

LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2012 TMOB 84
Date of Decision: 2012-04-30

**IN THE MATTER OF AN OPPOSITION
by Coca-Cola Ltd. to application
No. 1,336,069 for the trade-mark
POWERJUICE in the name of Industries
Lassonde Inc.**

[1] On February 19, 2007 Industries Lassonde Inc. (the Applicant) filed an application to register the trade-mark POWERJUICE (the Mark) based on proposed use in Canada in association with the following wares (the Wares):

Boissons énergétiques non alcoolisées. Jus de fruits et boissons aux fruits non alcoolisées. [Non-alcoholic energy drinks. Non-alcoholic fruit juices and fruit drinks]

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of September 26, 2007. A statement of opposition was filed by Coca-Cola Ltd. (the Opponent) on January 3, 2008. The Applicant filed and served a counter statement on February 21, 2008, denying all the allegations in the statement of opposition.

[3] The Opponent filed and served the affidavit of Mr. Silvio Annosantini.

[4] The Applicant filed and served the affidavits of Lisa Saltzman, Marie-Christine Levasseur, Salonge Doré, and Tony Augello.

[5] Both parties filed written arguments and only the Opponent was represented at the oral hearing.

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[6] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential burden 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 *John Labatt Limited v. The Molson Companies Limited* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298].

Grounds of Opposition pursuant to the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act)

Section 38(2)(a) and s. 30(e): Summarily Dismissed

[7] The Opponent pleaded that the application does not comply with s. 30(e) of the Act, in that the Applicant, at the filing date, had no *bona fide* intent to use the Mark in Canada in association with each of the wares set out in the application. The material date for non-compliance with s. 30 of the Act is the filing date of the application (February 19, 2007), [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 at 475 (T.M.O.B); *Canadian National Railway Co. v. Schwauss* (1991), 35 C.P.R. (3d) 90 (T. M.O.B.)]. The Opponent may rely upon the Applicant's evidence to meet its initial burden, which is lighter than usual for s. 30(e) [*Molson Canada v. Anheuser-Busch Inc.* (2003), 29 C.P.R. (4th) 315 (F.C.T.D.)], but the Opponent must show that the Applicant's evidence is clearly inconsistent with the Applicant's claim [see *York Barbell Holdings Ltd. v. ICON Health & Fitness Inc.* (2001), 13 C.P.R. (4th) 156 (T.M.O.B.)].

[8] I note that the Opponent has not provided any facts to support this ground nor made any references to the Applicant's evidence in this regard; nor has the Opponent advanced any arguments, either written or oral, to support this allegation. As a result, this ground is summarily dismissed.

Section 38(2)(a) and s. 30(i): Summarily Dismissed

[9] The Opponent pleaded that the application does not comply with s. 30(i) of the Act, in that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the Wares in light of the prior use of the Opponent's POWER trade-marks. This

ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [*Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155]. As the Application includes the required statement and there is no allegation or evidence of bad faith or other exceptional circumstances, the s. 30(i) ground is summarily dismissed.

Section 38(2)(c) and s.16(3)(a)(b)

[10] The Opponent pleaded that the Applicant is not the person entitled to secure registration of the Mark pursuant to s. 16(3)(a) as the Mark is confusing with the Opponent's POWER trademarks (listed below), which had been used by the Opponent prior to the filing date of the subject application.




[11] The Opponent pleaded that pursuant to s. 16(3)(b) that the Mark is confusing with the application filed by the Opponent prior to the filing date of the subject application:

POWERADE OPTION	App No. 1,334,002	Filed: 02-05-07 Reg'd: 02-13-08
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[12] The material date for assessing entitlement under s. 16(3) is the date of filing of the application, namely February 19, 2007; further, with respect to s. 16(3)(b), the Opponent must demonstrate that its application was pending as of the date of advertisement of the Mark in accordance with s. 16(4) of the Act.

