

IN THE MATTER OF AN OPPOSITION
by The Canadian Bankers' Association
to application No. 553,677 for the
trade-mark T-BILL SAVINGS filed by
Canada Trustco Mortgage Company

On December 4, 1985, the applicant, Canada Trustco Mortgage Company, filed an application to register the trade-mark T-BILL SAVINGS for "financial services, namely the offering, provision, operation and maintenance of saving accounts" based on proposed use in Canada. In response to an examiner's report, the applicant amended its application to include a disclaimer to the word SAVINGS. The application was subsequently advertised for opposition purposes on October 1, 1986.

The opponent, The Canadian Bankers' Association, filed a statement of opposition on March 2, 1987, a copy of which was forwarded to the applicant on March 18, 1987. The first ground of opposition is that the applied for trade-mark is not registrable pursuant to Section 12(1)(b) of the Trade-marks Act because it is clearly descriptive or deceptively misdescriptive of the character of the services and, in particular, the amount of interest given in a savings account. The second ground is that the applied for trade-mark is not registrable pursuant to Section 12(1)(c) of the Act because it is the name of the applied for services.

The third ground of opposition is that the applied for trade-mark is not registrable pursuant to Sections 12(1)(e) and 10 of the Act in that the mark has by ordinary and 'bona fide' commercial usage become recognized in Canada as designating the kind, quality, quantity, and/or value of the applied for services. The fourth ground is that the applied for trade-mark is not distinctive.

The applicant filed and served a counterstatement. The opponent failed to file evidence pursuant to Rule 43 of the Trade-marks Regulations and was twice refused leave to file evidence pursuant to Rule 46(1). The applicant did not file evidence. Both parties filed written arguments and an oral hearing was conducted at which both parties were represented.

As a preliminary matter, the applicant has submitted that the opponent's opposition should have been abandoned pursuant to the provisions of Rule 44 notwithstanding the decision in Sharp Corporation v. Registrar of Trade Marks (1981), 61 C.P.R.(2d) 63 (F.C.T.D.). In the Sharp decision, Mr. Justice Mahoney noted an opponent's right to a hearing and stated as follows (at page 64):

The provision of s. 44 of the Regulations that deems the opposition to have been abandoned is 'ultra vires' inasmuch as it deprives an opponent of the right to the hearing given by the Act.

The applicant has submitted that Mr. Justice Mahoney's finding only applies in those situations where an opponent has failed to file evidence. I do not agree. There is no such limitation in Mr. Justice Mahoney's finding. Furthermore, Rule 43 specifically provides for the situation where an opponent does not wish to file evidence by simply filing and serving a statement to that effect. Thus, even absent the Sharp decision, failure to file evidence would not necessarily preclude an opponent from being heard.

As a further preliminary matter, the opponent has submitted that it should be permitted to rely on the evidence filed by two other opponents in co-pending oppositions to the present application. I do not agree. The opposition decision relied on by the opponent (Springwall Sleep Products v. Ther-a-pedic Associates (1983), 79 C.P.R. (2d) 227 at 230) does not apply in the present circumstance.

As for the four grounds of opposition in this case, the onus or legal burden is on the applicant to show that its trade-mark is registrable and distinctive. However, respecting each ground of opposition, there is an evidential burden on the opponent to prove the allegations of fact underlying that ground: see the opposition decision in Joseph E. Seagram & Sons Ltd. v. Seagram Real Estate Ltd. (1984), 3 C.P.R. (3d) 325 at 329. The opponent having failed to file evidence, I therefore find that each of the four grounds of opposition is unsuccessful.

In view of the above, I reject the opponent's opposition.

DATED AT HULL, QUEBEC, THIS 22nd DAY OF June, 1990.

David J. Martin,
Member,
Trade Marks Opposition Board.