



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2016 TMOB 77**  
**Date of Decision: 2016-05-25**

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

**Gowling Lafleur Henderson LLP**

**Requesting Party**

**and**

**Trio Selection Inc.**

**Registered Owner**

**TMA298,834 for CREAM SODA Design**

**Registration**

[1] At the request of Gowling Lafleur Henderson LLP (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on June 9, 2014 to Trio Selection Inc. (the Owner), the registered owner of registration No. TMA298,834 for the trade-mark CREAM SODA Design (the Mark) as illustrated below:



[2] The Mark is registered for use in association with: junior sportswear, namely: pants, shirts, skirts, jackets, vests, T-shirts, dresses, sweat-suits, shorts, suits, sweaters and coats (the Goods).

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with each of the Goods, at any time between June 9, 2011 and June 9, 2014 (the Relevant Period). 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 reasons for the absence of use since that date.

[4] The relevant definition of use with respect to goods is set out in section 4(1) of the Act as follows:

4(1) A trade-mark 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.

[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 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 trade-mark in association with each of the goods and services specified in the registration during the relevant period [see *Uvex Toko Canada Ltd v Performance Apparel Corp* 2004 FC 448, 31 CPR (4th) 270].

[6] In response to the Registrar's notice, the Owner furnished the affidavit of Lloyd Prizant, sworn on August 25, 2014. Both parties filed written representations and were represented at a hearing.

#### The Owner's Evidence

[7] Mr. Prizant is the Owner's Vice-President. He states that the Owner operates 'a 60,000 square foot warehouse ventures in the textile and apparel wholesaling industry, designing, manufacturing and selling clothes mainly to retail stores.'

[8] Mr. Prizant alleges that junior sportswear clothing bearing the Mark has been sold and is presently sold at various retailers across Canada. Such statement constitutes a bald assertion of use that needs to be substantiated by the evidence in the record. Moreover, Mr. Prizant does not

make specific reference to the Relevant Period. However, Mr. Prizant does provide the following information and documentation concerning the alleged use of the Mark in Canada during the Relevant Period:

- Exhibit A-1 are photographs of a dress with a label bearing the Mark which has been sold to London Drugs, which name appears on the price tag. A related purchase order for this dress, dated November 19, 2013 can be seen in one of the photographs;
- Exhibit A-2 is an invoice dated March 20, 2014 issued by the Owner to London Drugs for the sale of dresses represented in the Exhibit A-1 photographs;
- Exhibit A-3 is a photograph of a skirt with a label bearing the Mark. The skirt was sold to London Drugs and the latter's name appears on the price tag;
- Exhibit A-4 is a copy of a purchase order dated November 19, 2013 for the purchase, by London Drugs from the Owner, of the type of skirt represented in Exhibit A-3, together with an invoice dated March 20, 2014 for the sale of that type of skirt;
- Exhibit A-5 is a photograph described by Mr. Prizant as being of a 'lace embroidered T-Shirt' to which is attached a label bearing the Mark, and was sold to London Drugs as appears from the price tag attached to the garment;
- Exhibit A-6 is a purchase order and its corresponding invoice dated March 20, 2014 providing details of a transaction between the Owner and London Drugs concerning the garment shown in the Exhibit A-5 photographs. However, these documents describe the garments as 'Ladies s/s cowl neck top with lace insert at back';
- Exhibit A-7 is a photograph of what Mr. Prizant describes as 'a floral lace embroidered black T-Shirt' with a label displaying the Mark, sold to London Drugs as appears from the price tag attached to the garment;
- Exhibit A-8 is a purchase order and an invoice dated March 20, 2014 providing details of a transaction between the Owner and London Drugs concerning the garment illustrated on the pictures Exhibit A-7. Again, however, rather than 'T-shirts', these documents describe the garments as 'Ladies s/s top with lace insert at back and studs on pocket'.

[9] I note that, aside from the general assertion of use and recitation of the statement of goods from the registration, at no point in his affidavit does Mr. Prizant refer to the garments sold by the Owner as "junior sportswear" clothing or the like. Similarly, none of the exhibited invoices and purchase orders list or refer to "junior sportswear" clothing items.

