



LE REGISTRAIRE DES MARQUES DE COMMERCE

THE REGISTRAR OF TRADE-MARKS

**Citation: 2017 TMOB 172**

**Date of Decision: 2017-12-18**

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

**Escola de Natação E Ginastica Bioswin  
Ltda.**

**Requesting Party**

**and**

**The Clorox Company of Canada, Ltd.**

**Registered Owner**

**TMA823,003 for FITSMART**

**Registration**

INTRODUCTION

[1] At the request of Escola de Natação E Ginastica Bioswin Ltda. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on May 20, 2016, to Renew Life Canada Inc. (Renew Life), the then registered owner of registration No. TMA823,003 for the trade-mark FITSMART.

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

Natural health products; dietary supplements; nutritional supplements; food supplements; nutraceuticals; herbal supplements; vitamin supplements; mineral supplements; botanicals; herbal remedies; and meal replacements, all of the above for the treatment of low dietary fibre, protein supplementation, vitamin supplementation, mineral supplementation, enzyme supplementation, cholesterol lowering and maintenance,

promoting weight loss, promoting weight management and the treatment of digestive disorders.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of 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 between May 20, 2013 and May 20, 2016.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) of the Act:

4(1) A trade-mark 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.

[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. While mere assertions of use are not sufficient to demonstrate use in the context of a section 45 proceeding [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1979), 45 CPR (2d) 194, aff'd (1980), 53 CPR (2d) 63 (FCA)], the threshold for establishing use in these proceedings is quite low [see *Lang, Michener, Lawrence & Shaw v Woods Canada Ltd* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [see *Union Electric Supply Co v Canada (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 trade-mark in association with each of the goods specified in the registration during the relevant period.

[6] In response to the Registrar’s notice, Renew Life furnished an affidavit of its President, Thomas Bedford, sworn August 18, 2016 (the Bedford affidavit).

[7] Renew Life further submitted written representations; the Requesting Party did not.

[8] The registration for the Mark was subsequently amended by The Clorox Company of Canada, Ltd. (Clorox Canada) to reflect the assignment, on June 7, 2017, from Renew Life to Clorox Canada in the rights of the trade-mark FITSMART. Unless indicated otherwise, I will refer collectively to Renew Life and Clorox Canada as the Owner.

[9] Both parties were represented at a hearing.

#### THE OWNER'S EVIDENCE

[10] In his affidavit, Mr. Bedford attests that:

- Renew Life is in the business of manufacturing, selling, distributing, advertising, and promoting natural health products throughout Canada. [Bedford affidavit, para 2]
- Renew Life's natural health products are sold across Canada to retail health food stores, grocery stores, and to health-care practitioners. These entities then sell the products to the ultimate consumer. [Bedford affidavit, para 3]
- Renew Life's head office is located in Oakville, Ontario. The company employs approximately 48 individuals and has annual sales in excess of \$25,000,000. [Bedford affidavit, para 4]
- Renew Life markets a variety of natural health products, including: probiotics, digestive enzymes, essential fatty acids, fibre supplements, digestive cleansing products, and weight management products. [Bedford affidavit, para 5; and Exhibit A: printouts from Renew Life's website *www.renewlife.ca* showing the various products sold by the company]
- The application for the Mark was filed on September 10, 2010 based on use of the Mark in Canada since at least as early as March 2007, and was registered on April 27, 2012. [Bedford affidavit, para 7; and Exhibit B: particulars of the registration printed from the Canadian Intellectual Property Office's database]
- Renew Life "has continuously used the [Mark] in association with a line of meal supplementation products" since at least as early as March 2007." [Bedford affidavit, para 8]
- More particularly:

Renew Life has used the [Mark] in association with protein and fibre based shakes (the “FITSMARTS Products”) continuously between May 20, 2013 and May 20, 2016. The FITSMART Products are natural health products that are used as dietary supplements, nutritional supplements and food supplements and are designed and used in cholesterol lowering and maintenance, promoting weight loss and weight management and for the treatment of digestive disorders. The FITSMART Products are also designed and used for protein supplementation and for the treatment of low dietary fibre and can be used as a meal replacement. The FITSMART Products contain vitamins, minerals, herbals, beneficial digestive enzymes and other nutrients that provide a range of beneficial and remedial health effects. The FITSMART Products are properly characterized as nutraceuticals because they have a physiological benefits [*sic*] in terms of, inter alia, weight loss and weight management, cholesterol lowering and maintenance and the treatment of digestive disorders. The FITSMART Products are available in different flavours and formulations. For example, the FITSMART Pomegranate Berry flavoured shake is a gluten free vegan alternative which uses non-gmo / gmo-free ingredients including botanicals. [Bedford affidavit, para 9]

- The FITSMART Products are available in five flavors: Old-Fashioned Vanilla, Chocolate Crème, Strawberry Dream, Pomegranate Berry, and Chocolate Delight.

