



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 198

Date of Decision: 2021-09-08

IN THE MATTER OF A SECTION 45 PROCEEDING

Miller Thomson LLP

Requesting Party

and

Janelle Nahmabin

Registered Owner

TMA527,265 for CALM 'N SCENTS

Registration

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding with respect to registration No. TMA527,265 for the trademark CALM 'N SCENTS (the Mark).

[2] The Mark is registered for use in association with the goods and services listed in Schedule A.

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

THE PROCEEDING

[4] At the request of Miller Thomson LLP (the Requesting Party), the Registrar of Trademarks issued a notice on March 19, 2018, pursuant to section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) to Maureen Lees, the owner of the Mark on record at the time.

[5] On June 12, 2018, an assignment was recorded on the register to reflect the assignment of the Mark from Maureen Lees to the current owner, Janelle Nahmabin (the Owner), effective September 30, 2016.

[6] The notice required the Owner to show whether the Mark was used in Canada in association with each of the goods and services 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.

[7] In this case, the relevant period for showing use is between March 19, 2015 and March 19, 2018. In the absence of use during this period, pursuant to section 45(3) of the Act, the Mark is liable to be expunged, unless the absence of use is excused by special circumstances.

[8] In response to the Registrar's notice, the Owner furnished her own affidavit, sworn on October 17, 2018.

[9] Both parties filed written representations. Only the Requesting Party was represented at an oral hearing.

SUMMARY OF THE OWNER'S EVIDENCE

[10] Ms. Nahmabin states that she is the sole proprietor of Calm 'n Scents Aromatherapy & Metaphysical Store, a retail store located in Sarnia, Ontario. The store was originally founded by Maureen Lees in 1996.

[11] Ms. Nahmabin explains that through this store, she manufactures and sells her own “all-natural bath and body products and aromatherapy merchandise and offer[s] a full range of services intended to invigorate the body, mind, and spirit.” She further explains that she also sells a “wide variety of third party aromatherapy and metaphysical products” at her store.

[12] Ms. Nahmabin attests that she, and previously her predecessor in title, used the Mark in Canada in association with the registered goods and services, including during the relevant period. As Exhibit A to her affidavit, Ms. Nahmabin attaches representative photographs of products she attests were sold in her store; in her affidavit, she identifies each of the products depicted in the exhibit. The Mark is either displayed on the products themselves, their packaging, or signage adjacent to the products.

[13] As Exhibit B to her affidavit, Ms. Nahmabin attaches representative sales receipts issued during the relevant period. The receipts display the name of the store, namely Calm 'n Scents, the store address and the website *www.calmnscents.com*, as well as the name of the items and services sold. In her affidavit, Ms. Nahmabin identifies the products and services associated with each of these receipts.

[14] Ms. Nahmabin also states that she markets and advertises the registered goods and services. In support, she attaches the following promotional materials which she states are representative of the type which were distributed during the relevant period:

- an advertisement for various “bath additives” [Exhibit C];
- two advertisements for desk top diffusers [Exhibit D];
- a promotional brochure providing information regarding a “NeuroSpa” massage [Exhibit E];
- a newsletter from May 2015 advertising the NeuroSpa massage [Exhibit F]; and

- a coupon for a free “Mini NeuroSpa Session” directing customers to either call ahead to schedule a visit or to “take a chance on walking in” [Exhibit G].

[15] The Mark followed by the symbol “®” is displayed on the exhibited promotional materials, along with information such as the Owner’s address, phone number, hours of operation and website address. I note that the Exhibit C advertisement also includes the photograph of a storefront, with a large sign displaying the Mark.

[16] Finally, Ms. Nahmabin states that she operates a website for her store located at *www.calmnscents.com* and attaches as Exhibits H and I screenshots and archived screenshots, respectively, of this website which she states advertise the registered goods and services, and are representative of how the Mark was displayed in such advertising during the relevant period. The Mark followed by the symbol “®” is displayed on the banner at the top of every webpage.

