

**IN THE MATTER OF AN OPPOSITION by Frank T. Ross & Sons (1962) Limited to application No. 782,245 for the trade-mark NATURE'S ACCENTS filed by The Dial Corp.**

On May 8, 1995, the applicant, The Dial Corp., filed an application to register the trade-mark NATURE'S ACCENTS based upon proposed use of the trade-mark in Canada by the applicant itself or through its licensees in association with:

"Toiletries, namely body talc, foaming bath, and bubble bath; bath and toilet soap in all forms, including bar, liquid, wash, and powder, all the foregoing with and without moisturizing properties; bath salts; shower and bath gel; hand and body lotion; facial wash; hair shampoo with and without conditioner; hair conditioner; potpourri; scented candles and body puff."

The present application was advertised for opposition purposes in the *Trade-marks Journal* of August 28, 1996 and the opponent, Frank T. Ross & Sons (1962) Limited, filed a statement of opposition on September 19, 1996, a copy of which was forwarded to the applicant on October 2, 1996. The opponent alleged the following grounds of opposition in its statement of opposition:

- (a) The present application does not comply with Section 30 of the *Trade-marks Act* in that the applicant does not have the genuine intention or ability to use its trade-mark on all of the wares set out in the application within the time that is likely to be allowed by the Trade-marks Office;
- (b) The trade-mark NATURE'S ACCENTS is not registrable in view of Paragraph 12(1)(d) of the *Trade-marks Act* in view of the opponent's prior use and registration of the trade-mark NATURE CLEAN, registration No. 198,880, covering shampoos, detergents, washing compounds and cosmetic products;
- (c) The applicant is not the person entitled to registration of the trade-mark NATURE'S ACCENTS in view of the prior use and registration of the trade-mark NATURE CLEAN;
- (d) The trade-mark NATURE'S ACCENTS is not distinctive of the applicant's wares in view of the opponent's prior use and registration of the trade-mark NATURE CLEAN.

The applicant served and filed a counter statement on October 28, 1996 in which it denied the allegations set forth in the statement of opposition. The opponent filed as its evidence the affidavit of Bernard F.J. Ross, President of the opponent, while the applicant submitted as its evidence the affidavits of Arti Kane, Herbert McPhail and Margaret Kruszewski. Both parties filed a written argument and the applicant alone was represented at an oral hearing.

As its first ground, the opponent alleged that the present application does not comply with

Section 30 of the *Trade-marks Act* in that the applicant does not have the genuine intention or ability to use its trade-mark on all of the wares set out in the application within the time that is likely to be allowed by the Trade-marks Office. While the legal burden is upon the applicant to show that its application complies with Section 30 of the *Trade-marks Act*, there is an initial evidential burden on the opponent in respect of its Section 30 ground [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330]. To meet the evidential burden upon it in relation to a particular issue, the opponent must adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. As no evidence has been adduced by the opponent in respect of its Section 30 ground, the opponent has failed to meet the evidential burden upon it. I have therefore dismissed this ground of opposition.

The remaining grounds of opposition are based on allegations of confusion between the applicant's trade-mark NATURE'S ACCENTS and the opponent's trade-mark NATURE CLEAN. Accordingly, the determination of the issue of confusion will resolve all the remaining grounds in this proceeding. In assessing whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in Subsection 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 the material date(s). With respect to the ground of opposition based on Paragraph 12(1)(d) of the *Trade-marks Act*, the material date is the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks*, 37 C.P.R. (3d) 413 (F.C.A.)]. Further, the material date in respect of the non-entitlement ground of opposition is the applicant's filing date [May 8, 1995] while the material date for considering the non-distinctiveness issue is the date of opposition [September 19, 1996].

Paragraph 6(5)(a) of the *Act* requires that the Registrar consider the inherent distinctiveness of the trade-marks at issue. In this regard, the opponent's trade-mark NATURE CLEAN possesses little inherent distinctiveness in that the word CLEAN is descriptive of the function of the opponent's wares while the word NATURE when combined with the word CLEAN might suggest to some

consumers that the opponent's wares contain natural ingredients as opposed to artificial ingredients or ingredients which are harmful to the environment [see *Frank T. Ross & Sons (1962) Limited v. Belvedere International Inc.*, 74 C.P.R. (3d) 243, at p. 246]. The applicant's trade-mark NATURE'S ACCENTS possesses some measure of inherent distinctiveness when considered in its entirety even though the word NATURE'S may suggest to some consumers that the applicant's wares are formulated from natural ingredients.

