SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

(ON APPEAL FROM COURT OF APPEAL INTELLECTUAL PROPERTY DIVISION)

BETWEEN:

HEALTHWARD CANADA

Appellant

-AND-

VAXCO LTD.

Respondent

FACTUM FOR APPELLANT

Team number: 8

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PART I – OVERVIEW

[1] The legislator created the official marks regime to remove marks used by public authorities from the commercial marketplace, in order to facilitate the use of these marks in the public interest. The Appellant, Healthward Canada ("Healthward"), is a government-controlled entity that has been using its FLUSTOPPER mark for years, while providing educational and clinical services to Canadians living in low-income and remote communities, where vaccines are unavailable or harder to come by. This is the very kind of activity that should be protected through the official marks regime. Access to vaccines and healthcare has never been as pressing, front-of-mind, and vital to the public interest as it is today.

[2] This case arises from the Respondent, Vaxco Ltd.'s ("Vaxco"), refusal to respect the rights of a charitable organization partnered with Health Canada in an official mark used while providing free vaccines. Vaxco argues it has a right to use the FLUSTOPPA trademark that infringes Healthward's official mark, despite entering the Canadian market five years after Healthward began its operations here. A foreign commercial entity should not be allowed to co-opt a mark that in Canada has come to be associated with a service provided in the public interest, namely access to vaccines and clinics for those who would otherwise be deprived of this essential care.

[3] The Registrar of Trademarks and the Trial Court have both already recognized and agreed that Healthward's mark FLUSTOPPER is a valid official mark, and that Vaxco's FLUSTOPPA should not be registered. The Trial Court also found that Vaxco should not be allowed to use its mark in Canada because it would undermine the official marks regime. These decisions were correct. This appeal should therefore be allowed and the decision of the Trial Court should be restored.

PART II - STATEMENT OF FACTS

[4] Healthward is a charitable organization that provides free public health education and inoculation services to low-income and remote communities. Vaxco is a for-profit corporation based in the United States that manufactures and sells vaccines and medical supplies.

[5] Healthward has been operating in Canada since 2014.[1] In 2015, it launched a long-term collaboration with Health Canada, which funds the majority (75%) of Healthward's activities.[2] In return, Health Canada offers input and supervision over the strategic direction and day-to-day operations of Healthward, by consulting on the curriculum and messaging of the educational program, identifying the areas of service of the mobile clinics, and appointing board members. Funding is contingent on these components.[3]

[6] In January 2019, public notice of Healthward's adoption and use of the FLUSTOPPER official mark was given by the Registrar, pursuant to section 9(1)(n)(iii) of the *Trademarks Act* ("*TMA*").[4]

[7] Healthward Industries Corp ("Industries") is an affiliated Canadian corporation that provides the vaccines and medical supplies needed, at a fair market price, for Healthward's free mobile clinic. Any revenue that Healthward generates, including royalty fees paid by Industries, is invested back into its public health services.[5] In return, Industries is authorized to use the FLUSTOPPER official mark.

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[1] Official Problem: Trial Court of Canada Intellectual Property Division, Harold G Fox Moot 2020-2021 at para 9 [*TCCIP*].
[2] *Ibid* at para 10.
[3] *Ibid* at para 11.
[4] *Ibid* at para 8. See *Trademarks Act*, RSC 1985, c T-13 at s 9(n)(iii).
[5] *TCCIP*, *supra* note 1 at para 10.

[8] Vaxco has been operating in the United States for more than 20 years, but only entered the Canadian market in February 2019.[6] At that time, it received Health Canada approval to sell its vaccines.

[9] In March 2019, two months after public notice was given for Healthward's official mark, Vaxco applied to register the FLUSTOPPA & Design trademark in Canada in association with goods and services including vaccines and pharmaceutics, vaccination training, research and development, medical advice, and supply chain services. The Registrar refused the application because of the valid FLUSTOPPER official mark.[7]

[10] Vaxco appealed the Registrar's decision and sought judicial review of the validity of the official mark at the Trial Court of Canada Intellectual Property Division. Healthward's cross-application sought a declaration that Vaxco's use of the FLUSTOPPA mark infringes its official mark, as well as an injunction preventing further use of the FLUSTOPPA mark in Canada.

[11] The Trial Court confirmed the Registrar's decision to refuse registration of the FLUSTOPPA mark and granted the injunction.[8] The Trial Court concluded that the Registrar was correct to find that Healthward held a valid official mark, given its public authority status and found that the proposed trademark was "confusingly similar" to the official mark. The Trial

[6] *Ibid* at para 6.
[7] *Ibid* at para 8.
[8] *Ibid* at para 15.

Court also rejected Vaxco's argument that there was use of the FLUSTOPPA mark in Canada prior to the notice of adoption of the official mark.

[12] Vaxco appealed the decision to the Court of Appeal Intellectual Property Decision, and the appeal was allowed.[9] The appellate court found that Vaxco should not have been blocked from registering its trademark, because the mark would not be mistaken for the official mark, and because Healthward did not constitute a public authority within the meaning of s. 9(1)(n)(iii) *TMA*. In addition, the Court of Appeal held that Vaxco should have been allowed to continue using the FLUSTOPPA mark in Canada given its prior use.

[9] Official Problem: Court of Appeal Intellectual Property Division, Harold G Fox Moot 2020-2021 at para 15 [*CAIP*].

PART III - POINTS IN ISSUE

[13] This appeal raises three issues:

1. **Did the Court of Appeal err in invalidating Healthward's official mark?**

   Yes. Healthward's official mark is valid because it meets all the requirements of the *TMA*, which include being a "public authority" within the meaning of s. 9(1)(n)(iii). Therefore, Healthward's FLUSTOPPER mark is entitled to the protection provided by the official marks regime.

2. **Did the Court of Appeal err in finding Vaxco's proposed mark was registrable?**

   Yes. FLUSTOPPA is unregistrable per s. 12(1)(e) *TMA* because it is likely to be mistaken for the official mark FLUSTOPPER.

3. **Did the Court of Appeal err in allowing Vaxco to use its proposed mark?**

   Yes. Given the validity of Healthward's official mark, Vaxco should be enjoined from using the FLUSTOPPA mark because it would infringe s. 9(1)(n)(iii) *TMA*. Vaxco did not use the mark in Canada prior to public notice of the official mark, and, furthermore, the proposed goods and services would constitute expanded use.

PART IV - ARGUMENTS IN BRIEF

1. FLUSTOPPER is a valid official mark

[14] Section 9(1)(n)(iii) *TMA* sets out the framework for "official marks", which recognizes that certain symbols deserve special protection under intellectual property law, because they are associated with the work of public institutions. These exclusive symbols are not intended to be capitalized upon by any person for their own wares or services.[10] A wide range of marks fall under the protection of the official marks regime, including terms associated with professional regulatory bodies[11] and the designs of registered charities.[12] The law blocks the use and adoption of any mark that consists of or is so similar that it may be mistaken for an official mark.

[15] Any entity that qualifies as a public authority may request that the Registrar give public notice of the adoption and use of any badge, crest, emblem or mark.[13] Once public notice is given, the official mark becomes a prohibited mark.[14] Healthward's adoption and use of the FLUSTOPPER mark was not an issue in dispute at trial, nor were the requisite formalities for public notice of adoption and use.

