



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2025 TMOB 197

Date of Decision: 2025-09-26

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Shift Law Professional Corporation

Registered Owner: Joanna Habbous

Registration: TMA914,954 for PHYSIOHEALTH STUDIOS

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) with respect to registration No. TMA914,954 for the trademark PHYSIOHEALTH STUDIOS (the Mark), owned by Joanna Habbous (the Owner).

[2] For the reasons that follow, I conclude that the registration ought to be amended.

THE RECORD

[3] At the request of Shift Law Professional Corporation (the Requesting Party), the Registrar of Trademarks issued a notice to the Owner under section 45 of the Act on August 28, 2024. The notice required the Owner to show whether the Mark had been used in Canada in association with the goods and services specified in the registration

at any time within the three-year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of use since that date. In this case, the relevant period for showing use is August 28, 2021, to August 28, 2024.

[4] The Mark is registered for use in association with the following goods and services:

Goods (Nice class & Statement)

- (1) Physiotherapy equipment and supplies, namely, resistance tubing, supports, braces, wraps, slings, heat packs, cold packs, athletic tape, medical tape, exercise balls, foam rollers, massage balls for general health and well-being, compression garments; printed publications, namely, magazines, pamphlets, brochures, guides, posters, cards, stickers and leaflets, all containing information relating to physical fitness, athletic therapy, holistic massage therapy, fitness training, physical fitness instruction, acupuncture, physical fitness consulting, physical rehabilitation, health and wellness, nutrition, and exercise.
- (2) Custom orthotics; orthotic bracing.
- (3) Nutritional supplements for general health and well-being; vitamin supplements.

Services (Nice class & Statement)

- (1) Physiotherapy; athletic therapy; holistic massage therapy; fitness training; physical fitness instruction; acupuncture; physical fitness consulting; physical rehabilitation; providing a website in the fields of physical fitness, athletic therapy, holistic massage therapy, fitness training, physical fitness instruction, acupuncture, physical fitness consulting, physical rehabilitation, health and wellness, nutrition, and exercise.
- (2) Chiropractic services; providing a website in the field of chiropractic and orthotics.
- (3) Operation of a business offering naturopathy services; educational services in the field of nutrition; food and nutrition consultation services; providing a website in the fields of naturopathy, food, and nutrition.
- (4) Operation of a business offering medical and cosmetic varicose vein therapy, sclerotherapy, and vein therapy; providing a website in the fields varicose vein therapy, sclerotherapy, and vein therapy.
- (5) Osteopathy treatment by osteopathic manual practitioners; providing a website in the field of osteopathy.

[5] The relevant definitions of “use” in the present case are set out in section 4 of the Act as follows:

4(1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

4(2) 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.

[6] In response to the notice, the Owner furnished her own affidavit, sworn on November 26, 2024. Both parties filed written representations; only the Owner was represented at an oral hearing.

EVIDENCE

[7] The Owner is the owner and Clinic Director of Physiohealth Studios (Physiohealth), an “integrated multidisciplinary clinic and studio located in downtown Toronto”. She states that the total revenues from the operation of Physiohealth since 2011 have been over \$11 million. She provides images of the Mark being displayed on interior and exterior signage of the clinic (Exhibit B), screenshots from the Physiohealth website *physiohealthstudios.com* (Exhibit C), social media screenshots from the Physiohealth social media accounts (Exhibit D), online advertising materials (Exhibit E), and invoices, letterhead, and email signatures (Exhibit F), all representative of how the Mark was displayed during the relevant period.

[8] She explains that in the normal course of business, patients book an appointment, then visit the clinic to attend the appointment, at which time they are recommended a specific course of treatment, including physiotherapy, chiropractic, acupuncture, naturopathy, and the like. Specific products may be recommended; these are sold at the clinic or may be ordered. As Exhibit H, she attaches representative invoices for a number of goods, including athletic/medical tape, compression garments/wraps, exercise balls, heat/cold packs, massage balls, custom orthotics and

orthopedic bracing, resistance tubing, and supports and bracing/wraps/slings. The Mark is displayed in the top left corner of the invoices.

[9] She states that the clinic last sold foam rollers in 2019, but has not stocked them since then due to “limited space and prioritizing other goods, fewer patients during the Covid pandemic, and our medical practitioners’ specific preferences”. Similarly, she states that the clinic last sold vitamins and supplements in January 2021 due to a practitioner’s preference for direct-to-consumer purchase and shipping, but that the Owner intends to sell them at the clinic again. As Exhibit K, she attaches examples of informational publications provided at the clinic and online. Again, the Mark is displayed in the top left corner of the invoices.

