



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

**Citation: 2016 TMOB 138**  
**Date of Decision: 2016-08-10**

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

**Custom Building Products, Inc.**

**Requesting Party**

**and**

**Lloyds Laboratories Inc.**

**Registered Owner**

**TMA679,855 for NANO CLEAN**

**Registration**

[1] At the request of Custom Building Products, Inc. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on November 14, 2014 to Lloyds Laboratories Inc. (the Owner), the registered owner of registration No. TMA679,855 for the trade-mark NANO CLEAN (the Mark).

[2] The Mark is registered for use in association with the following goods: “Cleaning preparations for automobiles, trucks and motorcycles, and for machines and machinery parts.”

[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 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 between November 14, 2011 and November 14, 2014.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) of the Act:

4(1) A trade-mark 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.

[5] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of a section 45 proceeding [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd v Lang Michener et al* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the goods specified in the registration during the relevant period.

[6] In response to the Registrar's notice, the Owner furnished the statutory declaration of Craig Willoughby, President of the Owner, sworn on February 10, 2015 in Lakefield, Ontario. Only the Owner filed written representations; an oral hearing was not requested.

#### The Owner's Evidence

[7] In his declaration, Mr. Willoughby attests that the Owner sells cleaning preparations for automobiles, trucks and motorcycles. He refers to these preparations as "car wash" and "truck wash" products and attests that, during the relevant period, the Owner sold such products to customers in Canada in association with the Mark. In this respect, he attests that the Mark is displayed on labels attached to the containers in which the cleaning preparations are sold.

[8] Mr. Willoughby states that the Owner sells its products to customers directly and through distributors, explaining that the Owner has established a list of customers "to whom it provides catalogues and other materials describing products available for sale". He attests that, during the relevant period, customers in Canada were able to order the Owner's products, including cleaning preparations with labels displaying the word "NANOCLEAN", through such catalogues produced by the Owner. He also states that such products are identified with "part number" designations according to the type and volume of cleaning preparation sold.

[9] In support, Mr. Willoughby provides the following exhibits attached to his declaration:

- Exhibit A is a copy of a label for a 20-litre container of “NANOCLEAN Industrial Strength TRUCK WASH”. Mr. Willoughby confirms that such labels are affixed to all containers of such cleaning preparations sold by the Owner. The label describes features of the product, including “Easily Cuts Through Road and Pollution Film” and “Great on Vinyl, Fibreglass, and Metal Siding”.
- Exhibits B and C are similar labels for containers of “NANOCLEAN Super Concentrated CAR WASH”. Again, Mr. Willoughby attests that such labels appear on the different volumes of NANOCLEAN cleaning preparations sold by the Owner.
- Exhibit D consists of the cover page and an interior page from what Mr. Willoughby attests is the English language catalogue produced by the Owner in 2014. The interior page displays various products along with a brief description of such products. Among the displayed products are “NANOCLEAN truck wash” and “NANOCLEAN car wash”. Consistent with Mr. Willoughby’s statements, different volumes of each type of cleaning preparation have a unique part number designation. For example, 20-litre containers of “NANOCLEAN truck wash” are designated as part number 77220, while 455-millilitre containers of “NANOCLEAN car wash” are designated as part number 72250.
- Exhibit E consists of a similar page from one of the Owner’s French language catalogues. Again, “NANOCLEAN Industrial Strength TRUCK WASH” and “NANOCLEAN Super Concentrated CAR WASH” are two of the products displayed on the exhibited page.
- Exhibit F consists of 16 invoices for various products that Mr. Willoughby attests were sold to customers in Canada. The invoices are all dated within the relevant period and are invoiced to Canadian addresses. The invoices include a brief description of each product sold as well as a part number and product price. Although the Mark is not displayed on the invoices, Mr. Willoughby indicates that the invoices refer to part numbers that correspond to the part numbers of the products shown in the exhibited catalogue pages. For example, the first invoice shows sales of a product described as “20 L Car Wash Concentrate” with part number 72220. This part number corresponds to the 20-litre

container of “NANOCLEAN car wash” shown in the catalogue page at Exhibit D. It also corresponds to the part number appearing on the Exhibit B label.

### Analysis

[10] In its representations, the Owner submits that the evidence of Mr. Willoughby “leaves no doubt” that the Owner made use of the Mark in Canada during the relevant period.

[11] Indeed, with respect to “cleaning preparations for automobiles, trucks and motorcycles”, the exhibited labels and invoices support Mr. Willoughby’s clear assertion of use in association with such goods.

[12] However, it is also clear that the evidence in this case is limited to cleaning preparations for different kinds of road vehicles. Mr. Willoughby does not assert use of the Mark in association with cleaning preparations for the broader “machines and machinery parts”, and does not attest to particular sales of any products other than “cleaning preparations for automobiles, trucks and motorcycles”. None of the exhibited labels depict any other types of cleaning preparations and the Owner’s brief written representations make no reference to either “machines” or “machinery parts”.

[13] As such, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered goods “cleaning preparations for... machines and machinery parts” within the meaning of sections 4 and 45 of the Act. Furthermore, the Owner furnished no evidence of special circumstances excusing such non-use of the Mark. The registration will be amended accordingly.

[14] With respect to “cleaning preparations for automobiles, trucks and motorcycles”, I note that the exhibited labels and catalogue pages display the single word “NANOCLEAN”, rather than the two separate words constituting the Mark. However, in applying the principles set out by the Federal Court of Appeal, I consider that this display of NANOCLEAN as one word rather than two to be only a minor deviation from the Mark as registered [per *Canada (Registrar of Trade Marks) v Cie internationale pour l’informatique CII Honeywell Bull, SA* (1985), 4 CPR (3d) 523 (FCA)].

[15] Otherwise, Mr. Willoughby provides representative evidence showing that the Mark appeared on labels of the products he identifies as “cleaning preparations for automobiles, trucks and motorcycles”. In conjunction with the exhibited invoices and catalogue pages, it is clear that transfers of such goods bearing the Mark occurred in Canada during the relevant period.

[16] In light of Mr. Willoughby’s assertion of use and in the absence of representations from the Requesting Party, I am satisfied that the Owner has demonstrated use of the Mark in association with “cleaning preparations for automobiles, trucks and motorcycles” within the meaning of sections 4 and 45 of the Act.

Disposition

[17] In view 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 amended to delete “... and for machines and machinery parts” from the statement of goods.

[18] The amended statement of goods will read as follows: “Cleaning preparations for automobiles, trucks and motorcycles.”

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Andrew Bene  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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No Hearing Held

**AGENTS OF RECORD**

Dickinson Wright LLP

For the Registered Owner

MBM Intellectual Property Law LLP

For the Requesting Party