



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2025 TMOB 57

**Date of Decision:** 2025-03-07

## **IN THE MATTER OF A SECTION 45 PROCEEDING**

**Requesting Party:** Christopher Tan

**Registered Owner:** H.H. Franchising Systems, Inc.

**Registration:** TMA770,886 for CARING HEARTS

## **INTRODUCTION**

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) concerning registration No. TMA770,886 for the trademark CARING HEARTS (the Mark).

[2] The registration covers the services [the Services]:

Personal support services for individuals at their residences, namely, companionship, daily living personal care namely bathing, dressing, medication reminders, light housekeeping, errands, transportation to appointments, bill paying, mail and household affairs.

[3] The owner of the registration is H.H. Franchising Systems, Inc. (the Owner).

[4] For the reasons that follow, I conclude the registration should be maintained.

### **PROCEEDING**

[5] At the request of Christopher Tan (the Requesting Party) the Registrar of Trademarks issued the Owner of the Mark a notice on May 1, 2023, under section 45 of the Act.

[6] The notice required the Owner to show whether the Mark was used in Canada in association with each of the services specified in the registration at any time within the three years immediately preceding the date of the notice and, if it was not, the date when it was last used and the reason for the absence of use since that date. In this case, the relevant period for showing use is May 1, 2020 , to May 1, 2023 (the Relevant Period).

[7] The pertinent definition of use applicable to this matter is set out in section 4(2) of the Act:

A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[8] The purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the Register. The evidentiary threshold that a registered owner must meet is therefore quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448 at para 68] and “evidentiary overkill” is not required [*Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD) at para 3]. An owner’s evidence needs only supply facts from which a conclusion of use may follow as a logical or reasonable inference [*Cosmetic Warriors Limited v Riches, McKenzie & Herbert LLP*, 2019 FCA 48 at para 10 and *Sherzady v Norton Rose Fullbright Canada LLP/sencrl, srl*, 2022 FC 1712 at para 21]. Nonetheless, the evidence must suffice to inform

the Registrar of the prevailing situation in respect of the use of the trademark during the relevant period. It cannot be limited to bald assertions of use [*Plough (Canada) Limited v. Aerosol Fillers Inc.* (1980), 53 CPR (2d) 62 (FCA)].

[9] Where the owner has not shown “use”, the registration is liable to be expunged or amended, unless special circumstances excuse the absence of use.

[10] In response to the Registrar’s notice, the Owner relies on the affidavit of Mr. Barry Nelson, its Executive Vice President and General Counsel.

[11] Only the Owner filed written representations and attended the hearing.

#### **SUMMARY OF RELEVANT EVIDENCE**

[12] Throughout the Relevant Period Mr. Nelson held a senior position with the Owner. The relevant evidence includes:

- Information that the Owner is a franchisor providing personal support services through its licensed franchisees located in North America, including in Canada, the quality of whose services it controls [Nelson affidavit para 3 and Exhibit E, see for example section clause 7.2, 7.3, 8.1 and 8.2 Franchise Agreement];
- Information that one of the Owner’s home care franchisees provides licensed services in association with the CARING HEARTS trademark in Medicine Hat, Alberta, and has done so since 2015, earning more than one million dollars during the Relevant Period by offering the Services [Nelson affidavit, paras 4, 11 and 12 and 13(a) and Exhibit E];
- A statement that the Owner, through its franchised licensees, has used the CARING HEARTS trademark in Canada in association

with personal support services for individuals at their residences, namely, companionship, daily living, mediation reminders, light housekeeping, errands, transportation to appointments, bill paying, mail and household affairs, within the Relevant Period [Nelson affidavit, para 8];

- That the Owner and its Canadian franchisee spent considerable amounts of money on advertising and promotion of the Services during the Relevant Period (providing a cost breakdown and documentary support), with the advertising showing the Mark [Nelson affidavit, paras 9 and 10 and for example Exhibits B, G and K];
- That revenue associated with the provision of services during the Relevant Period was in excess of one million dollars with documentary support provided [Nelson affidavit, para 13 and Exhibits F];
- A statement that all services were offered and available during the Relevant Period, and advertised on website materials and brochures displaying the Mark, which materials include the availability of services described as “personal care”, “using the bathroom”, “dressing” and bathing/personal hygiene [Nelson affidavit, paras 13(c) and 5 and Exhibits G and K];
- Website materials and brochures indicating availability of the services “personal care”, “using the bathroom”, “dressing” and bathing/personal hygiene [Nelson affidavit, Exhibits G and K].

