Federal Court of Appeal | Cour d'appel fédérale

Date: 20260505

Docket: A-403-24

Citation: 2026 FCA 85

CORAM: **LOCKE J.A.**
ROUSSEL J.A.
HECKMAN J.A.

BETWEEN:

THERME DEVELOPMENT (CY) LTD.

Appellant

and

NORDIK SPA VILLAGE CHELSEA INC.
and
NORDIK IMMOBILIERS WINNIPEG INC.

Respondents

Heard at Ottawa, Ontario, on December 18, 2025.

Judgment delivered at Ottawa, Ontario, on May 5, 2026.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: ROUSSEL J.A.
HECKMAN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20260505

Docket: A-403-24

Citation: 2026 FCA 85

CORAM: **LOCKE J.A.**
ROUSSEL J.A.
HECKMAN J.A.

BETWEEN:

THERME DEVELOPMENT (CY) LTD.

Appellant

and

NORDIK SPA VILLAGE CHELSEA INC.
and
NORDIK IMMOBILIERS WINNIPEG INC.

Respondents

REASONS FOR JUDGMENT

LOCKE J.A.

I. Background

[1] Therme Development (CY) Ltd. (TD) appeals from a decision of the Federal Court (2024 FC 1765, the Decision) that granted in part an application by the respondents Auberge & Spa Le Nordik Inc. (now Nordik Spa Village Chelsea Inc.) and Nordik Immobiliers Winnipeg Inc.

(collectively, Nordik) seeking an Order pursuant to sections 57 and 58 of the *Trademarks Act*, R.S.C. 1985, c. T-13 (the Act), striking out some of the services listed in association with the following four trademark registrations owned by TD:

Trademark	**Registration No.**	**Relevant Dates**
THERME	TMA1110500	Filed: March 16, 2018 Registered: September 29, 2021
THERME GROUP	TMA1110501	Filed: March 16, 2018 Registered: September 29, 2021
 (THERME WOMAN mark)	TMA1110061	Filed: March 16, 2018 Registered: September 22, 2021
 (THERME WOMAN'S HEAD mark)	TMA1110502	Filed: March 16, 2018 Registered: September 29, 2021

[2] The Federal Court's conclusions in the Decision that remain in issue are as follows:

A. When sounded, the THERME WOMAN mark and the THERME WOMAN'S HEAD mark are clearly descriptive in the French language of the character of some of their listed services, contrary to paragraph 12(1)(b) of the Act;

B. When sounded, the THERME mark (and allegedly also the THERME WOMAN mark and the THERME WOMAN'S HEAD mark) is deceptively misdescriptive in the French language of the character of some of its listed services, contrary to paragraph 12(1)(b) of the Act;

C. The THERME mark and the THERME GROUP mark, in respect of some of their listed services, are confusing with Nordik's THERMËA trademark registrations, reproduced below, contrary to paragraph 12(1)(d) of the Act:

Trademark	**Registration No.**	**Relevant Dates**
THERMËA	TMA897305	Filed: May 30, 2013 Registered: February 24, 2015
	TMA897306	Filed: May 30, 2013 Registered: February 24, 2015

[3] The specific listed services identified by the Federal Court in relation to each of the foregoing issues are as listed in paragraph 50 of the Decision (for Issue A), paragraph 77 of the Decision (for Issue B), and paragraph 130 of the Decision (for Issue C).

[4] As part of its arguments concerning confusion (Issue C), TD also takes issue with the Federal Court's conclusion that the affidavit of Dr. Shana Poplack sworn May 4, 2023 (the Poplack Affidavit), which was submitted to the Court as part of TD's response materials, was inadmissible as expert evidence.

[5] For the reasons set out below, I would dismiss the appeal.

[6] One additional issue, raised by Nordik at the hearing of the appeal, concerns the change of name of one of the respondents, Auberge & Spa Le Nordik Inc. to Nordik Spa Village Chelsea Inc. Nordik requests that the style of cause of this appeal be amended to reflect that change. I would treat Nordik's request as an informal motion and grant that motion. The style of cause at the beginning of these reasons should reflect the change of name.

II. Standard of Review

[7] The parties do not dispute that the applicable standard of review in this case is as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: questions of law are reviewed on a standard of correctness, while the Court will intervene on questions of fact or of mixed fact and law from which no question of law is extricable only where the court below has made a palpable and overriding error. A palpable error is one that is obvious. An overriding error is one that goes to the very core of the outcome of the case.

