

**IN THE MATTER OF AN OPPOSITION by
Pharmasave Drugs (National) Ltd. and Pharmasave
Drugs Ltd. to Application No. 1202749 for the trade-
mark LIVE WELL. WORK WELL. filed by Anne
Rae Jammer, trading as Pathways Health
Promotion**

I The Proceedings

On January 5, 2004 Anne Rae Jammer, trading as Pathways Health Promotion (the “Applicant”) filed an application to register the trade-mark LIVE WELL. WORK WELL. (the “Mark”) based on use in Canada since October 1, 2003 in association with:

Corporate Health Promotion programs and Corporate Wellness Programs in the form of educational workshops, lectures & seminars, lunch & learn sessions, and individual coaching which are provided in single or multi-session format and in varying lengths which range from 30 minutes to six hours per session. These programs are provided to small, medium and large companies and their employees, and are delivered onsite or offsite. These programs teach skills in the areas of stress management, health promotion, illness prevention, and general lifestyle wellness related to physical health, emotional health, social health, mental health, spiritual health and occupational health, and are taught using cognitive learning, skill-building and behaviour change tools (the “Services”).

The application was advertised on September 8, 2004 in the *Trade-marks Journal* for opposition purposes. Pharmasave Drugs (National) Ltd. (“Pharmasave National”) and Pharmasave Drugs Ltd. (“Pharmasave Drugs”) (collectively referred to as the “Opponent”) filed a statement of opposition on October 20, 2004 and was forwarded on November 9, 2004 by the Registrar to the Applicant. The grounds of opposition raised are: non compliance to s. 30 (a) (it should have been (b) as the Opponent alleges that the Applicant did not use the Mark as of the claimed date of first use) and (i) of the *Trade-marks Act*, 1985 R.C.S. c. T-13, (the “Act”), registrability, entitlement and distinctiveness.

The Applicant filed a counter statement on December 8, 2004 denying essentially all grounds of opposition.

The Opponent filed the affidavit of Anna Hewstan. The Applicant filed the affidavits of Rae Anne Jammer, Cecilla Oliviera and Kim Brulé. No reply evidence was filed.

Both parties filed written arguments and an oral hearing was held where both parties were represented.

II General Principles Applicable to all Grounds of Opposition

The legal burden is upon the Applicant to show that its application complies with the provisions of the Act, but there is however an initial evidential onus on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once this initial onus is met, the Applicant still has to prove, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330; *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Wrangler Apparel Corp. v. The Timberland Company*, [2005] F.C. 722].

The relevant dates for the analysis of the grounds of opposition are:

- Compliance to the requirements enumerated under s. 30 (b) and (i) of the Act: the filing date of the application (January 5, 2004) [see *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R. (3d) 469];
- Registrability of the Mark under s. 12(1)(d) of the Act: the date of the Registrar's decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. (1991)*, 37 C.P.R. (3d) 413 at 424 (F.C.A.)];
- Distinctiveness of the Mark: the filing date of the statement of opposition is generally accepted as the relevant date (October 20, 2004) [see *Andres Wines Ltd. and E & J Gallo Winery (1975)*, 25 C.P.R. (2d) 126 at 130 (F.C.A.) and *Metro-Goldwyn-Meyer Inc. v. Stargate Connections Inc. (2004)*, 34 C.P.R. (4th) 317 (F.C.T.D.)];
- Entitlement to the registration of the Mark where the application is based on use: the date of first use alleged in the application (October 1, 2003) [see s. 16(1) of the Act].

III Compliance to s. 30 requirements

I have reviewed the evidence filed by both parties, some of which will be described in more details hereinafter, and none of it supports the grounds of opposition based on the failure to meet the requirements specified in s. 30(b) and (i) of the Act. There is no evidence of the Applicant's knowledge of the Opponent's trade-marks hereinafter listed. Moreover even if the Applicant had knowledge of the Opponent's , the Applicant could still state in good faith that she believed that she was entitled to obtain registration of the Mark.

As for the allegation that the Applicant did not use the Mark as of the claimed date of first use, the Opponent has an evidential onus but it has been characterized by the jurisprudence as a light one. Moreover the Opponent can rely on the evidence filed by the Applicant, but it must raise serious doubts on the accuracy of the statements made by the Applicant in her application [see *Tune Masters v. Mr. P's Mastertune Ignition Services Ltd.* (1986) 10 C.P.R. (3d) 84 (T.M.O.B.), *Labatt Brewing Co. v. Molson Breweries, a Partnership* (1996), 68 C.P.R. (3d) 216 (F.C.T.D.) and *Williams Telecommunications Corp. v. William Tell Ltd.*, (1999) 4 C.P.R. (4th) 107 (T.M.O.B)].

