

**IN THE MATTER OF AN OPPOSITION
by The Toronto-Dominion Bank to
application No. 1,010,066 for the trade-
mark EFUNDS in the name of e-Funds
Limited**

On April 29, 1999, eFunds Limited filed an application to register the trade-mark EFUNDS (the “Mark”) based upon proposed use of the Mark in Canada. The current statement of wares and services reads:

wares

(1) Application forms and client reporting statements for self directed registered retirement savings accounts, registered retirement income funds, registered education savings plan and investment accounts; mutual fund prospectus, unitholder reports, financial statements and newsletters; merchandise namely pens, cups, tee shirts, jackets, hats, keychains, golf balls, umbrellas, magnets, writing pads.

services

(1) Self directed registered retirement savings accounts, registered retirement income funds, registered education savings plan and investment accounts; a world wide web site for conducting mutual fund sales and purchases and for delivering client statements and investment information, an asset allocation service and an account look up service.

The name of the applicant was subsequently corrected to read e-Funds Limited (the “Applicant”).

The application was advertised for opposition purposes in the Trade-marks Journal of August 7, 2002. On January 7, 2003, The Toronto Dominion Bank (the “Opponent”) filed a statement of opposition against the application.

The Applicant filed and served a counter statement, which denied the allegations made in the statement of opposition.

The Opponent subsequently obtained leave to file an amended statement of opposition and, in response, the Applicant obtained leave to file an amended counter statement.

Pursuant to r. 41 of the *Trade-marks Regulations* as it read on September 30, 2007, the Opponent filed:

- an affidavit of Sandy Cimoroni, Vice President & Managing Director, TD Asset Management Inc., a subsidiary of the Opponent, and
- an affidavit of Raquel Sananes, an Intellectual Property Law Clerk employed by the Opponent's law firm.

The Applicant obtained an order to cross-examine each of these affiants and transcripts of their cross-examinations (as well as responses to undertakings given) have been filed.

Pursuant to r. 42, the Applicant filed:

- an affidavit of Robert Thiessen, the Applicant's Chairman,
- an affidavit of Jamie Hollingworth, a summer student with the Applicant's law firm,
- an affidavit of Michael Godwin, President of Michael Godwin & Associates Inc., a company that specializes in searching the records of the Canadian Intellectual Property Office,
- a certified copy of the trade-mark application file No. 1,015,748 for EFUNDS, and
- a certified copy of the trade-mark application file No. 1,034,636 for EADVISOR.

The Opponent obtained an order to cross-examine Mr. Thiessen and has filed a transcript of his cross-examination plus responses to undertakings given.

Pursuant to r. 43, the Opponent filed:

- an affidavit of Michelle Mazepa, a corporate search clerk employed by the Opponent's trade-mark agents,
- an affidavit of Herman Campbell, part owner of the media monitoring firm Ad Ease Media Research, and
- an affidavit of K. Enis Davis-Lewars, a law clerk employed by the Opponent's trade-mark agents.

Pursuant to r. 44, the Opponent obtained leave to file:

- a certified copy of trade-mark application No. 1,059,362 for EFUNDS, and

- a certified copy of trade-mark application No. 1,297,368 for E FUNDS & Design.

Each party filed a written argument and was represented at an oral hearing.

Onus

Although the Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the “Act”), there is an initial burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. [See *John Labatt Limited v. The Molson Companies Limited*, 30 C.P.R. (3d) 293 at 298; *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.).]

Grounds of Opposition

The grounds pleaded in the amended statement of opposition are reproduced below:

- (a) Section 38(2)(a)
 - (i) The Application does not comply with the requirements of Section 30 in that the Applicant could not have been satisfied that it is entitled to use the Trade Mark in Canada in association with the wares and services described in the Application, since at the date of filing of the Application, the Applicant did not exist nor did the Applicant have any intention of using the mark.
 - (ii) The Application does not conform to the requirements of section 30(e), in that the Applicant incorrectly made the statement that the Applicant by itself or through a licensee, or by itself and through a licensee, intended to use the trade-mark applied for in Canada as of the Application filing date, when in fact the Trade Mark had already been in use, by the Applicant, in Canada, as of the date of filing of the Application.

