



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 202

Date of Decision: 2023-11-30

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Polyflor Limited

Registered Owner: Inkster Park Millwork Ltd.,

Registration: TMA489,477 for RIGID-LOC

INTRODUCTION

[1] This is a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA489,477 for the trademark RIGID-LOC (the Mark) registered in association with the following Goods:

(1) Building materials namely: window systems namely; window sills, window jambs, brick mould, jamb extensions, sash and other window frame members, blind stops, mullion, transoms, nailing flanges, muntin bars, window grilles, hardware items namely cam locks and roto gears, screens, glass and glazing systems, weather strip, caulking and other sealants, cladding, window blinds and components thereof, door systems namely: sills, thresholds, jambs, brick mould, jamb extensions, astragals, mullions, transoms, door frame components, door panels, glass and glazing systems, blind stops, nailing flanges, door sweeps, weather-strip, caulking, cladding, handles, locks, hinges, strikers components thereof; moulding systems, namely: casings, baseboards, door stops, window

stops, glazing stops, crown moulding, panel moulding, corner mouldings, jamb profiles, sill profiles, brick mould, corner blocks, plinth blocks.

[2] For the following reasons, the registration will be maintained with only the goods: Building materials namely: window systems namely; window jambs, brick mould, jamb extensions, door systems namely: jambs, brick mould, jamb extensions; moulding systems, namely: jamb profiles, brick mould.

THE PROCEEDING

[3] At the request of Polyflor Limited (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on March 8, 2022 to the registered owner of the Mark, Inkster Park Millwork Ltd., (the Owner).

[4] The notice required the Owner to show whether the Mark was used in Canada in association with the Goods 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 use. The relevant period for showing use is March 8, 2019 to March 8, 2022 (the Relevant Period). In the absence of use, the registration is liable to be expunged, unless the absence of use is due to special circumstances.

[5] The relevant definition of use is set out in section 4(1) of the Act:

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] 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. The evidence in a section 45 proceeding need not be perfect; the Owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act. This burden of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184].

[7] In response to the Registrar's notice, the Owner furnished the affidavit of Gary Glowa. Both parties submitted written representations. No hearing was held.

THE OWNER'S EVIDENCE

[8] Mr. Glowa is the President, a director, and a major shareholder of the Owner (para 1). Mr. Glowa explains that the Owner has developed many innovative products and manufacturing processes, all within the window, door, and moulding industries. The Owner uses the Mark for its family of fastening and locking systems for window systems, door systems, and moulding systems (para 3). The Owner's customers are dealers and their retail customers, wholesalers and manufacturers (para 7). The Owner's business is described below (Exhibit B):

Inkster Park Millwork products are sold through a dealer network that looks after product measurements, order specifications, price quotations, sales and installation. Their new software allows customers to work with a dealer in their own home to select the right door configurations to suit their needs and taste, from a menu of over 5,000 possible options. Customers can see their choices and have them priced right on the spot.

Inkster Park has a reputation for producing complex/complicated entrance door configurations of very high quality, including: single doors, doors with sidelights, transoms, garden doors, terrace doors, as well as other multi-door configurations.

[9] Mr. Glowa's evidence shows the Mark is on product feature sheets (Exhibit A), is on display during factory and showroom visits by customers (para 12), is featured in a magazine article which is available to customers (Exhibit B), on the Owner's website (Exhibit C), and letterhead (Exhibit D). Mr. Glowa's evidence shows that the Mark appears on bow tie fasteners, as shown below, which are used in brick mould and jamb products (paras 16, 18 and Exhibit E). Because the Owner's brick mould and jamb would not be seen once installed, the Mark is not physically visible to end consumers (para 18).



For the remainder of the Goods, Mr. Glowa's evidence includes photographs of them and, in some cases schematics. The Mark is not featured on any of the remaining Goods. The Owner's evidence is that the product feature pages displaying the Mark have been distributed to customers along with the Goods consistently and continuously since December 18, 1997 (para 12, Exhibit A).

[10] The Owner's evidence does not include any sales figures, sales volumes or invoices supporting its use of the Mark in association with the Goods. Mr. Glowa's evidence, however, includes that brick mould and jamb products have been sold "consistently and continuously" in association with the Mark since 2004 (para 18). For the remainder of the Goods, Mr. Glowa describes the Owner as having "used" or "consistently and continuously used" or "consistently or continuously utilized" the Mark in association with them.

ANALYSIS AND REASONS FOR DECISION

[11] The Requesting Party submits that the evidence is insufficient to maintain the registration. While the Requesting Party acknowledges that there is an abundance of promotional materials, website screenshots, schematics and photographs, it submits that the Registrant has not provided any invoices, sales figures, or the like to evidence a normal commercial transaction supporting bona fide use of the Mark in the normal course of trade.

