

Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2026 TMOB 28

Date of Decision: 2026-02-17

IN THE MATTER OF A SECTION 45 PROCEEDING

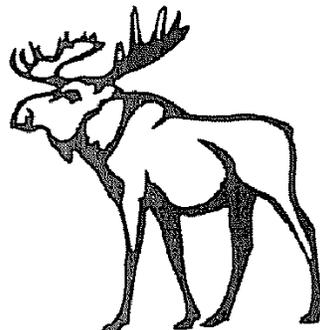
Requesting Party: 14095863 Canada Inc.

Registered Owner: Abercrombie & Fitch Trading Co.

Registration: TMA812,203 for Outlined Moose Design

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA812,203 for the trademark Outlined Moose Design (the Mark), owned by Abercrombie & Fitch Trading Co., an Ohio corporation (the Owner) and shown below:



[2] For the reasons that follow, I conclude that the registration ought to be amended.

THE RECORD

[3] At the request of 14095863 Canada Inc. (the Requesting Party), the Registrar of Trademarks issued a notice to the Owner under section 45 of the Act on December 28, 2024. The notice required the Owner to show whether the Mark had been used in Canada in association with the goods and services specified in 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 this case, the relevant period for showing use is December 28, 2021, to December 28, 2024.

[4] The Mark is registered for use in association with the following goods and services:

Goods

- (1) Jewelry, namely, bracelets; gym bags, tote bags, travel bags.
- (2) Clothing, namely, polo shirts, blouses, sweaters, t-shirts, knit shirts, knit tops, sweatshirts, sweatpants, sweat suits, pants, jogging suits, jeans, shorts, skirts, caps, hats, scarves, jackets, coats, sandals, flip flops, socks, belts, tank tops, underwear, boxer shorts, swim suits, pajamas, sleepwear and thongs.

Services

- (1) Mail order catalogue services and online retail services featuring clothing, footwear, accessories, fragrances and jewelry.

[5] The relevant definitions of “use” in the present case are set out in section 4 of the Act 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.

(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

(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.

[6] In response to the notice, the Owner furnished the affidavit of Lindsay Yeakel Capps, Director, Legal – Intellectual Property of the Owner, sworn on May 27, 2025. Both parties filed written representations; no hearing was held.

EVIDENCE

[7] Ms. Capps states that the Owner has used the Mark, including with minor variations, in Canada for more than 20 years in association with various clothing goods and online retail services, particularly the following goods and services:

- Goods: clothing, namely, polo shirts, blouses, sweaters, t-shirts, knit shirts, knit tops, sweatshirts, sweatpants, sweat suits, pants, jogging suits, shorts, jackets, coats, socks, tank tops, swim suits, pajamas, sleepwear (collectively, the Claimed Goods)
- Services: online retail services featuring clothing and accessories (the Claimed Services)

[8] She states that such goods and services were provided in Canada through the Owner's retail locations in Canada and the Canadian subdomains of its website. She further states that throughout the relevant period, the Owner's licensee AFH Canada Stores Co. (AFH Canada) used the trademark under a licence with terms providing that the Owner exercises control over the character and quality of goods and services offered, performed, and sold in Canada in association with the Mark. Ms. Capps further confirms that all goods sold by AFH Canada originate from the Owner.

[9] As Exhibits A through D, she provides website evidence showing locations of the Owner's retail stores in Canada for the years 2021 through 2024.

[10] As Exhibit F-1 through F-14, Ms. Capps attaches sample photographs of the Claimed Goods, which she states are representative of the appearance of those goods during the relevant period. In each case, a moose design appears on the product itself, as well as the label and/or tag. In instances where the moose design is not clearly visible on the item of clothing, a larger image is provided alongside the photograph of the item of clothing. Ms. Capps correlates each exhibit with one (or, in a few instances, two) of the Claimed Goods. However, I note that in a few instances, the same item of clothing is correlated with multiple goods. For instance, Exhibit F-5, corresponding to “knit sweaters, knit tops”, appears to show the same garments as Exhibit F-3 (“sweaters”) and Exhibit F-4 (“t-shirts”); a single image of pants is shown in Exhibit F-7 (“sweatpants, pants”) and also appears in Exhibit F-8 (“sweat suits, jogging suits”, which also contains the “sweatshirts” shown in Exhibit F-6); Exhibit F-10 (“jackets, coats”) includes only a hoodie sweater also shown in Exhibit F-6 (“sweatshirts”), and Exhibit F-13 (“swim suits”) shows only shorts also shown in Exhibit F-9 (“shorts”). Finally, Exhibit F14 (“pajamas, sleepwear”) includes only shorts, pants, and t-shirts shown elsewhere.