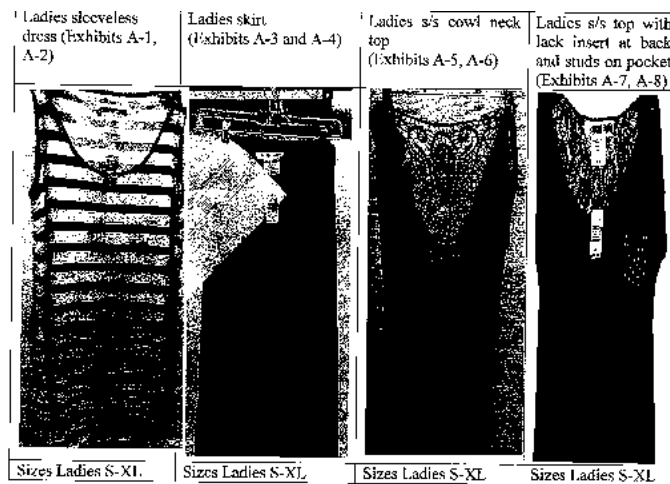
#### The Requesting Party's arguments

[10] The Requesting Party claims that the evidence concerns use of the Mark in association with what it contends to be 'ladies formal apparel' instead of 'junior sportswear' as referred to in the registration.

[11] Moreover, the Requesting Party argues that there is no evidence of use of the Mark in association with pants, jackets, vests, T-shirts, sweat-suits, shorts, suits, sweaters and coats, being, junior sportswear or otherwise.

[12] The Requesting Party notes that, based on the descriptions taken from the corresponding invoices, the garments depicted at Exhibits A-5 and A-7 are, in fact, “Ladies s/s cowl neck top” and “Ladies s/s top with lack insert at back and studs on pocket”, respectively, and not T-shirts as alleged by Mr. Prizant in his affidavit. For purposes of discussion, I will assume that the abbreviation ‘s/s’ stands for ‘short sleeves’.

[13] For ease of reference, I reproduce the illustration of the garments from paragraph 11 of the Requesting Party’s written representations, which itself reproduces images from the aforementioned exhibits:



[14] The Requesting Party emphasizes that the invoices provided by the Owner specifically refer to the garments as ‘Ladies...’ clothing items. Indeed, as noted above, the exhibited purchase orders and invoices do not make reference to junior clothing, junior size or the like.

[15] At the hearing and in its written submissions, the Requesting Party argued that the word ‘junior’ in the description of the Goods refers to ‘junior sizing’ as opposed to ‘lady’, commonly understood to mean ‘adult female’. Moreover, it submits that ‘sportswear’ stands for ‘sports clothing’ such as a tennis skirt for example.

[16] The Requesting Party argues that in accordance with the standard dictionary definitions of the words ‘junior’, ‘sportswear’ and ‘lady’, there is a distinction to be made between ‘junior sportswear’ and ‘lady formal apparel’; as such, ‘junior sportswear’ would not be included in the category of ‘lady formal apparel’.

[17] To support its contention, the Requesting Party provided various dictionary definitions for the words ‘junior’, ‘lady’, ‘woman’ and ‘sportswear’. I note the following excerpts from those definitions:

Junior: For or denoting young or younger. *North American*: Of or for students in third year of a course lasting four years at college or high school. *In sport*: a young competitor, typically under sixteen or eighteen.

Sportswear: Clothes worn for sport or for casual outdoor use.

Lady: A polite or formal way of referring to a woman. *Synonyms*: woman, female.

[18] Finally, the Requesting Party notes that the Owner did not provide any reasons explaining non-use of the Mark within the meaning of section 45(3) of the Act.

#### The Owner’s arguments

[19] The Owner submits that the definitions of the words ‘junior’ and ‘sportswear’ reproduced above do not support a narrow interpretation of those words in the context of the description of the Goods. It pleads that the Registrar should give a generous interpretation to the statement of goods and that it would be an improper approach to engage in an overly meticulous analysis of the specifications of the Goods. Assuming it is the case, can I still conclude that they fall in the category of ‘junior sportswear’?

[20] Furthermore, the Owner argues that the garments shown in Exhibits A5 and A-7 fall within the definitions of ‘shirt’ and ‘T-shirt’.

