



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 114**

**Date of Decision: 2021-05-31**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**Barrette Legal Inc.**

**Requesting Party**

**and**

**Ltd. “Aqua-Life”**

**Registered Owner**

**TMA724,698 for DUCHESS**

**Registration**

[1] At the request of Barrette Legal Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on July 17, 2017 to Ltd. “Aqua-Life” (the Owner), the registered owner of registration No. TMA724,698 for the trade-mark DUCHESS (the Mark).

[2] The Mark is registered for use in association with the following goods: “Beers; mineral and aerated waters and fruit juices”.

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with the goods specified in the registration, at any time between July 17, 2014 and July 17, 2017. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last used and the reason for the absence of such 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 mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in section 45 proceedings is quite 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)], 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 specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of the head of its intellectual property department, Tatiana Arkadevna Aparshina, made on February 15, 2018, in Russia. Both parties filed written representations and were represented at an oral hearing.

#### THE OWNER’S EVIDENCE

[7] In her affidavit, Ms. Aparshina states that the Owner is in the beverage business and has, for many years, been manufacturing and selling beverages under various trademarks in Canada. In particular, she states that, since 2008, the Owner has continuously sold in Canada “mineral and aerated waters and fruit juices” branded with the Mark (the DUCHESS Goods). She explains that the Mark is printed on labels affixed to such goods by the Owner at the time of manufacture and shipment, and that this is how the Mark was used during the relevant period.

[8] As Exhibit A to her affidavit, Ms. Aparshina attaches two sample labels showing how the Mark was displayed on the DUCHESS Goods sold in Canada during the relevant period. The first label prominently features the Mark above the words “CARBONATED SOFT DRINK” and

an image of three pears. The drink's ingredients are listed on the label as "purified carbonated water, sugar, citric acid, Pear Flavouring, preservative sodium benzoate, Caramel Color". The significance of these ingredients will be discussed below. The second label features the Mark in a banner above the words "CARBONATED NON ALCOHOLIC BEVERAGE", below a design featuring an orchard bordered by groupings of pears and additional banners, one of which reads "ORIGINAL SOFT DRINK". The ingredients list is illegible, but I note that it is printed next to a "NATURAL INGREDIENTS" logo. On both labels, a small "AQUA LIFE" logo is displayed next to the Nutrition Facts table.

[9] Ms. Aparshina states that, during the relevant period, the DUCHESS Goods were shipped to Canada by Mercatus Nova Company, LLC (Mercatus), the Owner's trading entity for distribution of the DUCHESS Goods. She confirms that it is the Owner who supplied the DUCHESS Goods to Mercatus for distribution during the relevant period. She further states that Slovenian Chocolate in Toronto, Ontario, and Wonder Berry Distribution Inc. in Vaughan, Ontario, were distributors for DUCHESS Goods in Canada during the relevant period.

[10] As Exhibit B to her affidavit, Ms. Aparshina attaches various documents that she describes as sample invoices, packing lists, and shipping documents evidencing sales and shipments of the DUCHESS Goods from Mercatus to Slovenian Chocolate and Wonder Berry Distribution Inc. for resale to customers in Canada. Of the two documents for Slovenian Chocolate, only one is dated within the relevant period: a 2015 packing list. The remaining documents actually identify the recipient as Wonder Berry North America Inc. (in Vaughan). They comprise five sets of documents dated from February 2017 to June 2017, with each set containing an invoice, a corresponding packing slip, and various corresponding Russian-language forms, which are presumably the shipping documents. Each of the invoices and packing lists covers hundreds of bottles of "'Duchess' carbonated soft drink".

[11] In addition, as Exhibit C to her affidavit, Ms. Aparshina attaches what she describes as a representative flyer of a Freshco food store located in the Toronto area and representative photographs of the DUCHESS Goods displayed by the Owner's distributor in Vaughan. Ms. Aparshina confirms that the flyer, although dated after the relevant period, is representative of advertising of the DUCHESS Goods in Canada by Freshco (and unspecified others) during the

relevant period. The exhibited flyer page advertises “Soft Drinks” in a bottle whose label resembles the second label at Exhibit A. I note that a second page advertises the same beverage but has a different layout and general appearance as well as some Russian text, making it unclear whether it forms part of the same flyer; however, nothing turns on this second page. The remaining two pages contain photographs of shelving filled with various bottles, cans and jars, including bottles of DUCHESS soft drinks bearing a similar label to that depicted in the flyer.

#### PRELIMINARY REMARKS

[12] At the outset, as noted by the Requesting Party, the evidence is silent with respect to the registered goods “Beers”. Moreover, the Owner furnished no evidence of special circumstances excusing non-use of the Mark with respect to such goods. Accordingly, at a minimum, the good “Beers” will be deleted from the registration.

