



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

**Citation: 2012 TMOB 170
Date of Decision: 2012-09-19**

**IN THE MATTER OF AN OPPOSITION by
2156775 Ontario Inc. to application
No. 1406932 for the trade-mark LA
CHEETA & CHINESE CHARACTERS
Design in the name of Cheeta (Hong Kong)
Ltd.**

[1] On August 12, 2008, Cheeta (Hong Kong) Ltd. (the Applicant) filed an application for registration of the trade-mark LA CHEETA & CHINESE CHARACTERS Design (shown below) (the Mark) based on proposed use of the Mark in Canada in association with the following wares: “Bakery products namely biscuits, cakes, cookies; nuts namely edible almonds; candy” (the Wares):



LA CHEETA

The Canadian Trade-marks database indicates that:

Colour is claimed as a feature of the trade-mark ... The mark consists of the words LA CHEETA shown beneath a red square within which are shown Chinese characters in white.

As submitted by the [A]pplicant, the transliteration [sic] of the Chinese characters are Shi De Xiang. The translation of the Chinese characters is 'taste great'.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of July 29, 2009.

[3] On September 29, 2009, D'Angelo Brands Ltd. and 2156775 Ontario Inc. requested, as joint opponents, an extension of time for the filing of a statement of opposition against the application, which extension was granted by the Registrar. A statement of opposition was thereafter filed on December 29, 2009 by the sole opponent 2156775 Ontario Inc. carrying on business in Canada as D'Angelo Brands (the Opponent). The grounds of opposition are as follows:

1. the application for the Mark does not comply with the requirements of section 30(i) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) in that “the [A]pplicant could not state [in its application that] it was satisfied it was entitled to use the [Mark] in Canada in association with the [Wares] in view of the prior use of the trade-marks CHEETAH, CHEETAH POWER SURGE, and CHEETAH POWER SURGE – HIGH OCTANE in Canada by the [O]pponent and its predecessor [D'Angelo Brands Ltd.]”;
2. the Mark is not registrable pursuant to section 12(1)(d) of the Act in that it “is confusing within the meaning of section 6 [of the Act] with the registered trade-marks Canadian Trade-Mark Registration No. TMA694,210 for the mark CHEETAH POWER SURGE registered August 16, 2007 and Canadian Trade-Mark Registration No. TMA693,486 for the mark CHEETAH POWER SURGE – HIGH OCTANE registered August 3, 2007 both registered by D'Angelo Brands Ltd. [in association with “*Non-alcoholic beverages, namely fruit drinks, fruit juices, sports drinks, protein based drinks and soft drinks*”] and licensed to the Opponent”;

3. the Applicant is not the person entitled to registration of the Mark pursuant to section 16(3)(a) and (b) of the Act in that at the date of filing of the application, the Mark was confusing with “the trade-marks CHEETAH, CHEETAH POWER SURGE and CHEETAH POWER SURGE – HIGH OCTANE which were previously used and made known in Canada by since [sic] at least 2005 in association with energy drinks by the Opponent and its licensor D’Angelo Brands Ltd.”, and “in respect of which applications for registration had been previously filed in Canada by D’Angelo Brands Ltd.”; and
4. the Mark is not distinctive within the meaning of section 2 of the Act in that the Mark “could not distinguish and is not adapted to distinguish the services [sic] in association with which it is proposed to be used from the wares associated with the trade-marks of the Opponent set out herein. The trade-marks CHEETAH, CHEETAH POWER SURGE and CHEETAH POWER SURGE – HIGH OCTANE have been used extensively for many years in Canada by the Opponent and its licensor D’Angelo Brands Ltd.”

[4] The Applicant filed and served a counter statement in which it denied the Opponent’s allegations. In support of its opposition, the Opponent filed the affidavit of Frank D’Angelo, President and CEO of the Opponent, sworn January 4, 2011. The Applicant elected not to file evidence. Only the Opponent filed a written argument. No oral hearing was requested.

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[5] 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 evidentiary 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 Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); and *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA)].

