



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

Citation: 2012 TMOB 132
Date of Decision: 2012-07-19

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Ogilvy Renault against registration
No. TMA676,833 for the trade-mark VIGOR in the name
of Comercializadora Eloro, S.A.**

[1] At the request of Ogilvy Renault (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on February 1, 2010 to Frugosa, S.A. de C.V. (the Registrant), the registered owner at that time of registration No. TMA676,833 for the trade-mark VIGOR (the Mark).

[2] The Mark is registered for use in association with the following wares: fruits and canned fruit juices.

[3] 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 wares or services 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 between February 1, 2007 and February 1, 2010 (the Relevant Period).

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

4. (1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is

in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[5] In response to the Registrar's notice, the Registrant filed the affidavit of Manuel Vicente Martinez Lopez, sworn on August 26, 2010. Both parties filed written representations and attended an oral hearing.

[6] Mr. Lopez identifies himself as the Executive Vice President of the Registrant, having "full knowledge" of all areas of the Registrant's operations. He explains that the Registrant is a supplier of fruit juices sold in various countries including Canada and that, during the Relevant Period, the Registrant licensed a related company, Comercializadora Eloro, S.A. (Eloro), to use the Mark in association with the sale of fruit juices. These fruit juices were manufactured by another related company, Jugomex S. A. de C.V., pursuant to a manufacturer's agreement with Eloro. Eloro sold such canned fruit juices to a Texas-based distributor, Vilore Foods Company (Vilore), who in turn sold the canned fruit juices to Canadian-based distributors of ethnic goods, such as NutriFresh Foods Ltd. (Nutrifresh), located in Ontario.

[7] I note that as a result of a merger recorded by the Registrar on August 23, 2011, the registration now stands in the name of Eloro; this change is not at issue in this proceeding.

[8] In support of his assertion of use of the Mark in association with canned fruit juices during the Relevant Period in Canada, Mr. Lopez attaches the following exhibits to his affidavit:

- Exhibit B consists of a representative invoice from Vilore showing a sale of 1500 cases of various flavours of "Vigor" fruit juice to NutriFresh, dated January 20, 2010;
- Exhibit C consists of a representative invoice from Eloro showing a sale of 200 cases of two flavours of "Vigor" fruit juice to Vilore, dated May 20, 2008;
- Exhibit D consists of several pictures of Vigor canned fruit juice, clearly displaying the Mark, which Mr. Lopez attests are representative of the canned fruit juices sold in Canada during the Relevant Period.

[9] Based on the evidence provided, I am satisfied that the Registrant has satisfied its *prima facie* burden to show sales of canned fruit juices displaying the Mark during the Relevant Period

in Canada. With respect to the wares “fruits”, no evidence of use or special circumstances excusing non-use was submitted and the Registrant conceded that the registration should be amended accordingly.

Token Sale

[10] In addition to its arguments regarding hearsay, discussed below, the Requesting Party submitted that, as the Registrant furnished only one invoice regarding a sale of canned fruit juices in Canada, it should be viewed as a token sale and not a sale in the normal course of trade. However, it is well established that evidence of a single sale may be sufficient to establish use of a trade-mark in the normal course of trade [*1459243 Ontario Inc v Eva Gabor International, Ltd et al* (2011) 90 CPR (4th) 277 (FC) (*Eva Gabor*), at para 5]. The Exhibit B invoice is described as “representative” and is supported by Mr. Lopez’s description of the normal course of trade. I would also note that the large quantities of canned fruit juices sold, as shown on both the Vilore and Eloro invoices, provides further support for the conclusion that the evidence as a whole is sufficient to establish use in this case.

Hearsay Evidence

[11] As noted above, the Requesting Party objects to portions of Mr. Lopez’ affidavit as constituting hearsay. In particular, the Requesting Party submits that the Exhibit B invoice concerns an alleged transaction between the distribution companies Vilore and Nutrifresh, neither of which have a corporate relationship with the Registrant. It cites *Brick Brewing Co v Lakeport Brewing Corp* (2003), 35 CPR (4th) 70 (TMOB), for the proposition that business records of third party companies constitute hearsay, and further submits that the Registrar is under a “special duty” to ensure that reliable evidence is received, as evidence in section 45 proceedings is not subject to cross-examination [per *Aerosol Fillers Inc v Plough (Canada) Ltd* (1979), 45 CPR (2d) 194 (FCTD) at 199].

