

AFTERNOON SESSION

The committee resumed at 3.30 p.m.

The CHAIRMAN: Would you care now to answer the question which Mr. Crestohl was asking at the time of our adjournment?

Mr. STEIN: There was an agreement with Mr. Crestohl that we would defer answering the question until he was present.

The CHAIRMAN: Any other questions on the subject of a more adequate definition of what constitutes a trade mark?

Mr. MACDONNELL: You mean you are considering the actual words used in the interpretation section?

The CHAIRMAN: No.

Mr. MACDONNELL: Because I had a point I wanted to raise when we come to the actual wording.

Harold G. Fox, Q.C., Chairman, Trade Mark Law Revision Committee, recalled:

By Mr. Richard:

Q. There was only this question which I discussed at the adjournment at noon. We were talking of trade marks and some of the members had said that if a trade mark was used and not registered, and that it was not filed, that someone might take it over by registration. I was going to ask Mr. Fox to confirm what I know to be the fact now, that our trouble under section 4 will not exist in the revised Act because a person who has not registered a trade mark will not have concurrent rights with a person who registers his right later.—A. Under the present section 4?

Q. Yes.—A. No. We have had in front of us very vividly the problem that had arisen under present section 4, and for the benefit of the other members of the committee I might briefly explain that section 4 of the Unfair Competition Act provides in the first subsection that the person who has used or has made known a trade mark in Canada is entitled to its exclusive use provided he registers it within a certain delay, and then section 4(3) provides that if the first user applies after the period of the delay specified in (1), he can register that mark if a similar mark has not in the meantime been registered by another person. Now there is a great deal of confusion in those words, as you can see, because the right to register in subsection (1) is given to the person who first used or first makes known. That was the only right. The third subsection says that if that mark had not been registered by another—now it did not define who “another” was—the net result was that the jurisprudence has held that the rights of a person other than a first user, who registered first, were paramount on the register but that he could not stop the first user from continuing to use that mark, and there you had a complete departure from what we have always considered to be the proper law of trade marks—that a trade mark should be distinctive as indicating only one source of goods. Now that was the situation that arose and the court so interpreted it, and of course we must pay respect to that interpretation. But we felt that it was either an erroneous interpretation or an erroneous provision, and we have endeavoured to make it quite clear that such a position cannot arise. It is the first user who is entitled to registration. You do not get that double right.