The Ross affidavit establishes that the mark NATURE CLEAN has become known in Canada in association with shampoo, and cleaning and personal care products with annual sales increasing from \$65,000 in 1974 to in excess of \$300,000 as of the date of the Ross affidavit [April 25, 1997]. As pointed out by Mr. Ross in paragraph 8 of his affidavit, he is unable to provide detailed sales figures as the opponent sells many different products and “does not keep separate accounts giving separate figures in respect of NATURE CLEAN”. No evidence has been furnished by the applicant in respect of its use of the trade-mark NATURE'S ACCENTS in Canada. Consequently, both the extent to which the trade-marks at issue have become known and the length of time the trade-marks have been in use weigh in the opponent's favour in this opposition.

As for the wares and channels of trades of the parties, it is the applicant's statement of wares and the statement of wares covered in the opponent's registration for the trade-mark NATURE CLEAN which must be considered in assessing the likelihood of confusion in relation to the Paragraph 12(1)(d) ground [see *Mr. Submarine Ltd. v. Amandista Investments Ltd.*, 19 C.P.R.(3d) 3, at pp. 10-11 (F.C.A.); *Henkel Kommanditgesellschaft v. Super Dragon*, 12 C.P.R.(3d) 110, at p. 112 (F.C.A.); and *Miss Universe, Inc. v. Dale Bohna*, 58 C.P.R.(3d) 38,1 at pp. 390-392 (F.C.A.)]. However, those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties is useful [see *McDonald's Corporation v. Coffee Hut Stores Ltd.*, 68 C.P.R.(3d) 168, at p. 169 (F.C.A.)].

In the present case, registration No. 198,880 for the trade-mark NATURE CLEAN covers “Shampoos, detergents, washing compounds, cosmetic products” which overlap the applicant's

wares which include *inter alia* “toiletries, namely body talc, foaming bath, and bubble bath; bath and toilet soap; bath salts; shower and bath gel; hand and body lotion; facial wash; hair shampoo with and without conditioner; hair conditioner”. Further, for the purposes of assessing the Paragraph 12(1)(d) ground, the channels of trade associated with the wares of the parties must be considered as potentially overlapping, bearing in mind that there is no restriction in the applicant’s statement of wares which limits the distribution of its wares in any manner.

As to the degree of resemblance between the trade-marks of the parties, I consider there to be some similarity in appearance and in sounding between the applicant's trade-mark NATURE’S ACCENTS and the opponent's trade-mark NATURE CLEAN. Further, both trade-marks suggest the idea of nature or something which is natural.

As a further surrounding circumstance in respect of the issue of confusion, the applicant sought to rely upon evidence of the state of the register adduced by way of the McPhail affidavit. In particular, Mr. McPhail has annexed to his affidavit photocopies of more than sixty registered trade-marks including the words NATURE, NATURE’S or NATURES covering hair care products including shampoos, skin care and other personal care products, and soaps. Given the number of trade-marks disclosed by the search, I am prepared to conclude that at least some of these trade-marks are in use in Canada. The applicant also submitted marketplace evidence by way of the Kane affidavit which establishes *inter alia* use of the following: NATURE PATH moisturizing cream; NATURE’S FAMILY moisturizing cream; NATURE’S FAMILY moisturizing lotion; NATURE’S FAMILY foam bath; NATURE’S FAMILY shower gelée; NATURE PERFECT massage oil; NATURE PERFECT shampoo; NATURE PERFECT moisturizer; NATURE BODY y cream; NATURE DE FRANCE soap; NATURE’S GATE lotion; NATURE’S GATE lip balm; NATURE’S GATE gel; NATURE’S GATE shampoo; NATURE’S GATE conditioner; NATURE’S GATE sunblock; and NATURE WORKS cream.

The opponent in its statement of opposition, as well as in its evidence, pointed out that it has opposed twenty-five trade-mark applications for registration of trade-marks including the word NATURE or NATURE’S and that the opponent was successful in its oppositions to registration of

the trade-marks: NATURE FRESH, application No. 451,725; NATURE'S WISDOM, application No. 675,341; NATURE'S FRIEND, application No. 652,868; and NATURE'S PROMISE, application No. 657,653. Further, according to the opponent, the remaining oppositions resulted in the applications being abandoned, withdrawn or amended or are yet pending before the Registrar of Trade-marks.

