

Federal Court



Cour fédérale

Date: 20110128

Dockets: T-1969-07, T-1970-07

Citation: 2011 FC 102

Ottawa, Ontario, January 28, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

**EMPRESA CUBANA DEL TABACO TRADING
ALSO AS CUBATABACO**

Applicant

and

**SHAPIRO COHEN and THE REGISTRAR OF
TRADE-MARKS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal pursuant to section 56 of the *Trade-marks Act*, R.S.C. 1985, c. T-13, as amended (the Act), from two decisions of the Registrar of Trade-Marks dated September 13, 2007, expunging, pursuant to section 45 of the Act, the applicant's Cohiba cigar and cigarillo trade-marks, namely:

1. COHIBA, registration number 277,250; and
2. COHIBA & DESIGN, registration number 373,446.

[2] The two trade-marks were expunged for failure by the applicant to show use by the registrant (the applicant) and, in the case of the COHIBA trade-mark, also for failure to show use in association with any of the registered wares.

[3] Section 45 of the Act provides for the expungement of a registered trade-mark which is not used in the three-year period immediately preceding notice by the Registrar of Trade-marks to the trade-mark owner requiring the owner to show evidence of such use.

PARTIES

[4] The applicant, Empresa Cubana del Tabaco, trading also as Cubatabaco, is an enterprise of the Government of the Republic of Cuba created by statute and based in Havana, Cuba. Cubatabaco is the registrant of both trade-marks and appeals the Registrar's decision to expunge its COHIBA and COHIBA & DESIGN marks.

[5] The respondent Shapiro Cohen is an intellectual property law firm based in Ottawa, Ontario. In September of 2000, Shapiro Cohen requested that the Registrar issue a notice in accordance with section 45 of the Act to inquire whether the two relevant trade-marks should be expunged.

[6] The other respondent, the Registrar of Trade-marks, made no representations on this appeal.

Other corporations involved with the trade-marks

[7] Two other companies feature in this appeal but are not parties. Corporacion Habanos S.A. S.A. (Habanos S.A.) is a company incorporated in Havana, Cuba. Habanos S.A. received a license in 1994 from Cubatabaco to use the trade-marks COHIBA and COHIBA & DESIGN. Habanos S.A. was responsible for the export, marketing, and commercialization of tobacco-related products bearing the trade-marks COHIBA and COHIBA & DESIGN.

[8] Havana House Cigar & Tobacco Merchants Ltd. (Havana House) is a corporation based in Toronto, Canada. Havana House is Habanos S.A.'s distributor in Canada, and holds the exclusive right to import and sell Habanos S.A.'s goods in Canada.

FACTS

[9] The applicant applied for the trade-mark for COHIBA on June 17, 1982. The COHIBA trade-mark was registered on March 4, 1983, in association with the following wares:

leaf tobacco, manufactured tobacco for smoking and chewing, snuff and cigarettes.

[10] The applicant applied for the trade-mark for COHIBA & DESIGN (shown below) on July 4, 1989. The COHIBA & DESIGN trade-mark was registered on September 14, 1990, in association with the following wares:

Raw tobacco, cigars, cigarillos, cigarettes, cut tobacco, rappee, manufactured tobacco of all kinds, matches, tobacco pipes, pipe holders, ashtrays, match boxes, cigar cases and humidors.



[11] On September 21, 2000, at the request of Shapiro Cohen, the Registrar, pursuant to section 45 of the Act, required Cubatabaco to furnish within three months an affidavit or a statutory declaration showing, with respect to each of the wares or services specified in the registration of its COHIBA trade-mark, whether the COHIBA trade-mark was in use by the applicant 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.

[12] On October 13, 2000, also at the request of Shapiro Cohen, the Registrar, pursuant to section 45 of the Act, required Cubatabaco to furnish within three months an affidavit or a statutory declaration showing, with respect to each of the wares or services specified in the registration of its COHIBA & DESIGN trade-mark, whether the COHIBA & DESIGN trade-mark was in use by the applicant 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.

Relevant time period

[13] Accordingly, the relevant time period for the appeal regarding the COHIBA trade-mark is September 21, 1997 to September 21, 2000, and the relevant time period for the COHIBA & DESIGN trade-mark is October 13, 1997 to October 13, 2000.

The Decisions of the Registrar under appeal

[14] In two decisions dated September 13, 2007, the Registrar found that the trade-marks COHIBA and COHIBA & DESIGN should be expunged from the Trade-marks Register, pursuant to section 45 of the Act.

Decision with respect to the COHIBA trade-mark

[15] As stated above, the wares or services specified in the registration of the COHIBA trade-mark are the following: “leaf tobacco, manufactured tobacco for smoking and chewing, snuff and cigarettes.”

[16] The Registrar stated that section 45 of the Act requires the registered owner of the trade-mark to show use in association with each of the wares 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.

[17] The Registrar reviewed the evidence submitted by the applicant—namely, the Affidavit of Abel Gonzalez Ortego of Havana House in Canada, and the Affidavit of Adargelo Garrido De La Grana of Habanos S.A.

[18] The Registrar accepted that Habanos S.A. is a licensee of Cubatabaco.

[19] Consequently, the Registrar considered the following two issues at the hearing:

1. Does the use by Habanos S.A. accrue to the registrant (the applicant herein) pursuant to section 50 of the Act?; and
2. Does the use shown accord with the statement of wares?

[20] With regard to the first issue, whether the use by Habanos S.A. accrues to the registered owner of the trade-mark, the Registrar found that the evidence did not support such a conclusion:

Consequently, in the absence of admissible evidence showing that the registrant was the manufacturer of the wares sold in Canada during the relevant period, I am not prepared to conclude that the registrant produced the wares exported into Canada by Habanos S.A. and therefore had control of their character and quality pursuant to s. 50(1) of the Act. Further, as pointed out by the requesting party, the presumption dictated by s-s. 50(2) does not arise as there is no evidence showing that public notice was given of the fact that the use was licensed use and of the identity of the owner.

In view of the above, I conclude that the use shown by the evidence does not ensure to the benefit of the registrant.

