



# Canadian Intellectual Property Office

## THE REGISTRAR OF TRADEMARKS

**Citation:** 2024 TMOB 022

**Date of Decision:** 2024-02-05

## IN THE MATTER OF AN OPPOSITION

**Opponent:** BioSyent Inc.

**Applicant:** Pharmaris Canada Inc.

**Application:** 1955464 for SaFe+

### INTRODUCTION

[1] BioSyent Inc. (the Opponent) opposes registration of the design trademark SaFe+ (the Mark), depicted below, which is the subject of application No. 1955464 filed by Pharmaris Canada Inc. (the Applicant):

# SaFe<sup>+</sup>

[2] The Mark is applied for in association with “Dietary supplements, namely iron supplements” (the Goods).

[3] The opposition is based on three grounds, all of which are rooted in the allegation that the Mark is either clearly descriptive or deceptively misdescriptive of the Goods.

[4] For the reasons set out below, I reject the opposition.

### **THE RECORD**

[5] The application for the Mark was filed on April 4, 2019 and was advertised for opposition purposes on June 1, 2022.

[6] On July 29, 2022, the Opponent opposed the application by filing a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 as amended June 17, 2019 (the Act).

[7] The Applicant filed a counter statement denying the grounds of opposition.

[8] In support of its opposition, the Opponent filed the affidavit of Kerry Biggs, dated January 13, 2023 (the Biggs Affidavit). For its part, the Applicant filed the affidavit of William Greg Castagner dated May 2, 2023 (the Castagner Affidavit). No cross-examinations were conducted.

[9] Both parties filed written representations. No hearing was held.

### **OVERVIEW OF THE EVIDENCE**

#### ***Opponent's Evidence - Summary of the Biggs Affidavit***

[10] Ms. Biggs is a trademark paralegal for the Opponent's agent, a position she has held since 2019 [para 1].

[11] The Biggs Affidavit contains the following:

- search parameters and results for searches from various online dictionaries for the symbol "+" and the words "safe" and "plus" [paras 2 to 5, Exhibits A to D];
- a list of registered trademarks containing the word "safe" associated with classes 5 or 29 that disclaim the word "safe" [para 6, Exhibit E]; and

- particulars of and file wrappers for application nos. 1175953 and 1674285 for the trademarks BIO-SAFE and PEDIA-SAFE, respectively [paras 7 and 8, Exhibits F and G].

### ***Applicant's Evidence - Summary of the Castagner Affidavit***

[12] At the request of the Applicant's agent, on or around April 19, 2023, Mr. Castagner, a paralegal candidate, conducted various online searches including:

- for the ASCII table containing letters with a diacritic, as well as for the Cyrillic, Greek and Ionic alphabets [paras 1 to 6, Exhibits A to D];
- of the Canadian Trademark Registry for trademarks indexed as having a cross or mathematical sign associated with class 5 goods [paras 7 to 11, Exhibits E to H]; and
- of the Canadian Trademarks Registry for trademark registrations containing variations of the word SAFE and PLUS and the symbol "+" [paras 12 to 14, Exhibits I to J].

### **EVIDENTIAL BURDEN AND LEGAL ONUS**

[13] In accordance with the usual rules of evidence, there is an evidential burden on the Opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Ltd v Molson Companies Ltd*, 1990 CarswellNat 1053 (FC)]. The presence of an evidential burden on the Opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist [*John Labatt*, at 298].

[14] For those allegations for which the Opponent has met its evidential burden, the legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. The presence of a legal onus on an Applicant means that, if a determinate conclusion cannot be reached once all the evidence has been considered, then the issue must be decided against it.

## **PRELIMINARY REMARKS**

[15] In reaching my decision I have considered all the evidence in the file. However, only those portions of the evidence directly relevant to my findings are discussed.

[16] In this respect, I find much of the evidence filed by both parties to have little probative value. Both parties submitted state of the register evidence that does little, if anything, to advance the position of either party. Specifically, the state of the register evidence in the Biggs Affidavit listing Canadian trademark registrations containing but disclaiming the word “safe” associated with goods in classes 5 and 29 does not indicate whether the disclaimers were voluntary or required by the Registrar. Accordingly, this evidence does not establish anything other than that, historically, some applicants disclaimed the word “safe” apart from their trademark. But this fact alone does not assist the Opponent in the present case, particularly since it is unclear whether this list even represents a significant portion of registered trademarks in classes 5 and 29 containing the word “safe” as full search results for trademarks containing the word “safe” associated with classes 5 and 29 were not provided.

[17] With respect to the two application file wrappers attached to the Biggs Affidavit, the Opponent made no submissions relating to this evidence. I do not consider these files relevant given that application no.1175953 for the trademark BIO-SAFE was not subject to a section 12(1)(b) objection and the section 12(1)(b) objection to application no.1674285 for the trademark PEDIA-SAFE was in respect of the entire trademark being clearly descriptive of goods being safe for children, rather than the word “safe” alone.

