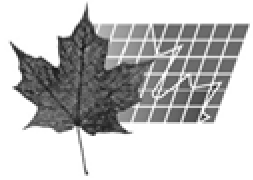

Canadian Intellectual Property Office

2026 TMOB 87 (CanLII)

THE REGISTRAR OF TRADEMARKS

Citation: 2026 TMOB 87

Date of Decision: 2026-04-28

IN THE MATTER OF AN OPPOSITION

Opponent: Abercrombie & Fitch Trading Co.

Applicant: 14095863 CANADA INC.

Application: 1949256 for Chilly Moose (Brand Name) Adventure Awaits (Tag Line)

INTRODUCTION

[1] 14095863 CANADA INC. (the Applicant) has applied to register the design mark Chilly Moose (Brand Name) Adventure Awaits (Tag Line), shown below (the Mark):

[2] The application for the Mark lists the following goods:

Goods (Nice class & Statement)

9	(1) Refrigerated equipment and environmental control apparatus, namely, portable electric refrigerated coolers and portable freezers
21	(2) Outdoor equipment, namely table glassware and beverage glassware, water bottles, thermally insulated tumblers, thermally insulated food or beverage containers, reusable straws, portable outdoor coolers for beverages
25	(3) Men's and women's apparel, namely shirts, t-shirts, sweatshirts, hats, socks, and mittens.

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[3] Abercrombie & Fitch Trading Co. (the Opponent) opposes the registration of the Mark. The grounds of opposition are primarily based on alleged confusion between the Mark and various of the Opponent's trademarks for Moose designs, and unlicensed use of the Mark.

[4] For the reasons set out below, the opposition is successful with regard to the clothing goods (3) in Nice class 25, and rejected with regard to the remaining goods.

THE PROCEEDING

[5] The application was filed on March 4, 2019, and was advertised pursuant to section 37(1) of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on August 9, 2023.

[6] The Opponent filed a statement of opposition on January 24, 2024. The Applicant filed a counter statement on March 18, 2024. The Applicant requested and was subsequently granted leave to file an amended statement of opposition on January 27, 2025. In response, the Applicant filed an amended counter statement which was made of record on April 22, 2025.

[7] In support of its opposition, the Opponent filed the affidavit of Lindsay Yeakel Capps, sworn on July 18, 2024 with Exhibits A through K, as well as certified copies of seven of its Canadian Trademark Registration.

[8] In support of the application, the Applicant filed the affidavit of Paolo Greco, sworn on November 15, 2024 with Exhibits A through N.

[9] In reply, the Opponent filed the affidavit of Mireille Seepersad, sworn on December 16, 2024, with Exhibits A through H, and with certified copies of Corporate Profile Reports for Chilly Moose Ltd. and the Applicant.

[10] None of the affiants were cross-examined. Both parties filed written representations. Representations were made at a hearing by the Opponent's agent and by Manu Patel, an internal representative of the Applicant.

GROUNDS OF OPPOSITION & ONUS

[11] The amended statement of opposition alleges that: (i) the Mark is not registrable pursuant to sections 12(1)(d) and 38(2)(b) of the Act; (ii) the Applicant is not the person entitled to registration to sections 16(1)(a) and 38(2)(c) of the Act; (iii) the Mark is not distinctive pursuant to sections 2 and 38(2)(d) of the Act; (iv) the Applicant has not used and does not propose to use the Mark pursuant to section 38(2)(e) of the Act; and (v) the Applicant was not entitled to use the Mark pursuant to section 38(2)(f) of the Act.

[12] For each ground of opposition, there is an initial evidential burden on the Opponent to adduce evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition are true. If this initial burden is met, then the Applicant bears the legal onus of satisfying the Registrar that, on a balance of probabilities, the ground of

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opposition should not prevent registration of the Mark [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD)].

EVIDENCE

Opponent's Evidence

Certified Copies of Trademark Registrations

[13] As part of its evidence, the Opponent filed certified copies of Canadian Trademark Registration Nos. TMA1052106, TMA1080132, TMA730185, TMA812203, TMA956795, TMA982118, and TMA988114.

Affidavit of Lindsey Yeakel Capps

[14] The Opponent also filed the affidavit of Lindsey Yeakel Capps. Ms. Capps is the Director, Legal – Intellectual Property of Abercrombie & Fitch Co., the parent of both the Opponent (the registered owner of the Canadian trademark registrations relied upon), and AFH Canada Stores Co. (the Opponent's licensee) [para 15] (referred to below, collectively, as A&F).

