



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

Reference: 2015 TMOB 82  
Date of Decision: 28/04/2015

### TRANSLATION

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Smart & Biggar against registration  
No. TMA303,667 for the trade-mark DA VINCI in the  
name of Constellation Brands Quebec, Inc.**

[1] This decision relates to a summary expungement procedure brought against registration No. TMA303,667 for the trade-mark DA VINCI.

[2] The goods covered by the registration are "boissons alcoolisées distillées; liqueurs" (distilled alcoholic beverages; liquors).

[3] For the following reasons, I conclude that the registration must be expunged.

#### The proceeding

[4] On April 5, 2013, the Registrar addressed a notice under section 45 of the *Trade-Marks Act*, RSC (1985), c T-13 (the Act) to Constellation Brands Quebec, Inc. (Constellation), registered owner of registration No. TMA303,667 for the DA VINCI trade-mark (the Mark). This notice was addressed at the request of Smart & Biggar (the Requesting Party).

[5] The Registrar's notice enjoined Constellation to prove the use of the Mark in Canada, at some time between April 5, 2010 and April 5, 2013 (the Relevant Period), in association with each of the goods specified in the registration. In the absence of use, the Registrar's notice

enjoined Constellation to prove the date when the Mark was used for the last time and the reason for its absence of use since that date.

[6] It is well established that the purpose and the scope of section 45 of the Act are to provide for a simple, summary and expeditious procedure for removing “deadwood” from the register. The criterion for establishing use is not demanding and an overabundance of evidence is unnecessary. However, sufficient facts must be presented to allow the Registrar to conclude that the trade-mark was used in association with each of the goods or services mentioned in the registration during the relevant period [see *Uvex Toko Canada Ltd v Performance Apparel Corp.* (2004), 31 CPR (4th) 270 (FC)]. Bare allegations of use are insufficient to prove the use of the Mark [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)].

[7] Section 4(1) of the Act, applicable in the case at bar, defines the use of a trade-mark in association with goods as follows:

A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property 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] In response to the Registrar's notice, Constellation adduced the affidavit of Dominique Berberi, include its Exhibits DB-1 to DB-11.

[9] Both parties filed written arguments and were represented at the hearing held on February 10, 2015.

### The evidence

[10] On the date of her affidavit, subscribed on November 5, 2013, Ms. Berberi was Brand Manager at Constellation and had been employed by Constellation since 2012.

[11] In paragraph 7 of her affidavit, Ms. Berberi affirms that the Mark has been used in Canada, both by Constellation and by its predecessors in title, since at least March 14, 1985. Ms. Berberi then presents evidence concerning the use of the Mark in association with the DA VINCI Amaretto goods and in association with wines.

[12] I thus summarize as follows the evidence concerning the use of the Mark in association with the DA VINCI Amaretto product [paragr. 8 to 10 of the affidavit]:

- a photograph of a bottle, specimen labels and copies of purchase orders are attached to the affidavit as Exhibit DB-1;
- the purchase orders cover the years 1998, 2003, 2004 and 2006. Item number 070474, which appears on the affidavit, refers to the DA VINCI Amaretto goods; and
- an excerpt from the Quebec Enterprise Register is attached to the affidavit as Exhibit DB-2 to prove that Dumont Vins & Spiritueux Inc., whose name appears on the label, is a predecessor in title of Constellation.

[13] I thus summarize as follows the evidence concerning the use of the Mark in association with wines [paragr. 11 to 16 of the affidavit]:

- copies of purchase orders for the years 2006 to 2010 are attached to the affidavit as Exhibit DB-3. Item number 10666041, refers to wines bearing the Mark;
- a photograph of a wine bottle bearing the mark is attached to the affidavit as Exhibit DB-4;
- since 2007, sales of wines associated with the Mark have amounted to over \$3,500,000. Since that same year, over 400,000 bottles of wine bearing the Mark have been sold in Quebec alone; and
- copies of various promotional documents are attached to the affidavit as Exhibit DB-5.

