

Federal Court



Cour fédérale

Date: 20240617

Docket: T-1483-22

Citation: 2024 FC 920

Ottawa, Ontario, June 17, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

PATAGONIA, INC.

Applicant

and

LABATT BREWING COMPANY LIMITED

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Patagonia Inc., appeals a decision of the Registrar of Trademarks to maintain the registration for the trademark PATAGONIA (“the Mark”), registration number TMA640, 533, registered for use in association with “Beer”.

[2] The Applicant claims that the Registrar erred in maintaining the registration because the Respondent's evidence was lacking in critical respects. In its view, the Registrar went too far in extending the benefit of the doubt to the Respondent despite the absence of evidence on key matters such as sales by the Respondent during the relevant period. The Applicant argues that the Respondent had the opportunity to address the gaps and deficiencies by filing new evidence on appeal, and its failure to do so should lead to a negative inference being drawn against it.

[3] The Respondent argues that its evidence meets the threshold for demonstrating use under section 45, based on the governing case-law. It says that there was no need to file any new evidence, in particular since it was successful before the Registrar.

[4] For the reasons set out below, the appeal will be dismissed. I am not persuaded that the Registrar made any palpable and overriding errors, considering the evidentiary record as a whole. The reasons for the decision are not perfect, but that is not required of any decision-maker. In this case, there was evidence to support the conclusions made by the Registrar on the key points.

I. Background

[5] On July 16, 2019, at the request of Patagonia, the Registrar issued a notice pursuant to section 45 of the *Trademarks Act*, RSC 1985, c T-13 [the *Act*] requiring the Respondent Labatt

Brewing Company Limited (“Labatt” or “the Owner”) to show use of the Mark during the previous three years. The relevant period was therefore between July 16, 2016, and July 16, 2019.

[6] In response to the notice, Labatt furnished two affidavits of George Tarnawsky, Manager of Retail Key Accounts for the Prairie Region for Labatt Brewing Company Limited, sworn February 14, 2020 (“Tarnawsky No. 1”) and February 17, 2020 (“Tarnawsky No. 2”). The contents of these affidavits will be discussed in more detail below. At this stage it is sufficient to note that the affiant provides an overview of the corporate history of the Respondent, and then describes the retail distribution chain for its beer products. Finally, the affidavits seek to provide evidence of use through receipts, and a label from a bottle of Patagonia beer (the Applicant challenges the adequacy of the copy of the label that was filed, as discussed below).

[7] The Respondent’s corporate history relevant to this proceeding is not in issue here, and it will be useful to describe it here because the sequence of events is relevant to the underlying proceeding. On September 5, 2012, Labatt Breweries of Canada LP (“Labatt LP”) acquired the Mark from the original registrant, Warsteiner Brauerei Haus Cramer KG. On October 30, 2015, Labatt LP was dissolved and all of its assets, including its rights to the Mark, were assigned to Labatt Brewing Company Limited (the Respondent here), which is a subsidiary of Anheuser-Busch InBev S.A. Since that date, the Respondent has been the owner of the Mark.

Approximately nine months after this assignment, the Registrar issued the Notice that launched this proceeding.

[8] The Applicant raised three issues in the hearing before the Registrar: (i) the trademark used is not the Mark as registered; (ii) the use of the mark does not enure to the benefit of the Owner; and (iii) any evidence of the use of the Mark was not during the relevant period.

[9] The first issue was based on the cropped photograph of the label that was put in evidence by Labatt, as reproduced below:



[10] The Registrar found that the PATAGONIA word Mark could easily be identified within the stylized logo, and the additions (for example, the mountains and the green background) did not cause it to lose its identity or become unrecognizable. The Registrar found the argument that

the full label may have shown some other relevant identifying information to be speculation and therefore did not draw any negative conclusion regarding the cropping that was done on the photograph of the label.