[10] As Exhibit L, the Owner attaches invoices dated during the relevant period for services including acupuncture, athletic therapy, chiropractic, cosmetic vein treatment, massage therapy, naturopathy/food and nutrition, osteopathic treatment, personal training/physical fitness, and physiotherapy/physical rehabilitation. She also attaches a report for medical vein treatments, which are billed separately.

ANALYSIS

[11] At the outset, I note that in the Owner’s affidavit and written representations, the Owner submits that these proceedings are frivolous and vexatious as they arose in the context of a separate Federal Court proceeding. However, section 45 of the Act is clear that “any person” may request the issuance of a section 45 notice. Thus, nothing prevented the Requesting Party from requesting that the Registrar issue the notice, nor did the Registrar determine there was good reason not to send the notice. The sole issue to be determined in a section 45 proceeding is whether a trademark has been used within the meaning of the Act; as such, the motivation of the Requesting Party is generally not a consideration [see *Consorzio del Prosciutto di Parma v Maple Leaf Foods Inc*, 2010 TMOB 52 at para 20; *Smart & Biggar LLP v Maranda Rampersaud*, 2023 TMOB 196 at para 12].

[12] Similarly, the Owner submits that the Requesting Party's submissions "raise concerns dealt with in decisions by the Trademarks Opposition Board and the Courts", namely, in the Federal Court decision in *Habbous v Arc Physio Health Ltd*, 2025 FC 297 (Arc), an infringement decision under section 57 of the Act in which the respondents appear to have been represented by the Requesting Party. The Owner also submits that , "the validity of [the Owner]'s trademark registration has been recognized by the Court and conceded by the Requesting Party's clients". However, the validity of a trademark is not at issue in a section 45 proceeding; the only matter to be determined is whether the Mark has been used as set out in sections 4 and 45 of the Act, or whether special circumstances existed that would excuse non-use.

[13] In its written representations, the Requesting Party submits that the registration ought to be amended to remove the following goods and services (the Contested Goods & Services):

Goods (Nice class & Statement)

- (1) Physiotherapy equipment and supplies, namely, resistance tubing, supports, braces, wraps, slings, heat packs, cold packs, athletic tape, medical tape, exercise balls, foam rollers, massage balls for general health and well-being, compression garments; printed publications, namely, magazines, pamphlets, brochures, guides, posters, cards, stickers and leaflets, all containing information relating to physical fitness, athletic therapy, holistic massage therapy, fitness training, physical fitness instruction, acupuncture, physical fitness consulting, physical rehabilitation, health and wellness, nutrition, and exercise.
- (3) Nutritional supplements for general health and well-being; vitamin supplements.

Services (Nice class & Statement)

- (1) physical fitness instruction; [...] physical fitness consulting; physical rehabilitation; providing a website in the fields of [...] physical fitness consulting, physical rehabilitation.

[14] As the Requesting Party appears to concede that use of the Mark has been established in association with the remaining goods and services, and as the evidence is supportive of a finding of use in association with such goods and services, the following goods and services will be maintained:

Goods (Nice class & Statement)

- (2) Custom orthotics; orthotic bracing.

Services (Nice class & Statement)

- (1) Physiotherapy; athletic therapy; holistic massage therapy; fitness training; [...] acupuncture; [...] providing a website in the fields of physical fitness, athletic therapy, holistic massage therapy, fitness training, physical fitness instruction, acupuncture, [...] health and wellness, nutrition, and exercise.
- (2) Chiropractic services; providing a website in the field of chiropractic and orthotics.
- (3) Operation of a business offering naturopathy services; educational services in the field of nutrition; food and nutrition consultation services; providing a website in the fields of naturopathy, food, and nutrition.
- (4) Operation of a business offering medical and cosmetic varicose vein therapy, sclerotherapy, and vein therapy; providing a website in the fields varicose vein therapy, sclerotherapy, and vein therapy.
- (5) Osteopathy treatment by osteopathic manual practitioners; providing a website in the field of osteopathy.

