



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

**Citation: 2015 TMOB 179
Date of Decision: 2015-10-01**

IN THE MATTER OF A SECTION 45 PROCEEDING

Barrette Legal Inc.	Requesting Party
and	
Southbrook Farms Limited	Registered Owner
TMA602,588 for Triomphe	Registration

[1] At the request of Barrette Legal Inc., the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on December 10, 2013 to Southbrook Farms Limited (the Owner) the registered owner of registration No. TMA602,588 for the trade-mark Triomphe (the Mark).

[2] The Mark is registered in association with the following goods: “Wines and fruit wines”.

[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 goods 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 December 10, 2010 and December 10, 2013.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) of the Act:

4(1) A trade-mark 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 these 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 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 trade-mark in association with each of the goods specified in the registration during the relevant period.

[6] In response to the Registrar’s notice, the Owner filed the affidavit of William Redelmeier, Co-Owner and President of the Owner, sworn on February 28, 2014 in Toronto. Neither party filed written representations; an oral hearing was not requested.

The Owner’s Evidence

[7] In his affidavit, Mr. Redelmeier attests that the Owner is a winery that sells its wine products directly on its premises, through the Owner’s website, via the phone, and through various provincial liquor boards and commissions across Canada. For example, Mr. Redelmeier attests that, during the relevant period, the Owner sold its Triomphe-branded wines to the Liquor Control Board of Ontario (LCBO), accounting for the majority of the Owner’s wine sales in Ontario.

[8] As described below, the Owner’s website provides information about the Owner’s vineyard and its Triomphe-branded line of wines, as well as detailed information about particular Triomphe-branded wines. Mr. Redelmeier attests that the website is “generally representative” of how the Owner’s website has looked since 2010, including during the relevant period.

[9] With respect to sales during the relevant period, Mr. Redelmeier attests that the Owner sold in excess of \$339,000 of Triomphe-branded wines in Canada from 2010 to 2013. This total corresponds to the breakdown of gross revenue of Triomphe-branded wines that he provides in his affidavit. For example, the Owner sold in excess of \$57,000 of Triomphe-branded wines in 2012. In addition, Mr. Redelmeier attests that the sales volume of Triomphe-branded wines to the LCBO from 2010 to 2013 was in excess of 30,000 bottles. Again, this total corresponds to the breakdown of sales volumes of Triomphe-branded wines that he provides in his affidavit.

[10] In support of his assertion of use of the Mark, attached to Mr. Redelmeier's affidavit are the following exhibits:

- Exhibit A consists of various printouts of the Owner's website, *www.southbrook.com*. Some of the webpages provide detailed information about particular Triomphe-branded wines, such as the purchase price in Canadian dollars. The Mark is displayed on the website's menu bar and includes a link to the Triomphe-branded wines category. The website also provides images of various Triomphe-branded wine bottles, each of which displays the Mark prominently on the label.

I further note, however, that a link for "Fruit Wines" is located on the left-hand side of the website's navigational menu and is separate from the link for "Triomphe". No individual product information pertaining to "fruit wines" is provided in the printouts. Finally, although an image of a "fruit wine" bottle appears on one of the exhibited webpages, it does not appear to display the Mark on its label.

- Exhibit B consists of printouts from LCBO's website, *www.lcbo.com*, which Mr. Redelmeier attests sells the Owner's wine products, including Triomphe-branded wines, to the public. The printouts include a list of Triomphe-branded wines available as of February 2014. The exhibit also includes printouts for individual Triomphe-branded wines from the list, along with a description of the item, the price in Canadian dollars, and the product's availability at various LCBO store locations.

I note that none of the descriptions identify any particular wine as a "fruit wine".

- Exhibits C, D and E include screen captures of the websites *WineryToHome.com* (Exhibit C), *WineOnline.ca* (Exhibit D), and *liquorconnect.com* (Exhibit E), that Mr. Redelmeier

attests make select wines from the Owner available for purchase. The printouts include lists of Triomphe-branded wine products available on each website as of February 2014. For example, *WineryToHome.com* makes available the “2008 Triomphe Cabernet Merlot”, “2012 Triomphe Cabernet Franc Rosé” and “2012 Triomphe Chardonnay”. The exhibits include individual printouts for some of the Triomphe-branded wine in each list, along with a description and the price in Canadian dollars.

Again, I note that none of the descriptions identify any of the wines as a “fruit wine”.

