

**IN THE MATTER OF AN OPPOSITION  
by G.I. Energy Drinks Corporation to  
Application No. 1064191 for the Trade-  
mark METAL GURU filed by Lodestar  
Anstalt**

**I The Pleadings**

On June 21, 2000 Lodestar Anstalt (the “Applicant”) filed an application to register the trade-mark METAL GURU (the “Mark”) in association with:

Beers; mineral and aerated waters; ginger beer; ginger ale; lemonade; carbonated non-alcoholic drinks; colas; malt beer; vegetable juices; tomato juice; sarsaparilla; seltzer water; fruit drinks and fruit juices; pastilles for effervescing beverages; powders for effervescing beverages; non-alcoholic fruit extracts; liquid mixtures for making soft drinks; fruit syrups for making beverages; syrups for non-alcoholic beverages; syrups for lemonade

The Applicant claimed priority under s. 34 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the “Act”) on the basis of an application for registration of the same or substantially the same trade-mark filed by the Applicant in Benelux on December 22, 1999 under number 953378. The present application is based on proposed use in association with the Wares.

The application was advertised in the Trade-marks Journal on August 21, 2002 for opposition purposes.

G.I. Energy Drinks Corporation (the “Opponent”) filed a statement of opposition on September 18, 2002, which was forwarded on October 22, 2002 by the Registrar to the Applicant. The grounds of opposition are:

- (1) The application does not comply with the provisions of s. 30(i) of the Act in that the Applicant could not have been satisfied that it is entitled to use the Mark in Canada as it knew or ought to know the prior use of the Opponent’s trade-mark GURU ENERGY DRINK, certificate of registration TMA520421;

- (2) The Mark is not registrable pursuant to the provisions of s. 12(1)(d) of the Act as it is confusing with the Opponent's registered trade-mark GURU ENERGY DRINK, certificate of registration TMA520421, in association with carbonated and non-carbonated non-alcoholic beverages;
- (3) the Mark is not distinctive within the meaning of s. 2 of the Act as it does not and cannot distinguish the wares of the Applicant from the wares of the Opponent in association with its trade-mark used in Canada.

The Applicant filed on November 22, 2002 a counter statement denying all grounds of opposition.

On November 29, 2005 the Applicant filed a revised application to include a restriction in the list of Wares. The Registrar accepted on December 7, 2005 such revised application. The wares are now defined as:

Beers; mineral and aerated waters; ginger beer; ginger ale; lemonade; carbonated non-alcoholic drinks; colas; malt beer; vegetable juices; tomato juice; sarsaparilla; seltzer water; fruit drinks and fruit juices; pastilles for effervescing beverages; powders for effervescing beverages; non-alcoholic fruit extracts; liquid mixtures for making soft drinks; fruit syrups for making beverages; syrups for non-alcoholic beverages; syrups for lemonade; specifically excluding energy drinks and pastilles, powders, liquid mixtures and syrups therefore. (The "Wares")

The Opponent filed the affidavits of Caroline Guy and Raymond Jolicoeur while the Applicant filed the affidavits of Brendan Lounsbery, Danial Faya, Greg Beach and Lisa Leger. The Registrar granted permission to the Applicant to file as additional evidence the affidavits of Ken Griffin, Joel B. Taller and Richelle Rae. None of the affiants were cross-examined.

Both parties filed written submissions and an oral hearing was held during which both parties presented oral arguments.

### **III Analysis of the 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 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. [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].

i) Ground of opposition under s. 30(i)

At the oral hearing, the Opponent informed the Registrar that it was abandoning that ground of opposition.

ii) Registrability under s. 12(1)(d)

The material date to determine if a trade-mark is registrable under s. 12(1)(d) of the Act is 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)]

Ms. Guy has been an employee of the Opponent's trade-marks agent firm. She filed a certificate of authenticity issued by the Registrar with respect to the Opponent's registered trade-mark GURU ENERGY DRINK, registration TMA520421 in association with non-alcoholic carbonated and non-carbonated beverages. Therefore the Opponent met its initial onus with respect to this ground of opposition.

The test to determine if there exists a reasonable likelihood of confusion is set forth in s. 6(2) of the Act and I must have regard to all the 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 any ideas suggested by them.

