



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2025 TMOB 16

Date of Decision: 2025-01-27

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Regeena Lifeso

Registered Owner: Toys “R” Us (Canada) Ltd.

Registration: TMA841513 for KOALA KIDS

[1] At the request of Regeena Lifeso (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 July 11, 2023 to Toys “R” Us (Canada) Ltd. (the Owner), in respect of its trademark registration No. TMA841513, for the trademark KOALA KIDS (the Mark).

[2] The Mark is registered for use in association with “Baby and children’s clothing” (the Goods).

[3] The notice required the Owner to show whether the Mark was used in Canada, in association with the Goods, at any time within the three-year period immediately preceding the date of the notice. If the Mark had not been so used, the notice required the Owner to show when it was last in use and the reason for the absence of use since that date.

[4] Section 4 of the Act defines trademark use in association with goods 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.

...

(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.

[5] In this case, the relevant period for showing use is July 11, 2020 to July 11, 2023.

[6] For the reasons that follow, the registration will be maintained.

THE PROCEEDING AND THE EVIDENCE

[7] In response to the Registrar's notice, the Owner furnished an affidavit of Amanda Jazvac, solemnly affirmed on February 12, 2024 (the Jazvac Affidavit). Only the Requesting Party submitted written representations. Both parties were represented at a hearing.

[8] Ms. Jazvac is a Director of Merchandising for the Owner [para 1]. She describes the Owner as the operator of the well-known toy store and baby store chains Toys R Us and Babies R Us [para 2].

[9] Ms. Jazvac states that the Owner sells a wide variety of products bearing the Mark. She states that the following products were sold during the relevant period, in the Owner's Canadian retail stores or to Canadian customers through the Owner's Canadian websites [paras 7 and 24]:

- 31 children's hats;
- 2 pairs of children's jeans;
- 1 pair of children's sunglasses; and
- 60 Halloween bibs.

[10] Ms. Jazvac also provides photographs of these products (except sunglasses) that are representative of how they would have appeared during the relevant period [para 24]. These photographs show the Mark displayed on packaging, hangtags and tags sewn into the products [Exhibits B to E].

REASONS FOR DECISION

[11] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing "deadwood" from the register. The evidence in a section 45 proceeding need not be perfect; indeed, a registered owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act. This burden of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 9]. That being said, sufficient facts must still be provided to allow the Registrar to conclude that the trademark was used in association with the relevant goods or services.

Use in association with the Goods

[12] In its written representations, the Requesting Party submits that the bibs, hats and sunglasses sold by the Owner are not included within the Goods. In particular, the Requesting Party argues that these goods are not "clothing", which the Requesting Party defines as "things such as dresses and trousers that you wear to cover, protect, or decorate your body" [Requesting Party's written representations, para 5]. However, even if I

were to accept and apply the Requesting Party's definition of "clothing", I would still consider bibs, hats and sunglasses to be things that are worn to cover, protect, or decorate the body, falling within that definition. In addition, the goods sold by the Owner during the relevant period are identified in the evidence as being within the scope of the Goods [Jazvac Affidavit, para 19], and the evidence to this effect is to be afforded substantial credibility in the absence of conflicting evidence [*Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para 25]. Furthermore, it is well established that, when interpreting a statement of goods in a section 45 proceeding, one is not to be "astutely meticulous" when dealing with the language used, and the Registrar should avoid expunging a trademark solely on the basis of an ambiguous description of the goods [*Miller Thomson LLP v Groupe Modulo Inc*, 2019 TMOB 118, para 21].

[13] The Requesting Party also submits that the evidence does not establish that the goods identified in paragraph 24 of the Jazvac Affidavit were sold in the ordinary course of trade, and that the sales information in paragraph 24 is an assertion based on hearsay [Requesting Party's written representations, paras 7 and 13]. However, Ms. Jazvac clearly states that "All of [the] sales are either in Toys R Us or Babies R Us retail stores in Canada or sold online to Canadian customers at toysrus.ca or babiesrus.ca" [para 24]. She also states that she has access to the Owner's sales information relating to the products bearing the Mark [para 22]. When the Jazvac Affidavit is read as a whole, I find it reasonable to conclude that the information provided in paragraph 24 is derived from the Owner's sales records, kept in the ordinary course of its business, to which Ms. Jazvac had access. Due to the summary nature of section 45 proceedings, concerns regarding hearsay generally go to the weight of the evidence, rather than its admissibility [*Eva Gabor International Ltd v 1459243 Ontario Inc*, 2011 FC

18, paras 17-18]. Since the Owner's business records would generally be admissible despite the rule against hearsay evidence [*Canada Evidence Act*, RSC 1985, c C-5, s 30(1)], I accept that the information in paragraph 24, stemming from the Owner's records, is reliable.

[14] In summary, the evidence shows that various quantities of children's hats, children's jeans, children's sunglasses and Halloween bibs were sold by the Owner in association with the Mark, during the relevant period [Jazvac Affidavit, para 24]. The evidence includes photographs showing the Mark displayed on these goods or their packaging [Exhibits B to E], and confirms that the photographs are representative of how the Mark appeared on these products during the relevant period [para 24]. This is sufficient to establish the requisite *prima facie* case of use of the Mark in association with "baby and children's clothing", during the relevant period in Canada. Accordingly, the Owner's evidence demonstrates that the Mark was used in Canada, during the relevant period, in association with the Goods, within the meaning of sections 4(1) and 45 of the Act.

DISPOSITION

[15] 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 maintained.

Jaimie Bordman
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2024-10-10

APPEARANCES

For the Requesting Party: Regeena Lifeso

For the Registered Owner: Lawrence Veregin

AGENTS OF RECORD

For the Requesting Party: No agent appointed

For the Registered Owner: Aird & Berlis LLP