



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 224

Date of Decision: 2023-12-29

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: SwissEnergy Pharma GmbH

Registered Owner: Les Laboratoires Suisse Inc.

Registration: TMA405,948 for SWICAL

INTRODUCTION

[1] On October 25, 2022, at the request of SwissEnergy Pharma GmbH (the Requesting Party), the Registrar issued a notice under section 45 of *the Trademarks Act*, RSC 1985, c T-13 (the Act) to Laboratoires Suisse Inc. (the Owner), the registered owner of registration No. TMA405,948 for the trademark SWICAL.

[2] The Mark is registered in association with the following goods: [TRANSLATION] “dietary supplements, including vitamin tablets containing calcium, magnesium and minerals” (the Goods).

[3] The Section 45 notice required the Owner to provide an affidavit or sworn statement showing that the Mark was used in association with the Goods in Canada at

any time between October 25, 2019 and October 25, 2022 (the relevant period), and if not, indicating the date on which the Mark was last used and the reasons for the absence of use since that date.

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

[5] It is well established that a bare allegation of use is not sufficient to establish use in a section 45 proceeding [*Plough (Canada) Ltd v Aerosol Fillers Inc.* (1980), 53 CPR (2d) 62 (FCA)]. It is well established that the threshold for establishing use in these proceedings is relatively 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 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 trademark in association with each of the goods and services specified in the registration during the relevant period [see *John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[6] In response to the Registrar’s notice, the Owner submitted the statutory declaration signed on January 18, 2023, by its Director General, Louis-Philip Vermeersch. Neither party submitted written representations, and no oral hearing was held.

THE EVIDENCE

[7] In his statutory declaration, Mr. Vermeersch confirms that the Owner is the owner of the Mark, registered in Canada under TMA405,948 on December 4, 1992, in association with the goods “suppléments alimentaires, nommément : comprimés vitaminiques contenant du calcium, magnésium et des minéraux” [dietary supplements, including vitamin tablets containing calcium, magnesium and minerals], which he

defines as “the Goods” [para 3]. (His repetition of the registration wording is accurate in referring to vitamin tablets [TRANSLATION] “containing” calcium etc. (not [TRANSLATION] “comprising”), but this minor substitution does not affect the analysis below.).

[8] Mr. Vermeersch then states that the Owner has used the Mark [TRANSLATION] “in association with the Goods” in Canada in the normal course of trade on an ongoing basis over the relevant period [at paras 4 and 11]. In support of his statement, he filed as Exhibit P-1 the following two photographs, representative of the manner in which the Mark was presented on “the Goods” during this period [see paras 6 and 10]:



[9] The photographs show a box of 20 ampoules of liquid vitamin B12 and a box of 20 ampoules of liquid iron polysaccharide, respectively. The Mark is prominently displayed on each box. However, the photographs do not show the complete list of ingredients in the two goods and, in particular, whether they contain calcium and magnesium, whether the [TRANSLATION] “Vitamin B12” ampoule also contains minerals, or whether the [TRANSLATION] “Iron” ampoule also contains vitamins.

[10] Mr. Vermeersch clarified that the “Goods” bearing the Mark are sold in Canada in various pharmacies, grocery stores, and other retailers, including Jean Coutu, Familiprix, Uniprix, Brunet, Provigo, Walmart, Proxim, Pharmaprix, Horizon Santé, and Pasquier [at para 7]. He states that several thousand units of the “Goods” were sold under the Mark in Canada in each of the years 2020 to 2022 [at para 8]. He filed as Exhibit P-2 in support of his statement of “sales of Goods” nearly thirty (partially redacted) invoices issued by the Owner between December 7, 2020 and May 19, 2022,

identifying sales of vitamin B12 and liquid iron under the Mark to such pharmacies and other companies in Quebec and New Brunswick [see para 9].

[11] In this regard, I note that the source of the invoices is indicated on the invoices as “Laboratoire Suisse” and not “Les Laboratoires Suisse Inc.” However, for the purposes of this proceeding, I consider it reasonable to infer that it is the same legal entity as the Owner, especially since the address of Laboratoire Suisse indicated on the invoices corresponds to that of the Owner.

ANALYSIS

[12] I accept the packaging shown in the images in Exhibit P-1 as display of the Mark in association with the products contained in the boxes. While other written elements, in smaller letters, are found in close proximity to the Mark on this packaging—namely [TRANSLATION] “NEW,” and “Vitamin B12” or “Iron”—the Mark is apparent from these descriptive elements. Thus, when I apply the principles set out in *Canada (Registrar of Trade-marks) v Cie Internationale pour l’informatique Cll Honeywell Bull, SA* (1985), 4 CPR (3d) 523 (FCA); *Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB); and *Loro Piana SPA v Canadian Council of Professional Engineers*, 2009 FC 1096, I find this is a use of the Mark as registered.

