

Federal Court



Cour fédérale

**Date: 20240529**

**Docket: T-44-24**

**Citation: 2024 FC 817**

**Ottawa, Ontario, May 29, 2024**

**PRESENT: Madam Justice Whyte Nowak**

**BETWEEN:**

**RED MAPLE MANUFACTURING INC.**

**Applicant**

**and**

**RED MAPLE BIO INC.**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Red Maple Manufacturing Inc. [RMM or the Applicant], appeals a decision of the Trademarks Opposition Board [the Board] which ordered that the Applicant's Canadian Trademark Registration No. TMA963,031 [the Registration] be amended to delete the registered goods [the Decision]. The Decision was made pursuant to section 45 of the *Trademarks Act*, RSC 1985, c T-13 [the Act]. The Board found that there was insufficient

evidence to demonstrate that the trademark was used by the trademark owner in association with the registered goods within the meaning of subsections 4(1), 4(3) and section 45 of the *Act*.

[2] This appeal is made pursuant to subsection 56(1) of the *Act*. The Applicant is seeking an order setting aside the portion of the Decision relating to the registered goods and maintaining the Registration with respect to all registered goods and services. The Respondent, Red Maple Bio Inc. [the Respondent], has not participated in this appeal.

[3] In support of this application, the Applicant has filed new evidence to demonstrate that the Applicant used the trademark at issue in association with the goods listed during the relevant time period.

[4] For the reasons that follow, I am allowing this application for judicial review because the new evidence adduced by the Applicant on this appeal materially affects the Board's Decision and demonstrates that the Applicant's trademark was in use in Canada in connection with the registered goods as part of the normal course of the Applicant's business during the relevant time period.

## II. Facts

### A. *The Design Mark*

[5] The Applicant is the owner of Registration TMA963,031 for the design trademark Red Maple Naturals [the Design Mark], as shown:



[6] The Applicant registered the Design Mark on February 15, 2017, for use in association with the following goods and services:

**Goods:** (1) 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 (the “Goods”).

**Services:** (1) 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 (the “Services”).

B. *The Section 45 Proceeding*

[7] At the request of the Respondent, the Registrar of Trademarks issued a notice on June 27, 2022, to the Applicant under section 45 of the *Act* [the Notice]. The Notice required the Applicant to show use of the Design Mark in Canada in association with the Goods and Services specified in the Registration at any time within the relevant period 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 demonstrating use was June 27, 2019, to June 27, 2022 [the Relevant Period].

[8] In response to the Notice, the Applicant filed the statutory declaration of Stephen Lee, President of RMM, affirmed on September 23, 2022 [the Original Declaration]. The Original Declaration set out that the Design Mark had been used on goods sold in Canada and exported, including on labels for the Applicant's product called "Red Maple Naturals Vitamin C Raspberry Flavour, 225 grams" [the Vitamin C Product], a version of which was manufactured in December 2019 and expired in December 2021 and another version of which was manufactured in January 2022. The Original Declaration attached photographs of containers of the Vitamin C Product with labels, which displayed the Design Mark and showed that they were manufactured during the Relevant Period. The Original Declaration stated that during the Relevant Period the Applicant actively marketed eight Red Maple Naturals products and packaging services in Canada and in export markets.

[9] Neither party submitted written representations and no oral hearing was held.

C. *The Board's Decision*

[10] On November 3, 2023, the Board issued its Decision on the section 45 summary cancellation proceeding.

[11] The Board found that the Original Declaration was sufficient to demonstrate use of the Mark in association with the Services during the Relevant Period, and accordingly, ordered that the Registration be maintained with respect to the Services. The Applicant does not appeal this portion of the Decision.

[12] On the other hand, the Board held that the Applicant failed to demonstrate use of the Design Mark in association with the Goods within the meaning of subsections 4(1), 4(3) and section 45 of the *Act*. Specifically, the Board held that the statements in the Original Declaration that certain of RMM's products bearing the Design Mark were "sold in Canada and exported" were insufficient on their own to demonstrate use in association with the Goods. The Board noted that the Original Declaration did not contain further information regarding *when* such sales or exportations occurred, *to whom* the products were sold or exported, and *how* the sales or exports occurred. Accordingly, the Board ordered that the Registration be amended to delete the Goods.