[6] Applying these principles to the instant case, the section 30 ground of opposition and part of the non-entitlement grounds of opposition can be summarily dismissed as follows:

- The section 30(i) ground of opposition, as pleaded, does not raise a proper ground of opposition. The mere fact that the Applicant may have been aware of the prior use of the trade-marks CHEETAH, CHEETAH POWER SURGE, and CHEETAH POWER SURGE – HIGH OCTANE in Canada by the Opponent and D’Angelo Brands Ltd. does not preclude it from making the statement in its application required by section 30(i) of the Act. Even if the ground had been properly pleaded, where an applicant has provided the statement required by section 30(i), a section 30(i) ground should only succeed in exceptional circumstances such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB)]. There is no such evidence in the instant case.
- The non-entitlement ground of opposition based on section 16(3)(a) of the Act, as pleaded, does not raise a proper ground of opposition. In view of the provisions of section 17(1) of the Act, the Opponent is precluded from relying on any previous use of a confusing trade-mark by an entity other than the Opponent in support of a ground of prior entitlement pursuant to section 16(3)(a) of the Act. The trade-marks CHEETAH, CHEETAH POWER SURGE, and CHEETAH POWER SURGE – HIGH OCTANE are owned by D’Angelo Brands Ltd. As pleaded by the Opponent in its statement of opposition, and as further evidenced by the D’Angelo affidavit discussed below, use of the said marks by the Opponent is made under licence and accrues to the benefit of D’Angelo Brands Ltd. pursuant to the provisions of section 50 of the Act. While D’Angelo Brands Ltd. initially requested an extension of time to oppose the instant application, it has not formally opposed same. D’Angelo Brands Ltd. is a third party to the instant proceeding. Therefore, use of the trade-marks CHEETAH, CHEETAH POWER SURGE, and CHEETAH POWER SURGE – HIGH OCTANE by the Opponent as licensee of the marks is not relevant for the purpose of this ground of opposition.
- The non-entitlement ground of opposition based on section 16(3)(b) of the Act, as pleaded, does not raise a proper ground of opposition as far as it relies on D’Angelo Brands Ltd.’s previous applications for the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE. Indeed, neither of these applications were pending as of the date of advertisement of the Applicant’s application contrary to

section 16(4) of the Act. Application Nos. 1,284,153 for the trade-mark CHEETAH POWER SURGE and 1,312,625 for the trade-mark CHEETAH POWER SURGE HIGH OCTANE matured to registration on August 16 and 3, 2007 respectively, which dates are well before the date of advertisement of the instant application on July 29, 2009. As a result, they cannot form the basis of a section 16(3)(b) ground of opposition. One application remains, however, namely application No. 1,330,096 for the trade-mark CHEETA, which was filed prior to the Applicant's application and only matured to registration on December 7, 2009, that is after the date of advertisement of the Applicant's application. The remaining ground of opposition based on section 16(3)(b) of the Act will be discussed further below.

[7] I shall now turn to the remaining grounds of opposition.

Section 12(1)(d) ground of opposition

[8] In its written argument, the Opponent indicates that it has pleaded that the Mark is not registrable having regard to the provisions of section 12(1)(d) of the Act in that it is confusing with the trade-marks CHEETAH, CHEETAH POWER SURGE and CHEETAH POWER SURGE - HIGH OCTANE registered under Nos. TMA754,668, TMA694,210 and TMA693,486 respectively, which is incorrect. As per my reproduction of the section 12(1)(d) ground of opposition above, the Opponent has restricted the said ground to the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE - HIGH OCTANE only. Accordingly, I shall restrict my analysis of the section 12(1)(d) ground of opposition to these two marks.

