



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 101

Date of Decision: 2022-05-19

IN THE MATTER OF AN OPPOSITION

Kenover Marketing Corp.

Opponent

and

**Konya Seker Sanayi Ve Ticaret
Anonim Sirketi**

Applicant

1,762,696 for Torku Tam & Design

Application

INTRODUCTION

[1] Konya Seker Sanayi Ve Ticaret Anonim Sirketi (the Applicant) has filed application No. 1,762,696 (the Application) for the trademark Torku Tam & Design (the Mark), depicted below.

Torku Tam

[2] The Application was filed on January 11, 2016 based on proposed use of the Mark in Canada in association with the goods listed in Schedule "A" to this decision.

[3] The Application was advertised for opposition purposes in the *Trademarks Journal* on April 5, 2017. On September 1, 2017, R.A.B. Food Group, LLC filed a statement of opposition against the Application pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). Leave was subsequently granted to amend the statement of opposition to identify Kenover Marketing Corp. as the Opponent in this proceeding; Kenover Marketing Corp. being the successor in title and current owner of the two trademark registrations relied on in the statement of opposition. For ease of reference in this decision, I will refer to R.A.B. Food Group, LLC and Kenover Marketing Corp. collectively as “the Opponent”.

[4] I note that the Act was amended on June 17, 2019, and pursuant to section 70 of the Act, the grounds of opposition in this proceeding will be assessed based on the Act as it read prior to June 17, 2019.

[5] The Opponent raises grounds of opposition based on registrability under section 12(1)(d), entitlement under section 16(3)(a) and (b), distinctiveness under section 2, and non-compliance with sections 30(e) and (i) of the Act. For the grounds of opposition which are based on an alleged likelihood of confusion, the Opponent relies on its registered trademarks “TAM TAM” (registration No. UCA20652 in association with crackers and biscuits) and TAM TAMS (registration No. TMA814,203 in association with crackers).

[6] Both parties filed evidence which is discussed below. Only the Opponent filed written representations. No hearing was held.

[7] For the reasons that follow, the Application is refused.

EVIDENCE

Opponent’s evidence

[8] The Opponent filed the affidavit of Tom Keogh sworn March 8, 2018 (the Keogh Affidavit). Mr. Keogh was not cross-examined.

[9] Mr. Keogh is the CFO of R.A.B. Food Group, LLC, trading as the Manischewitz Company. He attaches as Schedule A to his affidavit a copy of the particulars of registration

UCA20652 for the trademark “TAM TAM”, which was registered in 1945. Schedule B to his affidavit is described as “[...] a compilation of product packaging which displays the trademark prominently on the front panel.” Schedule B appears to be a printout of images from an online image search, which includes boxes of crackers bearing the trademark TAM TAM or TAM TAMS. Mr. Keogh states that “[t]his is representative of the way my company has used the trademark on product sold in Canada for decades.”

[10] Mr. Keogh describes the Opponent’s products in paragraphs 5 and 6 of his affidavit, which are reproduced in their entirety below:

5. Attached as **Schedule C** is an extract from Wikipedia which I have read and can verify as providing an accurate description of my company: “It is the world’s largest matzo manufacturer and one of America’s largest kosher brands.” As set out in the extract, “In the 1930s, in order to produce their products all year round, the company created Tam-Tam crackers, which are little hexagonal matzos, according to a recent book *Manischewitz: The Matzo Family*, written by the founder’s great-granddaughter, Laura Manischewitz Alpern (though the modern Tam Tam is quite different from matzo).”
6. The cracker is a staple culinary, cultural symbol, enjoyed on Passover and all year round, in homes, schools, hospitals and seniors’ homes. It is a standalone and an ingredient of cultural recipes such as “mock kishka,” as noted at cooks.com. It is featured in recipes displayed online e.g. at Pinterest, and sold online through Amazon.

