Federal Court  Cour fédérale

Date: 20250801

Docket: T-1918-24

Citation: 2025 FC 1348

Ottawa, Ontario, August 1, 2025

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

POWER HERBS WELLNESS TRADING CORPORATION

Applicant

and

SVENSKT KOSTTILLSKOTT AB

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant appeals a decision (the "Decision") of the Registrar of Trademarks (the "Registrar") issued on May 29, 2024 (2024 TMOB 99) under section 56 of the *Trademarks Act*, RSC 1985, c T-13 (the "Act"). The Decision expunged the Applicant's Trademark Registration No. TMA 1,078,163 for the trademark Healthvell & Design (the "Mark") as there was no evidence of special circumstances excusing non-use of the Mark.

[2] On appeal, the Applicant seeks to adduce new evidence under section 56 of the Act, asserting that it is sufficiently substantial and significant and of probative value such that the Decision should be reviewed on a correctness standard.

[3] For the reasons below, the application is dismissed.

II. Background

[4] The Applicant, Power Herbs Wellness Trading Corporation, owns Trademark Registration No. TMA 1,078,163 for the Mark, shown below:

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

> Goods
>
> (1) Amino acid dietary supplements; beta carotene supplements; botanical supplements for general health and well-being; calcium supplements; casein dietary supplements; diabetic fruit juice beverages adapted for medical purposes; dietary fibre for use as an ingredient in the manufacture of dietary supplements; dietary supplements consisting of amino acids; dietary supplements consisting of trace elements; dietary supplements for controlling cholesterol; dietary supplements for general health and well-being; dietary supplements for promoting weight loss; herbal and dietary supplements for promoting faster muscle recovery after exercise; herbal male enhancement capsules; herbal mud packs for therapeutic purposes; herbal pills for the treatment of diabetes; herbal supplements for general health and well-being; herbal supplements for the promotion of healthy liver function; herbal supplements for the treatment of arthritis; herbal supplements for the treatment of cancer; herbal supplements for the treatment of

cardiovascular diseases; herbal supplements for the treatment of dental and oral diseases; herbal supplements for the treatment of headaches; herbal supplements for the treatment of infectious diseases, namely, urinary tract infections; herbal supplements for the treatment of inflammatory diseases, namely inflammatory bowel diseases and inflammatory connective tissue diseases

(2) Barley flour; breakfast cereals; corn flour for food; edible flour; flour for food; oat bran cereals; ready-to-eat cereals

(3) Fresh lentils; unprocessed cereals

(4) Aloe vera juices; beverages consisting of a blend of fruit and vegetable juices

Services

(1) Distribution of advertising mail and of advertising supplements attached to regular editions for others

[6] On May 9, 2023, the Trademarks Opposition Board ("TMOB") issued a notice under section 45 of the Act to the Applicant in response to a request from the Respondent, Svenskt Kosttillskott AB. The notice required the Applicant to show whether the Mark was used in Canada in association with each of the goods and services 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 May 9, 2020, to May 9, 2023.

[7] The Applicant filed a statutory declaration of Sunil Munjaral with five exhibits.

[8] Only the Respondent submitted written representations and was represented at the section 45 oral hearing held on May 7, 2024.

III. The Decision

[9] On May 28, 2024, the Registrar issued the Decision expunging the Mark from the Registrar, finding that the Applicant failed to demonstrate use of the Mark in association with any of the goods and services listed in association with the Mark.

[10] With respect to the goods, there was not enough information in the affidavit or exhibits submitted that allowed it to infer correlations between the products referenced in the evidence and any of the registered goods for two reasons:

A. First, while Mr. Munjaral states that the Mark had been actively used in association of health products, and while each of the registered goods could arguably be considered a “health product”, the evidence provided did not define which “health product” the mark has been used in association with. The invoices and screenshots from the Amazon webpage provided do not describe the products that are being sold in association with the Healthvell trademarks. Little weight was given to the information on the Health Canada website as it came from a third-party website and was considered hearsay and, in any event, was found insufficient on its own to demonstrate use of the Mark in association with any of the registered goods.

B. Second, the TMOB was not prepared to accept the evidence of how the product packaging appeared on the Amazon website as representative of how the Mark appeared on the products in Canada.

[11] With respect to services, the TMOB found that use in association with the registered services was not demonstrated, for the following reason:

> [T]here is neither indication that the Owner is willing and able to perform the registered services in Canada nor evidence of the advertising of the Owner's registered services. In this regard, the mere display of the "Healthvell Shudh Amla" and "Healthvell Shudh Shilajit" products on a third party website in association with product information cannot, in my view, be considered advertising by the Owner of the registered services "Distribution of advertising mail and of advertising supplements attached to regular editions for others".