[15] Ms. Capps describes A&F as a retailer of clothing, fashion accessories, personal care products and related goods [para 3]. She states that A&F sells products and offers such services in association, notably, with various Moose and Moose-formative trademarks, and has done so for over 20 years [paras 5-6]. She explains that such trademarks are either embroidered, printed or displayed directly on the products or appear on their containers, labels or hangtags [para 8, Exhibit B]. She states that such trademarks are also displayed on in-store signage at all of A&F's seven retail stores in Canada, as well as on A&F's website [paras 10-12 and 16, Exhibits C-F].

[16] Ms. Capps states that A&F has sold its products and services in Canada in association with its Moose and Moose-formative trademarks, which have been used extensively since 2003, with over as many as four thousand unique items bearing the trademarks in some seasons [para 17]. She states

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that, since 2010, revenues from sales in Canada have exceeded US$50 million per year, and provides a yearly breakdown [paras 18-19]. She explains that, although A&F does not maintain sales data by trademark, "based on historical data, including review of and evaluation of records and documents maintained in the regular course of A&F's business", 25% of the total revenues provided can be reasonably attributed to sales of products sold in association with the Moose and Moose-formative trademarks [paras 20-21, Exhibit G].

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[17] Ms. Capps also explains that A&F's advertising of its products and services in association with the Moose and Moose-formative trademarks has been substantial. Such advertising was done via the A&F Canadian website, social media and promotional emails. She provides printouts of A&F's Canadian website showing the trademarks, and states that, for 2023, the site received over 22 million hits originating from Canada [paras 22-24, Exhibits H & I]. She also provides certain details regarding A&F's social media platform posts and promotional emails; however, no Canada-specific data is provided, other than a statement that the promotional emails were sent using a list-serve "including many located in Canada" [paras 25-26].

[18] Ms. Capps provides A&F's North American marketing and promotional expenditures for the "A&F Moose Products & Services" since 2010. These sums range from 25 to 117 million USD. Ms. Capps states that such expenditures include expenses regarding A&F's website and social media accounts "which are not territorial in nature", but does not breakdown or approximate the extent to which such expenses pertain to Canada.

Applicant's Evidence - Affidavit of Paolo Greco

[19] Mr. Greco is the Applicant's Director [para 1]. He states that the Applicant has been using the Mark since at least as early as October 1, 2018. He explains that the Applicant has been operating its website

displaying the Mark since 2019 and provides current screenshots [paras 4-5, Exhibit A].

[20] Mr. Greco explains that, since 2019, in addition to sales via the Applicant's website, the Applicant has sold goods bearing the Mark "across Canada through various distributors", for which he provides representative invoices [paras 6-7, Exhibit B]. I note that the representative invoices are in the name of Chilly Moose Limited.

[21] Mr. Greco states that net sales for products "bearing the Trademark in Canada exceed CAD $16,000,000" [para 8]. He provides a breakdown with a sales summary and representative invoices per category as follows:

(a) Class 9 goods: over $400,000 [paras 9-10, Exhibit C];

(b) Class 21 goods: over $13,000,000 [paras 11-12, Exhibit D]; and

(c) Class 25 goods: over $140,000 [paras 13-14, Exhibit E].

[22] I note that, again, the representative invoices are indicated as being issued by Chilly Moose Limited and the sales summary documents also indicate Chilly Moose Limited and do not reference the Applicant.

[23] Mr. Greco states that the marketing expenditures for the Mark have exceeded CAD $1,400,000 and provides copies of marketing materials and "representative screenshots of the web pages for the Applicant's current social media pages" [paras 16-18, Exhibit G].

[24] Mr. Greco details searches he conducted himself, online on the Canadian Trademarks Database, querying the terms "MOOSE", "MOOSE DESIGN" and "MOOSE LOGO" in the "TM Lookup" field with the status "All Active". He attaches printouts showing the specific search parameters and a list of the results [paras 19-26, Exhibits H-J]. I note, however, that the

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details of the individual resulting entries are not included. As such, it is not possible to identify the entries' owner or the specific goods and services covered (only a list of the Nice Classes of each result is shown, and is sometimes incomplete). Moreover, although the searches were limited to active trademarks, the results include some trademarks that are still pending.

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[25] Mr. Greco also describes various online searches he conducted using the Google search engine for clothing items with the terms "MOOSE" and "MOOSE Design"/"MOOSE Logo" and provides printouts of the search summary results [paras 27-32, Exhibits K-M].

[26] Mr. Greco also states that he attended "various retail outlets across Canada in 2023 and 2024 selling clothing and apparel related goods bearing design elements, logos, graphical representations and pictorials of moose and moose related designs" and provides resulting photographs [paras 33-34, Exhibit N].

