

IN THE MATTER OF AN OPPOSITION
by Lebanon Chemical Corporation
to application No. 550,811 for
the trade-mark GREEN POWER filed
by Capo Industries Limited

On October 16, 1985, the applicant, Capo Industries Limited, filed an application to register the trade-mark GREEN POWER based on proposed use in Canada for the following wares:

fertilizer; liquid fertilizer; lawn treatment materials, namely fertilizer in combination with herbicides and/or pesticides, lawn treatment materials, namely liquid fertilizer in combination with herbicides and/or pesticides.

The application was advertised for opposition purposes on October 22, 1986.

The opponent, Lebanon Chemical Corporation, filed a statement of opposition on November 10, 1986, a copy of which was forwarded to the applicant on December 18, 1986. The first ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(3)(a) of the Trade-marks Act because, as of the applicant's filing date, the applied for trade-mark was confusing with the opponent's trade-mark GREEN POWER previously made known in Canada in association with "fertilizers." The second ground reads as follows:

Opponent opposes registration of the said application under Section 37(2)(d) of the Trade Marks Act on the ground that the applicant's trade mark is not distinctive in that applicant's trade mark neither distinguishes nor is adapted to distinguish the applicant's wares from those offered for sale and sold by opponent in association with its trade mark as aforesaid.

The applicant filed and served a counterstatement. As its evidence, the opponent filed two affidavits of Kendall S. Tomlinson. As its evidence, the applicant filed the affidavit of G. Douglas Ridpath. Only the applicant filed a written argument and no oral hearing was conducted.

As for the first ground of opposition, there was an evidential burden on the opponent to establish that its trade-mark had been made known in Canada prior to the applicant's filing date. Section 5 of the Act sets forth the requirements for establishing that a trade-mark has been made known in Canada. Section 5 is reproduced below.

5. A trade-mark is deemed to be made known in Canada by a person only if it is used by such person in a country of the Union, other than Canada, in association with wares or services, and

- (a) such wares are distributed in association with it in Canada, or
- (b) such wares or services are advertised in association with it in
 - (i) any printed publication circulated in Canada in the ordinary course of commerce among potential dealers in or users of such wares or services, or
 - (ii) radio broadcasts, as defined in the Radio Act, ordinarily received in Canada by potential dealers in or users of such wares or services,

and it has become well known in Canada by reason of such distribution or advertising.

The first Tomlinson affidavit establishes that the opponent has effected fairly substantial sales of fertilizer in the United States in association with its trade-mark

GREEN POWER. Mr. Tomlinson further indicates that sales are made in retail outlets in cities in Michigan which are near the Canadian border. Based on that fact alone, Mr. Tomlinson offers his opinion that Canadians purchase his company's products in those outlets and transport them into Canada. Mr. Tomlinson, however, does not provide additional information to substantiate his opinion and I am therefore unable to conclude that any of the opponent's GREEN POWER product has made its way into Canada.

Mr. Tomlinson also seeks to rely on advertisements of his company's products on Detroit, Michigan television stations. However, those advertisements were placed well after the filing date of the applicant's application and, in fact, after the filing of the present opposition. Even if such advertisements had been broadcast earlier, Mr. Tomlinson's attempts to establish that they were actually viewed in Canada comprise inadmissible hearsay. In this regard, reference may be made to the decision in Borden, Inc. v. Hostess Food Products Ltd. (1989), 28 C.P.R. (3d) 45 at 60 (F.C.T.D.).

Mr. Tomlinson also relies on three advertisements placed on Detroit, Michigan radio stations in mid-1985. Although those ads were broadcast before the applicant's filing date, there is no evidence that they reached any Canadian listeners. Even if there had been such evidence, I suspect that it would, at most, have established a limited Canadian audience. In any event, I doubt that three radio advertisements would have had any measurable impact on any potential Canadian audience.

Mr. Tomlinson further relies on advertisements placed in Detroit newspapers and on advertising flyers and circulars distributed in the Detroit area. As for the latter, there is no evidence of any Canadian circulation. As for the former, the evidence of Canadian circulation is hearsay and therefore inadmissible.

In summary, the opponent has failed to adequately evidence any activities falling within the parameters of Section 5 of the Act. Even if the deficiencies in the opponent's evidence could be overlooked, that evidence would still be far from sufficient to qualify the opponent's mark as "well known" within the meaning of Section 5. Consequently, the opponent's first ground of opposition is unsuccessful.

The opponent's second ground of opposition is that the applicant's mark is not distinctive in view of the wares "...offered for sale and sold by opponent in association with its trade mark...." Since the opponent has failed to evidence any sales activities in Canada in association with its trade-mark GREEN POWER, this ground is also unsuccessful.

It may be that the opponent intended to raise a broader ground of opposition of non-distinctiveness based on the public awareness of its mark in Canada. However, no such ground was pleaded and I am therefore unable to consider it. Had such a ground been raised, however, I would likely have found it to be unsuccessful in view of the shortcomings in the opponent's evidence. As discussed, that evidence fails to evidence any measurable reputation for the opponent's mark in Canada.

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

DATED AT HULL, QUEBEC, THIS 31st DAY OF MAY 1990.

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