



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2024 TMOB 70

**Date of Decision:** 2024-03-28

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

**Requesting Party:** Cozen O'Connor LLP

**Registered Owner:** Sabre Retail Fashion Limited

**Registration:** TMA1042755 for HYGGE

### **INTRODUCTION**

[1] At the request of Cozen O'Connor LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act), on July 18, 2022, to Sabre Retail Fashion Limited (the Owner), the registered owner of registration No. TMA1042755 for the trademark HYGGE (the Mark).

[2] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with each of the goods and services specified in the registration, at any time between July 18, 2019 and July 18, 2022. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last used and the reason for the absence of such use since that date. The

goods and services specified in the registration when the notice was issued are reproduced at Schedule A to this decision.

[3] The relevant definitions of “use” are set out in sections 4(1) and 4(2) 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.

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.

[4] In the case of services, display of a trademark in advertising suffices to meet the requirements of section 4(2) of the Act as long as the owner is able and prepared to perform the services in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)].

[5] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in section 45 proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)], the owner must still establish a *prima facie* case [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 2]. In this respect, sufficient facts must be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with each of the goods and services specified in the registration during the relevant period [*John Labatt Ltd v Rainer Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[6] In response to the Registrar’s notice, the Owner furnished an affidavit sworn on February 17, 2023, by its Secretary, Judith Bean, asserting use in association with only some of the goods and services that were covered by the registration at the time.

[7] Subsequently, on June 16, 2023, the Owner voluntarily deleted a number of goods and services from the registration—essentially those for which Ms. Bean did not assert use of the Mark—and grouped those remaining according to the Nice Classification system. The goods and services that remain in the registration, listed by Nice Class (CI), are as follows (respectively the Goods and the Services):

Goods

- CI4 (1) Candles.
- CI18 (2) Casual bags.
- CI25 (3) Clothing, namely, casual clothing, dress clothing.
- CI25 (4) Footwear, namely, boots, sandals.

Services

- CI35 (1) The online sale of: candles, leather and imitations of leather, bags, casual bags, shirts and dresses, clothing, footwear and headgear; enabling customers to conveniently view and purchase the above-noted goods from a general merchandise Internet Website.

[8] Both parties filed written representations and were represented at an oral hearing.

**THE OWNER'S EVIDENCE**

[9] In her affidavit, Ms. Bean asserts that the Owner, a company incorporated in the United Kingdom in 2012 that also trades under the name “Mint Velvet”, used the Mark in Canada continuously during the relevant period, in the normal course of trade, in association with the following Goods and Services:

Candles; casual bags; clothing, namely, casual clothing (e.g. socks); clothing, namely dress clothing (e.g. dresses); footwear, namely, boots; footwear, namely, sandals.

The online sale of: candles, leather and imitations of leather, bags, shirts and dresses, clothing, footwear and headgear; enabling customers to conveniently view and purchase the above-noted goods from a general merchandise Internet Website.

[10] I note that Ms. Bean’s listing differs from the wording of the Goods and Services now in the registration in that she gives “socks” as an example of the goods “casual clothing” and “dresses” as an example of the goods “dress clothing”, and she omits “casual bags” from the subject matter of the Services.

[11] The Requesting Party argues that the Owner “conveniently defined” the foregoing groups of goods and services in an effort to “obfuscate the issues” and thus maintain goods and services for which the Owner has no direct evidence of use [written representations at paras 51, 74, and 87]. I disagree and find that Ms. Bean simply identified the subset of registered goods and services for which use is alleged before the remaining goods and services were deleted from the registration.

[12] In support of her assertions of use, Ms. Bean attaches the following exhibits to her affidavit:

- Exhibits B2 and B3 are, respectively, (i) a screenshot of the Owner’s Mint Velvet website at *mintvelvet.co.uk* (the Owner’s Website), indicating that “Mint Velvet” is a trade name of the Owner, and (ii) a printout of the Owner’s Canadian trademark registration for MINT VELVET, covering goods and services similar to those for which the Mark was originally registered. I note that MINT VELVET is displayed as a corporate logo and house mark in a simple yet distinct lettering style (the MINT VELVET Logo) on the Owner’s Website, social media, and product labelling, as described below. The significance of this aspect of the Owner’s branding will be discussed further below, in my analysis of the Mark’s association with the Services.
- Exhibit C is a series of photographs that Ms. Bean states are representative of use of the Mark in association with the Goods during the relevant period. The exhibit includes both close-ups and wider angle shots of the same articles. The Requesting Party submits that the products depicted in the close-ups are generally unidentifiable; however, I find it clear that the close-ups depict the same articles as the wider angle shots next to them. The Mark is displayed as a logo—next to a smaller MINT VELVET Logo—on the labels and hangtags attached to various products, including a small pouch having what appears to be a zipper pull, a knit pocket-like bag with a flap closure, a hot water bottle cover with pom-pom ties, thick plush-lined socks, knit plush-lined boots, faux fur slippers in a sandal-like style featuring two large straps with metal buckles, thick socks with dangling pom-poms, and a dark robe on a hanger. The Mark is printed

as a logo directly on candles, and it is also embroidered in thick, simple lettering followed by an ellipses on the hot water bottle cover.