(Emphasis added by the Court)

[21] In particular, the Registrar found that evidence was lacking in two major respects. First, the Registrar agreed with the respondent that the statements made by Mr. Ortego in his affidavit regarding who manufactured the wares that Havana House purchased from Habanos S.A. were inadmissible hearsay:

Mr. Ortego is not an Officer or Director of the registrant and nowhere is it indicated that his statement is based on “personal knowledge”. Further no reasons were given as to why a person having direct knowledge regarding the manufacturing of the wares could not have provided the information in question.

[22] Second, the Registrar found that the evidence demonstrated that Hababos S.A. is not merely Cubatabaco's exporting arm, but, rather, exercises control over the production of the wares:

It may be that the licensee could just sell and market the wares, however, given the wording in the license contract the assumption would be that the licensee would be doing all three that is "producing, selling and marketing" the wares.

Further, as the evidence shows that the labels applied to the packaging for the wares bear the name Habanos S.A. and not the name of the registrant, this is more consistent with the licensee producing the wares.

[23] With regard to the second issue, the Registrar found that the evidence failed to demonstrate use in association with the wares covered by the trade-mark registration:

None of the wares listed in the affidavit namely "cigars and cigarillos" are amongst the wares enumerated in the statement of wares of the trade-mark registration. The statement of wares covers "manufactured tobacco for smoking and chewing" not "manufactured tobacco products for smoking". As properly pointed out by the requesting party, there is an important distinction between the two. The registered wares "manufactured tobacco for smoking and chewing" would include "loose tobacco sold in pouches, tins and the like" but would not include finished smoking products such as cigars and cigarillos. As the evidence refers to "finished smoking products" namely "cigars and cigarillos", I conclude that the evidence furnished is not in respect of any of the registered wares.

[24] The Registrar therefore concluded that the COHIBA trade-mark should be expunged.

Decision with respect to the COHIBA & DESIGN trade-mark

[25] As stated above, the wares or services specified in the registration of the COHIBA & DESIGN trade-mark are the following: "Raw tobacco, cigars, cigarillos, cigarettes, cut tobacco,

rappee, manufactured tobacco of all kinds, matches, tobacco pipes, pipe holders, ashtrays, match boxes, cigar cases and humidors.”

[26] The same evidence that was before the Registrar with regard to the COHIBA trade-mark was also before the Registrar with regard to the COHIBA & DESIGN trade-mark.

[27] The Registrar considered the same two issues at the COHIBA & DESIGN hearing:

1. Does the use by Habanos S.A. accrue to the registrant pursuant to section 50 of the Act?; and
2. Does the use shown accord with the statement of wares?

[28] With regard to the first issue, whether the use shown accrues to the registered owner of the trade-mark, the Registrar found that the evidence did not support such a conclusion, for the same reasons as had been provided for the COHIBA trade-mark:

Consequently, in the absence of admissible evidence showing that the registrant was the manufacturer of the wares sold in Canada during the relevant period, I am not prepared to conclude that the registrant produced the wares exported into Canada by Habanos S.A. and therefore had control of their character and quality pursuant to s-s. 50(1) of the Act. Further, as pointed out by the requesting party, the presumption dictated by s-s. 50(2) does not arise as there is no evidence showing that public notice was given of the fact that the use was licensed use and of the identity of the owner.

In view of the above, I conclude that the use shown by the evidence does not enure to the benefit of the registrant and therefore, the trade-mark ought to be expunged.

[29] In contrast to the Registrar’s findings with regard to the COHIBA trade-mark, however, in the case of the COHIBA & DESIGN trade-mark the Registrar accepted the applicant’s admission

that the statement of wares should be amended to recognize only “cigars and cigarillos.” As a result, there was no question as to whether the use shown accorded with the statement of wares: the products sold were only cigars and cigarillos, as registered in the statement of wares.

Evidence before the Registrar

[30] The evidence before the Registrar was the same for both the COHIBA and COHIBA & DESIGN trade-marks.

[31] In response to the notices, Cubatabaco first filed an affidavit from Abel Gonzalez Ortego, Commercial Manager of Havana House, the Canadian distributor of Cohiba cigars, sworn on May 10, 2001. Mr. Ortego’s Affidavits in each case were similar, but bore one difference. Mr. Ortego deposed as follows at paragraph 3 of his affidavit submitted in the COHIBA & DESIGN hearing:

¶3. That the Registrant has been selling cigars and cigarillos under the design-mark COHIBA in Canada for at least 10 years. The cigars and cigarillos are manufactured by the Registrant, Empresa Cubana del Tabaco, trading as Cubatabaco, and are distributed throughout the world via HABANOS S.A. the exclusive export licensee of the Registrant, from where the cigars and cigarillos destined for the Canadian market are obtained by HAVANA HOUSE CIGAR & TOBACCO MERCHANTS LTD. The cigars are then sold by HAVANA HOUSE CIGAR & TOBACCO MERCHANTS LTD. to retailers across Canada. At the time of sale, the cigars and the boxes in which they are sold are either marked or carry labelling on which the trade-mark COHIBA and its design elements are prominently displayed.

[32] Mr. Ortego’s Affidavit submitted for the COHIBA trade-mark hearing differed in paragraph 3 by adding the words “manufactured tobacco for smoking” in the first three lines of the paragraph:

THAT the Registrant has been selling manufactured tobacco for smoking in the form of cigars and cigarillos under the name

COHIBA in Canada for about 20 years. The manufactured tobacco for smoking in the form of cigars and cigarillos are manufactured by the Registrant, Empresa Cubana del Tabaco, trading as Cubatabaco

...

[33] Mr. Ortego's Affidavits attached exhibits showing the Canadian sales receipts for cigars and cigarillos, including those sold under the COHIBA & DESIGN trade-mark, the Canadian wholesale price list for COHIBA cigars and cigarillos, two original COHIBA & DESIGN labels (differing slightly in their appearance) which are applied to boxes of COHIBA brand cigars and cigarillos, and a copy of Havana House's client list.

[34] On November 6, 2001, the respondent submitted that the following issues were raised by Mr. Ortego's evidence:

1. Mr. Ortego's evidence in paragraph 3 of his affidavit regarding the relationship between Cubatabaco and Habanos S.A. was hearsay and inadmissible as evidence.
2. Mr. Ortego ought to have included a copy of the license agreement between Cubatabaco and Habanos S.A. to which he referred.
3. The trade-mark COHIBA and its design elements that Mr. Ortego stated are applied to COHIBA brand product labels and included as an exhibit to his affidavit differed from the design of the registered mark in the following important ways:
 - i. The registered design mark features the registrant's trading name CUBATABACO on the bottom left hand corner, whereas the exhibits to Mr. Ortego's affidavit displayed the name Habanos S.A.
 - ii. The words appearing in the right-hand corner differed in that the registered mark said "HECHO A MANO" whereas the exhibit showed "TOTALMENTE A MANO".
4. None of the sales receipts attached by Mr. Ortego made reference to Cubatabaco; all sales were made by Havana House to Canadian retailers.