[16] Given Healthward's status as a public authority, Healthward was well within its rights to request public notice be given for its FLUSTOPPER mark. The Federal Court of Appeal in *Ontario Architects* established a two-part test for determining public authority status under section 9(1)(n)(iii) *TMA*. Specifically, to be considered a public authority, an entity must be subject to a significant degree of public control by Health Canada, and its activities benefit the

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[10] See *Techniquip Ltd v Canadian Olympic Assn*, 1999 CarswellNat 2511, [1999] FCJ No 1787 (FCA) at para 13.
[11] See e.g. *Chartered Professional Accountants of Ontario v American Institute of Certified Public Accountants*, 2019 TMOB 86.
[12] See e.g. *Parkinson Society Canada v Parkinson Society Alberta*, 2016 TMOB 154.
[13] See *Stainer v ICBC*, 2001 BCCA 133 at para 22.
[14] See *Trademarks Act, supra* note 4 at s 9(n).

public.[15] Healthward meets both parts of the test. With respect, the Court of Appeal's contrary finding is flawed.

1.1 Healthward is subject to ongoing public control

[17] Healthward is subject to public control by the government, meeting the first prong of the test. This first component is fundamentally about ongoing government supervision.[16] It is not about "absolute control". Rather, the Registrar is merely required to find a "sufficiently significant degree of government control," which may be "exercisable both directly and indirectly".[17] Healthward's relationship with Health Canada fulfils this criterion.

[18] The Registrar has the discretion to consider numerous factors as indicia of public control, which include government influence over decision-making, substantial government funding, government control over bylaws, tax exemption status, etc.[18] The indicia identified in case law are not exhaustive, nor is the presence or absence of any one factor determinative.[19]

[19] Here, in addition to Healthward's status as a registered charity,[20] there are at least four factors demonstrating a sufficiently significant degree of public control.

[20] The first two factors are closely related, and comprise Health Canada's supervision over Healthward, and its conditional funding that Healthward relies on for its operations. Healthward's operations largely consist of providing educational programs on the importance of

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[15] *Ontario Association of Architects v Association of Architectural Technologists of Ontario*, 2002 FCA 218 at para 52 [*Ontario Architects*]; See also *See You In – Canadian Athletes Fund Corporation v Canadian Olympic Committee*, 2007 FC 406 at para 59 aff'd 2008 FCA 124 [*See You In*].
[16] See *Ontario Architects*, *supra* note 15 at para 59; *Starbucks (HK) Limited v Trinity Television Inc*, 2016 FC 790 at para 22; *Canadian Jewish Congress v Chosen People Ministries, Inc*, 2002 FCT 613, [2003] 1 FC 29 at para 4 aff'd 2003 FCA 272.
[17] *See You In*, *supra* note 15 at para 60.
[18] See *Canadian Olympic Association v Canada (Registrar of Trade Marks)*, [1983] 1 FC 692 (FCA) at paras 28—32 [*Canadian Olympic Association*]; *Council of Natural Medicine College of Canada v College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia*, 2013 FC 287 [*Chinese Medicine*].
[19] *Chinese Medicine*, *supra* note 18 at para 38.
[20] *CAIP*, *supra* note 9 at para 8.

vaccination and running mobile health clinics offering free vaccinations.[21] As the Trial Court indicated, Health Canada is consulted on the curriculum and messaging for Healthward's educational programs, in consideration for the funding it provides.[22] Health Canada is also permitted to identify a number of underserved communities and direct Healthward to provide mobile clinic services to those communities. Funding is contingent on this component.[23]

[21] Health Canada's influence over Healthward is not trivial, as it exercises ongoing supervision and significant influence over two major components of the Healthward's operations: its educational programs and mobile health clinics. Not only does Health Canada enjoy significant control, it has the power to withdraw funding if its conditions are not met.

[22] In *Canadian Olympic Association*, the Court found that the federal government's power to compel the Association not to participate in the 1980 Olympic Games was indicative of its substantial degree of influence over the Association's decision-making, ultimately supporting a finding of public control.[24] Although this was a single incident, it was viewed as one of five supporting indicia of public control, presumably because the decision to participate in the Games represents an important component of the Association's mandate, much like Healthward's educational programs and mobile clinics are important components of its mandate.

[23] Third, Health Canada is entitled to appoint two of five seats on Healthward's board of directors, or 40% of its board members.[25] Applying the Court's analysis in *Chinese Medicine*, where the Government of British Columbia was found to exercise control over the College in

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[21] *TCCIP*, *supra* note 1 at para 2.
[22] *Ibid* at para 11.
[23] *Ibid*.
[24] *Canadian Olympic Association*, *supra* note 18 at para 31.
[25] *TCCIP*, *supra* note 1 at para 11.

part due to its power to appoint between one-third and one-half of the College's board members, it is evident that Healthward is subject to government control.[26]

[24] Finally, Healthward's continued operations depends on its compliance with Health Canada's directives, and these directives target the bulk of Healthward's aforementioned programmes.

[25] Case law has recognized government funding as a possible indicator of public control[27] Here, the level of public control is intensified by the combination of government funding and the nature of the contractual relationship between Health Canada and Healthward.

[26] Pursuant to the funding agreement, Health Canada covers roughly 75% of Healthward's yearly operating expenses. This is more than double the proportion of funding the Canadian Olympic Committee ("COC") received from the government (30%) in *See You In*, a case in which the Federal Court found the COC to be under public control, as its activities would not be viable absent government funding.[28] So too here, while it is true that Healthward can unilaterally terminate the agreement upon reasonable notice, this would gut 75% of its funding and almost certainly devastate the financial viability of the entity moving forward. As the Trial Court correctly concluded, Healthward has no practical choice but to comply with Health Canada's direction.[29]

[27] The Court of Appeal overstated Healthward's level of control in its relationship with Health Canada. Ultimately, in assessing the degree of public control, the Registrar balances relevant factors, as exemplified above, in a contextual manner, and this balancing act is entitled

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[26] *Supra* note 18 at para 37.
[27] See e.g. *Canadian Olympic Association*, *supra* note 18 at para 30.
[28] *Supra* note 15 at para 61.
[29] *TCCIP*, *supra* note 1 at para 19.

to deference.[30] The Court of Appeal erred in overturning the Trial Court's finding that Healthward is subject to public control.

1.2 Healthward provides a benefit to the public

[28] Healthward's operations are dedicated to advancing public health, to the benefit of the public, meeting the second prong of the public authority test. Public benefit refers to activities that benefit the public interest, as opposed to private profit.[31]

[29] The lower courts did not dispute that Healthward's activities provide a clear public health benefit to Canadians. The Trial Court found this explicitly.[32] While the appellate court did not make an express finding on the public benefit component of the test, Ailes J.A. agreed that "it is beyond reproach that Healthward's mobile clinics and educational programs have dramatically improved public health in underserved communities and saved many lives".[33]

[30] Simultaneously, the Court of Appeal raised the concern that the official marks regime could be misused by an organization for profit.[34] Respectfully, Industries' use of the FLUSTOPPER mark is not incompatible with a finding of public benefit, which is the focus of the second prong of the test.