- Exhibits D1 and D2 are screenshots from the Owner’s Website, representative of how it appeared in Canada during the relevant period. A welcome page offers online shopping with pricing in Canadian dollars and duties already included, as well as shipping to Canada that is free for orders over CA\$ 250. A product page, at [mintvelvet.co.uk/products/](http://mintvelvet.co.uk/products/), shows a pair of “Cream Faux Fur Strap Slippers” with a price in Canadian dollars and an option to “ADD TO BAG”. I note that the menu at the top of this page features a large MINT VELVET Logo—followed by the categories “New In”, “Clothing”, “Shoes”, “Accessories”, “Kids” and “InspireMe”. The Mark is displayed only on the slippers’ insole label.
- Exhibit E1 contains screenshots of the HYGGE webpage from the Owner’s Website, at [mintvelvet.co.uk/pages/hygge](http://mintvelvet.co.uk/pages/hygge). The copyright notice indicates a date of 2023, but Ms. Bean confirms the page is representative of how the HYGGE section of the site appeared during the relevant period. I note the same horizontal menu at the top of the page, but with a considerably smaller MINT VELVET Logo, under a banner offering shipping to Canada. The body of the webpage features images of a model in a home setting showcasing nightwear, loungewear, and accessories in the HYGGE line, with links to “SHOP NIGHTWEAR” and “SHOP THE LOOK”. The images depict pyjama sets, slippers, a restorative candle, a hot water bottle cover, an eye mask, and (in the final apparel image) a dark robe. The accompanying text describes the product line as “The art of cosiness”, “downtime pieces”, and “the joy of stepping out of the workwear or jeans”, but also promotes a “new dressier side to Hygge”, featuring feather-trimmed top and trouser sets that “double as the ultimate eveningwear for hosting at home or heading out”. The Mark is superimposed on a cover image at the top of the page and also appears in some of the text.
- Exhibits E2 to E5 each contain screenshots of the same HYGGE webpage, but with a different item from the horizontal menu underlined at each exhibit: Kids

(Exhibit E2), Shoes (Exhibit E3), Accessories (Exhibit E4), and Clothing (Exhibit E5). In each screenshot, the top of the HYGGE webpage content is obscured by what appears to be a set of one or more submenus and representative images for the underlined menu item, and I find it reasonable to infer that each such set was displayed by activating the menu item. (The Owner's written representations suggest a mouse was hovered over each menu item, but that methodology is not in evidence.) Notably, the "Shop by Category" submenus include product categories such as "Boots", "Bags", "Belts", "Candles & Diffusers", "Dresses & Jumpsuits", "Shoes", "Shirts & Blouses", and "Tops", among others. I also note three product lines listed under the "Clothing" menu's "Collections" submenu: "Activewear", "Leather", and "Loungewear". The one or two representative images for each menu depict a girl's dress, a baby outfit, a boot, shoes, a purse, earrings, and a woman's dress. The significance of the menu system will be further discussed below, in my analysis of the Services.

- Exhibits F and G contain screenshots from the Owner's Facebook and Instagram pages, representative of advertising the Owner posted during the relevant period. The Facebook page features videos posted in 2020 and 2021 with captions describing the HYGGE collection as "filled with luxurious nightwear and homewear accessories" (2020) and "our gorgeous new nightwear collection inspired by the Danish art of unwinding and relaxation... filled with the kind of luxurious PJs, slippers & eye masks you'll want to slip into as soon as you get home" (2021, ellipsis in original). The screen captures show the Mark displayed next to or on images in the videos, depicting pyjamas, grey faux fur strap slippers, thick grey cable knit socks, robes, and eye masks (the 2021 video also displays the MINT VELVET Logo, at the bottom of the screen). The Instagram advertisement, posted in December 2021, shows a selection of gift ideas from Mint Velvet, including faux fur strap slippers labelled with the Mark and a drawstring bag decorated with a printed logo featuring the Mark.
- Exhibit H is "a summary chart (showing representative Canadian sales volumes), along with copies of representative invoices", documenting sales of Goods