[11] The argument that the use of the Mark did not enure to the Owner's benefit related to a point that was also argued on this appeal, namely that there was no evidence that the goods were manufactured by the Owner or someone acting under its control. The Registrar's finding on this point is set out in the following passage:

[21] Although the Requesting Party invokes section 50 of the Act by questioning whether the Owner had control over the character or quality of the goods, there is no licensing issue in this case. While it could have been clearer, Mr. Tarnawsky described the Owner as a beer manufacturer and this statement is consistent with his description of the Owner's normal course of trade. Furthermore, there is nothing in the two affidavits which suggests that the Owner is not the party manufacturing or controlling the manufacture of the product. Instead, in paragraph 16 of the first Tarnawsky affidavit, the PATAGONIA products are described as being the Owner's products. In this respect, 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... and reasonable inferences can be made from the evidence provided... Consequently, for purposes of this proceeding, any use of the Mark was by the Owner itself.

[12] On the question of use during the relevant period, the Registrar had previously summarized the evidence of Mr. Tarnawsky to the effect that the Owner could not sell its product directly to consumers in Alberta. Instead, it was required to sell the goods to the Alberta Liquor and Gaming Corporation ("ALGC"). Once it had delivered its product to ALGC, the

Owner's distributors could then purchase them in ALGC's approved warehouses, for further sale to the end consumer.

[13] The Tarnawsky affidavit stated that "188 cases comprising 6 beer bottles of 750ml of PATAGONIA products were sold to the ALGC" and confirmed that this beer was then sold to end consumers during the relevant period. The Applicant argued this was not sufficient because the evidence showed that the sale to ALGC was done by Labatt LP, the Respondent's predecessor, and that the sale was completed prior to the relevant period. There was no proof that the Respondent (the current Owner of the Mark) had made any sale to ALGC during the relevant period.

[14] The Registrar found that the evidence of the earlier sale was meant to show a step in the distribution chain of the registered goods, within the Owner's normal course of trade. The Registrar determined that the evidence of sales by distributors of PATAGONIA beer to end consumers was sufficient to meet the requirements of section 45. Based on all of these findings, the Registrar maintained the registration of the Mark.

[15] The Applicant appeals to this Court pursuant to section 56 of the *Act*.

II. Issues and Standard of Review

[16] The Applicant raise two key questions:

- 1) Did the Registrar err in inferring that the Respondent is the manufacturer of the Goods or controlled the manufacture of the Goods and that the Distributors' sales to end consumers enure to its benefit? Within this, a related question is whether the Registrar erred by applying the wrong evidentiary threshold and onus.
- 2) Did the Registrar err in finding that the display of the Mark on the cropped label amounts to display of the Mark as registered, without having seen a full label, and particularly given the other factual deficiencies in the evidence?

[17] There was no new evidence filed on the appeal, and therefore the usual appellate standard of review set out in *Housen v Nikolaisen*, 2022 SCC 33, [2002] 2 SCR 235 [*Housen*] applies: *Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at para 23. This means for questions of fact and mixed fact and law (except for extricable questions of law), the applicable standard is that of "palpable and overriding error". For questions of law, the standard is correctness.

[18] The Applicant argued that the issues involve questions of law or questions of mixed fact and law from which there are extricable legal issues, because they turn on the Registrar's mis-

application of the legal test. In the alternative, it argues that there are palpable and overriding errors of mixed fact and law.

[19] I am not persuaded that the issues raised in this case involve any questions of law, extricable or otherwise. The core of the debate here concerns whether the evidence produced by Labatt was sufficient to meet the threshold for demonstrating use under section 45 of the *Act*. The Applicant argues that the evidence falls short in several crucial respects, and that the Registrar's evaluation of the record was deficient. The issues here involve questions of mixed fact and law, and therefore the palpable and overriding error standard applies.

[20] The palpable and overriding error standard of review is a highly deferential one. In an often-cited passage from *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at paragraph 46, Justice Stratas described it as follows:

“Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

III. Analysis

A. *The legal framework*

[21] Section 45 of the *Act* is a summary procedure by which trademarks which have fallen into disuse can be removed from the Register, so that they can be put to use in the market by others. A section 45 notice requires an Owner to produce evidence showing “use” of the Mark within the relevant three year period. Use is defined in subsection 4(1) of the *Act*:

When deemed to be used

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.

