



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 199

Date of Decision: 2021-09-10

IN THE MATTER OF A SECTION 45 PROCEEDING

Aventum IP Law LLP

Requesting Party

and

Hector Beverages Pvt. Ltd.

Registered Owner

**TMA916,246 for PAPER BOAT &
DESIGN**

Registration

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA916,246, owned by Hector Beverages Pvt. Ltd. (the Owner), for the trademark PAPER BOAT & DESIGN (the Mark), shown below..



[2] All references are to the Act as amended June 17, 2019, unless otherwise noted.

[3] The Mark is registered for use in association with the following goods:

Beverages, namely drinking waters, flavoured waters, mineral and aerated waters and other non-alcoholic beverages, namely soft drinks, energy drinks, and sports drinks, fruit drinks and juices, syrups, concentrates and powders for making beverages, namely flavored waters, mineral and aerated waters, soft drinks, energy drinks, sports drinks, fruit drinks and juices; and beer (the Goods).

[4] For the reasons that follow, I conclude that the registration ought to be maintained in part.

THE PROCEEDINGS

[5] At the request of Aventure IP Law LLP (the Requesting Party), the Registrar of Trademarks issued a restricted notice under section 45 of the Act on June 4, 2020 to the Owner of the Mark.

[6] The notice required the Owner to show whether the trademark has been used in Canada in association with each of the goods specified in the registration, except for “fruit drinks and juices” as it is excluded from the notice, 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 June 4, 2017 to June 4, 2020 (the Relevant Period).

[7] The relevant definition of use in the present case 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.

[8] 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. As such, the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448 at para 68] and “evidentiary overkill” is

not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD) at para 3]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the mark was used in association with *each* of the goods.

[9] In response to the Registrar's notice, the Owner furnished the affidavit of Mandeep Sing Bhatia sworn on August 10, 2020 to which were attached Exhibit I and Exhibits 1 to 8.

[10] Both parties submitted written representations and no hearing was held.

THE EVIDENCE

[11] In his brief affidavit, Mr. Bathia states that he lives in Bangalore, India and that he is the authorized representative of the Owner also located in India [para 1] and that the Exhibits attached, which are referred to as Annexures, show usage of the Mark [paras 2 and 3].

[12] Mr. Bathia also states that the Owner has spent money on advertising [para 5], that the Owner is the proprietor of a similar trademark in India [para 6], and that the Mark does not conflict with other trademarks [para 6].

[13] In support, Mr. Bathia attaches the following exhibits to his affidavit:

- Exhibit I: Chart summarizing eight shipments of “fruit beverages, coconut water and fruit bars” to Canada by the Owner during the Relevant Period with volume and pricing information.
- Exhibits 1 to 8: Export documents, including waybills and Indian custom documents related to the eight shipments identified in Exhibit I. All products listed in these documents contain the prefix “PB” before their descriptions.

ANALYSIS AND REASONS FOR DECISION

[14] As a preliminary matter, I note that this is a restricted section 45 notice and that “fruit drinks and juices” are excluded from the notice and will accordingly be maintained on the registration.

[15] The exhibits provided identify two products, other than fruit beverages, being sold in Canada by the Owner during the Relevant Period: fruit bars and coconut water.

[16] As noted by the Requesting Party in its written representation, “fruit bars” are not covered by the Mark and therefore not relevant to this proceeding.

[17] As for “coconut water”, the Requesting Party defines it as “the clear fluid inside the coconut, sometimes referred as coconut juice”. Neither party provides extracts from the dictionaries; however, the Registrar may take judicial notice of dictionary definitions [see *Tradall SA v Devil’s Martini Inc*, 2011 TMOB 65, 92 CPR (4th) 408]. Having exercised that discretion, here are the two relevant online dictionary definitions from *www.merriam-webster.com*:

Coconut water: the clear liquid within a young, fresh coconut

Coconut: the drupaceous fruit of the coconut palm whose outer fibrous husk yields coir and whose nut contains thick edible meat and, in the fresh fruit, a clear liquid

[18] Considering the definitions above, I agree with the Requesting Party that coconut water is not commonly considered drinking water or flavoured water but more likely considered a fruit juice. Furthermore, even if it was to be found that coconut water could be considered “drinking waters” or “flavoured waters”, the evidence provided is insufficient to conclude that the Mark as registered was displayed or used in association with such goods at the time of transfers in the normal course of trade during the Relevant Period.

[19] Accordingly, I am not satisfied that the Owner has demonstrated use of the Mark – as registered or otherwise – in association with any of the goods subjected to the restricted section 45 notice in Canada within the meaning of sections 4 and 45 of the Act.

[20] Furthermore, there is no evidence of special circumstances excusing non-use of the Mark before me.

[21] Lastly, when submitting its written representations on December 12, 2020, the Owner included a second and different affidavit from Mr. Bathia accompanied by new exhibits, which I am not considering as it was submitted after the expiration of the deadline to file evidence. In any event, even if the second affidavit had been timely filed, it would not have changed my decision as it does not include additional information to support use of the Mark as registered in Canada during the Relevant Period.

DISPOSITION

[22] 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 goods:

Beverages, namely drinking waters, flavoured waters, mineral and aerated waters and other non-alcoholic beverages, namely soft drinks, energy drinks, and sports drinks, syrups, concentrates and powders for making beverages, namely flavored waters, mineral and aerated waters, soft drinks, energy drinks, sports drinks, fruit drinks and juices; and beer.

[23] The statement of goods will read as follow:

Fruit drinks and juices.

Martin Béliveau
Chairperson
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

No Agent Appointed

For the Registered Owner

Aventum IP Law LLP

For the Requesting Party