



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2020 TMOB 28**

**Date of Decision: 2020-03-11**

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

**Croll & Co. Ltd.**

**Requesting Party**

**and**

**MiracleCorp Products**

**Registered Owner**

**TMA488,853 for QUIK KLOT**

**Registration**

INTRODUCTION

[1] At the request of Croll & Co. Ltd. (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 May 15, 2017, to MiracleCorp Products (the Owner), the registered owner of registration No. TMA488,853 for the trademark QUIK KLOT (the Mark).

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

Veterinary preparation - namely, styptic powder.

[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 trademark 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 May 15, 2014 to May 15, 2017.

[5] The relevant definition of use for goods is set out in section 4 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 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 each of the goods specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[7] In response to the Registrar's notice, the Owner furnished two affidavits of Patricia M. Weimer, sworn on August 21, 2017, and September 18, 2017, respectively. Both parties filed written representations and were represented at an oral hearing.

#### THE OWNER'S EVIDENCE

[8] In her first affidavit, Ms. Weimer states that she is the Chief Financial Officer and Treasurer of the Owner, a United States company. She states that the registered goods are an antihemorrhagic agent used to stop bleeding in dogs, cats, and birds. Ms. Weimer states that on October 25, 2010, the Owner acquired Gimborn Pet Specialities LLC (Gimborn), which continued to operate as a subsidiary of the Owner. She further explains that on December 15, 2015, Gimborn assigned its whole interest in the Mark to the Owner; this change in ownership was registered by the Canadian Intellectual Property Office on August 11, 2016.

[9] As Exhibit A, Ms. Weimer attaches a photograph that appears to show packaging displaying the Mark. She states that the photograph "is representative of how the Trademark was

used in association with the Registered Goods in Canada during the Material Period” [para 4]. I note that the packaging reads “Topical Styptic Powder” and also includes the words “Rich Health ®” and the code “DIN 02230699”. The Mark appears as follows:



[10] Ms. Weimer notes that “[t]he packaging is also marked with the Drug identification number 02230699” [para 5]. As Exhibit B, she attaches a printout from the Health Canada Drug Product Database showing product information for QUIK KLOT. The drug identification number is listed as 02230699, and the product is listed as having been “Marketed” as of November 17, 2015. The “Company” heading lists “MIRACLECORP PRODUCTS”. Ms. Weimer states that this printout was accessed on July 24, 2017.

[11] As to the normal course of trade, Ms. Weimer explains that the Owner’s veterinary and pet products are sold worldwide through independent retailers, major pet store chains, and national department stores. In particular, she states that the registered goods were sold to Walmart Canada stores during the relevant period. As Exhibit C, she attaches copies of invoices dated between May 2014 and October 2014 showing sales of “QUIK KLOT” to various Walmart Canada locations. In the top left corner of the invoices, “Gimborn Pet Specialities LLC” is listed along with an address. The invoices list the Owner under the heading “Remit To”, and a footnote reads “This invoice is governed by the MiracleCorp Terms and Conditions”.

[12] In her second affidavit, Ms. Weimer notes that in paragraph 11 of her first affidavit, the Mark was identified as QUIK CLOT rather than QUIK KLOT. She attests that at all times in her first affidavit, she was referring to use and advertisement of the Mark. I have no difficulty concluding that the appearance of the words “QUIK CLOT” in Ms. Weimer’s first affidavit was a typographical error and that she was referring to the Mark.

[13] As a preliminary matter, I note that in its written representations, the Requesting Party includes and refers to facts not in evidence relating to the trademark “RICH HEALTH”. Pursuant to sections 45(1) and (2) of the Act, I can only consider evidence submitted in the form of an affidavit or statutory declaration filed by the Owner. Accordingly, I cannot consider these alleged facts.

#### ANALYSIS

[14] The Requesting Party raises a number of issues with the Owner’s evidence which can be generally categorized as follows: first, that the trademarks displayed on materials shown in Exhibit A do not constitute the Mark as registered; second, that the evidence shows sales by a party other than the duly registered owner of the Mark at the relevant time; and third, that the evidence is ambiguous and as such does not establish use of the Mark in association with transfers in the normal course of trade. Each issue will be addressed in turn.

#### Display of the Mark

[15] The Requesting Party notes that the Exhibit A photograph displays the Mark in the form of a design mark, and submits that the Owner is therefore seeking to support a word mark registration with evidence of a design mark. However, use of a word mark in any stylized form and in any colour is considered use of the registered word mark so long as the public, as a matter of first impression, would perceive the trademark *per se* as being used [*Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB); *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)]. In the present case, I find that the word mark retains its identity and remains recognizable, given that the word mark is simply presented inside a red circle with no additional textual material.

