



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2019 TMOB 109**

**Date of Decision: 2019-10-10**

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

**Urbanek Intellectual Property Law**

**Requesting Party**

**And**

**489425 Alberta Ltd.**

**Registered Owner**

**TMA699,280 for QUICK GROW**

**Registration**

[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. TMA699,280 for the trademark QUICK GROW (the Mark), owned by 489425 Alberta Ltd.

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

**GOODS**

Liquid fertilizer; granular fertilizer.

**SERVICES**

(1) Operation of a business selling and distributing fertilizer.

(2) Operation of a website providing information to others with respect to plants, fertilizer and gardening.

[3] For the reasons that follow, I conclude that the registration ought to be maintained in its entirety.

## INTRODUCTION

[4] At the request Urbanek Intellectual Property Law (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on October 23, 2017, to 489425 Alberta Ltd. (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the trademark has been used in Canada in association with 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 October 23, 2014 to October 23, 2017.

[6] The relevant definitions of use 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.

[7] Concerning services, the display of the trademark in the advertisement of the services is sufficient to satisfy the requirements of section 4(2) of the Act, from the time the owner of the trademark offers and is ready to perform the services in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)].

[8] It is well established that bare statements that a trademark is in use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings 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)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with each of the goods and services

specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[9] In response to the Registrar's notice, the Owner furnished the affidavit of Mark Sutherland, sworn on January 16, 2018. Both parties filed written representations. An oral hearing was not requested.

#### THE OWNER'S EVIDENCE

[10] In his affidavit, Mr. Sutherland states that he is a director and the President of the Owner, an Alberta corporation operating under the trade name North American Greenhouse Supplies since 1992. He explains that the Owner's business throughout the relevant period involved the production, distribution, and sale of liquid and granular fertilizer through its commercial distribution centre located in Calgary, as well as through its website. As Exhibit B to his affidavit, he attaches a screenshot from the Owner's website showing a store front displaying the Mark. He states that the signage displaying the Mark was installed prior to the relevant period and has remained the same to the present date.

[11] Mr. Sutherland explains that while the Owner originally focused on sales and distribution to local wholesalers and retail consumers through its retail location, it set up its website in 1999 "through its affiliate corporation, QuickGrow Indoor Garden Centre Ltd. (the "Affiliate") on behalf of the [Owner]" and began marketing and selling its goods and services through its website in addition to its store. As Exhibit C, Mr. Sutherland attaches a WHOIS search showing that the website *www.quickgrow.com* is owned by the Affiliate, and states that "Throughout the [relevant period] and at all times including up to the present day, the website has been operated by the [Owner]." As Exhibits P, Q, R, and S, he attaches printouts of statistics from 2014, 2015, 2016, and 2017, respectively, showing traffic to the Owner's website during those years. The documents show approximately 100,000 visits to the Owner's website per year, primarily from Canada.

[12] As Exhibits E and F to his affidavit, Mr. Sutherland attaches copies of labels displaying the Mark as they appeared on a product order form on the Owner's website and on the Owner's products, respectively. I note that the products shown in Exhibit F are jugs and bottles bearing

the label which appear to be designed to contain liquid in quantities of 10L, 4L, and 1L. In addition, as Exhibit L, Mr. Sutherland attaches photographs of containers of granular fertilizer bearing the Mark. He states that these were sold by the Owner during the relevant period.

[13] Mr. Sutherland states that the Owner also sells other fertilizer products that were originally sold under the Mark, but are now sold under the trademarks “Quick Mix” and “Quick Bloom”, as well as fertilizers produced by third parties. As Exhibits G, H, and I, he attaches printouts from the Wayback Machine internet archive showing the Owner’s website as it existed during the relevant period. The Mark is displayed in the top left corner of each page. Exhibits H and I show the website’s “Shop” page within the category “Fertilizers and Nutrients”; I note that Exhibit I includes numerous listings for “Quick Grow” products, including “Quick Grow Part 2” and “Quick Grow Part 3”. Mr. Sutherland states that “Quick Grow Part 2” is now marketed under the name “Quick Mix”. As Exhibits J and K, he attaches photographs of liquid fertilizers with labels bearing the trademark “Quick Mix” in large letters. However, I note that the Mark is also displayed in smaller letters underneath this trademark.