[11] At paragraph 7 of his affidavit, Mr. Keogh states that “[i]n Canada, the TAM TAM product has been sold at all material times, prior to the date of opposition and since, through leading national retail outlets, including Walmart, Loblaws, Metro and Shoppers, in addition to specialty kosher food stores.” Schedule D to the affidavit includes annual sales figures for the product in Canada for the years 2011 to 2017, with annual sales during that period ranging from \$85,874 to \$188,274. Mr. Keogh specifies that these figures are only a partial listing of product sold through Canadian retail stores and do not include the figures from online sales.

Applicant’s evidence

[12] The Applicant filed the affidavit of Ali Tunçel sworn April 1, 2019 (the Tunçel Affidavit). Mr. Tunçel was not cross-examined.

[13] Mr. Tunçel is the General Manager of the Applicant. He describes the Applicant as an agricultural industrial corporation that is the 31st largest company in Turkey. He states that the Applicant launched the TORKU brand in Turkey in 2007 and that the brand “encompasses a very large range and variety of natural food products, from bakery products to chocolate covered products, candy, frozen potatoes to dairy and meat products, bulgur to fruit juice and vinegar to turnip juice.”

[14] Mr. Tunçel describes that there are a variety of TORKU-formed trademarks, including TORKU KREMALI, TORKU FAVORIMO, TORKU DELIDOLU, covering different types of biscuits. Examples of the packaging for these products are attached as Exhibit A-3 to his affidavit.

[15] Mr. Tunçel describes that within the TORKU family of trademarks, the trademark TORKU TAM refers to specific lines of products. Exhibit A-4 is described as a compilation of images showing product packaging of a wide range of biscuits featuring the trademark TORKU TAM. Exhibit A-6 is described as a photograph displaying biscuits packaging bearing the TORKU TAM trademark, as available on store shelves in Canada. The TORKU TAM biscuits shown in these images appear to be in the nature of pre-packaged cookies. In all of the images in Exhibits A-4 and A-6, the word “TAM” is written in a different font than the word “TORKU” on the product packaging, and in nearly all instances the font used for “TAM” is larger than that for “TORKU”. An example from Exhibit A-6 to the Tunçel Affidavit is shown below:



[16] Mr. Tunçel states that sales for the TORKU TAM products in Canada were \$100,000 USD in 2018, and he states that “the products are mainly sold in the Turkish markets in

Canada”. Exhibit A-7 is described as a sales report showing the TORKU TAM products sold in Canada since January 13, 2016 to the Canadian corporation “The Golden Bridge Food Inc.” Mr. Tunçel notes that this sales report is not representative of the entire sales made in Canada.

[17] Mr. Tunçel states that to the date of his affidavit, no instances of confusion in the Canadian marketplace with the opponent’s trademark TAM TAM have been reported.

ONUS AND MATERIAL DATES

[18] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the Application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[19] The material dates for the grounds of opposition are as follows:

- Section 38(2)(a) / 30 – the filing date of the Application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- Section 38(2)(b) / 12(1)(d) – the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)];
- Section 38(2)(c) / 16(3)(a) and (b) – the filing date of the Application;
- Sections 38(2)(d) and 2 - the filing date of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317 (FC)].

GROUND OF OPPOSITION SUMMARILY REJECTED

Section 30(e) ground of opposition

[20] With this ground of opposition, the Opponent alleges that the Applicant did not have a *bona fide* intention to use the Mark in Canada in association with all of the goods, or alternatively that prior to the filing date the Applicant had already used the Mark in Canada.

[21] There is no evidence of record to support either aspect of this ground of opposition. First, there is no evidence to suggest that the Applicant did not have the requisite intention to use the Mark. Second, there is no evidence to suggest that the Applicant was already using the Mark when it filed the Application on January 11, 2016. On this latter point, the earliest evidence of Canadian sales by the Applicant set out in the Tunçel Affidavit are dated January 13, 2016.

[22] In view of the above, the Opponent has not met its initial evidential burden and the section 30(e) ground of opposition is rejected.

Section 30(i) ground of opposition

[23] With this ground of opposition, the Opponent alleges that the Applicant could not have been satisfied of its entitlement to use the Mark because it knew of the Opponent's registered trademarks.