[12] At the oral hearing, the Registrant did not concede that any portions of Mr. Lopez’s affidavit constituted hearsay, noting that while Mr. Lopez does not explicitly state that he has “personal knowledge” of the facts to which he was swearing, he does state that he has “full knowledge of all areas of [the Registrant’s] operations including manufacturing, warehousing,

shipping, sales and administration”. Furthermore, nowhere does Mr. Lopez state that any facts in his affidavit are based on “information and belief”, which would indicate that the allegations are hearsay.

[13] In contrast to the fact situation in the recent decision in *Gowling Lafleur Henderson LLP v Guayapi Tropical SRL*, 2012 TMOB 123, it is reasonable to infer in this case that, by virtue of his position, the affiant would be knowledgeable of the activities of parties in the chain of distribution during the Relevant Period. In view of this and the supporting statements in his affidavit, I agree with the Registrant’s characterization of the evidence as not constituting hearsay.

[14] In the alternative, if I were to consider the Exhibit B invoice as hearsay, the Registrant submitted it should be admissible as it corroborates statements made in Mr. Lopez’s affidavit regarding the normal course of trade [per *Sim & McBurney v Przedsiębiorstwo Handlu Zagranicznego Agros* (2001), 20 CPR (4th) 360 (TMOB)]. Furthermore, the Registrant argued that a strict interpretation of hearsay, as suggested by the Requesting Party in this case, would be contrary to the purpose of section 45 proceedings.

[15] It is well established that 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 and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)]. It is not intended to provide an alternative to the usual *inter partes* attack on a trade-mark envisaged by section 57 [*Meredith & Finlayson v Canada (Registrar of Trade Marks)* (1991), 40 CPR (3d) 409 (FCA)].

[16] A strict approach to hearsay evidence may be appropriate where adversarial proceedings are intended to determine the rights of parties, but not in section 45 proceedings [*Eva Gabor*, *supra*, at para 12]. On the contrary, a “relaxed” approach to hearsay, as suggested by the Registrant, is more consistent with the general principle that evidence in these proceedings is to be considered as a whole, rather than focusing on individual pieces of evidence [*Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB)].

[17] As noted by the Registrant, the Requesting Party offers no contrasting precedent to indicate that a stricter interpretation of hearsay is appropriate in section 45 proceedings. Indeed, *Aerosol Fillers, supra*, cited favourably by the Requesting Party, did not concern issues of hearsay but instead concerned an affidavit consisting solely of a bare assertion of use. In the present case, Mr. Lopez's affidavit consists not only of an assertion of use regarding the particular wares in association with the Mark, but also includes a description of the Registrant's normal course of trade, invoices corroborating such description and exhibits demonstrating how the Mark was displayed on the wares when sold in Canada.

[18] In view of the foregoing, I would find the Exhibit B invoice admissible as reliable and necessary. Although the Requesting Party suggested that the Registrant should have obtained a supplementary affidavit from its licensee's distributor, I agree with the Registrant that it is not necessary to subject the Registrant to such evidentiary overkill.

Non-compliance with Canadian labelling requirements

[19] Finally, the Requesting Party also submitted that the canned fruit juice shown in Exhibit D does not comply with Canadian labelling requirements per regulations under the *Food and Drugs Act*. Accordingly, it submitted that any sales could not have been in the normal course of trade, since the sale of such goods would be illegal under the labelling regulations. However, as the Registrant correctly notes, it is well-established that compliance with other Acts is not at issue in section 45 proceedings. As stated in *Lewis Thomson & Sons Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD), a section 45 proceeding is not the correct forum for determining whether the Registrant is in compliance with the *Food and Drugs Act* and, in any event, such a determination is not immediately relevant to the question of use as defined by the *Trade-marks Act*.

Disposition

[20] In view of the foregoing, I am satisfied that there was use of the Mark in association with the wares "canned fruit juices" during the Relevant Period within the meaning of sections 4 and 45 of the Act. 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 following wares only: “fruits”.

[21] The amended statement of wares will read as follows: “canned fruit juices”.

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