

Federal Court



Cour fédérale

Date: 20250221

Docket: T-1498-24

Citation: 2025 FC 347

Toronto, Ontario, February 21, 2025

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

PROVEXIS NUTRITION LIMITED

Applicant

and

ANDREWS ROBICHAUD

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This appeal is brought by Provexis Nutrition Limited [Provexis NL or the Applicant] pursuant to subsection 56(1) of the *Trademarks Act*, RSC 1985, c T-13 [*Act*] from a decision dated April 16, 2024 [Decision] of a Hearing Officer of the Trademarks Opposition Board on behalf of the Registrar of Trademarks [Registrar]. The Decision ordered the cancellation of the Applicant's Trademark Registration No. TMA975,381 [Registration] under section 45 of the *Act*.

[2] For the reasons that follow, this application is granted in light of the new evidence adduced by the Applicant, which materially affects the Registrar's Decision. Based on a *de novo* review of the whole of the evidence, I find that the Applicant has demonstrated use of the registered mark in Canada within the meaning of subsection 4(1) of the *Act* during the relevant time period.

II. Facts

A. *The Design Mark*

[3] The Applicant is the owner of the Registration for the trademark FRUITFLOW & Design [Registered Mark], shown here:



[4] The Applicant sought to register the Registered Mark for use in association with the following goods:

Goods

(1) Nutritional supplements and dietetic additives formed from fruit and vegetable extracts; nutritional supplements and dietetic additives for the prevention of cardiovascular diseases, heart attacks, strokes and venous thrombosis; nutritional supplements and dietetic additives for the encouragement of healthy blood flow; vitamin preparations [Challenged Goods]; non-alcoholic carbonated and non-carbonated drinks; syrups, extracts and essences for making non-alcoholic beverages; fruit drinks, fruit juices, fruit nectars, vegetable juices, sport drinks, aerated water [Unchallenged Goods].

[5] The Applicant has not appealed the Registrar's Decision in respect of the Unchallenged Goods on this application; accordingly, they shall remain expunged from the Registration.

B. *The Section 45 Proceeding*

[6] On September 21, 2022, at the request of the Respondent, Andrews Robichaud [Respondent], the Registrar issued a notice under section 45 of the *Act* to the Applicant. The notice required the Applicant to show use of the Registered Mark in Canada in association with the goods in the Registration at any time within the three-year period immediately preceding the date of the notice, which in this case is September 21, 2019, to September 21, 2022 [the Relevant Period].

[7] On April 19, 2023, the Applicant provided an affidavit of Ian Ford [Ford] [the First Ford Affidavit], the Director and Secretary of the Applicant, purporting to show use of the Registered Mark in Canada during the Relevant Period in two ways. First, the Applicant sold a dietary supplement product named "Fruitflow+ Omega-3" [Fruitflow+ Product] via a website in Canada, www.fruitflowplus.com [Website], the packaging for which bears the Registered Mark. Second, the Applicant's manufacturer and licensee, Koninklijke DSM N.V. [DSM], sublicensed Bricker Labs, who, through at least two sellers, offered for sale and sold in Canada a dietary supplement, "Optiflow" [Optiflow Product], which contains the Fruitflow product produced by DSM [the Fruitflow Product] and bears the Registered Mark on its bottle and packaging.

C. *The Registrar's Decision*

[8] On April 16, 2024, the Registrar issued the Decision expunging the Registration on the basis that the Applicant's evidence in relation to both the Unchallenged and Challenged Goods fails to support use of the Registered Mark by the Applicant in Canada during the Relevant Period. The Registrar considered there to be significant deficiencies in the Applicant's evidence.

[9] First, the Registrar noted that "the only mention of the [Applicant] is in the text of Mr. Ford's affidavit" and not in the documentary evidence provided by the Applicant. The packaging sample only displays the name "Provexis plc" instead of the Applicant's name, and the Website purporting to offer the Fruitflow+ Product to customers in Canada does not clearly identify the Applicant as the entity that operates the website from which it was sold.