[14] In paragraph 17 of her affidavit, Ms. Berberi represents:

Moreover, according to my experience in the alcoholic beverages field, I am able to affirm that the term liquors encompasses and has been used to encompass, in general, alcoholic beverages, including wines;

[15] Finally, Ms. Berberi mentions searches she conducted for the terms "liqueur" (liquor) and "vin" (wine). She essentially affirms the following [paragr. 18 to 29 of the affidavit]:

- the *Reverso* dictionary, a language tools portal, defines "liqueur" as "boisson, alcool" (alcoholic drink) and "vin" as "boisson alcoolisée obtenue par la fermentation du jus de raisin, cépages, cru" (an alcoholic drink produced by the fermenting the juice of varieties and vintages of grapes) [Exhibit DB-6];
- according to the translation service available on the Google search engine, the English translation of the term "liqueur" is "liquor" [Exhibit DB-7];
- according to the *Oxford, Merriam-Webster* and *Collins* dictionaries:
  - the term "*liquor*" means "*an alcoholic drink*" or "*any alcoholic drink*" [Exhibit DB-8]; and
  - the term "*wine*" means "*an alcoholic drink produced by the fermenting of grapes with water and sugar*", "*an alcoholic drink made from the juice of grapes*" and "*an alcoholic drink made from fermented grape juice*" [Exhibit DB-9];
- according to the history of the SAQ, available on its website, its predecessor was called the Commission des liqueurs (Liquor Board) [Exhibit DB-10]; and
- the term "vin de liqueur" is found in the 1979 edition of *Nouveau Larousse des vins* [Exhibit DB-11].

### Preliminary observations

[16] I note that the Requesting Party attached excerpts from "Google Translate" and dictionaries" to its written representations. Similarly, its collection of case law for the hearing contained excerpts from "Google Translate" and dictionaries.

[17] At the hearing, Constellation submitted that the Requesting Party was incorrectly attempting to adduce evidence in this proceeding. In response to Constellation's arguments, the Requesting Party submitted that it is completely acceptable for it to refer to dictionary definitions in the course of its written and oral representations. To support its position, the Requesting Party noted that in the exercise of the Registrar's discretion, I am empowered to refer to a dictionary myself. This is what the Requesting Party ultimately invited me to do.

[18] Indeed, in addition to calling into question the reliability of the *Reverso* language tools portal, the Requesting Party calls into question the accuracy of the translation service available on the Google search engine during its consultation by Ms. Berberi. The Requesting Party submits that the term "liqueur" is translated in English as "*liqueur*" and not as "*liquor*". Also according to the Requesting Party, the dictionary excerpts attached as Exhibit DB-8 to Ms. Berberi's affidavit contradict her assertion that the English term "*liquor*" refers to an alcoholic drink, in that they prove this term refers more specifically to a *distilled* alcoholic drink.

[19] I agree with the Requesting Party that I can refer to a dictionary. Thus, referring to the *Robert & Collins* and *Oxford-Hachette* French-English dictionaries, I agree that the term "liqueur" translates into English as "*liqueur*". This having been said, since the statement of the registration is in French, the questions of the English translation of the term "liqueur" or the meaning of the English term "liquor" seem to have raised a false debate. Whatever the case may be, I find that neither the English translation of the term "liqueur" nor the definitions of the English term "liquor" have any impact in the case at bar. Therefore, I will not return to these questions in the following analysis.

#### Analysis and reasons for decision

[20] In general, the Requesting Party agrees there is sufficient evidence to conclude as to the use of the Mark during the relevant period within the meaning of section 4(1) of the Act. However, it submits that the evidence does not prove the use in association with each of the products specified in the registration.

[21] Indeed, the Requesting Party submits that the evidence does not prove the use of the Mark in association with "boissons alcoolisées distillées" (distilled alcoholic beverages). The Requesting Party also submits that the use of the Mark in association with wines does not constitute a use in association with the "liqueurs" goods specified in the registration.

[22] Still speaking in general, Constellation submitted in its written representations that its evidence proves the use of the Mark, during the relevant period, in association with each of the goods specified in the registration. However, during the hearing, Constellation acknowledged

that Ms. Berberi's affidavit does not present any evidence regarding the use of the Mark in association with "boissons alcoolisées distillées" (distilled alcoholic beverages).

