

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190402

**Dockets: A-94-18
A-95-18**

Citation: 2019 FCA 63

**CORAM: GAUTHIER J.A.
RENNIE J.A.
GLEASON J.A.**

BETWEEN:

SEARA ALIMENTOS LTDA.

Appellant

and

AMIRA ENTERPRISES INC.

Respondent

Heard at Ottawa, Ontario, on January 10, 2019.

Judgment delivered at Ottawa, Ontario, on April 2, 2019.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**RENNIE J.A.
GLEASON J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Seara Alimentos Ltda. [Seara] appeals from two decisions of Heneghan J. of the Federal Court (2018 FC 351 and 2018 FC 350). The reasons in both decisions are identical and will be referred to as the “FC Decision”. These appeals were heard together and the respondent, Amira Enterprises Inc. [Amira], did not appear before us.

[2] Before the Federal Court, Seara sought judicial review of two decisions of the Trademarks Opposition Board [TMOB] which refused its applications to register two trademarks to which Amira had objected. The first decision concerned trademark application No. 1,511,822 for the word mark “SEARA” (2016 TMOB 167), and the second dealt with Seara’s trademark application No. 1,504,296 for “SEARA & Design”, reproduced below (2016 TMOB 168):



[3] The TMOB refused the applications on the ground of likely confusion with the registered trademark “SERA” held by Amira (registration No. TMA769140). Both decisions of the TMOB are at times referred to as the “TMOB Decisions” throughout these reasons.

[4] The Federal Court determined that new evidence submitted by Seara was not material and should not be admitted on appeal pursuant to subsection 56(5) of the *Trade-mark Act*, R.S.C. 1985, c.T-13 [Act]. The Federal Court thus assessed the TMOB Decisions on a reasonableness standard and dismissed Seara’s appeal on the basis that the decisions were indeed reasonable with regard to the facts and law.

[5] The Federal Court appears to have misunderstood the applicable materiality test for admitting new evidence on appeal. Even so, for the following reasons, I am of the view that the Federal Court’s dismissal of Seara’s appeal of the TMOB Decisions should stand.

I. Background

A. *Facts*

[6] Filed on November 18, 2010 (No. 1,504,296) and January 19, 2011 (No. 1,511,822),

Seara's applications were based on proposed use of the "SEARA" design and word marks in

Canada in association with the following goods:

meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; ready meals based on meat dishes (beef, pork and poultry); semi ready meals based on meat dishes (beef, pork and poultry).

[7] Amira's "SERA" mark was registered on June 8, 2010 based on use in Canada since

September 1, 1998 in association with the following goods:

Turkish food products namely: processed fruits namely dry fruits and jams, edible nuts, chick peas; processed vegetables namely: okra, eggplant, cabbage, ready to eat vegetables, pickles, pepper paste, vine leaves; flavourings, namely: syrups, lokoum (turkish delight), halva, bakery products, namely: yafca (philo pastry dough).

[8] Amira filed its statements of opposition for the "SEARA" design and word marks on

March 18, 2013 (for No. 1,504,296) and September 3, 2013 (for No. 1,511,822). Notably, only

Seara filed a written argument in the proceedings before the TMOB, and neither party requested a hearing in those proceedings.

B. *Record before the TMOB*

[9] Two affidavits were filed before the TMOB. On behalf of Amira, the affidavit of Ms. Jennifer Leah Stecyk, a trademark searcher, introduced into evidence a certified copy of Amira's trademark registration and results from internet searches of the terms "seara" and "seara brazil" (Appeal Book A-94-18, vol. 1 at pp. 143-44). On behalf of Seara, the affidavit of Ms. Jill Roberts [Roberts Affidavit] introduced evidence of several trademarks similar to Amira's "SERA" mark, as well as a number of internet pages from online dictionaries (Appeal Book A-94-18, vol. 1 at pp. 243-45).

C. *TMOB Decisions*

[10] Amira raised grounds other than likely confusion with its mark in its oppositions, but the TMOB rejected them. As mentioned, it concluded that Seara's marks were not registrable pursuant to paragraph 12(1)(d) of the Act on the ground of likelihood of confusion with Amira's registered mark. This is the only relevant ground for the proceedings before us.