[9] I shall mention at this point of my analysis that contrary to the situation prevailing under the section 16(3)(a) ground of opposition discussed above, the Opponent is not precluded from relying on D'Angelo Brands Ltd.'s registration Nos. TMA694,210 and TMA693,486 in support of its section 12(1)(d) ground of opposition provided such registrations are extant as of today's date, which date is the material date to assess a section 12(1)(d) ground of opposition [see *Park Avenue Furniture Corp v Wickers/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)]. I have exercised the Registrar's discretion to confirm that these two registrations are in good standing as of today's date. I note that Registration No. TMA693,486 for the trade-mark CHEETAH POWER SURGE HIGH OCTANE does not include an hyphen between the words "SURGE"

and “HIGH”. Neither do the specimens of use attached to the D’Angelo affidavit discussed below. Accordingly, I will refer to this mark as it is spelled in the registration rather than as it is spelled in the statement of opposition.

[10] As the Opponent’s evidentiary burden has been satisfied, the Applicant must therefore establish, on a balance of probabilities, that there is not a reasonable likelihood of confusion between the Mark and D’Angelo Brands Ltd.’s registered trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE.

[11] 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.

[12] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those listed at section 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 the trade-marks 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 in appearance or sound or in the ideas suggested by them. This list is not exhaustive; all relevant factors are to be considered, and are not necessarily attributed equal weight [see *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée* (2006), 49 CPR (4th) 401 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC) for a thorough discussion of the general principles that govern the test for confusion].

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

[13] The Applicant’s Mark and D’Angelo Brands Ltd.’s trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE are both inherently distinctive, although arguably less so in the case of D’Angelo Brands Ltd.’s marks given the suggestive

connotation of the words “POWER SURGE” / “POWER SURGE HIGH OCTANE” in the context of their associated wares, especially the ones described as “sport drinks”.

[14] The strength of a trade-mark may be increased by means of it becoming known through promotion or use. However, there is no evidence that the Applicant’s Mark has been used in Canada pursuant to section 4 of the Act or that it has become known to any extent whatsoever in Canada. Turning to D’Angelo Brands Ltd.’s trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE, the D’Angelo affidavit establishes the following.

[15] Mr. D’Angelo states that prior to the formation of the Opponent in December 2007, he had been the founder and chief operating officer of D’Angelo Brands Ltd. and has knowledge of the facts deposed in his affidavit [paragraph 1 of his affidavit]. He then briefly goes over the relationship existing between the Opponent and D’Angelo Brands Ltd.

[16] More particularly, Mr. D’Angelo explains that in early 2008, the Opponent acquired the business and assets of D’Angelo Brands Ltd. relating to the sale and distribution of a wide variety of high quality foods and beverages. As part of the acquisition of D’Angelo Brands Ltd. certain trade-marks of D’Angelo Brands Ltd. are to be transferred to the Opponent upon completion of the payment of the purchase price. In the meantime, the Opponent (since February 1, 2008) is the exclusive licensee in Canada of the trade-marks being transferred including registration Nos. TMA694,210 and TMA693,486 for the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE respectively [paragraph 2 of his affidavit; and Exhibit 1 that consists of a copy of the trade-mark license agreement between D’Angelo Brands Ltd. and the Opponent, which provides, among others, for control over the character and quality of the wares by D’Angelo Brands Ltd. in accordance with section 50 of the Act].

[17] Mr. D’Angelo states that D’Angelo Brands Ltd. commenced the sale of non-alcoholic energy drinks associated with the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE (the CHEETAH Drinks) in about 2005. He explains that the CHEETAH POWER SURGE drink is made with a unique blend of ginseng and royal jelly to give the consumers an all-natural burst of energy without unwanted caffeine side effects. The

CHEETAH POWER SURGE HIGH OCTANE drink is made with Ginkgo Biloba to give an all-natural burst of energy, plus it improves memory and circulation and reduces mental fatigue [paragraph 3 of his affidavit; and Exhibits 2 to 4 that consist of photos of the CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE products].

[18] Mr. D'Angelo states that since acquiring the business and assets of D'Angelo Brands Ltd. in February/March 2008, the Opponent has manufactured and distributed the CHEETAH Drinks in association with the registered trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE. Mr. D'Angelo adds that in the Opponent's advertising, the CHEETAH Drinks are colloquially referred to simply as "CHEETAH" (pronounced CHEE – TA). I will revert to the Opponent's advertising below [paragraphs 4 and 6 to 7 of his affidavit; and Exhibit 5].