Quand une marque de commerce est réputée employée

4 (1) Une marque de commerce est réputée employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces produits, dans la pratique normale du commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu’avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.

[22] There is a wealth of jurisprudence on the nature of the evidence that an Owner must produce to demonstrate use of the trademark. The cases reflect attempts to reconcile and balance three different aspects of the procedure under section 45: it is meant to be summary in nature, and only the registrant can file evidence; it is not meant to resolve contentious issues of ownership or validity, those are best dealt with under other processes in the *Act*; and finally, the onus rests with the registrant to provide evidence demonstrating use of the trademark during the relevant period, and while the threshold may be a low one, the evidence must be sufficient to

demonstrate use. There is also a “public” dimension to a section 45 proceeding, but that is not particularly relevant in the instant case.

[23] The Federal Court of Appeal summarized the relevant legal principles in *Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134, [2021] 1 FCR 323 [*Hilton Worldwide*] :

[9] Section 45 of the Act provides a summary procedure for clearing the Register of Trademarks of registrations for marks that have fallen into disuse: *Sport Maska Inc. v Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3, at paragraph 55. The section 45 process has been described as one for removing “dead wood” from the Register: *Boutiques Progolff Inc. v. Canada (Registrar of Trade Marks)* (1993), 164 N.R. 264, 54 C.P.R. (3d) 451 (F.C.A.). It is not intended to resolve contentious issues between competing commercial interests. Such issues are resolved through expungement proceedings under section 57 of the Act: *Molson Cos. v. Moosehead Breweries Ltd.* (1985), 11 C.P.R. (3d) 208, at page 210, 63 N.R. 140 (F.C.A.), at page 141.

[10] The threshold for establishing “use” in a section 45 proceeding is quite low: *Woods Canada Ltd. v. Lang Michener* (1996), 1996 CanLII 17297 (FC), 71 C.P.R. (3d) 477, [1996] F.C.J. No. 1701 (T.D.) [*Woods Canada Ltd.*]. Evidentiary overkill is, moreover, not required: *Union Electric Supply Co. v. Registrar of Trade Marks*, 1982 CanLII 5195 (FC), [1982] 2 F.C. 263, (1982), 63 C.P.R. (2d) 56 (T.D.). That said, sufficient facts must still be adduced to allow the Registrar of Trademarks (the Registrar) to find use of a trademark in association with each of the registered services during the relevant period.

[24] Two other aspects of the procedure should be mentioned here. First, under subsection 45(2) of the *Act*, the Registrar may only receive evidence tendered by or on behalf of the registered owner and there is no cross-examination on affidavits. As Justice Hugessen noted in *Meredith & Finlayson v Canada (Registrar of Trade Marks)*, (1991) 40 CPR (3d) 409 (FCA) at

412, this provision makes it clear that “it is not intended that there should be any trial of a contested issue of fact, but simply an opportunity for the registered owner to show, if he can, that his mark is in use or if not, why not.”

[25] Second, under subsection 56(5) of the *Act*, “evidence in addition to that adduced before the Registrar may be adduced [on an appeal]...” As discussed below, the fact that Labatt chose not to file new evidence on this appeal was a point of contention between the parties.

[26] Having set the background and outlined the legal framework, we turn to a discussion of the issues raised in this case.

B. *Did the Registrar err in finding that use enured to the benefit of Labatt?*

[27] The Applicant argues that the Registrar erred by failing to require evidence from Labatt that it was the first link in the chain of distribution during the relevant period. This argument focuses on several aspects of the evidence before the Registrar, in light of the corporate history outlined earlier.

[28] In Tarnawsky No. 1, he described Exhibit GT-3 as a “representative sample of an invoice evidencing the sales of PATAGONIA Products from Labatt to the ALGC in the normal course of

trade.” He stated that Exhibit GT-3 is a copy of an invoice dated September 10, 2015, and indicated that the name at the top of the invoice at the time of the sale was Labatt LP (i.e. the previous owner of the Mark). He said the invoice indicated that “188 cases comprising 6 beer bottles of 740 ml of PATAGONIA Products were sold to the ALGC.”

