

**SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS**

BETWEEN:

**HEALTHWARD CANADA**

Appellant

– and –

**VAXCO LTD**

Respondent

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**FACTUM OF THE RESPONDENT**

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## I. OVERVIEW

[1] This case is about the Appellant's attempt to co-opt the protection of official marks under the *Trademarks Act* (the "*Act*") to foreclose the Respondent's entry into the Canadian vaccine market. Official marks receive broad protections in order to prevent traders from appropriating the symbols of public institutions to gain a competitive edge. However, in this case, the Appellant is unfairly restricting competition by adopting an official mark which knowingly capitalizes on the goodwill of the Respondent's long-standing trademark.

[2] The Respondent, Vaxco Ltd. ("Vaxco"), is a well-known U.S. business in the vaccine industry. Vaxco has been using its "FLUSTOPPA & Design" trademark to sell flu vaccines and related services in the U.S. for over 20 years. Although Vaxco has not sold vaccines in Canada, it provides vaccine information and services to Canadians via its website. Upon receiving its long-awaited approval from Health Canada in February 2019, Vaxco applied to register the FLUSTOPPA trademark in March 2019. The Registrar of Trademarks (the "Registrar") denied Vaxco's application, citing the Appellant's official mark. Vaxco applied for judicial review of the Registrar's decision.

[3] The Appellant, Healthward Canada ("Healthward"), is the charitable Canadian branch of a network of public health organizations specializing in vaccination. Healthward is supported in part by a conditional funding arrangement with Health Canada. Healthward's chief affiliate, Healthward Industries Corp. ("Industries"), is a for-profit company which manufactures and supplies vaccines to Healthward and other vaccination providers using the FLUSTOPPER mark. Industries is a direct competitor of Vaxco, and was aware of both Vaxco's FLUSTOPPA mark and its intended expansion into Canada. Healthward adopted "FLUSTOPPER" as an official mark in January 2019, and subsequently authorized its use by Industries for vaccines and related supplies.

[4] This appeal raises two issues: whether Healthward’s “FLUSTOPPER” mark is a valid official mark, and if so, whether Vaxco’s prior use of its “FLUSTOPPA & Design” trademark entitles Vaxco to the continued use of that mark.

[5] First, Healthward cannot seek protection under the official marks regime because Healthward is not a public authority. As will be demonstrated below, Healthward is not under sufficient government control to elevate it to the status of public authority.

[6] Furthermore, Healthward cannot be afforded the protections of the official marks regime while exploiting that regime to give its affiliate a competitive advantage. Official marks are granted broad protections because they are *outside* the ambit of use in trade and business. While Healthward’s activities serve the public interest, any public benefit is overshadowed by Healthard and Industries’ anti-competitive tactics. Namely, Healthward receives royalties from Industries’ use of the “FLUSTOPPER” mark in the sale of vaccines and related supplies.

[7] Second, Vaxco’s prior use of “FLUSTOPPA & Design” establishes a right to continued use, notwithstanding the validity of “FLUSTOPPER” as an official mark. Vaxco has established prior use in association with goods and services, via online vaccine booking and educational services available to Canadians. Through these services, Vaxco has provided material benefits to Canadians, analogous to those that might be provided by a “bricks and mortar” clinic. The online reservation of a vaccines actuates a transfer of property, which constitutes use in association with goods in Canada.

[8] This appeal should be dismissed. The Court of Appeal correctly held that “FLUSTOPPER” is not a valid official mark because Healthward is not a public authority, and that Vaxco’s prior use of the FLUSTOPPA mark nevertheless establishes a right to continued use. Healthward’s FLUSTOPPER mark therefore cannot block Vaxco from registering its “FLUSTOPPA & Design” trademark in Canada.

## II. STATEMENT OF FACTS

### 1. Healthward and its Business Relationship with Industries

[9] Healthward is a registered charity in Canada, providing educational programs in the field of vaccination and running mobile health clinics offering free vaccinations.<sup>1</sup> Healthward is part of a global network of affiliated organizations specializing in public health issues related to vaccination.<sup>2</sup> Chief among Healthward's affiliated organizations is Industries, a for-profit corporation that has operated in Canada since the mid-1990's. Industries manufactures vaccines and medical supplies and sells these goods to Healthward's mobile clinics. Healthward has authorized Industries to use the FLUSTOPPER mark in exchange for royalties on products Industries sells to third parties.<sup>3</sup> Industries is a direct competitor of Vaxco and has knowledge of Vaxco's presence in the vaccine industry.

