



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 98

Date of Decision: 2024-05-27

IN THE MATTER OF AN OPPOSITION

Opponent: Massage Addict Incorporated

Applicant: Faydra Collene Meyers

Application: 2,031,898 for YOGA ADDICTS

INTRODUCTION

[1] Faydra Collene Meyers (the Applicant) has applied to register the trademark YOGA ADDICTS (the Mark), which is the subject of application No. 2,031,898 (the Application) in association with the following goods and services (the Goods and Services), shown together with the associated Nice classes (CI):

- | | |
|-------|---|
| CI 14 | (1) Custom jewelry; jewelry; jewelry and imitation jewelry; jewelry chains; jewelry charms |
| CI 21 | (2) Water bottles |
| CI 24 | (3) Blankets |
| CI 25 | (4) Bras; clothing particularly pants; exercise wear; fleece jackets; fleece pants; hot pants; jackets; jackets and socks; jogging pants; socks; socks and stockings; sports bras; strapless bras; yoga pants; yoga shoes |
| CI 26 | (5) Hair accessories; hair ties |
| CI 27 | (6) Personal exercise mats; yoga mats |

- CI 28 (7) Exercise balls; exercise benches; exercise platforms; gym balls for yoga; hoops for exercise; portable support structures for dance and other exercises; yoga blocks; yoga straps; yoga swings
- CI 35 (1) Online sales of clothing; online sales of sporting goods
- CI 41 (2) Yoga instruction

[2] Massage Addict Incorporated (the Opponent) opposes registration of the Mark. The opposition is primarily based on an allegation that the Mark is confusing with the Opponent's prior use and registration of trademarks comprised of or containing the phrase MASSAGE ADDICT.

[3] For the reasons that follow, the opposition is rejected.

THE RECORD

[4] The Application was filed on June 3, 2020, and was advertised for opposition purposes in the *Trademarks Journal* of July 13, 2022. On September 8, 2022, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The grounds of opposition relate to registrability under sections 12(1)(d) and 12(1)(b), entitlement to register under sections 16(1)(a) and 16(1)(c), and distinctiveness under section 2 of the Act.

[5] The Applicant filed a counter statement indicating its intent to respond to the opposition. The Opponent filed a statement that it did not wish to file evidence. The Applicant filed as her evidence her own affidavit (sworn September 13, 2023).

[6] Neither party filed written representations or attended a hearing.

LEGAL ONUS AND EVIDENTIAL BURDEN

[7] The Opponent has the initial evidential burden to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once that burden is

met, the Applicant bears the legal onus of establishing, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [*John Labatt Ltd v Molson Companies Ltd* (1990), 1990 CanLII 11059 (FC), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29, 20 CPR (4th) 155]. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all the evidence, then the issue must be decided against the Applicant.

PRELIMINARY REMARKS – APPLICANT’S EVIDENCE

[8] I note that in considering the affidavit of Ms. Meyers, I have disregarded any assertions that I consider equivalent to an opinion on the questions of fact and law to be determined by the Registrar in this proceeding, including Ms. Meyers’ personal belief that there is no likelihood of confusion between the parties’ marks.

ANALYSIS OF THE GROUNDS OF OPPOSITION

Section 12(1)(d) ground of opposition

[9] The material date for this ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 1991 CanLII 11769 (FCA), 37 CPR (3d) 413 (FCA)].

[10] The Opponent has pleaded that the Mark is not registrable because, contrary to section 12(1)(d) of the Act, the Mark is confusing with one or more of the Opponent’s registrations comprised of or containing the phrase MESSAGE ADDICT. A list of these registrations is set out in Schedule A to this decision.

[11] I have exercised my discretion to check the Register and confirm that these registrations remain extant [*Quaker Oats Co Ltd of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore

met its initial evidential burden with respect to this ground of opposition. As a result, the Applicant bears the legal burden of demonstrating on a balance of probabilities that there is no likelihood of confusion between the Mark and one or more of the Opponent's registered trademarks.