[11] As Exhibits G-1 through G-14, she attaches invoices corresponding to the goods shown in Exhibits F-1 through F-14. Each invoice shows a transfer in Canada during the relevant period of the corresponding product. She further confirms that each product was advertised and offered for sale on the Owner’s Canadian website during the relevant period, and provides combined Canadian online and retail sales figures for each of the years 2021 through 2024, ranging from \$65 million to \$135 million annually. She states that these figures are conservative estimates, and that products displaying the Mark account for at least 25% of the total sales amounts. Finally, Ms. Capps provides evidence indicating that millions of Canadians visited the Owner’s website annually for the years 2021 through 2024.

ANALYSIS

Preliminary comments regarding the Requesting Party’s submissions

[12] I note that in its written representations, the Requesting Party makes reference to several cases that do not appear to exist [Requesting Party’s written representations,

paras 53, 55, 59, 60, 64, 66, 67, 74, 75, 86]. Furthermore, there is at least one instance where the Requesting Party inaccurately quotes passages from the Act [para 11] or case law [paras 13, 18, 19, 23, 71, 72]. For example, in several instances, the Requesting Party inserted “and services” in instances wherein only “goods” had been appears in the original text. Troublingly, paragraphs 71-75 include a number of purported quotations that appear to be completely fabricated. In addition, the submissions repeatedly mischaracterize the Owner’s evidence, including through references to non-existent exhibits [paras 25-30], while also making allegations to the effect that the Owner fabricated portions of its evidence [paras 28-29, 52-53]. If generative artificial intelligence (AI) was relied upon in the preparation of these materials, the Requesting Party clearly failed to verify the correctness of such materials. An alternative explanation is that the Requesting Party intentionally fabricated these cases and quotations in a deliberate attempt to deceive the Registrar. Given the frequency and scope of the errors and omissions, I see no other obvious explanations.

[13] Such conduct by the Requesting Party cannot be condoned. Courts have stated that reliance on decisions that do not exist or do not stand for the relied upon principles can lead to miscarriages of justice [*Zhang v Chen*, 2024 BCSC 285 at para 29; *Ko v Li*, 2025 ONSC 2965 at paras 14–17] and have also awarded costs against the party that made those misrepresentations [*JRV v NLV*, 2025 BCSC 1137; *Hussein v Canada (Immigration, Refugees and Citizenship)*, 2025 FC 1138]. The Owner submitted in its written representations, and I agree, that such conduct can lead to an award of costs against the offending party under section 74.1(1)(b) of the *Trademarks Regulations*, SOR/2018-227 (the Regulations). However, as the Owner did not make such a request pursuant to section 74.2 within the timeframe set out in the Regulations, costs cannot be awarded in this instance.

Use enuring to the Owner

[14] As noted above, Ms. Capps confirms in her affidavit that the Owner exercises control over the character and quality of goods and services offered, performed, and sold in Canada in association with the Mark by AFH Canada, and that all goods sold by AFH Canada originate from the Owner. The Requesting Party’s written representations

erroneously state that “[w]ithout quality control protocols, license agreements, or inspection reports, the licensee’s use cannot be attributed to the Owner” [para 33]. However, the Federal Court has held that there are three main methods by which a trademark owner can demonstrate the requisite control pursuant to section 50(1) of the Act: first, by clearly attesting to the fact that it exerts the requisite control; second, by providing evidence demonstrating that it exerts the requisite control; or third, by providing a copy of the licence agreement that provides for the requisite control [*Empresa Cubana Del Tabaco Trading v Shapiro Cohen*, 2011 FC 102 at para 84]. In this case, Ms. Capps has clearly attested to the fact that the Owner has exerted the requisite control. This is sufficient to establish that any use of the Mark by AFH Canada enures to the Owner.

Use of the Mark

[15] Ms. Capps acknowledges in her affidavit that the moose logo shown evidence differs to some extent from the Mark as registered, including a variant with raised stitching and a variant with contrasting colour, as shown below:



[16] The Requesting Party’s written representations include submissions that these variants do not amount to use of the Mark as registered and that the absence of the Mark as registered on the goods “fundamentally eviscerates the Owner’s claims of proper trademark use” [para 70]. In this respect, it incorrectly claims that “the registrant bears the burden of proving use of the identical mark as registered” [para 43, *sic*]. Its submissions also refer to a separate registration of the Owner, TMA1,229,611, for a moose design in colour. However, the fact that the Owner may own other registered trademarks is neither in evidence before me nor relevant to my determination of this case; it is well-established that an owner may own several associated trademarks and

that the use of one such trademark may also constitute use of other substantially similar trademarks where no person would be deceived [see *Cinnabon Inc v Austin Nichols & Co* (1998), 86 CPR (3d) 241 at para 18; *Smart & Biggar v Rothmans, Benson & Hedges Inc*, 2011 TMOB 78 at para 15].