ANALYSIS AND REASONS FOR DECISION

[17] The Requesting Party submits that the “evidence appears to have been assembled and filed in a desperate attempt to maintain the subject registration” and points to purported flaws in the evidence such as undated exhibit pages. The Requesting Party also submits that the evidence suffers “from a number of fundamental formal deficiencies that make them inadmissible”. In other words, the Requesting Party essentially argues that Ms. Nahmabin only provides a bare statement of use without any evidence of sales of goods, performance of services or display of the Mark in the performance of services.

[18] I find that, on the contrary, the Owner has provided much more than a bare statement of use. In particular, Ms. Nahmabin provides evidence of sales and performance in the form of sales receipts, together with photographs showing how the Mark is displayed on goods and on signage in her retail store. She meticulously identifies the goods and services appearing in each of the exhibited receipts and photographs. Moreover, each exhibit cover page is signed and dated, and the exhibits themselves are either dated (such as the receipts) or Ms. Nahmabin states that they

are representative of the relevant period (such as the photographs, promotional materials and website evidence).

Use in association with goods

[19] The relevant definition of “use” in association with goods is set out in section 4 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.

Goods referenced in sales receipts

[20] In her affidavit, Ms. Nahmabin specifically correlates particular items listed in the sales receipts with registered goods. As such, I accept that the receipts evidence sales of the following registered goods during the relevant period:

- “Scent stones, scent pebbles, bubble bath and bath champagne, bubble bath softener and bubble bath softener kits namely, bathing additives and kits for making bathing additives;”
- “body perfumes and deodorants;”
- “bath salts, mineral salts, dead sea salt;”
- “bath mitts;”
- “firestarters namely fire igniters;”
- “essential oil diffuser blends and synergistic blends of essential oils for diffusers;”
- “potpourri;”
- “lip balms;”
- “soaps, goatsmilk soaps, shaving soap;”

- “body spritzers namely perfumes and perfume oils, bath oils, massage oils, teething oils namely body oils for teething babies, body and skin oils, essential oils for personal use and use in the manufacture of scented products;”
- “body powders;”
- “body and skin lotions;”
- “body and skin creams and ointments;”
- “shampoos;”
- “air fresheners, pillows;”
- “electric diffusers, ceramic diffusers, desk top diffusers for evaporating essential oils and perfumes;”
- “diffuser filters, astringents for cosmetic purposes;”
- “perfume atomizers;”
- “oil lamps;”
- “car scent refill pads;”
- “insect repellent;”
- “candles and candle holders;”
- “relaxation CD’s namely compact disks storing pre-recorded relaxation music;”
- “herbal teas for food purposes;”
- “aromatherapy books and guides;”
- “gift certificates, gift baskets and care packages namely baskets of wicker, straw, wood, cloth, plastic and common metals;” and
- “bulk natural beauty product ingredients, namely witch hazel, ... magnesium sulphate, citric acid, ... milled oatmeal, beeswax, aloe vera gel, ... grapefruit seed extract, shea butter, adzuki beans- ground, ... paraffin wax, ... green clay, pink clay, kaolin clay, apricot kernel oil, avocado oil, holly oil, vegetable glycerin, sulphated castor oil, ... grapeseed oil, jojoba oil, ... rosehip seed oil, flaxseed oil, ... wheatgerm oil, palm oil, coconut oil, ... cocoa butter, hazelnut oil, ... lavender floral water, orange blossom floral water, chamomile floral water, rose floral water,

sandalwood floral water, rose petals, hibiscus flowers, lavender buds, jasmine flowers, chamomile flowers, ...”.

[21] Having regard to representative photographs showing how the Mark is used on the Owner’s products, 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 all of the goods referenced above.

[22] Ms. Nahmabin also identifies a product described on a receipt as *Lemongrass floral water* as evidence of the sale of the registered goods “floral waters”. However, in the statement of goods, this term is followed by “namely” and two specific goods: “perfumery and steamed distilled water”. It is well established that use evidenced with respect to one specific good cannot serve to maintain multiple goods in a registration. Having distinguished “perfumery” and “steamed distilled water” in the registration, the Owner was obligated to furnish evidence with respect to both [per *John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)]. In the absence of submissions in this regard, I find that *Lemongrass floral water*, most readily corresponds to the registered goods “floral waters namely perfumery”.