[23] During the hearing, Constellation also acknowledged that according to its evidence, sales of the DA VINCI Amaretto goods had ceased in 2006; subsequently, only wines were sold in association with the Mark. However, Constellation maintained its written representations according to which the evidence of use of the Mark in association with wines constitutes evidence of use in association with "liqueurs". Constellation takes the position that the term "liqueur" used in the statement of the registration [TRANSLATION] "underlies a broad interpretation of a range of alcoholic beverages, of which wine is an integral part".

[24] Since Constellation ultimately acknowledged the absence of evidence of use of the Mark for "boissons alcoolisées distillées" (distilled alcoholic beverages" and the evidence does not show special circumstances justifying this default of use, I find that I can summarily conclude for the expungement of the "boissons alcoolisées distillées" (distilled alcoholic beverages) goods specified in the registration.

[25] Therefore, following the representations of the parties, the only question that remains to be settled in the case at bar is:

*Does the evidence of use of the Mark in association with wines, during the relevant period, constitute evidence of use in association with the "liqueurs" goods specified in the registration?*

[26] I will begin the analysis of this question by returning in more detail to the representations of the parties, which I nonetheless will summarize. I then will discuss these representations and the reasons why I have decided to rule against Constellation on the question.

#### Representations of the Requesting Party

[27] Apart from its representations concerning the reliability or accuracy of the reference tools consulted by Ms. Berberi, the Applicant submits the following:

- Ms. Berberi's opinion concerning the use of the term "liqueurs" in the alcoholic beverages field is inadmissible because her expert qualification were not entered into evidence; no weight must be given to her opinion;
- in the absence of expert evidence suggesting a different meaning, the Register has interpreted the statement of goods in accordance with the common meaning of the terms found in the registration [see *Levi Strauss & Co v Canada (Registrar of Trade-Marks)* (2006), 51 CPR (4th) 434 (FC)];
- the dictionary definitions mentioned by Ms. Berberi do not suggest that "liqueur" is a term commonly understood as including wine;
- the entry for "liqueur (vin de)" found in the 1979 edition of *Nouveau Larousse des vins* indicates that the leader among these wines is "porto"; this entry does not support the argument that the term "liqueur" includes wines. Whatever the case may be, the Registrar has refused to consider definitions that do not represent the common meaning of a term. In particular, obscure definitions that would technically include specified goods in the registration must be ignored [see *Wrangler Apparel Corp v Pacific Rim Sportswear Co* (2000), 10 CPR (4th) 568 (TMOB)]; and
- even disregarding the admissibility of the SAQ website due to hearsay, the Mark was registered in 1985, whereas the name "Commission des liqueurs du Québec" (Quebec Liquor Board) dates back to 1921 and was changed in 1961 to "Régie des alcools du Québec". Since then, the term "liqueurs" has never been used in the name of the SAQ or its predecessor.

#### Representations of Constellation

[28] I summarize as Constellation's representations as follows, including its representations in response to that of the Requesting Party:

- in view of the goal of a proceeding under section 45 of the Act, the terms of the statement of a registration must be interpreted broadly;

- the term "liqueur" has always been used to encompass and still encompasses alcoholic beverages in general, in particular, wine products;
- Ms. Berberi does not have to be recognized as an expert to affirm that the [French] term "liqueurs" encompasses, in general, alcoholic beverages, including wines. This is an assertion based on the common meaning given to the [French] term "liqueur" in the alcoholic beverages field and not an assertion of an opinion in linguistic matters;
- the jurisprudence teaches that a person "immersed in the industry", in this case Ms. Berberi who represents Constellation, is in the best position to provide an interpretation of the terms used in the statement of goods [see *Wrangler Apparel Corp*, supra];
- Ms. Berberi's assertion in itself is sufficient to conclude that the [French] term "liqueurs" encompasses alcoholic beverages, including wines. The definitions presented in evidence only serve to support this assertion;
- contrary to the Requesting Party's claims, it was not decided in *Levi Strauss & Co*, supra, that expert evidence is necessary to derogate from the common meaning of a word. Constellation relies precisely on the fact that the common [French] meaning of the definition of "liqueur" in the alcoholic beverages field includes wine, based on a general approach. Moreover:
  - the language tools define the [French] term "liqueur" as "boisson, alcool" (alcoholic drink);
  - the term "vin" (wine) is defined by many tools as "boisson alcoolisée obtenue par la fermentation du jus de raisin" (alcoholic drink obtained by fermentation of grape juice);
  - the term "vin de liqueur" (liqueur wine) does not only refer to portos. This is a broadly defined wine category, except in France where it is subject to specific standards; and
- this history of the SAQ proves that the term "liqueur" (liquor) has always been used to refer to both spirits and wines. It is general knowledge that the Commission des liqueurs du Québec (Quebec Liquor Board), the predecessor of the SAQ, also sold