The Supreme Court of Canada through Mr. Justice Binnie in *Mattel, Inc. v. 3894207 Canada Inc.*, (2006) 49 C.P.R. (4th) 321 described the test of confusion as follow:

What, then, is the perspective from which the likelihood of a "mistaken inference" is to be measured? It is not that of the careful and diligent

purchaser. Nor, on the other hand, is it the “moron in a hurry” so beloved by elements of the passing-off bar: *Morning Star Co-Operative Society Ltd. v. Express Newspapers Ltd.*, [1979] F.S.R. 113 (Ch. D.), at p. 117. It is rather a mythical consumer who stands somewhere in between, dubbed in a 1927 Ontario decision of Meredith C.J. as the “ordinary hurried purchasers”: *Klotz v. Corson* (1927), 33 O.W.N. 12 (Sup. Ct.), at p. 13. See also *Barsalou v. Darling* (1882), 9 S.C.R. 677, at p. 693. In *Delisle Foods Ltd. v. Anna Beth Holdings Ltd.* (1992), 45 C.P.R. (3d) 535 (T.M.O.B.), the Registrar stated at p. 538:

When assessing the issue of confusion, the trade marks at issue must be considered from the point of view of the average hurried consumer having an imperfect recollection of the opponent’s mark who might encounter the trade mark of the applicant in association with the applicant’s wares in the market-place.

(...)

In opposition proceedings, trade-mark law *will* afford protection that transcends the traditional product lines unless the applicant shows the likelihood that registration of its mark will *not* create confusion in the marketplace within the meaning of s. 6 of the *Trade-Marks Act*. Confusion is a defined term, and s. 6(2) requires the Trade-marks Opposition Board (and ultimately the court) to address the *likelihood* that in areas where both trade-marks are used, prospective purchasers will infer (incorrectly) that the wares and services - though not being of the same general class - are nevertheless supplied by the same person. Such a mistaken inference can only be drawn here, of course, if a link or association is likely to arise in the consumer's mind between the source of the well-known BARBIE products and the source of the respondent's less well-known restaurants. If there is no likelihood of a link, there can be no likelihood of a mistaken inference, and thus no confusion within the meaning of the Act.

I shall now review the parties’ evidence in the context of each criteria listed above to determine if there exists, on a balance of probabilities, a likelihood of confusion between the Mark and the Opponent’s registered trade-mark GURU ENERGY DRINK.

The Mark is composed of two English words, the combination of which being unusual. As such it does have a certain degree of inherent distinctiveness. The distinctiveness of a trade-mark can be enhanced through use in Canada. The application is based on proposed use and there is no evidence of use of the Mark in Canada.

The Opponent's registered trade-mark GURU ENERGY DRINK is composed of three English words, two of them being descriptive of the Opponent's wares. In fact the Opponent had to disclaim the exclusive use of the words "ENERGY" and "DRINK" apart from the trade-mark as a whole.

There has been voluminous and detailed evidence of use of the Opponent's registered trade-mark in Canada that I shall review. Mr. Jolicoeur has been the Opponent's president since June 1998. He was personally involved in the development and marketing of the Opponent's products sold in association with the trade-mark GURU ENERGY DRINK. The word GURU was chosen in order to give to the public the image that the Opponent's energy drink would be the "guru" of those type of drinks, as such word means a spiritual leader that has knowledge and energy. I should point out at this stage that the Opponent puts a lot of emphasis on the word "GURU" alone. However the registered trade-mark is GURU ENERGY DRINK and sample products bear such trade-mark and not just the word GURU even though the words "ENERGY" and "DRINK" are written in much smaller letters on the material filed.

He alleges that the Opponent has been selling since August 1999 its products in Canada in association with the trade-mark GURU ENERGY DRINK. Those sales appear to be made in the provinces of Quebec, Ontario and Newfoundland. The Opponent has sold since 2000 at least over 725,000 cans of its energy drink on a yearly basis. He has provided unit sales figures for the period of August 1999 to January 2003. Samples of invoices were also produced to evidence the sale of its products.

To promote its energy drinks in association with the trade-mark GURU ENERGY DRINK, the Opponent has invested important sums of money in advertisement on radio, signs, ads in newspapers and magazines across Canada. He filed samples of those signs and ads. Some of the ads were published in the Journal de Montreal, a French language daily newspaper that circulates in the Greater Montreal area. I take judicial notice of that fact and that it had a fairly substantial circulation in that area. [See *Northern Telecom Ltd. c. Nortel Communications Inc.*, (1987) 15 C.P.R. (3d) 540, *Milliken & Co. v. Keystones Industries (1970) Ltd.*, 12 C.P.R. (3d) 166, at 168 and *Carling O'Keefe Breweries of Canada Ltd. v. Anheuser-Busch, Inc.*, 4C.P.R. (3d) 216, at

224)] As for articles published in the newspaper La Presse for example, despite the fact that they do not constitute advertisement of the Opponent's products *per se* but represent material for the reader's leisure, they can be considered in the analysis of the extent to which the Opponent's trade-mark may have become known.