[11] In refusing registration for the word mark ("SEARA") in the first decision (2016 TMOB 167), the TMOB considered each factor set out in subsection 6(5) of the Act separately:

- a) The TMOB concluded that the element of inherent distinctiveness, set out in paragraph 6(5)(a) of the Act, did not favour either party, since neither mark is particularly strong, even if Seara's mark possesses a "relatively higher degree of inherent distinctiveness", given that the term "sera", which is sometimes

used as a surname for individuals, is an ordinary word in English (e.g. as the plural of “serum”) and French (e.g. as the future tense of the verb “être”) that is neither descriptive nor suggestive of Amira’s registered goods. The TMOB also wrote that it could not draw any meaningful conclusion with respect to the extent to which Amira’s trademark has become known in Canada in association with the registered goods. The TMOB further noted that “Seara” did not appear to be a dictionary word in either French or English, but that it seems to refer to a municipality in Brazil; however, geographical locations are not inherently distinctive (paras. 17-27);

- b) Furthermore, the TMOB found that the length of time the trademarks have been in use pursuant to paragraph 6(5)(b) “[i]n the absence of actual use of either party’s mark” meant that this factor favoured neither party (paras. 28-30);
- c) In addition, the TMOB found that the nature of the goods, addressed in paragraph 6(5)(c) and (d) of the Act (nature of the goods, trade and business), “clearly” favoured Amira, particularly since there was a clear overlap between the statement of goods for both marks. The TMOB also concluded that, given that the parties’ goods either overlap or are closely related, for the purpose of assessing confusion, there is potential for overlap between the parties’ channels of trade as well (paras. 31-37);
- d) The TMOB concluded that the degree of resemblance, addressed in paragraph 6(5)(e), favoured Amira as well. The TMOB referred to the decision in

Masterpiece Inc. v. Alavida Lifestyles Inc., 2011 SCC 27 [*Masterpiece*], where the Supreme Court said that the degree of resemblance may be the most important element listed in subsection 6(5) of the Act. The TMOB found that evidence regarding this factor favoured Amira, noting the similarities in the pronunciation of “SEARA” and “SERA” when sounded by the average Canadian consumer (paras. 39-45); and

- e) Finally, in terms of other surrounding circumstances, the TMOB noted that there are an insufficient number of relevant registrations that include similar word marks, e.g. “SERRA”, to allow it to infer the state of the marketplace pertaining to food products in terms of likelihood of confusion between Amira and Seara’s marks (paras. 46-51).

[12] Likewise, in dismissing the application to register the design mark (“SEARA & Design”) in the second decision (2016 TMOB 168), the TMOB again considered each provision of subsection 6(5):

- a) In respect of paragraph 6(5)(a), the TMOB underlined that, while it was mindful that the “SEARA” design mark is described as an “oval design with five sun ray beams”, the word element remains the dominant feature given its relative size and position, and given that the design elements are not “particularly unique or striking”. It found that the factor of inherent distinctiveness slightly favoured Amira, but that the strength of Seara’s mark may be increased by means of becoming known in Canada through promotion

- or use (noting again that neither party had provided evidence in that regard (paras. 17-27).
- b) In respect of paragraph 6(5)(b), the TMOB commented that, “[i]n the absence of evidence of actual use of either party’s mark, the section 6(5)(b) factor does not favour either party” (paras. 28-30);
 - c) The TMOB also noted, in considering paragraphs 6(5)(c) and (d), that there is clear overlap between some of the parties’ goods while others appear to be closely related, as both marks pertain to food products. In addition, neither Amira’s registration nor Seara’s application contains any restriction on the parties’ channels of trade (paras. 31-37);
 - d) In considering paragraph 6(5)(e), the TMOB noted that, in terms of sound and given the similarities between the terms “SERA” and “SEARA”, there could be some resemblance between the two marks (paras. 38-44); and
 - e) Finally, in relation to additional circumstances, the TMOB again noted that the state of register evidence was of no assistance to Seara in terms of likelihood of confusion between it and Amira’s marks (paras. 45-50).

D. *New evidence*

[13] Before the Federal Court, Seara submitted two additional affidavits and annexed exhibits. Notably, the affidavit of Ms. Fernanda Ramirez Gallo Pires [Gallo Affidavit] indicated that Seara currently sells a variety of poultry products in Canada which are intended for distribution in the

food service industry, and that it had sold more than 37 million kilograms of poultry products between 2003 and 2010 and then again from 2014 to 2016 (para. 24). The Gallo Affidavit mentioned that Seara did not sell any products in Canada between March 2010 and 2014 due to the acquisition of the company by different owners who did not use the “SEARA” marks in Canada. It also asserts that, since 2014, there has never been any instance of confusion between Seara’s products and those sold in association with the “SERA” mark (para. 26). Otherwise, the Gallo Affidavit dealt mainly with its business and marketing efforts in numerous countries around the world, particularly Brazil, and proffered a different pronunciation of the word mark than the one submitted to the TMOB (Appeal Book A-94-18, vol. 2 at pp. 324-31).