[17] Instead, in considering whether the display of a trademark constitutes display of the trademark as registered, the question to be asked is whether the trademark was displayed in such a way that it did not lose its identity and remained recognizable, in spite of the differences between the form in which it was registered and the form in which it was used [*Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA)]. In deciding this issue, one must look to see whether the “dominant features” of the registered trademark have been preserved [*Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)]. In this case, the dominant features of the Mark are the outlined moose. This is preserved in both of the above variants, as each depicts a moose facing to the left in the same pose. I do not consider the addition of colour elements or a stitched outline to cause the Mark to lose its identity and become unrecognizable. Indeed, the Federal Court of Appeal noted in *Promafil* that “[w]hat can be drawn and what can be stitched may be somewhat different, especially in finer detail”, and that the dominant features of the trademark at issue were maintained despite such “miniscule differences” [*Promafil* at paras 39-40]. Accordingly, I find that the moose designs shown in evidence amount to the Mark as registered.

Use in association with the goods and services

[18] I note that Ms. Capps does not claim that the Mark was used in association with the goods “Jewelry, namely, bracelets; gym bags, tote bags, travel bags”; “jeans”, “skirts, caps, hats, scarves”, “sandals, flip flops”, “belts”, “underwear, boxer shorts”, or thongs”, or the services “Mail order catalogue services” or the subcategories “footwear”, “fragrances and jewelry”. In its written representations, the Owner submits that these goods and services can still be maintained, as they fall into the same general categories as the Claimed Goods and Services and the Registrar may therefore infer that the Mark was used in association with these goods and services [citing, *inter alia*, *Saks & Co v*

Canada (Registrar of Trade Marks) (1989), 24 CPR (3d) 49 (FCTD); *88766 Canada Inc v Thunder Tiger Model Co*, [2004] TMOB No 2].

[19] However, the cases cited by the Owner do not stand for the proposition that a registered good may be maintained where there is no evidence that it has been sold during the relevant period, merely on the basis that use in association with other registered goods has been shown [see *Saks* at paras 53-54; *Thunder Tiger* at paras 8-9; *Riches, McKenzie & Herbert LLP v Mary Quant Cosmetics Japan Limited*, 2005 CanLII 78243 (TMOB) at para 18]. The applicability of the *Saks* principle “depends on the degree of detail that the registered owner provides and the clarity with which it explains the representative evidence” [*Matthew S George v Dr’s Own, Inc*, 2018 TMOB 147 at para 72]. In this case, Ms. Capps indicates that the Mark was used specifically in association with the Claimed Goods and Services. There is nothing in evidence to suggest that the Mark was used in association with the remaining goods and services, and Ms. Capps appears to concede that the Mark was not so used. Further, as discussed below, the evidence tends to suggest that certain of the Claimed Goods were not sold during the relevant period.

[20] As there is no evidence of special circumstances which would excuse non-use, the registration will be amended to delete the goods and services other than the Claimed Goods and Services.

[21] As for the Claimed Goods and Services, the Requesting Party’s submissions maintain that the “exhibits are entirely disconnected from the registered Goods and Services, rendering the entire submission unreliable and irrelevant”, resulting in “a wholesale collapse of proof that demands the Registrar disregard these exhibits and the Affidavit as a whole entirely” since “permit[ting] such deficient evidence to influence this proceeding would undermine the integrity of trademark enforcement in Canada” [paras 27-29]. As I understand it, the Requesting Party’s submission is that this “wholesale collapse of proof” is based on the fact that the Exhibit F photographs are undated (notwithstanding that Ms. Capps explicitly confirms that they are representative of the appearance of the Owner’s goods during the relevant period) and an allegation that the

Owner improperly redacted the Exhibit G invoices to disguise the fact that the corresponding transactions actually took place in the United States (notwithstanding the fact that each invoice shows a Canadian shipping address). As noted above, the Requesting Party's allegation that the Owner provided "fabricated proof" [para 29] in a "deliberate attempt to mislead" the Registrar [para 28] is absolutely baseless and is particularly egregious given the fact that the Requesting Party's representations include a number of fabricated quotations and even non-existent cases. Otherwise, the Requesting Party's representations amount to an extreme instance of overly technical dissection of evidence that has been deemed to be inconsistent with the purpose of section 45 proceedings, where the evidence as a whole must be considered [see, e.g., *Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB); *MLT Aikins LLP v Caroline Barrett*, 2019 TMOB 91 at para 19].

