



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 74

Date of Decision: 2024-04-16

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Andrews Robichaud

Registered Owner: Provexis Nutrition Limited

Registration: TMA975,381 for FRUITFLOW & Design

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. TMA975,381 for the trademark FRUITFLOW & Design (the Mark), shown below, owned by Provexis Nutrition Limited (the Owner).



[2] The Mark is registered for use in association with the following:

Nutritional supplements and dietetic additives formed from fruit and vegetable extracts; nutritional supplements and dietetic additives for the prevention of cardiovascular diseases, heart attacks, strokes and venous thrombosis; nutritional supplements and dietetic additives for the encouragement of healthy blood flow; vitamin preparations; non-alcoholic

carbonated and non-carbonated drinks; syrups, extracts and essences for making non-alcoholic beverages; fruit drinks, fruit juices, fruit nectars, vegetable juices, sport drinks, aerated water.

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

THE RECORD

[4] At the request of Andrews Robichaud (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on September 21, 2022, to the Owner.

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

[6] The relevant definition of “use” in the present case is 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.

[7] It is well accepted that the threshold for establishing use 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 by the owner in association with each of the goods specified in the registration during the relevant period.

[8] Where the owner has not shown “use”, the registration is liable to be expunged or amended, unless there are special circumstances that excuse the absence of use.

[9] In response to the Registrar’s notice, the Owner furnished an affidavit of Ian Ford, Director and Secretary of the Owner, sworn in Chessington, England, on April 17, 2023, to which were attached Exhibits A through J.

[10] Both parties submitted written representations and were represented at an oral hearing.

ANALYSIS AND REASONS FOR DECISION

Goods for which no evidence of use was provided

[11] As acknowledged by the Owner at the oral hearing, the evidence in the present case is silent as to the use of the Mark during the relevant period in association with the following goods:

non-alcoholic carbonated and non-carbonated drinks; syrups, extracts and essences for making non-alcoholic beverages; fruit drinks, fruit juices, fruit nectars, vegetable juices, sport drinks, aerated water.

[12] The Owner further acknowledged that no special circumstances excusing non-use were evidenced. As such, these goods will be deleted from the registration.

Evidence regarding nutritional supplements, etc.

[13] With respect to the remaining goods in the registration, the Owner indicates that Provexis, defined in Mr. Ford’s affidavit specifically as the Owner, Provexis Nutrition Limited, “has been in an agreement since 2010 with Koninklijke DSM N.V. (hereinafter “DSM”) for the global development

and promotion of the Provexis Goods”, and that “[i]nformation concerning the agreement can be found on Provexis’ website [...] an image of which is attached as Exhibit B” [para 5]. As noted by the Requesting Party, Exhibit B does not contain any reference to the Owner, but rather provides details regarding Provexis Limited and Provexis Plc and their agreement with an entity identified as DSM Nutritional Products. The website describes the agreement in question not as a license agreement, but as an Alliance Agreement as follows:

In June 2010 it was announced that the company had entered into a long-term Alliance Agreement with DSM Nutritional Products to commercialise Fruitflow® through sales as an ingredient to brand owners in the food, beverage and dietary supplement categories. [...] DSM is responsible for: manufacturing; marketing; and selling via its substantial sales force. Provexis is responsible for contributing scientific expertise necessary for successful commercialisation, and for maintaining and strengthening the breadth and duration of its patent and trade mark coverage for Fruitflow®, seeking to maximise the commercial returns that can be achieved from the technology” [my emphasis].

[14] The Owner then specifies that its goods are available in both powder and liquid form as explained in a leaflet produced by DSM (defined in Mr. Ford’s affidavit as Koninklijke DSM N.V.), a copy of which is attached [para 6, Exhibit C]. As noted by the Requesting Party, the only full entity name referred to in the leaflet is in the mention “© DSM Nutritional Products Ltd 2011”. Otherwise, the leaflet refers only to “DSM” generally, which I understand to refer to the entity named in the copyright notice. The leaflet contains no mention of either Koninklijke DSM N.V., the Owner, or any other Provexis entity. Notably, the leaflet indicates that “All trademarks listed in this brochure are either registered trademarks or trademarks of DSM in The Netherlands and/or other countries” [my emphasis]. The Owner provides no evidence of any sales of FruitFlow products by any DSM entity.