- (b) Section 38(2)(b)
 - (i) The Trade Mark is not registrable, having regard to the provisions of Section 12(1)(b), on the ground that the alleged Trade Mark is clearly descriptive of the nature or character of the wares and services in association with which it is proposed.
 - (ii) The Trade Mark is not registrable having regard to the provisions of Section 12(1)(c), as it is the name of the wares and services in connection with which the Trade Mark is allegedly proposed to be used.
 - (iii) The Trade Mark is not registrable having regard to the provision of Section 12(1)(e) in that the Trade Mark has by ordinary and bona fide commercial

usage, become recognized in Canada as designating the kind of wares and services of the same general class and any use of the Trade Mark is likely to mislead contrary to Section 10.

(c) Section 38(2)(d)

The Trade Mark is not distinctive, within the meaning of Section 2, by reason of the fact that the Trade Mark does not actually distinguish the wares and services in association with which it is proposed to be used by the Applicant from the wares or services of others, nor is the Trade Mark adapted so as to distinguish the Applicant's wares and services.

Section 12(1)(b) Ground of Opposition

The Opponent submits that the key issue in these proceedings is descriptiveness and argues that, because “e” is understood to mean “electronic” or “Internet”, the addition of “e” to the clearly descriptive word “funds” does not result in a mark that is not clearly descriptive.

The issue as to whether the Applicant's Mark is clearly descriptive must be considered from the point of view of the average user of the Applicant's wares and services. Furthermore, the Mark must not be dissected into its component elements and carefully analyzed but must be considered in its entirety as a matter of immediate impression. [See *Wool Bureau of Canada Ltd. v. Registrar of Trade Marks*, 40 C.P.R. (2d) 25 (F.C.T.D.) at 27-8; *Atlantic Promotions Inc. v. Registrar of Trade Marks*, 2 C.P.R. (3d) 183 (F.C.T.D.) at 186.] Character means a feature, trait or characteristic of the wares/services and “clearly” means “easy to understand, self-evident or plain”. [See *Drackett Co. of Canada Ltd. v. American Home Products Corp.* (1968), 55 C.P.R. 29 (Ex.Ct.) at 34.]

The fact that a particular combination of words does not appear in any dictionary does not prevent a trade-mark from being found to be clearly descriptive or deceptively misdescriptive. If each portion of a mark has a well-known meaning in English or French, it may be that the resultant combination would be contrary to s. 12(1)(b) of the Act. Even where a mark is a created word, one can consider the dictionary meanings of its components [see *Oshawa Group Ltd. v. Canada (Registrar of Trade Marks)* (1980), 46 C.P.R. (2d) 145 at 149 (F.C.T.D.)].

The material date with respect to s. 12(1)(b) is the date of filing of the application. [See *Havana*

Club Holdings S. A. v. Bacardi & Company Limited (2004), 35 C.P.R. (4th) 541 (T.M.O.B.); *Fiesta Barbeques Limited v. General Housewares Corporation* (2003), 28 C.P.R. (4th) 60 (F.C.T.D.).] Earlier jurisprudence considered the material date to be the date of decision and if today's date was the material one, then I would have easily found the Mark to not be registrable pursuant to s. 12(1)(b) because the evidence shows that adding the prefix "e" to a word is now commonly understood to indicate an electronic or Internet version. Since "funds" is clearly descriptive of the Applicant's services, "efunds" is also at present clearly descriptive of them. However, the evidence as to whether the average user of the Applicant's wares/services would have applied the current meaning of "e" to the first portion of the Mark as of April 29, 1999 is less clear. I believe that I can take judicial notice that the Internet age came upon us quite suddenly. However, I cannot take judicial notice of when this occurred and it is possible that the present application was filed before the Internet (and the corresponding abbreviation "e") had become known to the average Canadian investor. As there is no evidence that the average Canadian understood the prefix "e" to be descriptive of an electronic or online application as of April 29, 1999, I find that the Opponent has not met its initial burden with respect to s. 12(1)(b). Such ground is accordingly dismissed.