[12] In considering the issue of confusion, my analysis focuses on the Opponent's registration No. TMA757,349 for the word trademark MASSAGE ADDICT as in my view this represents the Opponent's best case. This registration is for use in association with "massage therapy services" and "printed materials relating to massage therapy, namely manuals, guides, articles and pamphlets." If the Opponent does not succeed with respect to its pleading that there is a likelihood of confusion between the Mark and the Opponent's registration for the trademark MASSAGE ADDICT, it would not succeed with respect to the other trademarks pleaded in the statement of opposition.

Test for confusion

[13] In determining whether two trademarks are confusing, all the surrounding circumstances should be considered, including those listed in section 6(5) of the Act: 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, services or business; the nature of the trade; and the degree of resemblance between the trademarks, including in appearance or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, 1 SCR 772 at para 54; *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 49, where the Supreme Court of Canada states that section 6(5)(e), the degree of

resemblance between the trademarks, will often have the greatest effect on the confusion analysis.

[14] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's trademark, at a time when they have no more than an imperfect recollection of the opponent's trademark, and do not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

Inherent distinctiveness of the trademarks

[15] At the outset, it is helpful to identify the meanings that are likely to be attributed to the words that make up the parties' trademarks. I have exercised my discretion to refer to the following dictionary definitions from the *Canadian Oxford Dictionary*, 2nd ed. [see *Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 at para 29, which provides that the Registrar can take judicial notice of dictionary definitions]:

"massage" – *noun* – the rubbing, kneading, etc., of muscles and joints of the body esp. with the hands, for relaxation, to stimulate circulation, increase suppleness, etc.

"yoga" – *noun* – 1. A Hindu system of philosophic meditation and asceticism designed to effect reunion with the universal spirit. 2. A system of esp. posture and breathing exercises used to attain control of the body and mind.

"addict" – *noun* – 1. A person addicted to a habit [...]. 2. informal an enthusiastic devotee of a sport or pastime [...].

[16] I consider the Opponent's trademark MASSAGE ADDICT to hold a limited degree of inherent distinctiveness as it is highly suggestive of goods and services designed for and/or by individuals devoted to massage. The Applicant's Mark is similarly suggestive in that it suggests that the applied

for Goods and Services are designed for and/or by individuals devoted to yoga.

Extent known and length of time the trademarks have been in use

[17] There is no evidence of use of the parties' trademarks or the extent to which they have become known in Canada.

[18] While the Opponent's registration includes a claim of use in Canada since March 11, 2008, the Federal Court has cautioned against giving even *de minimis* weight to dates of use claimed in a registration certificate [see *Tokai of Canada v Kingsford Products Company, LLC*, 2018 FC 951]. In this case, a certified copy of the registration was not filed, though in any event, a finding of *de minimis* use of the Opponent's trademark would not support the conclusion that it has become known to any significant extent, nor that it has necessarily been used continuously since the claimed date [*Krauss-Maffei Wegmann GmbH & Co KG v Rheinmetall Defence Electronics GmbH*, 2017 TMOB 50].

[19] Accordingly, these factors favour neither party.

Nature of the goods, services or business; and nature of the trade

[20] While the Opponent's massage therapy services and the Applicant's yoga instruction services overlap insofar as both broadly relate to the general promotion of health and wellness, I consider that the nature of these services is readily distinguishable. For instance, massage therapy is a treatment (*i.e.*, rubbing, kneading, etc. of muscles and joints) done on an individual, while yoga is a practice that is done by an individual. Further, there is no evidence that the Opponent's massage therapy services would be offered or sold through the same channels of trade as yoga instruction services.

[21] Similarly, I consider the nature of the Applicant's Goods (generally covering clothing, exercise equipment, and the online sale of these items) to be fundamentally different from the goods of the Opponent (printed materials relating to massage therapy), and there is no evidence they would travel through the same channels of trade.

