

SECTION 45 PROCEEDING
TRADE-MARK: GENUINE BAVARIAN BEER & DESIGN
REGISTRATION NO.: 212,398

On March 8, 2001, at the request of Bavaria S.A., the Registrar forwarded a Section 45 notice to Verband Bayerischer Ausfuhr-Brauereien E.V., the registered owner of the above-referenced trade-mark registration.

The trade-mark GENUINE BAVARIAN BEER & Design (shown below) 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 March 8, 1998 and March 8, 2001.

In response to the notice, the affidavit of Manfred Newrzella together with exhibits has been furnished. Each party filed a written argument. The requesting party alone was represented at the oral hearing.

In his affidavit, Mr. Newrzella states that the registrant is an association of Bavarian breweries whose purpose is to protect, promote and represent the common beer export interests of the Bavarian brewery industry and that it has a duty to promote, at home and abroad, the described interests of its members by the use of association marks and to proceed against unfair practices of third parties, e.g. use of these association marks or use of marks of origin such as e.g. GENUINE BAVARIAN BEER & Design or BAVARIAN BEER or use of any other expression in German or any other language which makes reference to Bavaria. He indicates that the members of the association, inter alia, Löwenbräu AG, Hacker-Pschorr-Bräu GmbH and Tucher Bräu GmbH & Co., are authorized to use, free of charge, the mark GENUINE BAVARIAN BEER & Design when the beer actually originate in Bavaria. As Exhibits A, B and C respectively, he provides certified declarations executed by officers of each of these companies attesting to sales of genuine Bavarian Beer to Canada in each of the years 1998, 1999 and 2000. He specifies that he has reviewed these declarations and believe them to be accurate.

The requesting party has raised several objections concerning the admissibility of the evidence furnished and the sufficiency of the evidence furnished.

Concerning the sufficiency of the evidence furnished, one of the principal submissions by the

requesting party is that the evidence clearly fails to show that the trade-mark as registered was associated with the beer when such beer was exported to Canada or sold in Canada as required by Section 4(1) of the Trade-marks Act.

According to Section 4(1) of the Act, a trade-mark is deemed to be used in association with wares if, at the time of transfer of the property in or possession of such wares, in the normal course of trade, the following conditions are met:

- the trade-mark is marked on the wares themselves;
- the trade-mark is marked on the package in which the wares are distributed;
- the trade-mark 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 being transferred.

In this case the evidence refers to exports of genuine Bavarian Beer to Canada. However, it clearly fails to show the manner the registered trade-mark GENUINE BAVARIAN BEER & Design was associated with the wares when such wares were exported to Canada. We do not have any evidence showing that at the time of transfer of the wares, the trade-mark as registered was marked on the wares themselves or their packaging or was in any other manner so associated with the wares that notice of the association was then given to the person to whom the property or possession was transferred. Consequently, the evidence clearly fails to show use that accords with Section 4(1) of the Act.

In view of the above, I need not consider any of the other arguments raised by the requesting

party.

Registration No. 212,398 will be expunged in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 23RD DAY OF OCTOBER 2003.

D. Savard
Senior Hearing Officer
Section 45 Division