I note that, in support of its position, the Opponent directed me to several decisions of the United States Patent and Trademark Trial and Appeal Board, namely *In re SPX Corp.* (2002) 63 USPQ2d 1592, *In re Styleclick Inc.* (2000), 57 USPQ2d 1445, and *Continental Airlines Inc. v. United Air Lines Inc.* (1999) 53 USPQ2d 1385, re E-AUTODIAGNOSTICS, E FASHION, and E-TICKET, respectively. The Opponent acknowledges that Canadian and U.S. law differs and that these decisions are of course not binding on me. However, it urges me to consider these cases in the manner in which the Supreme Court of Canada has considered U.S. case law, i.e. as instructive and providing a line of logic that might be of value in our case. In this regard, I note the following comments of the Supreme Court in *Veuve Clicquot Ponsardin Maison Fondée en 1772 v. Boutiques Cliquot Ltee.*, 2006 SCC 23:

- 42 While the text of the U.S. *Lanham Trade-Mark Act* is different..., the following comment in the American Restatement also provides sensible guidance:...

- 64 ...while U.S. cases must be read with its different wording in mind, they
provide some useful elucidation of relevant concepts...
- 67 These references to U.S. cases are made for the purpose of illustration.

In particular, the Opponent directs my attention to pages 1446-1448 of the U.S. decision re E FASHION, which was an appeal from an Examiner's refusal to register the mark on the ground that E FASHION is merely descriptive. The onus in that case differs from our case, but the appeal was dismissed. In so doing, the TTAB considered various issues that are in play in our case, including the state of the register, when the meaning of "e" became commonly known, and whether the fact that the applicant is the first user of the term is significant, as follows.

We have reviewed the numerous third-party registrations of record which issued on the Principal Register...

These registrations offer little help in making a determination of the merits in this appeal....

Office practice has resulted in inconsistent treatment of "e-" prefix marks which are similar in nature to applicant's. In trying to understand this situation, we would make the point that, with each passing day, the Internet becomes more pervasive in American daily life. Many Internet words, such as "e-mail" and "e-commerce," have made their way into the general language... We note that most of the third-party registrations relied upon by applicant were issued in 1997-1998, with a few issuing in 1999. While, by most standards, one to three years in the past would be viewed as "recent", a year or two is an eternity in "Internet time," given the rapid advancement of the Internet into every facet of daily life (most especially, e-mail). Only "recently", the Internet meaning of the "e-" prefix may have been known only by those few who were then accessing the Internet. We have no doubt that in the year 2000, the meaning of the "e-" prefix is commonly recognized and understood by virtually everyone as a designation for the Internet...

In sum, "e-," when used as a prefix in the manner of the applicant's mark, has the generally recognized meaning of "electronic" in terms of computers and the Internet. When this non-source-identifying prefix is coupled with the descriptive word "fashion," the mark E FASHION, as a whole, is merely descriptive for applicant's foods and/or services. That applicant may be the first or only entity using E FASHION is not dispositive.

I am reluctant to allow the foregoing U.S. decision to give me much guidance and, in fact, do not consider that in the present case guidance needs to be sought from a foreign source, as opposed to Canadian sources. Regarding the relevance of the state of the register in descriptiveness cases, I can be guided by the Canadian cases set out below in my discussion of the distinctiveness ground of opposition. Regarding the final sentence in the quote produced above, I note that Board Member Martin made the following similar observation when dealing with the issue of

descriptiveness in *e-Funds Ltd. v. Toronto-Dominion Bank* (2007), 61 C.P.R. (4th) 475 at paragraph 15: “It also does not matter that no other trader has yet used the phrase ‘Web broker’ in describing its Web-based brokerage services.”

Distinctiveness Ground of Opposition

The material date with respect to distinctiveness is the date of filing the opposition. [See *Re Andres Wines Ltd. and E. & J. Gallo Winery* (1975), 25 C.P.R. (2d) 126 (F.C.A.) at 130 and *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 412 (F.C.A.) at 424.]

In *Clarco Communications Ltd. v. Sassy Publishers Inc.* (1994), 54 C.P.R. (3d) 418 (F.C.T.D.), Mr. Justice Denault stated at page 428:

While distinctiveness is quite often determined as part of an evaluation of whether the proposed trade mark is confusing with another trade mark within the meaning of s. 6 of the Act, it is possible to refuse an application for registration on the basis of non-distinctiveness independent of the issue of confusion, provided the ground is raised in opposition... The quality of distinctiveness is a fundamental and essential requirement of a trade mark and the ground of lack of distinctiveness may be raised in opposition by any person and may be based on a failure to distinguish or to adapt to distinguish the proposed trade mark from the wares of any others.

