

SECTION 45 PROCEEDINGS
TRADE-MARK: LITTLE FOLKS
REGISTRATION NO.: TMA 237,775

On January 15, 2004, at the request of Messrs. Riches, McKenzie & Herbert, the Registrar forwarded a Section 45 notice to Little Folks Ltd., (hereinafter “registrant”) the registered owner of the above-referenced trade-mark registration at the date of the notice. Although not relevant to the present proceedings, the trade-mark was transferred to Delta Enterprise Corp. on November 18, 2005 which transfer was recorded on the trade-mark registration page on January 4, 2006.

The trade-mark LITTLE FOLKS is registered for use in association with the following wares: “Juvenile wood furniture, namely, cribs, canopies, dressing kits, dressers, chests, dresser/desk, headboards, night stands, bunks, chairs, mirrors; mattresses, mattress pads, bumper pads, sheets, pillow cases, canopy covers, and bedspreads”.

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/or services listed 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. The relevant period in this case is any time between January 15, 2001 and January 15, 2004.

In response to the notice, the affidavit of Michelle Phillips together with exhibits has been furnished. Each party filed a written argument and was represented at the oral hearing.

In her affidavit, Ms. Phillips states that she is General Manager of the registrant. At paragraph 2 she states that wares as set forth in the registration No. 237,775, labelled with the subject trade-mark, were sold in the normal course of trade by the registrant in both Canada and the U.S. during the period January 15, 2001 - January 14, 2004.

She provides as Exhibit A photocopies of representative labelling carried by the wood furniture products and the mattresses and mattress pads sold by the registrant during the relevant period. As Exhibit B she attaches copies of representative invoices which she states document sales of wares labelled with the trade-mark. She then adds that the invoices show sales of cribs; dressing kits (contour pads); dressers (combo units); chests; dresser/desks (dressers - a type of dresser that can also serve as a desk); headboards (bed ends - part of beds, often sold with the beds, but also sold separately); night stands (night tables); bunks (twin beds); mattresses; mattress pads (contour pads). She explains that the terms appearing in parentheses are terms which are often used on the invoices and which she considers to be alternate terms for or to encompass the specific goods juxtaposed therewith which are identified in the registration.

She provides the registrant's annual sales figures for furniture, mattresses and mattress pads for the years 2000 through 2003 and she provides a breakdown by wares for the years 2002 and 2003. She then concedes that the registrant has made no sales of the following wares: canopies, chairs, mirrors, bumper pads, sheets, pillow cases, canopy covers and bedspreads and that the registrant is agreeable to the deletion of these goods from the registration.

As the registrant has conceded that the trade-mark was not in use in association with the wares: canopies, chairs, mirrors, bumper pads, sheets, pillow cases, canopy covers and bedspreads during the relevant period, such wares will be deleted from the trade-mark registration.

Concerning the wares mattresses and mattress pads, the requesting party has conceded that use had been shown in association with such wares. I agree. Therefore the wares "mattresses and mattress pads" will be maintained on the trade-mark registration.

With respect to the remaining wares counsel for the requesting party submitted at the oral hearing that the only issue in this case is whether use has been shown with the wares "juvenile wood furniture namely, cribs, dressing kits, dressers, chests, dresser/desk, headboards, night stands, bunks, mattresses and mattress pads". The requesting party accepted that use had been shown

with “wood furniture” but not “**juvenile** wood furniture”. He argued that the affidavit in this case must be considered from the point of view of what it does not say (*Plough Canada Ltd. v. Aerosol Fillers Inc.*, 45 C.P.R. (2d) 194 (FCTD) and 53 C.P.R.(2d) 62 (FCA)) and that here the affiant never mentions that the use is with “**juvenile** wood furniture” that rather references are made to wood furniture products and to furniture but not “**juvenile** wood furniture”. Further, it adds that none of the invoices refer to the wares as belonging to “**juvenile** wood furniture”.

The registrant on the other hand submits that the evidence is replete with references that support the fact that the wood furniture that was sold belong to the category “**juvenile** wood furniture” and that therefore the wares in question ought to be maintained.

In my view the evidence must be considered as a whole and when that is done I find that on a balance of probabilities, it can be concluded that use has been shown in association with “**juvenile** wood furniture”.

Although the whole issue about the furniture could have been avoided had Ms. Phillips clearly made reference in her affidavit to “**juvenile** wood furniture” and not just wood furniture products or furniture, the mere fact that the term “juvenile” does not appear in her affidavit does not automatically result in a negative inference. For one thing, sales of “cribs” have been made and, contrary to the requesting party’s submissions, I find that there can be no question that cribs fit in the “juvenile” category.

Further, I agree with the registrant that from most of the names of the purchasers appearing on the invoices (e.g. Kiddies World Discount, KACZ Kids, T.J.’s The Kiddie’s Store, Cribs’n More, Fear’s Bibs ‘N’ Cribs, E-Children Ltd., and The Baby’s Palace) it can be concluded that the goods that were sold were for infant or children and therefore the wares sold would fit in the “juvenile” category.

In addition, as pointed out by the requesting party the following warning found on the

dresser/chest (Exhibit A - the fourth page) “*always monitor your child’s activity when in the nursery*” again would seem to support the fact that the furniture is for infant or children.

Therefore, having regard to the evidence as a whole I conclude that the wares sold namely cribs, dressing kits, dressers, chests, dresser/desk, headboards, night stands and bunks” belong to the category “juvenile wood furniture”.

As I have concluded that the evidence shows use of the trade-mark in association with the wares “juvenile wood furniture namely cribs, dressing kits, dressers, chests, dresser/desks, headboards, night stands, bunks; mattresses and mattress pads”, these are the wares that will be maintained on the trade-mark registration.

Registration No. TMA 237,775 will be amended accordingly in compliance with the requirements of s-s. 45(5) of the *Act*.

DATED AT GATINEAU, QUEBEC, THIS 31ST DAY OF MAY 2006.

D. Savard
Senior Hearing Officer
Section 45 Division