

Court File No. A-119-23

FEDERAL COURT OF APPEAL

BETWEEN:

TWEAK-D INC.

<b>FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE</b>	
FILED	27-APR-2023
D Manshu Li	
<b>TORONTO, ON</b>	<b>1</b>

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

**NOTICE OF APPEAL**

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at (*place where Federal Court of Appeal (or Federal Court) ordinarily sits*).

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date)

Issued by: (Registry Officer)

Address of local office:

April 27, 2023

Issued By: "Todd Desanti" \_\_\_\_\_

(Registry Officer)

Address of local office: Federal Court of Appeal  
Toronto Local Office  
180 Queen Street West  
Toronto, Ontario  
M5V 3L6

TO: **Canadian Intellectual Property Office**  
**Attn: Registrar of Trademarks, Policy and Legislation Division**  
Place du Portage I  
50 Victoria Street  
Gatineau, QC  
K1A 0C9

AND TO: **Attorney General of Canada**  
Department of Justice  
Ontario regional Office  
120 Adelaide Street West, Suite 400  
Toronto, ON  
M5H 1T1

Per: **Adrian Zita-Bennett**  
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Respondent

## APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of The Honourable Mr. Justice Manson dated March 28, 2023 by which an application to appeal per section 56 of the *Trademarks Act* was dismissed respecting a decision of the Registrar of Trademarks dated July 13, 2022 refusing trademark application no. 1,817,001 to register TRIBAL CHOCOLATE as a trademark on the grounds that the trademark is confusing with a prior registered trademark, namely trademark registration no. TMA826,279 for the word TRIBAL (the “Cited Registration”).

THE APPELLANT ASKS that:

1. an Order setting aside the decision of the Registrar of Trademarks dated July 13, 2022 and the decision of the Federal Court dated March 28, 2023;
2. an Order approving registration of the trademark TRIBAL CHOCOLATE with respect to the following goods:

Class 3: hair care preparations, namely shampoo, hair conditioner, hair gel, hair dyes, hair mousse, hair pomade, hair rinses, hair spray, leave-in hair treatments, namely, leave-in hair conditioners and leave-in hair emollients, all intended for distribution to mass market retailers, drugstores, home shopping channels or internet retailers, but specifically excluding beauty salons and spas;

and

3. the costs of these proceedings.

**THE GROUNDS OF APPEAL are as follows:**

1. The Registrar of Trademarks erred by interpreting the scope of the Cited Registration to be so broad that it would effectively infringe on prior registrations and failing to reconcile inconsistencies on the register in its decision.
2. The Registrar of Trademarks erred by wholly discounting the relevance of the co-existence agreement executed by the applicant and the owner of the Cited Registration and in failing or refusing to acknowledge that said agreement mitigates against any risk that the registration of the trademark TRIBAL CHOCOLATE would be likely deceive the public.
3. The Registrar of Trademarks erred by finding a likelihood of confusion where, in all circumstances, there is at its highest only the possibility of confusion.
4. The Registrar of Trademarks erred by failing or refusing to apply the correct burden of proof at the examination stage by failing to provide the applicant with the benefit of any doubt respecting registrability and confusion with the Cited Registration as required per section 37 of the *Trademarks Act*.
5. The Court erred by failing or refusing to apply the correct standard of review with respect to the Registrar's interpretation of section 6(5) of the *Trademarks Act* and the stipulated circumstances and factors to consider when determining whether trademarks are confusing.

6. The Court erred by failing or refusing to recognize that in finding the trademark TRIBAL CHOCOLATE is confusing with the Cited Registration, the decision of the Registrar would perpetuate or compound past errors rather than avoiding their repetition.
  
7. The Court erred by faulting the appellant for failing to file evidence that prior registrations were being actively used to support its argument that TRIBAL CHOCOLATE is not confusing with such marks when the Registrar has no authority to require such evidence to determine questions of confusion.
  
8. The Court erred by failing or refusing to consider the questions of whether the Registrar applied the correct test for confusion or the correct burden of proof which had been identified as grounds of appeal.

Date: April 27, 2023



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