TRADUCTION/TRANSLATION

SECTION 45 PROCEEDINGS
TRADE-MARK: LA GAILLARDE
REGISTRATION NO.: 453,569

On July 7, 2004 at the request of Messrs. Shapiro Cohen the Registrar forwarded a Section 45 notice to Unibroue Inc., the registered owner of the above-referenced trade-mark registration.

The trade-mark LA GAILLARDE is registered for use in association with the following wares: "bières alcoolisées".

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. The relevant period in this case is any time between July 7, 2001 and July 7, 2004.

In response to the notice, the affidavit of André Dion has been furnished. The requesting party alone filed a written argument arguing that the affidavit furnished does not satisfy the requirements of Section 45 of the Act.

In his affidavit Mr. Dion states the following:

1. Je suis le représentant dûment autorisé de la requérante de la marque de commerce visée à la demande d'enregistrement quant à la Gaillarde;

2. Depuis le dépôt de ladite demande relativement à la marque de commerce mentionnée ci-dessus relativement à la marque de commerce qui y est décrite, la requérante a continué l'exploitation de cette marque de commerce au Canada avec les marchandises suivantes: bières alcoolisées y spécifiées;

3. Depuis un (1) an et demi soit en août 2002, la marque de commerce La Gaillarde n'est plus utilisée dans le cours courant des affaires de l'entreprise, puisque la marque et le marketing au soutien sont en réorganisation;

4. La requérante désire toujours utiliser la marque de commerce La Gaillarde et n'entend pas voir son enregistrement radié;

5. Tous les faits allégués dans la déclaration sont vrais.

It is settled law that evidentiary overkill is not required in order to properly reply to a Section 45 notice. The test that has to be met by a registrant under Section 45 is not a heavy one. All the registrant has to do is establish a prima facie case of use (see *Cinnabon, Inc*. v. *Yoo-Hoo of Florida Corp*., 82 C.P.R. (3d) 513). However, sufficient facts must be provided to permit the Registrar to conclude that the trade-mark has been used in association with the registered wares during the relevant period in a manner complying with the requirements of s. 4 of the Act.

It is clear in this case that the evidence furnished does not meet the test.

The affidavit merely contains a statement to the effect that the registrant has continued to use the trade-mark in association with the registered wares up until August 2002. As stated in *Plough*

Canada Ltd. v. *Aerosol Fillers Inc*., 45 C.P.R. (2d) 194 (FCTD) and 53 C.P.R. (2d) 62 (FCA) such a bare allegation is unacceptable to show use. It is trite law that the registered owner must provide evidence showing how it has used its mark in order that the Registrar may assess if the use qualifies as use of the trade-mark pursuant to s. 4 of the Act. Here the registrant has not described the manner the trade-mark was associated with the wares at the time of sale and has not provided any labelling or packaging for the wares. Further, there is absolutely no evidence of any sale of the wares having occurred during the relevant period. Mr. Dion has not provided any invoices or sales figures which would have confirmed that sales in Canada had been made.

I will now determine if special circumstances have been shown that may excuse the absence of use. Concerning special circumstances the jurisprudence has identified three (3) important criteria for determining whether special circumstances exist. First, one must consider the length of time the trade-mark has not been used; secondly, it must be determined whether the registered owner's reasons for not using the trade-mark were due to circumstances beyond its control; thirdly, one must find whether there exists a serious intention to shortly resume use (*RTM* v. *Harris Knitting Mills Ltd.*, 4 C.P.R. (3d) 488; *Ridout & Maybee* v. *Sealy Canada Ltd./Ltée*, 87 C.P.R. (3d) 307 and *NTD Apparel Inc*. v. *Ryan*, 27 C.P.R. (4th) 73).

Here although Mr. Dion has furnished August 2002 as the date the trade-mark was last in use, as pointed out above there is absolutely no evidence that the trade-mark was ever in use in the manner required by s. 4 of the Act.

Concerning the reason provided for the period August 2002 to July 7, 2004, I would say that without further details it appears the registrant made a voluntary decision to suspend the use of the mark. There is absolutely no indication that the decision was dictated by external forces beyond the registrant's control.

As for the registrant's alleged intent to resume use, we only have Mr. Dion's bare allegation to that effect and no evidence to support such a statement (see *Lander Co. Canada Ltd.* v. *Alex E. Macrae & Co.*, 46 C.P.R. (3d) 417 where it is clearly stated that the intention must be substantiated by factual elements).

In view of the above, I conclude that the registrant has not shown that the absence of use has been due to special circumstances excusing the absence of use.

Accordingly, I conclude that the trade-mark registration ought to be expunged.

Registration No. 453,569 will be expunged in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 31ST DAY OF MAY 2006.

D. Savard
Senior Hearing Officer
Section 45 Division