[35] On December 22, 2004, the applicant submitted its written submissions for both cases, along with a request for a retroactive extension of time to file an Affidavit of Adargelio Garrido De La Grana, Legal Director and General Secretary of Habanos S.A., providing a copy of the license agreement between Cubatabaco and Habanos S.A. The retroactive extension was granted. Mr. De La Grana's Affidavit attested that Habanos S.A. was granted a license in 1994 by Cubatabaco and attached a copy of that license agreement as an exhibit.

[36] In its written submissions, the applicant admitted that only the registration of cigars and cigarillos is justified with regard to the COHIBA & DESIGN trade-mark:

In view of the above, it is clear that the mark COHIBA & DESIGN was indeed used within the normal course of trade in association with the wares in Canada during the relevant period. It is noted by the Registrant that there has not been use in relation to the "Raw tobacco, cigarettes, cut tobacco, rappee, manufactured tobacco of all kinds, matches, tobacco pipes, pipe holders, ashtrays, match boxes, cigar cases and humidors." Thus, as such, the Registrant respectfully submits that a decision to maintain the registration in relation to the wares described as cigars and cigarillos is justified.

[37] The applicant could make no similar admissions regarding the COHIBA trade-mark, because, as stated above, cigars and cigarillos were not specifically named in the COHIBA trade-mark statement of wares.

[38] The respondent filed further written submissions in response to the applicant's submissions and Mr. De La Grana's Affidavit. The respondent submitted that the following issues were raised by Mr. De La Grana's evidence:

1. The license agreement did not contain terms that would make it fall within section 50 of the Act.

- i. Section 50(1) of the Act provides that where the owner of a trade-mark licenses an entity to use its trade-mark and retains, under the licence, direct or indirect control of the character or quality of the wares or services, use by the licensee is deemed to be use by the owner. The respondent submitted that the license agreement attached to Mr. De La Grana's Affidavit failed to meet the requirements of section 50(1) because it demonstrated that the owner had in fact relinquished control over the character or quality of the wares or services subject to the trade-mark and it failed to provide evidence that any use by the licensee, Habanos S.A., accrued to the benefit of the registrant, Cubatabaco. In particular, the respondent submitted that two elements of the agreement demonstrated that Cubatabaco had relinquished control:
1. the license agreement clearly gave the licensee "exclusive" responsibility for "producing, selling and marketing" Cuban tobacco products "without limitation of any kind", for promoting and advertising activities for the products, for establishing and controlling communications strategies and prices, and also gave the licensee the right to grant sub-licenses for production and distribution with the authorization of the owner;
 2. the license agreement is described as an "exclusive use" license contract. Exclusive use contracts give the licensee the exclusive use of the trade-mark, even to the exclusion of the registered owner. The respondent accepted, however, that the evidence submitted by the applicant did not support the characterization of the contract as an exclusive use agreement.
- ii. Furthermore, section 50(2) of the Act provides that where the public is notified of the fact that the use is a licensed use and of the registered owner's identity, there is a rebuttable presumption that the use by the licensee is for the benefit of the registered owner. The respondent submitted that the evidence showed that only Habanos S.A., and not Cubatabaco, was identified on the relevant wares.

[39] Both parties were represented at the oral hearing before the Registrar. The hearings for both the COHIBA and the COHIBA & DESIGN trade-marks were considered on the same day.

RELEVANT LEGISLATION

[40] The Act defines use in association with wares in subsection 4(1):

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

4. (1) Une marque de commerce est réputée employée en liaison avec des marchandises si, lors du

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.

transfert de la propriété ou de la possession de ces marchandises, dans la pratique normale du commerce, elle est apposée sur les marchandises mêmes ou sur les colis dans lesquels ces marchandises sont distribuées, ou si elle est, de toute autre manière, liée aux marchandises à tel point qu'avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.

[41] The proceedings before the Registrar were commenced in accordance with section 45 of the Act, which requires the trade-mark owner to show use of the trade-mark at any time in the preceding three years:

45. (1) The Registrar may at any time and, at the written request made after three years from the date of the registration of a trade-mark by any person who pays the prescribed fee shall, unless the Registrar sees good reason to the contrary, give notice to the registered owner of the trademark requiring the registered owner to furnish within three months an affidavit or a statutory declaration showing, with respect to each of the wares or 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.

45. (1) Le registraire peut, et doit sur demande écrite présentée après trois années à compter de la date de l'enregistrement d'une marque de commerce, par une personne qui verse les droits prescrits, à moins qu'il ne voie une raison valable à l'effet contraire, donner au propriétaire inscrit un avis lui enjoignant de fournir, dans les trois mois, un affidavit ou une déclaration solennelle indiquant, à l'égard de chacune des marchandises ou de chacun des services que spécifie l'enregistrement, si la marque de commerce a été employée au Canada à un moment quelconque au cours des trois ans précédant la date de l'avis et, dans la négative, la date où elle a été ainsi employée en dernier lieu et la raison de son défaut d'emploi depuis cette

(2) The Registrar shall not receive any evidence other than the affidavit or statutory declaration, but may hear representations made by or on behalf of the registered owner of the trade-mark or by or on behalf of the person at whose request the notice was given.

(3) Where, by reason of the evidence furnished to the Registrar or the failure to furnish any evidence, it appears to the Registrar that a trade-mark, either with respect to all of the wares or services specified in the registration or with respect to any of those wares or services, was not used in Canada at any time during the three year period immediately preceding the date of the notice and that the absence of use has not been due to special circumstances that excuse the absence of use, the registration of the trademark is liable to be expunged or amended accordingly. . . .

date.

(2) Le registraire ne peut recevoir aucune preuve autre que cet affidavit ou cette déclaration solennelle, mais il peut entendre des représentations faites par le propriétaire inscrit de la marque de commerce ou pour celui-ci ou par la personne à la demande de qui l'avis a été donné ou pour celle-ci.