[31] First, the "public benefit" component of the test examines the general activities of the organization in question, rather than the specific use of the official mark. In *See You In*, the Canadian Olympic Committee as an organization was "considered more globally" and still found to exist for the public benefit. The Federal Court found that although certain activities were

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[30] *See You In*, *supra* note 15 at para 54; Canadian Intellectual Property Office, *Practice Notice: Official Marks pursuant to subparagraph 9(1)(n)(iii)*, October 2020 update (Ottawa: 2007).
[31] *Canadian Olympic Association*, *supra* note 18 at para 16.
[32] *TCCIP*, *supra* note 1 at para 20.
[33] *CAIP*, *supra* note 9 at para 9.
[34] *Ibid* at para 14.

arguably not beneficial to the public, such as attempting to take away the Applicant's trademark rights, the organization served a public benefit overall, and was ultimately found to constitute a public authority.[35]

[32] In this case, the question of public benefit is not as simple as determining whether profit has been derived from the official mark. Indeed, the Court of Appeal in *Canadian Olympic Association* stated that an organization can be both of public interest *and* profitable to itself or to its members.[36] Similarly, the Court found in *Ontario Architects* that the fact that the organization's activities benefit its members, and not just the public, was not fatal to a determination of public benefit.[37] Although *Ontario Architects* is a case about professional regulation, its overall conclusion regarding public benefit is applicable here.

[33] Furthermore, there is no evidence to suggest Healthward or Industries used the FLUSTOPPER official mark to gain a competitive advantage in the marketplace. Healthward's status as a registered charity does not mean that it is prohibited from generating revenue. In fact, beyond the substantial funding that Healthward receives from Health Canada, a portion of Healthward's annual operating expenses is supported by licensing revenue.[38] When Industries sells products to third parties, Healthward receives royalties, which it reinvests into its operations serving the public. In return, Industries is authorized to use the FLUSTOPPER mark.[39] While Healthward does collect revenue from licensing its mark to Industries, this does not detract from the public benefit it provides.

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[35] *See You In*, *supra* note 15 at para 64.
[36] *Supra* note 18 at para 15.
[37] *Supra* note 15 at para 69.
[38] *TCCIP*, *supra* note 1 at para 10.
[39] *Ibid* at para 2.

[34] In *Pacific Carbon Trust*, Crown Corporation allowed private sector clients to use its official mark in order to certify that the client was operating a carbon neutral product.[40] In spite of the fact that private sector clients were benefiting from the official mark, it was not disputed that Pacific Carbon Trust was providing a public benefit by supporting the province's carbon reduction goals.

[35] Similarly, although Industries has arguably benefited from using the FLUSTOPPER mark to sell its vaccines, this is consistent with Healthward's overall public health benefit. More importantly, by reinvesting its profits into charitable activities, Healthward maintains the core public benefit of its own operations. Therefore, the Trial Court was correct in concluding that Healthward provides a benefit to the public, and Industries' use of the mark does not detract from this benefit.

[36] It follows that Healthward meets both components of the test — public control and public benefit — supporting the conclusion that it constitutes a public authority as contemplated in s. 9 *TMA*. Hence, the Trial Court's finding in this regard should be restored — because Healthward's official mark is valid, the Registrar was correct in refusing Vaxco's application to register the FLUSTOPPA mark.

2. The FLUSTOPPA mark is unregistrable

[37] The Registrar cannot register the FLUSTOPPA mark because it would easily be mistaken for Healthward's official mark, FLUSTOPPER. Pursuant to s. 12(1)(e) *TMA*, a mark cannot be registered if its adoption is prohibited by s. 9, which prohibits trademarks "consisting of, or so nearly resembling as to be likely to be mistaken for" official marks. FLUSTOPPA and FLUSTOPPER clearly resemble each other, which under s. 9(1) *TMA* bars Vaxco from using its

[40] *Carbon Trust v Pacific Carbon Trust*, 2013 FC 946 at para 7 [*Carbon Trust*].

mark. Furthermore, the exception which allows for the adoption of an official mark in s. 9(2)(a) *TMA* does not apply because Healthward did not consent to use of the official mark by Vaxco.

[38] The Federal Court and Federal Court of Appeal have consistently held that the appropriate test for infringement of s. 9(1) *TMA* is one of resemblance and imperfect recollection, which is less stringent than the test for confusion between two trademarks.[41] As opposed to a confusion analysis, the resemblance test is not one of straight comparison, as the Federal Court noted in *Big Sisters*.[42] In fact, unlike with a confusion analysis, Vaxco's mark could be associated with completely different wares or services and sold to completely different consumers and would still be unregistrable.[43]

[39] Resemblance is determined by considering whether a person, on first impression, knowing the official mark only and having a vague memory of it, would likely be deceived or confused.[44] In assessing the degree of resemblance, the Registrar or a court may consider resemblances in appearance, in sound and in the ideas of the marks, as set out in s. 6(5)(e) *TMA*.[45]

[40] FLUSTOPPA would easily be mistaken for FLUSTOPPER by a person with only a vague recollection of Healthward's mark. The words are nearly identical in appearance, they are homonyms, and evoke the same idea—both are associated with flu prevention.

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[41] See *Canadian Olympic Assn v Konica Canada Inc (CA)*, [1992] 1 FC 797 (FCA) [*Konica*]; *Canadian Olympic Assn v Health Care Employees Union of Alberta*, [1992] FCJ No 1129 (FC) [*HCEUA*]; *Big Sisters Association of Ontario v Big Brothers of Canada*, [1997] FCJ No 627 (FC) aff'd (1999) 86 CPR (3d) 504 (FCA) [*Big Sisters*].
[42] *Big Sisters*, supra note 41 at para 63.
[43] See *Canadian Council of Professional Engineers v APA- Engineered Wood Assn*, [2000] FCJ No 1027 (FC) at para 68 [*Council of Professional Engineers*].
[44] *HCEUA*, *supra* note 41 at para 19.
[45] *Big Sisters*, *supra* note 41 at para 64.

[41] Despite the Court of Appeal's findings,[46] the proposed design element of FLUSTOPPA merely includes a minimalist syringe that does not sufficiently distinguish it from the FLUSTOPPER word mark.[47] As opposed to *Pacific Carbon Trust*, where Trademarks Opposition Board found the design element was the most striking element of the proposed trademark,[48] there are no other words alongside the design in the proposed mark, and the syringe design in this case is much smaller than the word FLUSTOPPA. Moreover, FLUSTOPPER is a word mark that has been used with different styles and fonts.[49] Accordingly, consumers have likely seen the official mark in varied and diverse manifestations, which makes it more difficult to identify Vaxco's design as a distinct mark. Altogether, the design element does little to distinguish the FLUSTOPPA mark in the mind of a person with a vague recollection of the word FLUSTOPPER.

[42] Finally, FLUSTOPPER is not a common word as in *Council of Professional Engineers*, nor a household name as in *Big Sisters* and *ICBC*.[50] There is no evidence to suggest FLUSTOPPER is so well known that an average consumer, knowing the official mark only and having an imperfect memory of the word, can be expected to distinguish it from a mark that looks and sounds almost exactly the same.

[43] In this case, the Trial Court concluded correctly that the marks were too similar, even if the Court misstated the test. The Trial Court considered some factors that are only relevant in a

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[46] *CAIP*, *supra* note 9 at para 6.
[47] See e.g. *Hope International Development Agency v HOPE Helping Other People Everywhere, Ottawa-Carleton Inc*, [2008] TMOB No 213.
[48] *Pacific Carbon Trust Inc v Carbon Trust*, 2012 TMOB 98 at para 18 citing *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 64.
[49] See Moot Problem Clarifications, Harold G Fox Moot 2021, Question 22 [*Clarification Questions*].
[50] *Council of Professional Engineers*, *supra* note 43; *Big Sisters*, *supra* note 41; *ICBC v Stainton Ventures*, 2014 BCCA 296 at paras 25–29.

confusion analysis, but this actually narrowed the test for resemblance, which is less stringent.[51] Furthermore, it was the Court of Appeal that erred when it said official marks are afforded a narrower protection.[52] In fact, the Federal Court in *Council of Professional Engineers* said official marks are afforded a "great ambit of protection".[53] A mark may be "mistaken for" an official mark even when it is not confusing per s. 6.[54]

[44] Resemblance is determined case-by-case, as evidenced in Appendix B of this factum. Both the Registrar and Trial Court found FLUSTOPPA similar enough to be mistaken for FLUSTOPPER. Their finding should be restored.