III. Analysis

[8] Before commencing my analysis of the issues that remain in dispute, I wish to note certain findings by the Federal Court that are not in dispute and therefore will remain in place. For one thing, TD does not contest the Federal Court's conclusion that the THERME mark is clearly descriptive in the French language of the character of the services identified at paragraph 50 of the Decision. At the same time, Nordik does not contest the Federal Court's conclusion that the THERME GROUP mark is not clearly descriptive, as sounded in French, of the character of

any of the impugned services, or that the THERME mark is not deceptively misdescriptive in the French language of the character of the services identified at paragraph 74 of the Decision. Finally, Nordik does not take issue with the Federal Court's finding that TD's trademarks in issue are not in violation of paragraph 12(1)(c) of the Act as being the name in any language of any of the goods or services in connection with which they are used or proposed to be used.

A. *Whether, when sounded, the THERME WOMAN mark and the THERME WOMAN'S HEAD mark are clearly descriptive in the French language of the character of the services identified in the Decision*

[9] TD's argument on this issue surrounds the fact that the THERME WOMAN mark and the THERME WOMAN'S HEAD mark both include a word element and a design element. Such marks are sometimes called composite marks or combination marks. Since the Federal Court relied on the conclusion that the marks were clearly descriptive when sounded, and since a design element typically cannot be sounded, often only their word elements can be considered. TD correctly acknowledges that the leading case on the "when sounded" test applied to composite marks is *Best Canadian Motor Inns Ltd. v. Best Western International, Inc.*, 2004 FC 135, [2004] 3 F.C.R. 114 (*Best Canadian*). The Court's focus in *Best Canadian* was on whether the words of the composite mark in question are the dominant feature of the trademark. In *Best Canadian*, the word elements of the mark in question, reproduced below, were found to dominate:

[10] As other examples of cases in which the word element of composite marks was found by the Federal Court to dominate, TD cites the following cases and the marks in issue for each of them:

Case	**Trademark**
Worldwide Diamond Trademarks Limited v. Canadian Jewellers Association, 2010 FC 309, aff'd 2010 FCA 326	THE CANADIAN DIAMOND REPORT
Engineers Canada v. REM Chemicals, Inc., 2014 FC 644	REM Surface Engineering
Ottawa Athletic Club Inc. v. Athletic Group Inc., 2014 FC 672	The Athletic Club
Product Care Association v. Canada (Attorney General), 2015 FC 284	LightRecycle

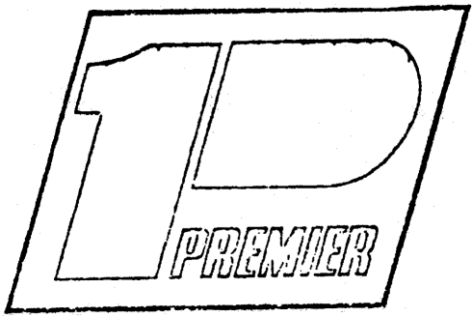
[11] Nordik also cites the following examples from the Trademarks Opposition Board:

Case	**Trademark**
Canadian Tire Corporation, Limited v. Exxon Mobil Corporation, 2009 CanLII 90878 (CA TMOB)	Touchless Car Wash

Muskoka Spirits Inc. v. Lakes of Muskoka Cottage Brewery Inc., 2021 TMOB 267	
130872 Ontario Inc. o/a Factory Direct Medical, HPU Rehab and HPU Medical Wholesale and Canadian Home Medical Group Inc., 2023 TMOB 121	

[12] In all of the foregoing cases, the word element was found to be dominant.

[13] The only example that TD cites with a composite mark in which the word element was found not to be dominant is *Lake Ontario Cement Ltd. v. Canada (Registrar of Trade Marks)*, 1976 CarswellNat 503, [1976] F.C.J. No. 1104 (F.C.T.D.), in which the mark in question was:



[14] As guidance for when a word element dominates, TD cites the Government of Canada's *Trademarks Examination Manual* at paragraph 4.4.10:

> In determining whether a word element is the dominant feature of a combination trademark, examiners will consider whether a prospective consumer would, as a matter of first impression, perceive the word element as being the most influential

> or prominent feature of the trademark. In doing so, examiners will look at the trademark in its totality, and compare the visual impression created by the word element(s) to the visual impression created by the design element(s). Where the design element of the trademark does not stimulate visual interest, the word element will be deemed dominant.
>
> Factors that may be considered by examiners in assessing the visual impression created by the elements include the size of the words and the size of the design, the font, style, color and layout of the lettering of the words, as well as the inherent distinctiveness of the design element.
>
> …
>
> When the word element of a combination trademark is not the dominant feature of the trademark, the Registrar considers that the trademark in its totality cannot, when sounded, be clearly descriptive or deceptively misdescriptive of the associated goods or services.