- Exhibit F consists of four photographs of different bottles of wine. Mr. Redelmeier attests that the bottles are representative of Triomphe-branded wines that the Owner sold in Canada during the relevant period. The Mark appears prominently on the labels. Again, however, I note that none of the depicted wines are identified as “fruit wines” by Mr. Redelmeier or otherwise.
- Exhibit G includes purchase orders for various Triomphe-branded wines from the LCBO, which Mr. Redelmeier attests are received and filled out by the Owner, who then ships the ordered products within 30 days of receipt. The purchase orders are all dated between 2010 and 2013, and include orders that were received during the relevant period for “Triomphe” wines. For example, one of the purchase orders is dated December 4, 2012 and shows an order for “11 CHARD TRIOMPHE”, with the total cost quoted as being \$14,396. None of the exhibited purchase orders state that they are for “fruit wines”.

Analysis - Wines

[11] With respect to the registered goods “wines”, the print-outs and screenshots from various websites include a number of indicia demonstrating that wines displaying the Mark were available to customers in Canada during the relevant period. Mr. Redelmeier’s assertion of use is supported by the evidenced purchase orders and volume of sales detailed in his affidavit. The exhibited photographs show that such wines sold in Canada prominently displayed the Mark on the goods themselves.

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

Analysis - Fruit Wines

[13] However, with respect to “fruit wines”, it is well established that use must be shown in association with all of the goods as registered [see *John Labatt Ltd v Rainier Brewing Co et al* (1984), 80 CPR (2d) 228 (FCA)]. As such, some evidence of transfers in the normal course of trade in Canada is necessary. Merely *offering* goods for sale is not sufficient [see, for example, *The Molson Companies Ltd v Halter* (1976), 28 CPR (2d) 158 (FCTD); and *Gowling, Strathy & Henderson v Royal Bank of Canada* (1995), 63 CPR (3d) 322 (FCTD)]. Such evidence can be in the form of documentation like invoices or sales reports, but can also be through clear sworn statements.

[14] This is not to say that a registered owner is obligated to provide invoices for each registered good [see *Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)]. However, in the absence of invoices, the Owner should have been prepared to furnish evidence regarding volumes of sales, dollar value of sales or equivalent factual particulars to allow the Registrar to conclude that transfers in the normal course of trade actually occurred in Canada with respect to *each* of the registered goods [see *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79, 2014 CarswellNat 2439; *Gowling Lafleur Henderson LLP v Wertex Hosiery Incorporated*, 2014 TMOB 193, 2014 CarswellNat 4624].

[15] Here, however, I consider Mr. Redelmeier’s affidavit effectively silent with respect to the more specific goods “fruit wines”. First, I note that where Mr. Redelmeier describes “Triomphe-branded Wines” in his affidavit, there is no mention of “fruit wines”. Indeed, Mr. Redelmeier does not attest to any specific sales, nor does he provide invoices or other evidence to show that “fruit wines” displaying the Mark were in fact sold to Canadians through the Owner’s website or otherwise during the relevant period.

[16] Although Mr. Redelmeier does not describe in his affidavit what would constitute a “fruit wine”, the Owner’s website itself suggests that “fruit wines” are distinct from any Triomphe-

branded wines. In this respect, as noted above, the website's navigational menu consists of two separate categories and hyperlinks for each category of product. In addition, in the one instance where a bottle on the Owner's website is identified as a "fruit wine", it is not also identified as a "Triomphe" wine and the Mark does not appear on its label.

[17] In the absence of further evidence – such as a representative photograph depicting a "fruit wine" displaying the Mark or clear statements regarding the sale of "fruit wines" in Mr. Redelmeier's affidavit – it is not clear that any "fruit wines" offered for sale by the Owner during the relevant period were, in fact, sold in association with the Mark. In view of the evidence as a whole and in the absence of written representations, I consider the evidence ambiguous in this respect; per *Plough, supra*, such ambiguities must be resolved contrary to the interests of the Owner.

[18] As such, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered goods "fruit wines". As there is no evidence of special circumstances excusing such non-use of the Mark before me, the registration will be amended accordingly.

Disposition

[19] Accordingly, 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 "fruit wines" from the registration.

[20] The amended statement of goods will be as follows: Wines.

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

Hearing Date: No Hearing Held

Agents of Record

McMillan LLP

Barrette Legal Inc.

For the Registered Owner

For the Requesting Party