There was a debate at the oral hearing on the admissibility of certain documents identified as Exhibits RJ-3A and RJ-3B to Mr. Jolicoeur's affidavit. In any event as it will appear hereinafter the admissibility of those documents will not be a major factor in the outcome of this decision. I will however dispose of this issue.

Mr. Jolicoeur's affidavit was filed on June 20, 2003. The Applicant requested and obtained on September 22, 2003 an order for the cross-examination of Mr. Jolicoeur and Ms. Guy, but the Applicant decided not to proceed. On October 9, 2003 the Opponent's agent filed into the record better copies of the material identified as Exhibit RJ-3B as well as additional material identified as Exhibit RJ-3A. Exhibit RJ-3A consisted originally of a list of publications in which advertisements of the Opponent's energy drink bearing the trade-mark GURU ENERGY DRINK were published before November 12, 2002. However none of those advertisements were annexed to Mr. Jolicoeur's affidavit. A copy of the aforesaid letter appears to have been sent to the Applicant's agent but at the hearing he claimed not having received such material. Moreover he alleged that the exhibits were not notarized by the commissioner of oaths who swore Mr. Jolicoeur's affidavit.

I allow the production of the better copies of Exhibit RJ-3B as those documents do not constitute *per se* new evidence and cannot take the Applicant by surprise. As for the additional documents Exhibit RJ-3A, I consider them as new evidence that should have been the subject of a request under rule 44 to file additional evidence. Originally, Exhibit RJ-3A was a list of publications. If the Opponent decided afterwards to introduce copies of the advertisements published in those publications listed, it should have done so through the mechanism available under the Act and the regulations. I shall disregard the copies of advertisements subsequently filed as Exhibit RJ-3A.

From such evidence I conclude that the Opponent's registered trade-mark GURU ENERGY DRINK was known in Canada. The Mark may have a higher degree of inherent distinctiveness than the Opponent's registered trade-mark, but the latter is known in Canada. Therefore, I conclude that the first criterion slightly favours the Opponent.

Corollary, the length of time the trade-marks in issue have been used also favours the Opponent as admitted by the Applicant in its written argument.

The Applicant introduced the affidavit of Mr. Taller, a partner at the Applicant's agents firm. He describes himself as a lawyer practicing in the area of regulatory law with an emphasis on providing advice in the area of regulatory requirements for products regulated pursuant to the Federal Food and Drugs Act and its regulations. He provides a list of associations in which he is a member.

He states that on January 1, 2004 the Federal Natural Health Products Regulations ("NHP Regulations") came into force and explained the scope of these regulations and the labelling requirements under those regulations for products falling under the definition of "natural health product". He filed extracts of web pages of the Opponent's website which contain a description of the Opponent's product sold in association with the trade-mark GURU ENERGY DRINK. He also reviewed the information contained on a can of the Opponent's energy drink. From the information contained therein he comes to the conclusion that the Opponent's product sold in association with the trade-mark GURU ENERGY DRINK is a natural health product as defined in the NHP regulations.

It is obvious that the Applicant is relying on such evidence to argue that the nature of the parties' respective wares is different. However Mr. Taller is introducing evidence on a contested issue (nature of the parties' respective wares). This situation was discussed in *Cross-Canada Auto Body Supply (Windsor) Limited v. Hyundai Auto Canada* (2006), 53 C.P.R. (4th) 286 wherein Von Finckenstein J., made the following comment:

While I appreciate that the practice of law could not be carried on without solicitors using the affidavits of their colleagues, such practice is usually restricted

to non-controversial or non- central matters. Here the entire evidence of the Applicants on the main and highly contested issue will be based on affidavits of members of Sim Lowman. In such a situation there is in the words of *Heck supra* " a risk and a possible perception that counsel may be inappropriately influenced by that relationship to the detriment of counsel's duties to the court and the client" This court will take all necessary step to avoid such risk or possible perception.