### 2. Healthward's Voluntary Relationship with the Government

[10] Healthward began operating in Canada in 2014 and lobbied the federal government regarding the importance of vaccination for public health.<sup>5</sup> In 2015, Healthward entered into a funding arrangement with Health Canada. Pursuant to their agreement, Health Canada funds a portion of Healthward's operating costs under a few conditions.<sup>6</sup> Firstly, Health Canada is to be consulted on the curriculum and messaging of Healthward's educational programs. Second, Health Canada may appoint two of the five members of Healthward's board of directors. Finally, Health Canada identifies underserved communities in need of Healthward's mobile clinic services. If Healthward is unable to accommodate those communities, Health Canada

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<sup>1</sup> *Vaxco Ltd v Healthward Canada*, 20 TCCIP 1222 at para 2 [Trial].

<sup>2</sup> *Ibid* at para 2.

<sup>3</sup> *Ibid* at paras 12–13.

<sup>5</sup> *Ibid* at paras 9–10.

<sup>6</sup> *Ibid* at paras 10–11.

may take back a portion of its funding. Both Healthward and Health Canada have the right to unilaterally terminate the agreement.

### **3. Vaxco's Prominent Presence in the United States and in Canada**

[11] Vaxco is a U.S. corporation in the business of manufacturing, distributing, and selling vaccines and related medical supplies.<sup>8</sup> Vaxco also provides a variety of related services including distributing educational materials on the importance of vaccination, providing medical advice, and operating vaccination clinics in the United States. Vaxco has been making and selling its FLUSTOPPA vaccines in the United States for more than twenty years.<sup>10</sup> Vaxco's FLUSTOPPA vaccines were first distributed in Canada in March 2019.<sup>11</sup> Leading up to its market entrance in Canada, Vaxco engaged with Canadians through Vaxco's website ([www.vaxco.com](http://www.vaxco.com)) and through billboard advertisements in Canadian cities.<sup>12</sup>

[12] Vaxco's website prominently displays the FLUSTOPPA trademark. The website provides educational materials about the importance of vaccination, as well as information on the FLUSTOPPA vaccine. Canadians have used Vaxco's website to research and book appointments to receive the FLUSTOPPA vaccine, which was administered at Vaxco's clinics in the United States.<sup>13</sup> These bookings required payment through Vaxco's website.<sup>14</sup>

### **4. Vaxco's Entrance into the Canadian Market and Healthward's Pre-emptive Official Mark**

[13] In January 2019, the Registrar gave public notice of the adoption and use of Healthward's official mark, FLUSTOPPER.<sup>15</sup> At this time, Vaxco was one month shy of

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<sup>8</sup> *Ibid* at para 1.

<sup>10</sup> *Ibid* at para 4.

<sup>11</sup> *Ibid* at para 6.

<sup>12</sup> *Ibid* at para 5.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at para 25.

<sup>15</sup> *Ibid* at para 8.

receiving regulatory approval to sell its FLUSTOPPA vaccines in Canada.<sup>16</sup> Industries was well aware of the FLUSTOPPA trademark in the United States and of Vaxco's pending approval for expansion into Canada.<sup>17</sup> In March 2019, Vaxco began selling its FLUSTOPPA vaccine in Canada and applied to register its "FLUSTOPPA & Design" trademark. The Registrar refused the application pursuant to section 12(1)(e) of the *Act*,<sup>18</sup> citing Healthward's official mark.<sup>19</sup>

## 5. Trial Decision

[14] Vaxco brought an application for judicial review of the Registrar's decision to refuse Vaxco's trademark registration. Vaxco challenged the validity of Healthward's official mark, and Healthward brought a cross-application for a declaration that Vaxco infringed upon its "FLUSTOPPER" official mark. Healthward also sought an injunction to enjoin Vaxco from continuing to use the FLUSTOPPA trademark in Canada.<sup>20</sup>

[15] The trial judge ruled in favour of Healthward on all issues. Coff J found that Vaxco's mark was confusingly similar to Healthward's official mark, based on a mistaken application of the confusion analysis under section 6(5) of the *Act*.<sup>21</sup> The trial judge erroneously held that Healthward is a public authority, and as a result, incorrectly dismissed Vaxco's challenge to the official mark.<sup>22</sup> Coff J also erred in finding that Vaxco was not entitled to continued use of the FLUSTOPPA trademark because Vaxco had not established prior use in Canada.<sup>23</sup>

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<sup>16</sup> *Ibid* at para 6.

