Federal Court Cour fédérale

Date: 20250827

Docket: T-624-24

Citation: 2025 FC 1430

Ottawa, Ontario, August 27, 2025

PRESENT: Madam Justice Pallotta

BETWEEN:

G6 HOSPITALITY IP LLC

Applicant

and

SANDALS RESORTS INTERNATIONAL 2000 INC.

Respondent

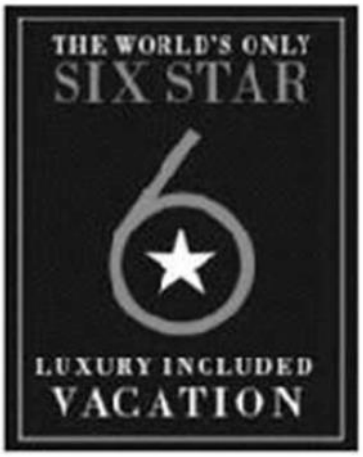
JUDGMENT AND REASONS

I. Introduction

[1] G6 Hospitality IP LLC appeals a decision[1] of the Trademarks Opposition Board (TMOB) rejecting all grounds of its opposition against Sandals Resorts International 2000 Inc's trademark application no. 1,919,702 (702 Application) for THE WORLD'S ONLY SIX STAR LUXURY

[1] *G6 Hospitality IP LLC and Sandals Resorts International 2000 Inc*, 2024 TMOB 12.

INCLUDED VACATION & Design (Mark) shown below. Sandals Resorts filed the 702 Application on September 12, 2018, based on proposed use of the Mark in Canada in association with travel- and hotel-related goods and services.



[2] G6 Hospitality owns trademarks and trade names that consist of or include the number 6. Its trademarks have been used in Canada in association with motel- and hotel-related services, notably the MOTEL 6 chain of accommodations. All of G6 Hospitality's grounds for opposing the 702 Application were based on allegations that the Mark is confusing, as that term is defined in the *Trademarks Act*, RSC 1985, c T-3 [*TMA*], with its own trademarks and trade names.

[3] G6 Hospitality alleges that the TMOB erred in determining that the Mark is not confusing. Specifically, G6 Hospitality alleges that the TMOB erred in assessing the degree of resemblance factor under the test for confusion in *TMA* s 6, and failed to consider whether G6 Hospitality's trademarks constitute a "family" of trademarks incorporating the number 6 that would afford a broader scope of trademark protection. It asks the Court to set aside the TMOB's decision and refuse the 702 Application.

[4] For the reasons below, I am dismissing this appeal.

II. **The TMOB's decision**

[5] The TMOB's confusion analysis focused on G6 Hospitality's registration TMA359639 for the trademark 6. The registered trademark 6 represented G6 Hospitality's strongest case—it is the number 6 alone and the opposed Mark incorporates 6 in its entirety. The TMOB reasoned that if the opposed Mark is not confusing with the registered trademark 6 it will not be confusing with G6 Hospitality's other trademarks.

[6] The evidence on likelihood of confusion was substantially the same across the relevant dates for assessing each ground of opposition, and the TMOB's finding that confusion is unlikely was determinative of all grounds.

[7] To assess whether confusion is likely, the TMOB stated that it considered all the surrounding circumstances, including each of the factors listed in *TMA* s 6(5). The s 6(5) factors are: (a) the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known; (b) the length of time the trademarks or trade names have been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks or trade names in appearance or sound or in the ideas suggested by them.

[8] The TMOB found that the statutory factors in ss 6(5)(a) to (d) favoured G6 Hospitality's position. However, the TMOB found there was a low degree of resemblance between the

trademarks in terms of appearance, sound, and ideas suggested, so the s 6(5)(e) statutory factor favoured Sandals Resorts' position.

[9] The TMOB noted that, despite being the last factor listed in *TMA* s 6(5), the degree of resemblance often has the greatest impact on the confusion analysis; other factors become significant only once the trademarks at issue are found to be identical or very similar: *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 49. It noted that, when considering the degree of resemblance, trademarks must be considered in their entirety as a matter of first impression—not carefully analyzed and dissected into their component parts: *Wool Bureau of Canada Ltd v Registrar of Trade Marks* (1978), 40 CPR (2d) 25 (FCTD). The TMOB added, "That being said, the preferable approach is to consider whether there is an aspect of each trademark that is particularly striking or unique [*Masterpiece* at para 64]."