[29] The Applicant acknowledges that a trademark owner can demonstrate use either through evidence of direct sales to consumers or through intermediaries. This was confirmed in *Manhattan Industries Inc v Princeton Manufacturing Ltd*, (1971), 4 CPR (2d) 6 (FCTD) [*Manhattan Industries*] and subsequent cases. However, the Applicant submits that sales by intermediaries during the relevant period can be considered sales of the registrant only if the wares associated with the mark originate with the registrant. As the Applicants put it in their Memorandum of Fact and Law: “In other words, the registrant must have initiated the first link in the chain of distribution.”

[30] The Applicant argues that the Registrar erred by ignoring two key problems with the evidence filed by Labatt. First, it submits that there is no evidence of a sale by the Respondent in its name during the relevant period. Instead, the evidence only shows a sale by its predecessor (Labatt LP) to the ALGC that occurred 10 months prior to the start of the relevant period. The Applicant submits that the Registrar erred by failing to note that there was no evidence that Labatt had made any sales at all during the relevant period.

[31] The Applicant focused much of their attention on their second argument, namely the absence of evidence demonstrating that Labatt either manufactured the PATAGONIA beer that was sold, or that it exercised control (directly or indirectly) over the quality of the product, as required by section 50 of the *Act*. Failing this, according to the Applicant, there was no basis for the Registrar to find that Labatt was, in fact, the first link in the chain of distribution.

[32] The Applicant cites a number of cases which it claims illustrate the proper application of the test to determine whether an owner is the first link in the chain of distribution. According to the Applicant, these cases demonstrate that in order for sales made along the chain of distribution to enure to a registrant's benefit, it must be established with statements of fact that the goods originated with the registrant as the first link in the chain. All but one of the twenty-one decisions cited by the Applicants found that use enured to the benefit of the owner, based on affidavit evidence showing either that the registrant manufactured the products, or exercised a sufficient degree of control over their production. A very recent example cited by the Applicant is *Shaoguan Risen Trading Corporation Ltd v Dong Phuong Group Partnership*, 2023 FC 748, where Justice Michael Manson found that the new evidence filed by the registrant on the appeal demonstrated its control over the manufacturing of the goods in question (see paras 21 and 30).

[33] The one case cited by the Applicants where use was not found to enure to the benefit of the owner is *Gowling WLG (Canada) LLP v Saucony UK Inc*, 2022 TMOB 44 [*Saucony*]. In that case, the Registrar found that the evidence failed to identify the owner or its licensee as

beginning the chain of distribution, and further that the affidavit did not identify the owner or its licensee as manufacturing or arranging for the manufacture of the registered goods or demonstrating by some other means that it was the source of the goods. The Registrar struck the registration because the owner had failed to meet the test of demonstrating use of its trademark.

[34] The Applicant argues that the Registrar in the instant case erred by failing to follow binding authority on this point. The Applicant submits that the following passage demonstrates that instead of applying the proper test, the Registrar lowered the burden on the owner to provide *prima facie* evidence of use, and shifted the onus to the requesting party:

[21] Although the Requesting Party invokes section 50 of the Act by questioning whether the Owner had control over the character or quality of the goods, there is no licensing issue in this case. While it could have been clearer, Mr. Tarnawsky described the Owner as a beer manufacturer and this statement is consistent with his description of the Owner's normal course of trade. Furthermore, there is nothing in the two affidavits which suggests that the Owner is not the party manufacturing or controlling the manufacture of the product. Instead, in paragraph 16 of the first Tarnawsky affidavit, the PATAGONIA products are described as being the Owner's products.

[35] In accepting the evidence, while acknowledging "it could have been clearer" and then going on to point out that nothing in the affidavits suggested that the Respondent is not the party manufacturing or controlling the manufacture of the beer, the Applicant submits that the Registrar fell into palpable and overriding error on a key question in this case. The Applicant argues that the onus rested with Labatt to demonstrate that it was the first link in the chain of distribution, and its evidence fell short of the mark.