displaying the Mark that were shipped to Canada after being ordered from the Owner's Website. The five invoices date from 2020 (labelled "COMMERCIAL INVOICE") and 2021 (labelled "Receipt") and are addressed to individuals in British Columbia and Ontario. The MINT VELVET logo is displayed on the upper left of the three invoices from 2021 (there is no reference to the Owner on the two invoices from 2020) and a logo combining the name "Globale" with the tag line "Smart Cross-Border™" is displayed on the upper right of all five invoices. This logo appears to refer to a company called Globale UK Limited (Globale), which is identified on the 2020 commercial invoices as the "Shipper/Exporter of Record", located at an airport address, and on the 2021 invoice/receipts under the heading "Sold By". Ms. Bean does not explain the relationship between the Owner and Globale, the significance of which will be discussed below.

[13] Ms. Bean confirms that she is able to determine which invoiced products are Goods from the product numbers and/or internal tracking numbers and codes on the invoices and in the Owner's computer system, and she attests that these Goods were sold and shipped "displaying the Mark" after Canadian customers ordered them from the Owner through the Owner's Website. With the arguable exception of "Glitter Socks" and "Sparkle Socks", most of the relevant invoiced products appear to be represented by images of products of the same or a similar type throughout the evidence.

[14] One or two items from each invoice (manually highlighted on four of them) correspond to a line in the summary chart for that year, namely the "Off-White Faux Fur Slippers", "Pink Glitter Socks", "Red Check Unisex Pyjama Set", "Black Sparkle Socks", and "Black Velvet Sleep Eye Mask". The copy of the invoice for the "Pink Glitter Socks" is of poor quality, but the date and destination city are legible and the text of the highlighted entry appears consistent with the corresponding row of the summary chart. The summary indicates one sale of each of the foregoing items, except for "Black Sparkle Socks", which appears on two of the invoices and for which two sales are indicated. The summary also indicates one sale each of a "ZOE ZEBRA LONG PYJAMA SET" and "ZOE CAMI & SHORT PYJAMA SET" in 2021, "BLACK CABLE KNIT SLIPPER SOCKS" in 2022, and "GREY FAUX FUR STRAP SLIPPERS" in 2023.

However, I note that the last sale is outside the relevant period and, in the absence of a more precise sale date, the second-last sale may be as well.

## **ANALYSIS**

[15] The Requesting Party submits that the affidavit furnished in this case does not have the level of directness that one would expect and leaves too much to speculation. At the oral hearing, the Requesting Party noted the limited number of goods and services at issue and the limited amount of documentation furnished, and argued that it would not have been evidentiary overkill for Ms. Bean to provide explicit correlations and more complete explanations, so as to have sworn evidence on the record.

[16] Conversely, the Owner submits that it is only required to provide “some evidence that the registered trade mark was being used in Canada in the normal course of business at the relevant time” and not an exhaustive set of evidence and specimens, citing *Saks & Co v Canada (Registrar of Trade Marks)* (1989), 24 CPR (3d) 49 at 57 (FCTD). In the Owner’s submission, the examples in Ms. Bean’s affidavit are meant to be representative and not exhaustive.

[17] A registered owner is not required to furnish direct or documentary proof with respect to each of the goods and services listed in a registration. However, sufficient facts must still be provided to allow the Registrar to form an opinion or logically infer use within the meaning of section 4 of the Act [see *Guido Berlucchi & C Srl v Brouillette Kosie Prince*, 2007 FC 245, at para 18]. In the present case, I agree with the Requesting Party that more detail would have been preferable. However, as noted above, the burden of proof in section 45 proceedings is a light one. These proceedings are not intended to try contested issues of fact or to provide an alternative to the usual *inter partes* attack on a trade-mark envisaged by section 57 of the Act [*Meredith & Finlayson v Canada (Registrar of Trade Marks)* (1991), 40 CPR (3d) 409 (FCA)].

[18] In the present case, I find that Ms. Bean makes a clear assertion of use of the Mark in Canada during the relevant period, in association with the Goods and the Services, through the Owner’s online sales website. Her assertion is supported by



representative images of the Mark displayed (i) directly on certain Goods and on the labels and/or hangtags of others, and (ii) on the website used to advertise and perform the Services. She provides representative invoices showing the performance of the Services through the sale of the invoiced Goods, which she confirms were ordered online from the Owner's Website, and she attests to sales in the same manner of the additional Goods set out in the chart attached to her affidavit. Furthermore, it is clear from her evidence as a whole that such online retail sale comprises the Owner's normal course of trade.