IV. Issues

[12] The two issues are:

A. Does the Applicant's new evidence affect the standard of review?

B. Has the Applicant established use of the Mark in association with the requested amended goods?

V. Analysis

[13] Subsection 56(5) of the Act as it was at the relevant date, permits parties in an appeal to adduce new evidence before this Court. If no new material evidence is adduced, the Court reviews the Registrar's decisions according to the appellate standards of review set out in *Housen v Nikolaisen*, 2002 SCC 33 (*Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134 [*Hilton FCA*] at para 48; *Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 [*Clorox*] at paras 22-23). If evidence is adduced which would have materially affected the Registrar's decision, the Court undertakes a *de novo* review of issues that relate to such evidence (*Hilton FCA* at para 47; *Clorox* at para 21).

[14] Evidence is said to be “material” when it is “sufficiently substantial and significant” and of “probative value”. New evidence is relevant when it fills a gap or assuages concerns identified by the Registrar (*Kabushiki Kaisha Mitsukan Group Honsha v Sakura-Nakaya Alimentos Ltda*, 2016 FC 20 at para 18).

[15] Here, the Applicant has filed a second affidavit of Mr. Munjaral, with attached exhibits of the following: a letter and invoices from a manufacturer, Medicap Laboratories, demonstrating that they have been manufacturing Healthvell products since July 2018, Amazon webpage printouts showing the product for sale and sales trend, labels for goods with the trademark, and Health Canada webpages confirming the approval and association of Healthvell with registered goods.

[16] The Applicant asserts that the new evidence supports registration with respect to shilahit (herbal supplements for the treatment of infectious diseases, namely urinary tract infections), amla (herbal supplement for general well-being) and diafit (herbal pills for the treatment of diabetes). The Applicant requests the amended description of goods to read: “Botanical supplements for general health and wellbeing, dietary supplements for general health and well-being, herbal pills for the treatment of diabetes, herbal supplements for general well-being, herbal supplements for the treatment of infectious diseases, namely urinary tract infections”.

[17] During the hearing, Applicant’s counsel did not seem to understand what use of a registered trademark must show in the relevant timeframe and repeatedly sought advice from the Applicant. Even then, the Court was only directed to some possible use of the mark for urinary

tract infections or sugar control in a diet – neither of which were clearly shown to be used in the relevant timeframe.

[18] None of the evidence provided overcomes the deficiencies found by the Registrar. The evidence does not establish use of the Mark in association with any of the registered goods within the meaning of sections 4 and 45 of the Act. The only new evidence provided that displays the Mark is found on printed Amazon webpages and on labels, neither of which demonstrate that the Marks appeared on products sold in Canada during the relevant time. Consequently, the evidence suffers the same deficiencies identified in the Decision. While some of the products being sold on Amazon appear to include the Mark, one cannot discern use of the mark during the relevant timeframe on the evidence provided, and any products having a better depiction of the Mark do not demonstrate use at the relevant time. The evidence is at best still ambiguous, as it is not clear what specific goods with respect to the registration are being shown, and the few items shown in the evidence clearly cannot cover any or all of the goods currently listed within the Applicant's proposed revised statement of goods.

[19] Therefore, the Decision will be reviewed on a palpable and overriding error standard of review.

[20] The Applicant does not identify any errors in the Decision and instead relies upon the new evidence to establish use and overcome the Registrar's Decision. The Registrar did not make a palpable and overriding error in concluding that the Applicant failed to provide any evidence of use sufficient to meet the low evidentiary threshold required for a section 45

proceeding. Mr. Munjaral's bald assertions of use for the amended goods is insufficient – the Applicant must adduce evidence showing use of the trademark within the meaning of sections 2 and 4 of the Act during the relevant time (*Sim & McBurney v en Vogue Sculptured Nail Systems Inc*, 2021 FC 172 at paras 14-16). The Applicant has not done so.

VI. Conclusion

[21] As the Applicant has failed to establish that the Registrar made a palpable and overriding error, the application is dismissed.

JUDGMENT in T-1918-24

THIS COURT'S JUDGMENT is that the application is dismissed.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1918-24
STYLE OF CAUSE:	POWER HERBS WELLNESS TRADING CORPORATION v SVENSKT KOSTTILLSKOTT AB
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JULY 28, 2025
JUDGMENT AND REASONS:	MANSON J.
DATED:	AUGUST 1, 2025

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