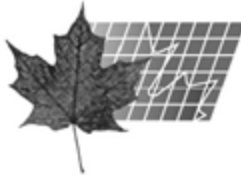


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C I P O

**LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS**

**Citation: 2022 TMOB 167**

**Date of Decision: 2022-08-25**

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

**Moffat & Co.**

**Requesting Party**

**and**

**2008474 Ontario Inc.**

**Registered Owner**

**TMA965,263 for THE 6**

**Registration**

**INTRODUCTION**

[1] This decision involves a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA965,263 for the trademark THE 6 (the Mark).

[2] The Mark is registered for use in association with the following:

Goods

(1) Alcoholic brewery beverages, namely beer.

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

## THE PROCEEDING

[4] At the request of Moffat & Co. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on May 19, 2020, to 2008474 Ontario Inc. (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the trademark was used in Canada in association with each of the registered goods specified in 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 such use since that date. In this case, the relevant period for showing use is May 19, 2017 to May 19, 2020.

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

4(1) 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] Where the owner has not shown “use”, the registration is liable to be expunged or amended, unless there are special circumstances that excuse the absence of use.

[8] In response to the Registrar’s notice, the Owner furnished the affidavit of Jeff Carefoote, sworn on December 15, 2020, to which were attached Exhibits 1 to 3.

[9] Both parties submitted written representations and were represented at an oral hearing.

## THE EVIDENCE

[10] Mr. Carefoote identifies himself as founder and President of the Owner, a brewery and restaurant/bar. He asserts that by virtue of his position, he had access to the Owner’s records and was involved in all aspects of its business, including sales related to the beer and related restaurant business. He also asserts that his affidavit is based on his personal knowledge or, when expressly indicated, on his information and belief [paras 2 to 4 and 8].

[11] Mr. Carefoote states that the Owner expanded its business since its foundation in 2002. In particular, he states that in 2017 the Owner opened a restaurant, brewery and beer store in the Leaside area of Toronto (Leaside) [paras 2, 11 to 12].

[12] Mr. Carefoote asserts that the Mark has been used in association with the registered goods during the relevant period. In particular, he states that in 2017, a significant number of customers were exposed to Mark at the Leaside tasting bar where the beer was on tap. He adds “our beer store in Leaside sold THE 6 branded beer in a 355ml bottle format” [paras 7, 19 to 20].

[13] At para 21 of his affidavit, Mr. Carefoote states:

I know that actual sales of THE 6 branded beer were made at our Leaside beer store and our tasting bar commencing at least as early as February, 2017, (as we filed our Declaration of Use for the trademark on February 21, 2017), and continuing into the summer months including June and July 2017.

[14] In the first portion of para 24 of his affidavit, Mr. Carefoote states:

I am able to personally confirm that sales occurred of our THE 6 bottled products to Toronto area consumers through our refrigerated retail display at our Leaside beer store, as I recall seeing the products for sale in “the fridge” (as we call it) in the spring and summer of 2017, in the manner and at the time shown in the date-stamped photograph, and as outlined in paragraph 20 above. I can also personally recall that we were serving THE 6 branded beer on tap in the tasting bar at our brewery store in that same period extending from February into June and July of 2017.

[15] Mr. Carefoote further explains that in June 2018 the Leaside’s point of sale system was replaced and the data and sales records corresponding to 2017 and early 2018 were lost. Nevertheless, he confirms that sales of beers occurred in Leaside in 2017. In this respect, Mr. Carefoote states that he was able to retrieve accurate accounts of these sales by virtue of a statement of opposition filed by the Owner, for which he collected evidence in March 2018. In particular, Mr. Carefoote asserts that in preparation of the statement of opposition, he asked Martin Piper, the Owner’s director of marketing, “to check the accounting records and to retrieve the precise sales figures for The 6 branded beer for 2017”. He further states that on March 9, 2018, Mr. Piper reported him confirming that the sales figures for the products under the Mark, including beer on tap and bottled beer, totaled \$13,042 for the year 2017.

Mr. Carefoote further adds: “I verily believe those sales numbers to be accurate, as they were based on our point of sale records, which were still accessible at that time”. [paras 17, 22 to 24].