In *Frank T. Ross & Sons (1962) Ltd. v. Nature Fresh Products Ltd.*, 1 C.P.R. (3d) 180, the Board refused an application for registration of the trade-mark NATURE FRESH, the Hearing Officer concluding that the applicant had failed to discharge the legal burden upon it in respect of the issue of confusion in view of the opponent's registration for the trade-mark NATURE CLEAN in that the words FRESH and CLEAN conveyed the same meaning. Likewise, in *Frank T. Ross & Sons (1962) Ltd. v. Hello Cosmetics Inc.*, 53 C.P.R. (3d) 124, and *Frank T. Ross & Sons (1962) Ltd. v. Luxo Laboratories Inc.*, 61 C.P.R. (3d) 410, the Board refused applications to register the trade-marks NATURE'S WISDOM and NATURE'S PROMISE in view of the opponent's registered trade-mark NATURE CLEAN, the Board Member concluding in each instance that the applicant had failed to discharge the legal burden upon it in respect of the Section 12(1)(d) ground of opposition.

In addition to the above decisions, the present opponent was successful in part in *Frank T. Ross & Sons (1962) Limited v. De Leeuw*, 77 C.P.R. (3d) 51, the Hearing Officer rendering a split decision in an opposition to registration of the trade-mark NATURE PERFECT & Design. In that case, Hearing Officer Groom commented as follows at pages 57-58 of the reported decision with respect to the applicant's argument that the word "nature" is a common word in the English language and should not be monopolized by anyone:

"... the fact that a word may or may not be commonly used in the English language is not enough to convince me to restrict the opponent's rights. Once a mark is registered it gives the owner the exclusive right to use it in association with the designated wares and services (Section 19 of the Act). The only question which the applicant can raise in its defence in a trade-mark opposition is whether the word has come to be commonly used by others in association with similar wares, which is shown by evidence of the state of the register or the state of the marketplace. If the applicant can show that it is so commonly used, then the presumption is that people are used to seeing marks of this sort for wares of this sort and therefore small differences between the marks will serve to distinguish them. In this case, the applicant has presented no evidence of the state of the register or the state of the market place therefore it is not open for me to speculate that the word might be commonly used and the opponent's rights will not be diminished."

Also, in *Frank T. Ross & Sons (1962) Ltd. v. London Drugs Ltd.*, 57 C.P.R. (3d) 438, the Board rendered a split decision, concluding in part that the applicant had met the legal burden upon it in respect of the issue of confusion between its trade-mark NATURE'S FRIEND as applied *inter alia* to hair conditioners, bath products and soap and the opponent's registered trade-mark NATURE CLEAN. In that case, the applicant adduced evidence of the state of the register and marketplace evidence from which Board Member Martin concluded as follows:

Ms. Côté conducted a computerized search of the trade-marks register with a view to locating trade-marks which include the word "nature." The search results appended to her affidavit do not provide complete particulars of the entries located and they must therefore be given diminished weight. Nevertheless, from a review of those results, I am able to conclude that, as of the material time, there were over thirty registrations on the register for trade-marks incorporating the word "nature" and covering wares related to those at issue in the present case. However, most of those registrations cover shampoo or similar wares. Thus, I am able to conclude that, as of the material time, at least some of those registrations were in active use and that consumers would therefore have been accustomed to seeing trade-marks incorporating the word "nature", at least for shampoo or related wares.

The applicant also sought to rely on state of the marketplace evidence by way of the Fitzpatrick and Doxsee affidavits. Both Ms. Fitzpatrick and Ms. Doxsee effected purchases in October of 1992 of products bearing trade-marks incorporating the word "nature", Ms. Fitzpatrick's purchases having been made in Vancouver and Ms. Doxsee's in Toronto. Most of the products purchased are not relevant to the wares at issue in the present case although some of the products were shampoo, conditioner or bath products. Such evidence suggests that, in October of 1992, it was not uncommon for traders to use trade-marks incorporating the word "nature" for wares such as shampoo, conditioner and bath products. To a much lesser extent, I can also infer that such evidence reflects the state of the marketplace as of the material time. At the very least, such evidence corroborates the conclusion which follows from the applicant's state of the register evidence.

In a number of more recent decisions, the Opposition Board rejected the opponent's oppositions which were based on allegations of confusion involving its trade-mark NATURE CLEAN. In *Frank T. Ross & Sons (1962) Limited v. Belvedere International Inc.*, 74 C.P.R. (3d) 243, the applicant met the legal burden upon it in respect of the issue of confusion between its trade-mark NATURES BASICS covering various hair care products and the opponent's trade-mark NATURE CLEAN by establishing that it is common in the hair care and skin care product trade to adopt and use trade-marks including the words NATURE or NATURE'S. Also, in *Frank T. Ross & Sons (1962) Limited v. Dep Corporation*, (application No. 772,075, yet unreported decision dated December 29, 1997), I rejected the opponent's opposition to registration of the trade-mark NATURES FAMILY based upon proposed use of the trade-mark in Canada in association with:

“Skin scrubs, skin oils, shower and bath gels, thigh creams, facial cleansers, soaps, liquid soaps, toners, skin creams, skin gels, moisturizing foam baths, facial moisturizers, foam baths and skin lotions; skin lotions, skin creams, skin gels, moisturizing foam baths and facial moisturizers all containing aloe vera and vitamin E; milk foam baths; extra strength skin lotions and skin creams”

and concluded as follows:

“In the present case, the wares of the parties do differ and the applicant’s evidence points to there being other trade-marks in the marketplace including the word NATURE or NATURE’S as applied to shampoo, skin lotions, and other personal care products. Furthermore, the absence of evidence of instances of actual confusion does at least support the conclusion that there would be no reasonable likelihood of confusion between the trade-marks at issue. I have concluded, therefore, that the applicant has met the legal burden upon it in respect of the issue of confusion and have therefore rejected the remaining grounds of opposition.”

In *Frank T. Ross & Sons (1962) Limited v. London Drugs Ltd.*, (application No. 738,424, yet unreported decision dated February 12, 1998), the opponent’s opposition to registration of the trade-mark NATURES PRESCRIPTION & Design as applied to “Vitamins and minerals; soap, namely toilet, deodorant, body, facial and liquid soaps” was rejected in that the wares of the parties were found to differ and the applicant’s evidence pointed to there being other trade-marks in the marketplace including the word NATURE or NATURE’S as applied to shampoo, skin lotions, and other personal care products. Furthermore, in that case, the absence of evidence of instances of actual confusion supported the conclusion that there would be no reasonable likelihood of confusion between the trade-marks at issue. Also, in *Frank T. Ross & Sons (1962) Limited v. Nature’s Sunshine Products, Inc.*, (application No. 718,017, yet unreported decision dated June 16, 1998), the opponent’s opposition to registration of the trade-mark NATURE’S SUNSHINE as applied to:

“Dietary food supplements, herbal, vitamin and mineral preparations and food supplements, namely, tablets, capsules, syrups, powders, lozenges, tonics, extracts, essences; herb extract liquids and powders; snack bars; liquid chlorophyll; vitamins; herbs; minerals; weight control beverages and beverage concentrates, namely syrups, powders, tonics; medicinal preparations, and homeopathic medicines, namely, creams, tablets, capsules, syrups, powders, lozenges, tonics, essences, ointment, salves, balms; skin discomfort cream; herbal cough syrup; breath freshening tablets, cosmetics and toilet preparations namely, creams, lotions, gels, oils, soaps conditioners for hair and body, ointments, salves, shampoos, toothpaste, facial and body cleansers, make-up solvents, astringents, toners, face and body moisturizers and lubricants, perfumes, colognes, body powders, antiperspirants and deodorants; general purpose cleaning concentrates; water filtration and purification units; aroma therapy products, namely, gels, soaps, conditioners; food and beverages containing real and herbal flavourings and light beverages, namely, juice, tea, herbal tea, aloe vera juice, mineral waters, snack bars, cookies, syrups, punches, powders.”

was rejected in that the applicant’s state of the register and marketplace evidence pointed to there being other trade-marks in the marketplace including the word NATURE or NATURE’S as applied

to shampoo, skin lotions, and other personal care products. Furthermore, in that case, the absence of evidence of instances of actual confusion supported the conclusion that there would be no reasonable likelihood of confusion between the trade-marks at issue.

In the present case, the applicant's state of the register evidence certainly points to there being other trade-marks in the marketplace including the word NATURE or NATURE'S as applied to shampoo, skin lotions, and other personal care products. Additionally, however, the applicant's marketplace evidence in this opposition is impressive in that it confirms use of NATURE PATH moisturizing cream, NATURE DE FRANCE soap, NATURE WORKS cream and NATURE BODY body cream. Furthermore, the Kane affidavit shows that there has been fairly extensive use of NATURE'S FAMILY for moisturizing cream, moisturizing lotion, foam bath and shower gelée, NATURE PERFECT massage oil, shampoo and moisturizer, as well as NATURE'S GATE lotion, lip balm, gel, shampoo, conditioner and sunblock. I have concluded, therefore, that the applicant has met the legal burden upon it in respect of the issue of confusion and have therefore rejected the remaining grounds of opposition.

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

DATED AT HULL, QUEBEC THIS 18<sup>th</sup> DAY OF DECEMBER, 1998.

G.W.Partington,  
Chairperson,  
Trade-marks Opposition Board.