(3) Lorsqu'il apparaît au registraire, en raison de la preuve qui lui est fournie ou du défaut de fournir une telle preuve, que la marque de commerce, soit à l'égard de la totalité des marchandises ou services spécifiés dans l'enregistrement, soit à l'égard de l'une de ces marchandises ou de l'un de ces services, n'a été employée au Canada à aucun moment au cours des trois ans précédant la date de l'avis et que le défaut d'emploi n'a pas été attribuable à des circonstances spéciales qui le justifient, l'enregistrement de cette marque de commerce est susceptible de radiation ou de modification en conséquence. . .

[42] Section 50 of the Act deems certain use by a licensee to be use by the registered owner of a trade-mark:

50. (1) For the purposes of this Act, if an entity is licensed by or with the authority of the owner of a trade-mark to use the trade-mark in a country and

50. (1) Pour l'application de la présente loi, si une licence d'emploi d'une marque de commerce est octroyée, pour un pays, à une entité par le

the owner has, under the licence, direct or indirect control of the character or quality of the wares or services, then the use, advertisement or display of the trade-mark in that country as or in a trade-mark, trade-name or otherwise by that entity has, and is deemed always to have had, the same effect as such a use, advertisement or display of the trade-mark in that country by the owner.

(2) For the purposes of this Act, to the extent that public notice is given of the fact that the use of a trade-mark is a licensed use and of the identity of the owner, it shall be presumed, unless the contrary is proven, that the use is licensed by the owner of the trade-mark and the character or quality of the wares or services is under the control of the owner.

...

propriétaire de la marque, ou avec son autorisation, et que celui-ci, aux termes de la licence, contrôle, directement ou indirectement, les caractéristiques ou la qualité des marchandises et services, l'emploi, la publicité ou l'exposition de la marque, dans ce pays, par cette entité comme marque de commerce, nom commercial — ou partie de ceux-ci — ou autrement ont le même effet et sont réputés avoir toujours eu le même effet que s'il s'agissait de ceux du propriétaire.

(2) Pour l'application de la présente loi, dans la mesure où un avis public a été donné quant à l'identité du propriétaire et au fait que l'emploi d'une marque de commerce fait l'objet d'une licence, cet emploi est réputé, sauf preuve contraire, avoir fait l'objet d'une licence du propriétaire, et le contrôle des caractéristiques ou de la qualité des marchandises et services est réputé, sauf preuve contraire, être celui du propriétaire.

...

[43] Section 56 of the Act grants a right of appeal from a decision of the Registrar and allows the appellant to file additional evidence:

56. (1) An appeal lies to the Federal Court from any decision of the Registrar under this Act within two months

56. (1) Appel de toute décision rendue par le registraire, sous le régime de la présente loi, peut être interjeté à la Cour fédérale

from the date on which notice of the decision was dispatched by the Registrar or within such further time as the Court may allow, either before or after the expiration of the two months.

...

(5) On an appeal under subsection (1), evidence in addition to that adduced before the Registrar may be adduced and the Federal Court may exercise any discretion vested in the Registrar.

dans les deux mois qui suivent la date où le registraire a expédié l'avis de la décision ou dans tel délai supplémentaire accordé par le tribunal, soit avant, soit après l'expiration des deux mois.

...

(5) Lors de l'appel, il peut être apporté une preuve en plus de celle qui a été fournie devant le registraire, et le tribunal peut exercer toute discrétion dont le registraire est investi.

ISSUES

[44] There are three issues raised by this appeal. The first issue is the proper standard of review for this Court to apply. This depends upon whether the new evidence submitted by the applicant on this appeal would have materially affected the Registrar's decision with respect to the two main issues.

[45] The two main issues are:

1. Does the registration for "manufactured tobacco for smoking and chewing" on the statements of wares for the COHIBA trade-mark include cigars and cigarillos?; and
2. Did the applicant have control over the character and quality of the cigars and cigarillos sold by its licensee, Habanos S.A., so that the applicant is able to show use of the trade-marks in Canada in accordance with subsection 50(1) of the Act?

STANDARD OF REVIEW

[46] This is an appeal initiated pursuant to section 56 of the Act, and, therefore, is not a judicial review application subject to a traditional standard of review analysis. In *Molson Breweries, a Partnership v. John Labatt Ltd.* (2000), 5 C.P.R. (4th) 180 (F.C.A.), Justice Rothstein considered the nature of an appeal under section 56 of the Act: section 56(1) provides for an appeal, which is usually a proceeding conducted on the basis of the record that was before the decision-maker whose decision is under appeal, but section 56(5) provides for the admission of new evidence and permits this Court to exercise “any discretion vested in the Registrar.”

[47] At paragraph 29, Justice Rothstein concluded that the proper approach to take on an appeal under section 56 of the Act is to defer to the Registrar’s expertise; but where additional evidence is adduced on appeal that would have materially affected the Registrar’s decision, the hearing is to be conducted on a correctness standard:

¶29. I think the approach in *Benson & Hedges (Canada) Ltd. v. St. Regis Tobacco Corp.* and in *McDonald's Corp. v. Silverwood Industries Ltd.* are consistent with the modern approach to standard of review. Even though there is an express appeal provision in the *Trade-marks Act* to the Federal Court, expertise on the part of the Registrar has been recognized as requiring some deference. Having regard to the Registrar's expertise, in the absence of additional evidence adduced in the Trial Division, I am of the opinion that decisions of the Registrar, whether of fact, law or discretion, within his area of expertise, are to be reviewed on a standard of reasonableness *simpliciter*. However, where additional evidence is adduced in the Trial Division that would have materially affected the Registrar's findings of fact or the exercise of his discretion, the Trial Division judge must come to his or her own conclusion as to the correctness of the Registrar's decision.

[48] Accordingly, as the later jurisprudence makes clear, whether the decision of the Registrar is reviewed by this Court on a standard of reasonableness or standard of correctness depends upon whether any new evidence adduced on this appeal “would have materially affected the Registrar's findings of fact or the exercise of his discretion”: see, for example, my decisions in *Worldwide Diamond Trademarks Limited v. Canadian Jewellers Association*, 2010 FC 309 (aff'd , *Worldwide Diamond Trademarks Limited v. Canadian Jewellers Association*, 2010 FCA 326) at paragraph 38, and *Jose Cuervo S.A. de C.V. v. Bacardi & Co.*, 2009 FC 1166 (aff'd *Jose Cuervo S.A. de C.V. v. Bacardi and Company Limited*, 2010 FCA 248), at paragraph 31.

