



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 085

Date of Decision: 2023 05 24

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: GML Solutions Ltd.

Registered Owner: Advanced Nutrients Ltd.

Registration: TMA797,134 for GRAND MASTER GROWER LEVEL

INTRODUCTION

[1] This is a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA797,134 for the trademark GRAND MASTER GROWER LEVEL (the Mark) registered for use in association with the following goods and services:

CI 01 Plant nutrients, fertilizers and additives.
(the Goods)

CI 35 Distribution of plant nutrients, fertilizers and additives.

CI 40 Manufacturing of plant nutrients, fertilizers and additives.

CI 42 Development of plant nutrients, fertilizers and additives.
(the Services)

[2] For the reasons that follow, I conclude that the registration ought to be expunged.

THE PROCEEDING

[3] At the request of GML Solutions Ltd. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on April 27, 2021 to the registered owner of the Mark, Advanced Nutrients Ltd. (the Owner).

[4] The notice required the Owner to show whether the Mark was used in Canada in association with each of the Goods and Services 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 April 27, 2018 to April 27, 2021 (the Relevant Period). In the absence of use, the registration is liable to be expunged, unless the absence of use was due to special circumstances.

[5] 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.

[6] 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] and evidentiary overkill is not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the Mark was used in association with the Goods and Services.

[7] In response to the Registrar's notice, the Owner furnished the Affidavit of Michael Straumietis, the Chief Executive Officer of the Owner, sworn on November 27, 2021, together with Exhibits 1 to 8.

[8] Both parties submitted written representations. No hearing was held.

THE EVIDENCE

[9] Mr. Straumietis asserts that the Owner sold the Goods and provided the Services in Canada and that it advertised the Goods and the Services through newsletters, product catalogues, brochures, e-mail blasts and via its social media sites and website located at *advancednutrients.com* (the Owner's website) during the Relevant Period. In support, he provides the following exhibits:

- (a) Exhibit 2: a screenshot from the Owner's website promoting its product range, including its Connoisseur brand of plant nutrients which are promoted with the Mark. Mr. Straumietis states that, during the Relevant Period, the plant nutrients were advertised and made available for purchase in Canada as shown in the exhibit.
- (b) Exhibit 3: representative packaging for the Owner's Connoisseur brand of plant nutrients showing the manner in which the Mark was displayed on packaging. Mr. Straumietis states that, during the Relevant Period, the Owner sold a variety of goods in such packaging in Canada. The packaging states "Guaranteed By Advanced Nutrients" above a Canadian flag and an address in Abbotsford, BC, and "Carefully Manufactured By Advanced Nutrients" above an American flag and an address in Woodland, Washington.
- (c) Exhibit 4: part of a product catalogue which Mr. Straumietis states showcases the Goods sold in association with the Mark. He states that the product catalogue is representative of the type of catalogue distributed by the Owner in Canada during the Relevant Period.
- (d) Exhibit 5: a copy of an "Advanced Nutrients Calculator" from the Owner's website which displays the Mark and which assists growers "to create and update your plants' feeding schedule". He states that the Owner used the Mark in this manner during the Relevant Period.

- (e) Exhibit 6: an information page regarding the Owner's range of products available in Canada which displays the Mark. The information sheet provides growers with information as to which nutrients to use, and when, so as to achieve bigger yields and increased essential oil production. Mr. Straumietis states that the information page was used by the Owner's sales team during the Relevant Period to promote and advertise the Goods and Services in Canada.
- (f) Exhibit 7: a promotional piece, used by the Owner's sales team, which provides information on the plant nutrients sold in association with the Mark. Mr. Straumietis states that the promotional piece "provides information on the [Owner's] offerings on its Goods and Services in Canada" and that it was used during the Relevant Period to promote the Goods and Services in Canada.
- (g) Exhibit 8: a brochure, used by the Owner's sales team, which provides information on the Owner's range of products available in Canada and which displays the Mark. The brochure provides growers with information as to which nutrients to use and when. Mr. Straumietis states that the brochure was provided to customers during the Relevant Period "to promote and advertise its Goods and Services in Canada".

[10] Mr. Straumietis states that the materials in Exhibits 6, 7 and 8 are representative of how the Mark was displayed in association with the Goods when purchased by consumers and in performing and advertising the Services to consumers and potential consumers in Canada during the Relevant Period.

