



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: TMOB 2022 183

Date of Decision: 2022-09-21

IN THE MATTER OF A SECTION 45 PROCEEDING

Fleurish Cannabis Inc.

Requesting Party

And

Varavoot Industry Company Limited

Registered Owner

**TMA943,470 for FLOURISH &
Design**

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. TMA943,470 for the trademark FLOURISH & Design (the Mark), reproduced below:



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

(1) Rice, rice products, namely, rice flour, rice noodles, glutinous rice flour; tapioca, tapioca starch, tapioca pearls, sago, corn meal, milled corn, corn flour, maize, flour for batter mixes, preparations made from cereals, namely, cereal-based snack foods and breakfast cereals; prepared meals comprised principally of the aforesaid goods (the Goods)

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

THE PROCEEDING

[4] On August 5, 2021, at the request of Fleurish Cannabis Inc. (the Requesting Party), the Registrar of Trademarks issued a notice pursuant to section 45 of the Act to Varavoot Industry Company Limited (the Owner). The notice required the Owner to show whether the Mark was used in Canada in association with 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 the Mark 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 between August 5, 2018 and August 5, 2021 (the Relevant Period).

[5] 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.

[6] In response to the Registrar's notice, the Owner submitted the affidavit of Mr. Narin Tungvaravoot, Managing Director of the Owner, sworn on October 25, 2021.

[7] Neither party submitted written representations and no hearing was held.

THE OWNER'S EVIDENCE

[8] Mr. Tungvaravoot explains that the Owner is a rice flour manufacturer and exporter, based in Thailand, involved in the rice flour industry for more than 20 years [para 6]. Mr. Tungvaravoot states that the Owner's "product portfolio includes, but is not limited to rice flour, glutinous rice flour and flour for batter mixes under the Flourish Brand". He explains that the Owner can also produce rice flour and glutinous rice flour according to customer specification. He asserts that the Owner's products are distributed worldwide [para 7]. In Canada, the Owner has an exclusive distribution agreement with Western Rice Mills Ltd. located in British Columbia, Canada [para 9].

[9] Mr. Tungvaravoot attaches the following exhibits to his affidavit:

- Exhibit A: A brochure which describes historical information relating to the Owner and displays the Owner's various products. Amongst several products, the brochure shows a 25kg bag of glutinous rice flour; 1kg/5kg bags of Thai glutinous rice, and; 400g bags of rice flour, glutinous rice flour, tapioca starch and tapioca pearl. All depictions of these products in the brochure appear to be bearing the Mark (low resolution image). Mr. Tungvaravoot states that these products are manufactured and sold worldwide, including Canada [para 8].
- Exhibit B: Photographs of the front and back views of bags of glutinous rice flour and rice flour. The Mark appears on both sides of the packaging. Mr. Tungvaravoot describes the photographs as representative of how the Mark was displayed on product packaging in Canada during the Relevant Period [para 11].
- Exhibit C: Multiple bills of lading from the Owner to Western Rice Mills Ltd. of British Columbia dated during the Relevant Period for various products, including two products of the "Flourish Brand": rice flour (VA-RF101) and glutinous rice flour (VA-GF101).
- Exhibit D: Multiple invoices from the Relevant Period from the Owner to Western Rice Mills Ltd. of British Columbia for various products, including two products listed on invoices as of the "Flourish Brand": rice flour (VA-RF101) and glutinous rice flour (VA-

GF101). Most of these appear to correspond directly to a bill of lading provided in Exhibit C. Mr. Tungvaravoot states that these “are representative examples of invoices during the Relevant Period for the Flourish Goods sold in connection with the Trademark to its exclusive Canadian distributor” [para 13].

ANALYSIS AND REASONS FOR DECISION

[10] While the threshold for establishing use in in the context of section 45 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 during the Relevant Period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)]. In this case, the evidence establishes that the Mark has been used in Canada by the Owner during the Relevant Period with some, but not all, of the Goods.

[11] In his affidavit, Mr. Tungvaravoot provided several invoices and bills of lading reflecting sales in Canada of two “Flourish Brand” goods, namely rice flour and glutinous rice flour, throughout the Relevant Period as well as photographs of how the Mark was displayed on their packaging. Based on this evidence, I am satisfied that the Owner has shown use of the Mark in Canada within the meaning of sections 4 and 45 of the Act for the rice flour and glutinous rice flour.

[12] While Mr. Tungvaravoot defines Flourish Goods as including flour for batter mixes and provides a brochure in Exhibit A depicting tapioca starch and tapioca pearl, he does not provide any documentary evidence supporting the transfer of these goods in association with the Mark. Furthermore, there is no mention of any of the remaining goods in the Owner’s affidavit, aside from reciting the goods listed in the registration. Having sought and obtained registration for a specific set of goods, when called upon to do so the Owner must evidence some use of each of the listed goods [see *John Labatt Ltd. V Rainier Brewing Co, supra* and

Sharp Kabushiki Kaisha v 88766 Canada Inc. (1997), 72 CPR (3d) 195 (FCTD)]. In the absence of evidence showing use of the Mark for these goods within the meaning of sections 4 and 45 of the Act, or special circumstances to justify the absence of use, these goods will be deleted from the registration.

DISPOSITION

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

rice, rice noodles, tapioca, tapioca starch, tapioca pearls, sago, corn meal, milled corn, corn flour, maize, flour for batter mixes, preparations made from cereals, namely cereal-based snack foods and breakfast cereals; prepared meals comprised principally of the aforesaid goods.

[14] The statement of goods will now read as follows:

(1) rice products, namely, rice flour and glutinous rice flour.

Martin Béliveau
Chairperson
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

Coastal Trademark Services Limited

For the Registered Owner

Norton Rose Fulbright Canada LLP/S.E.N.C.R.L.,

For the Requesting Party

S.R.L.