[10] The TMOB agreed with Sandals Resorts that, "in terms of prominence and location, the words 'SIX STAR' and the numeral six and star design are the most prominent and striking aspect" of the opposed Mark. While this aspect includes 6, the TMOB found that the addition of the word 'STAR' and the star design inside the circle of the 6 substantially changed the appearance and sound and caused the Mark to suggest the idea of six stars. The TMOB found the idea of six stars to be "a substantial departure from the simple idea of the number 6" suggested by G6 Hospitality's trademark. The differences between the trademarks were more pronounced when considering the Mark as a whole relative to the trademark 6, as the other elements of the Mark do not bear any resemblance to 6 in appearance, sound, or ideas suggested. Overall, the

TMOB considered the degree of resemblance between the trademarks to be fairly low, although not absent entirely.

[11] Even though degree of resemblance under s 6(5)(e) was the only statutory factor favouring Sandals Resorts' position, the TMOB found it was the statutory factor with the greatest impact on the confusion analysis. The TMOB concluded that the likelihood of confusion between the Mark and the trademark 6 is "somewhat less than even." Consequently, Sandals Resorts met its onus to show that confusion is not likely, and the TMOB rejected G6 Hospitality's opposition.

III. **Standard of Review and Issues**

[12] The appellate standard of review applies because G6 Hospitality brings this proceeding as a statutory appeal under *TMA* s 56 and neither party filed new evidence pursuant to s 56(5): *The Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at paras 22-23, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 36. This means that the Court reviews questions of law for correctness and questions of fact or mixed fact and law (absent an extricable question of law) for palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 37.

[13] Correctness review is not deferential—if the TMOB erred on a question of law, then the Court can substitute its own assessment on confusion. But if the TMOB erred on a question of fact or mixed fact and law that attracts the highly deferential palpable and overriding error standard of review, then the Court can only intervene if there is an obvious and significant error

that determinately affects the outcome of the case. As noted in *Venngo Inc v Concierge Connection Inc*, 2017 FCA 96 at paragraph 42, citing *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46:

> [42] […] "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.

[14] The issues in this case are:

A. Did the TMOB commit an extricable error of law or a palpable and overriding error of mixed fact and law in assessing degree of resemblance under *TMA* s 6(5)(e) by treating 'SIX STAR' as a dominant aspect of the Mark?

B. Did the TMOB commit an error of law by failing to consider a relevant surrounding circumstance in assessing confusion, namely, whether G6 Hospitality's trademarks constitute a "family" of trademarks with 6 as the common feature?

IV. **Analysis**

A. *Did the TMOB commit an extricable error of law or a palpable and overriding error of mixed fact and law in assessing degree of resemblance under TMA s 6(5)(e) by treating 'SIX STAR' as a dominant aspect of the Mark?*

(1) The parties' arguments

[15] G6 Hospitality concedes that the TMOB stated the correct legal test for assessing trademark confusion but alleges it committed an error of law in applying the test. Although

likelihood of confusion is a fact-finding exercise that is entitled to deference on appeal, an error in interpreting or applying the test constitutes an error of law: *Marlboro Canada Limited v Philip Morris Products SA*, 2012 FCA 201 at paras 60-61.

[16] G6 Hospitality states that identifying and comparing the dominant elements of trademarks is a necessary step in correctly assessing the degree of resemblance under *TMA* s 6(5)(e): *Loblaws Inc v Columbia Insurance Company*, 2021 FCA 29 at para 10, citing *Masterpiece* at para 92 and *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 76. Relying on *Masterpiece* at paragraph 84, G6 Hospitality states that the dominant element of a trademark is what the average consumer would perceive as the dominant *distinctive* element:

> [84]…[W]hile the consumer looks at the mark as a whole, some aspect of the mark may be particularly striking. That will be because that aspect is the most distinctive part of the whole trade-mark.