The Opponent argued both in its written argument and at the oral hearing that the Applicant failed to file evidence substantiating her claimed date of first use. The Applicant does have such burden only if the Opponent has met its initial onus. Nothing in the Opponent's evidence addresses this issue. Moreover there is nothing in the Applicant's evidence that would raise any serious doubts as to the truthfulness of the statement made by the Applicant in her application with regard to the claimed date of first use. The absence of evidence confirming the date of first use of the Mark alleged in the application *per se* is not sufficient to conclude in favor of the Opponent on this issue.

Consequently, those grounds of opposition are dismissed.

IV Registrability of the Mark

The Opponent alleges that the Mark is confusing with its following registered trade-marks:

LIVE WELL WITH PHARMASAVE, certificate of registration TMA485281 in association with all services of operating a retail drug store; all services of operating a retail food store; all services relating to advertising and promoting retail drug stores and retail food stores operated by others;

LIVE WELL CONSULTATIONS, certificate of registration TMA579688 in association with all services of operating a retail drug store; all services of operating a retail food store; all services relating to advertising and promoting retail drug stores and retail food stores operated by others through the distribution of printed material, promotional contests, discount cards, event sponsorship, television, radio, print media and via the internet; health care information services namely the operation of an information kiosk within a retail pharmacy

LIVE WELL LIFESTYLE PLAN, certificate of registration TMA580098 in association with all services of operating a retail drug store; all services of operating a retail food store; all services relating to advertising and promoting retail drug stores and retail food stores operated by others through the distribution of printed material, promotional contests, discount cards, event sponsorship, television, radio, print media and via the internet; health care information services namely the operation of an information kiosk within a retail pharmacy

Anna Hewstan is the Opponent's Director of Marketing and has held such position since November 2004. She filed as exhibits to her affidavit copies of the certificates of registration for the first two registered trade-marks listed above. They are owned by Pharmasave Drugs. As such, the Opponent has met its initial onus with respect to this ground of opposition in so far as those registered trade-marks are concerned. I shall ignore the last trade-mark, as I do not consider that the Opponent would be in a better position with the trade-mark LIVE WELL LIFESTYLE PLAN than it is with the first two registered trade-marks. In fact no arguments were raised either in the Opponent's written argument or at the oral hearing with respect to the trade-mark LIVE WELL LIFESTYLE PLAN.

The test to determine if there exists a likelihood of confusion between the Mark and the Opponent's registered trade-marks is set out in s. 6(2) of the Act and I must take into

consideration all the relevant surrounding circumstances, including those listed in s. 6(5): the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; the length of time the trade-marks or trade-names have been in use; the nature of the wares, services, or business; the nature of the trade; and the degree of resemblance between the trade-marks or trade-names in appearance, or sound or in the ideas suggested by them. Those criteria are not exhaustive and it is not necessary to give each one of them equal weight [see *Clorox Co. v. Sears Canada Inc.* (1992), 41 C.P.R. (3d) 483 (F.C.T.D.) and *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.)]. I refer to the decision of the Supreme Court of Canada in *Mattel, Inc. v. 3894207 Canada Inc.*, (2006) 49 C.P.R. (4th) 321 for an analysis of those criteria.

I shall now review the pertinent evidence and assess the relevant criteria to determine if there is, on a balance of probabilities, a likelihood of confusion between the Mark, when used in association with the Services, and the Opponent's registered trade-marks LIVE WELL WITH PHARMASAVE and LIVE WELL CONSULTATIONS.

The parties' marks are inherently distinctive. However the Opponent's registered trade-mark LIVE WELL CONSULTATIONS suggests that the services are consultations during which the consumer receives advices in order to improve one's quality of life. The Mark sounds like a slogan and suggests that the end users of the Services will learn how to improve the quality of its life and its working environment.

The degree of distinctiveness of a trade-mark can be enhanced through use and promotion. Ms. Hewstan explains the Opponent's corporate structure. She states that Pharmasave Drugs has licensed the use of its trade-marks to Pharmasave National and she alleges that the former exercises the necessary controls over the character and quality of the services provided in association with each of its registered trade-marks.

She provides the Opponent's total yearly sales figures for the period of 1997 to 2004 for the retail drug and food store services that range from \$423 millions to \$928 millions. She also provides the sums of money spent to advertise the Opponent's services including the services of

“health and wellness” which totalled for the same period more than \$9,7 millions on television and close to \$31 millions for flyers. Even though those figures might be associated with the Opponent’s trade-name or trade-mark PHARMASAVE, as pointed out by the Opponent’s agent at the oral hearing, the trade-mark LIVE WELL WITH PHARMASAVE appears on all of the Opponent’s marketing material and I refer to the content of paragraph 22 of the deponent’s affidavit where it is clearly stated. She filed samples of brochures covering various health issues on which the trade-mark LIVE WELL WITH PHARMASAVE is prominently displayed and used since 1997.

