



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 28

Date of Decision: 2021-09-21

IN THE MATTER OF A SECTION 45 PROCEEDING

88766 CANADA INC.

Requesting Party

and

THE THYMES, LLC

Registered Owner

TMA607,416 for GOLDLEAF

Registration

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA607,416 for the trademark GOLDLEAF (the Mark), currently owned by The Thymes, LLC.

[2] All references are to the Act as amended June 17, 2019 (the Act), unless otherwise noted.

[3] The Mark is registered for use in association with the following: aerosol room deodorizing/scenting sprays; candles; skin soap; hair and body shampoo; non-medicated bath preparations, namely, liquid soap, bath tablets, bath conditioner, gels, salts and scrubs; body creme; body powder; body oil; body lotion; sachets; perfume; and eau de toilette (the Goods).

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

THE PROCEEDINGS

[5] At the request of 88766 CANADA INC. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on June 7, 2019, to The Thymes, LLC, the registered owner of the Mark (the Owner).

[6] The notice required the Owner to show whether the trademark had been used in Canada in association with each of the Goods at any time within the three-year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is June 7, 2016 to June 6, 2019 (the Relevant Period).

[7] 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.

[8] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register. As such, the evidentiary threshold that the registered owner must meet is quite low [Performance

Apparel Corp v Uvex Toko Canada Ltd, 2004 FC 448 at para 68] and “evidentiary overkill” is not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD) at para 3]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the mark was used in association with each of the goods.

[9] In the absence of use as defined above, pursuant to section 45(3) of the Act, a trademark is liable to be expunged, unless the absence of use is due to special circumstances.

[10] In response to the Registrar’s notice, the Owner furnished the affidavit of Anne Ward, sworn on December 30, 2019, to which was attached Exhibits “A” to “D”.

[11] Only the Owner submitted written representations. No oral hearing was held.

THE EVIDENCE

[12] The Owner’s affiant, Anne Ward, is the Chief Executive Officer of the Owner and has held that position for more than seven years. Ms. Ward states that she provides overall leadership for the Owner and either has personal knowledge of the matters set out in her affidavit or else has obtained such knowledge from documents and records maintained by the Owner in its normal course of business and to which she has access. [*Ward Affidavit, para. 1*]

[13] Ms. Ward states that during the Relevant Period the Mark was used extensively and continuously in Canada in association with all of the Goods with the exception of “body oil” and “sachets”. [*Ward Affidavit, para. 3*] As there has been no allegation of special circumstances excusing non use of the Mark, the registration will be amended accordingly.

[14] The normal course of trade for the Goods is described by Ms. Ward. The Goods are manufactured and packaged by the Owner in the United States. The Goods are then imported by distributors in Canada who in turn sell to end consumers through large retailers and independent specialty stores. [*Ward Affidavit, para. 5*]

[15] Ms. Ward states that the Owner sold more than \$500,000 (CAD) of the Goods in Canada during the Relevant Period. [*Ward Affidavit, para. 6*]

[16] She also states that the Goods sold were clearly marked with the GOLDLEAF Mark. [*Ward Affidavit, para. 7*]

[17] To support these allegations, Ms. Ward attached to her affidavit the following exhibits:

- (a) Exhibit “B”: representative invoices documenting the sales of the Goods in Canada during the Relevant Period;
- (b) Exhibit “C”: printouts of screenshots of the Owner’s website displaying the Goods available to Canadians in Canada; and
- (c) Exhibit “D”: copy of the Owner’s Spring 2017 catalogue depicting the Goods. [*Ward Affidavit, paras. 8, 9 and 10*]

[18] Finally, Ms. Ward states that the depictions of the Goods contained in Exhibits “C” and “D” are representative of the Goods sold in Canada during the Relevant Period. [*Ward Affidavit, para. 11*]

ANALYSIS AND REASONS FOR DECISION

Interpretation of the registration

[19] The goods as described in the Ward affidavit and exhibits do not completely match the Goods as described in the registration. However, it is a well-established principle that when interpreting a statement of goods or services in a section 45 proceeding, one is not to be “astutely meticulous when dealing with [the] language used” [see *Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654 at para 17].

[20] Indeed, it has been held that a statement of goods should be granted a reasonable interpretation [*ConAgra Foods, Inc v Fetherstonhaugh & Co* . 2002 FCT 1257] and reasonable inferences may be drawn from the evidence provided [*Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64].

[21] Applying a reasonable interpretation to both the registration and the evidence, I am prepared to draw the following inferences:

- the “bar soap” referenced in the invoices dated October 3, 2017 and April 25, 2019 qualifies as the sale of “skin soap” as set out in the registration;
- the “handwash” referenced in the invoice dated July 11, 2019 qualifies as the sale of “liquid soap” as set out in the registration;
- the “bubble bath” referenced in the invoices dated November 1, 2018, April 25, 2019 and July 11, 2019 qualifies as the sale of “bath conditioner” as set out in the registration;
- the “hand lotion” referenced in the invoices dated November 1, 2018 and July 11, 2019 qualifies as the sale of “body lotion” as set out in the registration;
- the sale of “body wash” qualifies as the sale of “hair and body shampoo” as set out in the registration;
- as a “foaming bath envelope” is depicted in the *Ward affidavit, Exhibit “C”*, I infer that there has been use of the Mark in Canada in association with “bath salts” as set out in the registration; and
- as a “candle” is depicted in the *Ward affidavit, Exhibit “C”*, I infer that there has been use of the Mark in Canada in association with “candles” as set out in the registration.

[22] However, the Ward affidavit and exhibits do not provide any evidence from which I may conclude that the Mark was used in association with the following: bath tablets, gels and scrubs, body powder.

[23] The Requesting Party has submitted no representations. Based on the evidence filed by the Owner, as described above, I have concluded that use in Canada has been shown, and the registration should be maintained, in respect of aerosol room deodorizing/scenting sprays; candles; skin soap; hair and body shampoo; non-medicated bath preparations, namely, liquid soap, salts and bath conditioner; body creme; body lotion; perfume; and eau de toilette. It will be amended to delete body oil, sachets, bath tablets, gels and scrubs, and body powder.

DISPOSITION

[24] Pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be amended to delete the following goods:

- body oil, sachets, bath tablets, gels and scrubs and body powder

[25] The amended statement of goods shall now read:

- aerosol room deodorizing/scenting sprays; candles; skin soap; hair and body shampoo; non-medicated bath preparations, namely, liquid soap, bath conditioner, body creme; body lotion; perfume; and eau de toilette

Jean Carrière
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

Borden Ladner Gervais LLP

For the Registered Owner

No Agent Appointed

For the Requesting Party