



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2017 TMOB 169

Date of Decision: 2017-12-13

IN THE MATTER OF A SECTION 45 PROCEEDING

Goldman Sloan Nash & Haber LLP

Requesting Party

and

AGT CLIC Foods Inc.

Registered Owner

**TMA490,653 for CLIC
EXCELLENCE LOGO DESSIN**

Registration

INTRODUCTION

[1] At the request of Goldman Sloan Nash & Haber LLP, the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on March 22, 2016 to AGT CLIC Foods Inc. (the Owner), the registered owner of registration No. TMA490,653 for the trade-mark CLIC EXCELLENCE LOGO DESSIN (the Mark), shown below:



[2] The registration includes a colour claim, as follows (translation): “The word clic is black in colour, the word excellence is black edged in gold, the five bars are, from left to right: red, gold, black, gold, red. The colours are claimed as a feature of the trade mark.”

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

Riz, fèves, lentilles, pois, maïs, farine, orge, légumes et céréales en conserves comme fèves, pois, lentilles, haricots, carottes, tomates, artichauts, noix, excluant tous les produits de poulet et de viande.

(English translation): Rice, beans, lentils, peas, corn, flour, barley, canned vegetables and cereals such as beans, peas, lentils, beans, carrots, tomatoes, artichokes, nuts, excluding all chicken and meat products.

[4] 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.

[5] In this case, the relevant period for showing use is March 22, 2013 to March 22, 2016.

[6] The relevant definition of “use” in association with goods is set out in section 4 of the Act as follows:

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.

[7] It is well established that mere assertions of 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)]. Although 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)], 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 [*John Labatt Ltd v Rainer Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[8] In response to the Registrar's notice, the Owner furnished the affidavit of Rami Matta, General Manager of the Owner, sworn on August 19, 2016 in Laval, Quebec. Only the Owner filed written representations; a hearing was not requested.

THE OWNER'S EVIDENCE

[9] In his affidavit, Mr. Matta explains that the Owner, together with related companies in the "AGT Foods group", does business under the trading name AGT Foods. He states that the Owner is involved in the sale of a variety of consumer food products using a variety of packaging formats, including products sold in association with the Mark.

[10] In particular, he attests that the Mark is used by the the Owner on the packaging of the products, as well as by selective display of the Mark on invoices and in product listings.

[11] With respect to the registered goods, Mr. Matta attests that the Owner has made sales of each of the registered goods in association with the Mark since April 2013. However, as described below, the supporting evidence in this case appears to be limited to "rice". In this respect, Mr. Matta attaches the following exhibits to his affidavit:

- Exhibit A is a 26-page table that Mr. Matta attests is the Owner's "current product listing". The table is organized by item number and product description. I note that, although the listing includes various "CLIC" products, the only "CLIC EXCELLENCE" product listed is "Clic Excellence Parboiled Rice 40 Lb".
- Exhibit B is a copy of AGT Food & Ingredients Inc.'s "Annual Information Form" for 2015. As described by Mr. Matta, the report outlines the corporate structure of the AGT Foods group of companies that includes the Owner.
- Exhibit C is a photograph of "CLIC Excellence Parboiled Rice" in its packaging. The Mark is clearly displayed on the front and back of the packaging.

- Exhibit D consists of seven invoices for sales of products to various Canadian food markets from October 2015 to March 2016. Mr. Matta explains that he has highlighted the lines on each invoice representing products “sold in packaging similar or identical to that shown in Exhibit C”. I note that on all seven invoices, “CLIC Excellence Parboiled Rice 40 Lb” is the only product highlighted. I also note that some of the other goods listed on the invoices refer to “CLIC”, such as “CLIC – MEDIUM COUSCOUS 10 KG” and “CLIC – Baby Lima Beans 12/2 LBS”. However, these goods are not highlighted, and there is no indication that they displayed the Mark as registered.

ANALYSIS

[12] In its representations, the Owner submits that it has furnished adequate and proper evidence of use of the Mark in Canada within the requisite three-year period, and has satisfied all of the evidentiary requirements of section 45 of the Act to demonstrate use.

[13] First, with respect to the registered goods “rice”, I accept that the exhibited packaging displaying the Mark in combination with evidence of sales during the relevant period of such packaged rice is sufficient to demonstrate use of the Mark within the meaning of sections 4 and 45 of the Act.

[14] With respect to the remaining goods, the Owner submits that there is “sufficient granularity” and “sufficient underlying commercial evidence to establish applicability across the category of Wares alleged”.

[15] As presented, however, the Exhibit A product listing and Exhibit D invoices indicate that the trade-mark associated with such goods is “CLIC”, rather than “CLIC EXCELLENCE” or the design Mark as registered. In this case, the Owner furnished no packaging for goods other than the exhibited rice packaging. Furthermore, Mr. Matta indicates that the specific goods sold in such packaging are highlighted in the exhibited invoices, and this highlighting is limited to “rice”.

[16] As such, I do not accept the evidence of packaging for the Owner’s rice product to be representative of the packaging used by the Owner for its other products. Accordingly, the issue

is whether display of “CLIC” in the exhibited product listing and invoices constitutes display of the Mark as registered.

[17] In this respect, it is well established that where the trade-mark as used deviates from the trade-mark as registered, the question to be asked is whether the trade-mark was used in such a way that it did not lose its identity and remained recognizable in spite of the differences between the form in which it was registered and the form in which it was used [*Canada (Registrar of Trade-marks) v Cie International pour l’informatique CII Honeywell Bull* (1985), 4 CPR (3d) 523 (FCA)]. In deciding this issue, one must look to see if, as a question of fact, the “dominant features” of the registered trade-mark have been preserved [*Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)].

[18] In my view, the words “CLIC” and “Excellence” in combination with the particular stripe design form the dominant feature of the design Mark as registered. This combination is lost in the Owner’s use of “CLIC” by itself in the invoices and product listing. As such, use of “CLIC” alone cannot be considered use of the registered Mark.

[19] As noted above, notwithstanding Mr. Matta’s assertion of use of the Mark in association with all of the registered goods, the Owner’s evidence is essentially limited to “rice”. Although representative evidence of use can be acceptable in a section 45 proceeding, given the insufficiencies in the evidence and absent examples of other goods’ packaging, I do not accept that it is clear, *prima facie*, that such packaging would also have displayed the Mark as registered.

[20] In view of all of the foregoing, I am only satisfied that the Owner has demonstrated use of the Mark in association with “rice” within the meaning of sections 4 and 45 of the Act. The registration will be amended accordingly.

DISPOSITION

[21] 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 “fèves, lentilles, pois, maïs, farine, orge, legumes et cereales en conserves comme feves,

pois, lentilles, haricots, carottes, tomates, artichauts, noix, excluant tous les produits de poulet et de viande” from the statement of goods.

[22] The amended statement of goods will read as follows: “Riz.”

Andrew Bene
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

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

No Hearing Held

AGENTS OF RECORD

Furman IP Law & Strategy PC

For the Registered Owner

Goldman Sloan Nash & Haber LLP

For the Requesting Party