

IN THE MATTER OF AN OPPOSITION
by H & R Block, Inc. to application
No. 652,184 for the trade-mark
RAPID REFUND TAX SERVICES filed by
U & R Tax Services Ltd.

On February 28, 1990, the applicant, U & R Tax Services Ltd., filed an application to register the trade-mark RAPID REFUND TAX SERVICES based on use in Canada since 1982 with "tax services." The application as filed included a disclaimer to the words TAX and SERVICES and was later amended to extend the disclaimer to include the word REFUND. The application was subsequently advertised for opposition purposes on November 7, 1990.

The opponent, H & R Block, Inc., filed a statement of opposition on December 4, 1990, a copy of which was forwarded to the applicant on January 22, 1991. The first ground of opposition is that the applicant's application does not comply with the provisions of Section 30(a) of the Trade-marks Act because the application does not contain a statement in ordinary commercial terms of the specific services in association with which the mark is alleged to have been used. The second ground is that the application does not comply with the provisions of Section 30(b) of the Act because the applicant has not used the applied for mark since the date claimed.

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of Jill Parker, the District Manager of the opponent's wholly-owned subsidiary, H & R Block Canada, Inc. The applicant chose not to file evidence. Only the opponent filed a written argument and no oral hearing was conducted.

With respect to both of the opponent's grounds of opposition, the onus or legal burden is on the applicant to show its compliance with the provisions of Sections 30(a) and 30(b) of the Act: see the opposition decision in Joseph Seagram & Sons v. Seagram Real Estate (1984), 3 C.P.R.(3d) 325 at 329-330 and the decision in John Labatt Ltd. v. Molson Companies Ltd. (1990), 30 C.P.R.(3d) 293 (F.C.T.D.). There is, however, an evidential burden on the opponent respecting its allegations of fact in support of each ground. That burden is lighter respecting the issue of non-compliance with Section 30(b) of the Act: see the opposition decision in Tune Masters v. Mr. P's Mastertune (1986), 10 C.P.R.(3d) 84 at 89. The material time for considering the circumstances respecting the issues of non-compliance with Sections 30(a) and 30(b) of the Act is the filing date of the application: see the opposition decision in Georgia-Pacific Corp. v. Scott Paper Ltd. (1984), 3 C.P.R.(3d) 469 at 475.

As for the first ground, paragraph 6 of the Parker affidavit reads as follows:

The term "tax services" is so broad as to be almost meaningless. It could refer to legal services, accounting services, the preparation of income tax returns, electronic tax return filing services, tax rebate discount services, or services relating to any type of tax other than income tax.

I agree with Ms. Parker's observation. The applicant's own advertising demonstrates that the applicant uses more specific descriptions to describe its services to its potential customers such as "tax preparation", "tax training courses" and "income tax refund buying service" (see Exhibit A to the Parker affidavit).

In view of the above, I find that the opponent has met the evidential burden on it.

Since the applicant failed to file evidence or to even counter the opponent's case with argument, I find that the applicant has failed to satisfy the legal burden on it to show that it has complied with the provisions of Section 30(a) of the Act. The first ground of opposition is therefore successful.

As for the second ground of opposition, Ms. Parker states that her company is a competitor of the applicant, she is familiar with the applicant and the applicant carries on business in the Winnipeg area. The applicant's address is consistent with this latter observation. Mr. Parker goes on to state that she checked the classified telephone directory listings for the applicant in Winnipeg from 1982 to 1990. None of those advertisements includes the applied for trade-mark. Furthermore, Ms. Parker states that she has been employed with her company in Winnipeg since 1980 and is unaware of any use or advertisement of the trade-mark RAPID REFUND TAX SERVICES by the applicant prior to March, 1990.

In view of the above, I find that the opponent has satisfied the evidential burden on it to show that the applicant did not use its trade-mark on the date claimed. Since the applicant failed to file evidence, I find that it has failed to meet the legal burden on it to show that its claimed date of first use is correct. The second ground of opposition is therefore also successful.

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

DATED AT HULL, QUEBEC, THIS 30th DAY OF June, 1993.

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