

SECTION 45 PROCEEDINGS
TRADE-MARK: STEAM
REGISTRATION NO.: 362,494

On June 10, 1999, at the request of Messrs. Sim & McBurney, the Registrar forwarded a Section 45 notice to Anchor Brewing Company, the registered owner of the above-referenced trade-mark registration.

The trade-mark STEAM is registered for use in association with the following wares: “beer”.

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 June 10, 1996 and June 10, 1999.

In response to the notice, the affidavit of Frederick L. Maytag III, together with exhibits has been furnished. The registrant alone filed a written argument. Each party was represented at the oral hearing.

In his affidavit, Mr. Maytag states that he is the owner of Anchor Brewing Company, the registrant of the trade-mark and that the company brews, markets and sells beer in association

with the trade-mark STEAM. He explains that the beer is sold in cases of 24 on which the trade-mark is prominently displayed and as Exhibit A he attaches a representative sample of one such case. He indicates that in the ordinary course of business, his company sells its STEAM beer to distributors who export to Canada and that one distributor that has exported the beer in Canada is Sound Beverage Distribution Inc. of Bellingham, Washington and as Exhibits B1, B2 and B3 he attaches copies of invoices bearing dates during the relevant period in respect of the sale of STEAM beer by Sound Beverage Distribution Inc. to the B.C. Liquor Distribution Branch in Vancouver. He explains that the references to “ANCHOR” and “ANCHOR 4/6 NR” on the invoices refer to his company’s STEAM beer packaged in the cardboard case shown in Exhibit A.

Having considered the evidence, I am satisfied that it is sufficient to permit me to conclude that the trade-mark STEAM was in use in Canada during the relevant period in association with beer and that the use complied with the requirements of Sections 4(1) and 45 of the Trade-marks Act.

At the hearing, counsel for the requesting party raised the following arguments:

- The evidence fails to show sales by the registrant to anyone
- Paragraph 4 of the affidavit and the documents attached as exhibits consist of “hearsay” evidence and therefore they should not be given any weight
- In the alternative, the evidence fails to show use by the registrant, or use in the normal course of trade or use of the registered trade-mark.

First, considering whether the statements made in paragraph 4 of the affidavit and the exhibits

consist of “hearsay evidence”, I must say that it would have been easier if Mr. Maytag would have clearly indicated in his affidavit that he had personal knowledge of the facts stated therein. Nevertheless, as argued at the hearing by counsel for the registrant, as Mr. Maytag is the owner of the registrant company it is reasonable to assume that as owner (and because of the relationship his company has with Sound Beverage) he would have direct knowledge of the manner of distribution of his company’s beer. I would add that nowhere in paragraph 4 is it indicated that his statements are based on “information and belief”. Consequently, as there is no clear indication that Mr. Maytag’s statements are not based on personal knowledge, I am not prepared to find otherwise. Concerning the exhibits, I am prepared to consider them as they support Mr. Maytag’s statements which I have found are statements based on personal knowledge. Accordingly, the statements made in paragraph 4 of the affidavit and the exhibits will be given proper weight.

Concerning the sales made by the distributor, I find the evidence sufficient to permit me to conclude that they were sales made in the registrant’s normal course of trade. Mr. Maytag has clearly described the registrant’s normal course of trade with respect to its STEAM beer. He has stated that the registrant brews, markets, and sells beer under the trade-mark and that the STEAM beer is sold in cases of 24 on which the trade-mark STEAM is displayed. He has explained that the registrant sells its STEAM beer to distributors who export to Canada and he has provided evidence that one such distributor has exported STEAM beer into Canada during the relevant period.

The requesting party argues that more details regarding the business of the registrant (such as volume of sales, sales figures, etc) are needed in order for the Registrar to make a determination as to whether the sales were made in the normal course of trade. The requesting party relied on *Plough Canada Ltd. v. Aerosol Fillers Inc.*, 45 C.P.R. (2d) 194 (FCTD) and 53 C.P.R. (2d) 62 (FCA) and *Sim & McBurney v. Majdell Manufacturing Co. Ltd.*, 11 C.P.R. (3d) 306, in support of its contention that more details regarding the business of the registrant are required.

