



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

**Citation: 2011 TMOB 167**  
**Date of Decision: 2011-09-20**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Spiegel Sohmer Inc. against registration  
No. TMA645,387 for the trade-mark MAVERICK in the  
name of Maverick Brewing Company 2009 Ltd.**

[1] On May 7, 2009, at the request of Spiegel Sohmer Inc. (the Requesting Party), the Registrar of Trade-marks forwarded a notice under s. 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) to Maverick Brewing Corporation, who at that time was the registered owner (the Original Registrant) of registration No. TMA645,387 for the trade-mark MAVERICK (the Mark). The Mark is registered in association with brewed alcoholic beverages.

[2] Section 45 requires the registered owner of a trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and/or services listed in 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 this case, the relevant period for showing use is any time between May 7, 2006 and May 7, 2009 (the Relevant Period).

[3] What qualifies as use of a trade-mark is defined in s. 4 of the Act, which states:

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 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.

(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

(3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

In this case, s. 4(1) applies.

[4] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing deadwood from the register. The onus on a registered owner under s. 45 is not a heavy one [*Austin Nichols & Co. v. Cinnabon, Inc.* (1998), 82 C.P.R. (3d) 513 (F.C.A.)]. Evidentiary overkill is not required [*Union Electric Supply Co. Ltd. v. Registrar of Trade-marks* (1982), 63 C.P.R. (2d) 56 (F.C.T.D.)]. As stated by Mr. Justice Russell in *Uvex Toko Canada Ltd. v. Performance Apparel Corp.* (2004), 31 C.P.R. (4th) 270 (F.C.) at para. 58:

... We know that the purpose of s. 45 proceedings is to clean up the "dead wood" on the register. We know that the mere assertion by the owner that the trade mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade mark owner's business and merchandising practices.

[5] In response to the Registrar's notice, an affidavit of Donald J. Gluck was furnished. Both parties filed written submissions. An oral hearing was not requested.

[6] Mr. Gluck is the General Manager of Maverick Brewing Company 2009 Ltd. (the Current Owner), who was recorded as the owner of registration No. TMA645,387 on December 10, 2009.

[7] Mr. Gluck attests that he has been the general manager of the Current Owner since January 1, 2009. He has also been the operations manager of Five Oaks Inc. since June 1, 2003. Mr. Gluck informs us that the Current Owner owns and operates a brewery at 10229-105 Street NW in Edmonton, which was previously owned and operated by the Original Registrant. The Original Registrant rented the property at which the brewery is located from Five Oaks Inc. and,

as operations manager of Five Oaks Inc., Mr. Gluck visited the brewery on average two to three times each month while the brewery was being operated by the Original Registrant.

[8] The Original Registrant operated the brewery from about September 2005 until it suspended operations in about April 2007. The Original Registrant went into receivership in July 2007. In July 2007, Meyers Norris Penny Limited was appointed Interim Receiver of all of the Original Registrant's property. By an agreement dated October 31, 2007, English Bay Enterprises Inc. purchased the Original Registrant's assets, including the Mark, from the Interim Receiver. By an agreement effective November 1, 2007, English Bay Enterprises Inc. sold the assets to 1354322 Alberta Ltd. On January 27, 2009, 1354322 Alberta Ltd. changed its name to Maverick Brewing Company 2009 Ltd.

[9] The Requesting Party has submitted that the evidence shows neither use of the Mark by the Original Registrant during the Relevant Period nor special circumstances justifying a lack of use. In contrast, the Current Owner has submitted that the evidence supports the maintenance of the registration under both bases.

[10] The evidence concerning use can be summarized as follows:

- A sign displaying the Mark was displayed on the exterior of the building during the operation of the brewery by the Original Registrant. (Exhibit D)
- The Mark was clearly displayed on boxes in which the Original Registrant's beer was offered for sale prior to its receivership. (Exhibit E)
- The Original Registrant's sales from January to June 2006 were \$167,000. (Exhibit J)
- The Original Registrant's estimated sales from July to December of 2006 were \$100,000 and in 2007 were \$150,000 (Mr. Gluck bases these estimates on prior sales and his lease negotiations with the Original Registrant).
- The Interim Receiver's First Report to the Court of Queen's Bench of Alberta dated July 10, 2007 provides the following information: the Original Registrant's business is described as a brewery with a lounge style hospitality room for functions; the Original

Registrant continued to operate the business until April of 2007; from April 2007 to the appointment of the Interim Receiver, the business had minimal operations whereby no new product was produced, business being restricted to hosting functions; when the inventory of assets was conducted on July 6, 2007, all finished product within the premises had spoiled as it had not been refrigerated; the Original Registrant had a “brew pub” Class E license from the Alberta Gaming and Liquor Commission; the inventory of assets included 12.5 Maverick Labelled Boxes (crates), 1300 Maverick beer Bottles (approximate), and 5 Kegs of Maverick Beer (full). (Exhibit C)

[11] I consider it reasonable to conclude, based on the foregoing information, that the Original Registrant did make sales of beer in association with the Mark in Canada between May 7, 2006 and July 2007. While it is true that there is no evidence of specific sales, such as dated invoices, in the circumstances of this case it is understandable why such documentation was not provided. Furthermore, given the purpose of s. 45, it seems inappropriate to conclude other than that the Mark was in use by the Original Registrant prior to it entering receivership. The Original Registrant was clearly operating a “brew pub”, namely it operated a brewery in which it brewed beer connected to a lounge in which it served such beer. The beer’s packaging shows how the Mark was used in compliance with s. 4 of the Act and the quantity of beer containers and sales that existed prior to receivership supports a conclusion that there were sales of MAVERICK beer during the Relevant Period, prior to July 2007. Yes, the evidence could have been better but I see no reason to suspect that this particular trade-mark registration is deadwood.

[12] The evidence concerning the Current Owner’s activities since acquiring the Mark on November 1, 2007 can be summarized as follows:

- Mr. Gluck has attested that the Current Owner is in the process of reintroducing a line of beer bearing the Mark, initially to the Northern Alberta market, then to the remainder of Alberta, and ultimately across Canada.
- Mr. Gluck has provided a copy of an undated Business Plan that discusses the Current Owner’s corporate strategy, mission statement, market analysis, marketing, and distribution plans, which include selling its wares directly from the brewery. (Exhibit K)

- In January 2009, the Current Owner began test brewing beer to market under the Mark.
- Mr. Gluck attested that since March 2009, the Current Owner has been aggressively seeking a license from the Alberta Gaming and Liquor Commission to sell beer in Alberta, and anticipated that the license will be granted by the end of November 2009.
- As of November 6, 2009, the Current Owner had beer ready for sale but was awaiting the issuance of the license.

[13] Again, the evidence concerning the Current Owner's efforts to commence use of the Mark that it purchased from the Original Registrant could have been better. In particular, it has not explained why after two years it was not yet in a position to sell beer. It may be that obtaining a license to do so is a lengthy process, but there is no evidence to that effect. However, two years is not an unreasonable length of time for a new owner to revitalize a business that had gone into receivership. In any event, given that I have found that there was adequate evidence that the Mark was in use in the normal course of trade in association with beer during part of the Relevant Period, there is no need for the Current Owner to establish special circumstances justifying its lack of use of the Mark during the two year period of its ownership.

#### Disposition

[14] Pursuant to the authority delegated to me under s. 63(3) of the Act, in compliance with the provisions of s. 45 of the Act, the registration will be maintained.

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Jill W. Bradbury  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office