Section 38(2)(b) and s. 12(1)(d)

[13] The Opponent pleaded that the Mark is not registrable pursuant to s. 12(1)(d) of the Act as it is confusing within the meaning of s. 6 with the Opponent's registered trade-marks as listed below:

Trade-mark	Reg'n No./Date	Wares & Services
POWERADE	TMA392,881 / 01-17-92	Wares: sports beverage, namely non-alcoholic, non-carbonated, fruit-flavoured beverage and preparations for making same
POWERADE	TMA459,843 / 06-21-96	Services: Advertising, marketing and promotion of non-alcoholic sports beverages
POWERADE & Design 	TMA459,818 / 06-21-96	Wares: sports beverage, namely non-alcoholic, non-carbonated, fruit-flavoured beverage and preparations for making same
POWERADE & Design 	TMA584,276 / 06-25-03	Wares: non-alcoholic beverages, namely fruit drinks and fruit juices, sports drinks, soft drinks, syrups, concentrates and other preparations for making the same. Services: advertising services, promotional services and marketing services, namely, retail store based advertising programs, retail store and special-event based product sampling programs, product sample distribution programs and coupon programs all related to the distribution and sale of non-alcoholic beverages
POWERADE & Design 	TMA584,214 / 06-23-03	Wares: non-alcoholic beverages, namely fruit drinks and fruit juices, sports drinks, soft drinks, syrups, concentrates and other preparations for making the same. Services: advertising services, promotional services and marketing services, namely, retail store based advertising programs, retail store and special-event based product sampling programs, product sample distribution programs and coupon programs all related to the distribution and sale of non-alcoholic beverages

Section 38(2)(d) and s. 2 Non-distinctiveness

[14] The Opponent pleaded that for the reasons set out in the grounds under s. 38(2)(b) and (c) (above), the Mark is not distinctive of the Applicant within the meaning of s. 2 of the Act.

Opponent's Evidence

[15] The following is a summary of the relevant facts established by the affidavit of Mr. Annosantini, as well as the relevant findings of fact:

- a) The Opponent is the owner of the POWERADE trade-marks as listed above; TMA392,881 for the word mark POWERADE is stated to have been used as early November 1991.
- b) As set out above, the earlier registrations are for “sports beverage, namely non-alcoholic, non-carbonated, fruit flavoured beverage and preparations for making the same”. The more recent descriptions of wares include reference to sports drinks: “non-alcoholic beverages, namely fruit drinks and fruit juices, sports drinks, soft drinks, syrups, concentrates and other preparations for making the same.”
- c) The most comprehensive description of services is in TMA584,214 and TMA584,276: “advertising services, promotional services, and marketing services, namely, retail store based advertising programs, retail store and special-event based product sampling programs, product sample distribution programs and coupon programs all related to the distribution and sale of non-alcoholic beverages”.
- d) In this regard I note that the statement of services for POWERADE OPTION (relied on for s.16 grounds of opposition), corresponds to the comprehensive description referred to above; the statement of wares is slightly different in that includes reference to waters as well as energy drinks, as follows : “beverages, namely, drinking waters, flavoured waters, mineral and aerated waters; and other non-alcoholic beverages, namely: soft drinks, energy drinks, sports drinks, fruit drinks and juices; syrups concentrates and powders for making beverages namely:

flavoured waters, mineral and aerated waters, soft drinks, energy drinks, sports drinks, fruit drinks and juices.”