[10] Second, the Fruitflow Product leaflet makes no mention of the Applicant, or any other Provexis entity, and explicitly states that "[a]ll trademarks listed in this brochure are either registered trademarks or trademarks of DSM in The Netherlands and/or other countries." The provided description on the Website of the purported licensing agreement between the Applicant and DSM did not show a licence agreement, but rather an "Alliance Agreement" made between non-Applicant entities (i.e., Provexis Limited and Provexis plc) and DSM Nutritional Products.

[11] Finally, the Applicant provided insufficient evidence to support the licensed use of the Registered Mark by Bricker Labs in connection with its sale of the Optiflow Product, as the underlying sublicense was not provided and there was no evidence of sales.

[12] The Registrar concluded:

... in total, the [Applicant's] evidence refers to six different legal entities and provides no clear explanation of the structure or relationship between them. Moreover, the documentary evidence filed contains two distinct statements of trademark ownership over the Mark, neither of which are in the names of the [Applicant].

It may be possible that the roles and relationships between the different entities identified in the [Applicant's] evidence are such that use of the Mark could enure [sic] to the [Applicant's] benefit, but the evidence before [the Registrar] is insufficient to conclude or infer this to be the case. Moreover, the packaging of the only product evidenced to have been sold in Canada during the relevant period directly indicates that the Mark is a registered trademark of an entity other than the [Applicant]. Absent a clear and cogent explanation, this is a fatal flaw in the present case.

[13] On June 17, 2024, the Applicant filed a Notice of Application appealing the Decision.

On August 16, 2024, the Applicant served a new affidavit from Ford [the Second Ford Affidavit]. The Respondent did not cross-examine Ford in respect of the Second Affidavit and has not participated in this appeal.

III. Issues and Standard of Review

[14] This matter raises the following issues:

- A. What is the appropriate standard of review on this appeal?
- B. Is the new evidence submitted by the Applicant material?
- C. If the new evidence is material, does it establish use of the Registered Mark in association with the goods listed in the Registration during the Relevant Period?

IV. Analysis

A. *The Applicable Standard of Review*

[15] As the Applicant has led new evidence on this appeal under subsection 56(5) of the *Act*, this Court must first consider the materiality of that evidence and determine whether the evidence is sufficiently substantial, significant and probative that it would have a material impact on the Registrar's Decision (*Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at para 21 [*Clorox*]; and *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 at para 27).

[16] If the evidence is material, the Court must review that portion of the decision to which the evidence applies on a correctness standard and make its own determination on the basis of the whole of the evidence by way of a “*de novo*” review with the benefit of the Second Ford Affidavit (*Clorox* at para 21; and *Seara Alimentos Ltda v Amira Enterprises Inc*, 2019 FCA 63 at para 22).

B. *Is the Second Ford Affidavit Material?*

[17] To be material, new evidence must add something of significance to the evidence that was originally before the decision maker; new evidence may be material if it “fills gaps or remedies a deficiency identified” by the decision maker (*Centric Brands Holding LLC v Stikeman Elliott LLP*, 2024 FC 204 at para 25 [*Centric Brands*]).

[18] The Second Ford Affidavit directly addresses the fatal flaw of the Applicant's evidence of use by providing a clear explanation of the structure or relationship between the Applicant and the various Provexis entities and shows the Applicant's use of the Registered Mark. That evidence is that:

1. The Applicant (Provexis Nutrition Limited) and Provexis Natural Products Limited [Provexis NP] are wholly owned subsidiaries of Provexis plc;
2. Ford is the Director and Company Secretary of the Applicant, Provexis NP and Provexis plc [collectively, the Provexis Group];
3. The Applicant owns the Registered Mark and has licensed the use of it to the companies of the Provexis Group, including Provexis plc, by way of an oral licence;
4. The Applicant maintains care and control over the Registered Mark by virtue of having Ford as the Director and Company Secretary of both the Applicant and Provexis plc;
5. The Fruitflow Product is a proprietary dietary supplement derived from tomatoes, and DSM has been manufacturing it for the Provexis Group under the Alliance Agreement between Provexis plc and DSM;
6. Under the Alliance Agreement, DSM: (i) agreed to manufacture the Fruitflow Product to the specification of Provexis plc; (ii) agreed to supply the Fruitflow Product to Provexis plc for Provexis plc to distribute and sell under the Registered Mark; (iii) was authorized to distribute the Fruitflow Product to third-party manufacturers that wish to incorporate the Fruitflow Product into their own products; and (iv) was granted a licence to use the Registered Mark, including the right to sublicense it, by Provexis plc on behalf of the Applicant, but was required to submit all uses of the Registered Mark to Provexis plc for approval before use; and
7. DSM sublicensed Bricker Labs to use the Registered Mark on the bottle and packaging of Bricker Labs' Optiflow Product which contains the Fruitflow Product and was offered for sale and sold in Canada on e-commerce platforms by at least two sellers during the relevant period.

[19] I find that the Second Ford Affidavit provides evidence that is sufficiently substantial, significant and probative such that it would have had an effect on the Decision and is therefore material (*Centric Brands* at para 24).

C. *The Evidence on Appeal Demonstrates Use*

[20] For the sale of the Fruitflow+ Product to properly qualify as use of the Registered Mark, the evidence must show: i) that the Fruitflow+ Product falls within the list of the Challenged Goods; and ii) use of the Registered Mark within the meaning of subsection 4(1) of the *Act* by the Applicant in connection with the Challenged Goods.

(1) Direct Sales by the Provexis Group

[21] The First and Second Ford Affidavits provide the following evidence of use related to the Fruitflow+ Product in the Relevant Period:

1. The Fruitflow+ Product is offered directly for sale in Canada by Provexis plc via the Website;
2. Between January 1, 2022 and December 18, 2022, the total value of the sales of the Fruitflow+ Product directly made to customers in Canada via the Website is approximately \$1,000 CAD;
3. The packaging of the Fruitflow+ Product states that it is “water soluble tomato concentrate” that “supports healthy blood flow and normal heart function” and “help[s] support your cardiovascular system ... and acts on the blood platelets involved in clotting, to help support healthy blood flow around the body”; and
4. The packaging features both the Registered Mark (accompanied by a statement that says, “[m]anufactured in the EU for Provexis plc. Fruitflow® is a registered trade mark and patent

protected product of Provexis plc”) as well as the logo of Provexis plc.

[22] Considering that the threshold for establishing “use” in a section 45 proceeding has been described as “quite low” (*Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134 at para 10 [*Miller Thomson*]), I find that the Applicant has made out a *prima facie* case of use of the Registered Mark by Provexis plc in the normal course of trade given that: (i) the description of the Fruitflow+ Product falls within the description of the Challenged Goods; (ii) the evidence shows that the Registered Mark appears on the Fruitflow+ Product packaging; and (iii) the Applicant provided evidence of sales in Canada of the Fruitflow+ Product during the Relevant Period (*1459243 Ontario Inc v Eva Gabor International, Ltd*, 2011 FC 18 at para 5).

[23] Given Ford’s evidence that the Applicant had control of the character or quality of Provexis plc’s Fruitflow+ Product, I also find that the evidence is sufficient to constitute deemed use of the Registered Mark by the Applicant under subsection 50(1) of the *Act*. Ford’s sworn evidence is that: (i) direct sales of goods bearing the Registered Mark to customers in Canada by the Provexis Group was under the direction and control of Provexis NL as owner of the Registered Mark; and (ii) Provexis NL is able to maintain care and control over the Registered Mark because of the common control and because Ford is the Director and Company Secretary for both Provexis NL and Provexis plc (*Mantha & Associés/Associates v Central Transport Inc*, [1995] FCJ No 1544 (FCA) at para 3 and *Live! Holdings, LLC v Oyen Wiggs Green & Mutala LLP*, 2020 FCA 120 at para 24).