Pharmasave Drugs in cooperation with Pharmasave National have developed several “health and wellness” programs using the trade-marks LIVE WELL CONSULTATIONS and LIVE WELL WITH PHARMASAVE.

She explains that in July 1998 the program LIVE WELL CONSULTATIONS was developed to allow the Opponent’s customers to privately consult with pharmacists about their health and medications. It assists the Opponent’s customers to organize and manage medication, provides training on the correct use of medical devices, provides on-going health monitoring services to help identify changes or problems in a person’s health. She filed a promotional brochure as well as an appointment card bearing such trade-mark. We have no information as to what extent such trade-mark has been used by the Opponent in Canada and therefore it is impossible to determine to what extent this trade-mark is known in Canada.

Rae Ann Jammer is the sole proprietor of Pathways Health Promotion since 1996. She registered the trade-name Pathways Health Promotion on October 1, 2003. She describes the Applicant as a provider of workplace promotion programs and services in Canada. The Services are geared towards corporate and government employees, and are offered in the form of workshops, seminars and other sessions, and are customized to fit the specific workplace environment.

She then describes the Services and such description corresponds more or less to the description of the services in the application filed and reproduced herein above. She alleges that the Mark is displayed on brochures and other material provided to the participants and on the Applicant’s

business cards, on cost quotations, invoices and company's letterhead. She filed samples of invoices, quotations, promotional material and brochures. Although the Mark does not appear on the sample invoices filed as exhibit A to her affidavit, it does appear on the quotation sample filed as exhibit B and on the promotional material and brochures. She also filed a copy of various pages of the Applicant's website on which appear the Mark.

The Applicant advertises the Services in association with the Mark in industry-specific newspapers, magazines and trade publications directed to corporate organizations and government agencies and she filed copies of such advertisements but we have no information on the circulation figures of those magazines in Canada. There is a photocopy of a picture of an exhibitor's booth displaying the Mark on the signage used at the 2003 Health and Wellness Expo held in Oshawa.

We have no information on the Applicant's sales for the Services in association with the Mark in Canada since the date of first use.

I conclude from the foregoing that the Opponent's trade-mark LIVE WELL WITH PHARMASAVE is more known in Canada to some extent than the Mark but I cannot conclude in the same vein as regard LIVE WELL CONSULTATIONS. Overall, this factor favours the Opponent.

As for the length of time the trade-marks in issue have been in use in Canada, the evidence filed by the Opponent does establish use of the trade-mark LIVE WELL WITH PHARMASAVE since 1997. There is no proof of continuous use of the trade-mark LIVE WELL CONSULTATIONS. Therefore this factor also favours the Opponent in so far as the trade-mark LIVE WELL WITH PHARMASAVE is concerned.

The Services associated with the Mark are provided to corporations and their employees in the form of educational workshops, lectures & seminars, lunch & learn sessions while the Opponent's services in association with the trade-marks LIVE WELL WITH PHARMASAVE and LIVE WELL CONSULTATIONS are services associated with the operation of retail drug

stores and retail food stores. The only possible similarity between the parties' respective services are health care information services offered in association with the trade-mark LIVE WELL CONSULTATIONS but, as specified in the registration, such services are provided in the form of an information kiosk within a retail pharmacy. Therefore not only do they differ in terms of the format but also the end users differ. The typical user of the Opponent's services would be a customer visiting one of its retail pharmacies while the user of the Applicant's Services are corporations who retain the Applicant for the performance of the Services to its employees. On the basis of such analysis I conclude that there exists a difference in the nature of the services provided and the channels of trade used by the parties. Those factors favour the Applicant.

The degree of resemblance is an important factor when assessing the likelihood of confusion between two trade-marks. [See *Beverley Bedding & Upholstery Co. v. Regal Bedding & Upholstering Ltd.* (1980), 47 C.P.R. (2d) 145] Moreover as stated by Mr. Justice Denault of the Federal Court in *Pernod Ricard v. Molson Breweries* (1992), 44 C.P.R. (3d) 359, the first portion of a trade-mark is the most relevant for purposes of distinction.

The Mark contains a portion ("LIVE WELL") of the Opponent's registered trade-marks LIVE WELL WITH PHARMASAVE and LIVE WELL CONSULTATIONS. However it is the Mark as a whole that must be considered. There is definitively a difference not only in the ideas suggested by the Mark, which comprises two statements separated by periods, and the Opponent's trade-marks LIVE WELL WITH PHARMASAVE and LIVE WELL CONSULTATIONS but also visually and phonetically with the addition of the portion "WORK WELL".