- e) Sports drinks bearing the Opponent’s trade-marks are produced and/or distributed by authorized Bottlers across Canada under license from the Opponent according to specifications, instructions and quality policies that regulate and define specific levels of performance that must be met by the Bottlers in the manufacture, distribution, and sale of the sports drink beverages. This includes quality auditors who conduct external and internal auditing programs, including random testing of product samples on a monthly basis. As well there are approval processes for all product labeling and point-of-sale materials and programs to ensure compliance with all applicable food laws, and other regulatory requirements. I am satisfied that the use of the Opponent’s trade-marks is under license and subject to the direct or indirect control of the Opponent, such that use by the Bottlers accrues to the Opponent in accordance with s. 50(1) of the Act.
- f) POWERADE brand drinks are distributed to approximately 75,000 retail outlets across Canada. Such retail outlets include grocery stores, stores, fitness stores, convenience stores, club stores, drug stores, mass merchandisers, schools, hospitals, hotels and restaurants, sports and amusement facilities, transportation venues, and vending machines.
- g) POWERADE brand sports drink beverage packages include 355ml, 591ml, 710ml and 946ml bottles as well as 341ml cans. These products all bear the POWERADE trade-marks, prominently on all packaging, label and boxes at the time of sale. Sample labels representative of the way the Opponent’s trade-marks have been used in Canada since its new packaging was introduced in 2002 have been provided (Exhibit B). Copies of various point-of-sale materials are attached bearing the POWERADE trade-marks (Exhibit C). These trade-marks correspond with TMA Nos. 584,276 and 584,214.
- h) Over 200 million liters of ready to drink POWERADE brand beverages have been sold in Canada between 1995 and 2007. The annual average has risen steadily from just over 5 million to over 38 million liters in that time.
- i) The current market share of POWERADE is 25.1%; Mr. Annosantini states that it is one of two favourite brands among Canadian teenagers who drink sports drinks.

- j) The Opponent has always linked POWERADE brand beverages to sports generally, and targets “points of sweat” such as arenas, gyms, soccer fields and rinks, in addition to grocery and convenience stores. Specific marketing efforts are undertaken to link POWERADE to hockey and soccer.
- k) The Opponent provides advertising, marketing and promotions services to the Bottlers and advertises its beverages throughout Canada using various media, such as radio, magazines, television and outdoor media. This includes National Hockey League ice rink boards, bench and net placements. In 1997 and 1998 the Opponent spent approximately \$1,888,303 on media time to advertise its POWERADE brand beverages. From 2002 to 2005, the Opponent’s advertising expenditure to support POWERADE brand beverages was in excess of 5.3 million dollars. The Opponent also creates point-of-sale promotional materials to support the sales of their sports drinks which are sent to grocery channel retailers selling POWERADE brand beverages across Canada.
- l) The Opponent has licensed merchandise manufacturers and distributors throughout Canada to manufacture and distribute merchandise which includes shirts, hats, lapel pins, sports bottles, coolers, towels and cup dispensers, premium items and dealer loaders, in accordance with the specifications and instructions furnished by the Opponent.
- m) In 2008, the Opponent launched a national advertising campaign highlighting the fact that POWERADE is the Official Sports drink of the Olympic Games. Attached as Exhibit D are related point of-sale materials. The Opponent provides that POWERADE is also the Official Sports Drink of FIFA, the world’s governing body for soccer. In 2007, the Opponent launched its FIFA U-20 (under 20) campaign, through field board advertising, in store point-of-sale material and an extensive web presence. Over the course of the FIFA U-20 tournament, the Opponent advertised POWERADE brand sports drink beverages extensively by way of field board advertising in all six major Canadian cities where soccer games were televised. Attached as Exhibit E is a photograph of such a field board and I note that the Opponent’s trade-mark appears as POWERADEtv.com. The Opponent explains that POWERADE Ambassadors filmed content at the events,

which were posted on the POWERADE interactive website for FIFA U-20, for blog and commentary.

- n) The Opponent, working together with the Bottlers, increases the access and visibility of POWERADE by providing incentive programs, consumer programs and/or prizing programs to the sales force of the Bottlers, as well as arena management and staff.
- o) The Opponent has conducted various market surveys with the aid of survey houses. According to a Millward Brown Non-Carbonated Tracker survey for the 24 week period ending August 2, 2008, the total brand awareness of POWERADE brand sport drink beverages expressed as percentages of the Canadian population is as follows: Population 12-24 years of age - 93%; Males 12-24 years of age - 91.5%; Population 12-64 years of age - 86.6% and males 12-64 years of age - 87.4%.
- p) The POWERADE trade-marks have been used extensively in Canada by the Opponent and/or its licenses since November 25, 1991. The POWERADE trade-marks appear prominently on all labels and packaging of the POWERADE brand sports drink beverages and on all promotional and marketing material.