[24] I note that the incorrect naming of Provexis plc as the owner of the Registered Mark on the Fruitflow+ Product packaging does not detract from the notice function of subsection 4(1) of the *Act*. An owner's disclosure of its identity on product packaging, or in some other manner in association with its goods (or services), has been recognized as voluntary in so far as the *Trademarks Act* is concerned (*Michaels v Unitop Spolka Z Organiczona Odpowiedzialnoscia*, 2020 FC 937 at paras 12-13).

[25] I therefore find the evidence in connection with the sales of the Fruitflow+ Product shows use of the Registered Mark in Canada by the Applicant in the Relevant Period.

(2) Licensed Use

[26] The Applicant also furnished evidence of the offer for sale and sale of the Optiflow Product pursuant to a sublicense between DSM and Bricker Labs, suggesting that it also qualifies as use by the Applicant in the Relevant Period. However, I find that the Applicant's evidence remains deficient. The Applicant relies on Ford's sworn statement that the Optiflow Product bearing the Registered Mark was made available for sale and sold in Canada during the Relevant Period. However, no invoices or sales records were provided to back up this statement. This Court has held that a mere assertion of sales without more is not sufficient to prove use under subsection 4(1) of the *Act* (*Kazar Group Spólka z ograniczona odpowiedzialnoscia v BCF SENCRL/BCF LLP*, 2024 FC 2075 at para 20).

V. Conclusion

[27] Given that there is no need for “evidentiary overkill,” the finding of use in connection with the Fruitflow+ Product is sufficient to set aside the Registrar’s Decision and maintain the Registration in respect of the Challenged Goods (*Miller Thomson* at para 10). The Registration shall be amended to delete the Unchallenged Goods. The Applicant’s appeal pursuant to subsection 56(1) of the *Act* is therefore allowed.

JUDGMENT in T-1498-24

THIS COURT’S JUDGMENT is that:

1. The application is allowed.
2. The appealed decision of the Trademarks Opposition Board dated April 16, 2024, is:
 - a. set aside as it relates to the goods listed as “[n]utritional supplements and dietetic additives formed from fruit and vegetable extracts; nutritional supplements and dietetic additives for the prevention of cardiovascular diseases, heart attacks, strokes and venous thrombosis; nutritional supplements and dietetic additives for the encouragement of healthy blood flow; vitamin preparations”; and
 - b. maintained in relation to the goods listed as “non-alcoholic carbonated and non-carbonated drinks, syrups, extracts and essences for making non-alcoholic beverages; fruit drinks, fruit juices, fruit nectars, vegetable juices, sport drinks, aerated water.”
3. Registration No. TMA975,381, is maintained but only in respect of “[n]utritional supplements and dietetic additives formed from fruit and vegetable extracts; nutritional supplements and dietetic additives for the prevention of cardiovascular diseases, heart attacks, strokes and venous thrombosis; nutritional supplements and dietetic additives for the encouragement of healthy blood flow; vitamin preparations.” The Registration is amended to delete the goods listed as “non-alcoholic carbonated and non-carbonated drinks, syrups, extracts and essences for

making non-alcoholic beverages; fruit drinks, fruit juices, fruit nectars, vegetable juices, sport drinks, aerated water.”

4. There is no order as to costs.

"Allyson Whyte Nowak"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1498-24

STYLE OF CAUSE: PROVEXIS NUTRITION LIMITED v ANDREWS
ROBICHAUD

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 20, 2025

JUDGMENT AND REASONS: WHYTE NOWAK J.

DATED: FEBRUARY 21, 2025

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