



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 58

Date of Decision: 2024-03-26

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Distillerie Mariana Inc.

Registered Owner: 9020 5758 Québec Inc.

Registration: TMA726,051 for AVRIL

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. TMA726,051 for the trademark AVRIL (the Mark).

[2] The statement of services is reproduced below, together with the Nice classes (CI):

[TRANSLATION]

CI 35 (1) Operation of retail stores for the sale of natural, organic and fair trade foods and products, natural and organic alcoholic and non-alcoholic beverages, delicatessen products, regional products, vitamins and food supplements,

homeopathic products, aromatherapy and ambiance products, face and body care products, specialized magazines and books and accessories for the kitchen, for face and body care and for the hair.

CI 43 (2) Operation of health food restaurants.

CI 44 (3) Beauty and esthetic care services for the face and body. Naturopathic consultation services.

(Services (1), (2) and (3). Collectively, the Services)

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

PROCEEDING

[4] At the request of Distillerie Mariana Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on October 21, 2022, to 9020-5758 Québec Inc. (the Owner), the registered owner of the Mark.

[5] The notice required that the Owner show whether the Mark was used in Canada in association with each of the 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 from October 21, 2019, to October 21, 2022.

[6] The relevant definition of “use” is set out in section 4 of the Act as follows:

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 produced the solemn declaration of Maude Besner, signed on May 5, 2023, to which were attached Exhibits MB-1 to MB-12.

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

SUMMARY OF THE EVIDENCE

[9] Although I have reviewed all the evidence, this summary focuses particularly on the portions that are relevant to my findings.

[10] In her solemn declaration, Ms. Besner states that she has been the Owner's chief financial officer since 2017. She states that the Owner's website, *www.avril.ca*, describes [TRANSLATION] "the concept associated with the Mark" [paras 1 and 18].

[11] Ms. Besner states that the Mark has been used in Canada in association with the Services since at least as early as October 15, 2008 [para 4].

[12] In support of her assertions of use of the Mark in association with the services, Ms. Besner attaches:

- Exhibit MB-1: Three copies of invoices and three copies of purchase orders that Ms. Besner describes as being samples showing use of the Mark in performing the Services (1) during the relevant period [para 8]. The Mark is displayed at the top of each of these documents. On the invoices, it is followed by the corporate information for three different branches in Quebec. On the purchase orders, the Mark is followed by the purchaser's name and information for invoicing and delivery in Canada.
- Exhibit MB-2: Four images of advertisements and three excerpts from fliers that Ms. Besner attaches [TRANSLATION] "to illustrate the use of the Mark in association with the Services (1)" during the relevant period [para 9]. The images of advertisements are preceded by precisions concerning the year and means of their distribution. For instance, two advertisements promoting a meal [TRANSLATION] "cooked with organic vegetables from the Eastern Townships" were posted in 2021 in bus shelters and online. Another advertisement, promoting [TRANSLATION] "our gastronomical Holiday box" and showing a bottle of wine and prepared meals, was posted in late 2021 – early 2022 on signs near the branches and online. The excerpts from fliers show dates in the relevant period. The Mark, followed by the words

[TRANSLATION] “health supermarket”, is prominently displayed on each of the advertisements and fliers.

- Exhibit MB-4: 10 photographs of the fronts of certain branches. Ms. Besner asserts that these photographs are representative of the use of the Mark in association with the Services during the relevant period [para 11]. The addresses of the 10 stores in Quebec are indicated at the bottom of each photograph. The Mark, followed by the words [TRANSLATION] “health supermarket”, is prominently displayed on each of the photographs.
- Exhibit MB-5: In a bundle, photographs representative of the inside of branches. They show various aisles in the stores with shelves filled with products. Each photograph is followed by an indication of the store in which it was taken. The Mark is displayed on certain signs posted near the products. I see that all the products associated with the Services are shown in the photographs, except [TRANSLATION] “delicatessen products, regional products” and “accessories for the kitchen, for face and body care and for the hair”. I also see that one of the photographs, showing a space reserved for face and body care products at the branch in Brossard, shows unidentifiable goods.
- Exhibit MB-7: A photograph representative of the front of a branch. The Mark, followed by the words [TRANSLATION] “health supermarket”, is prominently displayed.
- Exhibits MB-8 and MB-9: Five photographs representative of the inside of branches, in which employees are seen wearing lab coats or shirts displaying the Mark. In those photographs, the employees are dealing with customers on the telephone and near display cases or windows where various care products and homeopathic products are displayed. One of the employees is applying a product to the face of a customer using a makeup brush.
- Exhibit MB-10: Three photographs representative of what Ms. Besner describes as being [TRANSLATION] “the restaurant section” of some branches. Two photographs show the Mark near screens detailing the

choice of meals. The third shows the Mark near the [TRANSLATION] “pizza and pasta” counter, with an employee standing behind the counter.