<sup>17</sup> *Ibid* at para 12.

<sup>18</sup> *Trademarks Act*, RSC 1985, c T-13, s 12(1)(e).

<sup>19</sup> *Ibid* at paras 6–8.

<sup>20</sup> *Ibid* at para 3.

<sup>21</sup> *Ibid* at paras 16–17.

<sup>22</sup> *Ibid* at paras 19–20.

<sup>23</sup> *Ibid* at paras 22–26.

## 6. Appellate Decision

[16] The Court of Appeal was correct to reverse the TCC decision on all issues. Healthward's charitable status and its relationship with Health Canada were found to be insufficient to deem Healthward a public authority. The appellate judges agreed with the Application Judge that Healthward provided a public benefit, but they observantly raised concerns about Healthward's relationship with Industries which appeared to give Industries a competitive advantage in the marketplace.<sup>24</sup> Furthermore, the Court of Appeal found that even if Healthward had a valid official mark, Vaxco was entitled to continue using its trademark in association with the same classes of goods and services as Vaxco's uses before the notice of adoption and use of the official mark. The appellate judges correctly found that Vaxco could even expand such uses insofar as they remained within the same classes of goods and services.<sup>25</sup>

### III. POINTS IN ISSUE

[17] This appeal raises two issues:

1. Is Healthward's mark "FLUSTOPPER" an official mark under section 9 of the *Act*?
2. If Healthward's official mark is valid, does Vaxco's prior use of its "FLUSTOPPER & Design" mark protect Vaxco's continued use of the mark?

### IV. ARGUMENTS IN BRIEF

#### ISSUE 1: "FLUSTOPPER" IS NOT AN OFFICIAL MARK

[18] The Court of Appeal correctly held that "FLUSTOPPER" is not an official mark and accordingly does not bar Vaxco's registration of the trademark "FLUSTOPPA & Design".<sup>26</sup> Similarly, the Court of Appeal was correct in ruling that Healthward is not a public authority because it is not under substantial government control.<sup>27</sup> Only public authorities can seek

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<sup>24</sup> *Vaxco v Healthward Canada*, 2020 CAIP 333 at paras 7–9 [*Appeal*].

<sup>25</sup> *Ibid* at paras 11–13.

<sup>26</sup> *Ibid* at para 10.

<sup>27</sup> *Ibid* at para 8.

protection under the official marks regime, and Healthward does not meet the public authority test. The “FLUSTOPPER” official mark is therefore invalid and is therefore not protected by section 9(1)(n)(iii) of the *Act*.<sup>28</sup>

### **1. Healthward is not a public authority**

[19] Healthward does not meet the criteria of a public authority. The term “public authority” is not statutorily defined, but a two-step test was developed by the common law. A public authority is (a) an entity which is subject to a significant degree of government control, and (b) performs functions for the benefit of the public.<sup>29</sup>

#### **A. Insufficient government control**

[20] Healthward is not controlled by the government. The test for government control requires “ongoing supervision of the entity claiming to be a public authority.”<sup>30</sup> While government-appointed directors or officers may indicate some degree of government control,<sup>31</sup> this is insufficient to warrant a designation of public authority. It was held in *College of Chiropodists of Ontario v. Canadian Podiatric Medical Assn.* (“*College of Chiropodists*”) that the mere presence of governmental employees on the board of executives does not meet the required threshold of control.<sup>32</sup> The evidence must show a “significant degree of government control.”<sup>33</sup>

[21] Health Canada supports, but does not control, Healthward’s activities. The financial influence of Health Canada on Healthward must not be exaggerated. By identifying underserved communities to target, Health Canada enables Healthward to fulfill of its own

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<sup>28</sup> *Trademarks Act*, *supra* note 18, s 9(1)(n)(iii).

<sup>29</sup> *Canadian Jewish Congress v Chosen People Ministries, Inc*, 2002 FCT 613 at para 48 [*Canadian Jewish*].