[13] I also note the Requesting Party’s objection that a large portion of the documents furnished as evidence of sales are inadmissible as they are either in Russian with no translation or handwritten and unreadable. However, the English-language invoices are legible and provide evidence of sales in the normal course of trade in Canada during the relevant period. It is therefore not necessary to rely on the Russian-language documents.

#### ANALYSIS

[14] Ms. Aparshina provides documentary evidence of sales of hundreds of bottles of DUCHESS carbonated soft drink in Canada during the relevant period through the Owner’s distributor Mercatus, along with images of labels showing how the Mark was displayed on the goods’ packaging at the time of transfer in the normal course of trade.

[15] The Requesting Party argues that any evidence of sales by Mercatus does not enure to the Owner’s benefit because there is no explanation of the relationship between the Owner and Mercatus; no evidence that Mercatus is licensed to use the Mark with the Owner retaining the requisite control over the character or quality of the goods; and no documentary evidence of sales from the Owner to Mercatus and subsequently to the ultimate consumer. The Requesting Party also notes that the “sample” labels furnished at Exhibit A are not affixed to any product

and, in this respect, submits that one cannot infer that products from the relevant period were necessarily labelled as depicted in the later flyer or undated photographs at Exhibit C. Finally, the Requesting Party submits that the only goods in evidence are a “carbonated soft drink”, which does not fall within the scope of the registered goods “mineral and aerated waters and fruit juices”.

[16] First, I am satisfied that Mercatus, as the Owner’s “trading entity for distribution of the DUCHESS Goods”, is merely a distributor of the Owner’s goods. In the circumstances, evidence of a corporate or other relationship between the two entities or of a licence to Mercatus for use of the Mark is not required. Indeed, as the manufacturer of the Goods, the Owner necessarily has direct control over their character and quality and forms the first link in the chain of distribution to the ultimate consumer.

[17] Moreover, there is no requirement to show sales from the Owner to its distributor or sales to the ultimate consumer. On the contrary, it is well established that a trademark owner’s ordinary course of trade will often involve distributors, wholesalers and/or retailers, and that distribution and sale of the owner’s goods through such entities can constitute trademark use that enures to the owner’s benefit [see *Manhattan Industries Inc v Princeton Manufacturing Ltd* (1971), 4 CPR (2d) 6 (FCTD); *Lin Trading Co v CBM Kabushiki Kaisha* (1988), 21 CPR (3d) 417 (FCA); and *Osler, Hoskin & Harcourt v Canada (Registrar of Trade Marks)* (1997), 77 CPR (3d) 475 (FCTD)].

[18] In any event, Ms. Aparshina attests that the labels bearing the Mark are affixed to the goods by the Owner at the time of manufacture and shipment and that it is the Owner who supplied the DUCHESS Goods to Mercatus for distribution during the relevant period. Contrary to the Requesting Party’s characterization of this statement as merely a “bald assertion”, an owner may “show” use of its trademark in association with registered goods “by describing facts from which the Registrar or the Court can form an opinion or can logically infer use within the meaning of section 4” [see *Guido Berlucchi & C Srl v Brouillette Kosie Prince*, 2007 FC 245, 56 CPR (4th) 401 at para 18]. What the Federal Court has found to be inadequate in section 45 proceedings are bald assertions of *use* (a matter of law) as opposed to assertions of *facts* showing use [*Mantha & Associés/Associates v Central Transport Inc* (1995), 64 CPR (3d) 354].

[19] I would also note that I do not consider the discrepancy between Ms. Aparshina's identification of one of the purchasers as Wonder Berry Distribution Inc. and the documentation identifying that purchaser as Wonder Berry North America Inc. to be of any consequence. The exhibited invoices still demonstrate repeat sales of large quantities of DUCHESS beverage by Mercatus to a company in Canada during the relevant period.

[20] With respect to display of the Mark, I accept Ms. Aparshina's statements to the effect that the exhibited labels show how the Mark was displayed on the DUCHESS-branded goods sold in Canada during the relevant period and that the exhibited flyer, regardless of its date, is representative of how the goods were advertised during the relevant period. On this basis, I am satisfied that the goods referenced in the invoices and packing slips would have borne labels as shown in Exhibits A and C.

[21] The main issue in this case is whether the product sold by Mercatus corresponds to the registered goods "mineral and aerated waters and fruit juices". In her affidavit, Ms. Aparshina identifies the product using this specific description. However, as noted by the Requesting Party, all of the documentary evidence identifies the product instead as a "soft drink" or "carbonated soft drink".

