



# Canadian Intellectual Property Office

## THE REGISTRAR OF TRADEMARKS

**Citation:** 2022 TMOB 198

**Date of Decision:** 2022-10-20

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

## IN THE MATTER OF A SECTION 45 PROCEEDING

**Requesting Party:** Cramer GmbH

**Registered Owner:** Pépinière Cramer Inc./Cramer Nursery Inc.

**Registration:** TMA340,553 for CRAMER & DESSIN

### 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. TMA340,553 for the mark CRAMER & DESSIN (the Mark) as illustrated below.



[2] The statement of goods and services is reproduced below:

[TRANSLATION]

#### Goods

(1) Horticulture goods, namely: plants, namely: perennial, annual, tropical, evergreen or flowering; cut flowers; vegetable plants; fruit or ornamental vines; trees, shrubs and ornamental conifers or fruit producing or for reforestation; aprons for gardening and horticultural work.

(2) Seeds and bulbs for: trees, shrubs, conifers, perennial plants, annual, tropical, perennial flowers, annual, vegetables; fertilizers and pesticides for horticulture and agriculture; bins, baskets and flower and plant pots; watering cans, gardening gloves, bags to carry aprons, gloves and gardening tools; tools, namely: rakes, shovels, pickaxe, knives, forks and clippers for horticulture, agriculture and gardening; horticulture and agriculture equipment, namely: wheelbarrows, spreaders, tractors, watering pumps, irrigation systems.

#### Services

(1) Operation of nurseries and horticultural and gardening centres; operation of a florist, wholesale and retail sales of horticultural, nursery and gardening goods.

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

### **THE PROCEEDING**

[4] At the request of Cramer GmbH (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on February 24, 2021, to Pépinière Cramer Inc./Cramer Nursery Inc. (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the trademark 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 February 24, 2018 to February 24, 2021.

[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] In response to the Registrar’s notice, the Owner furnished a statutory declaration of Mario Cramerstetter, General Manager of the Owner, declared on September 23, 2021.

[8] Both parties submitted written representations and no oral hearing was held.

### **THE OWNER’S EVIDENCE**

[9] Mr. Cramerstetter states that the Owner has been in business since 1965 on Île Perrot in Quebec [para 6]. He states that [TRANSLATION] “the Cramer Nursery... currently has 1,600 acres of production” and that it “is known for its production of large-sized trees, but also for its full range of conifers, evergreen plants, shrubs, fruit trees, vines, rose bushes, perennials, etc.” [para 7].

[10] In his declaration, Mr. Cramerstetter states [TRANSLATION] “use of the Mark” in association with the following goods and services [paras 14 and 23]:

[TRANSLATION]

- horticultural products, namely: plants, namely: perennial, annual, tropical, evergreen or flowering plants;
- cut flowers;
- vegetable plants;
- fruit or ornamental vines;
- trees, shrubs and ornamental conifers or fruit producing or for reforestation;
- aprons for gardening and horticulture work;

- operation of nurseries and horticulture and gardening centres;
- operation of a florist, wholesale and retail sales of horticultural, nursery and gardening goods.

[11] In support, the following relevant exhibits are attached to Mr. Cramerstetter's declaration:

- Copies of invoices from the Owner to customers located in Quebec during the relevant period [Exhibit 2]. The invoices are annotated to associate the goods sold with those in the statement of goods. The annotations categorize the many goods invoiced in the following groups of goods: perennials, annuals, evergreens, vegetable plants, vines, trees, shrubs and conifers. Although hidden in some cases, I see that the Mark is in the upper-left corner of the invoices. In this regard, Mr. Cramerstetter states that the invoices accompany the goods sold during their transfer of possession [para 16].
- Photographs of labels with images of flowers, shrubs, tree leaves, conifers, vines and grapes [Exhibits 3, 6 and 7], and labels without images that identify the following goods: [TRANSLATION] "English cucumbers" and "big beef tomatoes" [Exhibit 5]. All labels bear the Mark. Mr. Cramerstetter states that these photographs are illustrative of how the Mark was affixed to the labels that, in turn, were affixed to the goods during the relevant period [paras 17, 19, 20 and 21].
- Photograph of an apron bearing the Mark [Exhibit 8].
- Screen capture of a webpage featuring the Mark and the addresses of two [TRANSLATION] "Garden Centres" and the "Cramer Nursery Inc." in Quebec [Exhibit 9]. Mr. Cramerstetter states that the screen capture is from the Owner's website and that it is representative of the announcement of services made on this site during the relevant period [para 25].
- Photographs of two workbooks entitled [TRANSLATION] "Wholesale price list www.cramer.ca" for 2018 and 2020. The Mark appears on the cover page of both workbooks [Exhibit 10]. Mr. Cramerstetter states that these price

guides, which were distributed to Canadian consumers during the relevant period, illustrate use of the Mark in association with the services of florists and wholesale and retail sales of horticulture, nursery and gardening goods [para 26].

[12] Mr. Cramerstetter also states that sales of cut flowers from the [TRANSLATION] “floral department” totalled more than 800 bouquets during the relevant period [para 18] and he attached a cash register receipt outside the relevant period in Exhibit 4. He adds that, since the Mark cannot be affixed to cut flowers, employees wear an apron bearing the Mark during their shifts [para 22], including when they prepare bouquets of cut flowers chosen by customers [para 18]

### **ANALYSIS AND REASONS FOR DECISION**

[13] Although the threshold for establishing use 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 trademark in association with all the services specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)(*John Labatt*)].