[22] Instead, I have no difficulty taking Ms. Capps' sworn statements at face value; namely, that the goods shown in Exhibit F depict the goods sold by the Owner during the relevant period, and that the Exhibit G invoices show sales of those corresponding goods in Canada in the normal course of trade. However, although not argued by the Requesting Party, it is a longstanding principle that use of a trademark in association with one specific product cannot generally serve to maintain multiple goods in a registration [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)]. As noted above, the Owner's evidence includes several instances of what appears to be the same pictured product correlated with multiple registered goods. I do not consider the *John Labatt* rule to be applicable to every instance of products being repeated in evidence; for example, Exhibit F-4 depicts four different t-shirt products, some of which also appear in exhibits correlated with the goods "knit shirts", "knit tops", "pajamas", and "sleepwear". This is not an instance of a single product being correlated with multiple goods, but instead, multiple products being shown, which could potentially fall within multiple categories. However, I find that the Owner's evidence does not support a finding of use of the Mark in association with the following goods for the reasons set out below:

- “pants”: Ms. Capps correlates the registered goods “sweatpants” and “pants” with a single image of pants shown in Exhibit F-7. Where use in association with a specific good could potentially support two goods in a registration, the more specific registration will be maintained over the more generalized [*Sharp Kabushiki Kaisha v 88766 Canada Inc* (1997), 72 CPR (3d) 195 (FCTD) at paras 14-16; *DLA Piper (Canada) LLP v Huer Foods Inc*, 2019 TMOB 62 (TMOB) at para 19]. Accordingly, I find that the Owner has shown use of the Mark in association with “sweatpants” but not with “pants”.
- “sweat suits” and “jogging suits”: the products correlated with these goods shown in Exhibit F-8 include the same sweater, hoodie sweater, and pants depicted elsewhere. As each of these products would appear to correlate more readily with other registered goods (“sweaters”, “sweatshirts”, and “sweatpants”, respectively), I am not satisfied that the Owner has shown use of the Mark in association with “sweat suits” or “jogging suits”.
- “jackets” and “coats”: Ms. Capps correlates each of the registered goods “jackets”, “coats”, and “sweatshirts” with an image of the same hoodie sweater. As a hoodie sweater more readily corresponds to “sweatshirts” than “jackets” or “coats”, I find that the Owner has shown use of the Mark in association with “sweatshirts” but not “jackets” or “coats”.
- “swim suits”: Ms. Capps correlates this registered good with two images of shorts which are also correlated with “shorts”, “pajamas”, and “sleepwear”. As the depicted products would appear to more readily correspond to the latter registered goods, I am not satisfied that the Owner has shown use of the Mark in association with “swim suits”.

[23] As there is no evidence of special circumstances excusing non-use of any of these goods, the registration will be amended to delete the goods “pants”, “sweat suits”, “jogging suits”, “jackets”, “coats”, and “swim suits”.

[24] Finally, with respect to the services “online retail services featuring clothing and accessories”, Ms. Capps has attested that the Owner advertised, offered for sale, and

sold the depicted goods through its website in Canada during the relevant period, and has provided sales figures, including online sales. Bearing in mind that “in certain cases, statements of services contain overlapping and redundant terms in the sense that the performance of one service would necessarily imply the performance of another” [Gowling Lafleur Henderson LLP v Key Publishers Co, 2010 TMOB 7 at para 15], I am satisfied that the Owner has shown use of the Mark in association with the registered services within the meaning of the Act.

DISPOSITION

[25] In view of all of the foregoing, 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 amended to delete the entirety of goods (1), “sweat suits, pants, jogging suits, jeans”, “skirts, caps, hats, scarves, jackets, coats, sandals, flip flops”, “belts”, “underwear, boxer shorts, swim suits”, and “thongs” from goods (2), and “Mail order catalogue services”, “footwear”, “fragrances and jewelry” from the services.

[26] The amended registration will be as follows:

Goods

- (1) Clothing, namely, polo shirts, blouses, sweaters, t-shirts, knit shirts, knit tops, sweatshirts, sweatpants, shorts, socks, tank tops, pajamas, sleepwear.

Services

- (1) Online retail services featuring clothing, accessories.

G.M. Melchin
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: No agent appointed

For the Registered Owner: CPST Intellectual Property Inc.