[19] Turning to the sales of the CHEETAH Drinks, Mr. D'Angelo states that the Opponent has sold these in 710 ml cans to numerous retailers in Canada, including: Bloor Gift, Buck or Two, Canadian Tire, Country Grocery, Hasty Market, Rexall, Metro, Price Chopper, ValueMart Supermarket and Walmart. In addition to retail sales, the Opponent has also sold the CHEETAH Drinks to restaurants, such as Kettelmans Bagel and Pizza Nova restaurants in Ontario [paragraph 8 of his affidavit; and Exhibits 6 and 7 that consist of sample invoices prior to August 12, 2008, and between August 12, 2008 and September 29, 2009, respectively].

[20] Mr. D'Angelo states that the sale of the CHEETAH Drinks has been in the order of three million dollars per year and in 2010 the sale of CHEETAH Drinks was about five million dollars [paragraph 9 of his affidavit]. However, no breakdown of annual sales for each of the Opponent's CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE product is provided.

[21] Reverting to the advertising and promotion of the CHEETAH Drinks, Mr. D'Angelo explains that the Opponent promotes such products extensively in print, radio and television. He states that in each of the years 2008 to 2010, the Opponent has spent in the order of one million dollars per year in the promotion of the CHEETAH Drinks. Such promotion includes TV commercials aired on CNN featuring former Olympic champion sprinter Ben Johnson, billboards around the greater Toronto area featuring the CHEETAH POWER SURGE and CHEETAH

POWER SURGE HIGH OCTANE marks, promotional contests in connection with the CHEETAH Drinks, the attending or hosting of various events promoting the CHEETAH Drinks including the 2009 Montréal Pride parade and the 2009 Toronto Pride parade, etc. [paragraphs 10 to 12 of his affidavit; Exhibits 9 and 10 that consist of a copy of two commercials featuring Ben Johnson that aired between September 2006 and September 2007; Exhibit 11 that consists of samples of the media response the ads generated; Exhibits 12-1, 12-2 and 12-3 and Exhibits 13-1, 13-2 and 13-3 that consist of further TV commercials that have aired between the years 2006 to 2010; Exhibit 14 that consists of copy of the artwork displayed on the billboards; Exhibit 15 that consists of a photo of one of the promotional vehicles marked with the Opponent's marks; Exhibits 16 to 18 that consist of advertising promoting the Opponent's contests and featuring the Opponent's marks for use by retailers; etc.].

[22] While a significant part of the Opponent's advertising and promotion apparently consists of TV commercials, no information as to the frequency and audience for each ad is provided. No information or specimen corroborate the Opponent's radio advertising. No specimen corroborates the Opponent's attendance or hosting of the various events enumerated by Mr. D'Angelo. As a result, I am reluctant to accord significant weight to Mr. D'Angelo's statements as to the "extensive" advertising and promotion of the CHEETAH Drinks, especially for the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE *per se*. Nevertheless, I am satisfied from my review of the D'Angelo affidavit as a whole that the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE have become known in Canada to some extent. While the evidence of use of the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE provided by the Opponent does not establish continuous use of the marks in Canada in association with each and every one of the registered wares listed in D'Angelo Brands Ltd.'s registrations since the year 2005 as claimed by Mr. D'Angelo in his affidavit, the sales figures provided for the years 2008-2010 together with the statements of facts and exhibits discussed above, support the Opponent's contention that the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE have been used in Canada since at least as early as 2006 and become known to some extent in Canada in association with energy drinks.

[23] In view of the foregoing, the overall consideration of the inherent distinctiveness of the marks at issue and the extent to which they have become known favours the Opponent.

6(5)(b) – the length of time the trade-marks have been in use

[24] In view of my comments above, this factor also favours the Opponent.