[13] The Applicant commenced this application seeking to aside that portion of the Decision relating to the Goods and maintaining the Registration with respect to the Services.

D. *The New Evidence on this Appeal*

[14] The Applicant's evidence on this appeal consists of: (1) the Original Declaration; and (2) the Affidavit of Michael Lee, the Co-Founder and Director of RMM, and attached exhibits [the Further Affidavit], filed as new evidence before this Court [collectively, the Evidence on Appeal] pursuant to subsection 56(5) of the *Act*.

[15] The Further Affidavit provides the following evidence:

- (a) During the Relevant Period, the Applicant used the Design Mark in association with oral preparation products of herbs, vitamins and nutritional supplements [Products];

- (b) During the Relevant Period, the Applicant manufactured the Products and sold them to its distributor, Natural Vitamin Direct [NVD], a related company under common control and ownership by a parent holding trust that Mr. Lee is the sole trustee of;
- (c) NVD re-sold the Products to customers through its retail operations during the Relevant Period; and
- (d) The Products re-sold by NVD to end purchasers were identical to the Products NVD purchased from the Applicant, including their labelling and packaging.

[16] Attached to the Further Affidavit are exhibits. One exhibit includes a photo of a unit of the Vitamin C Product with the Design Mark on the front label. The other exhibits include related invoices which reflect the sale of eight units of the Vitamin C Product in Canada, first by the Applicant to NVD on March 15, 2020 and then by NVD to an end purchaser on March 17, 2020 [the Representative Sale].

[17] The Further Affidavit states that the Representative Sale reflects the sales of the Products made by the Applicant to NVD and distributed through NVD to consumers in Canada in the normal course of the Applicant's business throughout the Relevant Period.

### III. Issues and Standard of Review

[18] This matter raises the following issues:

- A. What is the appropriate standard of review on this appeal?
- B. Applying the appropriate standard of review, does the Applicant's Evidence on Appeal establish the Applicant's use of the Design Mark during the Relevant Period in association with the Goods, such that the Registration should be maintained in full?

[19] As the Applicant has led new evidence on this appeal under subsection 56(5) of the *Act*, this Court must first consider the materiality of that evidence and determine whether the evidence is sufficiently substantial, significant and probative that it would have a material impact on the Board's Decision (*Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at para 21 [*Clorox*]; and *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 at para 27).

[20] To be considered material, new evidence must add something of significance to the evidence that was before the Board (*Vass v Leef Inc*, 2022 FC 1192 at para 27). New evidence may be material if it fills gaps or remedies a deficiency identified by the Board in its Decision (*IPack BV v McInnes Cooper*, 2023 FC 243 at para 9).

[21] If the evidence is material, the Court must review that portion of the decision to which the evidence applies on a correctness standard and make its own determination on the basis of the whole of the evidence by way of a hearing “*de novo*” with the benefit of the Further Affidavit and Evidence on Appeal (*Clorox* at para 21; and *Seara Alimentos Ltda v Amira Enterprises Inc*, 2019 FCA 63 at para 22).

#### IV. Analysis

##### A. *The Applicable Standard of Review*

[22] The Board considered there to be gaps in the Original Declaration. It held:

...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 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.

[23] The Further Affidavit seeks to fill the gaps identified by the Registrar. The Further Affidavit demonstrates *how, to whom* and *when* the Applicant used the Design Mark in association with its Vitamin C Product in the normal course of business in Canada during the Relevant Period.

[24] I am satisfied that the evidence provided by the Further Affidavit is substantial, significant and of probative value. Since it fills the evidentiary gap identified by the Board, I am of the view that it materially affects the Decision. Accordingly, this Court will review the issue to which the Further Affidavit pertains (namely demonstration of use under the *Act*) on a correctness standard, and make its own determination based on the whole of the evidence (subsection 56(1) of the *Act*, and *Clorox* at para 21).

