

SECTION 45 PROCEEDINGS
TRADE-MARK: EVERGREEN & DESIGN
REGISTRATION NO.: 336,632

On March 7, 2002, at the request of Cammack & Company, the Registrar forwarded a Section 45 notice to Jiangxi Cereals, Oils & Foodstuffs Import and Export Corporation, the registered owner of the above-referenced trade-mark registration.

The trade-mark EVERGREEN & Design (shown below) is registered for use in association with the following wares: “canned pork, vegetables, fruits and poultry; and wines”.



Section 45 of the Trade-marks 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 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 March 7, 1999 and March 7, 2002.

In response to the notice, the affidavit of Cao Meng together with exhibits has been furnished. Each party filed a written argument. An oral hearing has not been requested in this case.

In his affidavit, Mr. Meng states that he is the President of the registrant company. At paragraph 4 he indicates that the trade-mark has appeared on labels affixed to the following products sold by his company in Canada within the time period from March 7, 1999 to March 7, 2002: canned pork, vegetables and fruits, as well as wine. As Exhibit 2, he provides labels representative of those applied to the products sold in Canada during the relevant period. As Exhibit 3, he provides copies of invoices. He then indicates that these invoices are representative of invoices from his company relating to sales of his company's products bearing the trade-mark.

The requesting party's main arguments are that the evidence fails to show sales of each of the wares in Canada in association with the trade-mark and sales in the normal course of trade. In the alternative, the requesting party submits that the registration should be limited to "canned bamboo shoots" as these are the only registered wares for which an invoice has been produced.

Having considered the evidence, I find it is sufficient, although barely so, to meet the requirements of the Trade-marks Act with respect to the wares "canned pork, vegetables, fruits; and wines".

In paragraph 4 of the affidavit, Mr. Meng has clearly identified the products that were sold in Canada during the relevant period as canned pork, vegetables and fruits, and wine. He has

indicated that the trade-mark appeared on labels and has submitted representative labels as Exhibit 2. The labels bear the trade-mark and, therefore, show the manner the trade-mark is associated with the wares when the wares are transferred in the normal course of trade.

Concerning the invoices they substantiate the registrant's claim that it sells its wares in Canada. It is true that labels and invoices have not been furnished for each of the products listed in paragraph 4 of the Meng affidavit, however, in a Section 45 proceeding, a registrant is not required to provide labels or invoices with respect to each registered ware. As stated in *Union Electric Supply Co. Ltd. v. RTM*, 63 C.P.R. (2d) 56, use must be shown, not examples of all uses. Further, as stated in *Philip Morris Inc. v. Imperial Tobacco Ltd. et al.*, 13 C.P.R. (3d) 289, "evidence of a single sale whether wholesale or retail in the normal course of trade may well suffice". Here, Mr. Meng has clearly enumerated under oath that all wares except "poultry" were sold during the relevant period and I find there is no reason to doubt the affiant's enumeration of the wares sold. Further, he clearly indicated that the invoices and labels furnished were "representative" invoices and labels.

Concerning whether the sales were made in the normal course of trade, having regard to the evidence as a whole I find there is no reason to conclude otherwise. Mr. Meng has clearly indicated that the registrant sells the wares in Canada and the invoices confirm that sales by the registrant were made to customers in Toronto, Canada. The labels bear the registrant's name, therefore, providing the message the wares emanate from the registrant. In my view, there is no doubt that the sales were bona fide. The invoices represent normal commercial transactions of

the registrant and they were put forward as examples of sales made by the registrant to customers in Canada.

In view of the evidence furnished, I conclude that all of the wares except “poultry” ought to be maintained on the trade-mark registration.

Accordingly, Registration No. 336,632 will be amended to delete the wares “poultry” therefrom in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 31ST DAY OF MARCH 2004.

D Savard
Senior Hearing Officer
Section 45 Division