[14] The second affidavit by Ms. Genny Tremblay [Tremblay Affidavit], a private investigator, recounted a visit to a local Middle Eastern food store where “SERA” branded products were purchased, as well as the efforts to contact several of Seara’s distributors to inquire into whether they sell “SERA” products or were at all familiar with the mark (they allegedly indicated they were not) (Appeal Book A-94-18, vol. 3 at pp. 523-28).

[15] In a post-hearing submission, Seara acknowledged that all of the actual evidence in respect of use in Canada relates only to frozen poultry products – and not to other goods listed in its applications. Seara also confirmed that the evidence relates only to these frozen poultry products insofar as they are intended for distribution in the food service industry and are marked as “NOT FOR RETAIL SALE” (see e.g. Appeal Book A-94-18, vol. 2 at p. 450; see also Gallo Affidavit at para. 20, Appeal Book, vol. 2 at p. 328). This corresponds to part of the Gallo

Affidavit which implied that Seara's products were "primarily" aimed at restaurants as the end consumers (Gallo Affidavit at paras. 20, 22, Appeal Book A-94-18, vol. 2 at pp. 328-29).

E. *FC Decision*

[16] The Federal Court described the two main issues in the appeal at paragraph 54 of its reasons as follows:

- 1) Is the new evidence "material"?
- 2) If that evidence is material, would it change the finding of confusion?

[17] But, when dealing with the materiality test, the Federal Court indicated the following at paragraphs 57 and 59 of its reasons:

If the new evidence is not material, in the sense that it would not change the result, then the Court is to apply a reasonableness standard; see the decision in *Kabushiki Kaisha Mitsukan Group Honsha v. Sakura-Nakaya Alimentos Ltda.*, 2016 FC 20 at paragraph 17.

[...]

Evidence is material if it would have changed the outcome before the Board. If new evidence is "material", the Court is to review all the evidence, including the evidence before the Board, on a *de novo* basis.

[Emphasis added.]

[18] The Federal Court concluded that the new evidence did not meet the materiality test and that there was therefore no basis to proceed to a *de novo* review (FC Decision at para. 101).

[19] In light of the issues before us, it is not necessary to describe in any more detail the findings of the Federal Court.

II. Issues

[20] Two issues are now before this Court on appeal:

- 1) Did the Federal Court set the bar too high in determining whether the new evidence submitted was material?
- 2) If so, should the appeal of the TMOB Decisions be allowed?

[21] The issue of the Federal Court's findings regarding the admissibility of the new evidence, i.e. its materiality, attracts the appellate standards of *Housen v. Nikolaisen*, 2002 SCC 33. The formulation of the materiality test is an extricable question of law which attracts the standard of correctness.

[22] When new evidence is admitted on an appeal of a TMOB decision under section 56 of the Act, the Court undertakes a *de novo* review of the record. However, admitting new evidence does not necessarily displace the TMOB's findings in respect of every issue. Only those issues to which the new evidence speaks warrants a fresh analysis by the Court. Otherwise, the TMOB's findings are to be assessed on a reasonableness standard (see *Saint Honore Cake Shop Limited v. Cheung's Bakery Products Ltd.*, 2015 FCA 12 at para. 18 [*Saint Honore*]). In other words, where additional evidence is adduced before the Federal Court that would have materially affected the TMOB's findings of fact or exercise of discretion, the Court must come to its own conclusion on the issues to which the new evidence relates (see *Molson Breweries, A Partnership v. John Labatt Ltd.*, [2000] 3 F.C. 145 (C.A.) at paras. 46-51, leave to appeal to S.C.C. refused, 27839 (September 14, 2000) [*Molson Breweries*]).