[19] For the reasons discussed below, I am satisfied that the Owner has thus demonstrated use of the Mark in Canada during the relevant period, but only in association with the Goods "Clothing, namely, casual clothing, dress clothing" and the Services "The online sale of: candles, bags, casual bags, clothing, footwear and headgear; enabling customers to conveniently view and purchase the above-noted goods from a general merchandise Internet Website".

[20] As the Owner furnished no evidence of special circumstances excusing non-use of the Mark in association with the remaining Goods and Services, the registration will be amended accordingly.

### ***The HYGGE product line***

[21] I would first note that I am satisfied all of the Goods were included in the HYGGE product line during the relevant period. The representative photographs attached as Exhibit C to Ms. Bean's affidavit, together with the images on the webpage, Facebook page, and Instagram page at Exhibits E1, F, and G respectively, show the Mark displayed on or in association with each of the Goods.

[22] In this respect, I am prepared to accept that the knit pocket-like bag depicted in the photographs corresponds to a "casual bag", that the plush-lined socks and pom-pom socks are "casual clothing", that the knit boots are "boots" (even if they may be for use as slippers), and that the faux fur strap slippers with metal buckles may be considered "sandals" (being essentially sandals made of faux fur).

[23] I am also prepared to accept the feather-trimmed pyjama sets depicted on the HYGGE webpage as “Clothing, namely, ... dress clothing”, given how they are described in the accompanying caption: “We know you’re going to love our new dressier side to Hygge too. With so much styling potential, our feather-trimmed sets in black and nude double as the ultimate eveningwear for hosting at home or heading out. Try the top with a relaxed jean and strappy heel. For a smarter tailored spin, tuck a white shirt into the trousers. ...”. Furthermore, since the social media advertisements from 2020 and 2021 feature a similar aesthetic, and the HYGGE webpage specifies that the line is “cozy, always with a serving of luxe” (my emphasis), I am prepared to infer that the “new dressier side” was already at least somewhat present during the relevant period, with pieces that can be dressed up or down, such as the flowy camisoles depicted on the HYGGE webpage and featured in the Facebook videos.

[24] With respect to the socks, the Requesting Party argues that they are properly characterized as “footwear” and that Ms. Bean’s election to define them as “casual clothing” instead creates “vague imprecise language [that] should not permit the Registrant to maintain the Registration” [written argument at para 56]. However, I note that the exhibited invoice entry for the “Pink Glitter Socks” characterizes them as “Articles of apparel and clothing accessories, knitted or crocheted”, in contrast to the entry for “Faux Fur Slippers”, which characterizes the latter as “Footwear, gaiters and the like, parts of such articles”. Furthermore, it appears the “Loungewear” section of the Owner’s online store comes under the clothing menu. The footwear menu comprises only the categories “Boots”, “Heels”, “Trainers”, “Shoes”, and “Wellies”, and there is no indication that the depicted socks would be sold under any of those sections. Indeed, in the summary chart at Exhibit H, the product subclasses “SOCKS/TIGHTS” and “SLIPPER SOCKS” come under the “NIGHTWEAR, LINGERIE & SOCKS” department, while only the subclass “SLIPPER” comes under the “FOOTWEAR” department. I am therefore prepared to accept the Owner’s socks as “clothing”.

[25] The Requesting Party also argues that the Owner is “attempting a [sleight] of hand by improperly referencing what it acknowledges to be a slipper as a sandal” [written argument at para 64, emphasis in original]. Indeed, as noted by the Requesting

Party, the product the Owner characterizes as “fuzzie/furry sandals” [sic] is described on the Owner’s Website as “Faux Fur Strap Slippers” [written argument at para 21.e; Bean affidavit at Exhibit D2, my emphasis]. However, I find that the article in question has the appearance of a sandal, the only ostensible difference being that it is made of faux fur, and I am therefore prepared to accept it as a cozy indoor sandal. As noted by the Federal Court, in a section 45 proceeding, “one is not to be astutely meticulous when dealing with language used in a statement of wares” [*Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654 at para 17].

### ***Use in association with the Goods***

[26] Based on the foregoing evidence, I am satisfied that all of the Goods would have been advertised for sale on the Owner’s Website during the relevant period. However, I am not satisfied that Ms. Bean has demonstrated actual transfers of each of the Goods in Canada in the normal course of trade. Although she states that the Mark was “used” in Canada during the relevant period in association with each of the Goods [para 4], she does not specify that each of the Goods was actually *sold* in Canada, as opposed to merely being advertised and made available for sale. She attests that the goods “that were sold in Canada” during the relevant period prominently displayed the Mark [para 5], but stops short of confirming which goods those were.