[16] In support, the following exhibits are attached to Mr. Carefoote’s affidavit:

- Exhibit 1: consists of a photograph of a label, which I note displays the Mark in a stylized form. Mr. Carefoote identifies this Exhibit as: “this is an enlarged photograph of the label of our bottled beer, showing the Trademark, when this *sku* was sold near the end of March 2017”;
- Exhibit 2: consists of a photograph of an array of bottles bearing the Mark in a stylized form that Mr. Carefoote states were “displayed for sale in the refrigerated retail area of our beer store in Leaside, Ontario”;
- Exhibit 3: consists of a screenshot displaying the *.jpg information* of a photograph entitled *TheSix\_fridge.jpg Info*. Mr. Carefoote identifies this Exhibit as: “this is another version of the photograph in Exhibit 2, including a time «date stamp». This photograph can be precisely dated to March 28, 2017, shown in the data sheet for the photograph attached as Exhibit 3. THE 6 branded beer was introduced for the first time and subsequently offered for sale at our brewery beer store beginning in February, 2017”. I note that the photograph is the same as the one identified as Exhibit 2. I also note that the *TheSix\_fridge.jpg Info* was created and last modified on March 28, 2017 at 1:39 PM.

#### ANALYSIS AND REASONS FOR DECISION

[17] In its written representations, the Requesting Party pointed several issues in the evidence and submitted that the Carefoote affidavit contains unsupported and ambiguous statements. On the whole, it submitted that the Owner failed to clearly demonstrate use of the Mark in association with the registered goods during the relevant period. At the oral hearing, the Requesting Party added that the Carefoote affidavit contains hearsay and should be disregarded. Thus, the following issues need to be discussed: (i) whether the affidavit should be disregarded and (ii) whether the evidence demonstrates use of the Mark during the relevant period.

## **The Hearsay Evidence**

[18] The Requesting Party submits the affidavit is unreliable and should be disregarded as Mr. Carefoote's statements contain hearsay. In particular, the Requesting Party refers to paragraph 24 of the affidavit where Mr. Carefoote reports information provided by Mr. Piper. The Owner, on the other hand, submits that Mr. Carefoote stated that the sales figures were accurate as they were based on the records available before the system replacement. It further submits that hearsay evidence is generally accepted in section 45 proceedings.

[19] I agree with the Requesting Party that Mr. Carefoote's statements related to the sales figures are hearsay as he relies on information provided by Mr. Piper, the Owner's director of marketing. However, as noted by the Owner, it is well established that, given the summary nature of section 45 proceedings, "concerns with respect to the hearsay nature of evidence can go to weight, rather than admissibility" [*Eva Gabor International Ltd v 1459243 Ontario Inc*, 2011 FC 18 at para 18]. Therefore, any concerns about the reliability of Mr. Carefoote's affidavit will be assessed in terms of weight rather than admissibility.

[20] In this case, Mr. Carefoote identified himself as the President and founder of the Owner. He stated having personal knowledge and being personally involved in the Owner's activities. He provided contextual information and explained why he considers the figures in question to be accurate. Given the nature of his position with the Owner and the explanations provided, I find that he was sufficiently knowledgeable to assess the accuracy of the sales figures obtained by Mr. Piper. Thus, I am satisfied that Mr. Carefoote's statements regarding the sales figures are sufficiently reliable to be admitted for the truth of their content. Furthermore, in my view, requiring more than one affidavit to establish the correctness of the sales figures would have been evidentiary overkill and contrary to the summary nature of section 45 proceedings.

## **The use of the Mark during the relevant period**

[21] In support to its submissions that the evidence does not sufficiently demonstrate use of the Mark during the relevant period, the Requesting Party questions whether notice of association has been given to customers during the relevant period. In this respect, it points out that the photographs provided predate the relevant period and submits that there is no evidence

that the Mark was displayed on the goods at the time of transfer. In this respect, the Requesting Party refers to Mr. Carefoote's statement linking the label shown on the first photograph to sales occurring "near the end of March 2017". It also points out that Mr. Carefoote dated the two other photographs on March 28, 2017. Additionally, according to the Requesting Party, Mr. Carefoote omitted to indicate that these photographs are representative of the way the Mark was displayed on the labels of the bottled beers during the relevant period. It therefore submits that all the exhibits are irrelevant and should be disregarded.

[22] The Requesting Party also questions whether sales actually occurred within relevant period. First, regarding Mr. Carefoote's statements of sales, the Requesting Party submits that his confirmation of sales is only based on his recollection of seeing the products for sale in the fridge. In this respect, the Requesting Party submits that the fact of having products for sale does not equate to transfer of possession within the meaning of the Act. It therefore submits that his statements are ambiguous and should be interpreted against the Owner. Second, regarding the sales figures provided, the Requesting Party submits that they are insufficient evidence. In particular, it suggests that there is a possibility that all of the sales occurred between March and May 19, 2017 as Mr. Carefoote is not precise as to which period within the year 2017 the sales figures correspond. Further, the Requesting Party submits that the affidavit should be considered from the point of view of what it does not say. In particular, it submits that as the evidence is silent as to what happened after replacement of the system, as the sales figures are undated and as Mr. Carefoote's statements related to the sales are vague, the most likely conclusion is that sales were not made or that Mr. Carefoote does not certainly know that sales occurred during the relevant period.

