IN THE MATTER OF AN OPPOSITION
by Credit Union Central of Canada to
application no. 762,455 for the trade-mark
ACCOUNTLINK filed by the Bank of Montreal

On August 24, 1994, the applicant namely, the Bank of Montreal, filed an application to register the mark ACCOUNTLINK, based on proposed use in Canada, in association with

> services in connection with brokerage accounts in the nature of banking, investment and securities.

The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated February 15, 1995 and was opposed by Credit Union Central of Canada (hereinafter "CUCC") on July 10, 1995. A copy of the statement of opposition was forwarded to the applicant on August 28, 1995. The applicant responded by filing and serving a counter statement. During the course of this proceeding, the opponent requested and was granted leave to amend its pleadings: see the Board ruling dated December 6, 1996. Similarly, the applicant requested and was granted leave to amend its pleadings: see the Board ruling dated October 27, 1997.

The first ground of opposition alleges that the applicant is not entitled to register the mark ACCOUNTLINK because, at the date of filing the application, the applied for mark was confusing with one or more of the opponent's ACCULINK marks, shown below,

ACCULINK ***Accu*Link**

each of which had previously been used in Canada by the opponent in association with the provision of (i) electronic funds transfer services, (ii) financial electronic transaction services, and (iii) electronic provision of financial information.

The second ground of opposition alleges that the applied for mark ACCOUNTLINK is not distinctive of the applicant's wares[sic] because it does not distinguish nor is it adapted to distinguish the applicant's wares[sic] from the wares or services of the opponent.

The third ground of opposition alleges that the subject application does not comply with Section 30(i) of the *Trade-marks Act* in that the applicant could not be satisfied that it was entitled to use the applied for mark in view of the opponents's prior rights as set out in the prior pleadings.

The fourth ground of opposition alleges that the applied for mark ACCOUNTLINK is not registrable, pursuant to Section 12(1)(d) of the *Act*, because it is confusing with the opponent's marks, which are registered marks, relied on in the first ground of opposition.

The opponent's evidence consists of the affidavit of John Ellis, Director, Electronic Services Development and Standards for the opponent CUCC. The applicant's evidence consists of the affidavits of Bruce Schwenger, a Senior Vice-President of the applicant bank; Linda Thibeault, a trade-mark searcher; and Kathleen Jost, a Vice-President for Bank of Montreal Investor Services Limited. Messrs. Ellis and Schwenger were cross-examined on their affidavit evidence. The transcripts of their cross-examinations and replies to undertakings given at their cross-examinations form part of the evidence of record.

Mr. Ellis' evidence may be summarized as follows. The credit union system in Canada is organized in three tiers, local, provincial and national. At the local level, credit unions provide full financial services including electronic banking services through automated teller machines known as ATMs. At the provincial level, there are nine provincial Central credit unions and one federation of caisses populaires. The provincial level credit unions support the local credit unions and also link the local credit unions to provincial governments and national co-operative organizations. At the national level, there are four co-operative organizations that support lower tier credit unions. The opponent CUCC is the national organization that provides new products, services and systems for credit unions.

In August 1992, the CUCC adopted the word mark ACCULINK for use in association with the credit union electronic funds transfer network. At about the same time, the word mark

was also used in a logo, shown below.

Since February 1993, the opponent has used the following marks in association with its financial services:

ACCULINK	registered October 27, 1995; regn. no. 449,403
***Accu*Link**	registered December 15, 1995; regn. no. 451,880
	registered November 3, 1995; regn. no. 449,617

CCUC uses its ACCULINK marks through licensees, that is, credit unions located across Canada. The credit unions use the ACCULINK marks on signage, on ATMs and on cards issued to members to allow access to ATMs. As of July 1994, there were 21 credit unions across Canada using the opponent's ACCULINK trade-marks in association with the opponent's financial services. As of July 1996, the were 259 such credit unions who issued in excess of 1.92 million access cards for use on more than 1030 ATMs. Such access cards can also be used through INTERAC, a third party financial network. The opponent has also promoted ACCULINK services by providing brochures, which prominently display the ACCURATE trade-marks, to credit unions for distribution to the public. Paragraph 12 of Mr. Ellis' affidavit is reproduced below.

Thus, the licensees' use of the opponent's marks appears to be in compliance with Section 50(1) of the *Act*.