3. Vaxco cannot use the FLUSTOPPA mark in Canada

[45] Should the Supreme Moot Court agree that the official mark is valid, Vaxco has argued it can continue using its mark based on "prior use". Healthward does not challenge Vaxco's "use" of the FLUSTOPPA mark outside of Canada. Vaxco's business may be successful in other jurisdictions, which is why it sought entry into the Canadian market. The issue on appeal is whether FLUSTOPPA-marked goods and services offered by Vaxco outside of Canada can be considered "use" in Canada. Respectfully, they cannot.

3.1 The FLUSTOPPA mark did not meet the requirement for "use" in Canada

[46] Public notice of the FLUSTOPPER official mark prohibits the adoption of the mark by others going forward. It has long been accepted that s. 9(1)(n)(iii) *TMA* does not have retrospective effect, and any person using the mark without registration is permitted to continue

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[51] *TCCIP*, *supra* note 1 at para 17.
[52] *CAIP*, *supra* note 9 at para 4.
[53] *Council of Professional Engineers*, *supra* note 43 at para 70.
[54] *Ibid* at para 71.

to do so.[55] However, Vaxco cannot prove any prior use in Canada. Even if it could, protection for prior use would not extend to the new or different products or services it seeks to market in Canada.[56] To determine prior use, one must refer to the definitions in s. 4 *TMA*.[57]

[47] The Trial Court found that Vaxco never sold FLUSTOPPA vaccines in Canada, and therefore could not have used the mark in association with goods.[58] This is correct. A mark is deemed to be used if it is associated with goods in the normal course of business, i.e. if it is marked on goods, packaging, or otherwise during a commercial transfer.[59] Wares such as vaccines and drugs cannot be commercially sold if they are missing necessary government approval.[60] Therefore, it was impossible for Vaxco to use the FLUSTOPPA mark to sell vaccines or deliver healthcare-related goods in Canada before receiving regulatory approval.[61] Vaxco only began selling vaccines when it applied for trademark registration—two months after the Registrar had already made public notice of Healthward's FLUSTOPPER official mark in January 2019.[62]

[48] Where the mark is alleged to have been used in association with services, mere display or advertising of those services in Canada is insufficient; the services must be performed in Canada.[63] The Court of Appeal failed to apply the appropriate test for Vaxco's use of the mark

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[55] See *Canadian Olympic Assn v Allied Corp* (1989), 28 CPR (3d) 161 at 166, [1990] 1 FC 769 (FCA).
[56] *Ibid* at paras 7–8; *Konica*, *supra* note 41; *Royal Roads University v R*, 2003 FC 922 at paras 12–16 [*Royal Roads*].
[57] *Konica*, *supra* note 41 at para 24.
[58] *TCCIP*, *supra* note 1 at para 23.
[59] *Trademarks Act*, *supra* note 4 at s 4(1).
[60] See *The Molson Cos v Halter* (1976), [1976] FCJ No. 302, 28 CPR (2d) 158 (FC) at paras 177–178; Kelly Gill, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th Edition at 3.5(b)(i)(B).
[61] See *Food and Drug Act*, RSC 1985, c F-27 at s 30(2); *Food and Drug Regulations*, CRC, c 870 at Divisions 1A, 4; Canada, "Regulating vaccines for human use in Canada", (Updated: 9 September 2020), online: <https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/activities/fact-sheets/regulation-vaccines-human-canada.html>.
[62] *TCCIP*, *supra* note 1 at paras 6, 8; *Clarification Questions*, *supra* note 49, Question 25.
[63] See *Trademarks Act*, *supra* note 4 at s 4(2); *Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134 at para 7; *Porter v Don the Beachcomber*, 1966 CarswellNat 37, (1966) 48 CPR 280 (Ex Ct); *Marineland Inc v*

online and on billboards.[64] Even though use in association with services does not need to derive a profit, it does need to demonstrate *some* benefit for people in Canada. Unlike jurisprudence involving accommodation reservation and listings,[65] Vaxco's website did not meet the standard of providing such a service because users were unable to purchase the vaccine or procure any benefit from its services without travelling to the US.

[49] Moreover, Vaxco cannot claim that FLUSTOPPA was well-known in Canada as to constitute adoption prior to public notice of the official mark. A mark used in another country made known in Canada is granted protection only when the mark is advertised or used in Canada pursuant to s. 5 *TMA*. The caveat is that the mark must be known in a substantial part of Canada, and the advertisements must affect the Canadian market.[66] The Trademarks Opposition Board in *Viper Room* found an applicant could register a trademark even though it knew that mark was used in another country.[67] By the same logic, Industries' awareness of the FLUSTOPPA mark in the US is irrelevant.[68] Ultimately, paying for billboard advertising along the border and targeting through Vaxco's website to an unknown number of Canadians is not the same as being sufficiently well-known to deserve trademark protection across all of Canada.

3.2 Healthward is not caught in a catch-22

[50] The Court of Appeal observed that Healthward is caught in a catch-22 in demanding an injunction against Vaxco,[69] even though the Trial Court found that Vaxco began using the

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Marine Wonderland and Animal Park, [1974] 2 FC 558, 1974 16 CPR (3d) 97 (FCTD); *Motel 6 Inc v No 6 Motel Ltd*., [1982] 1 FC 638, (1981) 56 CPR (2d) 44 (FCTD) [*Motel 6*].

[64] *CAIP*, *supra* note 9 at para 12.

[65] See e.g. *Societe Nationale des Chemins de Fer Francais SNCF v Venice Simplon – Orient Express Inc*, 2000 CarswellNat 2869, [2000] FCJ No 1897 (FC); *Homeaway.com, Inc v Martin Hrdlicka*, 2012 FC 1467.

[66] *Motel 6*, *supra* note 63 at paras 35–38.

[67] *Viper Room Development, LLC v 672661 Alberta Ltd*, 2014 TMOB 201 at para 4.

[68] *TCCIP*, *supra* note 1 at para 13.

[69] *CAIP*, *supra* note 9 at para 12.

FLUSTOPPA mark in March 2019 when it entered the Canadian market. It is this prohibited use that must be stopped. There is no catch-22 because conceding that Vaxco used a mark *outside* of Canada does not bind Healthward in any way.

[51] The appeal court referred to the catch-22 in the *Gillette* defence,[70] where a defendant must admit to using the infringing intellectual property because it is "prior art". The defence is not relevant to trademark law, but instead arises in patent litigation "when it is established that the alleged infringing product is based on the teachings of a prior patent."[71] The Court of Appeal seemed to suggest Healthward could not ask for an injunction barring use of FLUSTOPPA without admitting that it was already in use. Healthward submits that no use of FLUSTOPPA was established before March 2019, at which point it was prohibited by s. 9(1) *TMA*.

