

IN THE MATTER OF AN OPPOSITION by Imasco Retail Inc./ La  
Société de détail Imasco Inc. to application No. 545,850 for the trade-  
mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design  
filed by Purity Life Health Products Limited

On July 9, 1985, the applicant, Purity Life Health Products Limited, filed an application to register the trade-mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design, a representation of which appears below, based upon use of the trade-mark in Canada since at least as early as August, 1984 in association with "health products and devices, kits for detecting potential health problems, and agricultural chemicals" and in association with services described as "operation of distribution outlet of health products and devices". The application was also based upon proposed use of the trade-mark in Canada in association with "health and nutritional services".

During the prosecution of its trade-mark application, the applicant disclaimed the right to the exclusive use of the words HEALTH PRODUCTS apart from its trade-mark. Further, the applicant amended its statement of wares to cover "Food supplements, namely vitamins and minerals; cosmetics: deodorants, skin creams, lotions, hair preparations, lipsticks, mascara, powders, soaps; herbal preparations; teas, herbs for cooking, skin care, medicinal purposes; medical screening (diagnostic test) kits and devices, namely, Vitamin C, Calcium, Candida for yeast infections, blood conditions, blood pressure, pulse, bowel or toxic digestive conditions and the monitoring of bowel movements by the use of activated charcoal capsules; orthopedic (sic) supports for knee, back, wrist, ankle, neck and elbow; agricultural chemicals; lawn, garden and house plant chemicals and supplies specifically irrigation piping and fittings, flower pots; insect repellents. As well, the statement of services in respect of which use is claimed since at least as early as August, 1984 was amended to cover "Distribution services for others, retail mail order in the field of health products and supplies, hair analysis, service for determination of nutritional needs, education seminars and training for health and nutrition and publications associated therewith".

The opponent, Imasco Retail Inc./ La Société de détail Imasco Inc., filed a statement of opposition on August 5, 1987. In its statement of opposition, the opponent asserted that it is the owner of the trade-marks LIFE and LIFE BRAND for use in association with a wide range of wares, including health products, food supplements, pharmaceutical preparations and products, toiletry

preparations and products, and other related goods sold through drug and convenience stores. Further, the opponent alleged that its trade-marks have been extensively used and advertised in Canada commencing at least as early as 1946. Additionally, the opponent has claimed that its trade-marks are the subject of the following series of registrations: LIFE BRAND, registration No. 192,911, LIFE BRAND, registration No. 204,542, LIFE BRAND, registration No. 257,394 and LIFE & Design, registration No. 283,502. The opponent alleged that the use of the applicant's trade-mark and the opponent's trade-marks in the same area would be likely to lead to the inference that the wares and services associated with such marks are manufactured, sold and/or performed by the same person. Accordingly, the opponent pleaded that the applicant's trade-mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design is not registrable and not distinctive, and that the applicant is not the person entitled to its registration.

The applicant served and filed a counterstatement in which it denied the opponent's grounds of opposition.

The opponent filed as its evidence the affidavit of Verne Chelin while the applicant submitted two affidavits of David Chapman both dated March 30, 1989 and an affidavit of William S. Pearson. Further, both parties submitted written arguments and both were represented at an oral hearing.

The opponent in its statement of opposition sought to rely upon its trade-mark LIFE in challenging the applicant's entitlement to registration and the distinctiveness of the applicant's mark. However, the opponent's evidence fails to establish use of the trade-mark LIFE in association with the wares identified in the statement of opposition. Rather, the Chelin affidavit establishes that the opponent has extensively used the trade-marks LIFE BRAND and LIFE BRAND & Design, a representation of which appears below, in association with pharmaceutical preparations and products, health products, food supplements, toiletry preparations and products and beauty aids, there being more than 480 kinds of LIFE BRAND products being sold across Canada as of the date of the Chelin affidavit.

While the word BRAND does not form a dominant element of the opponent's trade-mark LIFE BRAND & Design and has been disclaimed by the opponent apart from its trade-mark in each of its registrations, it nevertheless does constitute an element of the opponent's LIFE BRAND and LIFE BRAND & Design trade-marks.

In determining whether there would be a likelihood of confusion between the applicant's trade-mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design as applied to the wares and services covered in its application and the opponent's trade-marks LIFE BRAND and LIFE BRAND & Design, as registered and previously used in Canada, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in Section 6(5) of the Trade-marks Act. Further, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue as of either the applicant's claimed date of first use of August 1985 (the material date in respect of the grounds of opposition relating to the applicant's entitlement to registration) or as of the date of opposition (the material date in respect of the s. 12(1)(d) and non-distinctiveness grounds of opposition).

