

**DECISION
of the Fourth Board of Appeal
of 17 April 2019**

In Case R 743/2018-4

140077 CANADA INC.

426 Ste-Hélène Street, Montreal
Quebec H2Y 2K7
Canada

Applicant / Appellant

represented by Abcor B.V., Frambozenweg 109/111, NL-2321 KA Leiden, The Netherlands

APPEAL relating to European Union trade mark application No 17 288 176

THE FOURTH BOARD OF APPEAL

composed of D. Schennen (Chairman), E. Fink (Rapporteur) and L. Marijnissen (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 4.10.2017, 140077 CANADA INC. (the ‘applicant’) sought to register the word mark

AGING BACKWARDS

for the following list of goods and services:

Class 9 – Pre-recorded DVD's and downloadable videos containing physical fitness instruction and episodes in the nature of a dramatic television series, reality tv series and documentaries relating to physical education, fitness, health and wellbeing; Digital media, namely, downloadable pre-recorded video clips, pre-recorded audio clips, text and graphics for use with electronic personal computers and handheld wireless devices, all featuring subjects of health, wellness and fitness; Compact discs featuring music.

Class 41 – Conducting fitness classes; developing fitness programs; fitness training; organisation of seminars, working groups, research groups and conventions in the field of physical fitness and health and wellness; physical education; physical education services; physical fitness consulting services; physical fitness instruction; providing an interactive website in the field of physical fitness and health and wellness; teaching physical fitness; providing online non-downloadable and streaming videos relating to physical fitness, health and wellbeing; operation of a blog in the field of physical fitness, nutrition, health and wellness; offering programmes, classes, education and instruction relating to physical fitness, health and wellness; production of pre-recorded DVD's and online videos in the field of physical fitness, health and wellbeing; production and development of television programs in the field of physical education, fitness, health and wellbeing; entertainment in the form of television shows relating to physical fitness, health and wellbeing; entertainment services in the nature of a dramatic television series, reality TV series and documentaries relating to physical education, fitness, health and wellbeing; instructor certification services and programmes, namely teacher training workshops in the field of physical fitness instruction; entertainment services, namely, multimedia programs in the field of health, wellness and fitness, distributed via various platforms across multiple forms of transmission media; television programming of general human interest relating to a series in the nature of a non-fiction show featuring various aspects of health, wellness and fitness; television programming of general human interest relating to a series in the nature of a documentary show featuring various aspects of health, wellness and fitness; entertainment services, namely, a continuing television show in the field of nutrition, weight loss, health, wellness and fitness; educational services, namely, providing live and online classes, courses, seminars and workshops in the field of nutrition, weight loss, health, wellness and fitness; providing a website featuring information in the field of fitness; on-line publication of journals, namely, blogs in the field of nutrition, weight loss, health, wellness and fitness; providing on-line non-downloadable newsletters in the field of nutrition, weight loss, health, wellness and fitness via email; educational services, namely, providing webcasts and podcasts in the field of nutrition, weight loss, health, wellness and fitness; information, advice and consultancy in relation to all the aforesaid services.

- 2 After an initial objection, and in the absence of any observations by the applicant, by decision of 22.02.2016, the examiner refused the application for all the goods and services claimed on the grounds of Article 7(1)(b) and 7(2) EUTMR.
- 3 He reasoned that the average ‘English-speaking consumer would immediately understand the sign as meaning showing the effects or characteristics of aging in a reverse way’, i.e. looking younger with age. This reasoning was supported by the dictionary definitions of ‘AGING’ (‘to show the effects or characteristics of increasing age’) and ‘BACKWARDS’ (‘in a reverse or contrary direction or way’).

Taken as a whole, the sign would simply be perceived as a laudatory slogan indicating that the relevant goods and services will help their consumer achieve decreasing-age like effects, i.e. to look younger with age. The examiner also observed that the wording in question is commonly used on the relevant market, citing internet search results and seven book titles on amazon.com, to illustrate that ‘aging backwards’ is commonly used in relation to fitness, health, diet and well-being.

