

IN THE MATTER OF AN OPPOSITION  
by Banff Wear Ltd. to application  
No. 529,748 for the trade-mark BANFF  
filed by Knit-Rite Mills Limited

On October 11, 1984, the applicant, Knit-Rite Mills Limited, filed an application to register the trade-mark BANFF based on use in Canada in association with the following wares:

men's, boy's and ladies' sweaters, ski jackets,  
parkas, suburban coats and knit goods, namely  
sweaters, jackets, skirts and dresses.

The application was advertised for opposition purposes on April 1, 1987.

The opponent, Banff Wear Ltd., filed a statement of opposition on September 18, 1987, a copy of which was forwarded to the applicant on October 8, 1987. The first ground of opposition is that the applicant's application does not comply with the provisions of Section 30(b) of the Trade-marks Act in that the applicant has not used the trade-mark BANFF since the date claimed. The second ground of opposition is that the applied for trade-mark is not distinctive in view of the opponent's use of its trade-mark BANFF in association with clothing.

The applicant filed and served a counterstatement. As its evidence, the opponent filed the affidavit of its President, Lory James. Ms. James was cross-examined on her affidavit and the transcript of that cross-examination and the replies to undertakings given during the cross-examination both form part of the record of the present proceeding. The applicant chose not to file evidence. Both parties filed written arguments but no oral hearing was conducted.

The onus or legal burden respecting the first ground of opposition is on the applicant to show its compliance with Section 30(b) of the Act. However, there was an evidential burden on the opponent to prove the allegation of fact underlying the first ground. The opponent having failed to file evidence directed to this point, the first ground is therefore unsuccessful.

As for the second ground of opposition based on non-distinctiveness, the onus or legal burden is also on the applicant to show that its trade-mark either distinguishes or is adapted to distinguish its wares throughout Canada from those of the opponent sold in association with its trade-mark BANFF. The material time for considering the circumstances respecting this issue is as of the filing of the opposition.

The James affidavit establishes that the opponent has effected fairly substantial sales of various clothing items throughout much of Canada in association with its trade-mark since 1980. Those clothing items include such items as jackets, pants, jogging suits, parkas and sweaters which have been sold with labels and hang tags prominently featuring the trade-mark BANFF. These wares are essentially the same as the applicant's wares and presumably the parties' trades would be the same. It is also noteworthy that the opponent has advertised its mark to some extent.

In its written argument, the applicant submitted that the opponent had failed to evidence use of the trade mark BANFF. The applicant contended that the opponent had only shown use of composite trade-marks including the word BANFF and the opponent did not rely on those marks in its statement of opposition. To the extent that there is any merit in the applicant's position, it is only relevant regarding the opponent's earliest business activities. More recent activities were in relation to hang tags, labels and promotional material dominated by the trade-mark BANFF.

Given the foregoing, I find that the opponent has more than adequately met its evidential burden. Considering that the applicant has failed to file evidence in this proceeding, I find that the applicant has failed to meet the onus on it to show that its trade-mark is distinctive. Thus, the opponent's second ground of opposition is successful.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 28<sup>th</sup> DAY OF SEPTEMBER 1990.

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