In Sum-Spec Canada Ltd. v. Imasco Retail Inc., 30 C.P.R. (3d) 7, the learned trial judge commented on the inherent distinctiveness of the trade-marks PURE LIFE & Design and LIFE BRAND as follows at pg. 13:

"This finding is supported by the fact that the word "life" itself is a very common word, suggestive of the wares it describes and has therefore a low level of inherent distinctiveness, and as such it is only entitled to a low level of protection. Moreover, no one can appropriate and monopolize a common word of the English or French language:..."

Having regard to the above, the opponent's LIFE BRAND and LIFE BRAND & Design trade-marks as applied to the opponent's wares must be considered as possessing little inherent distinctiveness, bearing in mind that the word BRAND has been disclaimed by the opponent in its trade-mark registrations and, in the context of the opponent's marks, merely confirms the trade-mark significance of the word LIFE. On the other hand, the applicant's trade-mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design as applied to its wares and services possesses a fair degree of inherent distinctiveness in that the words PURITY LIFE are neither descriptive nor suggestive of the applicant's wares or services, and the design features add to the inherent distinctiveness of the applicant's mark.

In his affidavit, William Pearson, an employee of the trade-mark agents for the applicant, states the following:

2. On or about the 23rd day of March, 1989, I contacted Linda Elford of Trade Mark Reflections Limited and requested that she provide me with photocopies of trade mark registrations incorporating the word "LIFE", in association with the following wares; health products, chemicals, cosmetics and food products. Now shown to me and marked Exhibit "A" to this my Affidavit are the photocopies of the aforementioned search request which I received from Trade Mark Reflections Limited on the 27th day of March, 1989.

3. On or about the 20th day of March, 1989, I contacted a representative of International Trade Name Clearance Inc. and requested that she provide me with the results of a microfiche search of tradenames incorporating the word "LIFE", in the jurisdiction of Ontario. Now shown to me and marked as Exhibit "B" to this my Affidavit are photocopies of the results of the aforementioned search request, which I received from International Trade name Clearance Inc. on the 23rd day of March, 1989.

The opponent objected to the admissibility of the results of the searches annexed to the Pearson affidavit as being hearsay. In this regard, the opponent has relied upon the decision of the Opposition Board in CKR Inc. v. Unilever PLC, 2 C.P.R. (3d) 376 where the hearing officer considered the admissibility of search notes (without copies of registrations) which were annexed as an exhibit to the affidavit of a marketing manager employed by a subsidiary of the applicant. In that instance, the hearing officer pointed out that "it is advisable that the searcher submit copies (preferably certified copies) of the trade mark registrations in order to ensure the accuracy of the state of the register evidence".

In the present case, photocopies of what appear to be Canadian trade-mark registrations have been annexed to the Pearson affidavit without any indication as to when the photocopies were prepared or whether a search of the records was even conducted prior to obtaining the photocopies. Having regard to the above, and to the extent that a hearsay objection goes to the weight which ought to be accorded to the evidence and not to its admissibility as evidence under Rule 44 of the Trade-marks Regulations, as well as considering that twenty-four copies of registrations were annexed to the Pearson affidavit, I consider that as least some weight should be accorded to this evidence. However, I am of the view that this evidence merely confirms that the word LIFE adds little inherent distinctiveness to the trade-marks of the parties.

With respect to the results of the trade-name search which was annexed to the Pearson affidavit, there is no indication as to the nature of the business conducted by the companies appearing in the photocopy of the printout from which it could be concluded that any of the companies operate in the same area as the applicant or the opponent (see Consumers Distributing Co. Ltd. v. United Consumers Club, Inc., 25 C.P.R. (3d) 284, at pg. 290). Accordingly, I do not consider that any weight can be attributed to this evidence.

The Chelin affidavit establishes that the opponent's trade-marks LIFE BRAND and LIFE

BRAND & Design have become well known in Canada in association with various health care and beauty products sold through more than 500 SHOPPERS DRUG MART stores throughout Canada with sales in 1985-1986 alone being approximately \$82,000,000. Likewise, the opponent's evidence relating to its media advertising and promotional materials is equally impressive. On the other hand, the applicant has not provided evidence relating to the volume or dollar value of sales in this country of the wares or services associated with its trade-mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design although the reference by Mr. Chapman to the applicant having expended more than \$74,500 in advertising during the three years prior to the date of his affidavit (March 30 1989) does indicate that the applicant's trade-mark must have become known to at least some extent in Canada.