[22] Accordingly, these factors favour the Applicant.

Degree of resemblance

[23] As noted above, the degree of resemblance between the trademarks will often have the greatest effect on the confusion analysis. In considering the degree of resemblance, the Supreme Court of Canada in *Masterpiece*, *supra* sets out that resemblance is defined as the quality of being either like or similar (para 62) and that the approach to assessing resemblance should involve a consideration of whether there is an aspect of a trademark that is particularly striking or unique (para 64).

[24] With respect to the Applicant's Mark, neither the word "YOGA" nor "ADDICTS" is particularly striking or unique, given the descriptiveness of the prefix YOGA and the suggestive connotation of the suffix ADDICTS. Similarly, for the Opponent's MASSAGE ADDICT trademark, I do not find either of its constituent words to be particularly striking given the descriptiveness of the word MASSAGE and the suggestive connotation of the suffix ADDICT.

[25] The parties' trademarks share some resemblance in appearance and when sounded since they are both made up of a prefix followed by the suffix ADDICT(S). However, the fact that the shared component is highly suggestive reduces the impact of this similarity. With respect to the ideas suggested, while both of the parties' trademarks suggest goods and services designed for individuals that are highly attached or devoted to something,

the endeavors to which they are attached, namely yoga and massage, are quite different with the result that the ideas conveyed by the parties' respective marks as a whole are quite different.

[26] Ultimately, while there is some degree of resemblance owing to the presence of the shared suffix "ADDICT(S)" in both parties' trademarks, given the highly suggestive nature of that term, I consider the degree of resemblance between the trademarks to be limited, with the result that this factor favours the Applicant.

Surrounding circumstance – family of trademarks

[27] In its statement of opposition, the Opponent refers to its family of trademarks comprised entirely of the phrase "Massage Addict" or whose dominant element is the phrase "Massage Addict".

[28] However, there can be no presumption of the existence of a family of marks in opposition proceedings. A party seeking to establish a family of marks must establish that it is using more than one or two trademarks within the alleged family (a registration or application does not establish use) and that such use must be sufficient to establish that consumers would recognize a family of marks [*Arterra Wines Canada, Inc v Diageo North America Inc.*, 2020 (FC) 508]. As the Opponent has not filed such evidence (or indeed, any evidence), this circumstance does not assist the Opponent.

Surrounding circumstance – state of the register

[29] State of the register evidence favours an applicant when it can be shown that the presence of a common element in marks would cause consumers to pay more attention to the other features of the marks, and to distinguish between them by those other features [*McDowell v Laverana GmbH & Co KG*, 2017 FC 327 at para 42]. Inferences regarding the state of the marketplace may be drawn from such evidence in two situations: where

a large number of relevant registrations are located; and/or where there is evidence of common use in the marketplace of relevant third party marks [*Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 1992 CanLII 14792 (FCA), 43 CPR (3d) 349 (FCA); *McDowell v Laverana GmbH & Co KG*, 2017 FC 327 at paras 41-46].

[30] The Meyers affidavit makes reference to a third party registration (TMA973,055) for the trademark 'Health Addict' in association with services including "alternative medicine training in the field of massage therapy; health clubs; holistic massage therapy services". However, a single registration is insufficient to make inferences regarding the state of the marketplace.

[31] Accordingly, this circumstance does not assist the Applicant.

Conclusion on the section 12(1)(d) ground

[32] Having considered all the surrounding circumstances, and in particular taking into account that the Opponent's MASSAGE ADDICT trademark is not an inherently strong mark and there is no evidence of its use, I find that the balance of probabilities between finding that there is no reasonable likelihood of confusion between the Mark and the Opponent's trademark, and finding that there is a reasonable likelihood of confusion, falls in favour of the Applicant. Accordingly, the section 12(1)(d) ground of opposition is rejected.

