

IN THE MATTER OF AN OPPOSITION
by American Legend Cooperative to
application No. 569,226 for the
trade-mark CANADIAN LEGEND SABLE
filed by Hideyoshi Kaneko carrying
on business as Caneco International

On September 16, 1986, the applicant, Hideyoshi Kaneko carrying on business as Caneco International, filed an application to register the trade-mark CANADIAN LEGEND SABLE for "fur garments of sable" based on proposed use in Canada. The application was amended to include a disclaimer to the words CANADIAN and SABLE and was subsequently advertised for opposition purposes on April 1, 1987.

The opponent, American Legend Cooperative, filed a statement of opposition on September 1, 1987, a copy of which was forwarded to the applicant on September 16, 1987. The grounds of opposition include one based on Section 38(2)(d) of the Trade-marks Act, namely, that the applied for trade-mark is not distinctive in view of the opponent's use in Canada of its trade-mark AMERICAN LEGEND in association with furs, pelts and skins.

The applicant filed and served a counterstatement. As its evidence, the opponent filed the affidavits of Austin Mullen and Glen Martin and two affidavits of Ted Jacob. The applicant did not file evidence. Both parties filed written arguments but no oral hearing was conducted.

As for the ground of non-distinctiveness, the material time for considering the circumstances is as of the filing of the opposition. The onus or legal burden is on the applicant to show that its trade-mark either distinguishes or is adapted to distinguish its wares from those of others throughout Canada. There is, however, an evidential burden on the opponent to prove the allegations of fact underlying its ground of opposition.

The opponent's evidence establishes that it is a cooperative or association comprised of members who raise minks for fur. It was formed in October of 1985 and, since that time, has sold mink fur pelts in the United States and Canada in association with the trade-mark AMERICAN LEGEND. From a review of the two Jacob affidavits, it would appear that the mark AMERICAN LEGEND is functioning as a certification mark.

The opponent's evidence further establishes that, as of the filing of the opposition, fairly significant sales of AMERICAN LEGEND mink fur pelts had been made throughout Canada. It also establishes that a number of Canadian mink ranchers were aware of the opponent's mark as of that date. Finally, there is some indication that there may have been advertisements featuring the mark in American periodicals having some Canadian circulation.

The marks of the parties are similar. Since the component SABLE is the name of the applicant's proposed wares, consumers would center on the first part of the mark, namely, the words CANADIAN LEGEND. Consumers, retailers, furriers and breeders familiar with the opponent's mark AMERICAN LEGEND would, upon seeing the mark CANADIAN LEGEND SABLE, likely assume that the opponent had adapted its mark for use in the Canadian marketplace for use with sable furs. The wares of the parties are very similar. The opponent's own evidence suggests that the trades of the parties would be identical. I therefore find that the applicant has failed to establish that its proposed mark is distinctive.

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

DATED AT HULL, QUEBEC, THIS 31st DAY OF October, 1990.

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