The Contested Goods

[15] With respect to the Contested Goods, the Requesting Party submits that there is no evidence of how the Mark was associated with these goods at the time of transfer, and that the evidence instead indicates that many such goods were marked by third-party trademarks and not the Mark at the time of sale, suggesting that the Owner is a seller of third-party products rather than its own products. In response, the Owner submits that her affidavit includes a detailed description of her normal course of trade, along with representative invoices which display the Mark and provide a description of the goods sold. In the Owner's submission, "this should be the end of the Registrar's inquiry" since section 45 proceedings are not intended to involve "any trial of a contested issue of fact" [citing *United Grain Growers Ltd v Lang Michener (CA)*, 2001 FCA 66 at paras 11, 14-16]. Furthermore, with respect to the Requesting Party's submission that the Owner has provided no photographic evidence of how the Mark would be associated with the goods at the time of transfer, the Owner appears to

suggest that this submission amounts to the improper introduction of evidence since “the analysis provided suggests that the absence of photos is evidence of non-use under section 4”.

[16] With respect to the Owner’s submissions regarding the scope of section 45 proceedings, I agree with the Owner that the purpose of section 45 proceedings is to determine whether a registered owner has used the trademark in question in view of the evidence put forward by that owner, and that it is improper for the Registrar to expand that inquiry into such questions as whether a trademark marked on goods is being used as a trademark within the meaning of section 2 of the Act [*United Grain Growers* at paras 14-16] or by a court admitting evidence from a requesting party at the appeal level [*Meredith & Finlayson v Canada (Registrar of Trade Marks)* (1991), 40 CPR (3d) 409 (FCA)]. However, sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with the goods and services specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)]. In this respect, the Federal Court has held that the Registrar must be able to “rely on an inference from proven facts rather than on speculation” to satisfy every element required by the Act [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 11; see also *Smart & Biggar v Curb*, 2009 FC 47].

[17] In other words, the fact that the Owner has described her normal course of trade and provided invoice evidence showing sales of goods in Canada during the relevant period is not “the end of the inquiry” as suggested by the Owner, since the Owner must still meet the crucial step of establishing the requisite notice of association between the Mark and the goods at the time of transfer, as set out in section 4(1) of the Act. In this respect, the fact that the Requesting Party has pointed to the absence of photographic evidence demonstrating this association does not somehow amount to the improper introduction of evidence.

[18] In its written representations, the Owner refers to the presence of the Mark on the Exhibit H invoices showing sales of goods. The Federal Court of Appeal has held that display of a trademark at the top of an invoice that accompanies goods at the time

of transfer in the normal course of trade may, in some circumstances, constitute use of that trademark in association with the goods listed in the invoice [see *Hortilux Schreder BV v Iwasaki Electric Co*, 2012 FCA 321]. The major consideration remains “whether the trade-mark is being used as a trade-mark in describing the wares contained in the invoice and, as such, whether appropriate notice of such use is being given to the transferee of the wares” [per *Tint King of California Inc v Canada (Registrar of Trade Marks)*, 2006 FC 1440 at para 32]. In this respect, it is important to consider the prominence of the trademark at the top of the invoice and whether other trademarks appear on the invoice, either in the body or otherwise [per *Hortilux*, supra, at para 12].

[19] In this case, third party trademarks do appear in the product descriptions in some instances, including “Bauerfeind Compression Socks”, “DonJoy Custom ACL Brace”, “Acuball”, and “Breg Customized Knee Brace”. Further, the Owner states in her affidavit that in the normal course of trade, the clinic practitioners may “recommend specific products” and that the clinic “routinely works with specific vendors” to either order that vendor’s products as needed, or by keeping its products in stock at the clinic. In view of this evidence, I find that the registered goods “braces”, “massage balls for general health and well-being”, and “compression garments” would have been associated with third-party trademarks at the time of transfer, and that the presence of the Mark on the invoice would not provide the requisite notice of association with the goods, following *Hortilux*. Although there is an entry in the Exhibit H invoices for “custom knee brace” that is not associated with another trademark, I infer that the sale of this product would have followed the pattern set out by the Owner at paragraph 35 of her affidavit, which indicates that these are ordered from third-party vendors, presumably including the ones identified by the third-party trademarks identified elsewhere in the Exhibit H invoices for braces.

[20] As there is no evidence of special circumstances which would excuse non-use of the Mark with the registered goods “braces”, “massage balls for general health and well-being”, and “compression garments”, the registration will be amended to delete these goods.

[21] However, with respect to cold and hot packs, exercise bands, and lacrosse balls, the Owner confirms that these goods are sold directly by the clinic. In view of this explanation, and as the Exhibit H invoices show sales of athletic tape, exercise and lacrosse balls, hot/cold packs, and resistance bands which are not associated with third-party trademarks, I accept that the display of the Mark on the invoices would, in these cases, establish the requisite notice of association with the goods. In this respect, since the Owner has explicitly confirmed that the invoices show sales of the registered goods “resistance tubing”, I accept that the resistance bands listed on the invoices would amount to the registered good “resistance tubing”, in view of the well-established principle that when interpreting a statement of goods or services in a section 45 proceeding, one is not to be “astutely meticulous when dealing with [the] language used” [see *Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654 at para 17].