[14] As Exhibit M and N to his affidavit, Mr. Sutherland attaches printouts of the Owner’s website from the Wayback Machine internet archive dated during the relevant period. The first page is titled “Articles” and the second contains an informational article discussing gardening issues such as aeration and nutrient uptake. The Mark is displayed in the top left corner of each page.

[15] As Exhibit O to his affidavit, Mr. Sutherland attaches five invoices dated March 27, 2015, February 14, 2017, March 17, 2017, August 21, 2017, and September 14, 2017. These invoices show sales of products called “Quick Grow” and “Quickgrow”, Parts 1, 2, and 3. The invoices also display the Mark at the top of the page. The invoices show that the “Quick Grow” and “Quickgrow” products were sold in units of 1L, 2L, and 4L, as well as units of “Concentrate Mix –(220 grams per Liter)”. Mr. Sutherland states that an original copy of the invoice would have been provided to the buyer at the time of purchase.

[16] Finally, as Exhibit T to his affidavit, Mr. Sutherland attaches a sales report entitled “Quick Grow Sales Totals”. The report shows sales of both dry fertilizer and liquid fertilizer during the relevant period. Mr. Sutherland explains that the products listed in the sales report

correspond to the liquid fertilizer shown in Exhibit J and the granular fertilizer shown in Exhibit L.

#### ANALYSIS

[17] At the outset, I note that in its written representations, the Owner makes reference to facts not in evidence with respect to the Affiliate. As such, these submissions will be disregarded [*Ridout & Maybee LLP v Encore Marketing International Inc* (2009), 72 CPR (4th) 204 (TMOB)].

[18] In its written representations, the Requesting Party breaks down Mr. Sutherland's affidavit paragraph by paragraph and argues that virtually all of his statements and exhibits should be disregarded. This dissection of the evidence amounts to an overly technical approach that is inconsistent with the purpose of section 45 proceedings [see *Dundee Corp v GAM Ltd*, 2014 TMOB 152 at para 21; *Reckitt Benckiser (Canada) Inc v Tritap Food Broker*, 2013 TMOB 65 at para 27]. It is the evidence as a whole that must be considered, and it must be remembered that exhibits should be read in conjunction with the information provided in the affidavit. Further, absent evidence to the contrary, an affiant's sworn statement is to be accepted at face value, and statements in an affidavit must be accorded substantial credibility in a section 45 proceeding [*Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para 25]. Finally, while the Requesting Party's submissions refer to a number of Mr. Sutherland's attached photographs being unintelligible, I have no such difficulty with any of the photographic evidence submitted to the Registrar.

[19] The Requesting Party's submissions can be summarized as follows: that the Owner's website evidence amounts to hearsay; that the Owner's invoice evidence does not cover the entire relevant period and makes use of a trademark other than the Mark as registered; and that Mr. Sutherland has not shown that use of its website enures to the Owner rather than to the Affiliate.

### Hearsay

[20] It is well-established that given the summary nature of section 45 proceedings, “concerns with respect to the hearsay nature of evidence can go to weight, rather than admissibility” [*Eva Gabor International Ltd v 1459243 Ontario Inc*, 2011 FC 18 at para 18]. Therefore, any concerns about the reliability of the Owner’s website evidence will be assessed in terms of weight rather than admissibility.

[21] With respect to the Requesting Party’s concerns regarding the reliability of evidence from the Wayback Machine, I note that archived web pages produced by Wayback Machine indicating the state of websites in the past have been found to be generally reliable [see *ITV Technologies Inc v WIC Television Ltd*, 2003 FC 1056, affirmed 2005 FCA 96; *Cogan v EMusic.com Inc*, 2011 TMOB 34 at para 18].