[16] I am satisfied, based on this evidence, that the Opponent has used its POWERADE trade-marks (in particular the word mark for wares and services as listed above as well as the two POWERADE & Design marks TMA584,214 and TMA584,276) extensively in Canada. Further, there has been significant advertising and promotion, including at the FIFA U-20 soccer games televised in Canada, and as the Official Sports Drink of the 2008 Olympic Games. Based on the evidence as a whole, I am of the view that it is reasonable to infer that the Opponent's trade-marks are well known in Canada.

Applicant's Evidence

[17] The following is a summary of the relevant facts established by the Applicant's evidence as well as the relevant findings of fact:

- (a) The affidavit of Solange Doré indicates that she is the Vice-President Research & Development of A. Lassonde Inc, (Lassonde), a wholly owned subsidiary of the

Applicant. Lassonde specializes in the conception, production, distribution and sale of fruit juices and fruit drinks.

(b) Ms. Doré's affidavit suggests that there are two distinct types of drink, sports drinks and energy drinks. The affiant explains that fruit drinks, are essentially sweetened drinks containing fruit juice, generally from 1 to 25%; an energy drink is a fruit drink or fruit juice with vitamins, and other energy ingredients such as caffeine, guarana, ginseng and ginkgo biloba. The affiant states that sports drinks on the other hand, including those sold by the Opponent, are composed of water, sugar, electrolytes such as sodium and potassium as well as flavouring; these products are for maximizing rehydration during or after physical exercise. I accept that there may be a difference between energy drinks and sports drinks; however, I would observe that this affidavit does not address differences in their respective channels of trade and whether or not non-alcoholic drink manufacturers would or would not manufacture both. I would observe, in this regard, that the Opponent's recent registration for POWERADE OPTION includes both sports and energy drinks in its statement of wares.

(c) Mr. Tony Augello is Account Manager at Lassonde. His affidavit is directed towards establishing that a variety of drinks with "power" on the label are found in grocery stores and convenience stores in the Greater Toronto area.

(d) It appears that energy drinks were purchased in 6 different locations. Photographs were taken of the containers, and in total there appear to be 5 different brands of energy drinks displayed in the photographs attached to the Augello affidavit. I am able to discern the word or portion - "power", on many of the containers, (cans or bottles), but not all. This is due in part, I believe, to the size of font and the quality of the images. I note however, the use of "power" in relatively large font on the cans in following cases, POWER QUENCHER, CHEETAH POWER SURGE, JOLT POWER COLA, POWER OF THE MYTH , and also in small font as part of the descriptive material in other cases, such as: "the most powerful antioxidant" and "powered by XYIENCE". I also note that some of the XYIENCE cans also display the information "Official Energy Drink UFC

Ultimate Fighters Championship”. It would appear from this that these energy drinks have been associated with at least one sport.

