



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2020 TMOB 107**  
**Date of Decision: 2020-09-30**

**IN THE MATTER OF AN OPPOSITION**

**ABT, Inc.**

**Opponent**

**and**

**MULTY HOME LP**

**Applicant**

**1,746,872 for FLEXI CURVE**

**Application**

[1] ABT, Inc. (the Opponent) opposes registration of the trademark FLEXI CURVE (the Mark) filed by MULTY HOME LP (the Applicant). Filed on September 21, 2015, the application is based on use of the Mark in Canada since January 2014 in association with flexible rubber-based edging blocks for retaining earth; lawn and garden edging; lawn edging blocks; gardening edging blocks; rubber based patio pavers (the Goods).

[2] The Opponent alleges in its statement of opposition that: (i) the application does not conform to the requirements of sections 30(b) and 30(i) of the *Trademarks Act*, RSC 1985, c T-13 (the Act); (ii) the Mark is not registrable pursuant to section 12(1)(b) of the Act; (iii) the Mark is not registrable pursuant to section 12(1)(d) of the Act; (iv) the Applicant is not the person entitled to registration of the Mark; and (v) the Mark is not distinctive under section 2 of the Act. The Opponent's allegations with respect to sections 30(i), 12(1)(d), 16(1) and 2 of the Act are based on confusion with the Opponent's trademark FLEXEDGE used and registered in

association with non-metallic polymeric landscape borders, namely, plastic landscape edging for sports fields, playgrounds, parks and recreational areas.

[3] For the reasons that follow, I refuse the application on the basis that the Mark is not registrable pursuant to section 12(1)(b) of the Act as I am not satisfied that the Applicant has satisfied its legal onus to prove on a balance of probabilities that the Mark is registrable pursuant to section 12(1)(b) of the Act.

#### The Record

[4] The Opponent filed a statement of opposition on June 30, 2016. The Act was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition which refer to the Act before it was amended (see section 70 of the Act). The Applicant filed and served a counter statement. The Opponent filed the affidavit of Ralph E. Brafford, Jr., the President of the Opponent. Mr. Brafford was cross-examined. Neither party submitted written representations, and only the Opponent attended a hearing.

#### Evidential Burden and Legal Onus

[5] The Applicant bears the legal onus of establishing that, on a balance of probabilities, its application complies with the requirements of the Act. There is, however, 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 [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

#### Grounds of Opposition

##### *Section 12(1)(b) Ground of Opposition*

[6] I will first consider the ground of opposition based on section 12(1)(b) of the Act. The material date for this ground of opposition is the date of filing the application [*Fiesta Barbeques Ltd v General Housewares Corp*, 2003 FC 1021, 28 CPR (4th) 60].

[7] The Opponent pleads that the Mark is not registrable under section 12(1)(b) of the Act in that it is clearly descriptive or deceptively misdescriptive of the character or quality of the Goods.

[8] In deciding the issue as to whether the Mark is clearly descriptive, the Mark must be considered as a matter of first impression within the context of the Goods [*John Labatt Ltd v Carling Breweries Ltd* (1974), 18 CPR (2d) 15 at 19 (FCTD); *Ontario Teachers' Pension Plan Board v. Canada (Attorney General)*, 2012 FCA 60]. “Character” means a feature, trait or characteristic of the goods and “clearly” means “easy to understand, self-evident or plain” [*Drackett Co of Canada Ltd v American Home Products Corp* (1968), 55 CPR 29 (Ex Ct) at 34]. Further, the character or quality of a good includes its effect or function [*Sharp Kabushiki v Dahlberg Electronics, Inc* (1983) 80 CPR (2d) 47 (TMOB) at 55].

[9] Finally, in determining whether a trademark is registrable under section 12(1)(b) of the Act, the Registrar must not only consider the evidence but also apply common sense [*Neptune SA v Attorney General of Canada* (2003) 29 CPR (4th) 497 (FCTD)]. One of the most important purposes of section 12(1)(b) is to protect the right of all traders to use apt descriptive language. The courts have recognized that descriptive words are the property of all and cannot be appropriated by one person for their exclusive use [*General Motors Corp v Bellows* (1949), 10 CPR 101 (SCC) at 112-113].