ANALYSIS

New evidence filed on this appeal before the Court

[49] The applicant filed the following new or additional evidence before the Court:

1. Affidavit of Juan Manuel Diaz Tenorio, dated January 10, 2008;
2. Affidavit of Adargelo Garrido De La Grana, dated January 10, 2008;
3. Affidavit of Ernest Rix, dated January 8, 2008;
4. Affidavit of Brendan Haveman, dated January 15, 2008; and
5. Affidavit of Ronald J. Shulman, dated January 15, 2008.

[50] The respondent conducted cross-examinations of Messrs. Tenorio, De La Grana, and Haveman.

Affidavit of Juan Manuel Diaz Tenorio, dated January 10, 2008

[51] Juan Manuel Diaz Tenorio was a Director of Cubatabaco from 1995 to 2006. He states that Cubatabaco was able to monitor and veto decisions made by Habanos S.A. with respect to the trade-

marks COHIBA and COHIBA & DESIGN, and the quality of the wares sold under those marks. He deposes at paragraph 2 that Cubatabaco achieved this control by having him attend and actively participate in monthly meetings of the Board of Directors of Habanos S.A., and, at paragraph 3, through frequent communications between himself and employees of Habanos S.A. The exhibit to Mr. Tenorio's Affidavit provides examples of letters between Mr. Tenorio and Habanos S.A. regarding the quality of tobacco and tobacco-related products produced by Cuban factories.

[52] At paragraph 4 of his affidavit, Mr. Tenorio deposes that he has read the Affidavit of Adargelio Garrido De La Grana and the exhibits attached to it (see below), and has personal knowledge of the facts stated therein as well. Mr. Tenorio states that he adopts Mr. De La Grana's affidavit as his own "with respect to these matters."

Affidavit of Adargelio Garrido De La Grana, dated January 10, 2008

[53] As stated above, Mr. Adargelio Garrido De La Grana is the Legal Director and General Secretary of Habanos S.A. He has held that position since September 1994.

[54] In his new affidavit, Mr. De La Grana deposes that Habanos S.A. was granted a license in 1994 by Cubatabaco to use the trade-marks COHIBA and COHIBA & DESIGN, and to export tobacco-related products bearing those trade-marks.

[55] Mr. De La Grana also attests to the nature of Cubatabaco as a Cuban state enterprise created by statute. Mr. De La Grana states at paragraph 3 of his affidavit that he has personal knowledge of

these matters “in light of the close working relationship between Cubatabaco and Habanos S.A., especially given that Cubatabaco is currently part owner of Habanos S.A.”

[56] At paragraph 4, Mr. De La Grana describes the roles of Habanos S.A. and Cubatabaco with regard to cigars marked with the relevant trade-marks:

Between September 21, 1997 to September 21, 2000 and October 13, 1997 and October 13, 2000 (the “Relevant Periods”), Habanos S.A. was responsible for the marketing and commercialization of cigars marked with the COHIBA and COHIBA & DESIGN trade-marks, while Cubatabaco was responsible for the control over the production and quality of the tobacco and tobacco-related products bearing the COHIBA and COHIBA & DESIGN trade-marks.

[57] At paragraphs 5-7, Mr. De La Grana describes the way in which Cubatabaco was created. He explains that Cubatabaco is an enterprise of the Government of the Republic of Cuba, and that its responsibilities and objectives are established by statute which he attaches as an exhibit. He provides a list of some of the most relevant of these objectives and responsibilities, including that Cubatabaco is responsible for “managing, executing and overseeing development plans for the Nation’s tobacco industry, particularly the development of tobacco exports.” The statute also specifies that Cubatabaco is to closely oversee and develop standards and guidance with regard to tobacco production, harvesting, and processing. The provisions of the statute are detailed and give Cubatabaco an all-encompassing role in the production of tobacco and tobacco-related products.

Below are some examples:

1. Article 6(g) of the statute states that Cubatabaco is to “Organize, manage, execute and supervise the industrial production of cigars and cigarettes in order to ensure greater efficiency, better use of installed capacity, increased productivity, reduced costs and improved product quality.”
2. Article 6(i) states that it must “Organize, manage and carry out the distribution of cigars, cigarettes, raw tobacco and other tobacco products on the domestic market,

as well as the distribution of matches, ensuring that deliveries of such products to retail outlets are made in the required quantities and assortments, in accordance with the needs of the population.”

3. Article 6(j) requires it to “Suggestion prices and profit margins to be applied to tobacco harvesting, and to the wholesale and retail distribution of cigars, cigarettes, raw tobacco and other tobacco products.
4. Article 6(k) states it is to “Carry out operations relating to the export of tobacco in all its forms, including managing sales in foreign markets and, if applicable, other tobacco foreign trade operations assigned to it by the Government complying with the business policy developed by the Ministry of Foreign Trade.

[58] At paragraphs 8-12, Mr. De La Grana describes the process by which Cubatabaco oversaw the production of, and ensured the quality of, “cigars and other tobacco-related products” marked with the COHIBA and COHIBA & DESIGN trade-marks. He states that many factories in Cuba produced the “cigars and other tobacco-related products” labelled with the COHIBA and COHIBA & DESIGN trade-marks, and that all “cigars and all final tobacco-related products” were produced according to quality standards developed by Cubatabaco, which also hired quality control inspectors to ensure compliance. Mr. De La Grana provides examples of the quality specification standards created by Cubatabaco and of hiring contracts of quality control inspectors.

[59] Mr. De La Grana repeats Mr. Tenorio’s statement that issues raised at the monthly board meetings of Habanos S.A. were addressed by Cubatabaco through frequent communication between Mr. Tenorio and Habanos S.A. employees. Mr. De La Grana states:

¶13. It was widely understood by the employees of Habanos S.A. that Cubatabaco ultimately had the ability to monitor and veto any decision made by Habanos S.A. with respect to the trade-marks COHIBA and COHIBA & DESIGN, and the quality of the tobacco-related products sold under these trade-marks.

