



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2020 TMOB 109

Date of Decision: 2020-09-30

IN THE MATTER OF A SECTION 45 PROCEEDING

Palmer IP Inc.

Requesting Party

and

Allmax Nutrition Inc.

Registered Owner

TMA795,628 for RAZOR8

Registration

INTRODUCTION

[1] At the request of Palmer IP Inc. (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 February 19, 2018, to Allmax Nutrition Inc. (the Owner), the registered owner of registration No. TMA795,628 for the trademark RAZOR8 (the Mark).

[2] The Mark is registered for use in association with the goods “Dietary supplement containing caffeine for weight loss.”

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

[4] The notice required the Owner to show whether the Mark has been used in Canada in association with the registered goods 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 February 19, 2015, to February 19, 2018.

[5] The relevant definition of use in the present case is set out in section 4(1) 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.

[6] 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)]. 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)]; however, sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with the goods specified in the registration during the relevant period.

[7] In response to the Registrar's notice, the Owner furnished the affidavit of Michael Kichuk, President of the Owner, sworn September 16, 2018. Both parties submitted written representations. No oral hearing was held.

THE OWNER'S EVIDENCE

[8] Mr. Kichuk states that the Owner has used the Mark in association with the registered goods in Canada since at least 2005. As Exhibits A and E, he attaches photographs of packaging and labels displaying the Mark for a product displaying the Mark and identified as "Allmax Razor8 Blast Powder", a "Pre-Workout Stimulant". The labels list the ingredients for the product, which include caffeine, hordenine HCl and yerba maté. He states that products bearing such labels were sold during the relevant period.

[9] Mr. Kichuk provides sales figures in the hundreds of thousands of dollars for goods sold in association with the Mark in the years 2015, 2016, and 2017. As Exhibit B, he attaches a spreadsheet showing sales of “Allmax Razor8 Blast Powder” for 2015 through 2017.

[10] As Exhibit D, Mr. Kichuk attaches a number of advertisements for the Razor8 product, which refer to the product’s utility for workouts but do not refer to weight loss. As Exhibit F, Mr. Kichuk attaches screenshots from the Owner’s website. The website advertises the Owner’s RAZOR8 “Blast Powder” product as a “Pre-Workout Stimulant”, identifies the product’s ingredients including caffeine, hordenine, and yerba maté, and states that “RAZOR8 increases ATP production, supporting high intensity training, and reduced muscle fatigue, all while incinerating fat through increased fat oxidation”.

[11] As Exhibit C, Mr. Kichuk attaches a number of invoices dated during the relevant period, showing sales by the Owner to retailers in Canada of a number of products, including “Allmax Razor8 Blast Powder”.

[12] Finally, as Exhibit G, he attaches copies of three articles “establishing that hordenine HCl and yerba maté are effective for weight loss”.

ANALYSIS

[13] The Requesting Party submits that the product shown in evidence is not a dietary supplement for weight loss. Instead, the Requesting Party submits that the totality of the evidence indicates that the product shown in evidence is a pre-workout stimulant for promoting mental focus, energy, and muscle growth, and states that the scope of a weight loss product is not broad enough to cover a pre-workout stimulant, citing *Trademark Tools Inc v Miller Thomson LLP*, 2016 FC 971 [*Trademark Tools*], and *Gowling Lafleur Henderson LLP v Trio Selection Inc*, 2016 TMOB 77 [*Trio Selection*].

[14] In particular, the Requesting Party notes that the ingredients described by Mr. Kichuk as being effective for weight loss are only a tiny component of the product, and that none of the product labels, website, or advertising, mentions that the product can promote weight loss. The Requesting Party notes that the Exhibit F webpage includes the sentence “RAZOR8 increases ATP production, supporting high intensity training, and reduced muscle fatigue, all while

incinerating fat through increased fat oxidation”, but submits that the public may not interpret “fat oxidation” to be equivalent to weight loss given that oxidized fat may be converted into muscle, leaving no net change in weight. With respect to the research papers, the Requesting Party submits that the need for scientific research and clinical trials suggests that the potential of the two ingredients for weight loss was not previously known or discovered, and that the general public might therefore be unaware of the potential weight loss properties of these ingredients.

[15] In response, the Owner submits that while the product is sold primarily as a pre-workout stimulant, hordenine HCl and yerba maté are known weight loss substances. Further, the Owner submits that the quantities of these two ingredients in the final product are irrelevant, noting that small quantities of active ingredients can have dramatic effects. The Owner notes that the abstract of one of the research papers states that yerba maté is a popular herb ingested for weight loss outcomes. Ultimately, the Owner submits that the evidence establishes that the RAZOR8 product “has been used extensively primarily as a pre-workout stimulant, but also as a weight loss supplement containing caffeine” during the relevant period.

[16] It is a well-established principle that when interpreting a statement of goods or services in a section 45 proceeding, one is not to be “astutely meticulous when dealing with [the] language used” [see *Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654 at para 17]. In this respect, I note that the Owner’s product is advertised as a stimulant for use before a workout, that it contains active ingredients that facilitate weight loss, and that the Owner’s website promotes the product’s capacity for “fat oxidation”. Given the limited scope of section 45 proceedings, I am satisfied that the Owner’s product falls within the scope of the registered goods.

[17] This case is distinguishable from the *Trio Selection* case cited by the Requesting Party; I note that one of the reasons for the decision in that case was the lack of a clear sworn statement that the garments shown in the evidence could be categorized as the registered good “sportswear”, or any explanation or clarification as to how the garments could be categorized as such. By contrast, in the current case, Mr. Kichuk identifies the pre-workout supplement product as the registered goods and explains why it can be categorized as such. Similarly, the case is distinguishable from the *Trademarks Tools* case in that the registered owner in that case sought to maintain the general category “tools”, which was subdivided into a specific list of tools,

through use of its trademark in association with a tool that was not enumerated in the list. By contrast, there is only a single registered good in this case, and the affiant has clearly explained how the pre-workout supplement corresponds to this registered good.

[18] Given that the Owner has shown that the Mark was displayed on the packaging for the supplement product, and that such products were sold to retailers in Canada during the relevant period, I am satisfied that the Owner has established use of the Mark within the meaning of the Act.

DISPOSITION

[19] 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.

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

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

Cassan Maclean IP Agency Inc.

For the Registered Owner

Vantek Intellectual Property LLP

For the Requesting Party