



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2010 TMOB 181
Date of Decision: 2010-10-29

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Goudreau Gage Dubuc against registration
No. TMA652,053 for the trade-mark GLYCO-FLEX in
the name of FoodScience Corporation**

[1] At the request of Goudreau Gage Dubuc (the Requesting Party), the Registrar of Trade-marks forwarded a notice under s. 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) on December 3, 2008 to FoodScience Corporation (FoodScience or the Registrant), the registered owner of the above referenced trade-mark.

[2] The trade-mark GLYCO-FLEX (the Mark) is registered for use in association with the following wares:

(1) Nutritional supplements for dogs, cats and horses, namely, supplements containing glycosaminoglycans, amino acids, polypeptides, chelated minerals, enzymes, vitamins, nucleic acids and phytonutrients, for the maintenance of joints, synobial fluid, tendons, ligaments and cartilage.

(2) Nutritional supplements for humans containing perna, alfalfa leaf, cinnamon oil, glucosaminoglycans, glucosamine and methysulfonylmethane, for maintenance of joints, synovial fluid, tendons, ligaments and cartilage.

(3) Nutritional supplements for dogs, namely, supplements containing glycosaminoglycans, amino acids, polypeptides, chelated minerals, enzymes, vitamins, nucleic acids and phytonutrients, for the maintenance of joints, synobial fluid, tendons, ligaments and cartilage.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares 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 between December 3, 2005 and December 3, 2008 (the Relevant Period).

[4] “Use” in association with wares is set out in s. 4(1) and 4(3) of the Act. In this case, only s. 4(1) applies:

4. (1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[5] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing “deadwood” from the register and as such, the evidentiary threshold that the registered owner must meet is quite low. As stated by Mr. Justice Russell in *Uvex Toko Canada Ltd. v. Performance Apparel Corp.* (2004), 31 C.P.R. (4th) 270 (F.C.) at 282:

[...] We know that the purpose of s. 45 proceedings is to clean up the "dead wood" on the register. We know that the mere assertion by the owner that the trade mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade-mark owners' business and merchandising practices.

[6] In response to the Registrar’s notice, the Registrant furnished an affidavit of Mary E. Helrich, sworn on June 1, 2009, and two affidavits of Lynn M. Bromstedt, sworn on June 2, 2009 and June 11, 2009, together with accompanying exhibits. Only the Registrant filed written submissions; an oral hearing was not requested.

[7] At the outset of her affidavit, Ms. Helrich states that she is the Vice President of New Product Development at FoodScience, and that she has held this position since 2003. Ms. Bromstedt states that she is the Divisional Vice President and G.M. of Abbott Animal Health, a division of Abbott Laboratories (Abbott), and that she has held this position since 2002. Both affiants state that by virtue of their positions, they have personal knowledge of the matters deposed to in their affidavits, except where they are stated to be based on information and belief, in which case they verily believe them to be true.

[8] Ms. Helrich states that FoodScience is a Vermont, U.S.A. corporation that produces and sells high-quality nutritional supplements for animals. She explains that these supplements are manufactured in the United States and exported for sale around the world. When marketing certain products, including products bearing the Mark, she states that FoodScience does business under the trade-name Vetri-Science Laboratories of Vermont (Vetri-Science), the marketing division of FoodScience.

[9] Ms. Helrich deposes that FoodScience has sold nutritional supplements for animals in Canada in association with the Mark since 1985. She explains that these products are manufactured for FoodScience in the United States in accordance with its formulas and specifications, and FoodScience's quality control department verifies batch production records to ensure that the formulas for the supplements accord with these specifications.

[10] Ms. Bromstedt states that Abbott is a broad-based health care company, incorporated under the laws of Illinois, U.S.A., with headquarters in Abbott Park, Illinois. Abbott does business worldwide as a developer, manufacturer, and vendor of pharmaceutical products, nutritional products, diagnostic products, and vascular products, operating more than 100 facilities worldwide.