[23] Similarly, for the goods registered as “clay”, Ms. Nahmabin identifies a product described on a receipt as *Three Clay Exfoliating Fac* as evidence of the sale of the registered goods “mud and clay”. In my view, this invoice most reasonably evidences the sale of the registered goods “clay”.

[24] I therefore find that the Owner has also shown use of the Mark within the meaning of sections 4 and 45 of the Act in association with “floral waters namely perfumery” and “clay”.

[25] As there is no further evidence regarding the registered goods “steamed distilled water”, I am not satisfied that the Owner has demonstrated use of the Mark within the meaning of sections 4 and 45 of the Act in association with such goods and, as there is no evidence of special circumstances before me, these goods will be deleted.

[26] Finally, with respect to the registered goods “mud”, I note that one of the Exhibit A photographs depicts a product identified as *Dead Sea Mud*. Evidence of use of the Mark in

association with “mud” and other photographed goods will therefore be discussed in the following section.

Photographed goods

[27] In addition to many of the invoiced goods, the exhibited photographs depict the following additional registered goods, as correlated by Ms. Nahmabin:

- “mud;”
- “flax seed;” and
- “bulk natural beauty product ingredients, namely ... sodium bicarbonate, ... corn talc, ... sweet almond oil, ... kukui nut oil, olive oil, ... macadamia nut oil, ... vegetable shortening, ... calendula flowers”.

[28] Having regard to the representative nature of the invoices, and the absence of evidence to the contrary, I am prepared to accept at face value Ms. Nahmabin’s statement that the goods depicted in the Exhibit A photographs were sold during the relevant period [following *Oyen Wiggs Green & Mutala LLP v Atari Interactive Inc*, 2018 TMOB 79 at para 25].

[29] I am therefore 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 photographed goods, including those referenced above.

Remaining goods

[30] This leaves the remaining goods, namely “mouth rinse”, as well as certain “bulk natural beauty product ingredients”, namely “lecithin, anhydrous lanolin, ... black turtle beans-ground, cornmeal, ... borax sea salt ... sunflower oil, safflower oil ... pecan oil”.

[31] These goods are not specifically referenced by Ms. Nahmabin other than being included in her identification of the registered goods, and are nowhere identified in the supporting

evidence. As such, I am not satisfied that the Owner has shown use of the Mark in association with the goods referenced in this section within the meaning of sections 4 and 45 of the Act.

Use in association with services

[32] The definition of “use” in association with services is set out in section 4 of the Act as follows:

4(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[33] In the present case, the Mark is not only displayed on product signage located in the store, on the Owner’s website as well as on the representative promotional materials, the Mark is also displayed at the top of each sales receipt. In her affidavit, Ms. Nahmabin correlates the services referenced in the exhibited sales receipts with the registered services. I note that there is at least one receipt dated from the relevant period for each of the registered services and I accept the Mark at the top of the receipts as display of the Mark in the performance of the services.

[34] As such, 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 all of the registered services.

DISPOSITION

[35] In view of the foregoing, 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 amended to delete the following goods: “mouth rinse”, “and steamed distilled water”, “lecithin, anhydrous lanolin”, “black turtle beans-ground, cornmeal”, “borax sea salt”, “sunflower oil, safflower oil” and “pecan oil”. The registration will be maintained in association with the entirety of the registered services.

[36] The amended statement of goods will read as follows:

Scent stones, scent pebbles, bubble bath and bath champagne, bubble bath softener and bubble bath softener kits namely, bathing additives and kits for making bathing additives; body perfumes and deodorants; bath salts, mineral salts, dead sea salt; mud and clay; bath mitts; firestarters namely fire igniters; essential oil diffuser blends and synergistic blends of essential oils for diffusers; potpourri; lip balms; soaps, goatsmilk soaps, shaving soap; floral waters namely perfumery, body spritzers namely perfumes and perfume oils, bath oils, massage oils, teething oils namely body oils for teething babies, body and skin oils, essential oils for personal use and use in the manufacture of scented products; body powders; body and skin lotions; body and skin creams and ointments; shampoos; air fresheners, pillows; electric diffusers, ceramic diffusers, desk top diffusers for evaporating essential oils and perfumes; diffuser filters, astringents for cosmetic purposes; perfume atomizers; oil lamps; car scent refill pads; insect repellent; candles and candle holders; relaxation CD's namely compact disks storing pre-recorded relaxation music; flax seed; herbal teas for food purposes; aromatherapy books and guides; gift certificates, gift baskets and care packages namely baskets of wicker, straw, wood, cloth, plastic and common metals; bulk natural beauty product ingredients, namely witch hazel, sodium bicarbonate, magnesium sulphate, citric acid, corn talc, milled oatmeal, beeswax, aloe vera gel, grapefruit seed extract, shea butter, adzuki beans- ground, paraffin wax, green clay, pink clay, kaolin clay, apricot kernel oil, avocado oil, holly oil, vegetable glycerin, sulphated castor oil, sweet almond oil, grapeseed oil, jojoba oil, kukui nut oil, olive oil, rosehip seed oil, flaxseed oil, macadamia nut oil, wheatgerm oil, palm oil, coconut oil, cocoa butter, hazelnut oil, vegetable shortening, lavender floral water, orange blossom floral water, chamomile floral water, rose floral water, sandalwood floral water, rose petals, hibiscus flowers, lavender buds, jasmine flowers, chamomile flowers, calendula flowers.

[37] The statement of services will read as follows:

Aromatherapy massage; aromatherapy facials; herbal hand and foot spa treatments; herbal body wraps; hot compress treatments; nail care; foot care treatments; reiki treatments; aromatherapy workshops and seminars; reiki workshops and seminars.

Eve Heafey
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Goods

(1) Scent stones, scent pebbles, bubble bath and bath champagne, bubble bath softener and bubble bath softener kits namely, bathing additives and kits for making bathing additives; body perfumes and deodorants; bath salts, mineral salts, dead sea salt; mud and clay; bath mitts; firestarters namely fire igniters; essential oil diffuser blends and synergistic blends of essential oils for diffusers; potpourri; lip balms; soaps, goatsmilk soaps, shaving soap; mouth rinse; floral waters namely perfumery and steamed distilled water, body spritzers namely perfumes and perfume oils, bath oils, massage oils, teething oils namely body oils for teething babies, body and skin oils, essential oils for personal use and use in the manufacture of scented products; body powders; body and skin lotions; body and skin creams and ointments; shampoos; air fresheners, pillows; electric diffusers, ceramic diffusers, desk top diffusers for evaporating essential oils and perfumes; diffuser filters, astringents for cosmetic purposes; perfume atomizers; oil lamps; car scent refill pads; insect repellent; candles and candle holders; relaxation CD's namely compact disks storing pre-recorded relaxation music; flax seed; herbal teas for food purposes; aromatherapy books and guides; gift certificates, gift baskets and care packages namely baskets of wicker, straw, wood, cloth, plastic and common metals; bulk natural beauty product ingredients, namely witch hazel, sodium bicarbonate, magnesium sulphate, citric acid, corn talc, milled oatmeal, beeswax, aloe vera gel, lecithin, anhydrous lanolin, grapefruit seed extract, shea butter, adzuki beans- ground, black turtle beans-ground, cornmeal, paraffin wax, borax sea salt, green clay, pink clay, kaolin clay, apricot kernel oil, avocado oil, holly oil, vegetable glycerin, sulphated castor oil, sweet almond oil, grapeseed oil, jojoba oil, kukui nut oil, olive oil, rosehip seed oil, flaxseed oil, sunflower oil, safflower oil, macadamia nut oil, wheatgerm oil, palm oil, coconut oil, pecan oil, cocoa butter, hazelnut oil, vegetable shortening, lavender floral water, orange blossom floral water, chamomile floral water, rose floral water, sandalwood floral water, rose petals, hibiscus flowers, lavender buds, jasmine flowers, chamomile flowers, calendula flowers.

Services

(1) Aromatherapy massage; aromatherapy facials; herbal hand and foot spa treatments; herbal body wraps; hot compress treatments; nail care; foot care treatments; reiki treatments; aromatherapy workshops and seminars; reiki workshops and seminars.

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

HEARING DATE July 29, 2021

APPEARANCES

No one appearing

For the Registered Owner

David J. Schnurr

For the Requesting Party

AGENTS OF RECORD

Smart & Biggar LLP

For the Registered Owner

Miller Thomson LLP

For the Requesting Party