Evidence is sufficient to show use with brick mould and jamb products

[12] The Owner's evidence is sufficient for it to meet its burden of establishing a prima facie case of use of the Mark in association with Building materials namely: window systems namely; window jambs, brick mould, jamb extensions, door systems namely:

jamb, brick mould, jamb extensions; moulding systems, namely: jamb profiles, brick mould.

[13] The Owner's evidence shows that the trademark RIGID-LOC is marked on the bow tie fasteners used in brick mould and jamb (Exhibit E). While I acknowledge that end consumers cannot see the bow tie fasteners once the products are installed, the fasteners and the RIGID-LOC trademark may be visible at the time of transfer to dealers and wholesalers who resell the products. Importantly, the trademark otherwise comes to the attention of purchasers both during the manufacturing process and is on product feature sheets which accompany the goods (para 12, Exhibit A). One example included in Exhibit A is shown below:



[14] Finally, while the Opponent's evidence does not include sales figures, Mr. Glowa attests that the Owner has consistently and continuously sold RIGID-LOC branded brick mould and jamb products in association with the Mark since 2004 to its customers, which he identifies as being across Canada (paras 7, 18). As such, the registration will be maintained with respect to: Building materials namely: window systems namely: window jambs, brick mould, jamb extensions, door systems namely: jambs, brick mould, jamb extensions; moulding systems, namely: jamb profiles, brick mould.

Evidence is insufficient to show use with the remaining goods

[15] The Owner's evidence is insufficient to show use of the Mark in accordance with section 4(1) of the Act for the remaining goods. In *Syntex Inc v Apotex Inc* (1984), 1 CPR (3d) 145 (FCA), Mr. Justice Stone explains (my emphasis):

Use of a trade mark is deemed to have occurred if at the time property in or possession of the wares is transferred, in the normal course of trade, it is "marked on the wares themselves or on the packages in which they are distributed". The mark thus may come to the attention of the transferee in a direct way at the time of transfer which is the critical point in time. Similarly, for there to be a deemed use, notice of any other manner of association is likewise to be given at that same point in time.

[16] With respect to the remaining goods there is no evidence that the trademark is marked on the goods themselves or the packaging in which the goods are distributed for installation in a way which is visible to consumers. Furthermore, there is no evidence that the Mark is associated with the remaining goods in the product features sheets at Exhibit A which the Owner identifies as accompanying the goods. The product feature sheets only reference the Mark in association with the bow-tie fasteners for the brick mould. The Owner has failed to evidence that the Mark "comes to the attention of the transferee in a direct way at the time of transfer, which is the critical point in time" for the remaining goods.

[17] Finally, the Owner has not provided evidence of special circumstances which would excuse non-use. "Special circumstances" include as a requirement that non-use of the mark was due to circumstances beyond an owner's control meaning "circumstances that are unusual, uncommon or exceptional" [*John Labatt Ltd v Cotton Club Bottling Co* (1976), 25 CPR (2d) 115 (FCTD)]. While the Owner submits that in its industry, it would not be practical to display a brand on the components of a finished door or window, section 4(1) of the Act contemplates such situations and allows for use so long as a trademark "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". In this case, the Owner has not shown this for the remaining goods in the registration. The fact that it has not done so is in its control and does not result from circumstances which are unusual, uncommon or exceptional. As such, the registration will be amended to delete the goods other than Building materials namely: window systems namely; window jambs, brick mould, jamb extensions, door systems namely: jambs, brick mould, jamb extensions; moulding systems, namely: jamb profiles, brick mould.

DISPOSITION

[18] 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 goods in strikeout below. The registration will now read: Building materials namely: window systems namely; window jambs, brick mould, jamb extensions, door systems namely: jambs, brick mould, jamb extensions; moulding systems, namely: jamb profiles, brick mould.

(1) Building materials namely: window systems namely; **window sills**, window jambs, brick mould, jamb extensions, ~~sash and other window frame members, blind stops, mullion, transoms, nailing flanges, muntin bars, window grilles, hardware items namely cam locks and roto gears, screens, glass and glazing systems, weather strip, caulking and other sealants, cladding, window blinds and components thereof~~, door systems namely: **sills, thresholds**, jambs, brick mould, jamb extensions, **astragals, mullions, transoms, door frame components, door panels, glass and glazing systems, blind stops, nailing flanges, door sweeps, weather strip, caulking, cladding, handles, locks, hinges, strikers components thereof**; moulding systems, namely: **casings, baseboards, door stops, window stops, glazing stops, crown moulding, panel moulding, corner mouldings**, jamb profiles, **sill profiles**, brick mould ~~corner blocks, plinth blocks~~.

Natalie de Paulsen
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: BENNETT JONES LLP

For the Registered Owner: FILLMORE RILEY LLP