[11] Both affiants attest that from 2002 to the present, FoodScience's GLYCO-FLEX nutritional supplements for dogs and cats have been marketed and distributed in Canada by Abbott. Ms. Bromstedt explains that this marketing and distribution is primarily aimed at veterinarians and other professionals in the nutritional supplement industry. Pursuant to a written agreement dated August 15, 2002 between FoodScience and Abbott, FoodScience granted Abbott the exclusive right to promote and sell GLYCO-FLEX products for dogs and cats in

Canada, including the right to display the Mark on certain materials, subject to FoodScience's controls. Ms. Helrich states that as a result of FoodScience's control over the manufacture, promotion and distribution of the products, FoodScience has controlled and continues to control the character and quality of the wares with which the Mark is associated in Canada.

[12] Ms. Helrich and Ms. Bromstedt explain that throughout the Relevant Period, Abbott purchased GLYCO-FLEX nutritional supplements for dogs and cats from FoodScience's Vetri-Science division, which invoiced Abbott and shipped the products to Abbott's warehouse located in Abbott Park, Illinois. They state that these products were then shipped from the U.S. warehouse to Abbott's distribution center in St. Laurent, Quebec, Canada for sale.

[13] Attached as Exhibit C to Ms. Helrich's affidavit are copies of two representative invoices, dated within the Relevant Period and issued by Vetri-Science, a division of FoodScience, showing sales and shipments of "FE GLYCO FLEX 3" and "FE GLYCO FLEX I" to Abbott, in Abbott Park, Illinois. Ms. Helrich states that the product codes marked on the invoices designate products destined to be sold in Canada. Copies of invoices showing sales and shipments of GLYCO-FLEX products for cats and dogs to Abbott's St. Laurent, Quebec location during the Relevant Period, issued by Abbott (in Abbott Park, Illinois), are attached as Exhibit A to Ms. Bromstedt's June 11, 2009 affidavit.

[14] Both affiants provide that FoodScience's sales to Abbott of nutritional supplements for dogs and cats bearing the Mark for distribution in Canada totalled more than \$140,000 (US) in wholesale value from 2005 to 2008. Ms. Bromstedt states that between 2005 and 2008, Abbott sold almost 18,000 units of FoodScience's GLYCO-FLEX nutritional supplements for dogs and cats in Canada, representing approximately \$430,000 (US) in Canadian retail sales.

[15] With respect to the manner in which the trade-mark was associated with the wares, Ms. Helrich states that all of the labels for GLYCO-FLEX nutritional supplements for dogs and cats are printed and applied to the product packaging by FoodScience prior to being shipped to Abbott. Attached as Exhibit B to her affidavit are "representative samples of product labels which have been used in Canada since 2003 and continue to be used today for FoodScience's nutritional supplements, on which the GLYCO-FLEX trade-mark is prominently displayed." I note that sample labels for three products for dogs (GLYCO-FLEX[®] I, GLYCO-FLEX[®] II, and

GLYCO-FLEX[®] III) and one product for cats (GLYCO-FLEX[®]) have been provided. The labels are bilingual and indicate that the products are joint support supplements, made with glucosamine, amino acids, chelated minerals, vitamins and other ingredients, manufactured by Vetri-Science and distributed by Abbott. The labels also state that GLYCO-FLEX is a registered trade-mark of Vetri-Science, a division of FoodScience. Although the trade-mark appears with a stylized X and a large dot instead of a hyphen between the words GLYCO and FLEX, such deviation is minor and is not apt to deceive or injure the public in any way [*Nightingale Interloc Ltd. v. Prodesign Ltd.* (1984), 2 C.P.R. (3d) 535 (T.M.O.B.)]. Accordingly, I am satisfied that the trade-mark shown on the labels constitutes use of the registered trade-mark, and that the use of the Mark in this manner satisfies the requirements of s. 4(1) of the Act.