3.3 In the alternative, Vaxco expanded its use of the FLUSTOPPA mark

[52] Even if prior use is established, it is limited to wares and services associated with a mark at the time public notice of the official mark was given.[72] Therefore, any prior use of the official mark by Vaxco is limited to the services and products offered prior to January 2019 when the official mark was recorded.

[53] Respectfully, the Court of Appeal cast too wide a net in its application of "prior use". In *Royal Roads University*, the Federal Court judge held that "protection under s. 9 for a prior user of an official mark does not extend to the marketing of a new and different product developed by the user after publication of the mark."[73] At most, prior use could be found for Vaxco's

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[70] *Gillette Safety Razor Co v Anglo-American Trading Co* (1913), 30 RPC 465 (HL) at 480.
[71] *AB Hassle v Apotex Inc*, 2006 FCA 51 at para 15.
[72] See *Filenet Corp v Canada (Registrar of Trade Marks)*, 2002 FCA 418 at para 32; *Cable Control Systems Inc v Electrical Safety Authority*, 2012 FC 1272 at para 6.
[73] *Royal Roads*, *supra* note 56 at para 16.

educational resources and website for booking appointments in the US. This is a far cry from the category identified by the appellate court of "healthcare products and related services."[74]

[54] There was no evidence to suggest that Vaxco's prior use in Canada extended into "healthcare products and related services" at the time that public notice was given for the FLUSTOPPER official mark. Reserving inoculation services abroad is comparable to online hotel reservation services, but this category of services does not include the provision of vaccines in Canada.[75] Also, the educational content on Vaxco's website was passive and did not provide personalised services for Canadians. Indeed, any such services would have contravened healthcare regulations. Therefore, among the list of wares and services in Vaxco's application, the only service listed that was associated with the mark before January 2019 was "information in connection with vaccination." All other listed wares and services constitute expanded use that is prohibited by s. 9(1) *TMA*.

[55] Ultimately, the doctrine of prior use is not a "holistic" or contextual analysis, because it does not extend to new uses of a restricted mark. The "holistic" approach to establishing use that was advanced by the trial judge in *Pro-C v Computer City* was set aside on appeal.[76] Therefore, the Court of Appeal erred when it overturned the injunction against Vaxco ordered by the Trial Court. The injunction should be restored.

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[74] *CAIP*, *supra* note 9 at para 13.
[75] *TCCIP*, *supra* note 1 at para 5
[76] *Pro-C Ltd v Computer City Inc,* 2001 CarswellOnt 3115, [2001] OJ No 3600 (ONCA) at paras 7–8.

PART V – ORDER REQUESTED

[56] The appeal should be allowed, and the decision of the Trial Court should be restored. The Appellant seeks:

1. A declaration that the Appellant's FLUSTOPPER mark is an official mark per s. 9(1)(n)(iii) *TMA*, and an order restoring official mark status from the time public notice was given by the Registrar in January 2019.
2. A declaration that the Respondent's FLUSTOPPA mark is unregistrable per s. 12(1)(e) *TMA*.
3. An injunction enjoining the Respondent from using the FLUSTOPPA mark in association with any wares sold or services performed in Canada.

Tuesday, January 12, 2021.

PART VI - TABLE OF AUTHORITIES

LEGISLATION	PARAGRAPHS
Food and Drug Act, RSC 1985, c F-27.	47
Food and Drug Regulations, CRC, c 870.	47
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JURISPRUDENCE	PARAGRAPHS
AB Hassle v Apotex Inc, 2006 FCA 51.	51
Big Sisters Association of Ontario v Big Brothers of Canada, [1997] FCJ No 627 (FC) aff'd (1999) 86 CPR (3d) 504 (FCA).	38, 39, 42
Cable Control Systems Inc v Electrical Safety Authority, 2012 FC 1272.	52
Canadian Council of Professional Engineers v APA- Engineered Wood Assn, [2000] FCJ No 1027 (FC).	38, 42, 43
Canadian Jewish Congress v Chosen People Ministries, Inc, 2002 FCT 613, [2003] 1 FC 29 aff'd 2003 FCA 272.	17
Canadian Olympic Assn v Allied Corp (1989), 28 CPR (3d) 161 at 166, [1990] 1 FC 769 (FCA).	46
Canadian Olympic Assn v Health Care Employees Union of Alberta, [1992] FCJ No 1129 (FC).	38, 39
Canadian Olympic Assn v Konica Canada Inc (CA), [1992] 1 FC 797 (FCA).	38, 46
Canadian Olympic Association v Canada (Registrar of Trade Marks), [1983] 1 FC 692 (FCA).	18, 22, 25, 28, 32
Carbon Trust v Pacific Carbon Trust, 2013 FC 946 aff'g 2012 TMOB 98.	34, 41
Chartered Professional Accountants of Ontario v American Institute of Certified Public Accountants, 2019 TMOB 86.	14
Council of Natural Medicine College of Canada v College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia, 2013 FC 287.	18, 23
Filenet Corp v Canada (Registrar of Trade Marks), 2002 FCA 418 aff'g [2002] 1 FC 266 (FC).	52
Gillette Safety Razor Co v Anglo-American Trading Co (1913), 30 RPC 465 (HL).	51
Homeaway.com, Inc v Martin Hrdlicka, 2012 FC 1467.	48
Hope International Development Agency v HOPE Helping Other People Everywhere, Ottawa-Carleton Inc, [2008] TMOB No 213.	41
ICBC v Stainton Ventures, 2014 BCCA 296	42
Marineland Inc v Marine Wonderland and Animal Park, [1974] 2 FC 558, 1974 16 CPR (3d) 97 (FCTD).	48
Masterpiece Inc v Alavida Lifestyles Inc, 2011 SCC 27.	41
Miller Thomson LLP v Hilton Worldwide Holding LLP, 2020 FCA 134.	48

Motel 6 Inc v No 6 Motel Ltd., [1982] 1 FC 638, (1981) 56 CPR (2d) 44 (FCTD).	48, 49
Ontario Association of Architects v Association of Architectural Technologists of Ontario, 2002 FCA 218.	16, 32
Parkinson Society Canada v Parkinson Society Alberta, 2016 TMOB 154.	14
Porter v Don the Beachcomber, 1966 CarswellNat 37, (1966) 48 CPR 280 (Ex Ct).	48
Pro-C Ltd v Computer City Inc, 2001 CarswellOnt 3115, [2001] OJ No 3600 (ONCA).	55
Royal Roads University v R, 2003 FC 922.	46, 53
See You In – Canadian Athletes Fund Corporation v Canadian Olympic Committee, 2007 FC 406 aff'd 2008 FCA 124.	16, 17, 26, 27, 31
Société Nationale des Chemins de Fer Français SNCF v Venice Simplon – Orient Express Inc, 2000 CarswellNat 2869, [2000] FCJ No 1897 (FC).	48
Stainer v ICBC, 2001 BCCA 133	15
Starbucks (HK) Limited v Trinity Television Inc, 2016 FC 790.	17
Techniquip Ltd v Canadian Olympic Assn, 1999 CarswellNat 2511, [1999] FCJ No 1787 (FCA).	14
The Molson Cos v Halter (1976), [1976] FCJ No 302, 28 CPR (2d) 158 (FC).	47
Viper Room Development, LLC v 672661 Alberta Ltd, 2014 TMOB 201.	49

SECONDARY SOURCES	**PARAGRAPHS**
Canada, "Regulating vaccines for human use in Canada", (Updated: 9 September 2020), online: <https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/activities/fact-sheets/regulation-vaccines-human-canada.html>.	47
Canadian Intellectual Property Office, *Practice Notice: Official Marks pursuant to subparagraph 9(1)(n)(iii)*, October 2020 update (Ottawa: 2007).	27
Kelly Gill, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th Edition.	47

OFFICIAL MOOT SOURCES	**PARAGRAPHS**
Moot Problem Clarifications, Harold G Fox Moot 2021.	41, 47
Official Problem: Court of Appeal Intellectual Property Division, Harold G Fox Moot 2020-2021.	12, 19, 29, 30, 41, 43, 50, 53
Official Problem: Trial Court of Canada Intellectual Property Division, Harold G Fox Moot 2020-2021.	5, 6, 7, 8, 9, 11, 20, 23, 26, 29, 33, 43, 47, 48, 49, 54

PART VII - APPENDICES

Appendix A

***Trademarks Act*, RSC, 1985, c T-13**

Prohibited marks
9 (1) No person shall adopt in connection with a business, as a trademark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for,
[...]

