

**IN THE MATTER OF AN OPPOSITION
by Heart & Stroke Foundation of Canada/
Fondation des Maladies du Coeur du Canada
to application No. 587,376 for the trade-mark
HEART SMART filed by Henry Ford Hospital**

On July 7, 1987, the applicant, Henry Ford Hospital, filed an application to register the trade-mark HEART SMART based on use and registration (No. 1,542,960) in the United States for the following services:

educational services, namely a health promotion program for the public at large on the awareness of and prevention of heart disease.

The application was amended to include a disclaimer to the word HEART and was subsequently advertised for opposition purposes on April 18, 1990.

The opponent, Heart & Stroke Foundation of Canada/Fondation des Maladies du Coeur du Canada, filed a statement of opposition on May 17, 1990, a copy of which was forwarded to the applicant on June 4, 1990. On February 7, 1996, the opponent was granted leave to amend its statement of opposition to add an additional ground. The first ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(2)(a) of the Trade-marks Act because, as of the applicant's filing date, the applied for trade-mark was confusing with the trade-mark HEART SMART previously used in Canada by the opponent and its predecessor in title with

a research program conducted in restaurants to ascertain if consumers show preference to restaurants offering nutritional information.

The second ground is that the applied for trade-mark is not distinctive in view of the use of the mark HEART SMART by the opponent and its predecessor in title. The third ground is that the applied for mark is not registrable pursuant to Sections 9(1)(n)(iii) and 12(1)(e) of the Act because it consists of, or so nearly resembles as to be likely to be mistaken for, the opponent's official mark HEART SMART published in the March 2, 1994 issue of the Trade-marks Journal.

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavits of Douglas I. Watson and Richard R.J. Lauzon and certified copies of the opponent's application No. 658,295 and associated registered user applications. Messrs.

Watson and Lauzon were cross-examined on their affidavits and the transcripts of those cross-examinations form part of the record of this proceeding. The applicant did not file evidence. Only the opponent filed a written argument and no oral hearing was conducted.

The material time for considering the circumstances respecting the third ground of opposition would appear to be the date of my decision: see the decisions in Allied Corporation v. Canadian Olympic Association (1989), 28 C.P.R.(3d) 161 (F.C.A.) and Olympus Optical Company Limited v. Canadian Olympic Association (1991), 38 C.P.R.(3d) 1 (F.C.A.). The opponent is not required to evidence use and adoption of each official mark relied on: see page 166 of the Allied decision and pages 7-9 of the unreported opposition decision in The Canadian Council of Professional Engineers v. Parametric Technology Corporation (S.N. 602,455; January 31, 1995). Finally, the test to be applied is one of straight comparison of the marks in question apart from any marketplace considerations such as the wares, services or trades involved: see page 166 of the Allied decision and page 65 of the decision in Canadian Olympic Association v. Konica Canada Inc. (1990), 30 C.P.R.(3d) 60 (F.C.T.D.); reversed on other grounds (1991), 39 C.P.R.(3d) 400 (F.C.A.). As stated in Section 9(1)(n)(iii) of the Act, that test is whether or not the applicant's mark consists of, or so nearly resembles as to be likely to be mistaken for, the official mark. In other words, is the applicant's mark identical to, or almost the same as, the official mark?

In the present case, the applicant's mark is identical to the opponent's official mark. Thus, the third ground of opposition is successful and the remaining grounds need not be considered.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 10th DAY OF MARCH, 1997.

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