[27] It is well established that offering for sale is not the same as selling and, in itself, is insufficient to establish use of a trademark in accordance with section 4(1) of the Act; some evidence of transfers in the normal course of trade is necessary [see *Michaels & Associates v WL Smith & Associates Ltd* (2006), 51 CPR (4th) 303 (TMOB); and *Riches, McKenzie & Herbert LLP v Cleaner’s Supply Inc*, 2012 TMOB 211]. Such evidence can be in the form of documentation like invoices or sales reports, or it can be through clear sworn statements. However, in the present case, Ms. Bean does not clearly state that the Owner’s sales in Canada included any products other than those listed in the summary chart at Exhibit H. Although the exhibited invoices cover additional items, none of them are highlighted and, in the absence of confirmation from Ms. Bean, I am not prepared to infer that any of them were among the products whose numbers or codes she was able to correlate with display of the Mark. This is not a case like *CPST*

*Intellectual Property Inc. and InjaNation Fun and Fitness Inc*, 2023 TMOB 73, cited by the Owner, where the sales report in evidence listed all of the registered goods and prefaced each by the registered mark.

[28] This is also not a case where it may be inferred that aggregate sales figures include the goods in question. The summary chart “showing representative Canadian sales volumes” does not provide aggregate figures for product categories but instead lists only a small number of individual products, indicating only one or two sales of each. In the absence of any statistics on website traffic from Canada or any explanation of what is meant by “representative” sales volumes, one is left to speculate as to what additional products, if any, the Owner may have sold in Canada from its U.K. website.

[29] In the circumstances, I am only prepared to accept that the Owner has sold in Canada the particular Goods identified in the chart at Exhibit H, which Ms. Bean attests summarizes sales such as those reflected in the representative invoices.

[30] The Requesting Party submits that the exhibited invoices do not represent sales by the Owner because they originate instead from Globale. In the Requesting Party’s submission, invoices issued by “an unexplained third-party” are “of no help to the trademark owner” if there is no mention of the latter being involved in the transaction. The owner cites in support *Smart & Biggar v Jarawan*, 2006 FC 1253; *Nelligan O'Brien Payne LLP v Shaw Satellite GP*, 2017 TMOB 90; and *Boutiques Proggolf Inc v Marks & Clerk* (1992), 44 CPR (3d) 380 (FCTD), rev'd on other grounds (1993), 54 CPR (3d) 451 (FCA)]. However, these cases are not on point. In *Jarawan*, the finding was that the invoices did not provide a notice of association between the trademark displayed thereon and the goods. *Shaw* concerned third parties sending invoices that identified the recipient by its trademark and *Proggolf* involved certain manufacturer’s invoices bypassing the trademark owner on the way to the ultimate purchaser.

[31] It is true that the Owner is not identified on the two 2020 invoices. However, the MINT VELVET logo is displayed on the three invoices from 2021. Moreover, Ms. Bean attests that internal codes and tracking numbers confirm the invoiced products at issue were ordered from the Owner’s Website [para 10]. I would also note that some of the

relevant invoiced product descriptions are, on their face, consistent with items featured in the videos the Owner posted on Facebook in 2020 and 2021, such as the depicted golden zebra-print pyjamas and black eye mask [see Exhibit F].

[32] In a section 45 proceeding, absent evidence to the contrary, the statements in an affidavit must be accorded substantial credibility [*Ogilvy Renault v Compania Roca-Radiadores SA*, 2008 CarswellNat 776 (TMOB)]. Furthermore, the owner's evidence must be considered as a whole and the exhibits interpreted in conjunction with the statements made in the affidavit [see, for example, *Fraser Milner Casgrain LLP v Canadian Distribution Channel Inc* (2009), 78 CPR (4th) 278 (TMOB)]. The evidence need not be perfect; a registered owner need only establish a *prima facie* case of use and the Registrar may draw reasonable inferences from the facts provided [see *Diamant, supra*; and *Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64, 48 CPR (4th) 223]. A trademark owner is not required to provide evidence of use of its trademark along with its name [*Vogue Brassiere Inc v Sim & McBurney* (2000), 5 CPR (4th) 537 (FCTD)].

[33] In the present case, although Ms. Bean does not expressly state the relationship between the Owner and Globale, or clarify the notation “Sold By” in the later invoices, I agree with the interpretation advanced in the Owner’s written representations [paras 37–39]. Upon review of the evidence as a whole, the reasonable inference is that Globale was the international shipping company the Owner used to deliver its goods to its Canadian customers, and thus acted only as an intermediary.