Opponent's Reply Evidence – Affidavit of Mireille Seepersad

[27] As its reply evidence, the Opponent filed the Affidavit of Mireille Seepersad with certified copies of the Corporate Profile Report for the Applicant obtained from Corporations Canada and of the Corporate Profile Report for Chilly Moose Ltd. obtained from the Ministry of Public and Business Service Delivery of Ontario.

[28] Ms. Seepersad is an assistant employed by the Opponent's agent. She attaches the following documents to her affidavit:

(a) Printouts from the website *chillymoose.ca* [para 2, Exhibits A & B-1 through B-25];

(b) A copy of a search for and details of registration No. TMA1235437 for the trademark GRANITE TOUGH, owned by Chilly Moose Ltd. [para 3, Exhibits C & D]; and

(c) A copy of search results from the Government of Canada "Search for a Federal Corporation" webpage for the Applicant, and a copy of its Certificate of Incorporation [para 4, Exhibits E-H].

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ANALYSIS

Preliminary Issues

Applicant's Written Representations

[29] At the outset, I consider it necessary to address certain issues with the Applicant's written representations.

[30] First, the written representations refer to facts not in evidence. This includes references to a trademark license in favour of Chilly Moose Ltd. appended to a security interest granted in favour of Mr. Greco, purportedly filed with the Registrar, but not filed as evidence in this opposition proceeding. However, the representations also include facts embedded within argument, for example, regarding the businesses and channels of trade of the parties. I have not considered facts or documents referenced only in the Applicant's written representations [see section 49 of the *Trademarks Regulations*, SOR/2018-227 (the Regulations); and *Mattamy Homes Limited v Matti Homes Inc*, 2025 TMOB 260].

[31] Second, paragraph 17 of the written representations states that "the Applicant respectfully requests that the opposition be dismissed in its entirety, *with costs awarded to the Applicant*". However, section 58.2 of the Regulations requires that cost requests be filed within 14 days of a hearing or the deadline for requesting one; that the request be filed using TMOB e-services; and that the reasons and circumstances for the request be

specified. The apparent request for costs in the Applicant's written representations does not comply with the Regulations and has therefore not been considered.

[32] Most problematic, however, is that the Applicant's written representations contain references to cases that do not exist or do not support the legal principles in support of which they are cited, which suggests the undisclosed use of generative artificial intelligence (AI) in their preparation, and a failure to verify the correctness of such materials. In addition, the written representations do not always accurately identify or characterize the evidence or applicable legal principles, and the arguments are often based on a misunderstanding or misapplication of fundamental issues including, for example, initial evidential burden and legal onus, grounds of opposition and basis of registration, or the effect of statutory amendments.

[33] These are serious issues that significantly diminish the cogency and reliability of the Applicant's representations, particularly in the present case where, earlier in the proceeding, the Registrar brought the practice notice on the use of AI to the Applicant's attention, and strongly cautioned it to verify the accuracy of its submissions.

[34] I recognize that the Applicant is self-represented. However, as noted by the Federal Court, "being self-represented carries with it obligations of self-education" [*Arora v Canadian National Railway*, 2026 FC 82 at para 31]. Moreover, the Applicant remains responsible for ensuring the accuracy of its submissions [see *Llyod's Register Canada Ltd v Munchang Choi*, 2025 FC 1233 citing *Choi v Lloyd's Register Canada Limited*, 2024 CIRB 1146 at paras 73-79], even more so after having been cautioned to this effect.

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[35] Nevertheless, as discussed below, I have attempted to consider and address the essence of the Applicant's representations.

Use of the Mark by Chilly Moose Limited/Ltd.

[36] In support of the ground of opposition based on section 38(2)(e) and part of the ground based on section 2 of the Act, the Opponent argues that the evidence shows unlicensed use of the Mark by an entity other than the Applicant, namely Chilly Moose Limited/Ltd.

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[37] The Applicant submits that the Mark is duly licensed to Chilly Moose Ltd. pursuant to section 50 of the Act. In this regard, the Applicant references a license filed with the Registrar, but not as evidence in this proceeding. As such, as explained above, I cannot consider it.

[38] The Applicant also argues that Paolo Greco has a controlling interest in both the Applicant and Chilly Moose Ltd., and is the "controlling mind" behind both entities. Again, the Applicant has not evidenced these facts.

[39] That being said, section 50(1) of the Act does not require a written agreement, and evidence of control by the owner of the trademark can support the existence of an implied license agreement [*Well's Dairy Inc v UL Canada Inc*, 2000 CanLII 15538 (FC), 7 CPR (4th) 77]. Also, the same individual being president, director or officer of both the owner and user of the trademark *can* be sufficient to satisfy the control requirements of section 50 of the Act [*TGI Friday's of Minnesota Inc v Canada (Registrar of Trade Marks)* (1999), 241 NR 362 (FCA); *Goodwill Industries International Inc v Vedett IP Corporation*, 2015 TMOB 212].