wines and spirits. The decision to change the name of the Commission des liqueurs du Québec to Société des alcools du Québec [my underlining] proves that the term "liqueur" underlies a definition at least as broad as that of alcohol and undeniably includes wine.

### Discussion

[29] To begin, I point out that even though I have summarized the representations of the parties for the purposes of my decision, I considered all their representations. Also, I considered all the decisions the parties brought to my attention, even though I have referred only to the *Levi Strauss & Co* and *Wrangler Apparel Corp* decisions, *supra*. Moreover, I find that despite their divergent positions on the question in the case at bar, the parties seem to agree on the relevance of these two decisions, at least to the extent that they raise questions of interpretation of the statement of a registration within the context of proceedings under section 45 of the Act.

[30] I note from the outset that I have no intention to discuss at length the representations of the parties regarding the relevance, in the case at bar, of the excerpts from the website of the SAQ, the predecessor of which was the Commission des liqueurs du Québec. Let it suffice to say that Constellation has not convinced me of the conclusiveness of this website to prove that the [French] term "liqueur" has been used to refer to both spirits and wines, nor of the relevance of the name change of the Commission des liqueurs du Québec to prove that the [French] term "liqueur" undeniably includes wine.

[31] Also, regarding the definitions in common language of the [French] terms "liqueur" and "vin", I decided to refer to the *Le Petit Robert* dictionary, where I found the following definitions:

- liqueur: "... boisson sucrée et aromatisée à base d'alcool ou d'eau-de-vie ..." (sweet and flavoured beverage based on alcohol or brandy)
- vin: "boisson alcoolisée provenant de la fermentation du raisin" (alcoholic beverage resulting from the fermentation of grapes)

[32] I acknowledge that "liqueurs" and "vins" correspond to alcoholic beverages. I also acknowledge that the Court, in the *Levi Strauss & Co.* decision, supra, indicated the following:

[ORIGINAL TEXT OF ENGLISH JUDGMENT]

[17] The case law consistently states that one is not to be astutely meticulous when dealing with language used in a statement of wares. For instance the age old debate as to whether a tomato is a fruit need not be resolved at a trade-mark level, use on tomatoes can sustain a registration for fruit (see *Countryside Cannery Co. v. Canada (Registrar of Trade Marks)* (1981), 55 C.P.R. (2d) 25 (FC)); even use of corn can sustain a registration including fruit (*Fetherstonhaugh & Co. v. ConAgra Inc.* (2002), 23 C.P.R. (4th) 49 (FC)).

[33] I note that Constellation also brought to my attention the *Fetherstonhaugh & Co.* decision, supra. In my opinion, the following comment of the Court in this case, in which the registration was maintained on the basis of the purely botanical meaning of the word "fruit", is particularly à propos:

[ORIGINAL TEXT OF ENGLISH JUDGMENT]

[23] I agree with ConAgra that a reasonable interpretation of "side dishes of vegetables and fruit", used in the description of the wares subject to the trade-mark in issue would include "side dishes of vegetables and corn, or side dishes of vegetables, if corn were not a fruit. That interpretation would avoid expunging a trade-mark, the use of which is established in accord with s-s. 45(1), solely on the basis of an ambiguous description of the wares subject to trade-mark. [...]

[My underlining]

[34] In the present case, I find that the [French] term "liqueurs" in the statement of the registration is not ambiguous.

[35] This last comment leads me to discuss the conclusiveness of Ms. Berberi's assertion, in paragraph 17 of her affidavit, that the [French] term "liqueurs" encompasses and has always been used to encompass alcoholic beverages, including wines.

