



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 188

Date of Decision: 2023-11-03

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Red Maple Bio Inc.

Registered Owner: Red Maple Manufacturing Inc.

Registration: TMA963,031 for Red Maple Naturals

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. TMA963,031 for the trademark Red Maple Naturals (the Mark), owned by Red Maple Manufacturing Inc. (the Owner), and shown below:

red y maple
n a t u r a l s

[2] For the reasons that follow, I conclude that the registration ought to be amended to delete the registered goods.

THE RECORD

[3] At the request of Red Maple Bio Inc. (the Requesting Party), the Registrar of Trademarks issued a notice to the Owner under section 45 of the Act on June 27, 2022. The notice required the Owner to show whether the Mark had been used in Canada in association with each of the goods and services 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 June 27, 2019, to June 27, 2022.

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

GOODS

Oral single and multi-ingredient preparations of: namely herbs, and nutritional supplements, namely vitamins, multi-vitamins, minerals, fatty acids, essential fatty acids, glucosamine, chondroitin, MSM (Methyl-sulfonyl-methane), coenzyme Q10, lutein, flaxseed, dietary fibres, enzymes, antioxidants, melatonin, lecithin, proteins, amino acids, probiotics.

SERVICES

Manufacturing of Oral single and multi-ingredient preparations of: namely herbs, and nutritional supplements, namely vitamins, multi-vitamins, minerals, fatty acids, essential fatty acids, glucosamine, chondroitin, MSM (Methyl-sulfonyl-methane), coenzyme Q10, lutein, flaxseed, dietary fibres, enzymes, antioxidants, melatonin, lecithin, proteins, amino acids, probiotics for sale

[5] The relevant definitions of use in the present case 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.

(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.

(3) A trademark that is marked in Canada on goods or on the packages in which they are contained is, when the goods are exported from Canada, deemed to be used in Canada in association with those goods.

[6] It is well accepted that 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 Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)]. However, sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with each of the goods and services specified in the registration during the relevant period.

[7] In response to the Registrar's notice, the Owner furnished the statutory declaration of Stephen Lee, President of the Owner, affirmed on September 23, 2022. Neither party submitted written representations and no oral hearing was held.

EVIDENCE

[8] The substantive portions of Mr. Lee's statutory declaration are reproduced below:

1. Red Maple Naturals Trademark has been used on goods sold in Canada and Exported – **Exhibit 1.** Red Maple Naturals Vitamin C Raspberry Flavour, 225 grams, Lot 827369, Exp Dec 2021 (Manufactured: December 2019)
2. Red Maple Naturals Trademark has been used on goods sold in Canada and Exported – **Exhibit 2.** Red Maple Naturals Vitamin C Raspberry Flavour, 225 grams, Lot 827662, Exp January 2024 (Manufactured: January 2022)
3. Red Maple Manufacturing have provided contract manufacturing services/packaging for Canadian companies between the period of June 28, 2019 – June 27, 2022
4. Red Maple Manufacturing has a Site License issued by Health Canada for manufacturing, labelling, and packaging, issued on April 09, 2020. – **Exhibit 3.**
5. Red Maple Manufacturing has a Safe Food for Canadians Act Record of License, issued on 2022-03-24 – **Exhibit 4.**
6. In 2015-2016, Red Maple Naturals had exported the following products:
 - a. Red Maple Naturals Bee Propolis
 - b. Red Maple Naturals Seal Oil, 500mg
 - c. Red Maple Naturals Garlic, 500mg
 - d. Red Maple Naturals Evening Primrose Oil, 500mg
 - e. Red Maple Naturals, Blueberry, 500mg

- f. Red Maple Naturals, Vitamin D3 1000IU
- g. Red Maple Naturals, Vitamin C 500mg + Bioflavonoids
- h. Red Maple Naturals, Spirulina

Between June 28, 2019 – June 27, 2022, Red Maple Manufacturing have been actively marketing Red Maple Naturals products and packaging services in Canada and in export markets. **Exhibit 5** – Registration to “Doing business in Singapore and Malaysia: Opportunities for BC Businesses and Investors Under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); **Exhibit 6** – Registration for Supply Side West & Food Ingredients North America – October 25-28, 2021. **Exhibit 7** – Business card for Stephen Lee, Red Maple Manufacturing Inc, handed out to business contacts.

[9] As Exhibits 1 and 2, Mr. Lee attaches photographs of containers of vitamin C powder displaying the Mark, the labels of which show that they were manufactured during the relevant period. As Exhibit 3, Mr. Lee attaches a site licence issued by Health Canada to the Owner for manufacturing, labelling, and packaging, which was valid during the relevant period, and as Exhibit 4, he attaches a “Safe Food for Canadians Record of Licence” issued in March 2022. As Exhibits 5 and 6, he attaches email confirmation of his registration for what appear to be two business conferences during the relevant period. As Exhibit 7, he attaches a copy of his business card, which displays the Mark and says “MANUFACTURING – PACKAGING – LABELING”.

ANALYSIS

[10] The evidence before me is insufficient to demonstrate that the Mark was used in association with the registered goods within the meaning of sections 4(1) and 4(3) of the Act.