In the present case, when read in conjunction with the statement of opposition as a whole, the distinctiveness ground of opposition is understood as pleading that the Mark is not distinctive because it is clearly descriptive. It is possible for this ground to succeed on such basis even though the s. 12(1)(b) ground has failed, because descriptiveness is to be assessed at a significantly later date under the distinctiveness ground, namely January 7, 2003.

The evidence relevant to the descriptiveness of the Mark as of January 7, 2003, can be divided into two categories: 1) general evidence of the adoption of “e” prefixed marks by third parties and the meaning of “e”; and 2) evidence of the Opponent’s use and promotion of EFUNDS.

1) evidence of the adoption of “e” prefixed marks by third parties and the meaning of “e”

As Exhibit “F”, Ms. Sananes has provided excerpts from the 2001 book entitled *Computer*,

Internet and Electronic Commerce Terms: Judicial, Legislative and Technical Definitions, by Barry B. Sookman, B.A., M.E.S., LL.B. of the Ontario Bar. The author provides the following definition at page 107:

“E”

To anyone remotely familiar with the internet and with e-mail, the prefix “e” is a shorthand for electronic, and refers to the internet. *EFax.com v. Oglesby*, Parker J., 25 January 2000 (Eng.Ch.D.) (unreported).

I find that the foregoing evidence satisfies the Opponent’s initial burden with respect to the distinctiveness ground of opposition.

The Applicant has evidenced that it was common as of January 7, 2003 to register trade-marks in Canada that consist of the prefix “e” followed by a descriptive word. Mr. Godwin conducted a search of the Canadian Trade-marks Register on August 9, 2004 for trade-marks using the following parameters:

1. applications filed after 1997;
2. comprised of the prefix “e” and a dictionary word only, with or without a hyphen;
3. having a status of allowed or registered;
4. excluding design marks; and
5. excluding compound trade-marks.

The search located 268 marks and Mr. Godwin has provided full particulars with respect to each of them [Exhibit “C”]. Marks registered prior to 2003 include: E*TRADE for stock brokerage services; E-BALE for Internet shopping service relating to forage and feed for animals; e-Benefit for insurance services; E-CHART for computer software...; E-CINEMA for production of advertising in electronic media...; E-CLIP for computer programs, namely, computer software for integrating content and applications from websites...; E:COACH for provision of on-line internet services to financial advisors; E-FLOSS for electronic services designed to create and encourage dental flossing compliance...; E-METER for electronic devices....; E-PAGER for telecommunication services, namely paging services; e-Perform for website performance monitoring; E-PRINTS for on-line electronic selection and ordering of photographs...; E-ROCK for electronic web initiatives for the mining market; and many others.

The parties disagree as to the meaning and relevancy of the search results. I shall therefore address the state of the case law concerning the relevancy of state of the register evidence to the issue of descriptiveness.

In *Mitel Corporation v. Registrar of Trade Marks* (1994), 79 C.P.R. (2d) 202 (F.C.T.D.), Mr. Justice Dubé provided the following review of the jurisprudence concerning the relevancy of the state of the register to the issue of descriptiveness:

8 As to the relevancy of the state of the register, the authorities are conflicting.

9 In *John Labatt Ltd. v. Carling Breweries Ltd.* (1974), 18 C.P.R. (2d) 15, wherein Cattanaach J. found the trade mark NO. 1 to be clearly descriptive, he said this on the relevancy of the state of the register, at p. 23:

The principle so enunciated, as I understand it, is simply that because errors may have been made in the past these should not be grounds for perpetuating those errors.

10 The editorial note is worthy of reproduction:

The state of the register can not be examined to make an unregistrable mark registrable. However, the state of the register has been examined to show that a segment of a mark is common to the trade. The latter consideration is often significant for a determination of distinctiveness and scope of protection.

11 In *Provenzano v. Registrar of Trade Marks, supra*, Addy J. held that the mark KOOL ONE for beer was not clearly descriptive. As to the relevancy of the state of the register, he said as follows, at pp. 190-1:

In deciding whether to interfere or not with such a decision, this Court is entitled to examine the state of the Register and, where, as in the present case, there have been previous decisions by the Registrar which appear to be directly contrary to the present one, it is proper to consider them before deciding the issue of whether the decision under review should or should not be reversed.