[36] In response, Labatt submits that its evidence was more than sufficient to demonstrate use. It points to Exhibit GT-4 to Tarnawsky No. 1, which provided copies of receipts showing the sale of PAGAGONIA beer from distributors in Alberta to end consumers. These sales occurred in July and August 2016, and therefore fell within the relevant period. Labatt argues that this is sufficient to demonstrate use of its Mark, since the receipts clearly show sales of beer in Canada under the PATAGONIA brand during the relevant period. The beer that was sold had been previously sold to the ALGC by Labatt LP, and then purchased by the distributors for onward sale to the end customer. Labatt submits that the Registrar properly treated the invoice from Labatt LP to the ALGC as evidence of the usual chain of distribution.

[37] As for the absence of evidence about who manufactured the beer, Labatt has two primary responses. First, it points to the statement in the Tarnawsky affidavit that Labatt is a beer company, and notes that the invoice and sales receipts all relate to the sale of PATAGONIA beer through the chain of distribution in accordance with provincial laws. Labatt argues that it is a beer company and it owns a Mark in association with beer. It was not a huge leap for the Registrar to conclude that the invoice and receipts related to the sale of beer marked with the PATAGONIA label.

[38] Second, Labatt submits that there is abundant jurisprudence establishing that the Owner need not be the manufacturer of the product. For example, Labatt refers to a recent decision of

the Registrar that directly contradicts the Applicant's argument on this point. In *McCarthy Tetrault LLP v Habitat International SA*, 2022 TMOB 39:

[17] The Requesting Party argues that HDI's use of the Mark cannot enure to the benefit of the Owner in this case because there is no evidence that the Owner is the first link in the chain of distribution. At the hearing, the Requesting Party further argued that, per *United States Tobacco* at para 30, the Owner was required to show that it manufactured the goods, that it applied the Mark to the goods, and that it initiated the first link in the chain of transactions leading to sales in Canada.

[18] I agree that, in *United States Tobacco*, the trademark owner manufactured the goods and itself applied the trademark at issue to the packaging of those goods. However, this is not a requirement – a trademark owner may outsource manufacturing, or have one or more manufacturer suppliers. In other words, contrary to the Requesting Party's suggestion, a registered owner need not be the actual manufacturer of goods for it to be considered the source of such goods for purposes of the Act [*Marks & Clerk v Tritap Food Broker, a division of 676166 Ontario Limited*, 2017 TMOB 35 at para 18].

[39] Labatt submits that the cases relied on by the Applicant relate to challenges to the validity of trademark registrations rather than Registrar's Notices issued under section 45. To meet its onus under section 45, Labatt says that it simply needs to provide evidence of use of the Mark in association with the goods during the relevant period. It argues that the invoices it has presented, together with the PATAGONIA label and the Tarnawsky affidavits that explain the usual chain of distribution and confirm that sales of the beer occurred during the relevant three-year period, is sufficient to meet its burden.

[40] In my view, the determination of whether the Registrar erred in finding that the evidence was sufficient to demonstrate that the use of the Mark enured to the benefit of the Respondent in these proceedings turns on the evidence rather than on fine points of law. There can be no debate that use of a trademark can be demonstrated either through direct sales of the goods or sales by intermediaries along a chain of distribution. That has been clear at least since *Manhattan Industries*, and has been confirmed in many decisions since then. There can also be no debate that if an owner is relying on sales by intermediaries, it must show that it was the first link in the chain of distribution of goods associated with its trademark: *Manhattan Industries* at 16-17; *Osler, Harkin & Harcourt v Canada (Registrar of Trade-Marks)*, 1997 CanLII 5927 (FC) at para 30.

[41] In this case, the Tarnawsky affidavits provided the evidentiary foundation for the Registrar's decision. In Tarnawsky No. 1, he stated that Labatt "is one of the biggest beer manufacturers, producers and sellers in Canada..." He then described the corporate history set out above, including the acquisition of the Mark and the company's evolution from Labatt LP to the corporation that is the Respondent in these proceedings.