¶14. Employees of Habanos S.A. and Cubatabaco had formal monthly meetings. In addition, several informal discussions occurred

between various employees of Habanos S.A. and Cubatabaco, as required, typically two or three times per week. Such informal meetings were required in order to deal with the day-to-day activities of Cubatabaco and Habanos S.A.

[60] Mr. De La Grana states that these frequent interactions were further facilitated by the fact that Habanos S.A. and Cubatabaco were located in the same building.

[61] Finally, at paragraph 17 Mr. De La Grana states that “The budget for tobacco and tobacco-related products marked with the COHIBA and COHIBA & DESIGN trade-marks, as well as general strategy, was decided by Cubatabaco.”

Affidavit of Ernest Rix, dated January 8, 2008

[62] Ernest Rix is an accredited translator, certified with the Association of Translators and Interpreters of Ontario. He provides a certified translation of the statute that created Cubatabaco: Law No. 1191, in the *Official Gazette of the Republic of Cuba*, April 29, 1966.

Affidavit of Brendan Haveman, dated January 15, 2008

[63] Brendan Haveman was an articling student with the law firm Marusyk Miller and Swain LLP and the patent and trademark agency MBM & Co. at the time of the swearing of his affidavit.

[64] In the exhibits attached to his affidavit, Mr. Haveman provides dictionary definitions of the words *cigar* and *cigarillo* from five printed English-language dictionaries, and from four popular websites that provide English-language dictionaries.

[65] The evidence demonstrates that a cigar is “a cylinder of tobacco rolled in tobacco leaves for smoking” and a cigarillo is “a small cigar”: Catherine Soanes, ed., *The Oxford Dictionary of Current English*, 3rd ed. (Oxford University Press, 2001).

Affidavit of Ronald J. Shulman, dated January 15, 2008

[66] Ronald Shulman is Operations Manager for Park IP Translations. His affidavit swears to the fact that his company translators had translated various documents for the applicant. He attached the translations that his company’s translators had made. These are the same as the exhibits attaches to the affidavits of the other witnesses, described above.

Issue No. 1: Does the Registration for “Manufactured Tobacco for Smoking and Chewing” in the Statement of Wares for the COHIBA Trade-mark Include Cigars and Cigarillos?

[67] As discussed above, there are two relevant statements of wares:

1. The statement of wares for COHIBA: “Leaf tobacco, manufactured tobacco for smoking and chewing, snuff and cigarettes”, and
2. the statement of wares for COHIBA & DESIGN: “Raw tobacco, cigars, cigarillos, cigarettes, cut tobacco, rappee, manufactured tobacco of all kinds, matches, tobacco pipes, pipe holders, ashtrays, match boxes, cigar cases and humidors”.

[68] With regard to COHIBA & DESIGN trade-mark, the applicant admitted in its written submissions to the Registrar that the only wares in use were cigars and cigarillos. The Registrar therefore amended the registration accordingly, and this part of the decision is not under appeal to the Court.

[69] No such admission was possible with regard to the COHIBA trade-mark because cigars and cigarillos are not listed in its statement of wares. Accordingly, the Registrar had to consider whether the general category of “manufactured tobacco for smoking and chewing” in the COHIBA trade-mark statement of wares included cigars and cigarillos.

[70] The Registrar decided that “manufactured tobacco for smoking and chewing” does not include cigars and cigarillos so that the COHIBA trade-mark should be expunged because the statement of wares did not include cigars and cigarillos.

[71] Whether the Registrar’s decision with regard to the COHIBA trade-mark’s statement of wares is evaluated by the Court against a reasonableness standard or whether the Court applies a correctness standard depends upon whether the new evidence filed by the applicant would have materially affected the Registrar’s decision.

[72] Before the Registrar, the written representations from the Registrant did not address the issue of whether the statement of wares “manufactured tobacco for smoking and chewing” included cigars and cigarillos. The written representations with respect to the COHIBA trade-mark simply repeated a paragraph from the written representations with respect to the COHIBA & DESIGN trade-mark. Because the statement of wares for the COHIBA & DESIGN trade-mark included cigars and cigarillos, the written submissions stated:

... It is noted by the Registrant that there has not been use in relation to the “Raw tobacco, cigarettes, cut tobacco, rappee, manufactured tobacco of all kinds, matches, tobacco pipes, pipe holders, ashtrays, match boxes, cigar cases and humidors”. Thus, as such, the Registrant respectfully submits that a decision to maintain the

registration in relation to the wares described as cigars and cigarillos is justified.

[73] It is clear to the Court that this was not intended by the Registrant to be a concession with respect to the COHIBA trade-mark that “manufactured tobacco for smoking and chewing” did not include cigars and cigarillos. However, it appears to the Court that the Registrar construed this as an admission that “manufactured tobacco of all kinds” does not include cigars and cigarillos.

[74] The new evidence filed by the applicant with respect to this issue was the Affidavit of Brendan Haveman which attached dictionary definitions of cigars and cigarillos. The applicant submits that the registration of “manufactured tobacco for smoking and chewing” listed in the COHIBA trade-mark registration includes cigars and cigarillos, which are, in fact, simply manufactured tobacco for smoking.

[75] The respondent maintains that the new evidence would not have materially affected the Registrar’s decision on this ground for the following reasons:

1. There is no evidence of sales of any goods beyond the cigars and cigarillos already considered by the Registrar.
2. None of the affiants retracted the position taken before the Registrar in the COHIBA & DESIGN hearing that there was no use of the “manufactured tobacco of all kinds” listed in the COHIBA & DESIGN statement of wares.
3. The new evidence was sworn by a student-at-law and not any of the affiants related to the applicant, who would have more credibility as people working within the trade. Moreover, it provides only standard dictionary definitions of the terms.

[76] It was clear to the Registrar at the hearing, and it is clear to the Court, that both the COHIBA and the COHIBA & DESIGN trade-marks are used on cigars and cigarillos. As quoted above,

however, the Registrar found that there is a distinction between “manufactured tobacco for smoking and chewing” and “manufactured tobacco products for smoking”. The Registrar stated:

The registered wares “manufactured tobacco for smoking and chewing” would include “loose tobacco sold in pouches, tins and the like” but would not include finished smoking products such as cigars and cigarillos. As the evidence refers to “finished smoking products” namely “cigars and cigarillos”, I conclude that the evidence furnished is not in respect of any of the registered wares.