[21] The Owner contends that the Requesting Party has placed undue emphasis on the distinction between ‘ladies’ and ‘junior’ clothing. Additionally, the Owner argues there is no reason why the clothes illustrated above could not be characterized as ‘sportswear’. In this respect, the Owner submits that ‘sportswear’ encompasses ‘casual outdoor use’.

[22] Lastly, the Owner asserts that evidence of use of the Mark in association with each and every registered Goods is not necessary. It submits that the evidence of use of the Mark in association with dresses, skirts, shirts and T-shirts, as illustrated above, is sufficient to maintain the registration of the Mark with respect to all of the Goods.

### Analysis

#### *Is there evidence of use of the Mark in association with ‘junior sportswear’?*

[23] In my view, at best, I consider the evidence ambiguous with respect to whether the garments shown in the exhibits fall under the category of ‘junior sportswear’. In this respect, the Owner chose to describe the Goods in the registration as ‘junior sportswear’. However, Mr. Prizant provides no explanation as to the significance or meaning of “junior sportswear”.

[24] To me, the term “junior” referred to in the description of Goods in the registration logically references sizing. The Owner chose that term to distinguish it from ‘ladies’ or ‘children’ sizing. It is the Owner, in its own description of the garments appearing in the exhibited invoices that describes them as ‘Ladies...’ clothing items. The fact that the term ‘junior’ can also refer to a third year college or high school student, as per the dictionary definition filed by the Requesting Party, is of no assistance to the Owner. Per section 30 a) of the Act, the statement of goods must be in ordinary commercial terms. A ‘junior dress’ does not refer to a dress to be worn by a third year high school or third year college student. In the absence of evidence that ‘junior sportswear’ falls in the category’ of ‘Ladies sportswear’, I must interpret such ambiguity against the Owner [see, by analogy, *MAPA GmbH Gummi-und Plastikwerke v to 2956-2691 Québec Inc*, 2012 TMOB 192, 2012 CarswellNat 4869].

[25] In any event, as stated earlier, Mr. Prizant does not refer to the use of the Mark in association with ‘junior sportswear’ in his affidavit, except for a general bald assertion of use of the Mark in association with such category of goods. Moreover, the invoices issued by the Owner do not make reference to ‘junior sportswear’.

[26] At best for the Owner, there is a doubt as to whether the skirt and the dress illustrated in Exhibits A-1 and A-3 could be categorized as ‘junior sportswear’. Given their appearance and

description, in the absence of a clear statement by Mr. Prizant that those garments are ‘junior sportswear’, this doubt must be resolved against the Owner [see *Plough, supra*].

[27] Additionally, I do not consider the garments illustrated above to be ‘sportswear’, despite the possibility of a generous interpretation for such term to include ‘casual clothing’. Based on the foregoing definitions, it would seem that ‘sportswear’ represents a certain type of clothing that is principally used for sports activities, but could also be worn casually. It is not apparent that any of the garments illustrated above could be worn principally during sports activities. Again, there is no reference to ‘sportswear’ or the like in the description of the garments sold by the Owner on the exhibited invoices, nor even in Mr. Prizant’s own description of the garments illustrated on the exhibited pictures. Tellingly, Mr. Prizant failed to provide any explanation or clarification of the meaning of ‘sportswear’ or ‘junior sportswear’ in his affidavit.

*No evidence of use in association with other Goods*

[28] Notwithstanding the above, I agree with the Requesting Party that there is no evidence of use of the Mark in association with: pants, jackets, vests, sweat-suits, shorts, suits, sweaters and coats. Moreover, there is no allegation contained in Mr. Prizant’s affidavit that would describe special circumstances justifying non-use of the Mark in Canada during the Relevant Period within the meaning of section 45(3) of the Act.

Disposition

[29] There is no evidence of use of the Mark during the Relevant Period by the Owner in association with any of the Goods as described above and there is no evidence of special circumstances justifying non-use of the Mark in Canada during the Relevant Period in association with the Goods.

Disposition

[30] Pursuant to the authority delegated to me under section 63(3) of the Act, registration TMA298,834 will be expunged in compliance with the provisions of section 45 of the Act.

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Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office



**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE:** 2016-04-26

**APPEARANCES**

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Melissa A. Binns

FOR THE REQUESTING PARTY

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