[22] Accordingly, I find that the Owner has established use of the Mark in association with the registered goods “resistance tubing”, “heat packs”, “cold packs”, “athletic tape”, and “exercise balls” within the meaning of sections 4 and 45 of the Act.

[23] With respect to the registered goods “supports”, “wraps”, “slings”, and “medical tape”, the Owner states that the Exhibit H invoices show sales of “athletic / medical tape” and “supports and bracing / wraps / slings”. However, to the extent that these goods can be correlated with the entries in the invoices for “athletic tape” and “custom orthotics” or other products, use evidenced with respect to one specific good generally cannot serve to maintain multiple goods in a registration [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA) at paras 13 and 14]. Having distinguished these items in the statement of goods, the Owner was required to provide evidence with respect to *each* of them accordingly. As the Owner has not done so, and in the absence of special circumstances excusing non-use, the registration will be amended to delete these goods.

[24] As for the printed publication goods, the Requesting Party submits that the digital publications shown in evidence are not equivalent to these registered goods, and that the Exhibit K image does not appear to show printed publications bearing the Mark and

is not dated during the relevant period. The Owner submits that section 4 of the Act does not provide an exhaustive list on how to establish the requisite association between a trademark and goods, and detailed photographic evidence is not necessary.

[25] I agree that the digital publications in evidence do not amount to “printed publications” as set out in the registration. While the Owner’s evidence refers to informational publications on the topics of naturopathy and osteopathy, the evidence does not confirm that any such publications were transferred in the normal course of trade during the relevant period, nor does it explain how the Mark would have been associated with these goods at the time of transfer. Accordingly, as there is no evidence of special circumstances excusing non-use of the Mark in association with these goods, the registration will be amended to delete the “printed publications” goods.

Special Circumstances

[26] As for foam rollers, supplements, and vitamins, the Requesting Party submits that the circumstances described in the Owner’s affidavit do not amount to special circumstances excusing non-use. The Owner, however, submits that the Federal Court confirmed in the *Arc* decision that the Covid-19 pandemic significantly impacted the Owner’s business. In this respect, the Owner submits that the Covid-19 pandemic will excuse non-use of a trademark if the pandemic was the cause of such non-use [citing *The Wonderful Company LLC v Fresh Trading Limited*, 2023 TMOB 8].

[27] To determine whether special circumstances have been established, the Registrar must first determine, in light of the evidence, why in fact the trademark was not used during the relevant period. Second, the Registrar must determine whether these reasons for non-use constitute special circumstances [per *Registrar of Trade Marks v Harris Knitting Mills Ltd* (1985), 4 CPR (3d) 488 (FCA)]. The Federal Court has held that special circumstances mean circumstances or reasons that are “unusual, uncommon, or exceptional” [*John Labatt Ltd v Cotton Club Bottling Co* (1976), 25 CPR (2d) 115 (FCTD) at para 29].

[28] If the Registrar determines that the reasons for non-use constitute special circumstances, the Registrar must still decide whether such special circumstances *excuse* the period of non-use. This involves the consideration of three criteria: (i) the length of time during which the trademark has not been in use; (ii) whether the reasons for non-use were beyond the control of the registered owner; and (iii) whether there exists a serious intention to shortly resume use [per *Harris Knitting Mills*].

[29] All three criteria are relevant, but satisfying the second criterion is essential for a finding of special circumstances *excusing* non-use [per *Smart & Biggar v Scott Paper Ltd*, 2008 FCA 129].

[30] The Owner gives several reasons for non-use of foam rollers, supplements and vitamins, including “limited space and prioritizing other goods, fewer patients during the Covid pandemic, and our medical practitioners’ specific preferences” for foam rollers, and a practitioner’s preference to use direct-to-consumer purchase and shipping with respect to supplements and vitamins. At the oral hearing, the Owner submitted that the pandemic was the overarching reason that these decisions had to be made; however, if this was the case, it is not clear from the affidavit. In any event, even if these decisions were made in the context of the pandemic, the affidavit nevertheless indicates that they were voluntary decisions made by the Owner’s staff, which do not amount to special circumstances [see *Wonderful Company* at para 42]. Furthermore, the Owner has not established that any conditions preventing the Owner from using the Mark in association with the goods in question would have applied to the entire relevant period, which extends to August 28, 2024. Thus, while I do not doubt that the pandemic impacted the Owner’s business, I am not satisfied that the absence of non-use of the Mark in association with these goods was, in fact, the result of circumstances beyond the Owner’s control, as opposed to a voluntary decision based on the preferences of the Owner’s practitioners. Accordingly, the registration will be amended to delete “foam rollers” and “Nutritional supplements for general health and well-being; vitamin supplements”.

