

IN THE MATTER OF AN OPPOSITION
by Jewelcor Limited to application
No. 558,785 for the trade-mark MEDI
HELP filed by Arthur M. Karpman

On March 10, 1986, the applicant, Arthur M. Karpman, filed an application to register the trade-mark MEDI HELP based on proposed use in Canada with "jewelry." The application was advertised for opposition purposes on August 6, 1986.

The opponent, Jewelcor Limited, filed a statement of opposition on January 6, 1987 and a revised statement on January 7, 1987. A copy of the revised statement was forwarded to the applicant on January 26, 1987.

The first ground of opposition is that the application does not comply with Section 30 of the Trade-marks Act because the applicant does not intend to use the applied for trade-mark himself but rather intends to license others to manufacture and sell wares in association with the mark. The second ground is that the applied for trade-mark is not distinctive in view of the use of trade-marks which include the element MEDI by others such as Medi Data Inc., Arthur M. Karpman & Associates Limited, EmTech Quartz Co. and Embix Watch Importing Co.

The applicant filed and served a counter statement. As its evidence, the opponent filed two affidavits of John Bruce, a law student employed by the firm acting as the opponent's agent. The applicant did not file evidence. Only the applicant filed a written argument but an oral hearing was conducted at which both parties were represented.

As for the opponent's first ground of opposition, the onus or legal burden is on the applicant to show his compliance with the provisions of Section 30 of the Act. However, there is an initial evidential burden on the opponent to prove the allegations of fact in support of its ground. In this regard, the first affidavit of John Bruce has appended to it copies of corporate documents for a company named Medi Data Inc. Those documents indicate that Arthur M. Karpman is the President of Medi Data Inc. and that the company carries on business as a jewelry distributor. In the absence of additional information, this is not inconsistent with Mr. Karpman having the intention to use the trade-mark MEDI HELP himself.

The opponent has also submitted a second affidavit of John Bruce in which Mr. Bruce indicates that he reviewed a transcript of a cross-examination of Mr. Karpman on an affidavit filed as evidence in another proceeding. Mr. Bruce's affidavit is admissible to establish that the transcript is of record in the other proceeding. However, it is inadmissible to establish the truth of the contents of the transcript. Thus, the opponent has failed to meet its evidential burden and the first ground is unsuccessful.

As for the second ground of opposition, the onus or legal burden is on the applicant to show that his trade-mark is adapted to distinguish or actually distinguishes his wares from those of others throughout Canada. However, there is an initial evidential burden on the opponent to prove the allegations of fact underlying its second ground. The first Bruce affidavit is insufficient to establish that Medi Data Inc. has used any trade-marks incorporating the element MEDI and the second Bruce affidavit cannot be relied on to establish the truth of the contents of the Karpman transcript attached to it. Thus, the opponent has failed to meet the evidential burden on it and the second ground is also unsuccessful.

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

DATED AT HULL, QUEBEC, THIS 29th DAY OF MAY 1992.

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