

IN THE MATTER OF AN OPPOSITION
by Northwest Hospital to appli-
cation No. 566,506 for the
trade-mark MEDINFOCARD filed by
Infoman Inc.

On July 22, 1986, the applicant, Infoman Inc., filed an application to register the trade-mark MEDINFOCARD based on proposed use in Canada with the services of "providing information management services to others" and with the following wares:

medical information cards; information cards containing information relating to a customer; cards or other vehicles containing the customer's vital medical information for quick and easy reference, particularly in the event of emergencies; and cards using physical, optical, magnetic, electrical data technologies embedded in the cards.

The application was advertised for opposition purposes on February 9, 1988.

The opponent, Northwest Hospital, filed a statement of opposition on July 11, 1988, a copy of which was forwarded to the applicant on August 12, 1988. The grounds of opposition are reproduced below.

- (a) The applicant is not the person entitled to registration and the trade-mark is not registrable in that contrary to Sections 12(1)(b) and (d) and 16(3)(b) of the Trade Marks Act the proposed trade mark is confusing with the opponent's application for the trade mark MED-INFO, Application Serial Number 558,915 which was filed March 11, 1986 based on use since December 17, 1984 and was also based on a priority filing in the United States of America dated September 24, 1985, well prior to the date of filing of the application herein and the use and registration in Canada of the trade mark INFOMED and INFOMED AND DESIGN.
- (b) The trade mark is not registrable pursuant to the provisions of Section 37(2)(d) [now 38(2)(d)] of the Trade Marks Act in that it is not distinctive, nor is it adapted to distinguish the wares and services of the applicant from those of the opponent and others, particularly in view of the prior use of the trade marks referred to above in paragraph 1(a) and Applications Serial Numbers 459,274, 556,059, 556,060 and 495,645.
- (c) The applicant is not entitled to registration in that at the date of application:
 - (i) the applicant could not have been satisfied as to its entitlement to use the trade mark in Canada contrary to Section 29(i) [now 30(i)] of the Trade Marks Act in view of the application and use in Canada by the Opponent of the trade mark referred to above, the descriptive nature of the mark and the long and extensive use by others of the trade marks referred to above and
 - (ii) the applicant did not have the intention to use the mark as required by Section 29(e) [now 30(e)] in Canada.
- (d) The trade mark MEDINFOCARD is clearly descriptive of the wares and services for which it is applied namely, medical information cards and services relating thereto. The applicant is therefore contrary to Section 12(1)(b) and 37(1)(a) [sic] [now 38(2)(b)] of the Trade Marks Act.

The applicant filed and served a counter statement. The opponent did not file evidence. As its evidence, the applicant filed the affidavits of Donna Harris and Jake V. Th. Knoppers. Only the applicant filed a written argument and no oral hearing was conducted.

As for the ground of opposition set forth in paragraph (d) above, the opponent has

failed to file evidence on point. On its face, the applicant's mark appears to be a coined word comprising the word "card" and abbreviations of the words "medical" or "medicine" and "information." Upon reflection, the everyday user of the applicant's wares and services might decipher the applicant's mark as being a shorthand version of the phrase "medical information card" or "medicine information card." However, as a matter of first impression, I doubt that the everyday user would immediately react to the mark in that fashion. The immediate reaction would more likely be that MEDINFOCARD is a coined word having some relation to medicine and cards. Although such a coined word may be suggestive of the applicant's wares and services, in the absence of evidence from the opponent, I cannot find that it clearly describes the character or quality of those wares and services. The opponent's final ground of opposition is therefore unsuccessful.

As for the two grounds in paragraph (c) above, the onus or legal burden is on the applicant to show its compliance with the provisions of Section 30 of the Act. However, there is an evidential burden on the opponent to prove the allegations of fact underlying its grounds. The opponent has failed to evidence any use of any other trade-marks, it has failed to show that the applicant's mark is clearly descriptive, it has failed to show that the applicant did not have the intention to use its mark and it has failed to indicate the relevance of its application to these grounds. Thus, the two grounds in paragraph (c) are also unsuccessful.

The wording of the ground of opposition in paragraph (b) above is somewhat abstruse. However, it appears that the opponent is alleging that the applicant's mark is not distinctive in view of the use of a number of different marks. Since the opponent has failed to evidence use of any marks, this ground is also unsuccessful.

Paragraph (a) above is a confusing hodgepodge of pleadings. Insofar as it purports to raise a ground of opposition based on Section 12(1)(b) of the Act, that issue has already been dealt with above. There appears to be an attempt to raise a ground of non-registrability pursuant to Section 12(1)(d) of the Act but no trade-mark registrations were sufficiently identified to allow the applicant to reply.

To the extent that paragraph (a) seeks to assert any grounds of prior entitlement based on use of any trade-marks it is unsuccessful since the opponent has not evidenced any use of any marks. Furthermore, the opponent has failed to allege use of the INFOMED marks by itself or any predecessors in title. In view of the provisions of Section 17(1) of the Act, the opponent is precluded from relying on use of those marks by others in support of a ground of prior entitlement.

After eliminating the chaff from paragraph (a), what remains is a ground of prior entitlement pursuant to Section 16(3) of the Act based on the opponent's previously filed application for the trade-mark MED-INFO. The opponent did not see fit to provide full particulars of that application nor did it file a copy in evidence. The Harris affidavit, however, has a copy of that application appended to it as an exhibit. It reveals that the application was filed on March 11, 1986 and that it was pending as of the applicant's advertisement date. It seeks registration for the following services:

medical information services, namely, medical professionals providing non-emergency medical information to the general public by telephone.

In view of the above, the Section 16(3) ground remains to be decided on the issue of confusion between the marks of the parties. The material time for considering the circumstances respecting this ground is as of the applicant's filing date. Furthermore, the onus or legal burden is on the applicant to show that the marks are not confusing. Finally, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act.

As discussed above, the applicant's mark is suggestive in relation to the applied for wares and services. Thus, it is not inherently strong. The opponent's mark, too, is inherently weak in relation to the "medical information services" for which registration is sought. There is no evidence of use of either mark.

The length of time the marks have been in use is not a relevant circumstance in the present case. The applicant's services appear to be completely different from the opponent's services. The applicant's wares also appear to be different from the opponent's services except to the extent that both have some connection with medical information in general. Presumably the trades of the parties would also be different. As for Section 6(5)(e) of the Act, the marks of the parties bear a fair degree of resemblance in all respects.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the inherent weakness and absence of use of the opponent's mark and the differences between the wares, services and trades of the parties, I find that the applicant has satisfied the onus on it to show that its mark is not confusing with the opponent's applied for mark. In so concluding, I have also considered the opponent's apparent lack of interest in this proceeding. Thus, the ground of prior entitlement based on the opponent's previously filed application is unsuccessful.

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

DATED AT HULL, QUEBEC, THIS 28TH DAY OF JUNE 1991.

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