III. Analysis

A. *Did the Federal Court set the bar too high in determining whether the new evidence submitted was material?*

(1) The test

[23] As mentioned, the test for admitting new evidence pursuant to subsection 56(5) of the Act has been formulated as whether the additional evidence adduced in the Federal Court “would have materially affected the Registrar’s findings of fact or the exercise of his discretion” (*Molson Breweries* at para. 51, *per* Rothstein J.A.). The use of “would have” must be understood in its proper context. It is a preliminary test to determine if, on appeal, the Federal Court will have to reassess the evidence on a given issue. This test therefore cannot and should not involve such a reassessment up front to determine if it would ultimately change the result or outcome. This is why in the formulation of the test in French the “would have” has been consistently translated as “aurait pu avoir” (see e.g. *Rogers Communications Inc. c. Society of Composers, Authors and Music Publishers of Canada*, 2012 CSC 35 at para. 71; *Pizzaiolo Restaurants inc. c. Les Restaurants La Pizzaiolle inc.*, 2016 CAF 265 at para. 2; *Brasseries Molson c. John Labatt Ltée*, [2000] 3 C.F. 145 at para. 51 (C.A.)).

[24] Furthermore, it is well understood that the materiality test addresses the significance and probative value of the new evidence. If the proffered evidence merely supplements or confirms the findings of the TMOB, then it cannot be said to be “material” enough to warrant being admitted (see *U-Haul International Inc. v. U Box It Inc.*, 2017 FCA 170 at para. 26). To be

“material”, the additional evidence must not be repetitive and should enhance the overall cogency of the evidence on the record (*Cortefiel, S.A. v. Doris Inc.*, 2013 FC 1107 at para. 33, aff’d 2014 FCA 255; see also *Servicemaster Company v. 385229 Ontario Ltd. (Masterclean Service Company)*, 2015 FCA 114 at paras. 23-24).

[25] The question is thus: could this new evidence, because of its significance and probative value, have had a bearing on a finding of fact or the exercise of discretion of the TMOB? In other words – in the context of the confusion analysis in this case – could this evidence lead to a different conclusion in respect of one or more of the factors set out in subsection 6(5) of the Act and the balancing underpinning the conclusion as to whether confusion was likely?

[26] With this proper understanding of the test in mind, it would appear from the statements referred to at paragraph 17 above that the Federal Court was under the impression that, in order to be material, the new evidence should necessarily bring about a different outcome. That is not the case.

(2) Whether new evidence should be admitted

[27] Some of the evidence in the Gallo Affidavit should have been admitted as it was directly relevant to the subsection 6(5) analysis, namely with regard to paragraphs (a) (distinctiveness) and (c)-(d) (nature of the goods and trade).

[28] I start by underlining that, in addition to its error in misstating the materiality test, the Federal Court, in assessing the new evidence, failed to review whether the evidence could have had an impact on the factor identified at paragraph 6(5)(a) of the Act dealing with inherent or

acquired distinctiveness (see FC Decision at para. 62). This omission is important, as acquired distinctiveness is precisely the criterion on which Seara insisted when arguing before us. This makes sense, as Seara's new evidence shows that it sold millions of kilograms of frozen poultry products in Canada. As mentioned, the absence of evidence about the marks' use was underlined as problematic by the TMOB on numerous occasions.

[29] In considering the evidence as a whole, the Federal Court seems to have focused on the fact that much of the Gallo Affidavit dealt with Seara's business activities in Brazil and elsewhere besides Canada. But Seara acknowledged at the hearing before us that all of the evidence showing use of the marks in Brazil is irrelevant in this case. That said, the Federal Court does not explain why the evidence of use in Canada could not have an impact on the pertinent findings of the TMOB. To my mind, the new evidence of distribution of millions of kilograms of poultry products in Canada is directly relevant to the considerations of many factors listed in subsection 6(5) and considered by the TMOB. It fills a gap in the record before the TMOB, as there was a clear absence of any evidence in respect of acquired distinctiveness, the nature of the parties' goods and the channels of trade in which they move. It is thus significant and has probative value.

[30] It is important to highlight, though, that much of Seara's evidence relates to *past* sales figures for frozen poultry (2003-2010), while its applications are based on *proposed* use. Armed on appeal with such additional evidence, Seara cannot simply disregard the basis on which its applications were made in an effort to take advantage of now available sales figures for product sold during that period. It was nonetheless open to Seara to refer to acquired distinctiveness from

the time its applications were filed. In effect, the Gallo Affidavit would clearly establish that Seara earned over \$30 million in sales with respect to over 10 million kilograms of frozen poultry on an ongoing basis from 2014 to 2016 (see Appeal Book A-94-18, vol. 3 at p. 458).

[31] Further, the new evidence relating to the absence of actual confusion between the consumers of Amira and Seara's marks is, in my view, of low probative value considering the position Ms. Gallo holds with Seara as well as the lack of detail as to how she formed her opinion. It would not meet the test even if it may be of some relevance under other "surrounding circumstances" pursuant to subsection 6(5).