[40] Moreover, I note that, as reply evidence, *the Opponent* provided the Profile Report of Chilly Moose Ltd. from the Ontario Ministry of Public and Business Service Delivery, as well as documents obtained from Corporations Canada regarding the Applicant. These documents show that Paolo Greco

and Kristi Greco are the only two directors of Chilly Moose Ltd., and that the company's address is the same as that of its directors. The documents also show that Paolo Greco is the Applicant's only director, and the one individual with significant control, directly holding more than 75 of its shares.

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[41] Considering the evidence as a whole, I am prepared to infer that, at the very least, there has been an implied license between the Applicant and Chilly Moose Ltd., and that control of the character or quality of the goods sold by Chilly Moose Ltd. is controlled by the Applicant, via Mr. Greco. As such, I accept that any evidenced use of the Mark by Chilly Moose Ltd. enures to the benefit of the Applicant pursuant to section 50 of the Act.

Registrability Ground

[42] Pursuant to sections 38(2)(b) and 12(1)(d) of the Act, the Opponent alleges that the Mark is not registrable as it is confusing with various of its registered trademarks. The material date for assessing this ground of opposition is the date of this decision [*Park Avenue Furniture Corp v Wickers/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)].

[43] An opponent's initial burden is met with respect to a section 12(1)(d) ground of opposition if the relied-upon registration(s) remain in good standing as of the material date. I have exercised my discretion to check the register [see *Quaker Oats Co of Canada v Menu Foods Ltd*, 1986 CanLII 7700 (TMOB), 11 CPR (3d) 410].

[44] As of the date of this decision, three of the seven registrations alleged by the Opponent have been expunged; only the four identified in the table below are extant (hereinafter, collectively, the "MOOSE Trademarks"). Of these four, three were the subject of section 45 proceedings for which the Registrar only recently issued decisions deleting certain goods and services. Although these deletions are not yet reflected on the register, they are

reflected in the table below. I note, however, that the deletions do not substantively impact the analysis or outcome that follows.

Registration	**Trademark**	**Goods and/or services**
TMA730185	Solid Moose Design	**Goods** 3 (1) Fragrances, namely, perfume and colognes. 18 (3) Gym bags, tote bags and travel bags. 25 (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** 35 (1) Online retail services featuring clothing, footwear, accessories, and fragrances. 35 (2) Retail store services.
TMA812203	Outlined Moose Design	**Goods** (2) 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.
TMA982118	Moose Design (Solid)	**Goods** (1) Carrying cases for mobile computers; Sunglasses.

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Registration	Trademark	Goods and/or services
TMA956795	Moose Design (Solid)	**Goods** (1) blankets for outdoor use

[45] Given the four extant registrations, the Opponent has satisfied its initial evidential burden for this ground. I must now assess whether the Applicant has met its legal onus. As nothing substantive turns on distinction between the Opponent's registrations, I will apply the test for confusion as between the Mark and the Opponent's registered trademarks collectively, as I note was done in the Opponent's representations.

Test for Confusion

[46] A trademark is confusing with another trademark if the use of both in the same area would be likely to lead to the inference that the goods or services associated with the trademarks are manufactured, sold, leased, hired or performed (as the case may be) by the same person [sections 6(1) and (2) of the Act]. The issue of confusion is to be considered as a matter of first impression in the mind of a casual consumer somewhat in a hurry, who sees the applied-for trademark at a time when they have no more than an imperfect recollection of the opponent's trademark. This casual, hurried consumer does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the trademarks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 20].

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[47] Applying the test for confusion is an exercise in finding facts and drawing inferences [*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 102 (*Masterpiece*)]. All surrounding circumstances of the case must be considered, including those listed at section 6(5) of the Act. These criteria are not exhaustive, and different weight will be given to each one in a context-specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54].

Inherent Distinctiveness and Extent Known

[48] The Opponent argues that its MOOSE Trademarks are inherently very distinctive as there is nothing in the design of a moose that suggests, much less describes, any of its goods or services.

[49] The Applicant submits that the Opponent's trademarks are "highly descriptive of outdoor recreational activities and therefore weak" [Applicant's written representations, at para 59]. It argues this is in contrast with the Mark, which it submits "combines descriptive wording with distinctive design elements" [Applicant's written representations, at para 60]. I note that later in its written representations, albeit in the context of a different issue, the Applicant submits that:

> […] Combining the dominant "CHILLY MOOSE" wordmark with a stylized moose graphic, integrated pine trees, the evocative "ADVENTURE AWAITS" slogan, and "est. 2018" with maple leaf motifs, the mark forms a cohesive Canadian outdoor adventure brand narrative […]. [Applicant's written representations at para 77].