#### The Opponent Meets Its Evidential Burden

[10] An opponent’s initial burden with respect to a section 12(1)(b) ground of opposition may be met simply by reference to the ordinary meaning of words in an applicant’s mark [*Flowers Canada/Fleurs Canada Inc v Maple Ridge Florist Ltd* (1998), 86 CPR (3d) 110 (TMOB); *McIntosh v La-Co Industries Inc*, 1998 CanLII 18596 (TMOB)].

[11] In considering whether the Opponent has met its initial evidential burden, I have taken judicial notice of the definitions for FLEXIBLE and CURVE in the online dictionary *dictionary.com* including those definitions set out below [*Molson Breweries, A Partnership v Saigon International Enterprise Inc*, 2002 CanLII 61422 (TMOB)]. Furthermore, I have also noted that the definition for FLEX on *dictionary.com* includes the following “a combining form

representing flexible in compound words: flexitime” and notes “also flexi-”. I have considered these dictionary definitions even though they post date the material date for this ground of opposition since the Registrar may take into account such evidence insofar as it may indicate a situation existing at the material date [see, for example, *George Weston Ltd v Corporate Foods Ltd* (1988), 19 CPR (3d) 566 (TMOB)].

## **Flexible**

### **adjective**

capable of being bent, usually without breaking; easily bent: a flexible ruler.  
susceptible of modification or adaptation; adaptable: a flexible schedule.  
willing or disposed to yield; pliable: a flexible personality.

### **noun**

a flexible substance or material, as rubber or leather.

## **Curve**

### **noun**

a continuously bending line, without angles.  
the act or extent of curving.  
any curved outline, form, thing, or part.  
a curved section of a road, path, hallway, etc.

### **verb (used with object), curved, curv·ing.**

to bend in a curve; cause to take the course of a curve.  
to grade on a curve.

### **verb (used without object), curved, curv·ing.**

to bend in a curve; take the course of a curve.

[12] Considering the Mark within the context of the Goods, I find that the first impression created by FLEXI CURVE is that it describes a characteristic of the Goods, namely, that they are flexible and curved or can be used to form curves. The mere fact that the Mark has more than one meaning does not prevent a section 12(1)(b) ground of opposition from succeeding, so long as both meanings are clearly descriptive, as is the case here [*Canadian Tire Corp v Hunter Douglas Inc* (2010), 81 CPR (4th) 304 (TMOB)]. As such, I find that the Opponent has met its initial evidential burden.

## The Applicant Fails to Meet Its Legal Onus

[13] In the absence of submissions or evidence and in view of my findings on the Opponent's evidential burden, I find that the Applicant has failed to meet its legal onus. The Mark, as an first impression, clearly describes the Goods as being flexible and curved or able to form a curve. The use of the abbreviation FLEXI in the trademark is not sufficient to render the Mark suggestive. Rather, in the context of the goods it clearly denotes flexible as a matter of first impression. Accordingly, this ground of opposition succeeds.

[14] With respect to the possible inconsistency of finding the Mark not registrable while the Opponent owns a registration for FLEXEDGE, this Board has held that it is not in a position to explain why particular trademarks were permitted to proceed to registration by the examination section of the Trademarks Office. Such a decision may have resulted because the examiner did not have the benefit of the type of evidence filed in an opposition proceeding or because the onus or legal burden is different at the examination stage [*Thomas J Lipton Inc v Boyd Coffee Co* (1991), 40 CPR (3d) 272 (TMOB) at 277].

### *Section 12(1)(d) Ground of Opposition*

[15] The Opponent has pleaded that the Mark is not registrable because it is confusing with registration No. TMA936,997 for the trademark FLEXEDGE. I have exercised my discretion and have checked the Register to confirm that this registration is extant [*Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. I now have to determine, on a balance of probabilities, if the Mark is likely to cause confusion with this registration.

### When are trademarks confusing?

[16] Trademarks are confusing when there is a reasonable likelihood of confusion within the meaning of section 6(2) of the Act:

The use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured . . . or performed by the same person, . . .