[18] For its part, the Applicant submitted search results of the register for registered trademarks containing the word “safe”, or variations thereof, and trademarks containing the word “plus” or “+” along with the particulars for these registrations. While these registrations demonstrate that each of these elements combined with other word matter have been registered in the past, they do not support a finding that the combination of the word “safe” with either “plus” or “+” in association with the Goods or similar goods is necessarily registrable. In its written representations, the Applicant highlighted four

registrations containing the word “plus”, three registrations containing the symbol “+”, and five registrations containing the word “safe”, all associated with various classes of goods and services. However, this evidence does not demonstrate that any of “safe”, “plus” or “+” are common to the Applicant’s industry or trade – the low number of relevant registrations do not permit such an inference.

## **ASSESSMENT OF THE GROUNDS OF OPPOSITION**

### ***12(1)(b) – Is the Mark Clearly Descriptive of the Goods?***

[19] The Opponent pleads that the Mark is not registrable as it is clearly descriptive of the character or quality of the Goods as the Mark clearly describes or misdescribes that the Goods are safe to consume and that the use of the “+” in the Mark is descriptive or misdescriptive of an enhanced level of safety for consumption.

[20] Section 12(1)(b) of the Act reads as follows:

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

...

(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the goods or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin

[21] The material date for this ground of opposition is the filing date of the application, being April 4, 2019 [*Shell Canada Limited v PT Safari Incofood Corporation*, 2005 FC 1040].

[22] The purpose of the prohibition in section 12(1)(b) of the Act is to prevent any single trader from monopolizing a term that is clearly descriptive or common to the trade, thereby placing legitimate traders at a disadvantage [*Canadian Parking Equipment v Canada (Registrar of Trade Marks)*, 1990 CarswellNat 834 (FCTD)].

[23] The issue as to whether a trademark is clearly descriptive or deceptively misdescriptive must be considered from the point of view of the average purchaser of

the associated goods or services. Character means a feature, trait or characteristic of the goods and services and “clearly” means “easy to understand, self-evident or plain” [*Drackett Co of Canada Ltd v American Home Products Corp* (1968), 55 CPR 29 (Ex Ct) at 34]. A trademark must not be carefully analyzed but must be considered in its entirety as a matter of immediate impression [*Wool Bureau of Canada Ltd v Registrar of Trade-marks* (1978), 40 CPR (2d) 25 (FCTD); *Atlantic Promotions Inc v Registrar of Trade-marks* (1984), 2 CPR (3d) 183 (FCTD)]. In other words, a trademark must not be considered in isolation, but rather in its full context in conjunction with the applied-for goods and services [*Ontario Teachers’ Pension Plan Board v Canada* (2012), 2012 FCA 60]. Finally, one must apply common sense in making the determination about descriptiveness [*Neptune SA v Canada (Attorney General)*, 2003 FCT 715].

#### The Opponent Meets its Burden

[24] In order to meet the initial evidential burden for this ground, the Opponent must provide sufficient evidence from which it could reasonably be concluded that the Mark is clearly descriptive or deceptively misdescriptive of the character or quality of the Goods to the average Canadian purchaser of these goods.

[25] As the Opponent’s evidence, namely, the Biggs Affidavit, contains definitions from several dictionaries for “plus”, “+” and “safe”, I am satisfied that the Opponent has met its initial burden for this ground [*Maple Ridge Florist Ltd v Flowers Canada/Fleurs Canada Inc*, 1998 CarswellNat 3004 at para 17].

#### Submissions and Analysis

[26] The Opponent submits that the Mark would be construed by consumers as representing “safe +” or “safe plus”. As provided in the Opponent’s evidence, the common definition of safe is “being free from danger or risk of harm” and that the common definition of plus is “for denoting an increase or, more of or in addition to something else”. Accordingly, it is the Opponent’s position that the average purchaser shopping for iron supplements would consider the Mark as representing a product offering increased or more safety than other iron supplements [Opponent’s written representations, para 32].

[27] The Applicant submits that the Opponent's characterization of the Mark as being read or understood to mean "safe plus" is inaccurate and submits that, rather than the "+" element appearing after the letters "SaFe", the "+" element would be seen as an accent on top of the "e" in the Mark, similar to *l'accent grave* and *circumflex* in the French language. Accordingly, the Applicant submits that as the plus symbol is depicted in the Mark as a diacritic over the letter "e", the first impression of an average Canadian consumer encountering the Mark would be that the pronunciation of the Mark would require additional thought given the presence of the diacritic [Applicant's written representations, para 22].

[28] In my view, there are several first impressions an average consumer may have in respect of the Mark, including "safe plus" as submitted by the Opponent. But I agree with the Applicant that, on first impression, an average consumer may read the Mark as being SaFe with an accent over the "e" due to the diacritical placement of the "+" symbol. In other words, the average consumer would not necessarily construe the Mark as "safe +" or "safe plus", as submitted by the Opponent.

