TRADE-MARKS

PRACTICE

Appeals from Federal Court decisions (2018 FC 351, 2018 FC 350) dismissing appellant's appeal from Trademarks Opposition Board decisions refusing its applications to register trademarks to which respondent objecting — First decision concerning trademark application No. 1511822 for word mark "SEARA"; second dealing with appellant's trademark application No. 1504296 for "SEARA & Design" — Board refusing applications on ground of likely confusion with respondent's registered trademark "SERA" — Federal Court determining that new evidence appellant submitting not material, should not be admitted on appeal pursuant to *Trademarks Act*, R.S.C., 1985, c. T-13, s. 56(5) — Federal Court thus assessing Board decisions on reasonableness standard; dismissing appellant's appeal on basis that decisions indeed reasonable with regard to facts, law — Although Federal Court misunderstanding applicable materiality test for admitting new evidence on appeal, Board decisions having to stand — Appellant's trademark applications filed in 2010, 2011, based on proposed use of "SEARA" design, word marks in Canada in association with goods such as meat, fish, poultry, game — Respondent's "SERA" mark registered in 2010 based on use in Canada since 1998 in association with Turkish food products in particular — Respondent filing statements of opposition for "SEARA" design, word marks in 2013 — Board concluding that appellant's marks not registrable pursuant to Act, s. 12(1)(d) on ground of likelihood of confusion with respondent's registered mark — Board considering each factor set out in Act, s. 6(5) separately for each separate decision — Before Federal Court, applicant submitting two additional affidavits, annexed exhibits — Federal Court concluding that new evidence not meeting materiality test; therefore no basis to proceed to *de novo* review — Whether Federal Court setting bar too high in determining whether new evidence submitted was material; if so, whether appeal of Board decisions should be allowed — Test for admitting new evidence pursuant to Act, s. 56(5) previously formulated as whether additional evidence adduced in Federal Court would have materially affected Registrar's findings of fact or exercise of his discretion — Use of "would have" preliminary test to determine if, on appeal, Federal Court having to reassess evidence on given issue — Materiality test addressing significance, probative value of new evidence — Having to determine whether new evidence, because of significance, probative value, could have had bearing on finding of fact or exercise of Board's discretion — Some of appellant's evidence should have been admitted since directly relevant to Act, s. 6(5) analysis, namely regarding s. 6(5)(a) (distinctiveness), ss. 6(5)(c),(d) (nature of goods, trade) — In addition to misstating materiality test, Federal Court, in assessing new evidence, failing to review whether evidence could have had impact on factor identified at s. 6(5)(a) dealing with inherent or acquired distinctiveness — While new evidence appellant submitting regarding use of marks in Canada since applications filed was material for purposes of appeal, conclusion alone not determinative of present appeal — Regarding the likelihood of confusion, Board's main finding pursuant to Act, s. 6(5)(e) that high degree of resemblance existing between two "SEARA" marks and respondent's registered mark left untouched — Given that appellant's new evidence pertaining solely to distribution of frozen poultry products in food service industry, considering record before Board, appellant failing to establish that confusion would not be likely respecting proposed use of other goods listed in its applications, such as fruits, vegetables jellies, jams, which do overlap with those registered for use in relation to respondent's "SERA" trademark — Appellant's suggestion that Federal Court of Appeal issue split decision allowing application in part rejected — Federal Court's conclusion dismissing appellant's appeal of Board's decision that refused appellant's applications for "SEARA" word, design marks upheld — Appeal dismissed.

SEARA ALIMENTOS LTDA. V. AMIRA ENTERPRISES INC. (A-94-18, A-95-18, 2019 FCA 63, Gauthier J.A., reasons for judgment dated April 2, 2019, 20 pp.)