[17] Thus, the issue is not confusion between the trademarks themselves, but confusion of goods and services from one source as being from another source. In the instant case, the question posed by section 6(2) is whether purchasers of the Goods, advertised or sold in association with the Mark would believe that those Goods were offered, authorized or licensed by the Opponent.

### Test to Determine Confusion

[18] In assessing confusion, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5): the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them. The criteria in section 6(5) are not exhaustive and different weight will be given to each one in a context-specific assessment [*Mattel, Inc v 3894207 Canada Inc* [2006], 1 SCR 772 at para 54.] I also refer to *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC) at para 49 where the Supreme Court of Canada states that section 6(5)(e) the resemblance between the marks, will often have the greatest effect on the confusion analysis. Rothstein J. in *Masterpiece Inc, supra 27* at paragraph 40 explains how the test is to be applied:

The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the [mark], at a time when he or she has no more than an imperfect recollection of the [prior] trademarks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

### Analysis of the Section 6(5) Factors

#### *Nature of the Goods and Trade*

[19] I consider it appropriate to begin with a consideration of the nature of the goods and trade of each party. For ease of reference, the Goods and the Opponent's registered goods are set out below.

| Goods                                                                                                                                                   | Opponent's registered goods                                                                                                              |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| Flexible rubber-based edging blocks for retaining earth; lawn and garden edging; lawn edging blocks; gardening edging blocks; rubber based patio pavers | Non-metallic polymeric landscape borders, namely, plastic landscape edging for sports fields, playgrounds, parks and recreational areas. |

[20] I find that the goods of each party to be highly similar, if not identical, and used for similar purposes, namely, for separating different landscape surfaces.

*Inherent Distinctiveness*

[21] The inherent distinctiveness of the trademarks does not favour either party. I have already declared the Applicant's trademark to be clearly descriptive and, as such, lacking inherent distinctiveness. Similarly, I find that the Opponent's trademark is descriptive or at least highly suggestive of the Opponent's goods. Specifically, Mr. Brafford's evidence shows that the Opponent describes its products as flexible edging and as being edging which is flexible enough for use in a variety of applications. The relevant evidence of Mr. Brafford excerpted from the Opponent's promotional materials is set out below. As Exhibits B and E contain multiple pages, I have provided the title of each of the promotional materials above each excerpt.

(a) FLEXEDGE Baseball (Exhibit E)

FlexEdge Rubber Baseball Divider Edge Solves These Issues for synthetic Turf baseball field applications. After installation of the rubber base, the flexible nylon reinforced rubber edge helps to separate the rubber infill material from the clay ... This edging is soft and flexible enough to be safe for athletes, yet rigid and durable enough to separate the various materials.

(b) FLEXEDGE Landscape Applications (Exhibit E)

FlexEdge Rubber Landscape Edging is flexible and easy to install. ...

(c) SPORTS EDGE (Exhibit B)

Rubber Baseball Divider Edge ...

The best way to address the interface of dissimilar surfaces.

- Soft Flexible Edging.
- Synthetic Turf to Mound Clay
- Synthetic Turf to Natural Turf
- Synthetic Turf to Infield Mix

(d) Rubber Ramps (Exhibit B)

Various tapered rubber ramps and transition pieces.

- Easy Install for Straight or Curved Lines
- Custom Sizes and Shapes Available
- Available in 48” Lengths
- Versatile, Flexible Transition Edging

(e) Rubber Landscape Edging (Exhibit B)

FlexEdge™ Rubber Landscape Edging is flexible- and easy to install...

Product Features

- Easy to install in curved or straight lines.
- Flexible for edging around many different types of landscaping.

(f) Rubber Ramps (Exhibit B)

FlexEdge™ Rubber Ramps are easy to install for straight or curved lines and are available in custom shapes and sizes, making them ideal to suit any need for versatile, flexible transition edging.

