

## TRADUCTION/TRANSLATION

SECTION 45 PROCEEDINGS  
TRADE-MARK: PHYTOMIN  
REGISTRATION NO.: 468,330

On August 16, 2001, at the request of Messrs. Riches, McKenzie & Herbert LLP, the Registrar forwarded a Section 45 notice to Horizon Santé International Inc., the registered owner of the above-referenced trade-mark registration.

The trade-mark PHYTOMIN is registered for use in association with the following wares:  
“supplément de vitamines”.

Section 45 of the Trade-marks Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and/or services listed on the registration at any time within the three-year period immediately preceding the date of the notice, and if not, the date when it was last in use and the reason for the absence of use since that date. The relevant period in this case is anytime between August 16, 1998 and August 16, 2001.

In response to the notice, a document signed by Serge Brault entitled “déclaration solennelle” with exhibits has been furnished. The requesting party alone filed a written argument. An oral hearing has not been requested in this case.

The document furnished by the registrant is not a “statutory declaration” meeting the requirements of Section 41 of the Canada Evidence Act.

Notwithstanding the above, I have considered whether the evidence shows use of the trade-mark PHYTOMIN during the relevant period in association with the registered wares.

What the evidence shows is that the registrant has sold in Canada in its normal course of trade vitamin supplements during the relevant period. The format in which the registrant uses its trade-mark is illustrated in the exhibits to the Brault document which comprises a sample of the registrant’s product labelling. The label is reproduced below:

The word “Phytomin” appears with additional matter. The issue then becomes whether or not use of PHYTOMIN-C on such label constitutes use of the trade-mark PHYTOMIN “per se”. In considering the issue, I had regard to the opposition decision *Nightingale Interloc Ltd. v.*

*Prodesign Ltd.*, 2 C.P.R. (3d) 535 at page 538, Principle 1:

“Use of a mark in combination with additional material constitutes use of the mark per se as a trade mark if the public, as a matter of first impression, would perceive the mark per se as being used as a trade mark. This is a question of fact dependent upon such factors

as whether the mark stands out from the additional material, for example by the use of different lettering or sizing (see e.g., *Standard Coil Products (Canada) Ltd. v. Standard Radio Corp. et al.* (1971), 1 C.P.R. (2d) 155 at p. 163, [1971] F.C. 106), or whether the additional material would be perceived as purely descriptive matter or as a separate trade mark or trade name: see e.g., *Carling O'Keefe Ltd. v. Molson Cos. Ltd.* (1982), 70 C.P.R. (2d) 279 at pp. 280-1, applying *Bulova Accutron Trade Mark*, [1969] R.P.C. 102 at pp. 109-10.

In the present case, I consider that the public as a matter of first impression would not perceive the word PHYTOMIN “per se” as functioning as a separate trade-mark from the letter “C”, even if the letter “C” is descriptive. Rather, I am of the view that the public would view the letter “C” as being tied to the word PHYTOMIN particularly due to the presence of the hyphen creating a composite mark namely PHYTOMIN-C. (see *Registrar of Trade-Marks v. Compagnie Internationale pour l'Informatique CII Honeywell Bull S.A.* (1985), 4 C.P.R. (3d) 523 (F.C.A.) and *Wilson v. Kellogg Salada Canada Inc.*, 37 C.P.R. (3d) 563 at 567).

As none of the exhibits show the trade-mark PHYTOMIN by itself, I conclude that any use shown by the evidence is not use of the registered trade-mark PHYTOMIN.

In view of the above, and considering that the document furnished is not a “statutory declaration” complying with the requirements of Section 41 of the Canada Evidence Act, I conclude that the trade-mark registration ought to be expunged.

Registration No. 468,330 will be expunged in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 22<sup>ND</sup> DAY OF MAY 2003.

D Savard  
Senior Hearing Officer  
Section 45 Division