Therefore I shall disregard the content of his affidavit. Should I be wrong on this ruling, its content would not be sufficient to conclude that there is a distinction to be made in the nature of the parties' respective wares. It is the general class of wares that must be considered. The Applicant tried, through this evidence, to draw a line between energy drinks on one hand and the Wares on the other hand. I consider the Wares in the same general class of wares as those listed in the Opponent's certificate of registration. The parties' respective wares are all beverages or ingredients to be used in the composition of a beverage. Moreover, the Opponent's registration is not limited to energy drinks. Pelletier J., in *Maison Cousin v. Cousins Submarines Inc.* 2006 CAF 409 made the following comment:

10 Avec respect, nous sommes d'avis que les conclusions du juge sur ces deux points connexes sont erronées. Pour ce qui est des produits eux-mêmes, le juge n'a pas expliqué le raisonnement par lequel il est arrivé à la conclusion que les produits en question, notamment des pains, des desserts, de la charcuterie et des sandwiches d'une part, et des sandwiches sous-marins et des boissons d'autre part, sont à ce point distincts les uns des autres qu'il faille écarter la possibilité de confusion. Ce sont tous des produits d'alimentation qui se ressemblent énormément et que l'on retrouve communément dans le même voisinage.

As to the nature of the trade, Mr. Jolicoeur states that the Opponent's wares are sold in convenient stores, grocery stores, natural food products store, gas station, nightclubs and bars, concert hall, cinema, fitness centres, food court in shopping centres, restaurants, hotels, drug stores, metro stations, train stations and sport sites. The ultimate consumers are athletes, workers, students, artists, professionals, and night workers.

The Applicant filed the affidavit of Greg Beach, a summer student, employed by the Applicant's agents firm. He was asked to purchase the following drinks: soft drink PEPSI COLA® in a can and in bottle, a can of vegetable cocktail V8 ®, a bottle of apple juice and a bottle of carbonated

natural spring water PERRIER ®. He filed a photograph of the containers of those drinks and proof of purchase from a convenience store, a health food store and a supermarket in Ottawa.

There is no evidence as to the channels of trade to be used by the Applicant. In view of the wide range of the type of commercial establishments selling the Opponent's energy drinks there is no reason not to think that there might be an overlap with the channels of trade that might utilize the Applicant. In fact the Applicant's own proof, through the affidavit of Greg Beach, suggests that there might be an overlap in the channels of trade. The products purchased by Mr. Beach in the same type of stores where the Opponent's energy drink can be found are of the same nature as some of the Wares.

The Applicant also filed the affidavit of Ms. Rae, an articling student employed by the Applicant's agents firm. She purchased a can of energy drink sold in association with the trademark RED BULL and filed photographs of such can including the information appearing on the can. From this evidence and the sample container filed by Mr. Jolicoeur, the Applicant argues that energy drinks are sold in a more elongated metal can than the ones used for soft drinks, juice and carbonated water. Reference is also made on this issue to the content of Mr. Lounsbury's affidavit, a summer student employed by the Applicant's agent firm. The information appearing on energy drink's containers goes beyond what can be found on containers of juices, soft drinks or carbonated water. However, we have no information on the packaging of the Applicant's Wares. In any event it is not the difference or the similarities in the packaging used that must be assessed but the differences and similarities in the wares.

Finally the Applicant argues that the price per ml. is much more expensive for energy drinks than for juices, soft drinks or carbonated water. The difference in pricing can be measured in terms of a dollar or two and not in terms of hundreds of dollars.

I conclude that the nature of the wares and the channels of trade factors favour the Opponent.

The Opponent's trade-mark suggests that the Opponent's energy drink would be the "guru" of those type of drinks. Such word means a spiritual leader that has knowledge and energy. The

Applicant introduced as evidence the affidavit of Mr. Faya, a summer student employed by the Applicant's agent firm at the time of execution of his affidavit. The main purpose of his affidavit is to establish that rock artist Marc Bolan, who died in car accident in 1977, and his band T. Rex released an album in 1972 entitled *The Slider* on which there is a song called *Metal Guru* which obtained success in Great Britain and to some extent in the United States. There is no evidence on the success of that song in Canada except that such album is still offered for sale in Canada. This evidence falls short from establishing that an average consumer would associate the Mark with the title of that song. Even if the immediate impression of a consumer would be to recall a song composed more than 30 years ago, that association does not preclude the same consumer, who has a vague recollection of the Opponent's registered trade-mark, to think that the Wares bearing the Mark originate from the Opponent.