[50] As such, as acknowledged by the Applicant itself, in this case, rather than adding to its inherent distinctiveness, the additional elements serve to make the Mark as a whole at least somewhat suggestive of products for use during "Canadian outdoor adventure" activities, including notably the "outdoor equipment" listed in the application. Moreover, the "CHILLY" word component of the Mark constitutes a play on words that is nevertheless at

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the very least evocative of goods (1) and some of goods (2) listed in the application given their cooling/refrigerating/insulating functions.

[51] With regard to the moose design component of the trademarks, while I agree that a moose may be evocative of the outdoors or nature, I do not consider it to be suggestive or evocative of products or services that are not described in relation to the outdoors or outdoor activities. As such, I consider both the trademark and the Opponent's MOOSE Trademarks to have a similar degree of inherent distinctiveness for general clothing.

[52] With regard to the extent to which the MOOSE Trademarks are known, the Opponent argues that its evidence clearly establishes their longstanding use since 2003, thus for over 20 years, as well as their extensive advertising and promotion. It argues that its MOOSE Trademarks have therefore become very well known.

[53] The Applicant criticizes the Opponent's evidence in this regard, arguing that it is largely based on data from the United States and is not Canada specific, and that the statements and information provided by Ms. Capps is not substantiated by specific documentation.

[54] I disagree with the Applicant's critiques of the Opponent's evidence regarding the use of the MOOSE Trademarks. Ms. Capps provides clear statements pertaining specifically to the market in Canada with regard to how the MOOSE Trademarks appeared in association with A&F's various products and services and she provides images which she states are representative. She explains that sales are not tracked by trademark, but that she consulted and relied on internal documentation to determine what portion of total sales in Canada could reasonably be attributed to products and services displaying the MOOSE Trademarks. I accept Ms. Capps' evidence that the MOOSE Trademarks were used in Canada since 2003 in

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association with clothing-type products and related retail services, and that associated revenues in Canada conservatively represented millions of dollars per year, at least since 2010.

[55] With regard to the Opponent's evidence of advertisement and promotion of the MOOSE Trademarks, however, I agree that it is somewhat vague and does not attempt to separate out or explain what portion relates to Canada. That being said, the views of the Opponent's website *from Canada* in 2023 alone are in the tens of millions and the marketing expenditures since 2010, which include Canada, are substantial.

[56] I therefore accept that the Opponent's MOOSE Trademarks have become well known, if not very well known, in Canada in association with clothing and clothing related services.

[57] With regard to the Mark, the Applicant submits that it has used it since October 1, 2018 and has had millions of dollars in sales in Canada, primarily in association with its outdoor equipment-type products in Nice Class 21. It also submits that it has spent over 1.4 million dollars advertising and promoting the Mark, although no breakdown of this figure is provided either by year or product. The Applicant also provides printouts of its website and social media accounts dated November 2024. I note that no historical data is provided. That being said, the Applicant's social media accounts do show thousands of likes, followers and/or views as of that date.

[58] The Opponent criticizes various aspects of the Applicant's evidence. It argues notably that there are inconsistencies in the evidence of sales and that not all the Applicant's products seem to display the Mark, making the sales figures unreliable. It also argues that the Applicant's own evidence establishes use only since 2019, at best.

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[59] At the hearing, the Applicant maintained its claimed date of first use of October 1, 2018, although it was not able to point to any specific statements or documents in the evidence substantiate this date.

[60] I agree with the Opponent that the Applicant's evidence does not support its claimed date of first use of the Mark. Indeed, Mr. Greco's evidence is that its goods are sold via its website, which has been operating only since 2019, and via various distributors, again only since 2019. The earliest invoice provided, although only representative, is nevertheless only dated from 2021. The sales summaries provide global figures from October 1, 2018 to November 5, 2024, however no details or explanations regarding how they were generated are provided. This evidence therefore does not serve to demonstrate sales since October 1, 2018. Considering the evidence as a whole, I accept that the Applicant has used the Mark since 2019 in association with at least some of goods (1), (2) and (3), given notably the website evidence and the sales summaries.

[61] With regard to the Applicant's evidence of advertising and promotion of the Mark, I am satisfied that it shows the Mark has become known, at least to some extent, particularly with the Applicant's outdoor equipment/ insulated tumbler-type products, as the vast majority of sales in volume and promotional materials relate to such products, but only as of late 2024.

[62] As such, I find that overall, the inherent distinctiveness and extent to which the trademarks have become known strongly favour the Opponent with regard to clothing-related products and services, but that these factors favour the Applicant with regard to non-clothing products.