**B. *The Evidence on Appeal Demonstrates Use***

[25] The relevant definition of “use” is set out in section 4(1) of the *Act* as follows:

**When deemed to be used**

**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

**Quand une marque de commerce est réputée employée**

**4 (1)** Une marque de commerce est réputée employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces produits, dans la pratique normale du



<p>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.</p>	<p>commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu’avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.</p>
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[26] I agree with the Applicant that the Further Affidavit demonstrates “use” of the Design Mark in Canada in the normal course of trade by the Applicant in association with the Goods listed in the Registration during the Relevant Period. While the Original Declaration provided a mere *declaration* of use, as opposed to a *demonstration* of use, the Further Affidavit satisfies the Applicant’s evidentiary burden by demonstrating *how, when* and *to whom* the Applicant as trademark owner used the Design Mark in association with the sale of the Goods in Canada during the Relevant Period (*Plough (Canada) Ltd v Aerosol Fillers Inc.*, [1981] 1 FC 679 at para 10).

[27] First, the Further Affidavit provides information regarding *how* the Design Mark was used by explaining the Applicant’s business arrangements, which assists in determining whether the “use” was in the “normal course of trade” at the time of the sale (s. 4(1) of the *Act*, *Vêtement Multi-Wear Inc. v Riches, McKenzie & Herbert LLP*, 2008 FC 1237 at para 21 [*Vêtement*]). The Applicant has demonstrated that during the Relevant Period, it sold Goods bearing the Design Mark in Canada through its distributor, NVD. The Further Affidavit also shows that NVD and the Applicant are, and have always been, under common control and ownership. Sales of goods bearing the trademark by its owner or a licensee to a distributor as an intermediary constitutes

use of a mark in the normal course of trade within the meaning of section 4 of the *Act* (*Harley-Davidson Motor Company, Inc. v Montréal Production Inc.*, 2023 FC 1727 at para 30).

[28] Second, the Further Affidavit provides evidence of *when* and *to whom* sales of the Goods in Canada were made. The Original Declaration merely provided photographs of the Vitamin C Product and stated that these were “sold in Canada and Exported” during the Relevant Period. The Further Affidavit includes invoices dated March 15 and 17, 2020 for the sale of eight units of the Vitamin C Product between the Applicant and NVD and a shipping label that shows those units were sold and shipped to a resident in British Columbia through NVD during the Relevant Period. In this case, the invoices support a finding of use. They sufficiently establish the association between the owner of the Design Mark, the Design Mark itself, and the product sold and delivered in the Relevant Period (*Fasken Martineau Dumoulin S.E.N.C.R.L., S.R.L. v. Les Laboratoires Bio-Santé Inc.*, 2011 FC 802 at para 22).

[29] I am satisfied that the use of the Representative Sale in this case is sufficient since it has been shown to be part of a genuine commercial transaction in the normal course of trade (*Vêtement* at para 22).

## V. Conclusion

[30] In light of the Further Affidavit submitted on this appeal, and considering that the Applicant’s onus to demonstrate use is not a heavy burden, I find that the Applicant has demonstrated use under subsection 4(1) of the *Act*. Accordingly, the Applicant’s appeal pursuant to subsection 56(1) of the *Act* is granted. That portion of the Decision amending the Applicant’s

Registration in relation to the Goods shall be set aside and the Applicant's Registration in relation to both the Goods and Services shall be maintained.

**JUDGMENT in T-44-24**

**THIS COURT'S JUDGMENT is that:**

1. The Board's decision dated November 3, 2023, is set aside, in part as it relates to the Goods listed in Trademark Registration No. TMA963,031.
2. Trademark Registration No. TMA963,031 shall be maintained so as to include the Goods and Services.
3. There shall be no order as to costs.

"Allyson Whyte Nowak"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-44-24

**STYLE OF CAUSE:** RED MAPLE MANUFACTURING INC. v RED  
MAPLE BIO INC.

**PLACE OF HEARING:** HELD BY WAY OF ZOOM VIDEOCONFERENCE

**DATE OF HEARING:** MAY 27, 2024

**JUDGMENT AND REASONS:** WHYTE NOWAK J.

**DATED:** MAY 29, 2024

**APPEARANCES:**

Karen F. MacDonald  
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FOR THE APPLICANT

N/A

FOR THE RESPONDENT

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