[11] To show use within the meaning of section 4(1) of the Act, it is necessary for an owner to provide evidence *demonstrating* sales of the goods in the normal course of trade in Canada during the relevant period. In this respect, while it is well established that 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)], an owner must provide *some* evidence showing use of its trademark through a transfer as set out in section 4(1) of the Act. Such evidence can be in the form of documentation like invoices or 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].

[12] In this case, while Mr. Lee has provided photographs of vitamin products displaying the Mark and manufactured during the relevant period, Mr. Lee merely states that these products were “sold in Canada and Exported”. There is no information regarding the Owner’s normal course of trade for these products, and no indication regarding to whom these products were sold or when the sale took place, or even that such sale or export took place during the relevant period. In this respect, while the product shown in Exhibit 1 was manufactured and would have expired during the relevant period, it is not clear whether this particular container of vitamin C powder was sold and/or exported during the relevant period, or if it is simply meant to be an example of the packaging used by the Owner. The fact that these goods may have been available for sale during the relevant period, or that the Owner may have marketed these products as described in paragraph 6 of the declaration, is not sufficient to show use of the Mark in association with goods. In the absence of further details demonstrating how, when, and to whom the Owner sold these goods during the relevant period, I am not satisfied that this evidence shows use of the Mark within the meaning of section 4(1) of the Act.

[13] Similarly, the evidence before me is insufficient to demonstrate that the Mark was used in the course of export of the registered goods within the meaning of section 4(3) of the Act. As noted above, while Mr. Lee states that the Owner’s goods were “sold in Canada and Exported”, there is no clear statement that any such exports would have taken place during the relevant period. Furthermore, while Mr. Lee provides a list at paragraph 6 of products exported in 2015-2016, these exports are not relevant to this proceeding as they predate the relevant period. In the absence of clear evidence showing that the Owner’s products displaying the Mark were exported during the relevant period, I am not satisfied that the evidence shows use of the Mark within the meaning of section 4(3) of the Act.

[14] As the Owner has not demonstrated use of the Mark in association with the registered goods within the meaning of sections 4(1), 4(3), and 45 of the Act, and as there is no evidence of special circumstances excusing non-use, the registration will be amended to delete the registered goods.

[15] By contrast, I am satisfied that the evidence shows use of the registered services within the meaning of section 4(2) of the Act. In this respect, I note that the display of a trademark in the advertisement of services is sufficient to satisfy the requirements of section 4(2) of the Act, from the time the owner of the trademark is willing and able to perform the services in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)]. In this case, while the vitamin products shown in Exhibits 1 and 2 do not demonstrate that the Mark was used in association with the registered goods, they demonstrate that the Owner manufactured health products during the relevant period. I therefore accept that the Owner was capable of performing the registered services of “Manufacturing of Oral preparations [...] for sale”, and did in fact manufacture such products during the relevant period. This finding is also supported by the licences attached as Exhibits 3 and 4, which demonstrate that the Owner had regulatory approval to manufacture certain health products for at least some of the relevant period. Thus, I am satisfied that the Owner was, at minimum, offering and prepared to perform the registered services during the relevant period.

[16] As for display of the Mark, I note that in the latter part of paragraph 6, Mr. Lee indicates that the Owner marketed its products and packaging services during the relevant period, refers to two business conferences dated during the relevant period, and states that he distributed his business card to business contacts. Based on a fair reading of this paragraph, and bearing in mind that drawing an inference is a matter of reasonably probable, logical deductions from the evidence [*Sim & McBurney v En Vogue Sculptured Nail Systems Inc*, 2021 FC 172 at para 15], I accept that Mr. Lee distributed the business cards at these conferences in the course of marketing the Owner’s services, including the registered services of manufacturing and selling products such as those shown in Exhibits 1 and 2.

[17] Business cards can be evidence of advertisement of services [*Tint King California Inc v Canada (Registrar of Trade-Marks)* (2006), 56 CPR (4th) 223 (FCTD)], if there are indicia of the relevant services on the card itself or there are clear statements alleging use in the affidavit [*88766 Canada Inc v RH Lea and Associates Ltd*, 2008 CarswellNat 4513 (TMOB)]. In this case, because the cards display the Mark along with indicia of the registered services, and because Mr. Lee has provided evidence showing the context in which the cards would have been distributed in the course of marketing activities for the registered services, I am satisfied that these business cards amount to display of the Mark in the course of advertising the registered services.

[18] While the evidence could have been clearer with respect to the registered services, I note that the purpose of section 45 is to remove “deadwood” from the register, and it is clear from a fair reading of the evidence as a whole in this case that the Owner was manufacturing health products displaying the Mark for sale during the relevant period, and was using the Mark in the course of marketing its services during the relevant period. As such, I am satisfied that the Owner has demonstrated use of the registered services within the meaning of sections 4(2) and 45 of the Act.

DISPOSITION

[19] In view of all of the foregoing, 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 registered goods. The registration will be maintained in respect of the registered services only.

G.M. Melchin
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: Jamie Bashtanyk

For the Registered Owner: No agent appointed