### Invoice Evidence

[22] The Requesting Party argues that on certain of the invoices, the mark being used is “Quickgrow” rather than the Mark as registered, which is two words. However, I agree with the Owner that this variation is sufficiently minor that the Mark has not lost its identity and remains recognizable [see *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA); *Canada (Registrar of Trade Marks) v Cie internationale pour l’informatique CII Honeywell Bull, SA* (1985), 4 CPR (3d) 523 (FCA); *Bennett Jones v Dowie* (2009), 77 CPR (4th) 74]. In any event, I note that several of the invoices display the Mark in its original form and that the Mark also appears on the goods referred to in the invoices.

[23] The Requesting Party also submits that Mr. Sutherland has provided no invoices for 2014 and 2016, and only a single invoice for 2015. However, it is well established that evidence of a single sale can be sufficient to establish use for the purposes of section 45 expungement proceedings, so long as it follows the pattern of a genuine commercial transaction and is not seen as deliberately manufactured or contrived to protect the registration [see *Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 at para 12].

[24] In this case, Mr. Sutherland has provided invoices displaying the Mark showing sales of fertilizer during the relevant period. Based on the units of measurement listed in these invoices, I

am satisfied that these invoices reflect sales of both liquid and granular fertilizer. I am assisted in reaching this conclusion by the sales report showing sales of both liquid and granular fertilizer during the relevant period, which Mr. Sutherland has correlated to the products shown in Exhibits J and L. Although certain of these products display the marks “Quick Mix” and “Quick Bloom”, Mr. Sutherland has attested that during the relevant period, these products were sold in association with the Mark rather than these other trademarks, and this assertion is supported by the Owner’s invoice evidence. Further, I note that as shown in Exhibits J and K to Mr. Sutherland’s affidavit, the products that are now sold under the trademark “Quick Mix” also display the Mark as registered; in this respect, I note that there is nothing to prevent two trademarks from being used at the same time [*AW Allen Ltd v Canada (Registrar of Trade Marks)* (1985), 6 CPR (3d) 270 (FCTD)]. Given all the above, considering the totality of the evidence, I am satisfied that the Owner has shown use of the Mark in association with liquid fertilizer and granular fertilizer in the normal course of trade in Canada during the relevant period. Similarly, I am satisfied that this evidence of sales establishes use of the Mark in association with the services “operation of a business selling and distributing fertilizer” in Canada during the relevant period.

#### Website

[25] The Requesting Party argues that the WHOIS report showing ownership of the website *www.quickgrow.com* is hearsay, and that in any event, it shows that the Affiliate owns the website, rather than the Owner. According to the Requesting Party, because the website is owned by the Affiliate, any use of the Mark enures to the Affiliate rather than the Owner. Further, the Requesting Party submits that the evidence does not show that the Owner exercises control over the character or quality of any of the goods or services allegedly sold through this website, and in the absence of a license agreement, the mere fact that the Owner and this third party may be “affiliates” does not demonstrate this requisite control.

[26] However, I agree with the Owner that it is irrelevant that the Affiliate owned the domain name so long as it was the Owner performing the service of “Operation of a website providing information to others with respect to plants, fertilizer and gardening”. It is well-established that ownership of a domain name does not amount to use of a trademark [see *Runway Beauty, Inc v*

*Hernandez*, 2013 TMOB 79; *Lidl Stiftung & Co. KG v. Liberty Merchant Company Inc*, 2018 TMOB 51]. Here, Mr. Sutherland's affidavit is clear that it was the Owner, rather than the Affiliate, that operated and conducted business through the website. As such, just as use of a trademark does not accrue to an owner of a building simply because a lessee displays signage on a storefront at that building, there is no use of the Mark by the owner of the website in this case.

[27] In this case, Exhibits M and N clearly show that the website displayed the Mark in association with information with respect to plants, fertilizer and gardening. Mr. Sutherland has attested that the articles shown in these exhibits existed on the website during the relevant period. Further, Exhibits P through S establish that the website was accessed by Canadians during the relevant period. Consequently, I am satisfied that the Owner's evidence establishes use of the Mark in association with services (2) in Canada during the relevant period.

#### DISPOSITION

[28] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

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G.M. Melchin  
Hearing Officer  
Trademarks Opposition Board  
Canadian Intellectual Property Office



**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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No Hearing Held

**AGENTS OF RECORD**

D. Scott Moore

For the Registered Owner

Ted B. Urbanek

For the Requesting Party