- (e) Ms. Marie-Christine Levasseur, law student, provided an affidavit related to research on the internet of the phrase “Power Juice Bar”. Ms. Levasseur found two listings, one in Ottawa for “Pure Power Juice Bar”, and two locations of “Pete’s Power Juice Bar” in Nova Scotia. The affiant states that she called the phone numbers listed for these establishments and was informed each time that she had reached either Pure Power Juice Bar, or Pete’s Power Juice Bar (as the case may be). Aside from the printout of the Google page listing these hits from the search of “power juice bar” no information is provided as to the nature of the respective businesses to guide me to a finding of fact as to what a “power juice bar” might be. Accordingly, I find that this evidence is of little relevance.
- (f) The affidavit of Lisa Saltzman provides information as to the state of the register. Ms. Saltzman is a searcher at Marque d’Or, a search house through which one can access the Canadian Trade-marks Database. Ms. Saltzman conducted a search of all active trade-marks with the word POWER as the beginning, middle or end, in association with class 32 [Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages]. She also searched all marks using the work ADE, AID or AIDE as a suffix, in the same class.
- (g) Of the 83 trade-marks found containing “power”, there were 55 registered or allowed trade-marks. From this information, I am able to determine that “power” is adopted by different traders for non-alcoholic beverages, as part of a descriptive slogan, or as part of a unitary phrase such as “HORSE POWER” or “POWERPLAY HOCKEY”, for example. There are also 2 trade-marks of record (other than the Opponent’s trade-marks), with different owners, which contain “power” within a single word trade-mark: POWERGRAPE and POWERPLUS. There are 5 (with different owners) that contain power as an element of a two-word mark: such as POWER RUSH, POWER SURGE, POWER SMOOTHIES, POWER QUENCHER and POWERBLEND. Collectively these trade-marks are

registered in association with sports drinks, energy drinks, protein shakes and fruit juices. In this connection I note that POWER RUSH and POWER SURGE are registered for *both* sports drinks and energy drinks.

(h) With respect to trade-marks containing the element “ade’ or “aid” there are 7 relevant registrations (the others being trade-marks containing MAID, or Lemonade, or “trade”, or being one of multiple registrations for GATORADE). The relevant registrations are CHAMPANADE, GATORADE, LUCOZADE, WELCHADE and KOOL-AID all for non-alcoholic beverages and/or syrups and concentrates, and/or fruit drinks; ACCELERADE for, *inter alia*, sports and energy drinks and SOCCERADE for sports drinks.

[18] I turn now to consideration of the remaining grounds of opposition, which are based on the likelihood of confusion pursuant to s. 6(5) of the Act. As such, a determination on the issue of confusion, will resolve the issues raised with respect to registrability, entitlement and non-distinctiveness.

Section 38(2)(b) and s. 12(1)(d)

[19] The material date for determining the likelihood of confusion under s. 12(1)(d) is the date of this decision [*Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks* (1991), 37 C.P.R. (3d) 413 (F.C.A.)]. I have exercised my discretion and confirmed that the Opponent’s registrations relied on above are extant, and thus sufficient for the Opponent to meet its burden under this ground.

[20] The Applicant must therefore establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between its Mark and any of the trade-marks that are the subject of the Opponent’s trade-mark registrations pleaded in support of the 12(1)(d) ground.

[21] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class. The

purchaser in mind is described as the casual consumer somewhat in a hurry (*Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.) at para. 58). Generally, it is not a proper approach to place the trade-marks side by side to compare their components. They must be considered as a whole. The question is whether this mythical consumer with a vague recollection of the first mark will, on seeing the second comer's mark, infer as a matter of first impression that the wares with which the second mark is used are in some way associated with the wares bearing the first mark [*United States Polo Assn. v. Polo Ralph Lauren Corp.*, (2000) 9 C.P.R. (4th) 51 (F.C.A.) at 58].

[22] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has 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 in appearance or sound or in the ideas suggested by them. These factors need not be attributed equal weight; rather, the weight to be given to each relevant factor may vary, depending on the circumstances [see *Clorox Co. v. Sears Canada Inc.* (1992), 41 C.P.R. (3d) 483 (F.C.T.D.); *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.)]. Furthermore, the list of factors set out is not exhaustive of matters that could be considered [see in general *Mattel supra*; *United Artists Corp. v. Pink Panther Beauty Corp.* (1988), 80 C.P.R. (3d) 247 (F.C.A.) at 263-264; *Veuve Cliquot Ponsardin v. Boutiques Cliquot Ltée.* (2006), 49 C.P.R. (4th) 401 (S.C.C.)].

[23] The analysis will consider the issue of confusion with the word mark POWERADE for “sports beverage, namely non-alcoholic, non-carbonated, fruit flavoured beverage and preparations for making the same”, which is the subject of the Opponent's registration No. TMA392,881, since, clearly, being the word alone, this is the Opponent's strongest case.

