



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2024 TMOB 99

**Date of Decision:** 2024-05-28

## **IN THE MATTER OF A SECTION 45 PROCEEDING**

**Requesting Party:** Svenskt Kosttillskott AB

**Registered Owner:** Power Herbs Wellness Trading Corp.

**Registration:** TMA1,078,163 for HEALTHVELL & 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. TMA1,078,163 for the trademark HEALTHVELL & Design (the Mark), shown below.



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

#### Goods

(1) Amino acid dietary supplements; beta carotene supplements; botanical supplements for general health and well-being; calcium supplements; casein dietary supplements; diabetic fruit juice beverages adapted for medical purposes; dietary fibre for use as an ingredient in the manufacture of dietary supplements; dietary supplements consisting of amino acids; dietary supplements consisting of trace elements; dietary supplements for controlling cholesterol; dietary supplements for general health and well-being; dietary supplements for promoting weight loss; herbal and dietary supplements for promoting faster muscle recovery after exercise; herbal male enhancement capsules; herbal mud packs for therapeutic purposes; herbal pills for the treatment of diabetes; herbal supplements for general health and well-being; herbal supplements for the promotion of healthy liver function; herbal supplements for the treatment of arthritis; herbal supplements for the treatment of cancer; herbal supplements for the treatment of cardiovascular diseases; herbal supplements for the treatment of dental and oral diseases; herbal supplements for the treatment of headaches; herbal supplements for the treatment of infectious diseases, namely, urinary tract infections; herbal supplements for the treatment of inflammatory diseases, namely inflammatory bowel diseases and inflammatory connective tissue diseases

(2) Barley flour; breakfast cereals; corn flour for food; edible flour; flour for food; oat bran cereals; ready-to-eat cereals

(3) Fresh lentils; unprocessed cereals

(4) Aloe vera juices; beverages consisting of a blend of fruit and vegetable juices

#### Services

(1) Distribution of advertising mail and of advertising supplements attached to regular editions for others

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

### **THE RECORD**

[4] At the request of Svenskt Kosttillskott AB (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on May 9, 2023, to Power Herbs Wellness Trading Corp. (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the Mark was 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 May 9, 2020, to May 9, 2023.

[6] 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.

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.

4(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.

[7] 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.

[8] In response to the Registrar’s notice, the Owner furnished a statutory declaration of Sunil Munjaral, declared in Surrey, British Columbia, on July 14, 2023, to which were attached Exhibits 1-5.

[9] Only the Requesting Party submitted written representations and was represented at an oral hearing.

### **THE OWNER’S EVIDENCE**

[10] In his statutory declaration, Mr. Munjaral states that, on behalf of Power Herbs Wellness Trading Corporation, he is the owner and user of the trademark “HEALTHVELL” in connection with the sale and distribution of health products.

[11] Mr. Munjaral attaches Exhibits 1 and 2 to his declaration, which he describes as screenshots of products in their packaging sold under the trademarks “Healthvell Shudh Amla” and “Healthvell Shudh Shilajit” on the Amazon platform.

[12] Mr. Munjaral also attaches as Exhibits 3 and 4 to his declaration which he describes as printouts from the Health Canada website listing the above products (“Healthvell Shudh Amla” and “Healthvell Shudh Shilajit”), together with their Natural Product Numbers. The printouts also indicate that the “licence status” of these products is “active”, which, according to Mr. Munjaral, confirms the products’ compliance with health and safety regulations. Mr. Munjaral asserts that these exhibits “meet the definition of” use pursuant to section 4(2) of the Act because “Healthvell” is displayed on this website.

[13] Mr. Munjaral attaches a number of invoices as Exhibit 5 to his declaration, which he describes as invoices issued to vendors for retail sales showing use of the "HEALTHVELL" trademark in the marketplace. The invoices are issued by the Owner and evidence sales of the "Healthvell Shudh Amla" and "Healthvell Shudh Shilajit" products during the relevant period. The customer addresses are fully redacted.

[14] Mr. Munjaral adds that "a few more products" are in the "pre launch" stages under the trademark HEALTHVELL and that a lot of resources are being invested in this trademark.

### **ANALYSIS**

[15] In its written and oral representations, the Requesting Party noted various deficiencies in the declaration of Mr. Munjaral, submitting that the evidence does not demonstrate use of the Mark in Canada, nor special circumstances excusing non-use of the Mark. In particular, the Requesting Party notes, *inter alia*, the following:

- nowhere in the evidence is there reference to the Mark as a whole;
- the screenshots depicting products allegedly displaying the Mark are dated after the relevant period and there is no indication that the depicted products were available for purchase in Canada during the relevant period;
- Mr. Munjaral does not indicate anywhere in his declaration whether any use shown has been use in Canada and the addresses on the invoices attached to his affidavit have been redacted;
- the excerpts from the Health Canada website indicate that the license holder for Healthvell Shudh Amla is Patanjali Ayurveda Inc., which is not the Owner;

- the products described on the Amazon screenshots are not listed in the description of goods and services; as such, the evidence is ambiguous and does not state with which goods the Mark is purportedly being used; and
- no use has been shown in association with any of the registered services.

[16] In his declaration, Mr. Munjaral submits that Exhibits 1 and 2 show Healthvell displayed in “bold and crystal clear letters” on the packaging of the goods. He further states the following:

By providing these exhibits, I intend to demonstrate that the “Healthvell” trademark has been actively used for the sale and distribution of health products in a continuous and consistent manner. The exhibits collectively establish the validity and ongoing commercial operation of the said trademark.

[17] Mr. Munjaral also submits that the display of Healthvell on the Health Canada website shows use of the Mark in association with services pursuant to section 4(2) of the Act as it shows the Mark being displayed in the advertising of the registered services.