(n) any badge, crest, emblem or mark
[...]

(iii) adopted and used by any public authority, in Canada as an official mark for goods or services,

in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority, as the case may be, given public notice of its adoption and use;

(2) Nothing in this section prevents the adoption, use or registration as a trademark or otherwise, in connection with a business, of any mark

(a) described in subsection (1) with the consent of Her Majesty or such other person, society, authority or organization as may be considered to have been intended to be protected by this section; [...]

When mark or name confusing
6 (1) For the purposes of this Act, a trademark or trade name is confusing with another trademark or trade name if the use of the first mentioned trademark or trade name would cause confusion with the last mentioned trademark or trade name in the manner and circumstances described in this section.
[...]
(5) In determining whether trademarks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including
[...]

(e) the degree of resemblance between the trademarks or trade names, including in appearance or sound or in the ideas suggested by them.

When trademark registrable
12 (1) Subject to subsection (2), a trademark is registrable if it is not

[...]

(e) a sign or combination of signs whose adoption is prohibited by section 9 or 10;

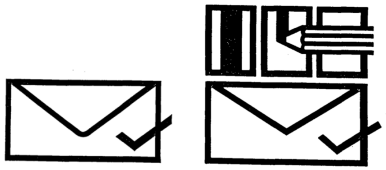
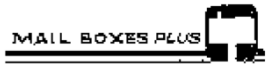
When deemed to be used

4 (1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

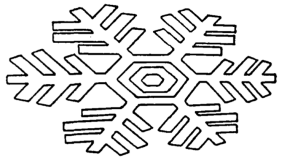
Appendix B

	Owner of official mark	Official mark(s)	Other mark	Resemblance	Citation
1	Big Sisters Association of Ontario and Big Sisters of Canada	L'Association des Grandes Soeurs de l'Ontario; Les Grandes Soeurs du Canada; et Les Grandes Soeurs Big Sisters Association of Ontario; Big Sisters of Canada; and Big Sisters	Les Grands Frères et Soeurs du Canada Big Brothers and Sisters of Canada (also an official mark)	No	***Big Sisters Association of Ontario v Big Brothers of Canada***, 1999 CanLII 8094 (FCA); aff'g 1997 CanLII 16918 (FC)
2	Boy Scouts of Canada	BEAVERS	BENNY THE BEAVER	Yes	***Boy Scouts of Canada v Gagné***, 2007 CanLII 81544 (CA TMOB)
3	Boy Scouts of Canada	BEAVERS	BILLY BEAVER	No	***Boy Scouts of Canada v Aleksiuk***, 2006 CanLII 80339 (CA TMOB)
4	British Columbia Hydro and Power Authority	POWER SMART; WATER SMART; POWER SMART SEAL OF ENERGY EFFICIENCY; POWER SMART SAVES	AN ENERGY SMART HOME	Yes	***British Columbia Hydro and Power Authority v The Consumers' Gas Company Ltd***, 2000 CanLII 28660 (CA TMOB)
5	British Columbia Hydro and Power Authority	POWER SMART SAVES & Design	SMARTPOWER	Yes	***British Columbia Hydro and Power Authority v Gallagher Group Limited,*** 2003 CanLII 68800 (CA TMOB)
6	The Bruce Trail Association	BRUCE TRAIL; BRUCE TRAIL ASSOCIATION and BRUCE TRAIL NIAGARA TO TOBERMORY	BRUCE TRAIL ENVIRO P.I.	Yes	***The Bruce Trail Association v Andrew Camp, Don Stevens, Darryl Peterson, A Registered Partnership***, 2001 CanLII 38014 (CA TMOB)
7	The Queen (Canada)	Sport Canada	Canasport	No	***The Queen v Kruger*** (1978), 44 CPR (2d) 135 (Registrar of Trade Marks)
8	Canada Post	POST; POSTE, etc	DEUTSCHE POST WORLD NET	No	***Canada Post Corporation v Deutsche Post AG***, 2011 TMOB 210
9	Canada Post	CYBERPOST; CYBERPOSTE; EPOST; EPOSTE; etc	WEBPOST	Yes	***Canada Post Corp. v. Butterfield & Daughters Computers Ltd***. 68 C.P.R. (4th) 280, 2008 CanLII 88310 (CA TMOB)
10	Canada Post	Ibid.	MICROPOST	No	***Canada Post Corp. v. Micropost Corp.*** (2000), 2000 CanLII 14992 (FCA), aff'g 1998 CanLII 8704 (FC)

11	Canada Post	Various	VIDEO MAIL	No	***Canada Post Corporation v Paxton Developments Inc***, 1999 CanLII 19590 (CA TMOB)
12	Canada Post	PRIORITY POST; POSTES PRIORITAIRES; INTELPOST; MEDIAPOSTE; PRIORITY POST COURIER; MAIL POSTE & Design, POSTE MAIL & Design; etc	WAGON POST LTD.	No	***Canada Post Corporation v Welcome Wagon Ltd,*** 1996 CanLII 11371 (CA TMOB)
13	Canada Post	ENVELOPE, CHECK MARK & Design; and ENVELOPE, CHECK MARK & PENCIL Design 	SUPERIOR & Design 	Yes	***Canada Post Corporation v Superior Envelopes, Direct Mail Services, Data Services***, 1997 CanLII 15776 (CA TMOB)
14	Canada Post	ADMAIL; ELECTRONIC MAIL; MAILTRAC; and SUPERMAILBOX		No	***Canada Post Corp v 736217 Ontario Ltd*** (1993), 51 CPR (3d) 112 (TMOB)
15	Canadian Council of Professional Engineers	Engineer, Engineering, Consulting Engineer, Ing., Professional Engineer, Ingenierie, Ingenieur, etc.	APA — The Engineered Wood Association The Engineered Wood Association	No (Not distinctive)	***Canadian Council of Professional Engineers v APA- Engineered Wood Assn (2000)***, 2000 CanLII 15543 (FC)
16	Canadian Council of Professional Engineers	ENGINEER; PROFESSIONAL ENGINEER; P.ENG.; CONSULTING ENGINEER; ENGINEERING; INGÉNIEUR; ING.; INGÉNIEUR CONSEIL; INGÉNIERIE; GÉNIE	KELLY ENGINEERING RESOURCES	No	***Canadian Council of Professional Engineers v Kelly Properties, Inc***, 2004 CanLII 71744 (CA TMOB)
17	Canadian Council of Professional Engineers	Ibid.	COMSOL REACTION ENGINEERING LAB	No	***Canadian Council of Professional Engineers v. COMSOL AB,*** 2011 TMOB 3
18	Canadian Council of Professional Engineers	ENGINEER	XENGINEER	Yes	***Canadian Council of Professional Engineers v Oyj***, 2008 CanLII 88286 (CA TMOB)