[32] Other elements of the new evidence submitted by Seara do not pass the materiality test. For instance, the Gallo Affidavit's insistence on the correct pronunciation of the "SEARA" word mark does not fill an evidentiary gap highlighted by the TMOB; it merely suggests an alternative to what was already considered by the TMOB (see *Amira Enterprises Inc. v Seara Alimentos S.A.*, 2016 TMOB 167 at para. 41). In any event, evidence of the "proper" pronunciation is of no moment, for, as found by the TMOB, the average Canadian consumer would not necessarily be privy to the correct pronunciation. At the hearing before us, counsel for Seara ultimately conceded that this evidence is not particularly relevant and is merely repetitive.

[33] In sum, there is new evidence submitted by Seara in regards to use of the marks in Canada since the applications were filed, that is, in association with frozen poultry products for distribution in the food service industry, which is material for the purposes of this appeal. However, as mentioned, this conclusion in and of itself is not determinative of this appeal.

Whether I perform a new assessment of the factors in respect of which this new evidence is material, or whether I review the TMOB's findings on those issues on a reasonableness standard – as was done by the Federal Court –, the answer remains that the appeal should be dismissed.

B. *Should the appeal be allowed?*

(1) Likelihood of confusion

[34] The general framework governing the confusion analysis has been laid out by the Supreme Court. The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the “SEARA” marks at a time when they have no more than an imperfect recollection of the prior “SERA” trademark and do not pause to give the matter any detailed consideration or scrutiny nor to examine closely the similarities and differences between the marks (*Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23 at para. 20). A careful examination of the two marks or a side by side comparison is not to be done (*Masterpiece* at para. 40).

[35] It is against this backdrop that the Supreme Court has emphasized that the degree of resemblance between the two marks is the factor that is often likely to have the greatest effect on the confusion analysis, and that other factors only become significant once the marks are found to be very similar (*Masterpiece* at para. 49).

[36] Starting with this important factor, there is no doubt in my mind that the TMOB's main finding pursuant to paragraph 6(5)(e) of the Act to the effect that there exists a high degree of

resemblance between the two “SEARA” marks and Amira’s registered mark, both visually, and, especially, phonetically, should be left untouched. Indeed, Seara’s new evidence focuses not so much on the small differences between the “SEARA” and “SERA” marks and the additional design element as on the fact that the marks relate to different food products and that Seara’s products cater to a different segment of the industry (no retail business) than Amira’s (specialty food products sold in different channels of trade to Canadian retail consumers).

[37] Seara argues that it is because of the contrast in goods and channels of trade that small differences between the marks are still significant. I would agree if the applications under review (particularly the design mark) were limited to poultry or frozen poultry destined to the food service industry. But I cannot do so on the wording of the current applications.

[38] Regarding paragraphs 6(5)(a) and (b) of the Act, Seara’s distribution sales numbers in the food service industry since 2014 would support an inference that its marks have acquired some distinctiveness. Moreover, the TMOB’s finding regarding the absence of evidence relating to the acquired distinctiveness of the “SERA” mark in the food industry generally and in the retail sphere specifically – with which I agree – further supports a finding that this factor weighs somewhat in Seara’s favour.

[39] Next, with respect to paragraphs 6(5)(c) and (d), Seara has established significant use of the marks in relation to frozen poultry products in the food service sphere as opposed to the retail market. But its evidence as to Amira’s own channels of trade is inconclusive.

[40] This is where the problem lies. Despite Seara's insistence at the hearing that the products it sells in the food services industry do no overlap with Amira's specialty products in large retail spaces or specialty food stores, no restrictions to the channels of trade appear in the statement of goods and services that make up Seara's applications. What's more, Seara's applications relate to much more than just the frozen poultry products it currently sells; the applications seek to have the marks registered in association with products such as fruit, fish, ready-made meals and much else besides.

[41] I cannot ignore the actual wording of Seara's applications because the actual products on which the marks are used actually move in different trade circles than Amira's. As underlined by the Supreme Court in *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22 at paragraph 53, the statement of goods as submitted to the Registrar is important and remains the focus of the confusion analysis. Conversely, the actual way in which the marks may be used by an applicant is less important. This is because what is at issue in cases such as this is what the trademark registration would authorize Seara to do, not what Seara happens to be doing at the moment. Thus, these factors do not weigh in favour of Seara.