[16] The Requesting Party also notes that the Exhibit A packaging displays a second trademark and does not identify the Owner; however, nothing prohibits the appearance of multiple trademarks on a single product [*AW Allen Ltd v Canada (Registrar of Trade Marks)* (1985), 6 CPR (3d) 270 (FCTD) at para 9], and the Act does not require a registered owner’s name to appear in association with a trademark [*Vogue Brassiere Inc v Sim & McBurney* (2000), 5 CPR (4th) 537 at para 36].

### Ownership

[17] With respect to the issue of ownership, the Requesting Party submits that the materials attached as Exhibits B and C identify the wrong owner, and are therefore of no assistance to establishing use of the Mark. In this respect, the Requesting Party notes that Ms. Weimer's affidavit states that Gimborn assigned its interest in the Mark to the Owner on December 15, 2015, whereas the Exhibit B information sheet shows the "current status date" as November 17, 2015, yet identifies the owner of the Mark as the Owner rather than Gimborn. Further, with respect to the Exhibit C invoices from 2014, the Requesting Party submits that the appearance of the Owner's name under the "Remit To" heading and in the footnote points to the source of the goods being the Owner, rather than Gimborn, the owner of the Mark at the time.

[18] For the purposes of this proceeding, I accept that the exhibited Health Canada drug information sheet simply confirms that the drug identification number listed on the Exhibit A packaging corresponds with the registered goods. In view of the affiant's clear sworn statements, I give little weight to the fact that the "company" heading on the information sheet refers to the Owner, rather than Gimborn. In any event, I note that if this "company" heading indicates ownership of the Mark and the registered goods, it would have been correct on the date that Ms. Weimer accessed the information sheet. With respect to the invoices, I note that Gimborn's name and corporate information appear in the top left corner of the invoices, consistent with Gimborn's status as registered owner of the Mark at the time the invoices were issued. The appearance of the Owner's name in the "Remit To" heading of the invoice is therefore of no consequence; as stated by the Registrar in *Le Centre Vu Lebel & Desroches Inc v SunVu Sunglasses & Optics*, 2017 TMOB 138, "the Owner is free to set what terms it wishes regarding the manner or party to whom customers should make payment" [para 13].

### Ambiguities in the Evidence

[19] The Requesting Party made submissions with respect to alleged ambiguities in each of Exhibits A, B, and C, such that use of the Mark has not been established. With respect to Exhibit A, the Requesting Party argues that there is no information as to whether the exhibited image shows the packaging of the product, an information sheet that accompanied the product at the time of sale, or merely a fact sheet for internal use. Therefore, the Requesting Party submits

that it is ambiguous as to whether the material shown in Exhibit A would have come to the attention of the purchaser at the time of purchase, and such ambiguity must be resolved against the Owner.

[20] However, it is clear that Ms. Weimer's reference to "packaging" in paragraph 5 of her affidavit refers to Exhibit A, and she clearly states that the image is representative of how the Mark was used in association with the registered goods in Canada during the relevant period. Ms. Weimer's statements in this regard are not bare assertions, but sworn statements of fact which are to be taken at face value in section 45 proceedings [*Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para 25]. Accordingly, I accept that the packaging shown in Exhibit A is representative of how the registered goods were sold in Canada during the relevant period.

[21] With respect to Exhibit B, the Requesting Party submits that the Health Canada drug information sheet merely shows that the registered goods were "marketed", rather than transferred in the normal course of trade. However, as noted above, I accept the information sheet as simply providing information about the registered goods and not for the purposes of showing whether transfers occurred in the normal course of trade. In this respect, the indication of "marketed" is consistent with the evidence of transfers shown in Exhibit C.

[22] With respect to the Exhibit C invoices, the Requesting Party submits that the lack of product information accompanying the "QUIK KLOT" listing creates ambiguity as to what goods are reflected by that listing, and that such ambiguity must be resolved against the Owner. In any event, the Requesting Party notes that there is no indication that the invoices accompanied the goods at the time of transfer, and submits that they therefore do not support a finding of use in association with the registered goods.

[23] However, Ms. Weimer is clear in her affidavit that the appearance of the words "QUIK KLOT" on the invoices refer to the registered goods, and that the invoices reflect sales by Gimborn to Walmart stores in Canada. Finally, it is not relevant whether the invoices accompanied the registered goods at the time of transfer as the appearance of the Mark on the packaging of those goods is sufficient to establish notice of association between the Mark and the goods.

[24] In sum, Ms. Weimer has provided sample packaging for the registered goods displaying the Mark, and has stated that such packaging is representative of how the Mark was used in association with the registered goods in Canada during the relevant period. Further, she has provided representative invoices showing sales during the relevant period by the Owner's predecessor in title, and has stated that these reflect sales of the registered goods.

[25] As such, I am satisfied that the Owner has established use of the Mark in association with the registered goods within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[26] 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.

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

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

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**HEARING DATE** 2020-01-27

**APPEARANCES**

Martha Savoy For the Registered Owner

Amy Croll For the Requesting Party

**AGENTS OF RECORD**

Gowling WLG (Canada) LLP For the Registered Owner

Amy Croll For the Requesting Party