[24] Section 30(i) of the Act requires an applicant to include a statement in the application that the applicant is satisfied that it is entitled to use the trademark in Canada. Where an applicant has provided the required statement, the jurisprudence suggests that non-compliance with section 30(i) can be found only where there are exceptional circumstances that render the applicant's statement untrue, such as evidence of bad faith [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. Mere knowledge of the existence of an opponent's trademark is not sufficient to support a section 30(i) ground of opposition [see *Woot Inc v WootRestaurants Inc*, 2012 TMOB 197].

[25] In the present case, the Application contains the requisite statement and there is no evidence that this is an exceptional case. Accordingly, the section 30(i) ground of opposition is rejected.

Section 16(3)(b) ground of opposition

[26] The Opponent has not identified any applications on which it could rely for the purposes of a section 16(3)(b) ground of opposition. The two registrations on which the Opponent relies in this proceeding were both registered long before the advertisement of the Applicant's Application, and thus the corresponding applications cannot form the basis of a section 16(3)(b) ground of opposition [see section 16(4) of the Act as it read prior to June 17, 2019]. Therefore, the section 16(3)(b) ground is rejected.

REMAINING GROUNDS OF OPPOSITION

Section 12(1)(d) ground of opposition

[27] The Opponent pleads that the Mark is not registrable because it is confusing with the Opponent's registered trademarks "TAM TAM" (UCA20652) and TAM TAMS (TMA814,203). I have exercised my discretion to check the Register and confirm that these two registrations remain extant [see *Quaker Oats Co Ltd of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial evidential burden with respect to this ground of opposition. As a result, the Applicant bears the legal burden of demonstrating on a balance of probabilities that there is no likelihood of confusion between the Mark and either of the Opponent's registered trademarks.

[28] In considering the issue of confusion, for ease of reference I will focus my analysis on the Opponent's trademark "TAM TAM" (UCA20652). However, in my view, the confusion analysis is essentially identical when considering the Opponent's other registered trademark TAM TAMS (TMA814,203). Further, I consider the Opponent's evidence to have demonstrated use of both of its registered trademarks.

[29] Also, I note that the registered trademark “TAM TAM” was the subject of consideration by the Supreme Court of Canada in *Gula v B Manischewitz Co* (1947), 8 CPR 103 (SCC) and nothing in this decision is intended to depart in any way from the findings in that case.

Test for confusion

[30] The test for confusion is set out in section 6(2) of the Act which provides that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them.

[31] These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361 at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

[32] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant’s mark, at a time when they have no more than an imperfect recollection of the opponent’s trademark, and do not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

Inherent distinctiveness of the trademarks and the extent to which they have become known

[33] The Opponent's trademark "TAM TAM" has a reasonable degree of inherent distinctiveness, as it has no descriptive connotation in English or French in relation to the Opponent's goods. In the *Canadian Oxford Dictionary*, 2nd Ed., the word "tam" is defined as "*noun* (in full tam-o'-shanter) a round knitted or cloth cap of Scottish origin fitting closely around the brows but large and full above". In that same dictionary, the word "tam-tam" is defined as "*noun* a large metal gong" [see *Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 (TMOB) at para 29 for the principle that the Registrar may take judicial notice of dictionary definitions]. Neither of these definitions is descriptive of the goods in issue.

[34] The Applicant's Mark is similarly inherently distinctive, as neither component of the Mark is descriptive in English or French in association with the Applicant's goods. I note that the Application includes the following translation: "the English translation of TORQU is 'Torque', and the English translation of TAM is 'Complete'." However, I have no evidence of record to suggest that Canadians would understand the Mark to have that meaning, and in any event it is not descriptive of the Applicant's goods.

[35] With respect to the extent to which the parties' trademarks have become known, in my view, this weighs in favour of the Opponent. While both parties have provided evidence of use of their respective trademarks in Canada, the Opponent has provided evidence of more significant sales in association with its trademark over a longer period of time and in a wider variety of stores than has the Applicant.

[36] In view of the above, when considering both the inherent distinctiveness of the trademarks and the extent to which they have become known, on balance, this factor favours the Opponent.

