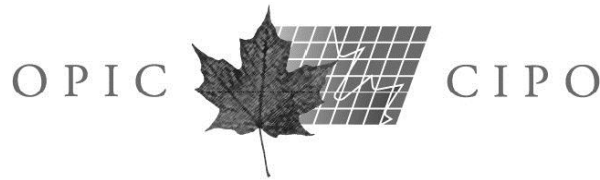


## Translation



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

**Reference: 2012 TMOB 238**  
**Date of Decision: 12/12/2012**

**IN THE MATTER OF THE SECTION 45  
PROCEEDINGS, undertaken at the request of Stikeman  
Elliott S.E.N.C.R.L., SRL / LLP regarding Registration  
No. TMA572,346 of the POM DE VIE trade-mark in the  
name of Cidrerie Michel Jodoin Inc.**

[1] On January 6, 2011, at the request of Stikeman Elliott S.E.N.C.R.L., SRL / LLP (the Requesting Party), the registrar sent the notice stipulated in Section 45 of the *Trade-marks Act*, RSC 1985, c. T-13 (the Act), to Cidrerie Michel Jodoin Inc. (the Registrant), registered as the owner in Registration No. TMA572,346 of the trade-mark POM DE VIE (hereinafter often referred to as the Mark) registered in relation to the following wares: "distilled spirits, distilled apple spirits" (hereinafter often referred to as the Wares).

[2] According to Section 45 of the Act, the registered owner of a trademark must show, in regard to each of the wares or each of the services specified in the registration, whether the trade-mark was in use in Canada at any time during the three-year period immediately preceding the date of the notice and, if not, the date when it was last so in use and the reason for the absence of such use since that date. The relevant period in this case is from January 6, 2008 to January 6, 2011 (the Relevant Period).

[3] The use in relation to the wares is defined according to Section 4 of the Act:

(1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property 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.

[...]

(3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

[4] 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 clearing the register of “dead wood,” which is why the applicable test is not particularly demanding. As stated by Judge Russell in *Uvex Toko Canada Ltd v. Performance Apparel Corp* (2004), 31 CPR (4th) 270 (CF), p. 282:

We know that the purpose of s. 45 proceedings is to clean up the "dead wood" on the register. We know that the mere assertion by the owner that the trade-mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade-mark owners' business and merchandising practices.

[5] In reply to the registrar's notice, the Registrant produced an affidavit from its president and owner, Michel Jodoin, sworn on March 18, 2011, accompanied by exhibits 1 to 11, inclusively. The two parties have produced written representations. No hearing was requested.

[6] Considering in greater detail the evidence submitted by the Registrant, Mr. Jodoin states that in 1999 the Registrant obtained a distilling licence and become the first apple micro-distillery in Canada. Mr. Jodoin states that one of the high-end spirits to result from this innovation was the distilled spirit sold in association with the Mark.

[7] Mr. Jodoin states that since 2002, the Mark has been used uninterruptedly by the Registrant in association with the Wares. In this regard, he states that the clientele globally covered by the Wares comprises top-end restaurants and connoisseurs of fine distilled spirits. More specifically, Mr. Jodoin states that during the Relevant Period, the POM DE VIE distilled spirit was and continues to be sold at the Société des alcools du Québec (SAQ) and at the Registrant’s point-of-sale. The POM DE VIE distilled spirit is also sold in France.

[8] Mr. Jodoin states that the selling price posted at the SAQ is \$44 and that at the Registrant's point-of-sale is between \$25 and \$40, depending on the promotions offered. Mr. Jodoin provided the registrant's approximate annual sales figures for the Wares for each year from 2008 to 2010 as well as the provisional sales figures for 2011, which totaled \$29,660.

[9] Mr. Jodoin also explained that the label on the bottle of POM DE VIE distilled spirit began to be rethought in 2009 and had a change of appearance in January 2010. He explained specifically that as of fall 2010, the POM DE VIE distilled spirit began to be sold in bottles with the new appearance. Since this time, the initial versions of the POM DE VIE distilled spirit bottle were gradually sold off, which explains why it is still possible to find them on sale at the SAQ.