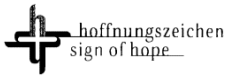
19	Canadian Council of Professional Engineers	PROFESSIONAL ENGINEER	PRO/ENGINEER	Yes	***Canadian Council of Professional Engineers v Parametric Technology Corporation,*** 1995 CanLII 10294 (CA TMOB)
20	Canadian Council of Professional Engineers	GÉNIE		No	***Canadian Council of Professional Engineers v Groupegénie Inc***, 2009 CanLII 90448 (CA TMOB)
21	Canadian Broadcasting Corporation/Société Radio-Canada	Hockey Night in Canada	COFFEE NIGHT IN CANADA	No (But opposition succeeds based on confusion with CBC's marks)	***Canadian Broadcasting Corporation/Société Radio-Canada v Big Mountain Coffee House & Roasters Ltd***, 2014 TMOB 240
22	Canadian Medical Association	DOCTOR and PATIENT'S CHOICE	DOCTOR'S CHOICE	Yes	***Canadian Medical Association v Enzymatic Therapy Inc***, 2002 CanLII 61530 (CA TMOB)
23	Canadian Medical Association	DR.; Dr; Doctor; Doctor; Docteur	DR. BERMAN'S	No	***Canadian Medical Association v The Enrich Corporation***, 2004 CanLII 71686 (CA TMOB)
24	Canadian Medical Association	DR.; Dr; DOCTOR; DOCTEUR	DRSOY.COM	No	***Canadian Medical Association v Babaknia***, 2007 CanLII 80856 (CA TMOB)
25	Canadian Medical Association	DR.; Dr; DOCTOR; DOCTEUR	DOCTOR APPROVED CHIROPRACTIC	No	***Canadian Medical Association v Sleep Products International Inc***, 2007 CanLII 80862 (CA TMOB)
26	Canadian Medical Association	DR.; Dr; DOCTOR; DOCTEUR	PRAIRIE DOCTOR BRAND	No	***Canadian Medical Association v Eclectic Echinacea Inc,*** 2005 CanLII 78211 (CA TMOB)
27	Canadian Medical Association	PHYSICIAN	PHYSICIAN'S CHOICE	Yes	***Canadian Medical Association v Physician's Choice of Arizona, Inc,*** 2005 CanLII 78570 (CA TMOB)
28	Canadian Olympic Assn	Olympic Games; Olympiad; Olympian; Olympic; Olympique	OLYMTIC	Yes	***Canadian Olympic Association v SmithKline Beecham Biologicals SA,*** 2001 CanLII 38020 (CA TMOB)

29	Canadian Olympic Assn	Olympic Games; Olympiad; Olympian; Olympic; Olympique	ALYMPIA	No	***Canadian Olympic Association v SmithKline Beecham Biologicals SA,*** 1997 CanLII 15904 (CA TMOB)
30	Canadian Olympic Assn		CEA CANADIAN ENTREPRENEURS ASSOCIATION & Design 	Yes	***Canadian Olympic Association v GA Marton Enterprises Ltd,*** 1990 CanLII 6439 (CA TMOB)
31	Canadian Olympic Assn	OLYMPIC	Konica Guinness Book of Olympic Records	Yes	***Canadian Olympic Assn v Konica Canada Inc (CA),*** 1991 CanLII 8363 (FCA) aff'g 1990 CanLII 7939 (FC)
32	Canadian Olympic Assn			Yes	***Canadian Olympic Assn v Health Care Employees Union of Alberta***, 1992 CarswellNat 179, [1992] FCJ No 1129 (FC)
33	Canadian Olympic Assn	Olympic Games, Olympiades, Olympian, Olympic, Olympique, Summer Olympics, Canada's Olympic Teams, Winter Olympics and Winter Olympic Games, Olympia, Olympus	OLYMEL	No	***Assoc. Olympique Canadienne c. Coopérative Fédérée de Québec (Canadian Olympic Assn. v. Olymel)*** (2000), 2000 CanLII 15748 (FC)
34	Canadian Olympic Assn	OLYMPIAN (etc.)	OLYMPIAN	Yes	***Cdn Olympic Assn v Allied Corp*** (1987), 16 CPR (3d) 80; 13 FTR 93 (FCTD)
35	Canadian Olympic Assn	OLYMPIAN (etc.)	OLYMPIAN	Yes	***Canadian Olympic Assn v IMI Norgren Enots Ltd*** 1989 CarswellNat 1157, 23 CPR (3d) 389
36	Canadian Olympic Assn.	EXPRESS	EXPRESS & Design 	Yes	***Canadian Olympic Association v Express Services, Inc***, 1993 CanLII 8117 (CA TMOB)

37	Canadian Olympic Assn			No	***Techniquip Ltd v Canadian Olympic Association***, 1999 CanLII 7573 aff'g 1998 CanLII 7573 (FC)
38	Canadian Olympic Assn			No	***Olympic Association v Constructions Isothermes Lambert***, 1990 CanLII 6405 (CA TMOB)
39	Canadian Olympic Assn			No	***Canadian Olympic Assn v Logo-Motifs Ltd*** (1999), 3 CPR (4th) 219 (FC)
40	Canadian Olympic Assn			No	***Canadian Olympic Assn v Fraser Valley Milk Producers Cooperative Assn*** (1989), 27 CPR (3d) 115 (TMOB)
41	Canadian Olympic Assn	OLYMPIC	THE OLYMPIC SNOW ROSE	Yes	***Canadian Olympic Assn v Jack G McIntyre & Associates Inc*** (1988), 21 CPR (3d) 58 (TMOB)
42	Canadian Olympic Assn	OLYMPIQUE	OLYMPIQUES MONTREAL	Yes	***Canadian Olympic Assn v Gerry Snyder Enterprises Inc***(1985), 5 CPR (3d) 136 (TMOB)
43	Canadian Olympic Assn	OLYMPIAN; OLYMPIAD		Yes	***Canadian Olympic Assn v Holmont Industries Ltd (1986),*** 13 CPR (3d) 308 (TMOB)

44	Canadian Olympic Assn	See above	balans	No	***Canadian Olympic Assn v Mengshoel*** (1989), 28 CPR (3d) 475 (TMOB)
45	Canadian Olympic Assn			No	***Canadian Olympic Assn v Nikon Corp*** (1990), 29 CPR (3d) 553 (TMOB)
46	Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games	TOURISM 2010	ECO-TOURISM 2010	Yes	***Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games v. Bester,*** 2009 CanLII 82114 (CA TMOB)
47	Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games	SPIRIT OF THE GAME	SPIRIT OF THE GAME	Yes	***Vancouver Organizing Committee v Brownridge***, 2009 CanLII 90466 (CA TMOB)
48	Ordre des comptables professionnels agréés du Québec	CPA Chartered Professional Accountants & Design; COMPTABLES PROFESSIONNELS AGRÉÉS DU QUÉBEC; etc.	AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS	No (mark refused for other reasons)	***Ordre des Comptables Professionnels Agréés du Québec v American Institute of Certified Public Accountants***, 2019 TMOB 82
49	Chartered Professional Accountants of Ontario	CPA	THIS WAY TO CPA	No	***Chartered Professional Accountants of Ontario v American Institute of Certified Public Accountants***, 2019 TMOB 65
50	Chartered Professional Accountants of Ontario	CPA	UNIFORM CPA EXAMINATION	No (mark refused for other reasons)	***Chartered Professional Accountants of Ontario v American Institute of Certified Public Accountants,*** 2019 TMOB 67
51	Chartered Professional Accountants of Ontario	CPA	GLOBAL CPA REPORT & Design	No (mark refused for other	***Chartered Professional Accountants of Ontario v American Institute of Certified Public Accountants,*** 2019 TMOB 68