[13] I also accept that the invoices in Exhibit P-2 indicate sales by the Owner in Canada, in the normal course of trade, during the relevant period, of dietary supplements, in particular vitamin ampoules containing vitamin B12 in liquid form and mineral ampoules containing iron polysaccharide in liquid form, as shown in Exhibit P-1.

[14] However, dietary supplements in the form of ampoules containing only one vitamin or containing only one mineral do not correspond to the Goods as described in the registration, which are instead tablets, both [TRANSLATION] “vitamins” and “containing calcium, magnesium and minerals”. (Since calcium and magnesium are themselves minerals, it is reasonable to assume that the portion of the phrase [TRANSLATION] “and minerals” found in the statement of the Goods is understood to refer to other minerals in addition to those of calcium and magnesium.)

[15] Although Mr. Vermeersch alleges that the Owner used the Mark in association with “the Goods”—the latter having been defined in paragraph 3 of his statutory declaration as the products in association with which the Mark was registered—he does not specifically state that the goods sold included goods in the form of tablets containing and vitamins and minerals (including calcium, magnesium, and other minerals). In fact, his statement makes no mention of these features or ingredients, merely repeating the wording of the registration, and gives no other explanation or specific correlation between the descriptions found on the boxes in Exhibit P-1 and the statement of the Goods. No further explanation is provided in the two attachments to his statement.

[16] If tablets containing vitamins, calcium, magnesium, and other minerals were among the goods sold by the Owner in association with the Mark in Canada during the relevant period, it would have been easy to specifically mention this. However, Mr. Vermeersch did not do so. In the circumstances, his statements refer to mere allegations of use in association with the “Goods,” rather than statements of fact establishing the use of the Mark in association with them. However, as mentioned above, is it the responsibility of the Owner to show the use of the Mark in association with the Goods specified in the registration.

[17] The case law consistently states that one is not to be astutely meticulous when dealing with language used in a statement of wares [*Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654]. However, the statement of registration in this case is not ambiguous. Although the ingredients in the formulations shown in Exhibit P-1 had been consistent with those described in the registration, the fact remains that liquid ampoules are not what I would normally call tablets. In this regard, I refer, for example, to the following dictionary definitions [see *Tradall S.A. v Devil’s Martini Inc*, 2011 TMOB 65, with respect to the Registrar’s discretion to take judicial notice of dictionary definitions]:

Multidictionnaire de la langue française Édition du 30e anniversaire (2018)

[TRANSLATION] **AMPOULE: 1.** Glass tube containing medicine. *An ampoule of vitamins.*

[TRANSLATION] **TABLET:** Medicine in lozenge form. *Alain took an aspirin tablet. Not to be confused with **capsule**, a powdered medicine contained in a capsule that can be absorbed by the body.*

Le Petit Larousse illustré 2011 (2010)

[TRANSLATION] **AMPOULE: 3.** Glass tube tapered at the ends, intended to contain a liquid medicine; contents of the tube.

[TRANSLATION] **TABLET:** Solid medicine preparation by agglomeration, intended for oral intake.

[18] Thus, evidence of use of the Mark in association with ampoules does not enable me to conclude that the registration for “tablets” is maintained.

[19] It is well established that the procedure provided for in section 45 of the Act is limited in scope, the purpose of which is to provide a simple and expeditious method to clean up the “dead wood” on the register [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448]. Nevertheless, is it the responsibility of the registered owner to show the connection between the wares registered and those included in the evidence filed [see *Wrangler Apparel Corp v Pacific Rim Sportswear Co* (2000), 10 CPR (4th) 568 (TMOB); and *SC Johnson & Son, Inc v the Registrar of Trade-marks* (1981), 55 CPR (2d) 34 (FCTD)]. In this case, given the ordinary meaning of the terms in the statement of Goods, and in the absence of any additional details from Mr. Vermeersch or even submissions from the Owner, I cannot conclude that the Owner has demonstrated use of the Mark during the relevant period, as defined in sections 4 and 45 of the Act, in association with the Goods described in the registration as [TRANSLATION] “dietary supplements, including vitamin tablets containing calcium, magnesium and minerals.”

DISPOSITION

[20] In view of all of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered Goods during the relevant period within the meaning of sections 4 and 45 of the Act. Furthermore, I have no evidence before me of special circumstances excusing non-use.

[21] 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 expunged.

Oksana Osadchuk
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Certified translation
Kristen Nguyen

Appearances and Agents of Record

No hearing held

AGENTS OF RECORD

For the Requesting Party: MARK W. TIMMIS

For the Registered Owner: LAVERY, DE BILLY, LLP