TRADUCTION/TRANSLATION

SECTION 45 PROCEEDINGS
TRADEMARK: MAESTRO
REGISTRATION NO.: 408,207

On September 8, 2004, at the request of Maax Corporation, the Registrar sent the notice prescribed by section 45 of the Act to Vanico-Maronyx Inc., the registered owner of the above-referenced trade-mark registration.

The MAESTRO trademark is registered in association with the following wares: "bathtubs".

Section 45 of the *Trade-marks Act* requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and/or services listed on the registration at any time within the three-year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of use since that date.

In response to the notice, the affidavit of Charles-Antoine Gauvreau was provided. Only the requesting party filed written arguments. I also note that the requesting party introduced evidence in paragraphs 1, 2, 8, 13, 14 and 15 of its written arguments. I shall not take this evidence into account given that in section 45 proceedings only the registrant may provide evidence (see subsection 45(2) of the Act). A hearing has not been requested in this case.

Mr. Gauvreau is marketing director of the registrant. He affirmed that the registrant was created in 2000, as a result of the merger of two companies and that the registrant is a manufacturer of plumbing and bathroom fixtures, including bathtubs. He indicated that the registrant's products, including bathtubs, are for sale in Canada and the United States; that it sells its products to more than thirty retailers in Quebec, another thirty in Ontario, as well as many American retailers.

With regard to the MAESTRO brand, he affirmed that the registrant used the brand in association with bathtubs during the period in question. He specified that the owner offers various collections of standardized bathtubs and that the consumer can also choose among three luxury options.

He explained that the bathtubs can be permanently converted into whirlpool baths; or that a mechanism that inserts air into the bathtub, at high pressure, can be permanently integrated into the bathtub or that both options can be permanently integrated into the same bathtub. He highlights the fact that the bathtubs that include one of these three luxury options are all sold in association with the MAESTRO brand, regardless of the collection.

He indicated that between September 8, 2001, and September 8, 2004, the total bathtub sales in association with the MAESTRO brand came to C$165,824.17 and submited as exhibits CAG-1 and CAG-2 copies of invoices and copies of delivery slips. He presented several promotional brochures describing the various bathtub collections that were distributed to Canadian consumers

through the various Canadian retailers. He added that the brochures also describe the fact that the luxury options can be incorporated into the bathtubs, in which case these bathtubs will be associated with the MAESTRO brand

He specified that when a bathtub is delivered with one of the luxury options, the owner's manual and installation guide that is provided to the consumer on delivery clearly mentions that it is a MAESTRO bathtub and he presents such an installation guide as exhibit CAG-5.

The requesting party submits that the demonstrated use is not in the normal course of trade and furthermore that it is not in association with the wares specified in the registration.

Having considered the evidence, I am satisfied that the demonstrated use is a use within the normal course of trade.

In *Philip Morris Inc*. v. *Imperial Tobacco Ltd. et al*., 17 C.P.R. (3d) 237, the following comments appear at pages 240-241:

> On this record the appellant contended that the respondent must provide facts which demonstrate its normal course of trade, such as the volume of sales and the identity and location of its purchasers. The appellant alleged that the sales covered by the invoices show minimal regional sales to wholesalers in British Columbia, Nova Scotia and New Brunswick, indicating a pattern of token sales effected solely for the purpose of protecting its trade mark registration. The invoices were said to indicate sales of the very trivial amount of 43 cartons of Marlboro cigarettes in a month. It was emphasized that there is no evidence of advertising, of sales of consumers or even to retailers.
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> As this court has frequently said, s. 44 [now s. 45] is designed primarily to clear the register of dead wood, not to resolve issues in contention between competing commercial

> interests, which would be resolved in expungement proceedings under s. 57: *Moosehead Breweries Ltd*. v. *Molson Cos. Ltd. et al.* (1985), 11 C.P.R. (3d) 208 at p. 210, 63 N.R. 140 at p. 141.
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> McNair J. has recently held in *Philip Morris Inc*. v. *Imperial Tobacco Ltd. et al*. (1987), 13 C.P.R. (3d) 289, that evidence of a single sale in the normal course of trade, whether wholesale or retail may suffice.
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> ...
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> There is no evidence whatsoever in the record as to the normal course of trade in the tobacco industry in Canada. As Rouleau J. held in *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie* v. *Registrar of Trade Marks et al*. (1983), 71 C.P.R. (2d) 1, it is not the function of a court to find and set standards of the normal course of trade.
>
> The respondent, as a manufacturer, normally sells to wholesalers. Evidence of sales to wholesalers is therefore evidence of its normal course of trade. In my view, if there is apparently genuine evidence as to the normal course of trade, the limited nature of s. 44 [now s. 45] proceedings does not allow a court to question that evidence on the basis of its own view, unsupported by evidence, as to what constitutes the normal course of trade." [Emphasis added]

As specified in *Philip Morris*, *supra*, a single sale may suffice and moreover "if there is apparently genuine evidence as to the normal course of trade, the limited nature of s. 44 [now s. 45] proceedings does not allow a court to question that evidence on the basis of its own view, unsupported by evidence, as to what constitutes the normal course of trade." Here Mr. Gauvreau indicates that the registrant sells its wares to retailers and the evidence clearly demonstrates sales and deliveries to retailers, thus sales in the registrant's normal course of trade. Furthermore, there is nothing indicating that the transactions are not authentic or that they were deliberately fabricated or invented in order to protect the registration. (See *Lin Trading Co*. v. *CBM Kabushiki Kaisha*, 5 C.P.R. (3d) 27, 14 C.P.R. (3d) 32, and 21 C.P.R. (3d) 417 as well as

Institut National des Appellations d'Origine des Vins et Eaux-de-Vie v. *Registrar of Trade-marks*, 71 C.P.R. (2d) 1, and *Sim & McBurney* v. *Anchor Brewing Co*., 30 C.P.R. (4th) 331 and 40 C.P.R. (4th) 120.)

It now remains for me to determine whether the usage is in association with the wares concerned by the registration, i.e. bathtubs.

The evidence demonstrates that the registrant supplies bathtubs in association with several trademarks and that it offers several luxury options, i.e. a whirlpool system, an air system or a combination, that are permanently installed in the bathtub under the trademark MAESTRO. I note that when the registrant sells a bathtub model incorporating one of the luxury options, the bathtub model appears on the delivery slip followed by the reference MAESTRO Tourbillon, MAESTRO Whirlpool or MAESTRO Air. Furthermore, the evidence shows that the owner's manual and installation guide (exhibit CAG-4) provided to the consumer also references the bathtub model equipped with the MAESTRO system.

Though I admit MAESTRO is mostly used in association with the whirlpool or air systems (or a combination of both) that can be incorporated into the bathtub, considering that the system is incorporated upon delivery of the bathtub and due to the fact that the brand MAESTRO is found on the delivery slip under the heading "bathtub", considering that these slips were provided to the purchasers at the time of delivery and that the installation guide references either the regular bathtub model or the model equipped with the MAESTRO system, I am led to believe that the

person to whom the property is transferred would associate the MAESTRO not only with the whirlpool system, but also to bathtubs including a whirlpool system, an air system or a combination. I therefore accept that the demonstrated use with bathtubs and that this use meets the requirements of subsection 4(1) and section 45 of the Act.

In light of the preceding, I conclude that the trade-mark registration should be maintained.

Registration No. 408,207 will be maintained in compliance with the provisions of subsection 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 25TH DAY OF OCTOBER 2006.

D. Savard
Senior Hearing Officer
Section 45