[34] It is well established that the concept of the “normal course of trade” recognizes a continuity of actions that commence with the trademark owner through intervening transactions by agents or distributors to the ultimate consumer. Thus, evidence of the trademark owner’s goods bearing the trademark distributed and sold through another entity—in this case, a cross-border shipper—can be sufficient to satisfy the requirements of section 45 of the Act, so long as the owner is the first link in the chain of distribution [per *Manhattan Industries Inc v Princeton Manufacturing Ltd* (1971), 4 CPR (2d) 6 (FCTD); *Philip Morris Inc. v Imperial Tobacco Ltd* (1985), 7 CPR (3d) 254, aff’d

(1987), 17 CPR (3d) 237 (FCA); and *Osler, Hoskin & Harcourt v Canada (Registrar of Trade Marks)* (1997), 77 CPR (3d) 475 (FCTD)]. In the present case, although it would have been preferable for Ms. Bean to explain Globale's role in the distribution chain, and it should have been a simple matter for her to do so, I find the evidence sufficient to establish the Owner's position as the first link in the chain.

[35] However, since Ms. Bean does not correlate the invoiced product descriptions to either the Goods or the exhibited product images, there remains the issue of which Goods were actually sold in Canada during relevant period. For example, the faux fur strap slippers that I am prepared to accept as "sandals", given their sandal-like construction, were sold in 2023, which is after the relevant period. Furthermore, there is no evidence to suggest that the article sold in 2020 identified simply as "Faux Fur Slippers" might also be considered a sandal. Indeed, the HYGGE webpage depicts, in the same image as the robe, furry-lined bedroom slippers that enclose the foot in the manner of a mule and thus do not appear to be "sandals". Similarly, in the absence of any images of socks that glitter or sparkle, it is not clear whether the invoiced Pink Glitter Socks and Black Sparkle Socks are casual or dress clothing. There is an image of casual cable knit socks in one of the Facebook videos, but in the absence of a precise date for the 2022 sale of BLACK CABLE KNIT SLIPPER SOCKS, it is not possible to determine whether such socks were sold within the relevant period.

[36] In the end, I am prepared to accept the recorded sales of "GLITTER" and "SPARKLE" socks and of the pyjama sets "ZOE ZEBRA LONG", "ZOE CAMI & SHORT", and "RED CHECK UNISEX" as sales of "Clothing, namely, casual clothing, dress clothing". Furthermore, I accept that these pieces would be branded with labels and/or hangtags bearing the Mark in the same manner as, for example, the other socks and the robe depicted in the representative photographs at Exhibit C. I am therefore satisfied that the Owner has demonstrated use of the Mark in association with "Clothing, namely, casual clothing, dress clothing" in Canada during the relevant period.

[37] Conversely, in the absence of any invoices, sales figures, or other particulars regarding sales of candles, bags, boots, or sandals in Canada during the relevant

period, Ms. Bean listing these goods as ones with which the Owner “used the Mark” in Canada during the relevant period amounts to a bare assertion of use. Thus, I find that the Owner has not shown use of the Mark in association with the Goods “Candles”, “Casual bags”, or “Footwear, namely, boots, sandals”.

### ***Use in association with the Services***

[38] I am satisfied that the HYGGE page from the Owner’s Website at Exhibit E1, with its images of the HYGGE product line, links to “SHOP NIGHTWEAR” and “SHOP THE LOOK”, and a banner offering shipping to Canada, shows the Mark displayed in advertising the following Services during the relevant period: “The online sale of: candles, bags, casual bags, clothing, footwear and headgear; enabling customers to conveniently view and purchase the above-noted goods from a general merchandise Internet Website”. I find that the Mark’s display as a logo on the cover image at the top of the HYGGE webpage constitutes a display of the Mark in advertising these services in respect of the HYGGE product line.

[39] The Requesting Party argues that the Mark’s display on the Owner’s Website is at most in association with goods, and not the Services, since the trademark associated with the operation of the website is MINT VELVET [written representations at para 79]. In support, the Requesting Party cites *Smart & Biggar v MAGG Gifts Inc*, 2022 TMOB 144, where the Registrar found display of a trademark on the products offered for sale at the owner’s “Q Wholesale”-branded website insufficient to demonstrate use of the trademark in association with the operation of an online wholesale store. However, in the same case, the Registrar accepted the trademark’s prominent display at the top of the owner’s retail store webpages with “Shop online!” feature as clear evidence that the owner operated an online retail store in association with that trademark. Similarly, in the present case, the Mark is displayed not only on the products offered for sale on the Owner’s Website but also, prominently, on the cover image at the top of the particular webpage that invites visitors to “SHOP NIGHTWEAR” and “SHOP THE LOOK” for items in the HYGGE collection. I find this evidence comparable to the evidence that was accepted to show use in association with retail store services in *MAGG Gifts*.

