



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 182**

**Date of Decision: 2021-08-17**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**Conduit Law Professional  
Corporation**

**Requesting Party**

**and**

**Great Western Brewing Company  
Limited**

**Registered Owner**

**TMA411,660 for THE GREAT  
WESTERN BREWING COMPANY**

**Registration**

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to Registration No. TMA411,660 for the trademark THE GREAT WESTERN BREWING COMPANY (the Mark), which is owned by Great Western Brewing Company Limited (the Owner).

[2] The Mark is registered for use in association with the following goods: “Beer.”

[3] For the reasons that follow, I conclude that the registration ought to be maintained.

## THE PROCEEDING

[4] At the request of Conduit Law Professional Corporation (the Requesting Party), the Registrar of Trademarks issued a notice to the Owner under section 45 of the Act on September 13, 2018.

[5] The notice required the Owner to show use of the Mark in Canada in association with the registered goods 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 such use since that date. In this case, the relevant period for showing use is September 13, 2015 to September 13, 2018.

[6] The relevant definition of “use” in this case is set out in section 4(1) of the Act as follows:

A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

[7] In the absence of use, the Mark is liable to be expunged unless the absence of use is due to special circumstances that excuse the absence of use [section 45(3) of the Act].

[8] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register. The evidence in a section 45 proceeding need not be perfect; indeed, a registered owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 11]. This burden of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [*Diamant Elinor* at para 9].

[9] In response to the Registrar’s notice, the Owner furnished the affidavit of its Chief Financial Officer, Brendan Halbgewachs, sworn on November 5, 2018. Both parties submitted written representations. Both parties were represented at an oral hearing.

## THE EVIDENCE

[10] With respect to the Owner's normal course of trade, Mr. Halbgewachs explains that the Owner has a significant share of the beer market in western Canada and it has recently begun to sell beer in the United States under its ORIGINAL 16 brand [para 6]. Through retail chains in Saskatchewan, Mr. Halbgewachs states that the Owner sells its beer in cans and bottles that are packaged in cartons that range in size from 6 to 24 cans/bottles [paras 7 and 8].

[11] Mr. Halbgewachs states that the Mark appears on each of the Owner's products as it is an umbrella trademark under which all brands of beer brewed by the Owner are sold, including its ORIGINAL 16 brand and others sold during the relevant period [para 8].

[12] With respect to display of the Mark, Mr. Halbgewachs provides artwork and photographs of cartons and cans of beer, which he states are representative of how they would have been sold in the ordinary course of trade in the relevant period [paras 9 and 11; Exhibits D, E, and F]. Mr. Halbgewachs explains that the Mark is not always used exactly as registered [para 10].

[13] Regarding transfer of the registered goods, Mr. Halbgewachs provides a report showing the Owner's sales of beer for the week of September 2, 2018 [para 7; Exhibit B]. He provides a spreadsheet with total sales of beer that are tabulated from the report for the week of September 2, 2018 [para 7; Exhibit C]. During that week, Mr. Halbgewachs indicates that the Owner sold 9,832 cases or 56,971.5 litres of beer through retail chains in Saskatchewan [para 7]. He explains that the sales report was obtained from the Saskatchewan Liquor and Gaming Authority's Liquor Information Online Network, which provides information on retail sales of liquor in the normal course of trade in Saskatchewan [para 7].

## ANALYSIS AND REASONS FOR DECISION

[14] The Requesting Party raises three issues in this case: (1) the evidence does not show use in the normal course of trade; (2) the evidence does not show use during the relevant period; and, (3) the Mark is not used as registered. I will discuss each of these issues in turn.