The Contested Services

[31] As for the Contested Services, the Requesting Party submits that the Owner's affidavit provides no information concerning use of the Mark in association with any of these services. In response, the Owner notes that she has provided invoices for "personal training" and "physical fitness", while the website screenshots indicate that clients can visit fitness trainers at the clinic, along with information about specific personal trainers. Similarly, the Owner submits that "physical rehabilitation" is the core of the Owner's business, that she has provided representative invoices relating to physical rehabilitation, and that her website makes numerous references to rehabilitation. The Owner submits that these examples are sufficient to establish use of the Mark in association with "physical fitness instruction", "physical fitness consulting", "physical rehabilitation", and "providing a website in the fields of [...] physical fitness consulting, physical rehabilitation".

[32] Unlike goods, it has been held that "in certain cases, statements of services contain overlapping and redundant terms in the sense that the performance of one service would necessarily imply the performance of another" [*Gowling Lafleur Henderson LLP v Key Publishers Co*, 2010 TMOB 7 at para 15; see also *Provent Holdings Ltd v Star Island Entertainment, LLC*, 2014 TMOB 178 at para 22; *GMAX World Realty Inc v RE/MAX, LLC*, 2015 TMOB 148 at para 69]. Further, it has been held that services should be given a broad and liberal interpretation [*Renaud Cointreau & Co v Cordon Bleu International Ltd* (2000), 11 CPR (4th) 95 (FCTD), aff'd 2002 FCA 11; *Live! Holdings LLC v Oyen Wiggs Green & Mutala LLP*, 2019 FC 1042]. In view of these principles, I accept that between the invoices for "personal training" and the numerous references on the Owner's website to personal training and physical rehabilitation establish that, at minimum, the Owner advertised and was offering and prepared to perform each of Contested Services in association with the Mark (as displayed on the invoices, signage, and on the Owner's website).

[33] Accordingly, I am satisfied that the Owner has demonstrated use of the Mark in association with "physical fitness instruction", "physical fitness consulting", "physical

rehabilitation”, and “providing a website in the fields of [...] physical fitness consulting, physical rehabilitation” within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[34] In view of all of the foregoing, 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 amended to delete “[...] supports, braces, wraps, slings, [...] medical tape, [...] foam rollers, massage balls for general health and well-being, compression garments; printed publications, namely, magazines, pamphlets, brochures, guides, posters, cards, stickers and leaflets, all containing information relating to physical fitness, athletic therapy, holistic massage therapy, fitness training, physical fitness instruction, acupuncture, physical fitness consulting, physical rehabilitation, health and wellness, nutrition, and exercise” from goods (1), and the entirety of goods (3).

[35] The amended registration will read as follows:

Goods (Nice class & Statement)

- (1) Physiotherapy equipment and supplies, namely, resistance tubing, heat packs, cold packs, athletic tape, exercise balls.
- (2) Custom orthotics; orthotic bracing.

Services (Nice class & Statement)

- (1) Physiotherapy; athletic therapy; holistic massage therapy; fitness training; physical fitness instruction; acupuncture; physical fitness consulting; physical rehabilitation; providing a website in the fields of physical fitness, athletic therapy, holistic massage therapy, fitness training, physical fitness instruction, acupuncture, physical fitness consulting, physical rehabilitation, health and wellness, nutrition, and exercise.
- (2) Chiropractic services; providing a website in the field of chiropractic and orthotics.
- (3) Operation of a business offering naturopathy services; educational services in the field of nutrition; food and nutrition consultation services; providing a website in the fields of naturopathy, food, and nutrition.

- (4) Operation of a business offering medical and cosmetic varicose vein therapy, sclerotherapy, and vein therapy; providing a website in the fields varicose vein therapy, sclerotherapy, and vein therapy.
- (5) Osteopathy treatment by osteopathic manual practitioners; providing a website in the field of osteopathy.

G.M. Melchin
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2025-09-11

APPEARANCES

For the Requesting Party: No one appearing

For the Registered Owner: Roland Battistini

AGENTS OF RECORD

For the Requesting Party: John H. Simpson (Shift Law Professional
Corporation)

For the Registered Owner: Roland Battistini