Length of time the trademarks have been in use

[37] The Opponent's evidence includes sales figures in Canada in association with the Opponent's trademark dating back to 2011. The Applicant's evidence includes evidence of sales in Canada in association with the Mark since 2016. Consequently, this factor favours the Opponent.

Nature of the goods, services or business; and the nature of the trade

[38] The Opponent's registration covers the goods "crackers", and the Opponent's evidence of use of its trademark is consistent with that description.

[39] The Application includes multiple goods that either directly overlap with the Opponent's goods or are close in character, including "Bread and pastry; [...] biscuits; chocolate wafers; snack crackers". I note that the Applicant's evidence of use of the Mark in Canada is in association with "biscuits". The Application also includes a variety of other food and beverage goods that are less closely related to crackers.

[40] With respect to the nature of the trade, the evidence suggests that thus far the parties' goods have been sold in different types of stores in Canada, with the Opponent selling in national retail outlets (such as Walmart and Loblaws) and specialty kosher food stores, and the Applicant selling mainly in Turkish markets in Canada. However, there is nothing in the description of goods in the Application that would necessarily limit the Applicant's channels of trade, and indeed the goods described in the Application are of a nature that they could well be sold in the same types of stores, and potentially the same sections of stores, as the Opponent's goods.

Overall, I consider the nature of the goods and trade factors to favour the Opponent.

Degree of resemblance

[41] When assessing the degree of resemblance, it is preferable to start by considering whether there is an aspect of the trademark that is "particularly striking or unique" [*Masterpiece, supra*, at paragraph 64]. In my view, the striking or unique aspect of the Opponent's trademark is the word "TAM", given that it has no descriptive connotation in association with the Opponent's goods, and its duplication in the trademark heightens its impact.

[42] The Applicant's Mark includes the word "TAM" in its entirety, and consequently in my view there is a meaningful degree of resemblance between the parties' trademarks. While of course the first word "TORKU" in the Mark provides a different appearance and sound, the Applicant's Mark nevertheless has adopted the key aspect of the Opponent's trademark.

[43] On balance, I consider the degree of resemblance factor to slightly favour the Opponent.

[44] As an aside, I note that while the Mark is characterized in the Application as a design trademark, the Mark contains no design elements beyond the basic font in which it is written. In the Applicant's evidence of its use of the Mark, the word "TAM" is given significant prominence on the product packaging, being depicted in a different and in most cases larger font than the word "TORKU". This reinforces my views on the degree of resemblance, but I note that I do not consider it dispositive and my conclusion regarding the degree of resemblance would have been the same even in the absence of the Applicant's evidence of its use of the Mark.

Surrounding circumstance - concurrent use

[45] The Applicant's evidence indicates that there have been no instances of confusion in the Canadian marketplace with the Opponent's trademark.

[46] Evidence of instances of actual confusion is not required in order to demonstrate a likelihood of confusion. However, concurrent use of two trademarks without such instances of actual confusion is a surrounding circumstance which can suggest an absence of a likelihood of confusion, depending on the specific nature and duration of that concurrent use [see *Christian Dior SA v Dion Neckwear Ltd*, 2002 FCA 29, 20 CPR (4th) 155 (FCA) at para 19; see also *Maple Leaf Consumer Foods Inc v Kelbro Enterprises Inc*, 2012 TMOB 28, 99 CPR (4th) 424].

[47] In the present case, the absence of evidence of actual confusion weighs in the Applicant's favour; however, I do not attribute much weight to this factor, because the evidence suggests that thus far the parties' channels of trade have not overlapped to any significant degree [for a similar analysis, see *Alpha Sportswear Ltd v Alpha Industries Inc* 2004, 39 CPR (4th) 87 (TMOB) at para 31]. In particular, the Tunçel Affidavit states that the Applicant's products "are mainly sold in the Turkish markets in Canada", whereas the Keogh Affidavit states that the Opponent's products are sold in national retail stores including Walmart, Loblaws, Metro and Shoppers, in addition to specialty kosher food stores.