[22] During the cross-examination, Mr. Brafford also provides the following evidence:

|     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|-----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Q43 | What does it mean for the context of your trademark? What does the “flex” mean here?                                                                                                                                                                                                                                                                                                                                                                                   |
| A   | That it can handle a bunch of various applications. I mean, the product is – we can colour it. You know, it can be used, you know, as a rigid curb you know. And so it’s inflexible, because it weighs several hundred pounds. But at the same time, you know, if you need to go around a tree or you’ve got a straightway and a turn ... So it has a lot of variable applications that you can use it for depending on what the architect or engineer is looking for. |



|     |                                                                                                                                                                           |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Q44 | So would you agree that it has flexible applications? Is that where the “flex” came from?                                                                                 |
| A   | The “flex” came from that – but, you know, it’s – “vary edge” or something like that wouldn’t be a very good name for it, but it just has a lot of variable applications. |
| Q51 | ... Do you sell FlexEdge products for plastic landscape edging for sports fields?                                                                                         |
| A   | Yes.                                                                                                                                                                      |

I do not find Mr. Brafford’s assertions that EDGE in the Opponent’s FLEXEDGE trademark at Qs 45-46 means something other than landscape edging to be credible as this is inconsistent with the Opponent’s promotional materials in which the trademarks FLEXEDGE and SPORTSEGE all appear in conjunction with the word “edging”.

*Extent Known and Length of Time in Use*

[23] The extent known and length of time favours the Opponent to a small extent. There is no evidence that the Applicant has commenced use of the Mark. Mr. Brafford’s evidence is that the Opponent first sold FLEXEDGE branded goods in Canada in 2015 (para 15). In 2015, the Opponent’s gross sales were \$4,322 (USD) and in 2016 from January to December 12, 2016, the Opponent’s gross sales were \$4,905 (USD). Over the time period of 2013-December 12, 2016, the Opponent has spent approximately \$20,000 (USD) on advertising.

*Degree of Resemblance*

[24] As stated earlier, the degree of resemblance between the trademarks will often have the greatest effect on the confusion analysis. When considering the degree of resemblance, the law is clear that the trademarks must be considered in their totality. The appropriate test is not a side-by-side comparison but an imperfect recollection in the mind of a consumer of an opponent’s trademark [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée et al*, 2006 SCC 23 at para 20].

[25] When I consider the trademarks as a whole, understanding that the importance of the first component is somewhat diminished by its descriptive significance [*Sky Solar Holdings Co, Ltd v*

*Skypower Global*, 2014 TMOB 262 at paras 48-50; *Health4All Products Limited v The Nutraceutical Medicine Company Inc*, 2012 TMOB 194 at paras 61-62], I find that the trademark FLEXI CURVE has some similarity to the Opponent's trademark for FLEXEDGE in appearance because each trademark begins with the first four letters FLEX and ends with the letter E. That being said, I find that the respective endings of each trademark EDGE vs CURVE and the difference in FLEX and FLEXI to result in somewhat different sounding trademarks. Furthermore, the trademarks suggest slightly different ideas with the Opponent's trademark suggesting flexible edging and the Mark suggesting flexible curved products.

Surrounding Circumstance: Jurisprudence Concerning Weak Trademarks

[26] The jurisprudence on weak trademarks supports the Applicant's position that the trademarks are not confusing. It is well accepted that comparatively small differences will suffice to distinguish between weak marks [*Boston Pizza International Inc v Boston Chicken Inc*, 2001 FCT 1024, 15 CPR (4th) 345 (FCTD) at para 66]. In *Provigo Distribution Inc v Max Mara Fashion Group SRL*, 2005 FC 1550, 46 CPR (4th) 112 at para 31 (FCTD), de Montigny J. explains:

The two marks being inherently weak, it is fair to say that even small differences will be sufficient to distinguish among them. Were it otherwise, first user of words in common use would be unfairly allowed to monopolize these words. A further justification given by courts in coming to this conclusion is that the public is expected to be more on its guard when such weak trade names are used ...

[27] A party adopting a weak trademark has been held to accept some risk of confusion [*General Motors v Bellows*, 1949 CanLII 47 (SCC), 10 CPR 101 at 115-116]. While it is possible for the degree of distinctiveness attributed to a weak trademark to be enhanced through extensive use [*Sarah Coventry Inc v Abrahamian* (1984), 1 CPR (3d) 238 (FCTD) at para 6], there is no evidence that this is the case here.