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Length of Time in Use

[63] Pursuant to the discussion above, I find that the Opponent has been using the MOOSE Trademarks in association with clothing goods and related services since 2003, well before the Applicant has been using the Mark.

[64] I also find that the Applicant has been using the Mark in association with the refrigerated equipment goods (1) in Nice Class 9, and the outdoor equipment goods (2) in Nice Class 21, since 2019. In addition, I find that there is no evidence of the Opponent using the MOOSE Trademarks in association with these or similar goods.

[65] As such, again I find that this factor strongly favours the Opponent, but only with regard to clothing related products and services.

Nature of the Goods and Services and Nature of the Trade

[66] The Opponent argues that there is direct overlap with regard to the clothing-related goods and submits that the businesses of the Applicant and the Opponent also directly overlap accordingly. It argues that, given the extensive use of the MOOSE Trademarks, there is a reasonable likelihood of confusion for the other products specified in the application as well.

[67] The Applicant submits that the nature of the parties' businesses and trades are entirely different, including their channels of trade and target customers, although it does not identify the specific evidence it relies on to make these arguments.

[68] Under this ground of opposition, it is the statement of goods and services as defined in the registrations relied upon by the Opponent and the statement of goods in the application that govern the assessment of the likelihood of confusion [*Henkel Kommanditgesellschaft auf Aktien v Super*

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Dragon Import Export Inc (1986), 12 CPR (3d) 110 (FCA); *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[69] In assessing the nature of the trades of the parties, the assessment should focus on the parties' entitlement to sell their respective goods through a given channel of trade rather than whether they in fact do so [*United Artists Pictures Inc v Pink Panther Beauty Corp*, 1998 CanLII 9052 (FCA); *Liverton Hotels International Inc v Diva Delights Inc*, 2015 TMOB 53 at para 48].

[70] In the present case, there is direct overlap between the clothing products in the application for the Mark and the clothing in the Opponent's registrations. Moreover, neither the application nor the registrations contain limitations as to the channels of trade available to the parties. The nature of the goods and the nature of the trade therefore strongly favour the Opponent as it pertains to clothing-related goods and services.

[71] I note that the Opponent's registrations contain other registered goods including fragrances, bags and computer carrying cases, sunglasses and blankets for outdoor use. I consider these goods to be in the nature of clothing accessories, even in the case of blankets notwithstanding that they are described as "for outdoor use".

[72] I also note that the Opponent's evidence is not particularly specific with regard to any of these clothing accessory-type goods. Indeed, the vast majority of the evidence relates to clothing, and the Opponent has not evidenced particular brand extension efforts. Indeed, the Opponent's written representations regarding non-clothing products are limited to claiming a reasonable likelihood of confusion with the class 9 and class 21 goods in the application in view simply of the Opponent's " […] substantial goodwill in the A&F Moose Trademarks by virtue of the extensive and longstanding use

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thereof” [Opponent’s written representations, para 70]. However, I have found this goodwill extends only to clothing-related products and services.

[73] I consider clothing and clothing accessory-type products to be very different in nature from the refrigerated equipment such as portable freezers and outdoor equipment such as insulated tumblers specified in the application for the Mark.

[74] I therefore find that this factor strongly favours the Opponent with regard to goods (3) in the application, but favours the Applicant with regard to goods (1) and (2).

Degree of Resemblance

[75] In *Masterpiece*, the Supreme Court of Canada stated that section 6(5)(e), the resemblance between the trademarks, will often have the greatest effect on the confusion analysis [at para 49] and that, while the first word in the trademark may be the most important in some cases, the preferable approach is to consider whether there is an aspect of the trademark that is particularly “striking or unique” [at para 64].

[76] The Opponent submits that its MOOSE Trademarks and the Mark have a very high degree of resemblance. It argues that the moose design is the most striking and unique feature of its trademarks as well as of the Mark; that the moose designs are very similar; and that its trademarks are essentially entirely subsumed within the Mark. It argues that, as a matter of first impression, a consumer would assume that goods bearing the Mark come from the Opponent, and that any additional design or word elements in the Mark would not affect this.

[77] I understand the Applicant’s position to be that the most striking features of the Mark are the moose design and the word element “CHILLY MOOSE”, and that the various word and design elements, when considered

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as a whole, create a “singular commercial impression” which is “a stark contrast to the Opponent’s contextually barren animal outlines” [Applicant’s written representations at para 77].

[78] In my view, the most striking or unique feature of the MOOSE Trademarks is the unitary design as a whole, whereas the most striking or unique feature of the Mark is the combination of the moose design and the words CHILLY MOOSE, given notably their size, the bold font and the top and bottom lines that link and relate the two components.