[22] The Requesting Party submits that the registration should be interpreted as comprising two separate goods: "mineral and aerated waters" and "fruit juices". The Requesting Party further submits that a soft drink is neither a "water" nor a "fruit juice". In this respect, at the hearing, the Requesting Party read a definition of "soft drink" from the *Britannica Online Encyclopedia* as "any of a class of non-alcoholic beverages usually but not necessarily carbonated normally containing a natural or artificial sweetening agent, edible acids, natural or artificial flavours and sometimes juice" and noted that this definition matches the ingredients list printed on the first label at Exhibit A. The Requesting Party also read a definition of "fruit juice" from the *Wikipedia* website as a "drink made from pressing fruit" and cited two definitions of "aerated water" from the Owner's written representations, namely by *www.meriam-webster.com* as "any water artificially impregnated with a large amount of gas (as carbon dioxide)" and by *Wikipedia* as "correctly speaking, water to which air is added [although the term is] frequently

applied to carbonated water”. I note that the corresponding extracts from these reference works have not been furnished, as evidence or otherwise.

[23] In the Requesting Party’s submission, listing multiple specific goods in a registration suggests that each of the listed goods is in some way different from the others [citing *John Labatt, supra*]. Similarly, the Requesting Party submits that labelling a product with the term “soft drink”, as opposed to one of the terms specified in the registration, suggests that the product is in some way different from any of the registered goods. By way of example, the Requesting Party argues that a consumer ordering a water or a fruit juice would not expect to receive the same type of product as when ordering a soft drink; in particular, a mineral or aerated water would not be expected to contain sugar as a main ingredient.

[24] The Requesting Party further submits that the fact a product may contain aerated water does not make that product an aerated water *per se*. While acknowledging that one should not be overly meticulous when categorizing ambiguous products—for example, in deciding whether tomatoes come within the registered good “fruit”—the Requesting Party distinguishes the present case on the basis that there is no ambiguity in a soft drink failing to match the registered statement of goods. In support of its position, the Requesting Party notes that in the *Goods and Services Manual*, published by the Canadian Intellectual Property Office as a representative listing of acceptable terms for identifying goods and services, “mineral and carbonated waters”, “fruit flavoured carbonated drinks”, “fruit drinks and fruit juices”, and “carbonated soft drinks” are all clearly distinct terms.

[25] The Owner, for its part, submits that “mineral and aerated waters and fruit juices” is a single registered good, which can be either a fruit flavoured carbonated water or a mixture of fruit juice and carbonated water. In this respect, the Owner seeks to draw an analogy with the case in *Ridout & Maybee srl v Omega SA*, where it was held that specific goods can “sometimes be legitimate representatives of a broader grouping or category of wares in the registration” (2004 FC 1703, 39 CPR (4th) 261 at para 25, rev’d but not on this point 2005 FCA 306, 43 CPR (4th) 18). The Owner submits that the DUCHESS Goods can be considered either a fruit flavoured carbonated water or a mixture of fruit juice and carbonated water, but does *not* take the

position that the DUCHESS Goods correspond in any way to the “mineral waters” aspect of the statement of goods.

[26] The Owner further submits that registered goods should be granted a generous interpretation, not restricted by consumer expectations. In this respect, the Owner cites *Molson Canada v Kaiserdom-Privatbrauerei Bamberg Wörner KG* (2005), 43 CPR (4th) 313 (TMOB), where it was held that a registration should not be expunged simply on the basis that individuals might expect something called “beer” to have a higher alcoholic content than the type of beer sold by the registrant. The Owner further argues that, in any event, the characterization of the DUCHESS Goods as “mineral and aerated waters and fruit juices” is not contrary to consumer expectations. In particular, the DUCHESS labels in evidence differ from typical soft drink labels in that the DUCHESS labels are dominated by images of orchards and fruit and, on the shelving depicted at Exhibit C, the DUCHESS Goods appear to be located next to shelves of waters and fruit products as opposed to soft drinks.

[27] I would first note that, although Ms. Aparshina identifies the Owner’s product as “mineral and aerated waters and fruit juices”, she does not specify whether this is an ordinary commercial term for such products. Nor does she explain how this one product can be considered to meet the three characteristics of being a mineral water, an aerated water, and a fruit juice. In the circumstances, I find it reasonable to interpret Ms. Aparshina’s statement to the effect that the DUCHESS Goods are “mineral and aerated waters and fruit juices” merely as confirmation that she would classify the product as falling within that statement of goods. It remains to be determined whether that classification can be accepted and, if so, to which specific good(s) the product corresponds.

[28] In this respect, I do not consider it necessary to determine whether the statement of goods could be interpreted as referring to a single product containing both aerated water (but not necessarily mineral water) and fruit juice. In the absence of evidence that the “Pear Flavouring” ingredient in the DUCHESS beverage was obtained by juicing fruit—as opposed to being, for example, a chemical that merely tastes like pears—I am not prepared to find that the DUCHESS Goods contain fruit juice. Although one of the labels bears a NATURAL INGREDIENTS logo and, as the Owner noted at the hearing, the inclusion of a preservative among the ingredients



may be consistent with a juice component, I do not consider these two factors in themselves sufficient for an inference that the ingredient identified on the label merely as “Pear Flavouring” is actually juice. In my view, such a conclusion would be speculative.