- Exhibit MB-11: A screen capture from a website page. Ms. Besner asserts that it is representative of the state of the Owner’s website and the use of the Mark in Canada during the relevant period. The Mark, followed by the words [TRANSLATION] “health supermarket”, is prominently displayed in the upper left portion of the screen capture. I see that, with the exception of [TRANSLATION] “natural and organic alcoholic and non-alcoholic beverages”, “specialized magazines and books” and “accessories for the kitchen, for face and body care and for the hair”, all the goods covered by the Services are listed on this screen capture.
- Exhibit MB-12: Excerpts from the Owner’s social media accounts. The Mark, followed by the words [TRANSLATION] “health supermarket”, is prominently displayed on each of these accounts. I see that one of the photographs from the Instagram account shows a hand beater or mixer placed next to a bowl full of green liquid.

[13] Finally, I see the description of the [TRANSLATION] “concept associated with the Mark” referred to by Ms. Besner in her declaration, appears on the screen capture from the website [Exhibit MB-11], a relevant excerpt of which I reproduce below:

Nos magasins respirent l'abondance et le bien-être. Ils ont été conçus de façon à économiser l'énergie et offrir une expérience de magasinage unique, empreinte de satisfaction. L'espace et l'énergie y régnant, à la fois inspirants, zen et vivifiants démontrent qu'il est possible de prendre le temps et avoir du plaisir à satisfaire un besoin fondamental: se nourrir.

Synonyme de qualité et variété

Le concept rassemble sous le même toit :

- des aliments naturels et certifiés biologiques
- des fruits et légumes certifiés biologiques par Ecocert Canada
- des suppléments et vitamines
- des cosmétiques naturels
- des viandes sans additifs chimiques et certifiées biologiques
- des produits sans gluten
- des produits équitables
- des produits locaux
- des produits écologiques
- des produits d'épicerie fine et du terroir
- des produits de phytothérapie, homéopathie et aromathérapie
- des soins d'esthétique en cabine
- un restaurant de type «café bistro»
- un personnel qualifié composé de naturopathes, homéopathes, herboristes, cosméticiennes
- un service de consultation privée en naturopathie, homéopathie, ostéopathie et massothérapie

Engagement pour le développement durable

Par souci environnemental et par devoir pour les générations futures, Avril s'est dotée d'une [Charte de développement durable](#) dans le cadre de la Certification ÉCORESPONSABLE du Conseil des Industries Durables (CID) en collaboration avec Ecocert Canada.

ANALYSIS AND REASONS

Preliminary comments concerning the written representations from the Requesting Party

[14] In its written representations, the Requesting Party generally claims that the advertisements [Exhibit MB-2] are just graphic mock-ups, that they are not dated and that their distribution has not been established. However, Ms. Besner describes those advertisements as [TRANSLATION] “illustrative of the use of the Mark during the relevant period” [see *Oyen Wiggs Green & Mutala LLP v Atari Interactive Inc*, 2018 TMOB 79 at para 25 for the well-established principle that an affiant's statements are to be accepted at face value in a section 45 proceeding]. Moreover, advertisements are preceded by precisions concerning the year and means of their distribution. I therefore consider these advertisements as such, and I conclude that they were distributed during the relevant period.

[15] The Requesting Party also claims that the photographs of the inside of the stores [Exhibit MB-5] are not dated and that no information was provided about when they were taken. However, given that Ms. Besner describes the photographs as representative, the date on which they were taken is not necessary [per *Oyen Wiggs Green & Mutala LLP, supra*].

[16] Otherwise, the Requesting Party adopts the approach of explicitly limiting its written representations to Services (1), particularly the [TRANSLATION] “operation of retail stores for the sale of natural, organic and fair trade foods and products, natural and organic alcoholic and non-alcoholic beverages”. With respect to the balance of goods associated with Services (1) and Services (2) and (3), it cites the evidence, leaving it to the Registrar to [TRANSLATION] “draw the necessary conclusions in this case” [paras 7 to 8 and 12 to 34].

[17] That said, as noted by the Owner in response, the Requesting Party fails to mention the [TRANSLATION] “operation of retail stores for the sale of natural, organic and fair trade foods and products” in the paragraphs containing the details of its written representations. It sometimes refers to non-alcoholic beverages and, most often to [TRANSLATION] “alcoholic beverages” or “natural and organic alcoholic beverages”.