[15] TD argues that the detail, distinctiveness and size of the design elements of the THERME WOMAN mark and the THERME WOMAN'S HEAD mark make those design elements dominant. It asserts that the design elements of the marks that were in issue in the cases identified in paragraphs 10 and 11 above were far less eye-catching and prominent than its composite marks in issue in this appeal. TD notes that the Federal Court, in discussion of the separate issue of confusion, acknowledged these qualities of the design elements, and that they "would draw the eye of the consumer." (see paragraph 106 of the Decision).

[16] TD argues that, instead of recognizing these qualities as making the design elements of these marks dominant, the Federal Court focused on the fact that those elements could not be vocalized and hence would not be part of what would be sounded in the marks, for example when answering the phone.

[17] In deciding whether the THERME WOMAN mark and the THERME WOMAN'S HEAD mark, when sounded, are clearly descriptive, the Federal Court acknowledged the *Best Canadian* decision and recognized the importance of the word element being dominant (see paragraph 63 and following of the Decision). To this point, I see no error in the Federal Court's understanding of the law.

[18] However, the Federal Court then determined that the word elements of TD's composite marks were dominant because the design elements would not be sounded. This reasoning was problematic in my view. Whether the marks in question, when sounded, are clearly descriptive is the second question in a two-stage analysis. We do not get to that question unless the word element is first found to be dominant; if it is not dominant, then the mark cannot be clearly descriptive.

[19] In my view, the *Trademarks Examination Manual* may be helpful in determining whether a word element is dominant. One should consider "whether a prospective consumer would, as a matter of first impression, perceive the word element as being the most influential or prominent feature of the trademark." Looking at the mark as a whole, the visual impression created by the word element is compared to the visual impression created by the design element. Relevant factors include the size of the words and the size of the design, the font, style, colour and layout of the lettering of the words, as well as the inherent distinctiveness of the design element.

[20] I conclude that the Federal Court erred in its analysis of whether the word elements of the THERME WOMAN mark and the THERME WOMAN'S HEAD mark were dominant. The

Federal Court should not have considered the fact that the design elements could not be sounded. Therefore, I would set aside the Federal Court's conclusion that the word elements were dominant because of their "accessibility for sounding compared to the design elements." (see paragraph 68 of the Decision).

[21] Having reached this conclusion, I must consider what remedy is appropriate: should this issue be remitted to the Federal Court for reconsideration, or can this Court decide the issue? When I put this question to TD's counsel at the hearing, he responded that this Court can decide the issue.

[22] I agree. We have sufficient information to decide whether the word elements of TD's composite marks in issue are dominant over the design elements.

[23] Following the guidance in the *Trademarks Examination Manual*, I have considered, for each of TD's composite marks in issue, the visual impression created by the word element as compared to the visual impression created by the design element. I have considered the relative size of the word and design elements, as well as the inherent distinctiveness of the design element. This exercise is necessarily subjective.

[24] Even recognizing that the design element of each of the marks is larger and more complex than the word element, I find that the word element is dominant. The jurisprudence provides many examples of composite marks in which the word element was found to be dominant, and few (if not only one) where it was not. In my view, despite the size and

complexity of the design element of each of the composite marks in issue, a prospective consumer, as a matter of first impression, would have the word THERME, as opposed to the other less articulable design elements, at the front of their mind when viewing both marks. In this way, the word element dominates.

[25] Having concluded that the word element of each of the THERME WOMAN mark and the THERME WOMAN'S HEAD mark is dominant, I confirm that the Federal Court did not err in its conclusion that, when sounded, each of these marks is clearly descriptive in the French language of the character of the services identified at paragraph 50 of the Decision.

B. *Whether, when sounded, the THERME mark, the THERME WOMAN mark and the THERME WOMAN'S HEAD mark are deceptively misdescriptive in the French language of the character of the services identified in the Decision*

[26] The Federal Court began its analysis of the issue of deceptive misdescriptiveness with the following statement at paragraph 71 of the Decision: "Given my conclusions in the preceding section on the THERME GROUP, THERME WOMAN'S HEAD mark and THERME WOMAN mark, the only trademark that will be analysed in this section is the THERME Registration."

