



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2019 TMOB 115**

**Date of Decision: 2019-10-25**

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

**Wilson Lue LLP**

**Requesting Party**

**and**

**InovoBiologic Inc.**

**Registered Owner**

**TMA772,436 for ELDERBERRYRICH**

**Registration**

INTRODUCTION

[1] At the request of Wilson Lue LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on December 6, 2017 to InovoBiologic Inc. (the Owner), the registered owner of registration No. TMA772, 436 for the trademark ELDERBERRYRICH (the Mark).

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

Dietary and nutritional supplements, namely, elderberry concentrate.

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with the goods specified in the registration, at any time between December 6, 2014 and December 6, 2017. If the Mark had not been so used, the Owner was

required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[4] The definitions of use with respect to goods 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(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.

[5] It is well established that the purpose and scope of section 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 [*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of Mark Dawkin, President of the Owner, sworn on February 28, 2018 in Burnaby, British Columbia. Neither party filed written representations. An oral hearing was not requested.

#### THE OWNER’S EVIDENCE

[7] In his affidavit, Mr. Dawkin identifies the Owner as an Alberta-based company that sells ingredients for the natural health, nutraceutical and functional food industries. He explains that the Owner sells proprietary nutritionals and natural raw materials to customers located in both Canada and the United States.

[8] In particular, Mr. Dawkin states that the Owner has continuously sold “proprietary nutritionals and natural raw materials” since June 2010 under the trademark ELDERBERRYRICH. I note that, throughout his affidavit, Mr. Dawkin does not refer to the registered goods “elderberry concentrate”, but rather identifies the Owner’s ELDERBERRYRICH product as “proprietary nutritionals and natural raw materials”.

[9] In any event, Mr. Dawkin confirms that the ELDERBERRYRICH product was labelled and shipped from Canada to consumers in both Canada and the United States. In this respect, he states that, according to section 4(3) of the Act, “a trademark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.”

[10] Attached as the first exhibit to Mr. Dawkin’s affidavit is a photograph of a label on a shipping drum. Mr. Dawkin explains that this photograph shows the manner in which the ELDERBERRYRICH product was labelled with the Mark during the relevant period. The label identifies the product within the drum as “Elderberryrich®” and further identifies the ingredients as “Elderberry”, “Maltodextrin”, and “Silicon Dioxide”.

[11] The second exhibit attached to Mr. Dawkin’s affidavit consists of 18 invoices dating from March 2014 to November 2017. Each invoice shows the sale of various goods, including “ELDERBERRYRICH” products. Some of the invoices, including an invoice showing a shipment of ELDERBERRYRICH product to a Canadian address, predate the relevant period. However, nine of the invoices are dated within the relevant period and show sale and shipment of ELDERBERRYRICH product to customers in the United States. I also note that one of the invoices dated within the relevant period shows a sale to a customer with a U.S. address, but the “Shipment” field of the invoice indicates “CUSTOMER TO PICK UP”.

#### ANALYSIS

[12] While Mr. Dawkin does not explicitly correlate the ELDERBERRYRICH product with the registered goods “dietary and nutritional supplements, namely, elderberry concentrate”, as noted above, the exhibited label shows that the ELDERBERRYRICH product’s ingredients as consisting of Elderberry, Maltodextrin, and Silicon Dioxide. As such, I am satisfied that the ELDERBERRYRICH product evidenced to have been sold by the Owner correlates with the registered goods.

[13] Furthermore, it is clear from Mr. Dawkin’s affidavit and the supporting invoices that the Owner sold and exported such goods to customers in the United States during the relevant period. The exhibited photograph shows that the Mark was displayed on the packaging of the

goods when shipped. As noted by Mr. Dawkin in his affidavit, such display of the Mark on the packaging of the subject goods when exported from Canada to customers in the United States is sufficient to constitute use of the Mark pursuant to section 4(3) of the Act.

[14] Similarly, with respect to the invoice indicating “CUSTOMER TO PICK UP”, assuming the “PICK UP” or transfer occurred at the Owner’s Alberta’s address, this would also be sufficient to constitute use of the Mark within the meaning of section 4(1) of the Act.

[15] In any event, at a minimum, I am satisfied that the Owner has demonstrated use of the Mark in association with the registered goods within the meaning of sections 4(3) and 45 of the Act.

#### DISPOSITION

[16] In view of all 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 maintained.

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Andrew Bene  
Member  
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**

No Agent Appointed

For the Registered Owner

Wilson Lue LLP

For the Requesting Party