Services (1)

[18] The Requesting Party argues that the evidence is unclear and has significant deficiencies. It submits that the Owner has not met its burden of showing that it used the Mark in association with Services (1) in relation to [TRANSLATION] “natural and organic alcoholic and non-alcoholic beverages”. In particular, with respect to the photographs showing goods [Exhibits MB-2 and MB-5], the Requesting Party submits that they are small and of a poor resolution. As a result, it submits that it is impossible to determine: (i) the Mark of the goods photographed, (ii) if they are alcoholic or non-alcoholic beverages, (iii) if they are natural beverages, and (iv) if they are organic beverages. The Requesting Party also submits that no invoice lists alcoholic or non-alcoholic beverages [paras 16, 18, 21 to 31 and 42].

[19] In response, the Owner refers to the common meaning of the terms [TRANSLATION] “natural” and “organic”, arguing that any organic product is necessarily natural. The Owner also submits that, in the context of its operations, the terms [TRANSLATION] “organic”, “natural” and “health” are consistent with the designation of a [TRANSLATION] “health supermarket”. The Owner thus argues that the [TRANSLATION] “organic”, “natural” and “health” nature of its goods is an integral part of what Ms. Besner identifies as the concept associated with the Mark and is a “*sina qua non* aspect” of it [paras 4.23 to 4.35].

[20] Finally, the Owner submits that the fact that no trademark is visible on the labels or that no invoice was provided for beverages is inconsequential given its burden in this proceeding [paras 4.76 and 4.82].

[21] Indeed, it is well established that displaying the trademark in advertising services is sufficient to meet the requirements of subsection 4(2) of the Act, if the owner of the trademark is ready and able to perform those services in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)]

Operation of retail stores for the sale of natural, organic and fair trade foods and products, retail stores for the sale of natural and organic alcoholic and non-alcoholic beverages

[22] I understand from the Requesting Party’s written representations that it is essentially submitting that evidence of use had to be provided with respect to four separate beverages, namely natural alcoholic beverages, organic alcoholic beverages, natural non-alcoholic beverages and organic non-alcoholic beverages. Following the same logic, the Owner also had to show the use of the Mark in association with Services (1) in relation to six different goods and foods.

[23] However, this interpretation goes against the well-established principle that services are generally granted a generous or liberal interpretation [*Aird & Berlis LLP v Virgin Enterprises Ltd.* (2009), 78 CPR (4th) 306 (TMOB)]. It also goes against decisions by the Registrar finding that “in certain cases, statements of services contain overlapping and redundant terms in the sense that the performance of one service

would necessarily imply the performance of another” [see, for example, *Gowling Lafleur Henderson LLP v Key Publishers Co*, 2010 TMOB 7, at para 15 and *GMAX World Realty Inc v RE/MAX, LLC*, 2015 TMOB 148 at para 69].

[24] I also agree with the Owner that the nature of the goods covered by Services (1) is consistent with the Owner’s core business. This nature also reflects the concept associated with the Mark, as noted by Ms. Besner and presented on the Internet page.

[25] Moreover, I am of the view that there is no need to display the advertised [TRANSLATION] “natural, organic and fair trade” characteristics of the goods and foods or the “natural and organic” characteristics of the alcoholic or non-alcoholic beverages. To be clear, even if the Owner indeed sells goods, food and beverages that are not natural, organic and fair trade, that is inconsequential in this case. Indeed, non-compliance with other legislation, such as the *Consumer Packaging and Labelling Act* or the *Food and Drugs Act*, does not prevent a conclusion of use in a proceeding under section 45 of the Act [see *Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)].

[26] In this case, in support of its assertions of use of the Mark in association with the [TRANSLATION] “operation of retail stores for the sale of natural, organic and fair trade foods and products, natural and organic alcoholic and non-alcoholic beverages”, the Owner provided several photographs of the fronts of its stores displaying the Mark followed by the words [TRANSLATION] “health supermarket” [Exhibit MB-4].

[27] With respect to services related to the operation of retail stores for the sale of natural, organic and fair trade foods and products, the Owner also provided a representative screen capture from its website [Exhibit MB-11]. That screen capture displays the Mark and clearly advertises the retail sale of those goods in the Owner’s stores. In addition, one of the invoices provided as a sample [Exhibit MB-1, page 13] details an [TRANSLATION] “extra-organic dark chocolate” and “organic white mushrooms”, thus showing the provision of services operating retail stores to sell natural, organic and fair trade foods and products in Canada during the relevant period.

[28] With respect to beverages in general, in addition to the photographs of the fronts of stores, the Owner provided two photographs taken inside the Granby branch [Exhibit MB-5, pages 49 and 50].

[29] Looking at those photographs, I can clearly distinguish the alcoholic beverages from the non-alcoholic beverages. Indeed, the first photograph shows transparent bottles containing orange liquid placed on the top of a shelf. On the bottom of the same shelf are other bottles containing white and yellow liquids. With respect to these bottles, the Owner submits, and I agree, that they contain tonics and syrups. The second photograph, taken at the same store, shows a different section identified as [TRANSLATION] “Beers and wines”. Not only do I find it reasonable to conclude that the products located there are alcoholic beverages, but some are clearly wine bottles.