- 4 On 20.04.2018, the applicant filed a notice of appeal against the contested decision, duly followed by a statement of grounds requesting that the Board waive the objection and permit the application to proceed to registration. The arguments raised in the statement of grounds may be summarised as follows:
- Some of the refused goods and services are entirely unrelated to aging, health, or fitness, namely ‘pre-recorded DVD’s and downloadable videos and episodes in the nature of a dramatic television series, reality tv series; compact disks featuring music’ in Class 9, and ‘entertainment services in the nature of a dramatic series, reality TV series’ in Class 41. There is no reason why ‘AGING BACKWARDS’ would be unsuitable to serve as a distinctive trade mark, title or even tagline for a musical CD or for a drama or reality TV series.
 - While it is granted that the remaining goods and services specifically relate or may relate to health, fitness or well-being, the sign has not been shown to be commonly used in the EU in any context. The evidence shows that the phrase is in use in the US, Canada and Australia, which however is of no consequence to the EUTM application. It is a well established principle that a sign may be non-distinctive in one country but perfectly distinctive in another.
 - Time moves in one direction only. A process of aging backwards does not exist. It is not possible to get any younger. No link exists between the meaning of the phrase and any effects that a consumer may reasonably expect from the purchase and use of the applicant’s goods and services.

Reasons

- 5 The appeal is not well founded. The sign is devoid of distinctive character for the relevant English-speaking public for all the goods and services applied for, in accordance with Article 7(1)(b) and Article 7(2) EUTMR.

Article 7(1)(b) EUTMR

- 6 Under Article 7(1)(b) EUTMR, trade marks which are devoid of any distinctive character are not to be registered.
- 7 It is settled case-law that for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the goods and services in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish those goods and services from those of other undertakings (29/04/2004, C-473/01 P & C-474/01 P, *Tabs*, EU:C:2004:260, § 32; 08/05/2008, C-304/06 P, *Eurohypo*, EU:C:2008:261, § 66; 21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 33), so that the consumer

who acquires the goods and services designated may repeat the experience, if it proves to be positive, or avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (11/12/2012, T-22/12, Qualität hat Zukunft, EU:T:2012:663, § 22).

- 8 The public perceive a mark as a whole and does not proceed to analyse its various details (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 25). A trade mark must enable purchasers of the goods in question to distinguish them from the goods of other undertakings without conducting an analytical or comparative examination and without paying particular attention (12/02/2004, C-218/01, Perwoll, EU:C:2004:88, § 53; 12/01/2006, C-173/04 P, Standbeutel, EU:C:2006:20, § 29).
- 9 Registration of a trade mark which consists of indications that are also used as advertising slogans, indications of quality or incitements to purchase the goods or services is not excluded as such for this reason (05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 19; 11/12/2012, T-22/12, Qualität hat Zukunft, EU:T:2012:663, § 15). However, in the case of such trade marks, it must be examined whether they have components that might, beyond their obvious promotional meaning, enable the relevant public to memorise the word sequence easily and immediately as a distinctive trade mark for specific goods or services. A sign which fulfils functions other than that of a trade mark is only distinctive for the purposes of Article 7(1)(b) EUTMR if it may be perceived immediately as an indication of the commercial origin of the goods and services (05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 20; 13/04/2011, T-523/09, Wir machen das Besondere einfach, EU:T:2011:175, § 31). Since the relevant consumer is not very attentive if a sign does not immediately indicate to him the origin or intended use of the object of his intended purchase, but just gives him purely promotional, abstract information, he will not take the time either to enquire into the sign's various possible functions or mentally to register it as a trade mark (Real People, Real Solutions, § 28, 29; Qualität hat Zukunft, § 30).
- 10 The distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of the sign by the relevant public (29/04/2004, C-473/01 P & C-474/01 P, Tabs, EU:C:2004:260, § 33; 08/05/2008, C-304/06 P, Eurohypo, EU:C:2008:261, § 67; 21/01/2010, C-398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 34).
- 11 The relevant services in Class 41 concern physical fitness, nutrition, weight loss, health and wellness, as does the majority of the digital media applied for in Class 9. The relevant public consists of the public at large as well as professionals in the fitness, health and wellness fields. In accordance with Article 7(2) EUTMR, the assessment is to be based on the English-speaking part of that public.
- 12 The English phrase 'AGING BACKWARDS' is grammatically correct. 'AGING' is the present continuous form of the verb 'to age', defined by the online Oxford English Dictionary as 'a. intransitive. Of a person, animal, or thing; to grow old; to become or appear aged. b. transitive. To make old; to cause to grow old, or to appear old or older.' (<http://www.oed.com/view/Entry/3832?redirectedFrom=aging#eid>). 'BACKWARDS' is defined as '5 a. In the direction from which one has come, towards the place of starting, in the opposite direction

