



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

**Citation: 2015 TMOB 43**  
**Date of Decision: 2015-03-17**

**IN THE MATTER OF AN OPPOSITION  
by J. Crew International, Inc. to  
application No. 1,430,778 for the trade-  
mark CAMPUS CREW in the name of  
Campus Crew (2005) Inc.**

[1] On March 12, 2009, Campus Crew (2005) Inc. (the Applicant) filed an application to register the trade-mark CAMPUS CREW (the Mark). The application claims the following goods and services on the bases identified below (the Goods and Services):

**GOODS:**

(1) Men's, women's and children's clothing and accessories, namely, shirts, sweaters, pants, shorts, jackets, backpacks, bags, namely handbags, tote bags, athletic bags, gym bags, headwear, namely hats, caps, toques, headbands and earmuffs, outerwear, namely varsity jackets, letterman jackets, parkas, vests, blazers and raincoats; belts, scarves, gloves, namely leather gloves, casual gloves, mittens, fingerless gloves and socks. *Used in Canada since at least as early as September 1987.*

(2) Footwear, namely slippers, flip-flops, deck shoes, running shoes and athletic shoes. *Used in Canada since June 1991.*

**SERVICES:**

(1) Retail store services for men's, women's and children's clothing and accessories. *Used in Canada since December 1988.*

(2) Wholesale sales of men's, women's and children's clothing and accessories. *Used in Canada since April 2005.*

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of June 9, 2010.

[3] On May 9, 2011, J. Crew International, Inc. (the Opponent) filed a statement of opposition. The statement of opposition includes only one ground of opposition, namely:

- The application does not comply with the provisions of section 30(b) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act). The Applicant has not used the applied-for trade-mark in Canada since the alleged dates of first use in connection with the specified goods and services.

[4] The Applicant served and filed a counter statement in which it denied the Opponent's allegation and put the Opponent to the strict proof thereof.

[5] In support of its opposition, the Opponent filed an affidavit of Pamela T. Tuchlin, a law clerk employed by the Opponent's agent.

[6] In support of its application, the Applicant filed an affidavit of Nickolas D. Rizzo, the owner, officer and director of the Applicant.

[7] None of the affiants was cross-examined.

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

#### Onus and Material Dates

[9] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support its ground of opposition exist [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[10] The material date that applies to the ground of opposition is as follows:

- sections 38(2)(a)/30 - the date of filing the application [see *Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB) and *Tower Conference Management Co v Canadian Exhibition Management Inc* (1990), 28 CPR (3d) 428 at 432 (TMOB)].

#### Section 30(b) of the Act

[11] While the legal burden is upon the Applicant to show that the application complies with section 30 of the Act, there is an initial evidential burden on the Opponent to establish the facts relied upon in support of its section 30 ground of opposition. However, the evidential burden on the Opponent respecting the issue of the Applicant's non-compliance with section 30(b) is a light one [see *Molson Canada v Anheuser-Busch Inc* (2003), 29 CPR (4th) 315 (FCTD)].

[12] In support of its ground of opposition, the Opponent filed an affidavit which attaches a Corporation Profile Report for the Applicant (Tuchlin affidavit, Exhibit A). The report shows that the Applicant was incorporated under the laws of Ontario in February 2005.

[13] In its written argument, the Opponent submitted that while the Applicant claimed that it first used the Mark "since at least as early as September 1987", amongst other dates, the evidence shows that the Applicant did not exist until February 2005. The Opponent submitted that since the application for the Mark fails to claim any predecessors in title, any claim of use which precedes the Applicant's incorporation date is necessarily incorrect and the application should be rejected in relation to any and all goods and services for which use prior to February 2005 is claimed.

[14] The Opponent's submissions were entirely unfounded as the application filed by the Applicant clearly claims use by "the applicant and the applicant's predecessor(s) in title First Effort Investments Limited". Furthermore as discussed below, Mr. Rizzo's evidence clearly shows use by First Effort Investments Limited (First Effort) as well as proof of a transfer of title in the Mark from the First Effort to the Applicant.

[15] Given the fact that the Applicant has claimed a predecessor in title, evidence showing that the Applicant was not incorporated until February 2005 is not sufficient to meet the Opponent's evidential burden in support of this ground of opposition.

[16] At the oral hearing, the Opponent chose to abandon its prior line of argument and focused its submissions instead on attempting to establish that the Applicant's evidence is clearly inconsistent with the claimed first use dates.

[17] The Opponent pointed to the previous application filed by First Effort in 1988 based on proposed use in association with retail services only (Exhibit B, Rizzo affidavit) and submitted

that this contradicts the Applicant's claims to use of the Goods (1) since September 1987. The mere fact that the Applicant's predecessor chose not to include goods in its prior application is not clearly inconsistent with the date of first use claimed in association with these goods in the present application.

[18] The Opponent pointed to what it felt were significant inconsistencies in the Rizzo affidavit which it submits show that the evidence is inconsistent with the claimed dates of first use. Specifically, the Opponent pointed out what it alleged were inconsistencies relating to specific wording used by Mr. Rizzo to describe the dates of use for specific goods and services.