[15] The Owner indicates that it “sells the product Fruitflow+ Omega-3”, the packaging of which features the Mark, and attaches a copy thereof [para 7, Exhibit D]. I note that immediately under the Mark on this packaging is a notice that reads: “Manufactured in the EU for Provexis plc. Fruitflow® is a registered trade mark and patent protected product of Provexis plc. For more information visit fruitflowplus.com”.

[16] The Owner specifies that it directly offers a product identified as “Fruitflow+ Omega-3” for sale in Canada via the website *www.fruitflowplus.com* [para 8]. The Owner attaches various excerpts of the *fruitflowplus.com* website [Exhibits E-F], but does not clearly state, nor do the website excerpts clearly identify which corporate entity operates the website.

[17] The Owner further indicates that it had Canadian orders between January 1, 2022, and December 18, 2022, totaling approximately \$1,000 CAD [para 9]. The Owner also provides a table with the heading “Fruitflowplus.com – Canada” showing orders, the majority of which are dated during the relevant period, with shipping addresses in Canada [Exhibit G]. The Owner clearly states, and the website excerpts clearly show, that the “Fruitflow+ Omega-3” product subject of the Canadian orders was in the packaging discussed above indicating “Provexis plc” as the trademark owner [para 8, Exhibits E-F].

[18] The Owner also states that “DSM has an agreement with Bricker Labs [...] under which Bricker is permitted to use the Trademark in association with the Provexis Goods” [para 10]. The Owner indicates that Bricker Labs sells a dietary supplement product under the name Optiflow, which features the Mark and provides excerpts of various websites showing the Bricker Labs Optiflow product for sale [paras 11-12, Exhibits H-J]. However, no further

details regarding the “agreement” are provided, and no sales of any Optiflow products are evidenced.

Use of the Mark with nutritional supplements, etc.

[19] It is well established that in response to a section 45 notice, the evidence must show use by the registered owner or a licensee:

[...] it cannot be said that the trade-mark has been used in Canada during the relevant period if it issued by a competitor, a stranger, or some vaguely-defined corporate affiliate of the registered owner. As observed by the Registrar in this case, to hold otherwise would be contrary to the definition of a trade-mark and the principle that trade-mark rights are acquired through use. [*BCF SENCRL v Spirits International BV*, 2011 FC 805 at para 24, rev'd on other grounds 2012 FCA 131].

[20] In the present case, as noted by the Requesting Party, the only mention of the registered Owner is in the text of Mr. Ford’s affidavit, which also specifically refers to two other entities, namely Koninklijke DSM N.V. and Bricker Labs, the various relationships between which Mr. Ford simply qualifies as “agreements”.

[21] Instead of clarifying the foregoing, the documentary evidence introduces further confusion. None reference the exact entities identified in Mr. Ford’s affidavit, but rather what appear to be other entities. As noted by the Requesting Party, in total, the Owner’s evidence refers to six different legal entities and provides no clear explanation of the structure or relationship between them. Moreover, the documentary evidence filed contains two distinct statements of trademark ownership over the Mark, neither of which are in the name of the Owner.

[22] It may be possible that the roles and relationships between the different entities identified in the Owner’s evidence are such that use of the Mark could enure to the Owner’s benefit, but the evidence before me is insufficient to conclude or infer this to be the case. Moreover, the packaging

of the only product evidenced to have been sold in Canada during the relevant period directly indicates that the Mark is a registered trademark of an entity other than the Owner. Absent a clear and cogent explanation, this is a fatal flaw in the present case.

[23] As such, while it does appear that some Fruitflow+ Omega-3 products bearing the Mark were shipped to customers in Canada during the relevant period, I do not find that the evidence shows use of the Mark by the Owner, or use which enures to the Owner's benefit. I therefore find it unnecessary to consider the issue of correlation between the Fruitflow+ Omega-3 product and the goods listed in the registration.

[24] In view of all the foregoing, I find that the Owner has not demonstrated use of the Mark within the meaning of sections 4(1) and 45 of the Act. As there are no special circumstances excusing non-use, the registration will be expunged.

DISPOSITION

[25] 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.

Emilie Dubreuil
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2024-03-13

APPEARANCES

For the Requesting Party: Steven Andrews

For the Registered Owner: Adele J. Finlayson

AGENTS OF RECORD

For the Requesting Party: Andrews Robichaud

For the Registered Owner: Moffat & Co.