[Bedford affidavit, para 11; and Exhibits C and D: screenshots of the product pages for the FITSMART products from the Renew Life’s website; and images of the FITSMART Products labels that have been used for each of the five different flavours of FITSMART Products throughout the relevant period.] Reproduced under Schedule A to my decision, is one of the labels referred to by Mr. Bedford.

Upon review of the exhibited labels, I note that the FITSMART Products are described as either a “Delicious Protein & Fibre Supplement” or a “Delicious Protein & Fibre Shake”. The labels prominently indicate the number of grams of fibre and protein per serving. The labels further include other secondary mentions or claims describing the FITSMART Products as a way to supplement one’s daily protein and fibre needs and providing vitamins, minerals as well as digestive enzymes [see *inter alia*, the text box entitled *The Fibre35 Diet* reproduced in Schedule A to my decision].

The exhibited screenshots from Renew Life’s website also describe the FITSMART Products as “a delicious way to help you reach your daily goal of 35 grams of fibre with added vitamins, nutrients and beneficial enzymes” and an “...easy and convenient way to start your day and keep you feeling satisfied.”

I will return to the descriptions found on these exhibited labels and web pages in my analysis.

- Renew Life sells the FITSMART Products to various retailers throughout Canada, including: pharmacies, grocery stores, and supplement and health food stores. Particular retailers include Loblaws, Shoppers Drug Mart, London Drugs, Save-On Foods, etc. These retailers then sell the FITSMART Products to the consumer in “brick and mortar” retail outlets or online. [Bedford affidavit, para 12; and Exhibit E: screenshots and a list of the retail outlets in Vancouver, Calgary, Toronto and Montreal that sell the FITSMART Products]
- Since March 2007, FITSMART Products have amassed \$4,638,846.00 in sales. [Bedford affidavit, para 13; and Exhibit F: copies of sample invoices for sales of the FITSMART Products in the relevant period]

Upon review of the exhibited invoices, I note that they refer to the “FitSMART Shake” (vanilla, strawberry and chocolate flavors), among other goods.

#### ANALYSIS

[11] The evidence is clear that the Mark was used by the Owner in association with a line of “protein and fibre based shakes” (collectively referred to by Mr. Bedford as the “FITSMARTS Products”) during the relevant period. However, as these “shakes” are not found verbatim in the registration, the real issue in the present case is whether the use shown is use of the Mark with respect to any or all of the goods described in the registration.

[12] As stressed by the Requesting Party at the hearing, the statement of goods includes 11 categories of goods, namely:

- Natural health products
- Dietary supplements
- Nutritional supplements
- Food supplements
- Nutraceuticals

- Herbal supplements
- Vitamin supplements
- Mineral supplements
- Botanicals
- Herbal remedies
- Meal replacements

All of the above for the treatment of low dietary fibre, protein supplementation, vitamin supplementation, mineral supplementation, enzyme supplementation, cholesterol lowering and maintenance, promoting weight loss, promoting weight management and the treatment of digestive disorders.

[13] Given that the Owner distinguished particular goods in the registration, the Requesting Party rightly submits that the Owner was required to provide some evidence with respect to each of the listed goods accordingly [per *John Labatt Ltd v Rainer Brewing Co et al* (1984), 80 CPR (2d) 228 (FCA); and *Sharp Kabushiki Kaisha v 88766 Canada Inc* (1997), 72 CPR (3d) 195 (FCTD)].

[14] However, I disagree with the Requesting Party's submission that the 11 categories of goods listed in the registration must all be considered to be "ingredients" included in the Owner's FITSMART "shakes". In this regard, I disagree with the Requesting Party's submission that the Owner's "shakes" cannot properly be characterized as falling into at least one of the 11 categories of goods described in the registration.