The first component of the parties' respective trade-marks is different. The words ENERGY and DRINKS do describe the type of wares sold in association with the trade-mark GURU ENERGY DRINK. The word GURU is the main component of the Opponent's registered trade-mark. The Mark has also the word GURU. The word METAL is a qualifier. There is some minor degree of resemblance in appearance when considered in their totalities. On this issue I refer to *Chesebrough-Pond's Inc. v. Lancôme Parfums et beauté & Cie* (1993), 46 C.P.R. (3d) 131, wherein the Chairman of the Trade-marks Opposition Board, as he then was, stated:

As for the degree of resemblance between the applicant's trade-mark BAUME INTENSE & Design and the opponents' trade-mark SOINS INTENSIFS, the marks do bear some minor degree of resemblance in appearance when considered in their entireties as a matter of immediate impression and imperfect recollection although there appears to be little similarity in sounding of the trade-marks. Further, both marks, and particularly the opponents' trade-mark, suggest the idea of providing protection for the user's skin.

Although the ideas suggested by the marks are different, overall I conclude that there is some degree of resemblance between them as the Mark comprises the main element of the Opponent's registered trade-mark. This factor slightly favours the Applicant.

Mr. Lounsbury's affidavit does also contain state of the register evidence. It shows that trade-marks having the same prefix, suffix or a common element, owned by different entities, cover on one hand energy drink while others are registered in association non-alcoholic beverages. Therefore the Registrar would permit the coexistence of "similar trade-marks" on the register, as the nature of the wares in those cases would differ. Each case is fact driven and it is difficult to draw general conclusions. The difference in the marks alone in some instances could justified such coexistence. [See for example ACCELERADE v. ENERGADE, POWERADE v. GATORADE, VRROOM THIRST QUENCHER v. ALL SPORT BODY QUENCHER]

Ms. Léger has been a trade-mark searcher employed by the Applicant's trade-mark agents. She conducted a search to locate on the register applications and registrations of trade-marks comprising of or containing the word "guru" and provided extracts of those citations. She located 16 trade-marks, including the Opponent's trade-mark. However, only four citations are related somewhat to food or drinks. They are:

FOODGURU, application 1133106  
GREEN GURU, registration TMA590253  
GUM GURU, registration TMA553700  
INDIAN GURU, registration TMA395352

Such number of relevant citations is not sufficient to draw an inference that GURU is commonly used in the trade in association with beverages or even to a larger extent to food so that consumers are accustomed to distinguish them. [*Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R. (3d) 432; *Del Monte Corporation v. Welch Foods Inc.* (1992), 44 C.P.R. (3d) 205 (F.C.T.D.)]

Mr. Griffin has been a partner in the firm of Saunders & Dolleymore, located in the United Kingdom, the trade-mark agents for the Applicant and its predecessor-in-title, Stichting Lodestar. He oversees the Applicant's worldwide trade-mark portfolio.

He states that the Applicant is the owner of registrations and applications for the trade-mark METAL GURU for use in association with beers, mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; syrups and preparations for beverages in numerous

jurisdictions. He filed some of the certificates of registration obtained in foreign jurisdictions. He filed a copy of the assignment of the trade-mark METAL GURU from Stichting Lodestar to the Applicant.

He alleges being aware of the fact that the Opponent has obtained in Japan, Australia and the European Community the registration for the trade-mark GURU ENERGY DRINK in association with non-alcoholic beverages. The Applicant owns, in those jurisdictions, registrations for the trade-mark METAL GURU; thus their coexistence in those territories. On this issue I will simply refer to the following extract of *Sun-Maid Growers of California v. William & Humbert Ltd.* (1981), 54 C.P.R. (2d) 41(F.C.T.D.):