[40] As regards the scope of the product line during the relevant period, I accept that the products depicted in Exhibits C, E1, F, and G would have been offered for sale through the HYGGE section of the Owner's Website at the time—including the knit pocket-like "casual bag" as well as the zippered pouch, drawstring bag, and "bag" for hot water bottles, which I find fall under the more general category "bags". I attach no importance to Ms. Bean's failure to differentiate the two categories of bag in her assertion of use with respect to the Services, since it was made prior to the narrowing of the specification in the registration. I am also prepared to accept the eye mask as "headgear", bearing in mind again that, when interpreting a statement of goods and services in a section 45 proceeding, "one is not to be astutely meticulous when dealing with language used" [*Aird & Berlis, supra*].

[41] Furthermore, I am satisfied that these Services were available to be performed in Canada during the relevant period. The Owner's Website targets Canada with pricing in Canadian dollars and the offer of shipping to Canada. Moreover, Ms. Bean's evidence regarding specific sales confirms the performance of these Services in Canada during the relevant period, at least in respect of clothing.

[42] The Services as listed in the registration also target leather, imitations of leather, shirts, and dresses. However, I am not satisfied that the evidence shows the Mark displayed in advertising or performing the Services in respect of such additional products, which are not depicted as items from the HYGGE collection.

[43] In this regard, I disagree with the Owner's submissions at the hearing that the robe depicted in the photographs at Exhibit C should be considered a dress. I appreciate that Ms. Bean asserts use of the Mark with only six goods, and "clothing, namely dress clothing (e.g. dresses)" is the only one of these that I have not found to be represented at Exhibit C. However, the garment on a hanger depicted in that exhibit does not have the appearance of either a dress or dressy clothing. Furthermore, the context in which it is depicted—among a hot water bottle cover, a bag consistent with a toiletry bag, thick socks, and slippers—reinforces the impression of a bath robe or housecoat as opposed to a dress. This impression is further reinforced by the image of



what appears to be the same robe being worn with a pyjama set and bedroom slippers on the HYGGE webpage at Exhibit E1. With respect to the Owner's submission that the submenu product categories include "Dresses"—not "Robes"—and that two invoices mention a "Dress", I do not find these references to be determinative in the absence of any representative images from the "Dresses" product pages. Since the HYGGE line appears to be for nightwear and loungewear, it seems more consistent with the "Loungewear" submenu item. As for the invoices, although Ms. Bean does not explicitly except any entries, I find no factual basis for an inference that entries omitted from the sales summary at Exhibit H may nevertheless be from the HYGGE line.

[44] Similarly, in the absence of any explanation from Ms. Bean, I am not prepared to accept that the pyjama tops depicted in the evidence are what she means by "shirts". (Indeed, I note that "shirts and dresses" appeared in the original registered statement of services only as part of the phrase "carriers for suits, shirts and dresses", which seems more in line with business attire.) In any event, I have already accepted that use of the Mark has been shown with the Services in respect of "clothing" in general.

[45] I have also considered the submenu listing the product categories "Shirts & Blouses" and "Dresses & Jumpsuits" along with a "Leather" collection [Exhibit E5]. However, I disagree with the Owner's submission that display of the Mark on the HYGGE webpage while this submenu is being accessed constitutes display of the Mark in advertising Services in respect of leather goods, shirts, and dresses. Rather, I find it is the MINT VELVET trademark that is displayed in advertising and performing the Services accessible from the general MINT VELVET menu and its submenus. The Mark on the HYGGE collection cover image is only displayed as a sub-brand, in advertising and performing the Services available *through the HYGGE section* of the site. Even if accessing the general MINT VELVET menu from the HYGGE section of the site leaves most of the HYGGE page visible underneath, I am of the view that customers would recognize the general MINT VELVET menu and its submenus as being separate from the specific page for the HYGGE collection, should they happen to have that page open at the time.

[46] In reaching this conclusion, I am mindful that Ms. Bean refers to the webpages at Exhibits E1 to E5 as “Hygge Subpages”, and states that they show the Mark “advertised in relation to” the various submenu items [para 7]. However, Exhibits E1 to E5 all show the *same* webpage, which advertises only (i) a HYGGE-branded collection of nightwear, loungewear, and related accessories, and (ii) links for shopping the depicted nightwear and loungewear looks. In the absence of screen captures depicting any additional pages there may be in the HYGGE section, or any of the sections offering “Leather”, “Bags”, “Belts”, etc. for sale, I am not satisfied that customers would perceive the HYGGE webpage visible underneath the MINT VELVET submenus as an indication that all of the items accessible from the MINT VELVET website through those submenus are made available for view and purchase through a HYGGE-branded service.

