



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

**Citation: 2012 TMOB 13**  
**Date of Decision: 2012-01-27**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Molson Canada 2005 against registration  
No. TMA139,109 for the trade-mark 67 in the name of  
Vincor International Inc.**

[1] At the request of Molson Canada 2005 (the Requesting Party), the Registrar of Trade-marks issued a notice under s. 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on October 23, 2009 to Vincor International Inc. (the Registrant), the registered owner of registration No. TMA139,109 for the trade-mark 67 (the Mark).

[2] The Mark is registered for use in association with “wines” (the Wares).

[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 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 October 23, 2006 and October 23, 2009.

[4] The relevant definition of “use” in association with wares is set out in s. 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] It is well established that the purpose and scope of s. 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 [*Performance Apparel Corp. v. Uvex Toko Canada Ltd.* (2004), 31 CPR (4th) 270 (FC)].

[6] In response to the Registrar’s notice, the Registrant filed the affidavit of Andrew Howard, Vice President Marketing of the Registrant, sworn on April 16, 2010. Both parties filed written representations; an oral hearing was not held.

[7] In his affidavit, Mr. Howard states that the Registrant and its predecessors in title have used the Mark in Canada in association with the Wares for decades, including during the relevant period. With respect to the normal course of trade, he states that the Wares are sold in two-litre bottles to select liquor boards and commissions in Canada by the Registrant, which in turn sells to members of the public and retailers.

[8] In support of the Registrant’s assertion of use, attached as Exhibit B to the affidavit are five representative invoices that show sales of “67 Sherry” in various quantities to either the Alberta Liquor Control Board or the Saskatchewan Liquor & Gaming Authority. All the invoices display the registrant’s name and address at the top of the invoice and are dated within the relevant period.

[9] As well, attached as Exhibit C are sample labels used on the front and back of the bottles and a photograph of the front of a two-litre bottle of the Wares, which Mr. Howard identifies as representative of those affixed to the Wares sold in Canada during the relevant period. I note that the labels display the Mark prominently and identify the product as both “wine” and “Canadian Sherry”.

[10] The Requesting Party objected to certain facts being alleged via the schedules of the Registrant’s written representations that were not in evidence in this proceeding; accordingly, I have disregarded all such references [see *Ridout & Maybee LLP v. Encore Marketing International Inc.* (2009), 72 CPR (4th) 204 (TMOB) at 206]. With respect to the Requesting

Party's own written representations, I would have benefitted had it provided further detail, as the Requesting Party simply states that it is "clear" that the Registrant has failed to establish use of the Mark and that "the evidence speaks for itself in that regard."

[11] Absent such detail, I would simply note that, in a section 45 proceeding, the evidence as a whole must be considered and focusing on individual pieces of evidence is not the correct approach [*Kvas Miller Everitt v. Compute (Bridgend) Limited (2005)*, 47 CPR (4th) 209 (TMOB)]. Although further details with respect to the Registrant's normal course of trade may have been helpful in this case, the burden on the owner in a section 45 proceeding is not a stringent one and a *prima facie* case will suffice for the purposes of section 4 of the Act [*Brouillette Kosie Prince v. Great Harvest Franchising Inc. (2009)*, 77 CPR (4th) 247 (FC)].

[12] Accordingly, in view of the evidence as a whole and in particular the furnished invoices, representative labels and supporting statements by Mr. Howard, I am satisfied that there was use of the Mark in association with the Wares during the Relevant Period within the meaning of s. 4 and s. 45 of the Act.

[13] In view of the foregoing, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be maintained in compliance with the provisions of s. 45 of the Act.

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