Surrounding Circumstance: the InstaFibre Case

[28] At the hearing, the Opponent drew my attention to the case *InstaFibre Ltd v QEP Co, Inc*, 2019 TMOB 146 in support of its allegation of confusion. I find this case distinguishable as the Registrar in that case found that the first part of the trademarks identical and noting that

while suggestive of INSTANT or INSTALL, that the abbreviation INSTA was somewhat unique and distinctive. In this case, I do not find the first components of the trademarks to be identical, nor do I find them somewhat unique or distinctive given that both relate to flexible landscape edging.

### Conclusion

[29] The question posed by section 6(2) of the Act is whether customers of the Goods, provided under the trademark FLEXI CURVE believe that these goods were provided, authorized or licensed by the Opponent owing to its trademark FLEXEDGE. I have assessed this as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the Mark, at a time when he or she has no more than an imperfect recollection of the trademark FLEXEDGE, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

[30] Having regard to section 6(5), in particular the low inherent distinctiveness of the Opponent's trademark, that small differences may suffice to distinguish between weak marks, and that there is no evidence that the Opponent's trademark has become known to any significant extent, I find that the Applicant has met the legal onus on it to show that, on a balance of probabilities, there is no reasonable likelihood of confusion between the Mark and the Opponent's mark FLEXEDGE. Accordingly, this ground of opposition is rejected.

### *Section 16(1)(a) Ground of Opposition*

[31] The Opponent fails to meet its evidential burden to show use or making known of its trademark FLEXEDGE prior to the material date of January 31, 2014 and non-abandonment as of May 4, 2016, the date of advertisement of the application [sections 16(1) and 16(5) of the Act]. Mr. Brafford's evidence is insufficient to show use of the Opponent's FLEXEDGE mark earlier than the material date as his evidence is that the Opponent first sold its FLEXEDGE branded goods in Canada in 2015 (para 15). The Opponent also fails to show that its trademark was made known as of the material date because Mr. Brafford's evidence fails to show that the Opponent's mark has become well known in Canada by reason of distribution or advertising in Canada as required by section 5 of the Act. Accordingly, this ground of opposition is rejected.

## *Section 2 Ground of Opposition*

[32] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its Goods from those of others throughout Canada, there is an initial evidential burden on the Opponent to establish the facts relied upon in support of the ground of non-distinctiveness. Pursuant to its evidential burden, the Opponent is under an obligation to show that, as of the filing date of the statement of opposition, the FLEXEDGE mark had become known sufficiently to negate the distinctiveness of the Mark [*Bojangles' International, LLC v Bojangles Café Ltd* 2006 FC 657].

[33] I am not satisfied that the evidence of Mr. Brafford is sufficient to establish that the Opponent's FLEXEDGE mark had become known sufficiently in Canada to negate the distinctiveness of the Mark. As of the material date, there had been less than \$10,000 of gross annual sales in Canada (para 16). As a result, the Opponent has failed to meet its evidential burden and the non-distinctiveness ground of opposition is rejected accordingly.

## *Sections 30(b) and 30(i) Grounds of Opposition*

[34] With the section 30(b) ground of opposition, the Opponent alleges that the Applicant has not used the Mark in Canada since the date claimed. However, neither the Opponent, nor the Applicant filed any evidence that speaks to the date of first use of the Mark. Consequently, there is no evidence by which the Opponent can meet its initial evidential burden for this ground and it is rejected [*Labatt Brewing Co Ltd v Molson Breweries, A Partnership*, 1996 CanLII 17947, 68 CPR (3d) 216 (FCTD)].

[35] With respect to the section 30(i) ground of opposition, the Opponent has submitted no evidence nor made any submissions with respect to this ground of opposition. Accordingly, this ground of opposition is rejected.

Disposition

[36] Having regard to the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(12) of the Act.

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Natalie de Paulsen  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**Hearing Date:** 2020-06-11

Appearances

Mitchell Charness For the Opponent

No one appearing For the Applicant

Agents of Record

RIDOUT & MAYBEE LLP For the Opponent

AIRD & BERLIS LLP For the Applicant