[30] With respect to natural and organic non-alcoholic beverages, the Owner provided an invoice showing the sale of a product identified as [TRANSLATION] “coconut beverage” [Exhibit MB-1, page 13]. According to the well-established principle that a trademark at the top of an invoice is perceived as being related to the Owner’s business, I am satisfied that the Mark was used in the provision of services in the operation of retail stores for the sale of natural and organic non-alcoholic beverages in Canada during the relevant period [see *Tint King of California Inc v Canada (Registrar of Trade-Marks)*, 2006 FC 1440, at para 32].

[31] With respect to natural and organic alcoholic beverages, the Owner provided an advertisement [Exhibit MB-2, page 28] distributed near its stores during the relevant period and showing, among other things, a bottle of wine. That advertisement shows that it advertised the Services (1) in association with natural and organic alcoholic beverages. Moreover, the presence of wine bottles in the [TRANSLATION] “Beers and wines” section of the Granby branch shows that the Owner was ready and able to perform its services of operating retail stores for the sale of natural and organic alcoholic beverages in Canada during the relevant period.

Operation of retail stores for the sale of the remaining products

[32] In addition to the photographs of the fronts of its stores, the Owner provided photographs taken inside the Brossard branch, where vitamins, food supplements, homeopathic products and face and body care products are displayed in various dedicated sections and spaces. Similarly, it provided a photograph taken at the Laval branch, showing magazines and books in a section of the store. The Owner also provided an advertisement displayed in bus shelters and online during the relevant period, advertising essential oils. In addition, it provided a photograph taken at the Laval branch, showing magazines and books in a section of the store.

[33] These photographs show that the Owner used the Mark in advertising its services associated with the operation of retail stores for the sale of [TRANSLATION] “vitamins and food supplements, homeopathic products, aromatherapy and ambiance products, face and body care products” and “specialized magazines and books” and that it was ready and able to perform them in Canada during the relevant period.

[34] Without written representations from the Requesting Party that satisfy me to the contrary, I accept that the delicatessen products and regional products, which are clearly advertised on the Owner’s website, were available for sale at one of its branches during the relevant period. In addition, given that the hand mixer or beater shown on the Owner’s Instagram account corresponds to a kitchen accessory, I also accept that that product is such an accessory and that it was available for sale in one of its branches during the relevant period. Finally, given the extent of the evidence provided, I am prepared to accept that the unidentifiable goods placed in spaces reserved for face and body care products in the Brossard branch correspond to the remaining accessories, namely accessories for face and body care and for the hair.

[35] I therefore agree to conclude that the Owner was ready and able to perform its services of operating retail stores for the sale of [TRANSLATION] “delicatessen products and regional products,” and “accessories for the kitchen, for face and body care and for the hair” in Canada during the relevant period.

[36] For all these reasons, I am satisfied that the Owner has demonstrated use of the Mark in association with Services (1) within the meaning of sections 4(2) and 45 of the Act.

Services (2) and (3)

[37] With respect to Services (2), I note that the advertising provided by the Owner shows use of the Mark not only in advertising its Services (1), as indicated by Ms. Besner, but also in advertising Services (2). Indeed, I consider that the advertising of the prepared dishes with organic vegetables, displayed in bus shelters and online during the relevant period, constitutes advertising of Services (2). In addition to this advertising, the Owner provided photographs showing the Mark in the restaurant section of its branches. It has therefore demonstrated that it was ready and able to perform its services of operating health food restaurants in Canada during the relevant period.

[38] With respect to Services (3), the Owner provided a photograph of the front of a branch displaying the word [TRANSLATION] “clinic” in reference to the services offered there. It also provided several photographs showing the Owner’s employees dealing with customers, either providing them with information on goods or services, or providing them with care. In light of these photographs, I conclude that the Owner has demonstrated use of the Mark not only in advertising but also in performing beauty and esthetic care services for the face and body and in performing naturopathic consultation services in Canada during the relevant period.

[39] For all these reasons, I am satisfied that the Owner has demonstrated use of the Mark in association with Services (2) and (3) within the meaning of sections 4(2) and 45 of the Act.

DISPOSITION

[40] In view 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 maintained:

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Certified translation
Daniel Lépine, Lisa Hannaford-Wong, Beau Brock

Appearances and Agents of Record

HEARING DATE: No hearing held.

AGENTS OF RECORD

For the Requesting Party: Fasken Martineau Dumoulin LLP

For the Registered Owner: Lavéry, De Billy, LLP