This American experience having been brought to the attention of the acting chairman, there is no further indication that it formed a part of his decision. I am aware of the jurisprudence which holds such evidence to be irrelevant and indeed registration in a foreign jurisdiction may indicate distinctiveness there but is irrelevant to the question of distinctiveness in Canada. In addition, where the *Trade Marks Act* refers to "use in Canada", evidence of use in other jurisdictions, even though advertised in Canada, is irrelevant: see *Porter v. Don the Beachcomber* (1966), 48 C.P.R. 280, 33 Fox Pat. C. 79, [1966] Ex. C.R. 982, a judgment of Thurlow J. I also readily agree that no significance can be attached to failure to oppose or object to registrations in other jurisdictions since such actions, of necessity, have their basis entirely in foreign law and procedure. I question, however, whether this principle can be extended to the point where evidence that in the United States market which is so similar to our own, the same marks have co-existed in respect to the same wares without confusion, is considered to be irrelevant to the question of the likelihood of confusion in Canada, as appears to have been the disposition by the Registrar in *Bayer Co. Ltd. v. Rexall Drug Co. Ltd.* (1966), 52 C.P.R. 91, 34 Fox Pat. C. 200, and *Hazel Bishop Inc. v. Bonat of Canada Ltd.* (1968), 56 C.P.R. 190, 39 Fox Pat. C. 65. I cannot determine whether the acting chairman, on the strength of these precedents, felt obliged to disregard such evidence, and in any event, it does not form a part of my decision, but my own view is that these pronouncements by the Registrar may very well be an undue extension of the principle enunciated in the decisions related to distinctiveness or prior use in Canada.

In the present case we have no evidence of the relevant market in those foreign jurisdictions and on the law governing the registration of those trade-marks abroad. I will therefore disregard such evidence.

In *Mattel*, supra, Binnie J. confirmed the following interpretation of s. 6(5) of the Act:

Within the "all the surrounding circumstances" test, s. 6(5) of the Act lists five factors to be considered when making a determination as to whether or not a trade-mark is confusing. These are: "(a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; (b) the length of time the trade-marks or trade-names have been in use; (c) the nature of the wares, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them". The list of circumstances is not exhaustive and different circumstances will be given different weight in a context-specific assessment. See *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (Fed. T.D.). In opposition proceedings, as stated, the onus is on the applicant (here the respondent) to show on a balance of probabilities that there is no likelihood of confusion. (My underlines)

The criteria listed in s. 6(5) of the Act 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.)]. Therefore it is not a mathematical exercise. It has often been said that the degree of resemblance is the most important factor when assessing the likelihood of confusion between two trade-marks especially when the wares of the parties are identical or similar. [See for example *Beverley Bedding & Upholstery Co. v. Regal Bedding & Upholstering Ltd.* (1980), 47 C.P.R. (2d) 145]

The Opponent's registered trade-mark GURU ENERGY DRINK has been used since 1999 and is known in Canada. There is a similarity in the nature of the parties' respective wares. There is no evidence that the channels of trade would be different. There is some similarity in the marks in issue as they both comprise of the word GURU. Consequently, I conclude that the Applicant has not discharged its burden to prove, on a balance of probabilities, that the Mark would not likely cause confusion with the Opponent's registered trade-mark GURU ENERGY DRINK. At the very best for the Applicant I would be in doubt and such situation must be resolved in favour of the Opponent. As a result, I maintain the second ground of opposition.

iii) Distinctiveness

It is generally accepted that the relevant date with respect to the distinctiveness ground of opposition is the filing date of the statement of opposition (September 18, 2002) [see *Re Andres*

*Wines Ltd. and E. & J. Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.) and *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 412 at 424 (F.C.A.)].

The Opponent has an evidential burden to show that, as of September 18, 2002, its trade-mark GURU ENERGY DRINK had become known sufficiently to negate the distinctiveness of the Mark [*Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D.) at 58]. Once this burden is met, the Applicant has a legal onus to show that the Mark is adapted to distinguish or actually distinguishes the Wares from the wares/services of the Opponent throughout Canada. [See *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272 (T.M.O.B.) and *Bojangles' International, LLC and Bojangles Restaurants, Inc. v. Bojangles Café Ltd.* 2006 FC 657] The same criteria listed under s. 6(5) are applicable to make such determination.

The evidence summarized above does establish that the Opponent's trade-mark GURU ENERGY DRINK was known in Canada to some extent as of the relevant date. Therefore the Applicant had to prove that the Mark is distinctive within the meaning of s. 2 of the Act.

For reasons similar to those outlined in my analysis regarding ground of opposition under s. 12(1)(d) ground of opposition, I find that the Applicant's Mark was not distinctive as of September 18, 2002. I therefore maintain the third ground of opposition.

#### **IV Conclusion**

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

DATED IN BOUCHERVILLE, QUEBEC, THIS DAY 13th DAY OF JUNE 2007.

Jean Carrière  
Member of the Trade-marks Opposition Board