[17] According to G6 Hospitality, the TMOB committed an extricable error of law by failing to identify the dominant *distinctive* element of the Mark from the perspective of the average consumer in view of the suggestive or laudatory connotation of 'SIX STAR'. If the TMOB had applied the test correctly, it would have found that 'SIX STAR' has a suggestive or laudatory connotation for the goods and services covered by the 702 Application and therefore could not be a dominant element of the Mark: *Puma SE v Caterpillar Inc*, 2023 FCA 4 at para 26, leave to appeal to SCC refused, 2023 CanLII 80889. Where a trademark includes elements that have a suggestive or laudatory connotation, the focus of the resemblance analysis shifts to other, more dominant elements of the trademark: *Caterpillar Inc v Puma SE*, 2021 FC 974 at paras 78, 83, aff'd 2023 FCA 4 [*Puma FC*].

[18] G6 Hospitality submits that the TMOB was required to put itself in the position of the average consumer going into the market to purchase travel and hotel services, and to use common sense and consider the normal attitudes and reactions of such person: *Masterpiece* at paras 91-92; *Fruit of the Loom, Inc v LRC Products Limited*, 2022 FC 217 at para 34. The average consumer is not "completely devoid of intelligence or of normal powers of recollection" or "totally unaware or uninformed as to what goes on around them": *Mattel* at para 57.
G6 Hospitality states it is common knowledge that star ratings are used to classify hotels and resorts according to the quality of services that they provide, and the average consumer of travel and hotel services would readily perceive 'SIX STAR' as having a suggestive or laudatory connotation in association with the goods and services of the 702 Application. In fact, 'THE WORLD'S ONLY SIX STAR LUXURY INCLUDED VACATION' presupposes that the average consumer would know that star ratings are used as an indicator of quality for travel and hotel services.

[19] For similar reasons, G6 Hospitality submits the TMOB committed a palpable and overriding error. The TMOB's finding that 'SIX STAR' was a dominant element, and not 6 alone, was an obvious error that was critical to the outcome of the case. When assessed from the perspective of the average consumer "somewhat in a hurry" who encounters the Mark in the marketplace, it is obvious that the number 6 is the most prominent and striking aspect of the Mark—it is the largest element and prominently situated in the centre, and it is the element that is most likely to affect the overall impression of the average consumer. 'SIX STAR' is not particularly striking by comparison and does not possess superior distinctiveness or dominance

over the number 6. The TMOB's error is critical because degree of resemblance was the deciding s 6(5) factor, as the other factors favoured G6 Hospitality's position.

[20] Sandals Resorts submits that assessing degree of resemblance is a question of mixed fact and law and the TMOB's alleged error is not a question of law. The TMOB stated and applied the correct legal principles for assessing confusion. Following the Supreme Court of Canada's guidance in *Masterpiece,* the TMOB began by determining whether there is an aspect of the Mark that is particularly striking or unique. The TMOB determined that, although the Mark includes the whole of G6 Hospitality's trademark 6, the addition of the word 'STAR' and the star design substantially changes the appearance and the sound of this aspect and also causes the Mark to suggest the idea of "six stars." The TMOB was entitled to put significant weight on its determination that there was little resemblance between the parties' trademarks, and to rely heavily on this factor.

[21] Sandals Resorts submits the Court should decline any invitation to determine whether it might have reached a different conclusion if it were hearing the case for the first time. The Federal Court of Appeal has cautioned that courts should not be overly intrusive and extricate questions of law where the dispositive question is actually driven by the facts, because doing so undercuts the deference that is owed to the trier of fact: *Venngo* at para 42. G6 Hospitality's argument that 'SIX STAR' would be viewed as merely suggestive or laudatory, and thus not distinctive, challenges a discretionary finding of the TMOB that should not be disturbed absent a palpable and overriding error.

