

SECTION 45 PROCEEDINGS  
TRADE-MARK: LA ESPANOLA & DESIGN  
REGISTRATION NO.: 423,972

On April 3, 2003 at the request of La Española Alimentaria Alcoyana, S.A. the Registrar forwarded a Section 45 notice to Aceites Del Sur S.A., the registered owner of the above-referenced trade-mark registration.

The trade-mark LA ESPANOLA & DESIGN (shown below) is registered in for use in association with the following wares: “olive oil and olives”.



Section 45 of the Trade-marks Act requires the registered owner of a trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and/or services listed on 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 use since that date. The relevant period in this case is any time between April 3, 2000 and April 3, 2003.

In response to the notice, the registrant filed two affidavits of Kendall W. Waiting, and the affidavit of Gonzalo Guillén. Both parties filed a written argument. An oral hearing has not been requested.

The requesting party argues that the evidence furnished by Mr. Kendall W. Waiting should be discarded as it constitutes hearsay evidence and as it is absolutely unreliable evidence. It points out that Mr. Waiting is a student-at-law, employed by the firm Carscallen Lockwood LLP who takes information from the Spanish law firm acting for the registrant. The requesting party submits that this is hearsay upon hearsay as confirmed by the introductory words “I am advised by” that can be found in each paragraph of his affidavit.

Concerning the affidavit sworn by Gonzalo Guillén the requesting party argues that the document ought to be discarded as it does not constitute an affidavit within the meaning of the *Canada*

*Evidence Act* or even under the *Quebec Civil Code* or the *Ontario Evidence Act*. It submits that at best the signature of Gonzalo Guillén has been legalized and notarized but said Gonzalo Guillén himself was not sworn.

The requesting party then argues that over and above these deficiencies, it is noted that nowhere is there any evidence of use in association with “olives”. Further, it adds that the trade-mark that appears to be affixed to the wares “olive oil” is substantially different from the trade-mark as registered.

I agree with the requesting party that the Waiting affidavits constitute inadmissible “hearsay” evidence with respect to the use of the trade-mark by the registered owner. The registrant argues that an affidavit based on information and belief, although hearsay evidence, may be admissible if it falls within the common law exceptions to the hearsay rule (*Labatt Brewing Co. v. Molson Breweries, A Partnership* 68 C.P.R. (3d) 216 F.C.T.D.), the question to be asked being whether the evidence is reliable and necessary. Here no reasons were given why a person with direct knowledge regarding

the use of the trade-mark could not have provided the evidence in question. In my view Mr. Waiting's evidence on the use of the trade-mark is essentially double hearsay with no indication given as to why such double hearsay was necessary.

The registrant added that the exhibits attached to the Waiting affidavits ought to be considered as they provide direct evidence and confirm some or all the assertions put forth in the affidavits. I disagree as the documents in question do not support statements based on the "personal knowledge" of the affiant as was the case in *Quarry Corp v. Bacardi & Co* (72 C.P.R. (3d) 127 F.C.T.D.). Thus, I have given no weight to the evidence of use provided by Mr. Waiting (*Labatt Brewing v. Molson*, *supra*).

Concerning the Guillén affidavit, as pointed out in an unreported Section 44 [now 45] decision of the Registrar involving Registration No. 167,632 dated January 26, 1983 and in the Section 45 decision *Russell & Dumoulin v. Guangdong Cereals & Oils Import & Export Corp* (17 C.P.R. (4<sup>th</sup>) 283), an affidavit prepared in a foreign jurisdiction is *prima facie* admissible as long as it is made

in accordance with the rules of the jurisdiction where it was made. Here as there is nothing to indicate that the affidavit was not made in accordance with the rules of the jurisdiction where it was made, I am prepared to consider it as admissible.

Mr. Guillén states that he is General Manager employed by the registrant's company and he states that he has personal knowledge of the matters deposed to in his affidavit, except where stated to be based on information and belief, and where so stated he states that he verily believes the same to be true.

He indicates that the registrant sent the wares with the trade-mark affixed thereto to its Canadian distributor, Rocket Distribution Inc. of Mississauga, Ontario in the past three years (his affidavit is dated October 6, 2003). He states that he was advised that copies of invoices proving shipments to the distributor were sent to the registrant's Canadian counsel. He indicates that the invoices show retail sales of olive oil. He then says that he was advised that the registrant has sent to its Canadian representative Carscallen Lockwood LLP labels which bear the trade-mark. He then states **that he**

**was advised** by the registrant and verily believes that the labels sent to the Canadian representative have been attached to the wares distributed and used in Canada within the three years preceding the date of his affidavit.

Although I find it unclear whether Mr. Guillen's description concerning the contents of the invoices is based on "hearsay", I find his statement concerning the labels to consist of inadmissible "hearsay" evidence.

Mr. Guillén has not furnished any labels with his affidavit nor has he indicated that he had personal knowledge that the labels furnished with the Waiting affidavit sworn October 1, 2003 were the ones attached to the wares (i.e. olive oil) sold in Canada. Further, there are no reasons given as to why an officer with personal knowledge could not have provided evidence of the manner the trade-mark was associated with the wares at the time of their transfer in Canada. Accordingly, I have given no weight to Mr. Guillen's statement concerning the labels bearing the trade-mark and must conclude that there is no evidence showing that the notice of association between the trade-mark and the wares

was given to the purchaser at the time of transfer of the wares “olive oils” as required by ss. 4(1) of the Act.

In view of the above, I conclude that the trade-mark registration ought to be expunged as there is absolutely no evidence showing use with “olives” and as the evidence with respect to “olive oil” is either inadmissible or is insufficient.

Registration No. 423,972 will be expunged in compliance with the provisions of Section 45(5) of the Trade-marks Act.

DATED AT GATINEAU, QUEBEC, THIS 30TH DAY OF NOVEMBER 2005.

D.Savard  
Senior Hearing Officer  
Section 45 Division