

**SECTION 45 PROCEEDINGS
TRADE-MARK: CASTELLO
REGISTRATION NO.: 262,283**

On August 8, 1994, at the request of Messrs. Riches, McKenzie & Herbert, the Registrar forwarded a Section 45 notice to Empresa Das Aguas de Pizoes-Moura, de Assis & Ca., Lda., the registered owner of the above-referenced trade-mark registration. The change of name to Sociedade das Aguas de Pizoes-Moura, S.A. was recorded on the register on August 11, 1995.

The trade-mark CASTELLO is registered for the following wares: "Bière, bière anglaise et bière noire, eaux minérales et gazeuses".

After having been granted two extensions of time, the registrant furnished the affidavit of Eric Pascal Laurent Alloo. Each party filed a written submission. An oral hearing was not requested in this proceeding.

In his affidavit, Mr. Alloo clearly alleges use by the registrant of the trade-mark in association with mineral water since at least 1991. As Exhibit EA-2, he has submitted various labels which he states are affixed to the bottles of mineral water that are sold in Canada and were sold in Canada between 1991 and 1994. As Exhibit EA-3, he attaches copies of invoices which he submits were taken at random and which he states evidence sales of mineral water under the trade-mark CASTELLO between 1991 and 1994.

In its written submission, the requesting party asks the Registrar to reconsider and withdraw the extension of time granted to the registrant until February 22, 1995 for filing its evidence. The requesting party argues that it did not consent to the granting of such additional extension of time and it submits that the registrant's request failed to establish "exceptional circumstances" as required in the official letter of November 29, 1994. It should be noted that there is no authority in law for the "Registrar" to review the exercise of his discretionary powers such as the grant of an extension of time pursuant to Section 47(1) of the Trade-marks Act. The only instance where it might be considered appropriate to do so is where there is a clear error of fact or law on the face of the record. In my view, no such clear error is apparent in this case which might justify a reconsideration of the Registrar's decision.

Concerning the evidence of record, the requesting party submits that the registrant has failed to provide evidence establishing the sale in Canada of beer, English beer or black beer in association

with the trade-mark during the relevant period. I agree. Consequently, I conclude that these wares ought to be deleted from the register.

Concerning use in association with "eaux minérales et gazeuses", the requesting party submits that the affidavit fails to set out any particulars of the registrant's trade so as to enable the Registrar to infer that any sales were in the normal course of trade; it adds that the affiant did not clearly state that the labels attached as Exhibit EA-2 were the type of labels affixed to the bottles of mineral water sold in Canada during the two-year relevant period.

Concerning the registrant's normal course of trade, it is clear from the evidence that the mineral water is bottled by the registrant (this is apparent from the labels), that the "mineral water" is sent on consignment to a company in Canada called Ferma Import & Export Ltd. who sells it in Canada. The documents attached as Exhibit EA-3 show transfers of the wares from the registrant to the Canadian company which occurred prior to and during the relevant period. Concerning the labels submitted as Exhibit EA-2, Mr. Alloo has clearly stated that those labels are affixed to the bottles of mineral water that are sold under the trade-mark CASTELLO in Canada and that have been sold in Canada between 1991 and 1994 and in paragraph 9, he confirms that the documents attached as Exhibit EA-3 evidence sales in Canada of mineral water under the trade-mark CASTELLO. Consequently, looking at the evidence in its entirety, I am satisfied that it is sufficient to show use of the trade-mark in association with the wares "eaux minérales et gazeuses" during the relevant period and in the registrant's normal course of trade.

In view of the evidence furnished, I conclude that the trade-mark registration ought to be amended so that the statement of wares refer only to the wares "eaux minérales et gazeuses".

Registration No. 262,283 will be amended accordingly, in compliance with the provisions of Section 45(5) of the Trade-marks Act.

DATED AT HULL, QUEBEC, THIS 30th DAY OF November, 1995.

D. Savard
Senior Hearing Officer
Section 45 Division