[79] Thus, both the MOOSE Trademarks and the Mark share a design of a moose, a striking or unique element. I agree with the Opponent that the moose designs themselves are visually similar, particularly in the case of the solid MOOSE Trademarks, which, like the Mark, shows the full body of a solid moose in profile.

[80] That being said, the striking or unique word component of the Mark, “CHILLY MOOSE”, including its outline, is entirely absent from the MOOSE Trademarks. Moreover, although striking or unique aspects are particularly noteworthy, trademarks must nevertheless be considered in their entirety. Here, the Mark contains several other elements, both word and design, which although not individually striking or unique, add additional elements that distinguish the MOOSE Trademarks from the Mark.

[81] As such, although the trademarks at issue share one similar striking or unique feature, overall, I find that the trademarks are slightly more different than alike in appearance, sound and in idea suggested. I therefore find this factor slightly favours the Applicant, although not particularly strongly.

Surrounding Circumstance – Family of MOOSE Trademarks

[82] The Opponent argues that it has a family of MOOSE Trademarks, which affords them a broader scope of protection.

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[83] However, of the seven registrations pleaded by the Opponent, only four remain extant and, as shown above, three are for the same moose in solid form, and one is for the same moose in outline. This does not, in my view, constitute a family of trademarks. Rather, I consider that the Opponent has several registrations covering different goods and services, but for essentially the same, or at best only two trademarks, and as it has been said, "two … marks do not a family make" [*U L Canada Inc v Wells' Dairy, Inc*, 1999 CanLII 19471 (TMOB); see also *Arterra Wines Canada, Inc v Diageo North America, Inc*, 2020 FC 508 at para 43].

[84] Accordingly, at best for the Opponent, I do not consider this to be an additional surrounding circumstance that is meaningfully in its favour.

<u>Surrounding Circumstance – State of the Register and State of the Marketplace</u>

[85] The Applicant evidences the entries resulting from various searches of the Canadian Trademarks Database as well several online searches and photographs from various stores, in support of its position that the word "moose" and moose designs are common in the Canadian marketplace.

[86] State of the register evidence is only relevant insofar as inferences about the state of the marketplace can be made from it [*Ports International Ltd v Dunlop Ltd*, 1992 CanLII 7031 (TMOB); and *Welch Foods Inc v Del Monte Corp*, 1992 CanLII 15408 (FC)]. Such inferences can only be drawn where large numbers of relevant *registrations* are located [*Maximum Nutrition Ltd v Kellogg Salada Canada Inc*, 1992 CanLII 14792 (FCA)].

[87] In this case, although the Applicant has indicated the query terms used, it has not provided particulars of any of the register entries resulting from its various searches. As mentioned above, the Applicant's searches were not limited to registered trademarks, and neither the owner nor the specific goods and services for each entry are provided. Absent such details,

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the potential relevance of the entries cannot be assessed, and the Registrar does not exercise discretion to take cognizance of its own records except to verify whether claimed trademark registrations and applications are extant [see *Quaker Oats*, *supra* at 411 and *Royal Appliance Mfg Co v Iona Appliance Inc* (1990), 32 CPR (3d) 525 (TMOB)]. I therefore give these search results little weight, if any.

[88] With regard to the various internet searches, there is insufficient basis to enable me to conclude that any of the results pertain to Canada, much less that the searches show products that were available and sold in the Canadian market. With regard to the photographs from various stores visited in unspecified locations in Canada by Mr. Greco in 2023 and 2024, there is no evidence as to the extent of sales of any of the clothing items shown. Moreover, as noted by the Opponent, some do not clearly display a moose design, some show a moose design that is merely ornamental, and several refer to locations outside of Canada including Boston, Maine, Colorado and Montana. Again, I give this evidence very little weight, if any.

[89] I note that, although not expressed in so many words, at the hearing, the representative of the Applicant invited me to take judicial notice of the moose as a Canadian symbol and thus as common in Canada. Willing as I may be to take judicial notice that the moose is an iconic Canadian symbol, this is altogether different from taking judicial notice of the word "moose" or designs thereof having any particular level of use or commonality in the market, which I decline to do.

[90] As such, I find the evidence insufficient to conclude that the word "moose" or moose designs are sufficiently common in the Canadian market place for this to be a surrounding circumstance meaningfully in the Applicant's favour.