[22] Sandals Resorts submits that the TMOB did not make a palpable and overriding error in finding that the most striking element of Mark is ‘SIX STAR’ in combination with the 6 star design. The TMOB reached this determination after properly considering the parties’ submissions and agreeing with Sandals Resorts that, when considered as a whole, the trademarks simply do not share sufficient similarities in terms of overall resemblance to find a likelihood of confusion.

[23] Sandals Resorts argues that whether a trademark contains suggestive or laudatory wording is generally considered under the s 6(5)(a) inherent distinctiveness factor. The TMOB had no legal obligation to consider whether the Mark is suggestive or laudatory when assessing degree of resemblance as long as it considered all relevant factors. Furthermore, while G6 Hospitality asserts that ‘SIX STAR’ is laudatory, Sandals Resorts reiterates that the TMOB’s finding was that ‘SIX STAR’ and the 6 star design are the striking aspect of the Mark, not ‘SIX STAR’ alone.

[24] Sandals Resorts argues that the alleged error was not critical to the TMOB’s overall determination. The decision rests on a broader assessment of the trademarks, including how the Mark was perceived as a whole, and this would not be displaced even if the TMOB erred in finding that ‘SIX STAR’ was a dominant element. It contends this case is similar to *GNR Travel Centre Ltd v CWI, Inc*, 2023 FC 2, where the Court found no error in the TMOB’s determination that two trademarks were sufficiently different despite a degree of resemblance due to the common presence of the term ‘CAMPING WORLD’.

(2) Consideration of the arguments

[25] Assessing the degree of resemblance under *TMA* s 6(5)(e) is a question of mixed fact and law. As such, the TMOB's determination must be reviewed for palpable and overriding error unless G6 Hospitality identifies an extricable error of law. G6 Hospitality concedes that the TMOB did not commit an error in characterizing the relevant legal principles. Therefore, the question is whether the TMOB made an extricable error of law in applying the principles to the facts. In my view, it did not.

[26] The TMOB found that, "in terms of prominence and location the words 'SIX STAR' and the numeral six and star design are the most prominent and striking aspect" of the Mark. G6 Hospitality argues that the TMOB's finding was not about the dominant distinctive aspect of the Mark—it is distinctiveness that matters, not prominence and location. G6 Hospitality states that if the TMOB had considered degree of resemblance from the average consumer's perspective, as it was required to do, it would not have found that the dominant element of the Mark includes 'SIX STAR' because a dominant element must be capable of distinguishing source. 'SIX STAR' has a suggestive or laudatory connotation and a consumer would perceive words and phrases with a laudatory connotation as indicators of quality, not source. Relying on *Puma FC*, G6 Hospitality argues that the TMOB's focus should have shifted to 6 alone, which is more distinctive than 'SIX STAR'.

[27] I am not persuaded by these arguments.

[28] The TMOB recognized that the test for confusion is about source confusion from the average consumer's perspective and said so expressly. It stated that the test for confusion is not about confusion of the trademarks or trade names themselves; rather, it is about confusion as to the source of goods or services. It further stated that the test is "a matter of first impression in the mind of a casual consumer somewhat in a hurry, who sees the applied-for trademark at a time when they have no more than an imperfect recollection of the opponent's trademark." The fact that the TMOB stated the correct test is a strong indication that it applied the correct test, absent some clear sign that the TMOB subsequently varied its approach: *Housen* at para 40. In my view, there is no indication that the TMOB varied its approach.

[29] The TMOB considered the fact that the Mark incorporates the trademark 6 in its entirety but properly recognized that an assessment of confusion required it to consider the Mark as a whole and any aspects of the Mark that serve to distinguish it from G6 Hospitality's trademark. The TMOB found that the presence of the number 6 necessarily gives rise to some resemblance, but the addition of 'STAR' and the star design substantially changes the appearance and sound of the dominant element of the Mark. It found that the differences between the trademarks are more pronounced when the Mark is considered as a whole because nothing about the remaining elements of the Mark bears any resemblance to the numeral 6 in appearance, sound, or ideas suggested.

[30] The TMOB did not misdirect its focus. As noted above, the TMOB directed its attention to the number 6 in the Mark, the element G6 Hospitality argued was the dominant element. The number 6 was a part of the dominant element consisting of 'SIX STAR' and the 6 star design.