Sections 16(1)(a) and 16(1)(c) grounds of opposition

[33] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark because, at the relevant date, the Mark was confusing with one or more of the Opponent's registered MASSAGE ADDICT trademarks (set out in Schedule A to this decision) and the trade names MASSAGE ADDICT and MASSOTHÉRAPIE MASSAGE ADDICT.

[34] To meet its initial evidential burden for these grounds of opposition, the Opponent must show that it had used one of its trademarks (for the section 16(1)(a) ground) and one of its trade names (for the section 16(1)(c) ground) at the filing date of the Application, namely June 3, 2020. The Opponent has not done so. Further, any reference to use in any of the Opponent's registrations (for instance the claim of use in Canada since March 11, 2008 for the trademark MASSAGE ADDICT) is not sufficient to satisfy the Opponent's evidential burden for a section 16(1)(a) ground of opposition [*Roos, Inc v Edit-SRL* (2002), 2002 CanLII 61421 (CA TMOB), 23 CPR (4th) 265 (TMOB) at 268]. Accordingly, these grounds of opposition are rejected.

Section 2 ground of opposition

[35] The Opponent has pleaded that the Applicant's Mark is not distinctive because it does not actually distinguish, nor it is adapted to distinguish the Applicant's Goods and Services from the goods and services of the Opponent, nor can it be so adapted to distinguish them.

[36] To meet its initial burden for this ground of opposition, the Opponent must show that as of the date of filing the statement of opposition, namely September 8, 2022, that one or more of its trademarks or trade names was known to some extent at least and the reputation of one or more of these trademarks or trade names in Canada was substantial, significant or sufficient [*Motel 6, Inc v No 6 Motel Ltd* (1981), 1981 CanLII 2834 (FC), 56 CPR (2d) 44 (FCTD); *Bojangles' International LLC v Bojangles Café Ltd* (2006), 2006 FC 657 (CanLII), 48 CPR (4th) 427 (FC)]. The Opponent has not done so, with the result that it fails to meet its initial burden. Accordingly, this ground of opposition is rejected.

Section 12(1)(b) ground of opposition

[37] The Opponent has pleaded that the Application is not registrable because the Mark is "...either clearly descriptive or deceptively misdescriptive in the English language of the character and/or quality of the goods and/or services with which it is used or proposed to be used, namely the goods and/or services listed in the Application", in particular "yoga pants; yoga shoes; yoga mats; yoga blocks; yoga straps; yoga swings; yoga instruction." The Opponent did not provide any additional information relating to this ground in its statement of opposition.

[38] The Opponent has taken no steps, such as presenting evidence or making written representations, in support of this allegation. As such, the Opponent has failed to meet its initial burden and this ground of opposition is rejected.



DISPOSITION

[39] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

Jennifer Galeano
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Opponent’s registrations comprised of or containing the phrase MASSAGE ADDICT:

Trademark	Goods and/or Services
 <p>MASSOTHÉRAPIE Massage Addict</p> <p>MASSOTHÉRAPIE MESSAGE ADDICT TMA1,087,648</p>	<p>(1) Offering technical assistance in the establishment and operation of massage therapy franchises (2) Massage therapy services, reflexology services and acupuncture services</p>
 <p>Massage Addict Membership Based Massage Therapy</p> <p>MESSAGE ADDICT & Design TMA757,513</p>	<p>(1) Printed materials relating to massage therapy, namely, manuals, guides, articles and pamphlets. (1) Massage therapy services.</p>
<p>MESSAGE ADDICT</p> <p>TMA757,349</p>	<p>(1) Printed materials relating to massage therapy, namely, manuals, guides, articles and pamphlets. (1) Massage therapy services.</p>
<p>MASSOTHÉRAPIE MESSAGE ADDICT</p> <p>TMA1,087,647</p>	<p>(1) Offering technical assistance in the establishment and operation of massage therapy franchises (2) Massage therapy services, reflexology services and acupuncture services</p>

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Opponent: McInnes Cooper

For the Applicant: No agent appointed