[18] The Requesting Party has submitted that the evidence of use of the Mark is ambiguous in many different respects. I agree. I will focus my analysis, however, on what I consider to be the central issues in this proceeding.

[19] To begin, when interpreting a statement of goods, it is well established that the meaning of terms can evolve over time and that an astutely meticulous analysis of the language used is not the correct approach for the purposes of section 45 proceedings. That being said, and although reasonable inferences may be drawn from the evidence provided, it is not for the Registrar to speculate as to the nature of the registered goods. It is the

responsibility of the registered owner to show the connection between the goods registered and those included in the evidence [see, for example, *Fraser Milner Casgrain LLP v Fabric Life Ltd*, 2014 TMOB 135 at para 13]. Further, having distinguished each of the registered goods in the statement of goods, an owner must produce evidence of use with respect to each of the registered goods [see *John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 227 (FCA) and *Sharp Kabushiki v 88766 Canada Inc* (1997), 1997 CanLII 16206 (FC), 72 CPR (3d) 195 (FCTD)].

[20] In my view, there is not enough information in the statutory declaration of Mr. Munjaral, nor the exhibited materials attached to it, from which I can reasonably infer correlations between the products referenced in the evidence and any of the registered goods for the following reasons.

[21] Mr. Munjaral states in his statutory declaration that the “Healthvell” trademark has been actively used for “the sale and distribution of health products in a continuous and consistent manner”. While each of the registered goods could arguably be considered a health product, nowhere in Mr. Munjaral’s evidence does he define which specific “health product” the Mark has been used in association with. For example, while Mr. Munjaral indicates that the invoices provided show the sale of the Healthvell Shudh Shilajit or the Healthvell Shudh Amla product, there is no description whatsoever provided in any of the invoices to indicate what the “Healthvell Shudh Amla” or “Healthvell Shudh Shilajit” products are, nor does Mr. Munjaral make any effort to correlate the invoiced products with specific goods. I also note that the Amazon webpage printouts do not describe the products that are being sold in association with the Healthvell Shudh Shilajit or the Healthvell Shudh Amla trademarks.

[22] While the information on the Health Canada website states that the recommended use or purpose for the Healthvell Shudh Shilajit product is to

“help alleviate painful urination associated with mild urinary tract disorders”, I can only give limited weight to this evidence because it comes from a third party website and is therefore hearsay and cannot be relied upon for the truth of its contents. At best, this information suggests that this good could correspond with the registered good “herbal supplements for the treatment of infectious diseases, namely, urinary tract infections”. However, in light of the lack of detail provided in Mr. Munjaral’s statements, and the fact that the products are not described on the Amazon platform nor in the invoices, I do not find the Health Canada website evidence on its own sufficient to permit me to conclude that the Owner has shown use of the Mark in association with any of the registered goods.

[23] Even if I were to accept that the Healthvell Shudh Shilajit product corresponds to the registered good “herbal supplements for the treatment of infectious diseases, namely, urinary tract infections”, there is insufficient evidence of the transfer or export of any of the registered goods to demonstrate use of the Mark within the meaning of the Act for the following reasons. First, the exhibited “listings on the Amazon platform” are insufficient to show transfer of the products shown [see, e.g., *Cassels Brock & Blackwell LLP v IW Apparel, LLC*, 2021 TMOB 154; and *Riches, McKenzie & Herbert LLP v Cleaner’s Supply Inc*, 2012 TMOB 211 for the well-established principle that “offering for sale” is not the same as “selling”].

[24] Second, with regard to the invoices the Owner has provided, Mr. Munjaral indicates that they show the sale of the “Healthvell Shudh Shilajit” or the “Healthvell Shudh Amla” product by the Owner during the relevant period. However, while the evidence does show how the product packaging appears on the Amazon website screenshots, I am not prepared to accept that this evidence is representative of how the Mark appeared on products in Canada.



[25] Consequently, on the basis of the evidence before me, I am not satisfied that the Owner has demonstrated use of the Mark in association with any of the registered goods within the meaning of sections 4 and 45 of the Act.

[26] The only other evidence provided with respect to the registered goods is a statement by Mr. Munjural that "a few more products are in the pre-launch stages under the trademark Healthvell". In the absence of further information, I am not satisfied that there is any evidence of special circumstances that would excuse the absence of use of the Mark.

[27] With respect to the registered services, where the trademark owner is offering and prepared to perform its services in Canada, use of the trademark on advertising of those services meets the requirements of section 4(2) of the Act [see *Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (RTM)]. In this case, however, there is neither indication that the Owner is willing and able to perform the registered services in Canada nor evidence of the advertising of the Owner's registered services. In this regard, the mere display of the "Healthvell Shudh Amla" and "Healthvell Shudh Shilajit" products on a third party website in association with product information cannot, in my view, be considered advertising by the Owner of the registered services "Distribution of advertising mail and of advertising supplements attached to regular editions for others". I therefore do not find that the Owner has demonstrated use of the Mark in association with the registered services within the meaning of sections 4 and 45 of the Act. In the absence of evidence of special circumstances excusing the absence of use of the Mark, the registered services will therefore also be struck from the registration.

[28] In view of this conclusion, I find it is not necessary to address the Requesting Party's alternative arguments, including the question of deviation of the Mark.

**DISPOSITION**

[29] As there is no evidence of special circumstances excusing non-use of the Mark before me, 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.

Cindy R. Folz  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

# Appearances and Agents of Record

**HEARING DATE:** 2024-05-08

## **APPEARANCES**

**For the Requesting Party:** Nathan Piche

**For the Registered Owner:** No one appearing

## **AGENTS OF RECORD**

**For the Requesting Party:** Gowling WLG (Canada) LLP

**For the Registered Owner:** No agent appointed