[77] The new evidence before the Court entirely re-characterizes the applicant’s submissions with regard to the relevant statement of wares. Although the applicant made no admission with regard to the COHIBA trade-mark, it is clear that the applicant’s former counsel did not adduce proper evidence in the form of dictionaries or affidavits that the nature of cigars and cigarillos is that they are manufactured exclusively out of tobacco. The written representations made no argument before the Registrar on this issue, perhaps because the registrant assumed the hearing officer would know that cigars are “manufactured tobacco for smoking”. If she, the hearing officer, did not have personal knowledge about cigars, she may not have known this fact, which presumably was taken for granted by the registrant’s previous counsel. The new evidence before the Court, which was not before the Registrar, is that cigars are manufactured tobacco for smoking. For example, the Oxford Dictionary of Current English defines as a cigar as “a cylinder of tobacco rolled in tobacco leaves for smoking” and a cigarillo is “a small cigar”: Catherine Soanes, ed., *The Oxford Dictionary of Current English*, 3rd ed. (Oxford University Press, 2001). As such, the Court accepts that the new evidence would have materially affected the Registrar’s decision. The Court will therefore review this issue on a standard of correctness.

[78] The purpose of section 45 was stated by Justice McNair in *Philip Morris Inc. v. Imperial Tobacco Ltd.* (1987), 13 C.P.R. (3d) 289, 8 F.T.R. 310 (F.C.):

¶12. It is well established that the purpose and scope of s. 44 [now s. 45] is to provide a simple, summary and expeditious procedure for clearing the register of trade marks which are not bona fide claimed by their owners as active trade marks. The procedure has been aptly described as one for removing "deadwood" from the register. . . .

[79] Moreover, as the Federal Court of Appeal stated in *Ridout & Maybee s.r.l. v. Omega S.A.*, 2005 FCA 306, where a registrant shows use of a trade-mark in a manner that falls within a general class listed in the statement of wares, the general class should be upheld:

¶4. In short, in our opinion, the Federal Court judge only had to find that the appellant's mark was being used in regard to property specified under the general class....

[80] The COHIBA trade-mark was registered in 1983. At that time, the only products being produced by Cubatabaco for sale in Canada under the COHIBA trade-mark were cigars and cigarillos. It is not contested that the COHIBA trade-mark was registered in good faith and is widely used. It is not "deadwood." Under any dictionary definition, cigars and cigarillos are manufactured tobacco for smoking. Of course they are also products. So is loose tobacco in a tin a product. They are all products in which tobacco is manufactured for smoking or chewing. Obviously the applicant would not have registered a COHIBA trade-mark except to protect the cigars that it was selling in Canada and therefore it must have intended to include cigars and cigarillos in the category of "manufactured tobacco for smoking and chewing." The Court finds on the basis of the new evidence that the ordinary meanings of *cigar* and *cigarillo* make them part of the general class "manufactured tobacco for smoking". The Registrar's decision was therefore not correct insofar as

the Registrar determined that cigars and cigarillos are not included within the statement of wares for the COHIBA registration. Accordingly, the Registrar's decision in this regard is set aside.

Issue No. 2: Did the applicant have “control over the character and quality” of the cigars and cigarillos sold by its licensee, Habanos S.A., so that the applicant is able to show use of the trade-marks in Canada in accordance with subsection 50(1) of the Act

[81] The Registrar found that both the COHIBA and COHIBA & DESIGN trade-marks should be expunged because the registrant had failed to show use by it of the two trade-marks in Canada. The applicant's new evidence is directed toward demonstrating that the applicant did in fact have control.

[82] There has never been an issue regarding whether the COHIBA or COHIBA & DESIGN trade-mark were used. The issue has always been whether the use was by the registrant, Cubatabaco, or by a different entity—namely, Habanos S.A.

[83] Section 50(1) of the Act deems use by a licensee to be use by the registrant if the registrant “has, under the licence, direct or indirect control of the character or quality of the wares or services....” The applicant therefore had the burden of satisfying the Registrar that it exercised direct or indirect control of the character or quality of the cigars and cigarillos distributed by Habanos S.A. The applicant has the same burden before the Court.

[84] There are three main methods by which registered owners of trade-marks can demonstrate the control required to benefit from the deeming provision in section 50(1) of the Act:

1. they can clearly swear to the fact that they exert the requisite control: see, for example, *Mantha & Associés/Associates v. Central Transport Inc.* (1995), 64 C.P.R. (3d) 354 (Fed. C.A.), at paragraph 3;
2. they can provide evidence that demonstrates that they exert the requisite control: see, for example, *Eclipse International Fashions Canada Inc. v. Shapiro Cohen*, 2005 FCA 64, at paragraphs 3-6; or
3. they can provide a copy of a license agreement that explicitly provides for the requisite control.

[85] At the hearing before the Registrar, the only evidence was the evidence of Mr. Ortego, Commercial Manager of Havana House, the Canadian distributor of the wares, and the evidence from the 2002 Affidavit of Mr. De La Grana, which attached the license agreement between Cubatabaco and Habanos S.A.

[86] The Registrar rejected Mr. Ortego's evidence regarding the production and quality control by Cubatabaco as hearsay. The only evidence before the Registrar regarding these critical elements of his decision was the label on the products themselves, which identified "Habanos S.A." and not "Cubatabaco", as the manufacturer or exporter, and the license agreement between Cubatabaco and Habanos S.A., which the Registrar found gave Habanos S.A. control over production and, therefore, the quality and character of the cigars. The Registrar therefore concluded that no use had been shown by the applicant with regard to either the COHIBA or COHIBA & DESIGN trade-marks because the applicant did not exercise the requisite control over the goods manufactured and sold by Habanos S.A. under subsection 50(1) of the Act:

Consequently, in the absence of admissible evidence showing that the registrant was the manufacturer of the wares sold in Canada during the relevant period, I am not prepared to conclude that the registrant produced the wares exported into Canada by Habanos S.A. and therefore had control of their character and quality pursuant to s. 50(1) of the Act. Further, as pointed out by the requesting party, the presumption dictated by s-s. 50(2) does not arise as there is no evidence showing that public notice was given of the fact that the use was licensed use and of the identity of the owner.