12 In *Wool Bureau of Canada v. Registrar of Trade Marks, supra*, wherein Collier J. found the mark SUPERWASH to be clearly descriptive of fabrics, he said as follows at p. 28:

It was contended, for the appellant, that the Court is entitled to examine the state of the register to determine whether a pattern of registrability exists. The state of the register is, I think, irrelevant. It cannot affect the validity or otherwise of the appellant's application.

In *Aetna Life Insurance Co. of Canada v. S.N.J. Associates Inc.* (2001), 13 C.P.R. (4th) 539 (T.M.O.B.), Board Member Folz said at paragraph 20, "state of the register evidence is generally irrelevant to establish that, because registrations for similar marks were granted previously, one more should not be refused (see *Thomas J. Lipton Ltd. v. Salada Foods Ltd. (No. 3)* (1979), 45 C.P.R. (2d) 157 at 163)."

If state of the register evidence is relevant with respect to the issue of descriptiveness, I find that the evidence before me does not advance the Applicant's case. Mr. Godwin's evidence does show that many parties consider it desirable to identify their wares or services by adding "e" as a prefix, and that many have been successful in registering such marks. However, that in itself does not address the issue of whether a typical consumer, as a matter of first impression, would have reacted to EFUNDS as clearly describing the Applicant's wares/services as of January 7, 2003. The evidence does perhaps show that Canadians were used to seeing all manner of "e" prefixed marks. To my mind, this does not support a conclusion that EFUNDS is not clearly descriptive; instead it may support a conclusion that the average Canadian understands that the prefix "e" has a certain meaning, which supports the conclusion that EFUNDS is clearly descriptive of investment fund services that are delivered via the Internet or electronically.

The onus is on the Applicant and any doubt that I may have as to whether EFUNDS was clearly descriptive as of January 7, 2003 must be resolved in favour of the Opponent. For this reason, I find that the distinctiveness ground succeeds based on the foregoing evidence. EFUNDS is a descriptive term that should be open to all traders in the industry.

Before proceeding, I will note that the Applicant did not provide any evidence to support a conclusion that its Mark had become distinctive as of January 7, 2003 through use and/or promotion.

2) *evidence of the Opponent's use and promotion of EFUNDS*

According to Ms. Cimoroni, the Opponent began using EFUNDS ADVANTAGE and TD eFUNDS on or about November 24, 1999 and Canadian net sales of TD eFUNDS services prior to 2003 exceeded \$196 million (although there were only 5329 active TD eFUNDS accounts as of September 22, 2003). However, the Applicant has submitted that the Opponent is not entitled to rely in these proceedings on the Opponent's own use of EFUNDS to attack the distinctiveness of the Applicant's Mark.

The Applicant's position is that the Opponent's adoption and use was not *bona fide* because it occurred after the Applicant approached the Opponent about acting as the Applicant's bare trustee for mutual funds offered by the Applicant. The sequence of events was as follows, according to paragraphs 9-18 of Mr. Thiessen's affidavit:

- June 16, 1999, Applicant approached Opponent via a Manager, Bare Trustee Services of the Opponent
- July 7 and 14, 1999, Applicant had telephone conversations with a Business Development Officer of the Opponent
- July 16, 1999, Applicant had a meeting with the Opponent's Business Development Officer
- August-September 1999, negotiations continued, resulting in a Letter of Undertaking being signed on October 1, 1999 [Exhibit "E", Thiessen affidavit]
- October 1999, the Applicant learned that the Opponent was planning to launch its own mutual funds using EFUNDS
- October 29, 1999, Mr. Thiessen left a voice message for an employee of the Opponent stating that the Opponent should not use EFUNDS
- November 1999, Opponent launched a family of mutual funds using the name EFUNDS
- January-March 2000, the Opponent continued to act on the Applicant's behalf
- March 10, 2000, the Applicant was informed during a telephone conversation with an employee of the Opponent that the Opponent would continue to use EFUNDS since it is a generic term.

The Opponent's response is three-fold:

1. the Opponent is a huge organization and it is not reasonable to conclude that the employees who made the decision to use EFUNDS were aware of the Applicant's dealing with other employees of the Opponent;
2. the Applicant never had any right to monopolize the use of EFUNDS because EFUNDS has always been a descriptive term;
3. the Applicant's evidence is unreliable because Mr. Thiessen said that his recollection of events was based on notes that he made but he was unable to provide such notes when requested to do so on cross-examination.