[29] Furthermore, there is no evidence to suggest that the DUCHESS Goods contain or may be characterized as “mineral water”. Nor do any of the Owner’s representations advance such a correlation.

[30] However, I am prepared to accept that the DUCHESS Goods may be characterized as a flavoured aerated water and that the registered good “aerated waters” is broad enough to encompass such flavoured waters. In this respect, I accept that the terms “carbonated” and “aerated” may be considered equivalent. Furthermore, although the product in evidence is labelled a “soft drink”, I disagree with the Requesting Party that, for the purposes of this proceeding, the categories “soft drinks” and “aerated waters” are necessarily mutually exclusive.

[31] In this respect, I do not find the citations from the *Goods and Services Manual* to be of particular assistance. In the absence of explanatory notes, the *Manual* provides examples of how goods and services may be defined in acceptably specific ordinary commercial terms, but does not indicate to what extent specific definitions may overlap or otherwise provide guidance on appropriate terms to choose for particular situations.

[32] Furthermore, although I agree with the Requesting Party that merely including aerated water in a product’s ingredients does not automatically make that product an aerated water *per se*, in the present case the product’s principal ingredient appears to be “purified carbonated water”, and there is no indication that the other ingredients are present in sufficiently large quantities to prevent the product as a whole from being a flavoured carbonated water.

[33] Even if I were to accept the encyclopedia entry cited by the Requesting Party as evidence that soft drinks “normally” contain a sweetening agent and edible acids, I would not consider that fact alone sufficient for a conclusion that a “soft drink” cannot come within the definition of “aerated waters”. Indeed, the encyclopedia entry does not indicate that “soft drinks” *necessarily* contain sweetener or taste sweet. In this respect, although it was not cited by either party, I note that the *Concise Canadian Oxford Dictionary* (Toronto: Oxford University Press, 2005) defines

“soft drink” simply as “a flavoured, carbonated, non-alcoholic drink” [see *Tradall SA v Devil’s Martini Inc*, 2011 TMOB 645, re: the Registrar’s discretion to take judicial notice of dictionary definitions]. In the circumstances, I am not prepared to find that the beverage sold under the DUCHESS brand—although it would appear to contain sugar as the second ingredient, with citric acid being the third—is necessarily so sweet as to no longer be classifiable as a pear-flavoured “aerated water”. At best, in my view, whether the DUCHESS beverage may be classified as both a “soft drink” and a flavoured “aerated water” is ambiguous.

[34] However, it is well established that one should avoid “expunging a trade-mark, the use of which is established in accordance with ss. 45(1), solely on the basis of an ambiguous description of the wares subject to [the] trade-mark”, as that result would be “inconsistent with the purpose of s. 45” [see *Fetherstonhaugh & Co v ConAgra Inc*, 2002 FCT 1257, 23 CPR (4th) 49 at para 23]. Accordingly, when interpreting a statement of goods in a section 45 proceeding, one is not to be “astutely meticulous when dealing with [the] language used” [see *Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654, 51 CPR (4th) 434 at para 17]. The purpose and scope of section 45 is to provide a simple, summary and expeditious procedure for removing “deadwood” from the register. Section 45 proceedings are not intended to try contested issues of fact or to provide an alternative to the usual *inter partes* attack on a trade-mark envisaged by section 57 of the Act [*Meredith & Finlayson v Canada (Registrar of Trade Marks)* (1991), 40 CPR (3d) 409 (FCA)].

[35] Finally, regarding the Owner’s submission that a specific good can represent a broader category of goods in a registration, the decision in *Omega* cited for this proposition is distinguishable. In *Omega*, the statement of goods was formulated as a listing of specific goods within a broader category and the issue was the accuracy of the wording used for the broader category. In the present case, the statement of goods only lists specific goods, not qualified by the expression of a broader category.

[36] In view of all the foregoing, I am only satisfied that the Owner has demonstrated use of the Mark in association with the registered goods “aerated waters” within the meaning of sections 4 and 45 of the Act.

[37] As the Owner furnished no evidence of special circumstances excusing non-use of the Mark within the meaning of section 45(3) of the Act, the registration will be amended to delete the remaining goods.

DISPOSITION

[38] Pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, the registration will be amended to delete the following from the statement of goods:

Beers; mineral and ... [waters] and fruit juices.

[39] The amended statement of goods will be as follows:

Aerated waters.

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Oksana Osadchuk  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

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**HEARING DATE** 2020-12-03

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