I am not prepared to find, as the requesting party has suggested, that there is some particular kind of evidence that must be provided in order to find use in the “normal course of trade”. It is true that volume of sales and sales figures may be useful when determining whether the use has been in the normal course of trade. However, they are not required. In the present case the affidavit sets out in sufficient detail the registrant’s normal course of trade with respect to the trade-mark and the wares and within the general context of the nature of these proceedings, the evidence furnished is adequate. As stated in *Lewis Thompson & Sons Ltd. v. Rogers, Bereskin & Parr*, 21 C.P.R. (3d) at 486:

The nature of these proceedings is such, it seems to me, that it is not considered that the facts of use are to be infinitely contestable before the registrar or the Federal Court. It seems to me that what is required is that the registrant establish a prima facie case of use and that that is all that is expected of him. There is usually no cross-examination permitted with respect to affidavits filed either before the registrar or before this court in these matters, and there is no provision for respondents filing any evidence before the registrar. It seems to me that that indicates quite clearly that these are not considered to be proceedings where there should be an infinite contestation of the facts.

In addition, the present case can clearly be distinguished from *Plough and Majdell*, supra, as sufficient facts concerning the registrant’s normal course of trade and use of the trade-mark have

been provided.

Further, I am satisfied that the use shown is use by the registrant. As Sound Beverage Distribution Inc. merely acts as a distributor concerning the registrant's STEAM beer, then any sale of the registrant's beer by the distributor as shown by the evidence is use of the trade-mark in Canada by the registrant. (*see Manhattan Industires Inc. v. Princeton Manufacturing Ltd.*, 4 C.P.R. (2d) 6.) Contrary to the requesting party's assumption, a showing of a transaction between the registrant and the distributor is not necessary in this case as it is clear from the evidence as a whole that the first link in the chain of transactions is the registrant.

The requesting party has commented on the appearance of the name "Anchor Brewing Co." on the cardboard case. In my view, the word "Co." is merely the abbreviation of the term "Company". Consequently, I conclude that the company's name appearing on the cardboard case is a reference to the registrant.

The last issue is whether the use shown by the evidence is use of the registered trade-mark. It is clear from the cardboard case (Exhibit A) that the trade-mark is being used with additional matter. The trade-mark appears as follows on the packaging:

On the front and back panels:

On the end panels:

I agree with the requesting party that the word “STEAM” as it appears on the front and back panels would not be perceived as a distinct trade-mark. However, I find that on the end panels of the cardboard case, the word “STEAM” “per se” would probably be perceived as being used as a trade-mark. The word STEAM stands out from the words “San Francisco’s Original” which appear in a different font and size and on a separate line. In addition the words “San Francisco’s Original” would probably be perceived merely as descriptive matter. As for the word “beer”, although it appears in the same format as the word “STEAM”, it would probably be considered the name of the wares and not as forming part of the trade-mark. (see *Nightingale Interloc Ltd. v.*

Prodesign Ltd., 2 C.P.R. (3d) 535 (Principle 1.) In this regard, the ® indicia immediately appearing after the word STEAM would probably draw the public's attention to the fact that STEAM is the trade-mark being used thereon. In view of the above, I conclude that as a matter of first impression the public would perceive the trade-mark STEAM as being used.

As I have concluded that the evidence shows that sales of the wares in a cardboard case bearing the registered trade-mark STEAM were made in Canada during the relevant period in the registrant's normal course of trade, namely through one of its distributors, and as the evidence shows that the use was in compliance with Sections 4(1) and 45 of Trade-marks Act, I conclude that the trade-mark registration ought to be maintained.

Registration No. 362,494 will be maintained in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 30th DAY OF JANUARY 2003.

D Savard
Senior Hearing Officer
Section 45 Division