[23] In response, the Owner submits that the Requesting Party is dissecting the evidence and analysing the paragraphs of the Carefoote affidavit in isolation. In this respect, the Owner relies on *Portage World-Wide, Inc. v Croton Watch Co., Inc.*, 2017 TMOB 96 [*Portage*], and submits that the evidence must be read with the attitude of a mind willing to understand what is being said in the evidence, rather than for the purpose of searching out ambiguities or contradictions. According to the Owner, the Requesting Party's proposition that the sales figures concern the period between March and May 19, 2017 is speculative. Thus, the Owner submits that the

evidence sufficiently shows use of the Mark in association with the registered goods during the relevant period.

[24] It is well established that evidence in a section 45 proceeding must be considered as a whole, and focusing on individual pieces of evidence in isolation is not the proper approach [see *Kvas Miller Everitt v Compute (Bridgend) Ltd* (2005), 47 CPR (4th) 209 (TMOB); and *Fraser Milner Casgrain LLP v Canadian Distribution Channel Inc* (2009), 78 CPR (4th) 278 (TMOB)]. As well, reasonable inferences can be made from the evidence provided [see *Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64].

[25] In this case, I find that the Requesting Party's dissection of the evidence amounts to an overly technical approach that is inconsistent with the purpose of section 45 proceedings.

[26] First, regarding the sales figures, given that Mr. Carefoote clearly states that they correspond to the year 2017, I agree with the Owner that the most logical inference is that the figures relate to all the year 2017, which includes June and July 2017. Furthermore, he explicitly confirms that the beer was sold during the summer months, including June and July 2017. Therefore, I find that the evidence covers a period of time that predates and overlaps to some extent with the relevant period.

[27] Second, regarding the photographs of bottled beer, while I agree with the Requesting Party that Mr. Carefoote did not expressly indicate that the photographs were representative examples, in my view, this omission is not fatal to the Owner. Indeed, Mr. Carefoote's statements on paragraph 24 of his affidavit, reproduced above in paragraph 14, specifically refer to the bottles, which he recalls "seeing them in the spring and summer of 2017" [emphasis added]. Furthermore, Mr. Carefoote clearly identifies the bottles in the fridge as bearing the Mark. Therefore, Mr. Carefoote's statements that sales occurred during June and July 2017 along with his statements that the bottled beer displayed the Mark, lead me to infer that notice of association was given to the customers with respect to the bottled beer at the beginning of the relevant period, namely during the summer months of June and July 2017. I come to a different conclusion regarding the beer on tap. Mr. Carefoote did not specify whether the Mark was displayed on the tap or on the serving glasses from February to July 2017 so as to give notice of association to the customers during such period. Therefore, absent further evidence, I am unable

to infer that the evidence demonstrates notice of association for the beer on tap during the relevant period.

[28] Finally, I see no ambiguity or contradiction in the Carefoote affidavit, either as a whole or considering its paragraphs 21, 23 and 24 only. In this respect, I agree with the Owner that the evidence in a section 45 proceeding must be read with the attitude of a mind willing to understand what is being said in the evidence [see *Portage* at para 21]. Mr. Carefoote explained that the sales figures were obtained from the sales records before the system was replaced in June 2018. He specified the period on which the Mark was in use based on his memory and on his knowledge of the Owner's business. Further, absent evidence to the contrary, an affiant's sworn statement is to be accepted at face value, and statements in an affidavit must be accorded substantial credibility in a section 45 proceeding [*Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para 25]. Thus, I find that the Carefoote affidavit sufficiently supports the finding that the bottled beer was sold in association with the Mark at the beginning of the relevant period, namely from May 19 to July 2017.

[29] In view of all of the foregoing, I am satisfied that the Owner has shown use of the Mark within the meaning of sections 4 and 45 of the Act in association with the registered goods.

#### DISPOSITION

[30] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

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Maria Ledezma  
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** 2022-07-27

**APPEARANCES**

James Green For the Registered Owner

Jaimie Bordman For the Requesting Party

**AGENTS OF RECORD**

Gowling WLG (Canada) LLP For the Registered Owner

Moffat & Co. For the Requesting Party