[36] I do not intend to discuss the representations of the parties as to whether it is appropriate for Ms. Berberi to make this assertion. Indeed, it seems to me that these representations raise a false debate. Whatever the case may be, I do not accept Constellation's position that in

application of the *Wrangler Apparel Corp* decision, supra, I must conclude that the [French] term "liqueurs" encompasses wines on the basis of Ms. Berberi's mere assertion.

[37] In the *Wrangler Apparel Corp* case, the author of the affidavit reportedly declared that the mark was used in association with a line of cotton clothing, including the wares covered by the registration. In this case, Jill Bradbury, acting on behalf of the Registrar, wrote [page 571]:

*The onus in Section 45 proceedings is on the registrant. It is not a heavy onus but I do believe that the registrant ought to make it clear as to what the ordinary commercial term is for the specific wares in association with which it is claiming use of the mark. To put it another way, the onus is on the registrant to make the correlation between the wares shown to be in use and the registered wares. It is inappropriate that the lawyers should be left to argue over whether a particular pair of pants are in fact jeans based on dictionary definitions when an individual who is obviously immersed in the industry has omitted, intentionally or not, to indicate whether or not the pants in question are jeans. That said, I will interpret the ambiguity in the affidavit concerning the ordinary commercial term of the wares sold against the affiant.*

[My underlining reflects the excerpt from the decision cited by Constellation.]

[38] The following excerpts from the decision essentially summarize the reasons why Ms. Bradbury ruled the affidavit was ambiguous and concluded that the use of the mark in association with pants was not a use in association with jeans:

*I am however concerned by the fact that Mr. Pau never refers to the pants as jeans. This is an ambiguity that I am entitled to interpret against the interest of the affiant. Jeans certainly are a type of pants but the pants introduced into evidence are not what are typically thought of as jeans. It would have been a simple matter for Mr. Pau to refer to these pants as jeans, if in fact that is what he considers them to be. In the absence of any such reference, I am left with the competing definitions of jeans provided in the parties' arguments. In its written argument, the requesting party takes the position that jeans are commonly understood to be "denim pants, generally blue in colour and fitted, with front 'hand' pockets and rear patch pockets".*

[...]

*The pants in question are made of cotton, but they are olive green wide wale corduroy trousers, which are pleated and cuffed, with side pockets and buttoned front and rear pockets. They are not what I would commonly call "jeans".*

[39] In the present case, I recall that Ms. Berberi affirmed, in paragraph 7 of her affidavit, that the Mark has been used by Constellation and its predecessors since at least March 14, 1985. Yet as noted by the Requesting Party, Ms. Berberi does not mention products in association with which the Mark would have been used. Even though this omission, intentional or not, is not a determining factor, I find it is at least questionable. Was Ms. Berberi hesitant to affirm that the Mark was used with "liqueurs", knowing that sales of the DA VINCI Amaretto goods, undoubtedly a liqueur, had ceased in 2006?

[40] In the final analysis, even if I accept Constellation's position that wines and liqueurs are alcoholic beverages, I do not accept its position that the evidence of use of the Mark in association with wine allows a conclusion of maintenance of registration for the "liqueurs" goods. I will not normally call wine a liqueur.

[41] In conclusion I take the liberty of adding that I strongly doubt that, if the DA VINCI Amaretto product had been sold during the relevant period, Constellation would have presented it as a wine rather than a fine liqueur, as indicated on the product label. With all due respect for Constellation, its position in the case at bar regarding the interpretation of the statement of the registration appears excessive, in that it implies that evidence of use of the Mark with any alcoholic beverage other than a liqueur, such as a beer, would allow maintenance of the registration for the "liqueurs" goods.

[42] In view of the above, I conclude that the evidence does not establish the use of the Mark in Canada, within the meaning of section 4(1) and section 45 of the Act, in association with "liqueurs". Moreover, the evidence does not present any special circumstances justifying the failure to use the Mark in association with the "liqueurs" goods.

Decision

[43] On the grounds set out above, pursuant to the authority delegated to me under section 63(3) of the Act, registration No. TMA303,667 will be expunged pursuant to section 45 of the Act.

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Céline Tremblay  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

Certified translation  
Arnold Bennett