G6 Hospitality's argument that the TMOB's focus should have shifted from 'SIX STAR' to 6 alone presumes that 6 alone is the most striking and distinctive element of the Mark and ignores the TMOB's s 6(5)(a) findings, which it does not challenge. In considering inherent distinctiveness under *TMA* s 6(5)(a), the TMOB found the numeric element of the Mark is a 6 star design, not 6 alone, and it found that the 6 star design is more inherently distinctive than 6 alone. The TMOB's finding that 'SIX STAR' and the 6 star design are the most striking aspect of the Mark is a factually suffused finding. G6 Hospitality disagrees with the finding, but it has not shown that the TMOB made an error of law or a palpable and overriding error of fact and law.

[31] Furthermore, the TMOB's finding about the dominant element of the Mark must be understood in the context of the parties' arguments and the record that was before it. G6 Hospitality argued that the dominant element of the Mark is 6, but it did not argue or file evidence showing that consumers would consider 'SIX STAR' to be suggestive or laudatory. Sandals Resorts argued that the dominant element is the combination of 'SIX STAR' and the 6 star design. The TMOB agreed with Sandals Resorts' argument.

[32] G6 Hospitality states that the absence of evidence is not determinative because a TMOB member is required to use their own common sense to decide the average consumer's impression. G6 Hospitality points to a recent opposition decision where the TMOB found the term 'ALL STAR' to be a laudatory term and suggestive of the character and/or quality of the associated goods and services based on a common sense consideration of the trademark from the average consumer's perspective, without evidence: *All Star CV v All Star Coffee Corporation*,

2024 TMOB 113 at para 28. This argument overlooks that G6 Hospitality did not even allege that ‘SIX STAR’ is suggestive or laudatory. The opposition was decided based on the parties’ written arguments, and G6 Hospitality’s written argument on s 6(5)(e) merely asserted that “the trademarks of both parties comprise or are dominated by the numeral 6.” The TMOB was not required to address whether aspects of the Mark are suggestive or laudatory when G6 Hospitality did not make this argument.

[33] G6 Hospitality also argues that the TMOB committed a palpable and overriding error in assessing degree of resemblance under *TMA* s 6(5)(e). I am not persuaded that the TMOB committed a palpable and overriding error by treating ‘SIX STAR’ as a dominant aspect of the Mark. G6 Hospitality argues it is obvious that the number 6 is the most prominent and striking distinctive aspect of the Mark, but this is a disagreement with the TMOB’s finding and does not identify an obvious error. G6 Hospitality does not argue, for example, that the TMOB’s finding was made without regard to the parties’ arguments or the evidence that was before it.

[34] The only alleged error relates to the TMOB’s application of the test for assessing confusion, and for the reasons above, G6 Hospitality has not established that the TMOB erred in this regard. The TMOB’s key findings on degree of resemblance were that the word ‘STAR’ and the star design substantially change the appearance and sound of the Mark as well as the idea suggested by it, and the idea of six stars is “a substantial departure from the simple idea of the number 6” suggested by G6 Hospitality’s trademark 6. The TMOB was following the law by considering whether aspects of the Mark serve to distinguish it from G6 Hospitality’s trademark 6.

[35] In summary, I find no error in the TMOB's assessment of the degree of resemblance factor that can be traced to an error of law, and I am not persuaded that the TMOB committed a palpable and overriding error in identifying the dominant element of the Mark or assessing degree of resemblance under *TMA* s 6(5)(e).

B. *Did the TMOB commit an error of law by failing to consider a relevant surrounding circumstance in assessing confusion, namely, whether G6 Hospitality's trademarks constitute a "family" of trademarks with 6 as the common feature?*

(1) The parties' arguments

[36] G6 Hospitality submits that the TMOB failed to consider whether its trademarks constitute a family of trademarks comprising or incorporating the numeral 6 that would afford a broader scope of trademark protection for the common element: *Arterra Wines Canada, Inc v Diageo North America, Inc*, 2020 FC 508 at para 41.