[15] As noted by the Owner, in the context of a section 45 proceeding, the evidence need not be perfect. Indeed, a registered owner need only establish a *prima facie* case of use within the meaning of section 4 of the Act [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 2]. This burden of proof is very light: evidence must only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant* at para 9]. It is always open to the Registrar, as the finder of fact, to draw reasonable inferences from the facts stated in the affidavit or statutory declaration [see *Spirits International BV v BCF SENCRL*, 2012 FCA 131, at

para 8]. Furthermore, the validity of the registration is not in dispute in section 45 proceedings [see *Ridout & Maybee LLP v Omega SA*, 2005 FCA 306, 43 CPR (4th) 18].

[16] As per my review of the labels under Exhibit D attached to Mr. Bedford's affidavit, the FITSMART Products are described as either a "Delicious Protein & Fibre Supplement" or a "Delicious Protein & Fibre Shake". The labels prominently indicate the number of grams of fibre and protein per serving. The labels also feature a list of ingredients contained in the Owner's "shakes". These ingredients include vitamins, minerals, herbs or other botanicals, enzymes, etc. Finally, the labels also contain claims promoting weight loss, weight management and the treatment of digestive disorders [see *inter alia*, the text box entitled *The Fibre35 Diet* reproduced in Schedule A to my decision].

[17] Having regard to the dictionary definitions of "dietary supplement" reproduced below, I find that the Owner's "shakes" can properly be characterized as "dietary supplements":

- A thing or part added to remedy deficiencies (*dietary supplement*) – *The Paperback Oxford Canadian Dictionary*, Second Edition
- A product taken orally that contains one or more ingredients (such as vitamins or amino acids) that are intended to supplement one's diet and are not considered food – *The Merriam-Webster Dictionary*
- Legally defined in USA as products intended to supplement the diet that contain one or more of certain specified ingredients (vitamins, minerals, herbs or other botanicals, amino acids), and so increase intake – *Oxford Dictionary of Food and Nutrition*, Fourth Edition
- Concentrated sources of nutrients (primarily vitamins and mineral salts) marketed in dose form (e.g. capsules, tablets, sachets, etc.) in order to supplement nutrient intake in a normal diet.

dietary supplement: These products are known as dietary supplements in the U.S., and are generally known as food supplements in the EU. In addition, the term "dietary supplement" is used in the EU for products regulated as Foods for Particular Nutritional Uses – *TERMIUM Plus (The Government of Canada's terminology and linguistic data bank)*

[18] Thus, I accept that the Owner has shown use of the Mark in association with “dietary supplements (...) for the treatment of low dietary fibre, protein supplementation, vitamin supplementation, mineral supplementation, enzyme supplementation, cholesterol lowering and maintenance, promoting weight loss, promoting weight management and the treatment of digestive disorders” within the meaning of section 45 of the Act.

[19] However, I am not prepared to accept that use of the Mark has been shown with respect to any of the remaining registered goods.

[20] As indicated above, Mr. Bedford asserts at paragraph 9 of his affidavit that:

The FITSMART Products are **natural health products** that are used as **dietary supplements, nutritional supplements and food supplements** and are designed and used in cholesterol lowering and maintenance, promoting weight loss and weight management and for the treatment of digestive disorders. The FITSMART Products are also designed and used for **protein supplementation** and for the treatment of low dietary fibre and can be used as a **meal replacement**. The FITSMART Products **contain vitamins, minerals, herbals, beneficial digestive enzymes** and other nutrients that provide a range of beneficial and remedial health effects. The FITSMART Products are properly characterized as **nutraceuticals** because they have a physiological benefits [sic] in terms of, inter alia, weight loss and weight management, cholesterol lowering and maintenance and the treatment of digestive disorders. [My emphasis]

[21] While I acknowledge that the Owner’s “shakes” *contain* vitamins, minerals, and herbals, they are not primary characterized on the labels under Exhibit D as “herbal supplements”, “vitamin supplements”, “mineral supplements”, and “botanicals” *per se*.

[22] Likewise, while Mr. Bedford asserts that the Owner’s shakes *can be used* as a meal replacement, the Owner’s shakes are nowhere described in the exhibited labels as a “meal replacement” *per se*. Rather, they are primary described as a “protein and fibre supplement”. In this regard, I do not find persuasive the Owner’s submission made at the hearing that the following mention found in the text box entitled *The Fibre35 Diet* indicates that the Owner’s shakes can properly be characterized as a meal replacement:

Whether you want to lose weight, or you just want to feel great, start every day the Fibre 35 way.