The opponent submitted that the applicant's evidence does not substantiate use by the applicant of its trade-mark in association with the wares covered in its application. In particular, the opponent submitted that the photocopies of the packaging bearing the applicant's trade-mark exhibited to the Chapman affidavit identify the applicant as a distributor of the wares which are manufactured by other persons. However, the applicant's trade-mark incorporates its corporate and trade-name which supports the position that the trade-mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design would be perceived by the average consumer as being that of the applicant and therefore arguably a distributor's mark. In any event, I do not consider that an applicant need be using its trade-mark within the scope of s. 4(1) of the Trade-marks Act in order that its trade-mark has become known in Canada in association with wares as contemplated by s. 6(5)(a) of the Act.

The length of time that the trade-marks have been in use in Canada clearly favours the opponent in that the Chelin affidavit confirms use by the opponent of its LIFE BRAND and LIFE BRAND & Design trade-marks in Canada since at least 1966 and 1977 respectively.

As to the nature of the wares of the parties and the channels of trade associated with those wares, the applicant's food supplements, deodorants, skin creams, lotions, hair preparations, lipsticks, mascara, powders and soaps are either identical to or closely related to the wares associated with the opponent's trade-marks. Further, and in the absence of any evidence to the contrary, I would assume that the applicant's teas, herbs for cooking, skin care, and medicinal purposes, as well as medical screening kits and devices, orthopaedic supports and insect repellents are all wares which might also be sold through a drug store. In this regard, exhibits YY and ZZ to the Chapman affidavit confirm the sale by the applicant to a SHOPPERS DRUG MART store of various types of diagnostic test kits. On the other hand, I do not consider the applicant's agricultural chemicals and lawn, garden and

house plant chemicals, irrigation piping and fittings, and flower pots would be wares which the average consumer would consider as being wares which normally would be available through a drug store.

As there is no restriction as to the channels of trade through which the applicant's wares would be made available to the public, I must conclude for the purposes of deciding this opposition that the trades of the parties would, or could, be identical. In this regard, and in assessing the likelihood of confusion between trade-marks, the Registrar must consider the channels of trade which would normally be associated with the wares as set forth in the applicant's application since it is the statement of wares as covered in the application which determines the scope of the monopoly to be accorded to an applicant should its trade-mark proceed to registration. As with a registered trade-mark in an infringement action, the scope of an applicant's trade is to be determined by reference to the statement of wares covered in the application rather than the applicant's actual trade to date (see Mr. Submarine Ltd. v. Amandista Investments Ltd., 19 C.P.R. (3d) 3, at pp. 10-12 (F.C.A.)). Thus, the fact that an applicant may be selling its wares through a particular type of retail outlet or through a particular channel of trade is irrelevant when considering the issue of confusion (see Henkel Kommanditgesellschaft Auf Aktien v. Super Dragon Import Export Inc., 2 C.P.R. (3d) 361, at pg. 372 (F.C.T.D.), 12 C.P.R. (3d) 110, at pg. 112 (F.C.A.)). Further, the applicant's services do not appear to bear any similarity to the opponent's wares although the opponent's vitamins, minerals, and other health care products, as well as its cosmetics could be sold to the public through a retail mail order system.

Considering next the degree of resemblance between the trade-marks at issue, I consider there to be little resemblance between the trade-marks LIFE BRAND and LIFE BRAND & Design and the applicant's trade-mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design in appearance or sounding when considered in their entireties as a matter of first impression and imperfect recollection. Further, to the extent that the trade-marks at issue generally suggest the idea of health, I do not consider that any party should be entitled to a monopoly in respect of such an idea in relation to a trade-mark applied to health care products. With respect to the degree of resemblance between the trade-marks at issue, I consider that I am bound by the decision of Denault, J. in the Sum-Spec case, referred to above, the learned trial judge commenting as follows when considering the degree of resemblance between the trade-marks LIFE BRAND and PURE LIFE & Design, at pg. 14:

"Viewed in their totalities, the competing trade marks and designs are very dissimilar in appearance. Their sound is quite different as well, especially in the first words which are altogether different in sound. The ideas suggested by each are similar; both have a connotation of health. But the respondent's is more suggestive of longevity, backed by the force of modern medicine, whereas the appellant's suggests clean living, good diet and homeopathic remedies."

Having regard to the above and, in particular, to the dissimilarity in appearance, sounding and ideas suggested by the trade-marks at issue when considered as a matter of immediate impression and imperfect recollection, I have concluded that the applicant has discharged the burden upon it of establishing that there would be no reasonable likelihood of confusion between the applicant's trade-mark and the opponent's trade-marks. Accordingly, I reject the opponent's opposition pursuant to Section 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 31<sup>ST</sup> OF OCTOBER 1990.

G,W.Partington,  
Chairman,  
Trade Marks Opposition Board.