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

[25] Turning to the nature of the wares and the nature of the trade, I must compare the Applicant's statement of wares with the statement of wares in the cited registrations [see *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); and *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[26] There is little similarity in the exact nature of the wares at issue. Indeed, the Applicant's Wares consist of bakery products, edible almonds, and candy, whereas D'Angelo Brand Ltd.'s wares consist of non-alcoholic beverages. While I acknowledge that the Applicant's Wares and D'Angelo Brands Ltd.'s non-alcoholic beverages could be sold through the same types of outlets, this is not sufficient to lead to a finding that the wares are similar [see *Clorox Co v Sears Canada Inc* (1992), 41 CPR (3d) 483 (FCTD) and *Tradition Fine Foods Ltd v Groupe Tradition'l Inc* (2006), 51 CPR (4th) 342 (FC)]. As stated by the Federal Court in *Clorox*, at page 490:

One only needs to look at the thousands of different foods, meats, condiments, confectioneries, cereals and what-not, found in some supermarkets to be wary of giving too much weight in some circumstances to the "same general class" test.

[27] Thus, while there is a potential overlap in the nature of the trade of the Applicant's Wares and D'Angelo Brands Ltd.'s wares, the differences existing between the latter's wares and the Wares favour the Applicant.

6(5)(e) – the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[28] The Opponent contends that both D’Angelo Brands Ltd.’s marks and the Mark have the letters “CHEETA” at the beginning of the trade-mark and that the Mark is identical to D’Angelo Brands Ltd.’s marks. I disagree with the Opponent’s approach.

[29] While it is true that the Mark and the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE both share the letters “CHEETA”, the marks must be assessed in their entirety (and not dissected for minute examination). D’Angelo Brands Ltd.’s trade-marks include the word “CHEETAH”, which is defined in the second edition of the Oxford Canadian Dictionary, as “a spotted feline native to the plains of Africa and SW Asia, the world’s fastest-running land animal”, combined with the words “POWER SURGE” / “POWER SURGE HIGH OCTANE”. The idea suggested by each of the marks in the context of energy drinks is that of a drink that will give the consumer a burst of energy. I note that according to some of the marketing and promotional material mentioned above, the Opponent apparently plays with the double entendre between the fastest land animal and one who does not play by the rules [see Exhibits 9 to 11 mentioned above – “Once a cheater, always a Cheetah” TV commercial featuring Ben Johnson].

[30] By comparison, the Mark is made up of the words “LA CHEETA”, combined with the design of a red square within which are shown Chinese characters in white. While the word “LA” corresponds to the French feminine article or pronoun “LA”, the word “CHEETA” has no dictionary meaning. As indicated above, the translation of the Chinese characters is “taste great” and the transliteration of these characters is “Shi De Xiang”. However, there is no evidence that the Canadian average consumer of the Applicant’s Wares is or will be one who can read and understand Chinese characters. Thus, the importance of the Chinese characters is attenuated given their absence of meaning for English and/or French-speaking consumers. Still, the combination of the design element with the Latin characters “LA CHEETA” does not evoke any particular meaning for English and/or French-speaking consumers.

[31] I acknowledge that the word “CHEETAH” in the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE and the word “CHEETA” in the Mark sound the same and that they may each be considered as the dominant element of the marks. However, as per my comments above, the Mark and each of D’Angelo Brands Ltd.’s trade-marks when considered in their totality, differ in appearance and sound, and most importantly, in the ideas suggested by each of them. As such, I find that they can be readily distinguished from one another.

Conclusion re likelihood of confusion

[32] As indicated above, the issue is whether a consumer, who has a general and not precise recollection of D’Angelo Brands Ltd.’s trade-marks, will, upon seeing the Mark be likely to believe that their associated wares share a common source.

[33] While the wares at issue both belong to the general category of food products and are likely to travel through the same type of retail stores, I find that there is little similarity in their exact nature. The differences existing between the wares at issue combined with the ones existing between each of the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE and the Mark shift the balance of probabilities in favour of the Applicant.

[34] Accordingly, the section 12(1)(d) ground of opposition is dismissed.