[27] TD interprets this statement as limiting the Federal Court's finding of deceptive misdescriptiveness to the THERME mark. On this basis, TD argues that the Federal Court erred in its Judgment by extending the effect of its analysis on this issue to the THERME WOMAN mark and the THERME WOMAN'S HEAD mark. TD argues that the Federal Court's Judgment was inconsistent with its reasons.

[28] Nordik disagrees. It argues that the statement at paragraph 71 of the Decision was intended to refer the reader to the Federal Court's analysis on the issue of clear descriptiveness of all of the marks in issue, which analysis concluded at paragraph 70 of the Decision by stating: "I find that the THERME WOMAN'S HEAD mark and the THERME WOMAN mark as sounded are just as clearly descriptive of the character of the same services as referenced above for the THERME mark" (original emphasis).

[29] I agree with Nordik. The Federal Court concluded that its findings concerning clear descriptiveness in respect of the THERME mark applied equally to the THERME WOMAN'S HEAD mark and the THERME WOMAN mark. In that context, the statement at the beginning of the Federal Court's analysis of deceptive misdescriptiveness is not inconsistent with its Judgment.

[30] TD also takes issue with the Federal Court's analysis on this issue. It argues that a trademark cannot be misdescriptive without first being found to be descriptive, and it points to the Federal Court's findings in the context of the issue of clear descriptiveness that the THERME mark, when sounded, was not clearly descriptive of various impugned services. At paragraph 51 of the Decision, the Federal Court stated: "These specifications of services can cover a health spa resort and wellness center that are completely unrelated to thermal baths."

[31] This argument cannot succeed. While it is true that a mark must first be found to be descriptive before it can be found to be misdescriptive (see *The Oshawa Group Ltd. v. Canada (Registrar of Trade Marks)*, 1980 CanLII 4192 (F.C.T.D.), [1981] 2 F.C. 18 at 22), the Federal

Court's finding that the trademarks in question are not clearly descriptive of certain services does not necessarily lead to the conclusion that they are not deceptively misdescriptive of those services. As argued by Nordik, the point is that the mark in question must be descriptive of something. Clear descriptiveness and deceptive misdescriptiveness are both included in paragraph 12(1)(b) of the Act as alternatives; a trademark will not be both clearly descriptive and deceptively misdescriptive of the same services. Obviously, a finding of deceptive misdescriptiveness of certain services does not require a prior finding of descriptiveness of those same services. The prohibition against registering a trademark that is deceptively misdescriptive in association with the services in question aims to prevent registration of a trademark that could mislead the public as to the character or quality of those services.

[32] The Federal Court did not misunderstand the law applicable to this issue. Its findings were properly based on common sense (see paragraph 73 of the Decision) and were factually suffused. Since I am not convinced that the Federal Court made any extricable legal error in its analysis of this issue, I will not interfere with its Decision unless I am convinced that it made a palpable and overriding error.

[33] In that regard, TD argues that there was no evidence before the Federal Court to indicate the likelihood that a consumer would be deceived into thinking that the services in question would offer something they do not.

[34] Firstly, it is not clear to me what evidence on this issue was necessary. The focus is on the ordinary consumer, and the Court is to apply common sense. The Federal Court was in as

good a position as anyone to determine whether the marks in question were deceptively misdescriptive.

[35] Secondly, I do not understand the Federal Court's statement in the context of clear descriptiveness (reproduced at paragraph 28 above) to be determinative of the issue of deceptive misdescriptiveness or to be inconsistent with its conclusions thereon. The fact that businesses such as health spa resorts and wellness centres can include services that do not offer thermal baths, as found at paragraph 51 of the Decision, does not establish that TD's THERME, THERME WOMAN'S HEAD and THERME WOMAN marks are not deceptively misdescriptive. In fact, the possible absence of thermal baths appears to be the principal concern that led to the Federal Court's conclusion on deceptive misdescriptiveness in the French language (see paragraphs 75 and 76 of the Decision).

[36] I find no reviewable error in the Federal Court's conclusion that, when sounded, the THERME mark is deceptively misdescriptive in the French language of the character of the services identified at paragraph 77 of the Decision. As discussed at paragraphs 26 to 29 above, this conclusion applies equally to the THERME WOMAN mark and the THERME WOMAN'S HEAD mark.