#### ***The goods***

[14] The Owner’s statutory declaration and the written representations say nothing about the goods (2), namely: [TRANSLATION] “Seeds and bulbs for: trees, shrubs, conifers, perennial plants, annual, tropical, perennial flowers, annual, vegetables; fertilizers and pesticides for horticulture and agriculture; bins, baskets and flower and plant pots; watering cans, gardening gloves, bags to carry aprons, gloves and gardening tools; tools, namely: rakes, shovels, pickaxes, knives, forks and clippers for horticulture, agriculture and gardening; horticulture and agriculture equipment, namely: wheelbarrows, spreaders, tractors, watering pumps, irrigation systems”. In the absence

of evidence of particular circumstances justifying the absence of use, these goods will be deleted from the registration.

[15] With respect to the other goods subject to the registration, the Owner demonstrated sales in Canada during the relevant period by providing invoices for products described in the annotations as [TRANSLATION] “perennials”, “annuals”, “evergreens”, “vegetable plants”, “vines”, “trees”, “shrubs” and “conifers” [Exhibit 2]. It also provided sales volumes for cut flowers [para 18]. In addition, it illustrated how the Mark was presented on labels [Exhibits 3, 5, 6 and 7] and invoices [Exhibit 2] or, associated with cut flowers that were sold, with the wearing of the apron bearing the Mark [Exhibit 8 and para 18]. On the basis of the above, I am satisfied that the Owner demonstrated use of the Mark in Canada within the meaning of sections 4 and 45 of the Act in association with the [TRANSLATION] “Horticulture goods, namely plants, namely: perennial, annual, evergreen or flowering; cut flowers; vegetable plants; fruit or ornamental vines; trees, shrubs and ornamental conifers or fruit producing or for reforestation”.

[16] With respect to the last two products, [TRANSLATION] “Horticultural products, namely: plants, namely: ...tropical” and “aprons for gardening and horticulture work”, Mr. Cramerstetter did not provide any documentary evidence in support of the transfer of these goods (i.e., no invoices, annotations or sales volumes). After applying for and obtaining the registration of a specific set of products, when called upon to do so, the Owner must prove the use of each of the goods in its registration [see *John Labatt and Sharp Kabushiki Kaisha v 88766 Canada Inc.* (1997), 72 CPR (3d) 195 (FCTD)]. Without evidence to demonstrate the use of the Mark for these two products within the meaning of sections 4 and 45 of the Act or particular circumstances to justify the absence of use, these products will be deleted from the registration.

### ***The services***

[17] When assessing the evidence, I 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)].

[18] The evidence shows that, during the relevant period, the Owner operated a nursery and two [TRANSLATION] “garden centres” located in Quebec where it carries on production and trade of horticultural and gardening goods [Exhibit 8]. The Owner also has a [TRANSLATION] “floral department” where it sells cut flowers [para 18]. In addition, the evidence shows that the Owner did sell these goods during the relevant period and that the Mark was clearly seen by consumers on the goods, invoices and aprons worn by the Owner’s employees when providing services to customers.

[19] The Owner also promoted its garden centres in association with the Mark online through its website [Exhibit 9 and para 25] and promoted its floral, wholesale and retail sale services through price guides that were distributed during the relevant period [Exhibit 10 and para 26].

[20] In view of all the evidence, I am satisfied that the Owner demonstrated use of the Mark in Canada within the meaning of sections 4 and 45 of the Act in association with all the services listed in the registration

## **DISPOSITION**

[21] 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.

[TRANSLATION]

(1) [Horticultural products, namely: plants, namely...] tropical; ...aprons for gardening and horticultural work.

(2) Seeds and bulbs for: trees, shrubs, conifers, perennial plants, annual, tropical, perennial flowers, annual, vegetables; fertilizers and pesticides for horticulture and agriculture; bins, baskets and flower and plant pots; watering cans, gardening gloves, bags to carry aprons, gloves and gardening tools; tools, namely: rakes, shovels, pickaxe, knives, forks and clippers for horticulture, agriculture and gardening; horticulture and agriculture equipment, namely: wheelbarrows, spreaders, tractors, watering pumps, irrigation systems.

[22] The statement of goods and services will now read as follows:

[TRANSLATION]

Goods

(1) Horticulture goods, namely plants, namely: perennial, annual, evergreen or flowering; cut flowers; vegetable plants; fruit or ornamental vines; trees, shrubs and ornamental conifers or fruit producing or for reforestation

Services

(1) Operation of nurseries and horticultural and gardening centres; operation of a florist, wholesale and retail sales of horticultural, nursery and gardening goods.

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Martin Béliveau  
Chairperson  
Trademarks Opposition Board  
Canadian Intellectual Property Office

Certified translation  
Tony Santin  
The English is WCAG compliant



# Appearances and Agents of Record

**HEARING DATE:** No hearing held

## **AGENTS OF RECORD**

**For the Requesting Party:** Perley-Robertson, Hill & McDougall LLP

**For the Registered Owner:** Robic