[42] In regard to the use of the Mark, Tarnawsky No. 1 included the following statement:

Based on research I have personally conducted or that I personally oversaw within the corporate records of Labatt, its predecessors in title, subsidiaries, or affiliated companies and with Labatt's products distributors and retailers, I have personal knowledge that

Labatt, directly or through its predecessor in title and its distributors, sold and transferred the property of beer products on which the PATAGONIA Trademark was prominently displayed on the products labels in the normal course of trade in Canada, notably during the Relevant Period.

[43] The case-law is clear: it is not sufficient for a registrant to simply declare that they have used the trademark during the relevant period. They must provide evidence that demonstrates such use: *Plough (Canada) Ltd v Aerosol Fillers Inc*, 1980 CanLII 2739 (FCA), [1981] 1 FC 679 at paras 9-10; *Sim & McBurney v. Gordon*, 2020 FC 710 at para 21. The evidence can either demonstrate use directly or provide the basis for reasonable inferences to be drawn: *Cosmetic Warriors Limited v Riches, McKenzie & Herbert LLP*, 2019 FCA 48, [2019] 3 FCR 125 at para 10; and see *Shaoguan Risen Trading* at paras 29 and 32.

[44] Tarnawsky No. 1 describes the distribution chain through which Labatt must sell its products, in accordance with the laws governing sales of alcoholic products in Alberta. He then provides Exhibit GT-3, which he states is a “representative sample of an invoice evidencing the sales of PATAGONIA Products from [Labatt LP] to the ALGC in the normal course of trade.” As noted earlier, he stated that the invoice showed a sale of 188 cases of beer labelled with the PATAGONIA Mark.

[45] The affidavit then states: “[t]he inventory of PATAGONIA Products available at the AGLC following the sales evidenced in Exhibit GT-3 was then ordered and purchased by the Distributors and sold to the end consumers, notably during the Relevant Period.” As discussed

earlier, Exhibit GT-4 contains copies of invoices for such sales from Distributors to end consumers during the relevant period, and these invoices show that the products were labelled PATAGONIA, and that the bottles contained “Amber Lager” which he describes as a type of beer.

[46] Based on this evidence, the Registrar concluded that Labatt had demonstrated use of its Mark during the relevant period. While I can understand why the Applicant may object to the wording of certain passages in the decision, infelicity of expression is not a basis to overturn the decision. Based on a review of the totality of the evidence in the record, I can find no error in the Registrar’s conclusion on this point. The original sale of the PATAGONIA beer from Labatt LP to the ALGC demonstrated the first link in the usual chain of distribution – a chain that is prescribed by a legal regime that strictly controls the sale and distribution of alcohol products in Alberta.

[47] The evidence in Tarnawsky No. 1 confirms that Labatt (and its predecessor) is a beer manufacturer, and that the PATAGONIA beer sold to end consumers during the relevant period was purchased by the distributors from the stock that had been sold to the ALGC by the Respondent’s predecessor in title. I agree with Labatt that it was a reasonable inference from all of the evidence that the beer sold was PATAGONIA beer that originated with Labatt (or its predecessor company).

[48] In my view, the evidence in the record provided a basis for the Registrar to find that the use of the Mark through these sales along the chain of distribution during the relevant period enured to the benefit of Labatt. There was no error in reaching this conclusion. The Applicant's questions about the Respondent's control over the manufacturing of PATAGONIA beer were beyond the scope of a section 45 proceeding: *Hilton Worldwide* at para 9, citing *Molson Cos. v. Moosehead Breweries Ltd.* (1985), 11 C.P.R. (3d) 208, at page 210, 63 N.R. 140 (F.C.A.), at page 141.

[49] For the reasons set out above, I cannot accept the Applicant's arguments on the first issue.