from that in which one has advanced' (<http://www.oed.com/view/Entry/14478?rskey=mNULEP&result=3&isAdvanced=false#eid>). While the relevant public will at once know that aging is a natural process that cannot be reversed, they will also know that 'to age' means not just growing old but also appearing old or older, and that physical exercise and a healthy lifestyle can improve physical appearance and 'turn back the clock' in terms of achieving a more youthful state of fitness and appearance.

- 13 In relation to goods and services in the field of fitness, nutrition, weight loss, health and wellness the sign 'AGING BACKWARDS' will simply be perceived by the relevant public as a laudatory slogan, namely the promise that the purchase and use of the relevant goods and services will help their consumer appear younger than they looked prior to using the goods or services. It is also well known that, apart from one's physical age, it is possible to measure the body's natural parameters in terms of what is commonly and loosely referred to as 'biological age' which may be different from the real age depending on one's physical and mental state. It is equally well known that the health, fitness and wellness industries in particular attract custom precisely because clients wish to look and/or feel younger, or wish to improve their mental and physical state to reduce the ravages of time, and to attain the physical and/or mental state that they enjoyed when they were younger.
- 14 Exercise is well known to keep aging muscles and immune systems young, as can be seen by an extremely wide variety of articles and books, which are posited on the basic tenet that most of the major deterioration caused by aging can be attenuated, delayed or reversed through frequent and vigorous exercise. It is equally well known that an unhealthy lifestyle such as excessive drinking or smoking can have a devastating effect on the skin and hence affect physical appearance. Both physical exercise and a healthy lifestyle can therefore overcome health problems that have the effect of making one both frailer and looking prematurely old: thus one can indeed appear younger, and be stronger and be more sprightly than before in this way.
- 15 The applicant's argument that some of the goods and services are not related to fitness, health and wellness is to be rejected. The broad term 'compact discs featuring music' encompasses compact discs with wellness music meant to increase relaxation, as well as recordings of instructions for exercises together with accompanying music for fitness and health exercises and classes: as such, these goods are merely ancillary products for the Class 41 services such as 'conducting fitness classes' or 'fitness training'. Since selected music recordings are normally closely coordinated with fitness and wellness classes and exercises, consumers will understand the promise of looking younger also in relation to these ancillary goods. For the remaining goods and services referred to by the applicant it suffices to note that the citation of the list of goods and services is incomplete and that they expressly refer to fitness, health and wellness, namely 'pre-recorded DVD's and downloadable videos containing physical fitness instruction and episodes in the nature of a dramatic television series, reality tv series and documentaries relating to physical education, fitness, health and wellbeing' in Class 9 and 'entertainment services in the nature of a dramatic television series, reality TV series and documentaries relating to physical education, fitness, health and wellbeing' in Class 41.

- 16 Equally unfounded is the argument that a phrase which is used in the US, Canada and Australia would not be understood by the English-speaking public in the Union. In that respect, regard must be had to the very international nature of the health, fitness and wellness industry, and indeed to the fact that it often follows very closely from the North American market. The number of books entitled 'Ageing backwards', in particular self-help books about how to 'age backwards', leaves no doubt that in the English language and the health, fitness and wellness fields, the term is well established. Given also the international nature of online shopping webpages such as Amazon.com and the fact that English language books are easily available for purchase from outside the European Union to English-speakers within the European Union, there can be no doubt that the prevalence of this phrase reflects a broad international understanding by English speakers regarding its merely promotional meaning, i.e. looking and feeling younger.
- 17 Accordingly, the sign 'AGING BACKWARDS' in relation to the goods and services here is not sufficient to enable purchasers of the goods in question to distinguish them from the goods of other undertakings, since the words will immediately be understood as a direct and non-distinctive promotional message that these goods and services merely help customers to attain their aim of looking and feeling younger.
- 18 In view of all the foregoing considerations, the appeal shall be dismissed.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

D. Schennen

Signed

E. Fink

Signed

L. Marijnissen

Registrar:

Signed

p.o. P. Nafz