[87] In contrast to the evidence that was before the Registrar, this Court has significant new evidence regarding the control Cubatabaco, the registrant, has over the character and quality of the cigars and cigarillos that bear the COHIBA and COHIBA & DESIGN trade-marks. This new evidence is in the Affidavits of Messrs. Tenorio and De La Grana. In particular, the Court finds the following evidence demonstrates control exercised by the applicant over the character and quality of the cigars and cigarillos sold in Canada under the COHIBA and COHIBA & DESIGN trade-marks:

1. Mr. Tenorio's (of Cubatabaco) sworn statement at paragraph 2 of his affidavit that Cubatabaco exerts control over the COHIBA and COHIBA & DESIGN trade-marks:

During the relevant periods, I attended at, and actively participated in, the monthly meetings of the Board of Directors of Habanos S.A. Through this procedure, Cubatabaco was able to monitor and veto decisions made by Habanos S.A. with respect to the trade-marks COHIBA and COHIBA & DESIGN, and the quality of the tobacco produced and final tobacco-related products sold under the COHIBA and COHIBA & DESIGN trade-marks.

2. Mr. De La Grana's (of Habanos S.A.) repeated emphasis upon the control exercised by Cubatabaco over the production, quality and character of the cigars and cigarillos using the COHIBA and COHIBA & DESIGN trade-marks. The following examples in his affidavit illustrate:
 - i. At paragraph 4: ". . . Habanos S.A. was responsible for the marketing and commercialization of cigars marked with the COHIBA and COHIBA &

DESIGN trade-marks, while Cubatabaco was responsible for the control over the production and quality of the tobacco and the tobacco-related products bearing the COHIBA and COHIBA & DESIGN trade-marks.

- ii. At paragraph 9: “The cigars and all final tobacco-related products were produced according to the standards developed by Cubatabaco. . . . This standard was implemented by Habanos S.A. under the supervision of Cubatabaco.
 - iii. At paragraph 10: “Cubatabaco was also responsible for hiring people to inspect tobacco and tobacco-related products, and related activities.”
 - iv. At paragraph 13: “It was widely understood by the employees of Habanos S.A. that Cubatabaco ultimately had the ability to monitor and veto any decision made by Habanos S.A. with respect to the trade-marks COHIBA and COHIBA & DESIGN, and the quality of the tobacco-related products sold under these trade-marks.”
3. The statute under which Cubatabaco operated during the relevant period demonstrates that Cubatabaco is responsible for ensuring the character and quality of tobacco products produced in Cuba.
 4. Mr. Tenorio and Mr. De La Grana’s answers to questions during cross-examination on their affidavits, which echo and expand upon the statements made in their affidavits.

[88] The Affidavits of Mr. Tenorio and Mr. De La Grana, supported by exhibits, satisfy the Court that the applicant Cubatabaco is responsible for ensuring the quality and character of the cigars and cigarillos sold in Canada under its Cohiba trade-marks.

[89] The Registrar’s decision stated that there was not admissible evidence on this point since Mr. Ortego’s evidence was hearsay. The Registrar was correct to reject this evidence. The new evidence of Mr. Tenorio of Cubatabaco and Mr. De La Grana of Habanos S.A. is evidence from personal knowledge and admissible evidence on the question in issue under subsection 50(1), *viz* did the registrant control the quality and character of the cigars sold in Canada under the COHIBA

and COHIBA & DESIGN trade-marks. It is clear to the Court that if this admissible evidence had been presented to the Registrar, it would have materially affected the Registrar's decision.

[90] The applicant cannot benefit from the presumption in section 50(2) of the Act, which deems use by the registrant where public has notice that a trade-mark is being used under license from an identified owner, because the applicant is not identified on the cigars and cigarillos sold by Habanos. Moreover, the license agreement does not demonstrate the required degree of control for the reasons stated by the Registrar. The Court finds, however, that the new evidence demonstrates that the applicant in fact exercises the control over the quality and character of the cigars and cigarillos manufactured and exported by Habanos S.A. The applicant can therefore benefit from the deeming provision contained in section 50(1) of the Act, which deems use by the registrant where the registrant shows that it has "direct or indirect control of the character or quality of the wares or services" – here, the cigars and cigarillos sold in Canada.

CONCLUSION

[91] Accordingly, the Court concludes that:

1. the new evidence before the Court would have materially affected the Registrar's decision with respect to whether the use of the COHIBA trade-mark for the sale of cigars and cigarillos constitutes use of "manufactured tobacco for smoking and chewing" as listed in the COHIBA trade-mark statement of wares;
2. cigars and cigarillos are "manufactured tobacco for smoking or chewing" and therefore fall within this general class in the statement of wares for the COHIBA trade-mark registration;
3. the new evidence before the Court would have materially affected the Registrar's decision with respect to whether the COHIBA and COHIBA & DESIGN trade-marks were used by the applicant; and

4. the applicant demonstrated to the Court its control over the character and quality of the cigars and cigarillos sold in Canada so as to constitute use by the applicant of the COHIBA and COHIBA & DESIGN trade-marks in Canada.

[92] For these reasons, the Court allows the appeals with respect to the Registrar's decisions to expunge the COHIBA & DESIGN trade-mark with regard to "cigars and cigarillos", and the COHIBA trade-mark with regard to "manufactured tobacco for smoking and chewing".

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. These appeals are allowed with costs to the applicant;
2. The Decisions of the Registrar of Trade-marks dated September 13, 2007 expunging the applicant's trade-marks COHIBA and COHIBA & DESIGN are set aside; and
3. The applicant can continue to use these trade-marks in Canada with respect to cigars and cigarillos.

“Michael A. Kelen”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS: T-1969-07 and T-1970-09

STYLE OF CAUSE: *T-1969-07, Empresa Cubana Del Tabaco trading also as Cubatabaco v. Shapiro Chohen and the Registrar of Trade-Marks*

T-1970-07, Empresa Cubana Del Tabaco trading also as Cubatabaco v. Shapiro Chohen and the Registrar of Trade-Marks

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 18, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** KELEN J.

DATED: January 28, 2011

APPEARANCES:

Mr. Scott Miller FOR THE APPLICANT

Ms. Chantal Bertosa FOR THE RESPONDENT
(SHAPIRO COHEN)

SOLICITORS OF RECORD:

Marusyk Miller & Swain LLP FOR THE APPLICANT
Intellectual Property Law
Ottawa, Ontario

Shapiro Cohen FOR THE RESPONDENT
Ottawa, Ontario (SHAPIRO COHEN)