[42] Therefore, given that Seara's new evidence pertains solely to the distribution of frozen poultry products in the food service industry, and also considering the record that was before the TMOB, Seara has not established that confusion would not be likely with respect to the proposed use of other goods listed in its applications, such as "reserved, frozen, dried and cooked fruits and vegetables [and] jellies, jams", which do overlap with those registered for use in relation to Amira's "SERA" trademark.

[43] In light of the foregoing, the appeal would normally be dismissed.

(2) Split decision

[44] At the hearing, counsel for Seara did acknowledge that the applications may indeed be overbroad and that a correction may be opportune. As an alternative, Seara invited the Court to consider issuing a “split decision” by which only part of an application is allowed.

[45] Splitting a decision entails striking out part of an application’s statement of goods or services. Thus, Seara is essentially asking us to allow its trademarks applications, but only in regard to poultry, effectively removing from its statement of goods “preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes” and other non-poultry related products.

[46] Seara asserts that the TMOB’s power to issue a split decision is found in an older decision of the Federal Court of Canada – Trial Division: *Produits Menagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH* (1986), 10 C.P.R. (3d) 486 at p. 492 (F.C.T.D.) [*Coronet*], as cited in *Les Marques Metro / Metro Brands S.E.N.C. v. 1161396 Ontario Inc.*, 2017 FC 806. *Coronet* has been invoked on many occasions by the TMOB in the past: see e.g. *Protech Chemicals Ltd./Protech Chimie Ltée. c. PROTECH S.A.M.*, 2018 TMOB 77 at para. 87. I also note that this power has indeed been exercised for at least four decades: see e.g. *Wenward (Canada) Ltd. v. Dynaturf Co.* (1976), 28 C.P.R. (2d) 20 (Reg. T.M.); *Interlago A.G. v Mego Corporation* (1978), 46 C.P.R. (2d) 198 (T.M.O.B.). In addition – given new legislation intending to make the Act consistent with the *Singapore Treaty on the Law of Trademarks*, done at Singapore on March 27, 2006, and to add the authority to make regulations for carrying into

effect the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, adopted at Madrid on June 27, 1989 – the power to issue split decisions has been more explicitly set out in amendments to the Act which will come into force on June 17, 2019 (see section 35 of the *Combating Counterfeit Products Act*, S.C. 2014, c. 32 and subsection 343(3) of the *Economic Action Plan 2014 Act, No. 1*, S.C. 2014, c. 20; *Order Fixing June 17 and 18, 2019 as the Days on which Certain Provisions of the three Acts Come into Force*, S.I./2018-100, P.C. 2018-1329, C. Gaz. 2018.II.4243).

[47] In my view, on the evidentiary record before us, I could indeed have concluded that the “SEARA” design mark, in association with poultry for distribution in the food service industry, would not likely create confusion with Amira’s registered “SERA” trademark.

[48] However, even assuming – without deciding – that the power to issue split decisions does exist as of today, I cannot conclude that it would be open to the Court or the TMOB to effectively read in a restriction to the channels of trade by adding words, i.e. “for distribution in the food service industry”, that are not themselves used in either application.

[49] Therefore, I come to the same conclusion as the Federal Court that Seara’s appeal of the TMOB Decisions refusing its applications for the “SEARA” word and design marks should be dismissed. As discussed at the hearing, Seara may wish to undertake new steps to seek registration of its marks in association with a more limited statement of goods and channels of trade. In this respect, I note that it may then be useful to include evidence regarding the “SERRA” trademark (registration No. TMA502539) registered in 1998 for use in association

with cheese and olive oil based on use since at least 1965 in association with cheese and as of 1998 with respect to olive oil.

IV. Conclusion

[50] Seara's appeal of the FC Decision should be dismissed. Given that the appeal was unopposed, I would make no order as to costs. A copy of these reasons shall be filed in A-94-18 and A-95-18.

“Johanne Gauthier”

J.A.

“I agree
Donald J. Rennie J.A.”

“I agree
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE
HENEGHAN DATED FEBRUARY 19, 2018, DOCKET NOS. T-2174-16 AND T-2175-16
DOCKETS:** A-94-18; A-95-18

STYLE OF CAUSE: SEARA ALIMENTOS LTDA. v.
AMIRA ENTERPRISES INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JANUARY 10, 2019

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

DATED: APRIL 2, 2019

APPEARANCES:

Jaimie M. Bordman

FOR THE APPELLANT

SOLICITORS OF RECORD:

Macera & Jarzyna LLP
Ottawa, Ontario

FOR THE APPELLANT