Conclusion regarding the Section 12(1)(d) ground

[48] Having considered all of the surrounding circumstances, and in particular the degree of resemblance between the trademarks and the extent to which the Opponent's trademark has become known, I find that at best for the Applicant, the probability of confusion between the Mark and the Opponent's trademark "TAM TAM" is evenly balanced between a finding of confusion and no confusion. As the onus is on the Applicant to demonstrate on a balance of probabilities that there is no reasonable likelihood of confusion between the trademarks, I must therefore find against the Applicant.

[49] Consequently, the section 12(1)(d) ground of opposition succeeds in respect of the Opponent's registration No. UCA20652. For essentially identical reasons, I find this ground of opposition also succeeds in respect of the Opponent's registration No. TMA814,203.

Section 16(3)(a) ground of opposition

[50] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark because it is confusing with the Opponent's trademarks "TAM TAM" and TAM TAMS that have been previously used in Canada.

[51] The Opponent has met its initial evidential burden by way of its evidence demonstrating use of its trademarks since well prior to the material date for this ground of opposition (namely, January 11, 2016).

[52] In my view, the earlier material date for the section 16(3)(a) ground of opposition does not alter to any meaningful degree the confusion analysis set out above for the section 12(1)(d) ground of opposition. Thus, the Applicant has not met its legal burden to demonstrate no likelihood of confusion as of the material date for this non-entitlement ground, and the section 16(3)(a) ground of opposition is also successful.

Section 2 ground of opposition

[53] As I have already found in the Opponent's favour in respect of the section 12(1)(d) and 16(3)(a) grounds of opposition, I will refrain from addressing the section 2 ground of opposition.

DISPOSITION

[54] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the Application pursuant to section 38(12) of the Act.

Timothy Stevenson
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Application No. 1,762,696 for Torku Tam & Design

Goods:

(1) Meat; fish; poultry; game; meat extracts; broth; prepared meat; frozen meat; dried meat; fried meat; meat jelly; meat juice; milk and milk products, namely milk, UHT milk, cheese, white cheese, cheese made of goat milk, cream cheese, yoghurt, ayran (drink based on yoghurt), dairy cream, milk powder, milk beverages containing fruits; instant soup; preparations for making soup; soup; edible oils and edible fats; butter; margarine; peanut butter; chocolate nut butter; hazelnut paste; tahini (sesame seed paste); jams; marmalades; fruit jellies for food; eggs; powdered eggs; potato chips; potato flakes.

(2) Bread and pastry; bakery products, namely sweet bakery desserts, chocolate confectionery; honey; royal jelly for human consumption; propolis for human consumption; food flavourings; vanilla flavourings; salad sauces; fruit sauces; tomato sauce; barbecue sauce; cheese sauce; chocolate sauce; dressings for salad; hot sauce; pasta sauce; soya sauce; baking powder; yeast extracts for food; spices; flour for food; semolina; corn starch for food; rice; granulated sugar; cube sugar; powdered sugar; brown sugar; white sugar; tea; iced tea; fruit-based confectionery; sugar confectionery; chocolates; candies; biscuits; chocolate wafers; snack crackers; molasses syrup for food; cocoa; non-alcoholic cocoa-based beverages; coffee; non-alcoholic coffee-based beverages; non-alcoholic chocolate-based beverages; pasta; ravioli; noodles; dough; waffles; chewing gum; edible ices; cooking salt; processed cereals; processed grains for eating; crushed barley; crushed oats.

(3) Beer; beer wort; mineral water; spring water; table water; soda water; tonic water; fruit drinks and fruit juices, namely apple juice, grape juice; vegetable juices, namely turnip juice, tomato juice; syrups for the preparation of fruit juices; powder used in the preparation of fruit juices; soft drinks; carbonated soft drinks; soda pops; lemonades.

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

HEARING DATE: No Hearing Held

AGENTS OF RECORD

BLANEY MCMURTRY LLP

For the Opponent

BENOÎT & CÔTÉ INC.

For the Applicant