

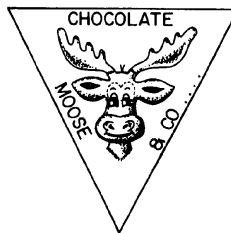
TRADUCTION/TRANSLATION

SECTION 45 PROCEEDINGS
TRADE-MARK: CHOCOLATE MOOSE & CO. & DESIGN
REGISTRATION NO.: TMA 326,235

On March 15, 2000, at the request of McDermid & Company, the Registrar forwarded a Section 45 notice to Chocolate Moose & Co. (Clothing) Inc., (Vêtements) Chocolate Moose & Co. Inc., the registered owner at the time of the above-referenced trade-mark registration. On June 14, 2000, “2744651 Canada Inc.” was recorded as the new owner.

The trade-mark CHOCOLATE MOOSE & CO. & Design (shown below) is registered for use in association with the following wares:

Children’s pants, shorts, jeans, overalls, T-shirts, shirts, sweatsuits, sweatshirts and sweatpants.



Section 45 of the Trade-marks Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and

services on 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 use since that date.

In response to the notice, the affidavit of Ron Kornbluth together with exhibits has been furnished. Neither party filed a written argument or requested an oral hearing.

In his affidavit, Mr. Kornbluth states that he is President of 2744651 Canada Inc., (the owner) and that he was a duly authorized representative (i.e. Director) of Chocolate Moose & Co. (Clothing) Inc. (the former owner).

He indicates that the former owner assigned the trade-mark to Sam Leitner and himself effective June 30, 1994; that on the same date Sam Leitner assigned the mark to him and again on June 30, 1997 he assigned the mark to 2744651 Canada Inc. Copies of confirmations of the assignments have been furnished.

He states that the former owner has used the trade-mark in Canada in association with the registered wares since January 28, 1987, which is the date of first use of the mark. He indicates that it manufactured and imported the wares for sale in Canada and he attaches specimens of clothing labels bearing the mark. He then states that for the Spring season 2000, sales of clothing bearing the mark came to a total of \$22,127.60. He has enclosed copies of specimen invoices and purchase orders for the season of Spring 2000 for wearing apparel. He then describes the use

being made by the owner of another registered trade-mark it owns. As Exhibit M he submits copies of labels bearing several other trade-marks. At paragraph 19, he indicates that during the three-year relevant period customers of the owner's clothing bearing the instant trade-mark and clothing bearing the other registered trade-mark included large department stores and retail clothing chains and by way of example, he states that sales of clothing bearing the trade-mark and the other mark from 1997 to 2000 came to a total of 5,724 units for a total invoiced amount of \$98,173.76.

I would note here that any showing of use of trade-marks other than the present trade-mark is irrelevant to the present proceedings and therefore such use has been disregarded.

Concerning the present trade-mark, the only use that has been shown to have occurred during the relevant period is found under Exhibit J, the invoice dated November 15, 1999 showing a sale of "cargo pants" to Winners Apparel Ltd. The purchase order accompanying the invoice shows that "Winners" placed the order for the "pants" on November 12, 1999 and the evidence shows that the trade-mark was affixed to the pants by way of a label on one of the back pockets. Although it is a single sale it does appear to be a genuine transaction made in the registrant's normal course of trade. Concerning the remaining wares, apart from the bare allegation that the former owner used the trade-mark since January 1987, no clear evidence of any other wares having been sold by the owner during the relevant period namely between March 15, 1997 and March 15, 2000 has been produced. Concerning invoices dated subsequent to the relevant period, they are irrelevant in showing use during the relevant period.

Concerning the invoices submitted as Exhibit N, they appear to show sales of clothing bearing other trade-marks. Accordingly, such invoices are irrelevant in showing use of the instant trade-mark.

Concerning the sales figure for the years 1997 to 2000 provided in paragraph 20 of the affidavit, Mr. Kornbluth has provided a global sales figure for all clothing wares sold under the trade-marks it owns. As he has not provided a breakdown by trade-mark and ware I conclude that it cannot be determined what portion, if any, of the sales figure is in respect of clothing bearing the instant trade-mark. As the evidence is ambiguous I interpret the ambiguity against the interests of the registrant.

As I can only conclude from the evidence that the trade-mark was in use in Canada during the relevant period in association with “children’s pants”, these are the only wares that will remain on the registration.

Registration No. 326,235 will be amended accordingly in compliance with the provisions of Section 45(5) of the Act.

DATED AT HULL, QUEBEC, THIS 30th DAY OF OCTOBER 2001.

D Savard
Senior Hearing Officer
Section 45 Division