[37] G6 Hospitality states that it pleaded, argued, and filed evidence that it owns a family of trademarks and that at least seven registered and unregistered trademarks have been used in Canada:

Trademark	Registration No.
6	TMA359639
MOTEL 6	TMA275651
	TMA531493
	TMA542121
	N/A
	N/A
	N/A

[38] By not considering the family of trademarks, G6 Hospitality submits that the TMOB failed to consider all surrounding circumstances as required by *TMA* s 6(5) and thus made an error of law.

[39] Sandals Resorts argues that the TMOB stated that it considered all of the surrounding circumstances, and this would implicitly include a consideration of G6 Hospitality's family of trademarks. Sandals Resorts also argues that G6 Hospitality overstates the importance of its

family of trademarks on the TMOB's decision: (i) broader protection requires sufficient evidence (such as sales figures, advertising campaigns, and/or expanding lines) and G6 Hospitality filed little evidence to establish use of a family of trademarks; (ii) any mark-to-mark comparison beyond a comparison to trademark 6 was unnecessary because trademark 6 was the strongest case; comparing the Mark with the closest trademark was permissible and determinative (*Masterpiece* at paragraph 61; *Canada Bread Company, Limited v Dr. Smood ApS*, 2019 FC 306); (iii) the existence of a family does not automatically strengthen G6 Hospitality's position and any further consideration of G6 Hospitality's family of trademarks would not have materially changed the TMOB's conclusion on confusion, particularly since the TMOB found that the trademark 6 has no meaningful degree of inherent distinctiveness; similar to the circumstances in *London Drugs Limited v International Clothiers Inc*, 2014 FC 223 (at paragraph 66), owning a family of trademarks with the common element 6 would be insufficient to counter the low degree of inherent distinctiveness of the number 6.

(2) Consideration of the arguments

[40] The TMOB did not use the word "family" but in my view it fully addressed G6 Hospitality's limited arguments and evidence on the point. G6 Hospitality argued that it owns a family of trademarks featuring the number 6 and the natural reaction of the average consumer seeing the Mark would be to associate it with G6 Hospitality. The TMOB noted that G6 Hospitality owns several registered trademarks, unregistered trademarks, and trade names that consist of or include the numeral 6. The TMOB found that the trademark 6 has no meaningful degree of inherent distinctiveness but had become known to Canadian consumers "to a fair extent" through use. In making its findings, the TMOB treated G6 Hospitality's evidence

of trademark use as a "family" by focusing on the common element 6 and effectively treating evidence about use of trademarks that included the number 6 as brand recognition of 6 alone.

[41] A family of trademarks does not always impact the confusion analysis (*Arterra* at para 41), particularly where the common element is not distinctive (*London Drugs* at para 66). I agree with Sandals Resorts that G6 Hospitality provided limited evidence of the extent of trademark use and advertising in Canada, that a comparison to the trademark 6 was sufficient in this case, and that any further consideration of the effect of a family of trademarks would not have changed the TMOB's findings.

[42] I would add that, in my view, the trademarks that were used in Canada, which G6 Hospitality characterizes as a family of seven trademarks, consist of design variations of two trademarks—MOTEL 6 and 6. In my view, the "family" of two trademarks does not support an expanded scope of protection: *Arterra* at paras 41-43.

[43] G6 Hospitality has not established that the TMOB erred by failing to consider a relevant surrounding circumstance in assessing confusion.

V. **Conclusion**

[44] G6 Hospitality has not established that the TMOB made an error of law or a palpable and overriding error of fact or mixed fact and law, and accordingly, the appeal is dismissed.

[45] I find that Sandals Resorts is entitled to costs. In my view, an award of costs calculated in accordance with the upper end of Column III of the Tariff is reasonable and appropriate in this case. If the parties cannot agree on the calculation of fees and/or disbursements, they shall be assessed by an assessment officer.

JUDGMENT in T-624-24

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed.
2. The respondent is entitled to costs calculated in accordance with the upper end of Column III of the Tariff.
3. In the event the parties are unable to reach an agreement on the calculation of fees and/or disbursements, they shall be assessed by an assessment officer.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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