C. *Whether the THERME mark and the THERME GROUP mark are, in respect of the services identified in the Decision, confusing with Nordik's THERMËA registered trademarks*

[37] TD argues that there is a paradox in the Federal Court's conclusion that the word THERME is descriptive such that anyone should be able to use it, while also finding that TD's

THERME and THERME GROUP marks are confusing with Nordik's THERMËA trademarks such that TD may not use them.

[38] In my view, there is no paradox. As explained by the Federal Court at paragraph 53 of the Decision, the finding of descriptiveness of the word THERME is based on the French word "thermes". These words have identical pronunciation in French. The finding that the THERME and THERME GROUP marks are confusing with THERMËA is based on how the words are pronounced in English. The Federal Court found as a fact that the word THERME is pronounced "THER-MA" in English (see paragraph 92 of the Decision). In this sense, the word found to be descriptive in French (pronounced as "THERM") is not the same as the word found to be confusing in English (pronounced as "THER-MA"). Though TD does not appear to want to acknowledge this factual conclusion concerning the English pronunciation, it cannot be set aside absent a palpable and overriding error.

[39] As indicated above, TD argues that the Federal Court erred in finding the Poplack Affidavit was inadmissible. The Federal Court found that the Poplack Affidavit was not necessary, and hence not admissible as expert evidence. The Federal Court based this finding on the fact that the issue of confusion concerned the perspective of an average consumer, and it did not need the assistance of an expert in that regard. The Federal Court relied on the reasons in *Cathay Pacific Airways Limited v. Air Miles International Trading B.V.*, 2016 FC 1125 (*Cathay Pacific*), specifically paragraphs 80 to 83.

[40] TD argues that the Federal Court was wrong to exclude the Poplack Affidavit because it provided evidence concerning the meaning and visual and phonetic effect of the marks in issue, which would assist the Federal Court in its determination of how a consumer is likely to react to them. TD argues that the Federal Court misapplied *Cathay Pacific* and *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (*Masterpiece*), on which *Cathay Pacific* relied. It distinguishes *Cathay Pacific* and *Masterpiece* on the basis that they did not involve coined words or uncertain pronunciations as are present in this case.

[41] Having considered TD's arguments in this regard, I am not convinced that the Federal Court made any error in law. For example, it did not suggest that expert evidence is unnecessary in all trademark cases, or even in all cases involving coined or invented words with uncertain pronunciations.

[42] Moreover, as a factually suffused conclusion, I am not convinced that the Federal Court made an error that was either palpable or overriding. For example, it is not clear to me that an expert could significantly assist the Federal Court in determining how an ordinary consumer would pronounce THERME in English.

[43] TD also argues that the Federal Court erred by failing to recognize the suggestiveness and low inherent distinctiveness of the "THERM" prefixal element that is common to TD's THERME and THERME GROUP marks on the one hand, and Nordik's THERMËA marks on the other. It argues that, had the Federal Court recognized such suggestiveness and low inherent distinctiveness, it would have recognized the importance of the distinction between the "E" at the

end of TD's THERME and the "ËA" at the end of Nordik's THERMËA. Finally, TD argues that the Federal Court erred by not focusing on the "ËA" at the end of THERMËA as a particularly striking or unique aspect of the mark, as contemplated in *Masterpiece* at paragraph 64.

[44] In my view, TD's arguments concerning inherent distinctiveness and striking features relate to other factually suffused conclusions by the Federal Court that cannot be disturbed in the absence of a palpable and overriding error, of which I see none.

[45] In the end, I am comfortable with the Federal Court's conclusion that the THERME mark, pronounced in English as "THER-MA", is confusing with Nordik's THERMËA trademarks, pronounced in English as "THER-MAY-A" or "THER-ME-A".

IV. Conclusion

[46] I would dismiss the appeal with costs.

[47] As mentioned above, I would change the style of cause as appears at the beginning of these reasons.

"George R. Locke"
J.A.

"I agree.
Sylvie E. Roussel J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-403-24
STYLE OF CAUSE:	THERME DEVELOPMENT (CY) LTD. v. NORDIK SPA VILLAGE INC. and NORDIK IMMOBILIERS WINNIPEG INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 18, 2025
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	ROUSSEL J.A. HECKMAN J.A.
DATED:	MAY 5, 2026

APPEARANCES:

Melissa Binns James Green	FOR THE APPELLANT
Pascal Lauzon	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Gowling WLG (Canada) LLP Hamilton, Ontario	FOR THE APPELLANT
BCF S.E.N.C.R.L. Montréal, Quebec	FOR THE RESPONDENTS