[10] In support of his statements, Mr. Jodoin submitted the following exhibits:

- Exhibit 1, which consists in a technical data sheet for the POM DE VIE distilled spirit. Mr. Jodoin stipulated that this fact sheet is available, on request, to consumers and is also used as a reference tool and for advertising. I note that this sheet includes a photograph of the new bottle displaying the Mark. The Wares are described as "*distilled spirit/apple distilled spirit.*" The Registrant's contact information and an excerpt of a critique published in the March 2008 edition of *Summum Magazine* were also submitted;
- Exhibit 2, which consists in an excerpt from the SAQ website *www.saq.com* representing the POM DE VIE distilled spirit. Although this excerpt is dated "2011-01-18," i.e. after the Relevant Period, I note that it includes a photograph of the old bottle on which is tied the label described in Exhibit 4 below. The excerpt also refers to a Universal Product Code (UPC).;
- Exhibit 3, which consists of a photograph of the former bottle of POM DE VIE distilled spirit;
- Exhibit 4, which consists of a specimen of the label tied onto the former bottle of the Wares available for sale between 2002 and fall 2010 (i.e. before the introduction of the new bottle). This label displays the Mark and refers to the same product code as that appearing in Exhibit 2;

- Exhibit 5, which consists in photographs of a new bottle of POM DE VIE distilled spirit. This bottle displays the Mark and the Registrant's contact information;
- Exhibit 6, which consists in a SAQ commercial information report on the sale of POM DE VIE distilled spirit in its branches. Although the Mark may not be referred to as such, I note that the report, under the heading “Michel Jodoin apple distilled spirit,” refers to the same UPC as that appearing in exhibits 2 and 4. Also, although the report was produced on 2011-02-03, i.e. after the Relevant Period, it shows the sales for 2008, 2009 and 2010;
- Exhibit 7, which consists in a representative sample of copies of invoices covering 2008 to 2010 and showing products at the Registrant’s point-of-sale, including specifically the Wares in relation to which the Mark is registered. I believe that the fact that these invoices refer to POM DE VIE rather than the Mark as such, is inconsequential in this case. Given the specimens described above under exhibits 3-5 and Mr. Jodoin’s detailed statement of facts, I believe it reasonable to accept the Registrant’s argument to the effect that the fact that the Mark did not appear in its precise form on these copies of invoices is simply attributable to the indexation of the Registrant’s till system;
- Exhibit 8, which consists in a copy of documents relating to the sale of the Wares in relation to the Mark in France, i.e. a copy of the Manufacturer's Declaration concerning the export of food products manufactured in Canada, two copies of the Certificate of Origin, and two copies of invoices. Although some of these documents are dated in 2007, i.e. prior to the Relevant Period, I note that others are dated March 2008 and expressly refer to POM DE VIE distilled spirit;
- Exhibits 9 and 10, which consist in a copy of the menu from the restaurant Ô QUÉBEC Le restaurant nature (located, among others, in Toulouse, France) and are available online at <http://www.oquebec.com> and an excerpt printed from the “online shop” section of this site, including a reproduction of the former bottle of POM DE VIE distilled spirit. Although these documents do not specifically mention the use of the Mark within the meaning of Section 4 of the Act, I deem that these nonetheless support Mr. Jodoin’s statements; and

- Exhibit 11, which consists in a representative sampling of press cuttings, all dated prior to the Relevant Period, except in regard to the excerpt from the March 2008 edition of the *Summum* magazine, referenced above. Although this latter excerpt does not specifically mention the use of the Mark within the meaning of Section 4 of the Act, I deem, here again, that it supports in a certain measure Mr. Jodoin's statements.

[11] Mr. Jodoin completes his affidavit in stating that the Registrant had the full intention of continuing to manufacture and sell the Wares and that it goes without saying that the Mark is of considerable importance to it.

[12] The Requesting Party submits that Mr. Jodoin's affidavit does not establish that the Mark had been used in Canada in relation to the Wares within the meaning of sections 4 and 45 of the Act during the Relevant Period. The Requesting Party specifically claims that Mr. Jodoin's statements were bald statements of use. I do not agree.

[13] As it stems from my review of Mr. Jodoin's affidavit, the latter's statements regarding the use of the Mark in relation to the Wares during the Relevant Period are supported by specific facts and numerous supporting documents that complete and corroborate one another.

Mr. Jodoin's affidavit cannot be qualified as vague or ambiguous. Taken overall, it clearly stems from Mr. Jodoin's affidavit that the Mark cannot be qualified as dead wood. On the contrary, Mr. Jodoin's affidavit shows the importance of the latter for the Registrant.

[14] In exercising the authority delegated to me pursuant to the provisions of subsection 63(3) of the Act, the registration will be maintained in compliance with the provisions of Section 45 of the Act.

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Annie Robitaille  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

Traduction certifiée conforme  
Alan Vickers