Non-entitlement ground of opposition

[35] As indicated above, the Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark having regard to the provisions of section 16(3)(b) of the Act in that at the date of filing of the Applicant’s application, the Mark was confusing with the trade-mark CHEETAH in respect of which an application for registration in association with a wide variety of ancillary merchandise (including, among others, items of clothing and clothing accessories, tableware, toys and novelty items, hair accessories, cosmetics, automotive accessories, etc.) had been previously filed by D’Angelo Brands Ltd.

[36] The validity of a ground of opposition based upon a trade-mark application filed by a third party has apparently not yet been decided by a Court. That said, given my ultimate finding below, I do not need to determine if the section 16(3)(b) ground of opposition, as pleaded by the Opponent, raises a valid ground of opposition.

[37] Indeed, the differences existing between the Wares and the wares covered by application No. 1,330,096 (that matured to registration No. TMA754,668 as per copy of the particulars thereof attached to the D'Angelo affidavit as Exhibit 5), combined with the differences existing between the marks in appearance and in the ideas suggested by them, outweigh any similarity existing in sound between the Mark and the trade-mark CHEETAH and shift the balance of probabilities in favour of the Applicant. Thus, assuming that the section 16(3)(b) ground of opposition, as pleaded, raises a valid ground of opposition, it would ultimately fail.

[38] Accordingly, the section 16(3)(b) ground of opposition based on D'Angelo Brands Ltd.'s application for the trade-mark CHEETAH is dismissed.

Non-distinctiveness ground of opposition

[39] The Opponent has pleaded that the Mark is not distinctive within the meaning of section 2 of the Act in that the Mark could not distinguish and is not adapted to distinguish the Applicant's Wares from the wares associated with the trade-marks CHEETAH, CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE.

[40] An opponent meets its evidentiary burden with respect to a distinctiveness ground if it shows that as of the filing date of the opposition, in this case December 29, 2009, its trade-mark had become known to some extent at least to negate the distinctiveness of the applied-for mark [see *Motel 6, Inc v No. 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD)]. The Opponent has met its evidentiary burden with respect to the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE. It has not with respect to the trade-mark CHEETAH.

[41] The D'Angelo affidavit does not evidence use of the trade-mark CHEETAH in association with any of the ancillary merchandise covered by registration No. TMA754,668 pursuant to section 4 of the Act. While the advertising and promotional materials discussed above include various promotional contests in connection with the CHEETAH Drinks, which

include prizes such as custom limited editions of CHEETAH leather motorcycle riding suit and motorcycle helmet, or CHEETAH POWER SURGE jackets, they do not show how the trade-mark CHEETAH, at the time of the transfer of the property in or possession of such ancillary wares, in the normal course of trade, is marked on the wares themselves or on the packages in which they are distributed or is in any other manner so associated with the wares. Furthermore, even if I were to consider that use of the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE as shown on the photos of cans of energy drink attached as Exhibit 4 to the D'Angelo affidavit could be considered to evidence use of the trade-mark CHEETAH *per se*, this would not ultimately change the outcome of the non-distinctiveness ground of opposition as explained below.

[42] The difference in relevant dates does not substantially affect my analysis above under the section 12(1)(d) ground of opposition. As a result, my finding made above concerning the likelihood of confusion between the Mark and each of the trade-marks CHEETAH POWER SURGE and CHEETAH POWER SURGE HIGH OCTANE remains applicable. If I were to consider also the trade-mark CHEETAH as applied to D'Angelo Brands Ltd.'s energy drinks, I would still find that the differences existing in the exact nature of the wares at issue combined with the differences existing between the Mark and the trade-mark CHEETAH in appearance and in the ideas suggested by them, outweigh any similarity existing in sound between the Mark and the trade-mark CHEETAH and shift the balance of probabilities in favour of the Applicant.

[43] Accordingly, the non-distinctiveness ground of opposition is dismissed.

Disposition

[44] In view of the foregoing and pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(8) of the Act.

Annie Robitaille
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office