REASONS FOR DECISION

Goods

[11] The Requesting Party submits that the evidence does not establish use of the Mark in Canada in association with the Goods because it fails to provide any evidence of sales of the Goods in Canada in the normal course of trade.

[12] In response, the Owner submits that the Mark was displayed on the Goods and on the promotional material (Exhibits 4 to 8) such that purchasers of the Goods would associate the Mark with the Goods at the time of transfer of the Goods in the normal course of trade. However, the Owner did not address the absence of evidence to show a transfer of the Goods in Canada in the normal course of trade during the Relevant Period.

[13] In this regard, although invoices are not mandatory in order to satisfactorily reply to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)], some evidence of a transfer in the normal course of trade in Canada is necessary [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)]. Such evidence can be in the form of documentation like invoices and sales reports, but 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]. Such evidence is lacking in this case.

[14] Further “offering for sale” is not the same as “selling” [see *Michaels & Associates v WL Smith & Associates Ltd* (2006), 51 CPR (4th) 303 (TMOB)], and advertising alone is insufficient to establish use of the Mark in accordance with section 4(1) of the Act [see *Riches, McKenzie & Herbert LLP v Cleaner’s Supply Inc*, 2012 TMOB 211].

[15] Given the complete lack of evidence of a transfer of the Goods in Canada in the normal course of trade during the Relevant Period, I am not satisfied that the Owner has established use of the Mark in association with the Goods, within the meaning of sections 4 and 45 of the Act. As there is no evidence of special circumstances to justify non-use, the registration will be amended accordingly.

Services

[16] The Requesting Party submits that, beyond bald assertions of use, there is no specific evidence to show that the Services were ever available let alone provided in Canada. Further, the Requesting Party submits that the exhibits, which Mr. Straumietis states show the way in which the Owner promoted the Services in Canada (Exhibits 6 to 8), promote the Goods and do not provide any information with respect to the

Services. As well, the Requesting Party submits that Mr. Straumietis has failed to provide information as to how these exhibits were used to promote the Services. Finally, the Requesting Party submits that the development, manufacture and distribution of one's own goods does not provide a benefit to third parties and, as such, is not a service.

[17] In response, the Owner submits that Mr. Straumietis states that the Mark was displayed in the performance or advertisement of the Services in Canada and that he confirmed that the Owner's sales team used the documents in Exhibits 6, 7 and 8 to promote and advertise the Services in Canada. Finally, the Owner notes that its address as shown on the registration is in Abbotsford, British Columbia and that the product packaging in Exhibit 3 shows that the Owner has an office in Abbotsford, British Columbia.

[18] With respect to advertising of the Services, none of the exhibits make any mention of the Services; rather, they all promote the Owner's line of plant nutrients. Further, while Mr. Straumietis states that the exhibits were used by the Owner's sales team to promote the Services, there is no explanation as to how that could be the case given that the documents do not mention the Services. Based on this, I am not prepared to conclude that the Mark was used in the advertising of the Services in Canada during the Relevant Period.

[19] With respect to the performance of the Services, I have three concerns.

[20] First, Mr. Straumietis does not provide any evidence to show how the Mark was used in the performance of the Services.

[21] Secondly, while Mr. Straumietis asserts that the Owner provided the Services in Canada, he does not provide any other information on how the Owner actually performed the Services.

[22] Thirdly, while services should be given a broad and liberal interpretation, Canadians should receive a tangible and meaningful benefit from the activity [*Renaud Cointreau & Co v Cordon Bleu International Ltd* (2000), 11 CPR (4th) 95 (FCTD), aff'd

2002 FCA 11; *Live! Holdings LLC v Oyen Wiggs Green & Mutala LLP*, 2019 FC 1042, aff'd 2020 FCA 120]. I am not satisfied that the evidence is sufficient to enable me to reasonably infer that any development, manufacturing and distribution activity provided a tangible and meaningful benefit to Canadians, as opposed to simply being the development, manufacturing and distribution of the Owner's own products.

[23] Based on this, I am not satisfied that the Owner has established use of the Mark in association with the Services, within the meaning of sections 4 and 45 of the Act. As there is no evidence of special circumstances to justify non-use, the registration will be amended accordingly.

DISPOSITION

[24] 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 expunged.

Robert A. MacDonald
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: Coastal Trademark Services Limited

For the Registered Owner: McMillan LLP