As an additional surrounding circumstance the Applicant has filed state of the register evidence. Cecilia Oliviera has been a secretary employed by the Applicant's agent. She conducted a search of the register and located 22 citations that contain the expression LIVE WELL, including the Opponent's registered trade-marks and the present application. Out of the remaining citations, five trade-marks have been abandoned. The other citations cover mainly nutritional products or services offering for sale such type of products. I do not believe those wares or services to be relevant when considering the type of services offered by the Applicant in association with the

Mark. There is a distinction to be made between on one hand offering programs that teach skills in the areas of stress management, health promotion, illness prevention, and general lifestyle wellness related to physical health, emotional health, social health, mental health, spiritual health and occupational health that are taught using cognitive learning, skill-building and behaviour change tools and on the other hand nutritional products.

I conclude that the Applicant has discharged its burden to prove, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's registered trade-marks LIVE WELL WITH PHARMASAVE and LIVE WELL CONSULTATIONS. I reach such conclusion based on the fact that there is a difference in the type of services provided by the parties and their channels of trade. Additionally, the idea suggested by the Mark is totally different than the ideas suggested by the Opponent's registered trade-marks. The presence of the terms LIVE WELL in the Mark is not sufficient to reach a conclusion in favour of the Opponent. The registrability ground of opposition is therefore dismissed.

V Entitlement

The evidence filed by the Opponent with respect to the prior use of its trade-mark LIVE WELL WITH PHARMASAVE is more than sufficient to meet its initial evidential onus as regard to this ground of opposition. However the conclusion reached under registrability is equally applicable in so far as this mark is concerned. The evidence of use of the trade-mark LIVE WELL CONSULTATIONS (or lack thereof) is not sufficient to conclude that the Opponent has met its initial onus with respect to this trade-mark. Moreover there is no evidence that the Opponent has not abandoned such trade-mark as of the advertisement date (s. 16(5) of the Act).

The Opponent added the use of the trade-mark WORK WELL under such ground of opposition.

The Opponent offers since June 2000 a type of "health and wellness" program by which it provides "a broad range of employee/patient health and wellness clinics" under the trade-mark WORK WELL. It is also "designed to help employers to control rising health plan costs". Ms.

Hewstan filed an actual brochure bearing the trade-mark WORK WELL. We have however no indication as to the number of brochures circulated in Canada, or any indication as to when such use commenced.

Since 2000 the Opponent is a “major partner” sponsor of the Health Work and Wellness Conference attended by management consultants, human resources professionals and senior executive. Ms. Hewstan filed photographs of a booth at the conference held in Toronto in October 2000 where the trade-mark WORK WELL is clearly displayed. She alleges that the WORK WELL program has been implemented with several companies across Canada such as Canadian Pacific Railways, Telus Mobility, The Vancouver Fairmont Hotel and the Saskatchewan RCMP. However such statement, in the absence of evidence of actual use of the trade-mark, constitutes a bare statement of use. She filed copies of articles published in specialized magazines or publications featuring the WORK WELL “health and wellness” program, which apparently circulated in Canada. Even assuming such circulation, we do not know its extent. The Opponent’s statement of use and the publications mentioned above do not constitute proper evidence of use of the trade-mark WORK WELL as per s. 4(2) of the Act. Moreover there is no evidence that the Opponent had not abandoned the use of its trade-mark WORK WELL as of the date of advertisement of the application (s. 16(5) of the Act).

As a result, in so far as the trade-mark WORK WELL is concerned, the Opponent has not met its initial onus that it had used the trade-mark WORK WELL prior to the alleged date of first use of the Mark by the Applicant and that it had not abandoned such use at the advertisement date of the present application (September 8, 2004). The only actual evidence of use of the trade-mark WORK WELL by the Opponent goes back to October 2000, prior to the alleged date of first use of the Mark, but we have no further evidence of use of the trade-mark WORK WELL.

Therefore the ground of opposition under entitlement is also dismissed.

VI Distinctiveness

The later relevant date when assessing distinctiveness compared to the relevant date associated to the ground of opposition of entitlement would not favour the Opponent. In any event, the admissible evidence of use of the trade-mark WORK WELL is limited to a conference in Toronto in October 2000. Such evidence falls short of being sufficient to negate any distinctiveness to the Mark, assuming that the Mark would be confusing with the Opponent's trade-mark WORK WELL which I do not need to decide at this stage. As for the trade-marks LIVE WELL WITH PHARMASAVE and LIVE WELL CONSULTATIONS, the conclusion reached under registrability is equally applicable to this ground of opposition.

The ground of opposition based on the Mark's lack of distinctiveness is also dismissed.

IV Conclusion

Having been delegated authority by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject the Opponent's opposition the whole pursuant to s. 38(8) of the Act.

DATED, IN BOUCHERVILLE, QUEBEC, THIS 14th DAY OF JULY 2008.

Jean Carrière,
Member, Trade-marks Opposition Board