The Opponent has also addressed the decision in *Humpty Dumpty Foods Ltd. v. George Weston Ltd.* (1989), 24 C.P.R. (3d) 454 (F.C.T.D.), which stands for the proposition that an opponent who is the junior user, can only rely on the use or promotion that it made of its mark prior to learning of the senior mark. The Opponent has distinguished that decision in more than one way. First, the mark being opposed in *Humpty Dumpty* was an inherently distinctive mark (AMIGOS), not a descriptive mark. Second, in *Humpty Dumpty* the second user had received express notice from a Trade-marks Office Examiner that its use of AMIGO was likely to cause confusion with the senior user's AMIGOS mark. Finally, the present Opponent seeks to rely upon its own descriptive use, whereas the junior user in *Humpty Dumpty* wanted to rely upon its own proprietary use.

As I have already held that the distinctiveness ground succeeds based on other evidence, I need not decide whether or not the Opponent is entitled to also rely on its own use in support of this ground.

Section 30 Ground of Opposition

The Opponent submits that it has met its initial burden with respect to its pleading that the Applicant did not have any intention to use the Mark, based on the following portion of the cross-examination of Mr. Thiessen:

164.Q. And can we agree that eFunds Limited, up until this point, has not engaged in providing RRSPs?

A. eFunds Limited never could provide RRSPs.

165.Q. So eFunds was never in a position to provide self-directed registered retirement savings accounts, for example?

A. eFunds.ca Securities made application to provide self-administered RSP accounts, yes.

166.Q. All right. So in this context when I say eFunds, I will mean it or its subsidiaries; okay?

A. Okay

167.Q. But it has never offered a self-directed RSP to this point in time; correct?

A. It made application and never got to the opportunity.

168.Q. All right. Same thing with registered retirement income funds? It has never been in that business?

A. That is right.

169.Q. And education savings plans, it has never offered...

A. Never was going to.

170.Q. Never was going to? No?

A. No.

171.Q. Okay. Registered education savings plan and investment accounts; was it ever planning to do that?

A. We explored the idea. It is not economic to do those, but we certainly explored the idea and may have made application through...along with TD, as our trustee and shareholder record keeper, to bring those accounts to fruition.

172.Q. Did eFunds Limited ever intend to sell forms and client reporting statements for self-directed RRSPs?

A. Sell forms?

173.Q. Yes.

A. No. Nobody sells forms.

174.Q. All right. And did eFunds ever intend to sell registered retirement income funds?

A. Yes, we made application for our own self-directed plan, our own self-directed RIF with TD Canada Trust operating as the trustee and jointly filed that application.

175.Q. What about selling mutual funds prospectuses? They weren't intending to do that ever; were they?

A. You don't sell a mutual fund prospectus, you sell a mutual fund related to that prospectus. And eFunds.ca Securities did sell mutual funds.

176.Q. Same answer with respect to unit holder reports and financial statements; correct? You wouldn't ever intend to sell those; would you?

A. No, in the eFunds vision we had contracted that service to TD.

177.Q. And did you ever intend to sell T-shirts, jackets, hats, key chains, golf balls, umbrellas, magnets or writing pads?

A. No.

Based on the foregoing, I am satisfied that the Opponent has met its initial burden with respect to its allegation that the Applicant never intended to use its Mark in association with the following wares:

Application forms and client reporting statements for self directed registered retirement savings accounts, registered retirement income funds, registered education savings plan and investment accounts; mutual fund prospectus, unitholder reports, financial statements; merchandise namely tee shirts, jackets, hats, keychains, golf balls, umbrellas, magnets, writing pads.

As the Applicant has not met its legal onus with respect to the aforementioned wares, the s. 30 ground succeeds with respect to such wares. On the other hand, I am not satisfied that the evidence supports a conclusion that the Applicant never intended to use its Mark in association with the applied-for services. The evidence indicates that the Applicant may have never used the Mark with most, if not all, of its services, but that does not appear to be due to an initial lack of intent.

Disposition

Having been delegated by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I refuse the application pursuant to s. 38(8) of the Act.

DATED AT TORONTO, ONTARIO, THIS 20TH DAY OF OCTOBER 2008.

Jill W. Bradbury
Member
Trade-marks Opposition Board