.

[50] While Mr. Sood asserts that the Owner provides retail services and he refers to the Owner's online store, there is insufficient evidence to show how the Mark was used in either the performance of retail services or the advertising of the retail services. The resolution of the product catalogue is of such poor quality that I am not able to ascertain if it promotes retail services and the content of the Owner's websites is not in evidence. Further, there is no evidence of retail sales as there is for wholesale sales (*i.e.*, the invoices to Champion). In the circumstances, and without the benefit of representations from the Owner to assist in the interpretation of the exhibits, I am not satisfied that the Owner has shown use of the Mark in relation to retail services.

[51] Accordingly, I am satisfied that the Owner has shown use of the Mark, within the meaning of sections 4(2) and 45 of the Act, in association with the following services only:

Providing a wholesale store for the following and manufacturer of industrial cleaning preparations, namely, pot & pan detergents, chlorine & destainer, dish detergent, degreaser multi-purpose cleaner, high temperature rinse aids, PH neutral cleaners, foaming & lotion soaps, hand sanitizer.

[52] However, I am not satisfied that the Owner has shown use of the Mark, within the meaning of sections 4(2) and 45 of the Act, in association with retail services or with any of the services in association with the remaining goods. As there is no evidence of special circumstances to justify non-use, the registration will be amended accordingly.

DISPOSITION

[53] Pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be amended to delete the following:

... cream cleansers, multipurpose cleaners; ... carpet care products, namely soil release carpet cleaner & carpet spot remover; ... high & low temperature rinse aids, disinfectant & fungicide cleaner, glass cleaner, ... foaming & lotion soaps, hand sanitizer, & anti bacterial soap.

[Providing a] retail & [wholesale store for the following and manufacturer of industrial cleaning preparations, namely], ... cream cleansers, multipurpose cleaners ... carpet care products, namely soil release carpet cleaner & carpet spot remover; ... [high] & low [temperature rinse aids], disinfectant & fungicide cleaner, glass cleaner, ... & anti bacterial soap.

[54] The amended statement of goods and services will read as follow:

Cleaning preparations, namely, pot & pan detergents, chlorine & destainer, dish detergent, degreaser multi-purpose cleaner, PH neutral cleaners.

Providing a wholesale store for the following and manufacturer of industrial cleaning preparations, namely, pot & pan detergents, chlorine & destainer, dish detergent, degreaser multi-purpose cleaner, high temperature rinse aids, PH neutral cleaners, foaming & lotion soaps, hand sanitizer.

Robert A. MacDonald
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

No Agent Appointed

For the Registered Owner

Smart & Biggar IP Agency Co.

For the Requesting Party