



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 60

Date of Decision: 2024-03-26

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Nelligan O'Brien Payne LLP

Registered Owner: Evolution Markets, Inc.

Registration: TMA761,222 for EVOLUTION MARKETS

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. TMA761,222 for the trademark EVOLUTION MARKETS (the Mark), owned by Evolution Markets, Inc. (a Delaware corporation) (the Owner).

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

THE RECORD

[3] At the request of Nelligan O'Brien Payne LLP (the Requesting Party), the Registrar of Trademarks issued a notice to the Owner under section 45 of the Act on March 8, 2023. The notice required the Owner to show whether the Mark had been

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 March 8, 2020, to March 8, 2023.

[4] The Mark is registered for use in association with the services “Financial services, namely trading commodities.”

[5] The relevant definition of use in the present case is set out in section 4 of the Act as follows:

(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] 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 the services specified in the registration during the relevant period.

[7] In response to the Registrar’s notice, the Owner furnished the affidavit of Matthew W. Knox, the General Counsel of the Owner, sworn on August 10, 2023. Only the Owner submitted written representations; no oral hearing was held.

EVIDENCE

[8] Mr. Knox explains that the Owner provides the financial services of trading commodities, particularly for global energy and environmental markets, with offices in New York, Houston, London, and France, and that its clients include Canadians.

[9] As Exhibit 2, Mr. Knox attaches a screenshot from the Owner’s *evomarkets.com* website home page. He states that this screenshot is representative of the site’s appearance throughout the relevant period, and that Canadians could access this site

throughout the relevant period to access market data sold by the Owner. I note that the screenshot prominently displays the Mark and includes links entitled “Our Services” and “LEARN MORE”.

[10] Mr. Knox explains that the Owner “provided financial services, namely trading commodities to Canadians in association with the [Mark] during the Relevant Period through trades made by Canadians directly through [the Owner’s] brokers”. As Exhibits 3 through 6, he attaches copies of invoices dated through the relevant period and issued by the Owner to Canadian clients. In each instance, Mr. Knox confirms that “[f]or this commodities trade [the Owner] executed the trade on behalf of this Client”.

ANALYSIS

[11] It is clear from the invoices attached to Mr. Knox’s affidavit that the Owner provided its commodities trading services in Canada during the relevant period. While Mr. Knox does not confirm that the invoices displaying the Mark were issued in the course of performance of the services, 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)].

[12] In this case, the Mark is displayed on the Owner’s website, which provides information about the Owner’s services. I note that materials displaying the trademark must be “distributed to” or accessed by prospective customers in order to constitute advertising [*Cornerstone Securities Canada Inc v Canada (Registrar of Trade Marks)* (1994), 58 CPR (3d) 417 (FCTD)]. As such, for the exhibited webpages to constitute advertisement of registered services, there must be some basis upon which to infer that those webpages were accessed by Canadians during the relevant period [see, for example, *Ridout & Maybee v Residential Income Fund LP*, 2015 TMOB 185 at paras 47 and 48]. I am prepared to infer that the website was accessed by Canadians during the relevant period on the basis that the Owner had an active business with multiple clients actually availing themselves of the Owner’s services during the relevant period [for similar conclusions, see *Norton Rose Fulbright Canada LLP/SENCRL, srl v Nectar, Inc*,

2017 TMOB 80 at para 35; *88766 Canada Inc v Volta Création Inc*, 2021 TMOB 127 at paras 33-34]. Therefore, I am satisfied that the display of the Mark on the Owner's website amounts to use of the Mark in advertising the Owner's services.

[13] As the Owner has shown that it used the Mark in the advertising of its services in Canada during the relevant period and was offering and prepared to perform those services, I am satisfied that the Owner has shown use of the Mark in association with the registered services within the meaning of sections 4(2) and 45 of the Act.

DISPOSITION

[14] 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 maintained.

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: Nelligan O'Brien Payne LLP

For the Registered Owner: Method Law Professional Corporation