[16] The law is clear that the use of a trade-mark at any point along the chain of distribution will accrue to the benefit of the registrant, provided that the wares bearing the trade-mark originate from the registrant [*Manhattan Industries Inc. v. Princeton Manufacturing Ltd.* (1971), 4 C.P.R. (2d) 6 (F.C.T.D.); *Osler, Hoskin & Harcourt v. United States Tobacco Co.* (1997), 77 C.P.R. (3d) 475 (F.C.T.D.)]. In *Manhattan Industries*, it was held that use in Canada by a wholesaler or distributor of goods bearing the trade-mark of a foreign trade-mark owner was “use” by the foreign owner, not the Canadian importer. Mr. Justice Heald explained the meaning of “use” in the context of the normal course of trade (at pages 16-17):

[...] s. 4 contemplates the normal course of trade as beginning with the manufacturer, ending with the consumer and with a wholesaler and retailer or one of them as intermediary [...] s. 4 contemplates that the use between the retailer and the public enures to the benefit of the manufacturer and its use in Canada. In other words -- if any part of the chain takes place in Canada, this is “use” in Canada within the meaning of s. 4.

[17] In the present case, the Registrant manufactured, packaged and applied labels bearing the Mark to its nutritional supplements for dogs and cats in the United States. During the Relevant Period, it sold these supplements to Abbott for import to and distribution in Canada. Abbott then sold the supplements in Canada with labels identifying Abbott as a distributor, and stating that the wares were manufactured by Vetri-Science and that the Mark is a registered trade-mark of Vetri-Science, a division of the Registrant. Based on this evidence, I am satisfied that the wares

originated from the Registrant, and that Abbott was a distributor of these wares in Canada. Therefore, I conclude that the use shown accrued to the Registrant.

[18] Based on the product description and list of ingredients on the labels in Exhibit B to Ms. Helrich's affidavit, along with the information provided about the ingredients in the brochures and pamphlets in Exhibit E thereto, I conclude that the Registrant's nutritional supplements for dogs and cats contain glycosaminoglycans, amino acids, polypeptides, chelated minerals, enzymes, vitamins, nucleic acids and phytonutrients, and are used for the maintenance of joints, synovial fluid, tendons, ligaments and cartilage. Consequently, I am satisfied that use of the Mark accruing to the Registrant has been shown with the following registered wares: "nutritional supplements for dogs [and] cats [...], namely, supplements containing glycosaminoglycans, amino acids, polypeptides, chelated minerals, enzymes, vitamins, nucleic acids and phytonutrients, for the maintenance of joints, synovial fluid, tendons, ligaments and cartilage" in accordance with s. 4(1) and s. 45 of the Act. Therefore, the registration will be maintained in respect of these wares.

[19] Concerning FoodScience's nutritional supplements for horses and for humans, Ms. Helrich states that FoodScience made direct sales of these wares to purchasers in Ontario and British Columbia. Demonstrating such sales, she provides as Exhibit D to her affidavit representative samples of invoices showing sales of "GLYCO FLEX II HUMANS", "GLYCO FLEX EQ", and "GLYCO FLEX II EQ" from Vetri-Science, a division of FoodScience, issued to Canadian businesses during the Relevant Period. However, unlike the evidence provided with regard to nutritional supplements for dogs and cats, the Registrant provided no information about the ingredients in or purpose of the nutritional supplements for humans and for horses which were sold. Lacking such evidence, I cannot determine that these supplements contained the ingredients or were sold for the purposes listed in the registration. Consequently, I am unable to conclude that the requirements of s. 4(1) and s. 45 of the Act have been met.

[20] Accordingly, I find that the Registrant has failed to show use of its Mark in association with the registered wares "nutritional supplements for [...] horses, namely, supplements containing glycosaminoglycans, amino acids, polypeptides, chelated minerals, enzymes, vitamins, nucleic acids and phytonutrients, for the maintenance of joints, synovial fluid, tendons,

ligaments and cartilage” and “nutritional supplements for humans containing perna, alfalfa leaf, cinnamon oil, glucosaminoglycans, glucosamine and methysulfonylmethane, for maintenance of joints, synovial fluid, tendons, ligaments and cartilage” and that such wares ought to be deleted from the trade-mark registration.

[21] In view of the foregoing, and pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be amended to delete:

(1) [...] horses [...].

(2) Nutritional supplements for humans containing perna, alfalfa leaf, cinnamon oil, glucosaminoglycans, glucosamine and methysulfonylmethane, for maintenance of joints, synovial fluid, tendons, ligaments and cartilage.

in compliance with the provisions of s. 45 of the Act.

Ronnie Shore
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office