### **ANALYSIS AND REASONS FOR DECISION**

#### ***Use of the Mark in Association with the Services other than Bathing and Dressing***

[13] A section 45 affiant’s statements should be accepted at face value and accorded substantial credibility absent evidence to the contrary [*Oyen Wiggs*

*Green & Mutala LLP v Atari Interactive Inc*, 2018 TMOB 79]. Mr. Nelson states clearly that the Mark was used in association with “personal support services for individuals at their residences, namely, companionship, daily living, mediation reminders, light housekeeping, errands, transportation to appointments, bill paying, mail and household affairs” within the Relevant Period. He substantiates this with financial statements showing significant revenues earned from “offering Personal Support Services in Canada”.

[14] Moreover, materials in evidence show the Mark was displayed in the advertising of these services and that they were available to be provided to customers in Canada during the Relevant Period.

[15] The Owner clearly controlled the character and quality of the services advertised and performed by its Canadian franchisee as set out in the franchising agreement. As such, use of the Mark via the performance and advertising of the Services enured to the Owner’s benefit pursuant to section 50 of the Act.

[16] Accordingly, I am satisfied the Owner has demonstrated its use of the Mark in Canada during the relevant period in association with the services “personal support services for individuals at their residences, namely, companionship, daily living, mediation reminders, light housekeeping, errands, transportation to appointments, bill paying, mail and household affairs”, within the meaning of sections 4(2), 45 and 50 of the Act.

### ***Use of the Mark in Association with Bathing and Dressing***

[17] Evidence relied upon in respect of a section 45 proceeding should be considered as a whole, as opposed to focusing on individual pieces of evidence in isolation [*Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB); *Fraser Milner Casgrain LLP v Canadian Distribution Channel Inc* (2009), 78 CPR (4th) 278 (TMOB)]. As

well, reasonable inferences can be made from the evidence provided [*Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64].

[18] Mr. Nelson does not explicitly reference use of the Mark in association with bathing and dressing services, even if he does specify personal care *per se*. I note however that, at paragraph 13(c), Mr. Nelson states that the Owner, through its franchisee, "...operated and offered all services listed in the trademark registration and at paragraph 5 of this affidavit." The registration of course includes the services of "personal care namely bathing and dressing".

[19] Moreover, Mr. Nelson's statement is supported by the documentary evidence which shows that the Owner advertised and indeed offered "personal care", "bathing/personal hygiene", "using the bathroom" and "dressing" services with the Mark [Nelson affidavit, Exhibit G and K]. This is consistent with Mr. Nelson's statement that all Services were operated and offered through its Canadian franchisee.

[20] Accordingly, I am satisfied that the Owner has demonstrated use of the Mark in association the Services, including with personal care, namely bathing and dressing, during the Relevant Period within the meaning of sections 4(2), 45 and 50 of the Act.

#### **DISPOSITION**

[21] Pursuant to the authority delegated to me under section 63(3) of the Act, and in compliance with the provisions of section 45 of the Act, the registration will be maintained.

Coleen Morrison  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office





# Appearances and Agents of Record

**HEARING DATE:** 2024-11-06

## **APPEARANCES**

**For the Requesting Party:** No one appearing

**For the Registered Owner:** Sangeetha Punniyamorthy

## **AGENTS OF RECORD**

**For the Requesting Party:** Blaney McMurtry LLP

**For the Registered Owner:** DLA Piper (Canada) LLP