C. *Did the Registrar err in assessing the display of the mark based on the copy in evidence?*

[50] As mentioned earlier, the Applicant's argument on this point rests on the cropped photograph of the label that was put into evidence by Labatt. The Applicant submits that the Registrar erred by finding that the public would perceive the word PATAGONIA as a trademark displayed on the beer bottles without ever having seen the full label. According to the Applicant, the rest of the label (not in evidence) might have included other significant word or design elements such that the public would not perceive PATAGONIA used as a trademark on its own.

[51] The Applicant also argues that the Registrar erred in failing to draw a negative inference against the Respondent for having elected to crop the label. In the words of the Applicant, the alleged manipulation of the label “suggests there may have been some identifying information on the full label determinative of the issue of origin of the product that was willfully, or deliberately, omitted.”

[52] The Registrar rejected this argument as speculative. I can find no error in this conclusion. The copy of the label that is in evidence may be somewhat unusual, in that it appears to be a photograph of a label attached to a beer bottle, and I agree with the Applicant that the copy of the label appears to have been cropped to remove other labelling elements that one would normally expect to see on such a label (such as alcoholic content).

[53] However, the copy of the label in evidence shows the word PATAGONIA prominently displayed, with a green background showing snow-capped mountains and some clouds in the sky. The Registrar found that this was sufficient evidence of use of the word PATAGONIA word Mark, in light of the prominence of the word as displayed on the label. I can find no error in this conclusion. The Registrar’s finding is bolstered by the fact that the customer receipts in the evidence show that the beer was sold under the PATAGONIA brand.

[54] Questions as to whether other aspects of the label met the regulatory requirements, or whether the label showed other elements that may be relevant to a challenge to the validity of the Mark, were beyond the scope of a section 45 proceeding. Given the other evidence in the record, the copy of the label was sufficient to demonstrate that the beer was sold with a label displaying the Respondent's PATAGONIA Mark. The Registrar did not err in so finding.

IV. Conclusion

[55] Based on the analysis set out above, the appeal will be dismissed. While I agree that the Registrar's decision is not perfect, that is not the standard to be applied. I am not persuaded that the Registrar committed any palpable or overriding errors in analyzing the evidence presented by the Respondent.

[56] The Respondent sought costs at the highest level, arguing that this appeal was frivolous given the evidence in the record, the clear decision by the Registrar and the ample binding authority in support of its position.

[57] Although I have found in favour of the Respondent on all issues, I am not persuaded that the appeal was frivolous or that there is any other justification to depart from the usual rule of costs at the middle of the scale (Rule 407). I agree with the Applicant's statement that there is a

trend towards lump sum costs, but even on this approach it is rare for a full indemnity to be awarded: see *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186.

[58] If the parties cannot agree on costs, they may make submissions as to a reasonable costs award, including whether a lump sum should be awarded. The Respondent shall serve and file its submissions on costs, not to exceed three pages (excluding a draft bill of costs) within 10 days of the issuance of the Judgment and Reasons. The Applicant shall serve and file its reply submissions on costs within 5 days following the filing of the Respondent's submissions.

[59] Finally, the Court acknowledges the delay in issuing these reasons and extends its apology to the parties for the time it has taken.

JUDGMENT in T-1483-22

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed.
2. Reasonable costs are awarded to the Respondent. If the parties cannot agree on an amount, they may make submissions on costs, including whether a lump sum should be awarded. The Respondent shall serve and file its costs submissions, not to exceed three pages (excluding a draft bill of costs) within 10 days of the issuance of this judgment. Following this, the Applicant shall have 5 days to serve and file reply submissions on costs.

"William F. Pentney"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1483-22
STYLE OF CAUSE: PATAGONIA, INC. v LABATT BREWING
COMPANY LIMITED
PLACE OF HEARING: OTTAWA, ONTARIO
DATE OF HEARING: JUNE 6, 2023
JUDGMENT AND REASONS: PENTNEY J.
DATED: JUNE 17, 2024

APPEARANCES:

Michelle Easton

FOR THE APPLICANT

Bruno Barrette

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling WLG (Canada) LLP
Ottawa, Ontario

FOR THE APPLICANT

Barrette Legal Inc.
Montreal, Quebec

FOR THE RESPONDENT