[23] Indeed, it is not that clear from this mention that the Owner's shakes can properly be used to replace a regular meal. Of note, The *Fibre35 Diet* refers to the Owner's shakes as a "power-packed shake" (in French: "*boisson énergétique*").

[24] Furthermore, while I acknowledge that the Owner's shakes may arguably fall under the broad categories of goods "natural health products" and "nutraceuticals", for the Owner to maintain its registration for such broader categories of goods, it would have to show use in association with such goods otherwise than by reference to precise goods ("protein and fibre supplements") [see *Stikeman Elliott LLP v Parmx Cheese Co Ltd*, 2015 TMOB 102 at para 18].

[25] Finally, with respect to the remaining two categories of goods "nutritional supplements" and "food supplements", I have difficulty differentiating between the two and the category of goods "dietary supplements". However, as the Owner made a distinction between the three terms in its statement of goods, and as Mr. Bedford reiterates that distinction at paragraph 9 of his affidavit without providing any explanation, I find Mr. Bedford's statement ambiguous.

[26] As such, I am not prepared to accept that evidence with respect to one good (the Owner's "shakes") can be used to maintain three separate registered goods ("dietary supplements", "food supplements", and "nutritional supplements"). While the evidenced "shakes" may fall within the scope of "food supplements" and "nutritional supplements", the fact is that the Owner has distinguished "food supplements" and "nutritional supplements" from "dietary supplements" in its registration. Per section 30 of the Act, a statement of goods must be in ordinary commercial terms. To the extent there is a difference between "food supplements" and "nutritional supplements" versus "dietary supplements", it was up to the Owner to explain what these differences are. It has not.

[27] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the following registered goods within the meaning of sections 4 and 45 of the Act:

Natural health products; nutritional supplements; food supplements; nutraceuticals; herbal supplements; vitamin supplements; mineral supplements; botanicals; herbal remedies; and meal replacements.

[28] Furthermore, the Owner has provided no evidence of special circumstances excusing the absence of use of the Mark.

DISPOSITION

[29] Accordingly, 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 amended to delete the following from the statement of goods:

Natural health products; nutritional supplements; food supplements; nutraceuticals; herbal supplements; vitamin supplements; mineral supplements; botanicals; herbal remedies; and meal replacements.

[30] The amended statement of goods will read as follows:

Dietary supplements for the treatment of low dietary fibre, protein supplementation, vitamin supplementation, mineral supplementation, enzyme supplementation, cholesterol lowering and maintenance, promoting weight loss, promoting weight management and the treatment of digestive disorders.

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Annie Robitaille  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

One of the labels referred to in Exhibit D

**The Fibre35 Diet**  
Formulé par Brenda Watson,  
N.D., C.C.N., T.C.

Un apport de 35 grammes de fibres par jour peut vous aider à atteindre et à maintenir votre poids optimal pour la vie. Le régime The Fibre35 Diet aide des aliments riches en fibres à un programme d'exercices réguliers à atteindre votre objectif. Cette délicieuse boisson fournie FITSMART contient 10 grammes de fibres et 20 grammes de protéines par portion. Les fibres et les protéines fournies par FITSMART contiennent des enzymes digestives qui faciliteront la digestion, l'absorption et l'assimilation des nutriments de cette boisson. Le régime The Fibre35 Diet est un supplément pour vous aider à atteindre votre objectif. Prenez FITSMART à chaque journée.

**Informations nutritionnelles importantes par portion**

Calories	140
Calories from Fat	10
Total Fat	1.5 g
Total Protein	20 g
Total Fiber	10 g
Total Sugar	10 g
Total Carbohydrate	20 g
Total Fat	1.5 g
Total Protein	20 g
Total Fiber	10 g
Total Sugar	10 g
Total Carbohydrate	20 g

**Composition de protéines de qualité**

Protéines	100%
Glucides	0%
Lipides	0%
Fibres	0%
Alcool	0%
Autres	0%

**Informations nutritionnelles importantes par 100 g**

Calories	140
Calories from Fat	10
Total Fat	1.5 g
Total Protein	20 g
Total Fiber	10 g
Total Sugar	10 g
Total Carbohydrate	20 g

**The Fibre35 Diet**  
Formulé par Brenda Watson,  
N.D., C.C.N., T.C.

Un apport de 35 grammes de fibres par jour peut vous aider à atteindre et à maintenir votre poids optimal pour la vie. Le régime The Fibre35 Diet aide des aliments riches en fibres à un programme d'exercices réguliers à atteindre votre objectif. Cette délicieuse boisson fournie FITSMART contient 10 grammes de fibres et 20 grammes de protéines par portion. Les fibres et les protéines fournies par FITSMART contiennent des enzymes digestives qui faciliteront la digestion, l'absorption et l'assimilation des nutriments de cette boisson. Le régime The Fibre35 Diet est un supplément pour vous aider à atteindre votre objectif. Prenez FITSMART à chaque journée.