### **DISPOSITION**

[47] In view of all 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 Goods (1), (2), and (4) and the following from Services (1): “...leather and imitations of leather,...shirts and dresses,...”.

[48] The amended statement of goods and services will read as follows :

#### Goods

CI25 (3) Clothing, namely, casual clothing, dress clothing.

#### Services

CI35 (1) The online sale of: candles, [...] bags, casual bags, [...] clothing, footwear and headgear; enabling customers to conveniently view and purchase the above-noted goods from a general merchandise Internet Website.

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Oksana Osadchuk  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

## **SCHEDULE A**

### ***Registered goods at the date of the Registrar's Notice***

(1) Soaps, namely, anti-bacterial soaps, bar soaps, bath soaps, beauty soaps, body care soaps, body soaps, cosmetic soaps; perfumery; essential oils for aromatherapy, food flavouring, personal use; essentials oils of cedar wood, citron, lemon; cosmetics; toiletries, namely, comb, hairbrush, shaver, razor, shaving cream, aftershave, toothbrush, toothpaste, floss, mouthwash, lip balm, deodorant, shampoo, conditioner; incense. (2) Candles. (3) Wicks, namely, candle wicks, lamp wicks, lighter wicks; lamp oil. (4) Leather and imitations of leather; trunks and travelling bags; travel cases; luggage; suitcases; hold-alls; portmanteaux; valises; bags, namely, book bags, duffel bags, handbags, messenger bags, satchels, purses, backpacks, travel bags, tote bags, thermal bags; handbags; shoulder bags; toilet bags; carrier bags; rucksacks; backpacks; bum bags; sports bags; casual bags; briefcases; attaché cases; music cases; satchels; beauty cases; carriers for suits, for shirts and for dresses; tie cases; notecases; notebook holders; document cases and holders; wallets; purses; umbrellas; parasols; walking sticks; shooting sticks; belts; boxes of leather and imitation leather. (5) Furniture, namely, bathroom furniture, bedroom furniture, dining room furniture, kitchen furniture, living room furniture, office furniture, outdoor furniture; mirrors; picture frames; pillows and cushions. (6) Textiles and textile goods, namely, belts of textile, coasters of textile, curtains made of textile fabrics, doormats of textile, face towels of textile, felt and non-woven textile fabrics, furniture coverings of textile, table cloth of textile, textile fabrics, textile oils, textile shopping bags, textiles for clothes, textiles for footwear; bed and table covers; blankets, rugs, towels, namely, bath towels, beach towels, children's towels, cloth towels, dish towels, paper towels, face towels, golf towels, hand towels, large bath towels, face flannels, handkerchiefs. (7) Clothing, namely, casual clothing, athletic clothing, baby clothing, children's clothing, dress clothing. (8) Footwear, namely, shoes, boots, sandals, cowboy boots, rubber boots, high-heels, running shoes, hiking boots; headgear, namely, baseball caps, beanies, cowboy hats, fedoras, straw hats, top hats, headbands, headscarves, helmets, visors, belts.

### ***Registered services at the date of the Registrar's Notice***

The retail and online sale of: soaps, perfumery, essential oils, cosmetics, toiletries, incense, candles, wicks and lamp oil, leather and imitations of leather, trunks and travelling bags, travel cases, luggage, suitcases, hold-alls, portmanteaux, valises, bags, handbags, shoulder bags, toilet bags, carrier bags, rucksacks, backpacks, bum bags, sports bags, casual bags, briefcases, attaché cases, music cases, satchels, beauty cases, carriers for suits, shirts and dresses, tie cases, notecases, notebook holders, document cases and holders, wallets, purses, umbrellas, parasols, walking sticks, shooting sticks, belts, boxes made of leather or imitation leather, clothing, footwear and headgear; enabling customers to conveniently view and purchase the above-noted goods from a general merchandise retail store, from a general merchandise Internet Website and from a general merchandise catalogue by mail order.

# Appearances and Agents of Record

**HEARING DATE:** 2023-02-06

## **APPEARANCES**

**For the Requesting Party:** Shane D. Hardy

**For the Registered Owner:** Sander R. Gelsing

## **AGENTS OF RECORD**

**For the Requesting Party:** Cozen O'connor LLP

**For the Registered Owner:** Sander R. Gelsing (Warren Sinclair LLP)