[24] I would nevertheless remark here that the design marks do not include elements that are particularly striking or distinctive so as to alter a finding of confusion with respect to the word mark. Neither does the addition of similar wares or related services in subsequent registrations alter the analysis. In other words, if confusion is likely between the Mark and the Opponent's trade-mark in registration No. TMA392,881, then it would also be likely between the Mark and

the other registered marks relied on by the Opponent such that this ground of opposition would be successful in its entirety.

[25] Recently, in *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), 92 C.P.R. (4th) 361 (S.C.C.), the Supreme Court of Canada discussed the importance of s. 6(5)(e) in conducting an analysis of the likelihood of confusion at para. 49:

...the degree of resemblance, although the last factor listed in s. 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis ... if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar... As a result, it has been suggested that a consideration of resemblance is where most confusion analyses should start...

Section 6(5)(e) – Degree of resemblance between the trade-marks in appearance, or sound or in the ideas suggested

[26] It is a generally accepted principle that it is not the proper approach to break the marks into their elements and concentrate upon the elements that are similar, since it is the effect of the marks in their totalities that must be considered [see *Ultravite Laboratories Ltd. v. Whitehall Laboratories Ltd.* (1965), 44 C.P.R. 189 (S.C.C.)]; however, it is still acceptable to "focus on a particular feature of the mark that may have a determinative influence on the public's perception of it" [*United Artists Corp. v. Pink Panther Beauty Corp.* (1998), 80 C.P.R. (3d) 247 (F.C.A.) at 263] and see *Masterpiece supra*. Often it is the first portion of a trade-mark is the most relevant for the purposes of distinction [see *Conde Nast Publications Inc. v. Union des Editions Modernes* (1979), 46 C.P.R. (2d) 183 at 188 (F.C.T.D.)].

[27] In this case, clearly, both trade-marks at issue have the identical first component POWER, which is also the most striking feature of the trade-marks. As I may take judicial notice of dictionary definitions, I have referred to the relevant definition of "juice" in the Merriam-Webster Online Dictionary at www.merriam-webster.com/dictionary and note that in addition to the meaning of "juice" as a "fluid extracted from plants" (i.e. fruit juice), it is also considered synonymous with "strength, vigour and vitality". Similarly, I have referred to the relevant definition of the suffix "ade" which is a "sweet drink" as in "limeade". I also note the self-evident phonetic equivalence of "ade" to "aid" as in - assistance.

[28] In my view through their respective uses of suffix “ade” and the word “juice” as the second syllable, both trade-marks suggest, at first instance, a power fruit drink or a fruit drink that provides power. As well, both trade-marks are susceptible to a clever double meaning that suggests a product that boosts power, as in “power aid” or “power strength”. As a result, I am of the view that not only do the trade-marks have a first component that is identical in appearance and when sounded, but when viewed as a whole, the ideas suggested by the respective trade-marks are virtually identical.

[29] Consequently, this factor favours the Opponent.

Section 6(5)(a) - Inherent distinctiveness of the trade-marks and the extent to which they have become known

[30] When considering the issue of inherent distinctiveness, it is clear that both trade-marks do have some degree of distinctiveness, in that the element POWER has no clear meaning with respect to the wares.

[31] With respect to acquired distinctiveness, I note that no evidence of use of the Mark by the Applicant has been provided. The Opponent, however, as set out above, states that it has used its trade-mark on wares since 1991, and has provided substantial evidence, including sales figures (e.g. from 5 million in 1995 to 38 million liters of beverage sold in 2007) as well as advertising figures (e.g. from 1.8 M in 1997 to 5.3 M in 2005); the advertising and promotion appear broadly based, through a variety of media and point-of-sale materials. Accordingly, I find it reasonable to conclude that the Opponent’s trade-mark has acquired distinctiveness in Canada, and further that it is well known in Canada. Although the use demonstrated by the Opponent since 2003 is with a design element as in TMA584,276 and/or TMA584,214 above, I do not find that the elements are so dominant as to impact the acquired distinctiveness of the word portion POWERADE. In any event, I find that use of the design marks is use of the word mark.