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Conclusion on Confusion

[91] As stated above, the Applicant bears the burden of demonstrating that, as a matter of first impression in the mind of a casual consumer, on a balance of probabilities, the Mark is not confusing with each of the Opponent's MOOSE Trademarks. I do not consider that the Applicant has met this burden with regard to the applied-for clothing goods in Nice Class 25. Given notably that there is direct overlap in clothing goods, that the MOOSE Trademarks are well known (if not very well known) in association with clothing, and that the moose design components of the trademarks are visually similar, I am not satisfied that there is no likelihood of confusion, notwithstanding the differences between the trademarks.

[92] However, I reach a different conclusion in respect of goods (1) and (2). I consider them to be very different in nature to clothing, and the Opponent has not established use or reputation of its MOOSE Trademarks in association with such goods. As such, given the different nature of the goods and the overall differences between the MOOSE Trademarks and the Mark, I am satisfied that the Applicant has met its legal onus to demonstrate, on a balance of probabilities, that there is no likelihood of confusion with regard to such goods.

[93] Thus, the non-registrability ground of opposition succeeds for goods (3) being the clothing goods in Nice Class 25, but is rejected for goods (1) being the refrigerated equipment and environmental control apparatus in Nice Class 9, and goods (2) being outdoor equipment in Nice Class 21.

Non-entitlement to Registration Ground

[94] The opponent pleads that the Applicant is not entitled to registration pursuant to sections 16(1)(a) and 38(2)(c) of the Act as, since the date of first use of the Mark, it was confusing with various of the Opponent's

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trademarks comprised of or containing a moose design. As I consider the Opponent’s registered MOOSE Trademarks discussed above to represent their best case, I will limit my comments thereto.

[95] I am satisfied that the Opponent has met its initial evidential burden of showing use of its MOOSE Trademarks with clothing since well before the Applicant’s date of first use of the Mark. The legal onus is therefore on the Applicant to show absence of likelihood of confusion.

[96] As this ground turns on the issue of confusion, I arrive at the same conclusion as for the non-registrability ground, notwithstanding the differing material date. As such, this ground succeeds in part and is rejected in part as set out in the conclusion regarding the non-registrability ground above.

Non-distinctiveness Ground

[97] The Opponent pleads that the Mark is not distinctive pursuant to sections 2 and 38(2)(d) of the Act as: (i) it does not distinguish the goods of the Applicant from the goods and services of the Opponent; and (ii) the Mark has been used by Chilly Moose Ltd. without a license.

[98] I am satisfied that the Opponent has demonstrated that, as of the material date, i.e. the date of the opposition, its MOOSE Trademarks had a reputation in association with clothing in Canada that was “substantial, significant or sufficient” to negate the established distinctiveness of the Mark [*Bojangles’ International LLC v Bojangles Café Ltd*, 2006 FC 657 at para 34]. The Opponent has thus met its initial evidential burden.

[99] To the extent that this ground turns on the issue of confusion, again I would arrive at the same conclusion as above notwithstanding the differing material date. As such, this ground succeeds in part and is rejected in part as per the non-registrability ground.

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[100] To the extent that this ground turns on use by Chilly Moose Ltd., as I have found above that its use of the Mark enures to the benefit of the Applicant, this ground fails and is rejected.

Applicant did not use or propose to use the Mark

[101] The Opponent pleads, pursuant to section 38(2)(e) of the Act, that the Applicant did not use or propose to use the Mark in Canada as it "filed the application with the intention that it be used by another party without a license, namely, Chilly Moose Ltd".

[102] There is, however, no evidence regarding the Applicant's intention to use the Mark without a license. As such, I do not consider the Opponent to have met its initial burden of demonstrating the facts in support of this ground. In any event, the finding above that there is, at the very least, an implied license between the Applicant and Chilly Moose Ltd. to use the Mark is dispositive of this issue. This ground is therefore rejected.

Applicant not entitled to use the Mark

[103] The Opponent pleads, pursuant to section 38(2)(f) of the Act, that the Applicant was not entitled to use the Mark as doing so would infringe the Opponent's copyright in its "Moose Design which is subject to trademark registration nos. TMA730185, TMA956795, TMA982118 and TMA988114", however the Opponent withdrew this ground of opposition at the hearing.

[104] Indeed, the Opponent has not evidenced ownership of copyright in the Moose Design as pleaded, such that even if not withdrawn, I would have found that the Opponent had failed to meet its initial evidential burden and rejected this ground of opposition.

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Disposition

[105] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application with regard to goods (3), and I reject the opposition with respect to goods (1) and (2), all pursuant to section 38(12) of the Act.

Emilie Dubreuil
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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Appearances and Agents of Record

HEARING DATE: 2026-01-14

APPEARANCES

For the Opponent: Sarah O'Grady

For the Applicant: Manu Patel

AGENTS OF RECORD

For the Opponent: CPST Intellectual Property Inc.

For the Applicant: No agent appointed

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