### **Transfers in the Owner's Normal Course of Trade**

[15] The Requesting Party submits that no evidence has been provided to show where the goods are sold, how a consumer actually purchases the goods, or any evidence of transfer as required by section 4 of the Act. I disagree. Mr. Halbgewachs states that, through retail chains in Saskatchewan, the Owner sells its beer in cans and bottles that are packaged in cartons that range in size from 6 to 24 cans/bottles [paras 7 and 8]. He also provides a sales report from the Saskatchewan Liquor and Gaming Authority's Liquor Information Online Network, which provides information on retail sales of liquor in the normal course of trade in Saskatchewan [para 7; Exhibit B]. Based on this evidence, I am satisfied that consumers purchase the goods in the formats that are sold by the Owner through retail chains in Saskatchewan, namely the Saskatchewan Liquor and Gaming Authority, and I am satisfied that this constitutes the Owner's normal course of trade.

[16] Mr. Halbgewachs also provides a spreadsheet with total sales of beer that are tabulated from the report for the week of September 2, 2018 [para 7; Exhibit C]. He indicates that the Owner sold 9,832 cases or 56,971.5 litres of beer during that period [para 7]. When Mr. Halbgewachs's clear sworn statement regarding volumes of sales is considered along with the sales report and spreadsheet, I find that this provides sufficient evidence of transfer in the normal course of trade within the meaning of section 4 of the Act [see, for example, *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79 at para 14].

### **Transfers during the Relevant Period**

[17] The Requesting Party submits that the sales report at Exhibit B does not indicate when the sales occurred. The only date that appears in the sales report is "2018-10-15", which is after the relevant period. However, it is necessary to consider the evidence as a whole. Mr. Halbgewachs makes a clear, sworn statement in his affidavit that these sales are from the week of September 2, 2018 [para 7]. The Requesting Party submits that amounts to a bald assertion. However, in this regard, I note that it is only assertions of use (a matter of law) that are inadequate in section 45 proceedings, not assertions of facts like Mr. Halbgewachs's statement at para 7 of his affidavit [per *Mantha & Associés/Associates v Central Transport Inc* (1995), 64

CPR (3d) 354 (FCA) at para 3]. When I consider the sales report along with Mr. Halbgewachs's statement, I am satisfied that the evidenced sales occurred during the relevant period.

### **Deviation of the Mark**

[18] The Requesting Party submits that the photographs of cartons and cans of beers at Exhibits D, E, and F do not show use of the Mark as registered. In particular, the Requesting Party submits that the differences between the Mark as registered and the trademarks that appear in evidence are "not very minor" because "THE" and "COMPANY" are missing so that the trademark displayed on the packaging is only "GREAT WESTERN" or "GREAT WESTERN BREWING". The Requesting Party submits that the Mark as registered evokes "the identity of the Owner" – a specific entity as the source of the product – whereas GREAT WESTERN and GREAT WESTERN BREWING are suggestive or descriptive of a particular style of brewing or an indication of the geographic area where the brewing occurs. However, in my view, the Mark does not lose its identity and it remains recognizable despite the differences noted by the Requesting Party [per *Canada (Registrar of Trademarks) v Cie internationale pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA) at para 5].

[19] I come to this conclusion by considering the dominant features of the Mark, which are the words "GREAT WESTERN". These dominant features are preserved from the Mark as registered to the trademarks that appear in evidence [per *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA) at paras 34 to 36].

[20] Furthermore, the differences between the trademarks (namely, the missing "THE" and "COMPANY") are so unimportant that an unaware purchaser would be likely to infer that the trademarks, despite their differences, identify goods having the same origin [per *Honeywell Bull* at para 5; *Promafil* at paras 38 and 40]. As a result, I am satisfied that use of the trademarks in evidence constitute use of the Mark as registered.

DISPOSITION

[21] Based on the findings above, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be maintained.

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Bradley Au  
Hearing Officer  
Trademarks Opposition Board  
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE** 2021-08-05

**APPEARANCES**

Terry J. Zakreski	For the Registered Owner
Rohit Parekh	For the Requesting Party

**AGENTS OF RECORD**

Terry J. Zakreski	For the Registered Owner
Conduit Law Professional Corporation	For the Requesting Party