[32] In sum, I find that this factor favours the Opponent.

Section 6(5)(b) - The length of time each has been in use

[33] The Opponent's asserts use in Canada since 1991, and its evidence supports use since at least 1995; the Applicant has not filed any evidence of use, so I can only presume that it has not yet commenced use in Canada. This factor is therefore in the Opponent's favour.

Section 6(5)(c) and (d) - The nature of the wares, services or business; the nature of the trade

[34] The Applicant applied to register its Mark in association with "non-alcoholic energy drinks, non-alcoholic fruit juices and fruit drinks." The Opponent's wares are described in its registrations as set out in the Table above.

[35] The Applicant argued that its wares were energy drinks while the Opponent's drinks were different in nature, being sports drinks. I am not convinced that this difference is sufficient to remove any overlap in the nature of the wares and the channels of trade. I note the state of the register evidence provided by the Applicant includes three registrations for wares that include both energy and sport drinks. Moreover, the Opponent's most recent registration, POWERADE OPTION, includes both sports drinks and energy drinks in its statement of wares.

[36] In a similar vein, the evidence of the Opponent (affidavit of Mr. Augello), relating to purchases of competitors non-alcoholic drinks, demonstrates at least one energy drink that was marketed in connection with a sports event. In general, I find that the nature of the wares is very similar and as such they would be found in close proximity in retail outlets. Further, I find that the acquired distinctiveness of the Opponent's trade-mark in Canada would transcend any boundary that might arguably exist between sports and energy drinks.

[37] Accordingly, this factor favours the Opponent.

Other Surrounding Circumstance

[38] The Opponent filed state of the register evidence, as discussed above. While I agree that 'power' might not be an uncommon *component* of trade-marks for non-alcoholic beverages and the like, I am not persuaded that there is sufficient indication that the use of "power" in one word

trade-marks (as in those at issue) is common in the marketplace. Mr. Augello's affidavit supports this view. In any event, this surrounding circumstance is not sufficient to shift the balance of probabilities in the Applicant's favour when the other circumstances of s. 6(5)(a) to (e) are taken into consideration.

[39] In view of the foregoing, I conclude that on a balance of probabilities, there is a reasonable likelihood of confusion between the trade-marks of the Opponent relied on under this ground and the subject Mark for use in association with the applied for Wares.

[40] Accordingly, this ground of opposition is successful.

Section s. 38(2)(d) and s. 2-Non-distinctiveness

[41] The material date with respect to the issue of non-distinctiveness, is the date of the opposition, namely, January 3, 2008 [*Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.)]. The Opponent needs to have shown that as of the date of filing of the opposition (January 3, 2008), one or more of its trade-marks had become known sufficiently to negate the distinctiveness of the applied-for mark [*Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 at 58 (F.C.T.D.), *Re Andres Wines Ltd. and E. & J. Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.); *Bojangles International, LLC v. Bojangles Café Ltd.* (2006), 48 C.P.R. (4th) 427 (2006)].

[42] The Opponent has met its initial burden in this regard by providing ample evidence of the use of its trade-marks. Further, I am satisfied from the evidence that the Opponent's trade-marks have become well known in Canada and therefore sufficiently known to negate the distinctiveness of the Mark. Assessing the likelihood of confusion at the filing date of the statement of opposition (rather than as of the date of this decision) does not alter the previous analysis, this ground of opposition is successful for reasons expressed in regard to the s. 12(1)(d) ground of opposition.

[43] Having found the Opponent successful under two grounds of opposition, it is unnecessary to consider the remaining grounds set out under s. 38(2)(c).

Disposition

[44] Consequently, pursuant to the authority delegated to me under s. 63(3) of the Act, I refuse the application pursuant to s. 38(8) of the Act.

P. Heidi Sprung
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office