Mr. Schwenger's evidence, filed on behalf of the applicant, may be summarized as follows. In 1988, the opponent incorporated a wholly owned subsidiary namely, Bank of Montreal Investor Services Limited, to carry on a discount brokerage business. The discount brokerage service operates under the trade-mark INVESTORLINE, which mark is owned by the Bank of Montreal. A number of other marks were introduced, beginning in 1989, in association with ancillary services offered by the subsidiary, such as INVESTORLINK, TRAVELINK, QUOTELINK and TRADELINK. In 1994, the applicant decided to introduce a further type of service to its INVESTORLINE clients, under the mark ACCOUNTLINK. The nature of the service provided under the mark ACCOUNTLINK, by the subsidiary, is explained at pages 8-9 of Mr. Schwenger's transcript of cross-examination:

On December 5, 1994, a letter was sent to about 45,000 INVESTORLINE customers informing them of the new ACCOUNTLINK service; 34, 000 chose to subscribe to it. The ACCOUNTLINK service is available only to those who are already INVESTORLINE subscribers. It cannot be purchased separately from the INVESTORLINE service. As of

November 1997, there were about 100,000 customers of the INVESTORLINE and ACCOUNTLINK services. As a general rule, it is necessary to have a minimum account of $10,000 to become an INVESTORLINE customer, while the average account is $30,000. Mr. Schwenger testifies, at paragraph 12 of his affidavit, that "Those who are customers of INVESTORLINE are in general people who have a good knowledge of investments and since they are customers of a discount brokerage service, are willing to make their own investment decisions." Since December 1994 about one million brochures advertising the applicant's INVESTORLINE and ACCOUNTLINK services have been distributed through about 1,100 branches of the Bank of Montreal throughout Canada. At paragraph 13 of his affidavit, Mr. Schwenger states that as an officer of the Bank of Montreal he oversees the character and quality of the service provided by Bank of Montreal Investor Services Limited under the mark ACCOUNTLINK. Thus, use of the applied for mark by Bank of Montreal Investor Services Limited appears to be in compliance with Section 50(1) of the *Act*. Customers of INVESTORLINE services may obtain an ATM access card which has the designation INVESTORLINE ACCOUNTLINK on the front face. Such a card may be used to withdraw cash from Bank of Montreal INSTABANK ATMs or from ATMs on the INTERAC or CIRRUS networks. Paragraph 14 of the Mr. Schwenger's affidavit is reproduced, in part, below.

Katherine Jost's evidence serves to confirm some aspects of Mr. Schwenger's evidence. Ms. Thibeault's affidavit serves to introduce into evidence the state of the trade-marks register insofar as the term LINK comprises a component of trade-marks for financial services.

The parties are in agreement that the determinative issue for decision is whether the applied for mark ACCOUNTLINK it is confusing, within the meaning of Section 6(2) of the *Trade-marks Act*, with the opponent's mark ACCULINK. In this regard, I would note that (i) the opponent's use of its mark ***Accu*Link** is equivalent to use of the mark ACCULINK as the design features of the mark ***Accu*Link** are intrinsic with the word "acculink" which comprises the trade-mark (see *Canadian Jewish Review Ltd. v. The Registrar of Trade Marks* (1961) 37 C.P.R. 89 (Ex. C.)), and (ii) the opponent's use of its mark ***Accu*Link** & Design, regn. no. 449,617, qualifies as use of the mark ***Accu*Link** *per se* in combination with a design mark: see *Nightingale Interloc v. Prodesign Ltd.* (1984), 2 C.P.R.(3d) 535 at 538, under the heading *Principle 1* (TMOB).

The material dates to consider the issue of confusion between the marks in issue are the date of filing the application, that is, August 24, 1994, with respect to the first and third grounds of opposition; the date of filing the opposition, that is, July 10, 1995, with respect to the second ground of opposition alleging non-distinctiveness; and the date of my decision with respect to the fourth ground of opposition alleging non-registrability: see *American Retired Persons v. Canadian Retired Persons* (1998), 84 C.P.R.(3d) 198 at 206 - 209 (F.C.T.D.) for a review of case law concerning material dates in opposition proceedings. However, in the circumstances of this case, nothing turns on whether the issue of confusion is assessed at any particular material date.

The legal onus is on the applicant to show that there would be no reasonable likelihood of confusion, within the meaning of Section 6(2), between the applied for mark ACCOUNTLINK and the opponent's mark ACCULINK. The presence of an onus on the applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant: see *John Labatt Ltd. v. Molson Companies Ltd.* (1990) 30 C.P.R.(3d) 293 at 297-298 (F.C.T.D.). The test for confusion is one of first impression and imperfect recollection. Factors to be considered, in making an assessment as to whether two marks are confusing, are set out in Section 6(5) of the *Act*: the inherent distinctiveness of the marks and the extent to which they have become known; the length of time each has been in use; the nature of the wares, services or business; the nature of the trade; the degree of resemblance in

appearance or sound of the marks or in the ideas suggested by them. This list is not exhaustive; all relevant factors are to be considered. All factors do not necessarily have equal weight. The weight to be given to each depends on the circumstances: see *Gainers Inc. v. Tammy L. Marchildon and The Registrar of Trade-marks* (1996), 66 C.P.R.(3d) 308 (F.C.T.D.).