**Informations nutritionnelles importantes par portion**

Calories	140
Calories from Fat	10
Total Fat	1.5 g
Total Protein	20 g
Total Fiber	10 g
Total Sugar	10 g
Total Carbohydrate	20 g

**Composition de protéines de qualité**

Protéines	100%
Glucides	0%
Lipides	0%
Fibres	0%
Alcool	0%
Autres	0%

**Informations nutritionnelles importantes par 100 g**

Calories	140
Calories from Fat	10
Total Fat	1.5 g
Total Protein	20 g
Total Fiber	10 g
Total Sugar	10 g
Total Carbohydrate	20 g

**The Fibre35 Diet**  
Delicious Protein & Fiber Supplement

Boisson fournie **FITSMART**  
Weight Management Formula • Formule de maîtrise du poids

**Shake**

20g of Protein - 10g of fiber  
20 g de protéines - 10 g de fibres

Net Wt. 641g  
14 Servings • Powder Mix  
Poids net 641 g  
14 portions • Mélange en poudre

**Chocolat Crème**  
Crème chocolat

**GREAT NEW TASTE • DÉLICIEUSE NOUVELLE SAVEUR**

**The Fibre35 Diet**  
Formulé par Brenda Watson,  
N.D., C.C.N., T.C.

Un apport de 35 grammes de fibres par jour peut vous aider à atteindre et à maintenir votre poids optimal pour la vie. Le régime The Fibre35 Diet aide des aliments riches en fibres à un programme d'exercices réguliers à atteindre votre objectif. Cette délicieuse boisson fournie FITSMART contient 10 grammes de fibres et 20 grammes de protéines par portion. Les fibres et les protéines fournies par FITSMART contiennent des enzymes digestives qui faciliteront la digestion, l'absorption et l'assimilation des nutriments de cette boisson. Le régime The Fibre35 Diet est un supplément pour vous aider à atteindre votre objectif. Prenez FITSMART à chaque journée.

**Informations nutritionnelles importantes par portion**

Calories	140
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Total Carbohydrate	20 g

**Composition de protéines de qualité**

Protéines	100%
Glucides	0%
Lipides	0%
Fibres	0%
Alcool	0%
Autres	0%

**Informations nutritionnelles importantes par 100 g**

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Calories from Fat	10
Total Fat	1.5 g
Total Protein	20 g
Total Fiber	10 g
Total Sugar	10 g
Total Carbohydrate	20 g

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www.fibre35diet.com

**THE FIBRE35 DIET**  
Formulé par Brenda Watson,  
N.D., C.C.N., T.C.

Un apport de 35 grammes de fibres par jour peut vous aider à atteindre et à maintenir votre poids optimal pour la vie. Le régime The Fibre35 Diet aide des aliments riches en fibres à un programme d'exercices réguliers à atteindre votre objectif. Cette délicieuse boisson fournie FITSMART contient 10 grammes de fibres et 20 grammes de protéines par portion. Les fibres et les protéines fournies par FITSMART contiennent des enzymes digestives qui faciliteront la digestion, l'absorption et l'assimilation des nutriments de cette boisson. Le régime The Fibre35 Diet est un supplément pour vous aider à atteindre votre objectif. Prenez FITSMART à chaque journée.

**Informations nutritionnelles importantes par portion**

Calories	140
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**Composition de protéines de qualité**

Protéines	100%
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**Informations nutritionnelles importantes par 100 g**

Calories	140
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**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE** 2017-12-04

**APPEARANCES**

Mark Edward Davies

FOR THE REGISTERED OWNER

Gabriel St-Laurent

FOR THE REQUESTING PARTY

**AGENTS OF RECORD**

Norton Rose Fulbright Canada LLP/S.E.N.C.R.L., s.r.l.

FOR THE REGISTERED OWNER

Robic

FOR THE REQUESTING PARTY