[19] The evidence is filed by the Applicant is substantial – and it shows use of the Mark beginning in 1986 – both on clothing wares and in the operation of retail and wholesale services. Mr. Rizzo also carefully details the bankruptcy proceedings and the above-mentioned transfer of the Mark and associated goodwill as well as use of the Mark more recently by the Applicant and its licensees.

[20] Mr. Rizzo provides photographs of clothing displaying the Mark – the earliest of which being a photograph taken in 1986 of a “ruggers shirt” which Mr. Rizzo states is one of the very first t-shirts branded with the Mark (Exhibit F). Mr. Rizzo states that the Mark is also marked on the label inside the shirt. The Mark is clearly displayed in the sample photograph (Exhibit F).

[21] Mr. Rizzo provides sample invoices and receiving documents from 1987 for tops and pants which he states were branded with the Mark (Exhibits H, I). He also provides photographs of various products sold in association with the Mark between 1991 and 1997 (Exhibit Q – including tops, socks, footwear) as well as a sample label which he states is representative of those used on denim and outerwear products sold between 1991 and 2012 (Exhibit R). He also provides photographs of a CAMPUS CREW store from 2001 showing tops and pants displaying the Mark (Exhibit BB), pictures of a store and advertisements from 2002 showing tops and pants displaying the Mark (Exhibit CC) and pictures of a store from 2004 (Exhibit DD).

[22] Mr. Rizzo provides sales figures for CAMPUS CREW stores for the years 1990 – 1994 ranging from \$1.8 million to \$9.6 million.

[23] Mr. Rizzo also provides sample advertisements dated variously from 1995 – 1998 (Exhibits V – Z) and advertising expenses for the 1990s in the realm of \$300,000 - \$700,000 a year and for 2006 – 2013 ranging from \$79,000 - \$200,000.

[24] Mr. Rizzo also provides photographs taken of the first CAMPUS CREW store, taken on November 1, 1988 (the day the store opened) in Ontario (Exhibit K). He also provides copies of photographs from 1992, 1994 and 1998 showing CAMPUS CREW stores in cities around Ontario (Exhibits N, O, P). All of the photos clearly display the Mark on exterior and interior signage at the store locations.

[25] Mr. Rizzo also makes the sworn statement that the Applicant has, since April 2005, through one or more of its licensees provided wholesale services for CAMPUS CREW branded clothing – selling clothing to universities and other retail clothing stores throughout Canada (para 107). Mr. Rizzo attaches photographs of the Applicant's wholesale booth at a trade show in Toronto, Ontario in 2009 (Exhibit KK).

[26] When the evidence is reviewed as a whole, I am not satisfied that it is clearly inconsistent with the dates claimed in the application.

[27] The Opponent's second line of attack centered on the chain of title for the Mark. The Opponent submits that the fact that Mr. Rizzo failed to provide a copy of the alleged assignment document showing transfer of the Mark from the Applicant's predecessor to the Applicant was fatal to the Applicant's claimed chain of title.

[28] In his affidavit, Mr. Rizzo explains how First Effort's assets were sold in the context of bankruptcy proceedings which were commenced in January 2005. He explains that the CAMPUS CREW business was sold to his wholly owned company, 2063377 Ontario Inc. on February 15, 2005 (paragraphs 78 – 83). Mr. Rizzo provides a copy of the agreement of purchase and sale effecting the transfer of the business (including the Mark and its associated goodwill) from First Effort to 2063377 Ontario Inc. (Exhibit EE) as well as a summary of the subsequent assignment of the Mark (and its associated goodwill) to the Applicant (paragraph 84) and details of the licensing of the Mark to the licensees (paragraphs 85 – 86). Mr. Rizzo explains that the transfer of the Mark from 2063377 Ontario Inc. to the Applicant was made by written agreement

but he was unable to locate the physical agreement as a result of the lengthy period of time that had passed since its execution (paragraph 84 the Rizzo affidavit). In the absence of cross-examination or contradictory evidence, I have no reason to doubt Mr. Rizzo's sworn statements on this issue.

[29] With respect to the licensing of the Mark, Mr. Rizzo provides details of the oral agreements granting licenses to use the Mark to 2063377 Ontario Inc., 2067986 Ontario Inc. and Vault 2012 Inc. (paragraphs 85-86 of the Rizzo affidavit). In terms of control to satisfy section 50 of the Act, Mr. Rizzo was at the time, and remained at the time of swearing his affidavit, the sole owner, officer and director for the licensees and the Applicant (Exhibit FF shows Corporation Profile Reports for each of these). As the sole directing mind for all of the licensees and the Applicant, Mr. Rizzo has caused the Applicant to exert direct control over the use of the Mark in association with the goods and services offered by the licensees. Furthermore, Mr. Rizzo swears at paragraph 85 of his affidavit that all use of the Mark by the licensees inures to the benefit of the Applicant and that the Applicant had direct control over the character and quality of the goods and services provided by the licensees in association with the Mark.

[30] I am thus not satisfied that the Opponent has established any clear inconsistencies in terms of the chain of title for the Mark.

[31] Based on the foregoing, when the evidence is reviewed as a whole, I am not satisfied that the Opponent has met its evidential burden and the section 30(b) ground of opposition is rejected.

#### Disposition

[32] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(8) of the Act.

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Andrea Flewelling  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office