				reasons)	
52	Chartered Professional Accountants of Ontario	CHARTERED ACCOUNTANT; CHARTERED PUBLIC ACCOUNTANT; CHARTERED PROFESSIONAL ACCOUNTANT; etc.	THE CHARTERED INSTITUTE OF MANAGEMENT ACCOUNTANTS	No (mark refused for other reasons)	***Certified Management Accountants of Ontario v The Chartered Institute of Management Accountants,*** 2019 TMOB 107
53	Chartered Professional Accountants of Ontario	Ibid.	CHARTERED GLOBAL MANAGEMENT ACCOUNTANT	No (mark refused for other reasons)	***Chartered Professional Accountants of Ontario v Association of International Certified Professional Accountants, a District of Columbia non-profit corporation,*** 2019 TMOB 120
54	Concordia University			No	***Concordia University v 649643 Ontario Inc***, 2006 CanLII 80381 (CA TMOB)
55	Duke University	DUKE UNIVERSITY; DUKE	DUKE & Design	Yes	***Duke University v Royal Textile Mills, Inc***, 2007 CanLII 80846 (CA TMOB)
56	First Nations Summit	FIRST NATIONS SUMMIT	FIRST NATIONS	Yes	***First Nations Summit v Skoolegiate Inc***, 1999 CanLII 19468 (CA TMOB)
57	Hockey Canada	HOCKEY CANADA; TEAM CANADA HOCKEY 		Yes	***Hockey Canada v Canadian Adult Recreational Hockey Association, a legal entity***, 2017 TMOB 145

58	Hope International Development Agency	HOPE INTERNATIONAL DEVELOPMENT AGENCY 	H.O.P.E. 	Yes	***Hope International Development Agency v HOPE Helping Other People Everywhere, Ottawa-Carleton Inc***, 2008 CanLII 88618 (CA TMOB)
59	Hope International Development Agency	Ibid.	HOPE WORLDWIDE 	No	***Hope International Development Agency v. Hope Worldwide, Ltd.***, 2009 CanLII 82147 (CA TMOB)
60	Hope International Development Agency	Ibid.	  ESPOIR VOIR LE MONDE SOUS UN JOUR NOUVEAU	Yes	***Hope International Development Agency v Aga Khan Foundation Canada***, 1996 CanLII 11405 (CA TMOB)
61	Hope International Development Agency	Ibid.		No	***Hope International Development Agency v Hoffnungszeichen Sign of Hope eV***, 2008 CanLII 88202 (CA TMOB)
62	Hope International Development Agency	Ibid.	BUILDING HOMES BUILDING HOPE	No	***Hope International Development Agency v. Habitat for Humanity (Canada) Inc.***, 2010 TMOB 12
63	Insurance Corporation of BC	ICBC	ICBCadvice.com	No	***ICBC v Stainton Ventures***, 2012 BCSC 608 aff'd 2014 BCCA 296
64	InTouch Ministries	IN TOUCH	I'M IN TOUCH	Yes	***In-Touch Network Systems Inc v 01 Communique Laboratory Inc,*** 2007 CanLII 80910 (CA TMOB)

	(not the opponent)				
65	Principauté de Monaco with Société Anonyme des Bains de Mer et du Cercle des Étrangers à Monaco	MONTE-CARLO; SHIELD & Design; and CROWN & Design	DIAMOND REWARDS CLUB MONTE CARLO INN & Design	No	***Principauté de Monaco v Monte Carlo Holdings Corp***, 2013 TMOB 58
66	Mount Royal University (not the opponent)	MOUNT ROYAL UNIVERSITY; MOUNT ROYAL CONSERVATORY	MOUNT ROYAL DENTAL CENTRE	No (Opposition succeeds on other grounds)	***H.R. Herchen Professional Corporation v John Caldwell Professional Corporation***, 2016 TMOB 18
67	Province of Ontario	NORTH WEST COMPANY	NORTH WEST COMPANY & Design	Yes	***Ontario v MacMillan,*** 1994 CanLII 10052 (CA TMOB)
68	Province of Ontario			Yes	***Ontario v Vacation Inns Inc*** (1990), 30 CPR (3d) 479 (TMOB)
69	Ontario Educational Communications Authority	VOX	CANAL VOX	No (Opposition succeed on other grounds)	***Ontario Educational Communications Authority v Groupe Vidéotron Ltée***, 2006 CanLII 80347 (CA TMOB)
70	Ontario Federation of Anglers and Hunters		UPPER CANADA SPECIALTY HARDWARE & 	No	***Ontario Federation of Anglers and Hunters v Upper Canada Specialty Hardware Limited***, 1992 CanLII 7012 (CA TMOB)
71	Ontario Federation of Anglers and Hunters	Ibid.		Yes	***Ontario Federation of Anglers and Hunters v FW Woolworth Co Limited***, 1991 CanLII 6785 (CA TMOB)
72	Ontario Lottery Corporation	LOTERIE NATIONALE	LOOTERY	No	***Ontario Lottery Corporation v Arkay Marketing Associates Inc***, 1993 CanLII 8108 (CA TMOB)

73	Pacific Carbon Trust	Pacific Carbon Trust	working with the Carbon Trust	Yes	***Carbon Trust v. Pacific Carbon Trust***, 2013 FC 946
74	Parkinson Society Canada	Parkinson Superwalk PARKINSON SUPERWALK SuperWalk for Parkinson's	Parkinson Step 'n Stride Step 'n Stride	No	***Parkinson Society Canada v Parkinson Society Alberta***, 2016 TMOB 153, 2016 TMOB 154
75	City of Terrace	KERMODE BEAR and KERMODEI BEAR	KERMODE WARRIOR	No	***City of Terrace v Canadian Pacific Phytoplankton Ltd***, 2013 TMOB 156
76	WWF	WWF	Panda MARKETS - a convenience with a difference - PANDA MARKETS	Yes	***WWF - World Wide Fund for Nature v 615334 Alberta Limited***, 2000 CanLII 28649 (CA TMOB)
77	Various	MTL	MLT DWN	No	***Mixing Bowl Inc. v MLT DWN Grill Inc.***, 2018 TMOB 2
78	Not identified	ENTERPRISE MANITOBA & Design; ENTERPRISE FORUM; ENTERPRISE YORK	ECAR	No	***Enterprise Car & Truck Rentals Limited v Enterprise Rent-A-Car Company,*** 2000 CanLII 28650 (CA TMOB)
79	Not identified	ALIS	ALICE	Yes	***Alis Technologies Inc v Alice Corporation Pty Ltd,*** 2004 CanLII 71787 (CA TMOB)
80	Not identified	Various including the word PHILANTHROPY	GLOBAL PHILANTHROPIC	Yes	***Blumberg Segal LLP v Global Philanthropic International Ltd,*** 2014 TMOB 82
81	Not identified	MOOOO	MOOJO	No	***Nu-Life Inc. v. Saputo Dairy Products Canada GP***, 2010 TMOB 94