The opponent's mark ACCULINK possesses a fair degree of inherent distinctiveness in relation to the opponent's services as it is a coined word without any direct nexus to financial services. However, the distinctiveness of the opponent's mark is lessened to the extent that it is suggestive of an "accurate link" to the consumer's financial data. The applied for mark ACCOUNTLINK possesses a relatively low degree of inherent distinctiveness in that the mark is highly suggestive, if not descriptive, of the applicant's services provided under the mark. The opponent began to use its mark ACCULINK in August 1992 and I infer that the mark had acquired a significant reputation, through use and advertising, by July 1996. The applicant began to use its mark ACCOUNTLINK in December1994 and I infer that the mark had acquired some reputation, through use and advertising, by November 1997. There is some overlap in the natures of the parties' trades and in the services provided under their respective marks ACCULINK and ACCOUNTLINK. However, while the opponent CUCC and its licensees operate in a manner similar to a bank, the CUCC is not engaged in the discount brokerage business.

There is a fair degree of resemblance between the parties' marks visually, although less so aurally and in ideas suggested. In regards to the latter, the opponent's mark ACCULINK suggests the idea of an "accurate link" while the applied for mark ACCOUNTLINK suggests the idea of "a link to an account." The applicant has submitted that the significance of any resemblance between the marks in issue is mitigated by the state of the register evidence introduced by means of the Thibeault affidavit. State of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace: see *Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R.(3d) 432 (TMOB) and *Del Monte Corporation v. Welch Foods Inc.* (1992), 44 C.P.R.(3d) 205 (F.C.T.D.). See also *Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1992), 43 C.P.R.(3d) 349 (F.C.A.) which is support for the proposition that inferences about the marketplace can only be drawn from state of the register evidence where large numbers of

relevant registrations are located. The state of the register evidence submitted by the applicant supports the applicant's position that the component LINK has been commonly adopted for trade-marks used in association with financial services. However, as the component LINK comprises the suffix portion of the marks in issue, rather than the prefix, the importance of the state of the register evidence is diminished: see *Conde Nast Publications Inc. v. Union Des Editions Modernes* (1979) 26 C.P.R.(2d) 183 at 188 (F.C.T.D.), *Pernod Ricard v. Molson Breweries* (1992), 44 C.P.R. (3d) 359 at 370 (F.C.T.D.).

I have also taken into account Mr. Schwenger's affidavit evidence, and testimony on cross-examination, that there have been, to his knowledge, no instances of actual confusion between the marks in issue although there has been contemporaneous use of the parties' marks since December 1994. While Mr. Schwenger's evidence concerning actual confusion is not particularly probative, it is nevertheless evidence which has some limited weight in my assessment of the likelihood of confusion. The absence of evidence of actual confusion, or evidence of instances of actual confusion, are merely additional circumstances among the many to be considered. For example, in *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 (F.C.A.), the Court found that the defendant's marks MR. SUBS'N PIZZA and MR. 29 MIN. SUBS'N PIZZA were confusing with the plaintiff's mark MR. SUBMARINE although there was no evidence of actual confusion despite 10 years of contemporaneous use in the area of Dartmouth. In the instant case, the earliest material date to assess the issue of confusion is August 24, 1994 which is prior to contemporaneous use of the marks in issue. Nevertheless, the Board may have regard to matters arising after a material date to the extent that one may draw inferences as to the situation existing as of the material date: see *Speedo Knitting Mills Pty. Ltd. v. Beaver Knitwear (1975) Ltd.* (1985), C.P.R.(3d) 176 at pp. 184-185 (TMOB).

Having regard to the above, and having regard in particular to the fact that purchasers of ACCOUNTLINK services are sophisticated clientele who have already chosen to purchase the applicant's INVESTORLINE brokerage services, I find that, as a matter of first impression and imperfect recollection, persons purchasing the applicant's ACCOUNTLINK services, at any of the material dates, would not be likely to infer that such services emanate from, or are associated

with, the opponent CUCC. Rather, such purchasers may be expected to be fully aware that ACCOUNTLINK services emanate from the brokerage discount provider namely, the Bank of Montreal. Accordingly, the opponent's opposition is rejected.

DATED AT HULL, QUEBEC, THIS 19th DAY OF JANUARY, 2000.

Myer Herzig,
Member,
Trade-marks Opposition Board