[29] I also note that the capitalization of the S and F in the Mark arguably act as indicators that the Mark is a combination of the letters "Sa" and "Fe", the latter being the periodic table symbol for iron, presumably in reference to the Goods. Given this, it is also possible the Mark could be perceived as that of a scientific/chemical formula, in the same vein as the commonly known H<sub>2</sub>O for water, CO<sub>2</sub> for carbon dioxide, or NaCl for table salt.

[30] Further, as is clear from the dictionary definitions for "plus" contained in the Biggs Affidavit, the word plus (and therefore necessarily the + symbol) has many potential meanings that could be imparted on the Mark as a whole. For example, the Mark on first impression could be describing that the Goods have additional beneficial ingredients, that the benefits associated with the Goods are superior to similar products, or that the Goods are safer than similar products. Accordingly, while the Mark is at least suggestive and possibly even to some extent descriptive of potential characteristics or qualities of the Goods, the meaning conveyed by the Mark is not self-evident or plain as required

for a finding of clear descriptiveness under section 12(1)(b) [*Drackett Co*, see also *Wonder Brands Inc and Poppy Industries Canada Inc*, 2023 TMOB 156 at para 16 for similar reasoning].

[31] Further, I do not consider the Mark to be deceptively misdescriptive of the Goods as there is no evidence to suggest that the Mark is likely to deceive consumers as to any inherent characteristic, quality or trait of the Goods.

[32] For all the reasons set out above, the section 12(1)(b) ground is rejected.

**38(2)(d) – Is the Mark Distinctive of the Applicant?**

[33] Pursuant to section 38(2)(d) of the Act, the Opponent pleads that the Mark is not distinctive of the Applicant, within the meaning of section 2 of the Act, as the Mark is clearly descriptive or deceptively misdescriptive of the Goods.

[34] The material date for this ground of opposition is the date of filing of the statement of opposition, namely, July 29, 2022 [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185].

[35] As I have found the Mark is not clearly descriptive or deceptively misdescriptive of the Goods, and the later material date applicable to this ground does not affect my conclusion set out above in the assessment of the section 12(1)(b) ground, this ground of opposition is also unsuccessful.

[36] This ground of opposition is therefore dismissed.

**38(2)(a.1) – Was the Application Filed in Bad Faith?**

[37] The Opponent pleads that the application for the Mark was filed in bad faith as, at the filing date, the Applicant could not have been satisfied that it was entitled to use the Mark in Canada as the Mark creates the erroneous impression regarding product safety in contravention of the the *Food and Drugs Act*, RSC, c .F-27 (Food and Drugs Act).

[38] More specifically, the Opponent refers to subsection 9(1) of the Food and Drugs Act, which reads as follows:



9 (1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

[39] The material date for this ground is the filing date of the application, namely, April 4, 2019.

[40] In its representations, the Opponent submits that the Applicant, being a company that sells pharmaceutical products, would be aware of the provisions of the Food and Drugs Act and would have known the use of the Mark would contravene subsection 9(1) of this act [Opponent's written representations, paras 49 and 50].

[41] The Opponent also submits that the Applicant would have known that use of the word SAFE in association with pharmaceutical products violates a federal statute; however, it is not clear if the Opponent is referring to aforementioned section of the Food and Drugs Act or some other federal statute.

Has the Opponent met its Evidential Burden?

[42] The Opponent submits it has established a *prima facie* contravention of the Food and Drugs Act and that it need not establish that the Applicant has actually contravened this act for purposes of this bad faith ground of opposition [Opponent's written representations, para 51].

[43] However, the Federal Court has noted that "hearsay and vague conjecture" are not sufficient to support an allegation of bad faith [see *Beijing Judian Restaurant Co Ltd v Meng*, 2022 FC 743 at para 39]. I also refer back to *John Labatt, supra* where it was held that in order for an issue to be considered at all in an opposition, there must be sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist.

[44] As there is no evidence on record relating to the Goods associated with the Mark, and, consequently, no evidence that supports this allegation, I consider the Opponent's submissions to be vague conjecture with no evidentiary foundation. In this respect, the Opponent has merely recited a provision of a Federal statute; the Registrar

is not an expert on the interpretation and application of that statute. More to the point, the Opponent has not evidenced any bad faith actions or behaviour on the part of the Applicant. In any event, at best, this ground as pleaded is rooted in first finding that the Mark is clearly descriptive or deceptively misdescriptive of the Goods. In view of my findings above, this ground necessarily fails.

[45] I find the Opponent has failed to meet its burden in respect of this ground and, therefore, this ground is dismissed.

**DISPOSITION**

[46] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition.

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Leigh Walters  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

# Appearances and Agents of Record

**HEARING DATE:** No hearing held

## **AGENTS OF RECORD**

**For the Opponent:** Darryl Joseph Bilodeau

**For the Applicant:** Smart & Biggar LP