



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2020 TMOB 69**

**Date of Decision: 2020-05-29**

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

**La Mer Technology, Inc.**

**Requesting Party**

**and**

**Upper Canada Soap and Candle Makers  
Corporation**

**Registered Owner**

**TMA838,572 for SEA SPA**

**Registration**

INTRODUCTION

[1] At the request of La Mer Technology, Inc. (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 February 22, 2018, to Upper Canada Soap and Candle Makers Corporation (the Owner), the registered owner of Registration No. 838,572 for trademark SEA SPA (the Mark).

[2] The Mark is registered for use in association with the following goods:

Personal care products, namely, replenishing body lotion, cream body wash, aroma foam bath, sea salt soak, massaging body gel, seaweed body polish, detoxifying mineral mud; home care products, namely, waterbead fragrance diffusers; candles.

[3] For the reasons that follow, I conclude that the registration ought to be maintained with the exception of “candles”.

[4] The notice required the Owner to show whether the Mark has been used in Canada in association with the goods 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. In this case, the relevant period for showing use is February 22, 2015, to February 22, 2018.

[5] The relevant definitions of use for goods are 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.

...

4(3) A trademark that is marked in Canada on goods or on the packages in which they are contained is, when the goods are exported from Canada, deemed to be used in Canada in association with those goods.

[6] It is well established that bare statements that a trademark is in 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) (*Plough*)]. Although the threshold for establishing use in these proceedings is 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 Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with each of the goods specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA) (*John Labatt*)].

[7] In response to the Registrar's notice, the Owner furnished the affidavit of Stephen Flatt, the owner and president of the Owner, sworn September 21, 2018. Only the Owner filed written representations. No oral hearing was held.

## THE EVIDENCE

[8] Mr. Flatt states that in the normal course of trade, customers, including retailers, place orders for the Owner's goods using his company's catalogues. As Exhibit B, he attaches a copy of the Owner's 2018 catalogue, which he states is representative of how the Owner offered and advertised its goods for sale in association with the Mark during the relevant period. Pages 24 and 25 of this catalogue show a number of products displaying the Mark on their packaging; these products are identified in the catalogue as replenishing body lotion, creamy body wash, aroma foam bath, sea salt soak, massaging body gel, seaweed body polish, detoxifying mineral mud, and waterbead fragrance diffusers. He states that "[t]his is representative of how all of my Company's SEA SPA Goods were marked with the trademark SEA SPA during the relevant period." Of the registered goods, I note that only candles are not depicted in this catalogue in association with the Mark.

[9] As Exhibit C, Mr. Flatt attaches an invoice dated April 3, 2017, showing sales to a retail customer based in Dallas, Texas. The invoice shows sales of goods identified as "SPA MUD", "SPA GEL", "SPA BODY POLISH", and "SPA B/BATH", which Mr. Flatt identifies as the Owner's detoxifying mineral mud, massaging body gel, seaweed body polish, and aroma foam bath, respectively. I note that the invoice shows that thousands of such items were exported. He states that the packaging of each good displayed the Mark at the time of export, and states that "[t]his is representative of how all of my Company's SEA SPA branded Goods were marked, exported and shipped to the U.S.A. during the Relevant Period."

## ANALYSIS

[10] Based on Mr. Flatt's invoice evidence showing export of the registered goods "detoxifying mineral mud", "massaging body gel", "seaweed body polish", and "aroma foam bath" to a United States-based retail customer during the relevant period, along with the exhibited catalogue showing how the Mark was displayed on the packaging for these goods during the relevant period, I am satisfied that the Owner has established use of these goods within the meaning of sections 4(3) and 45 of the Act.

[11] As such, the question to be determined is whether the Owner's evidence is sufficient to show use of the Mark in association with the remaining registered goods. In this respect, I am satisfied that each of the remaining registered goods, with the exception of "candles", displayed the Mark on their packaging as shown in the Exhibit B catalogue during the relevant period. However, the Owner has put forward no evidence to show that these goods were sold in Canada or exported during the relevant period aside from the statement that the sales shown in the Exhibit C invoices are "representative of how all of my Company's SEA SPA branded Goods were marked, exported and shipped to the U.S.A. during the Relevant Period."

[12] The Owner submits that Mr. Flatt's statements that the Mark was in use in association with all of the registered goods during the relevant period, combined with his evidence of display of the Mark on the goods and in the catalogue, are sufficient to satisfy the requirements of the Act.

[13] Although invoices are not mandatory in order to satisfactorily reply to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)], some evidence of transfers in the normal course of trade or export are necessary [*John Labatt*]. Such evidence can be in the form of documentation like invoices or sales reports, but can also be through clear sworn statements such as volumes of sales, dollar value of sales, or equivalent factual particulars [see, for example, *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79]. In other words, the Registrar must be able to "rely on an inference from proven facts rather than on speculation" to satisfy every element required by the Act [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 11; see also *Smart & Biggar v Curb*, 2009 FC 47].

[14] In this case, I am prepared to accept that the Exhibit C invoice is representative of export during the relevant period of the goods shown in the catalogue but not included in the invoice, namely, "replenishing body lotion, cream body wash, sea salt soak; home care products, namely, waterbead fragrance diffusers". There is considerably more in this case than a bare allegation of use of the sort found unacceptable by the Court of Appeal in *Plough*. In this respect, I note that the Owner has provided a catalogue dated during the relevant period showing how the Mark was displayed in association with a number of registered goods, and also illustrating that the Owner was offering such items for sale; further, the Owner has also provided detailed evidence

regarding its normal course of trade, a clear sworn statement that the Owner exported all of the registered goods during the relevant period, and an invoice showing substantial sales of certain goods. On a fair reading of the affidavit as a whole, and bearing in mind that the Owner need only establish a *prima facie* case of use, I am prepared to accept that the Owner exported each of the goods shown in the catalogue to retail customers in the United States during the relevant period. Accordingly, I am satisfied that the Owner has established use of the Mark in association with these goods within the meaning of sections 4(3) and 45 of the Act.

[15] As for the goods not evidenced in Mr. Flatt's affidavit or attached exhibits, namely, "candles", there is no evidence to suggest that the Owner sold or exported this item in association with the Mark during the relevant period aside from Mr. Flatt's general statement of use in association with all of the goods. As noted in *Plough*, a mere assertion of use is not sufficient to establish use in a section 45 proceeding. What is required is that an affidavit "show use by describing facts from which the Registrar or the Court can form an opinion or can logically infer use within the meaning of section 4 of the Act" [*Guido Belucchi & C Srl v Brouillette Kosie Prince*, 2007 FC 245 at para 18]. Accordingly, as candles are not shown in the exhibited catalogue or elsewhere in evidence, I am not prepared to infer that these were sold or exported during the relevant period in association with the Mark.

[16] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered good "candles", within the meaning of sections 4 and 45 of the Act. As there is no evidence of special circumstances before me which would excuse non-use of the Mark in association with candles, the registration will be amended accordingly.

#### DISPOSITION

[17] In view of all 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 registered goods:

candles.

[18] The amended statement of goods will be as follows:

Personal care products, namely, replenishing body lotion, cream body wash, aroma foam bath, sea salt soak, massaging body gel, seaweed body polish, detoxifying mineral mud; home care products, namely, waterbead fragrance diffusers.

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G.M. Melchin  
Hearing Officer  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

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**HEARING DATE** No Hearing Held

**AGENTS OF RECORD**

Moffat & Co.

For the Registered Owner

Bereskin & Parr LLP, S.E.N.C.R.L., s.r.l.

For the Requesting Party