<sup>30</sup> *Ontario Assn of Architects v Assn of Architectural Technologists of Ontario*, 2002 FCA 218 at para 59.

<sup>31</sup> *Canada (Registrar of Trade Marks) v Canadian Olympic Association*, [1983] 1 FC 692, 1982 CanLII 3031 (FCA) at para 10 [*Canadian Olympic*].

<sup>32</sup> 2004 FC 1774 at para 91 [*College of Chiropodists*].

<sup>33</sup> *Canadian Jewish*, *supra* note 29 at para 53.

charitable mandate. This passive and consultative role does not display “ongoing supervision” or “significant control” over Healthward’s activities. Either party can unilaterally terminate the agreement. Healthward’s arrangement with Health Canada will only persist insofar as it advances Healthward’s interests.

[22] The Appellant overstates Health Canada’s influence on Healthward’s board of directors. The funding agreement permits Health Canada to appoint two of Healthward’s board members. The Appellant assumes that both of these seats are filled by government employees.<sup>34</sup> However, there is no evidence to that effect. Even if there was, Health Canada would still only hold a minority of seats. This does not amount to “significant control” over Healthward.

[23] Moreover, the Appellant contends that this case “closely mirror[s]” *Canada (Registrar of Trade Marks) v. Canadian Olympic Association*, and that it should be disposed of similarly.<sup>35</sup> In *Canadian Olympic*, the respondent public authority was an entity incorporated by statute, which exercised control over Canadian participation in the Olympic Games, and which secured a portion of its funding from the federal government.<sup>36</sup> The facts are comparable only insofar as Healthward receives a portion of its funding from the government. Healthward’s conditional funding arrangement with Health Canada does not alone meet the threshold of significant government control.<sup>37</sup>

[24] The indicia of government control cited by the Appellant are not applicable to Healthward. *Ontario Assn of Architects v Assn of Architectural Technologists of Ontario* (“*Architects*”) set out indicia of ongoing government supervision. These indicia apply to self-regulatory professional bodies accompanied by originating legislation. Healthward is subject to Canadian law, but in no way constitutes a self-regulating professional body with enabling

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<sup>34</sup> *Factum for the Appellant, Team 6A* at para 23 [*Appellant Factum*].

<sup>35</sup> *Ibid* at para 18.

<sup>36</sup> *Canadian Olympic*, *supra* note 31 at para 2.

<sup>37</sup> *TCC Holdings Inc v Families as Support Teams Society*, 2014 FC 830 at para 27.

legislation. Rather, it is governed by Canadian laws regulating the operations of charities. The charitable status of an entity does not make it a public authority.<sup>38</sup> While the government control analysis is necessarily contextual, the status of Healthward as a public authority cannot be evaluated on the factors set forth in *Architects*.

[25] Finally, the Appellant incorrectly relies on the “excepted uses” language of section 9(2) of the *Act* to authorize Industries to use the FLUSTOPPER official mark. This interpretation of section 9 functions to dispossess the official marks regime of the purpose for which it was intended. The rationale put forth by the Appellant would allow Healthward to engage in the precise mischief that section 9 was enacted to prevent.

[26] The degree of “significant government control” required to warrant the protection of an official mark is high. The purpose of section 9 is to preclude the adoption of marks associated with public institutions as “pawns” of trade or proprietorship.<sup>39</sup> Section 9 thereby functions as a gatekeeper for the use of official marks to prevent their use by entities seeking to capitalize on the good reputation of public institutions. To grant Healthward the designation of public authority would unduly lower the threshold of this test.

#### B. Function for the public benefit

[27] Healthward’s questionable relationship with Industries negates a finding of public benefit. The Respondent does not dispute that Healthward indeed performs many activities which benefit the public. However, the Appellant is exploiting the breadth of protection afforded to official marks in the *Act* by virtue of its relationship with Industries. The concern for misuse of the official marks regime was also expressed by the Court of Appeal in this case.<sup>40</sup>

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<sup>38</sup> *Canadian Jewish*, *supra* note 29.

<sup>39</sup> *Techniquip Ltd v Canadian Olympic Assn*, (1998) 80 CPR (3d) 225 (Fed TD) at 233, *aff’d* (1999) 3 CPR (4th) 298 (Fed CA).

<sup>40</sup> *Appeal*, *supra* note 24 at paras 9, 14.

[28] The policy objective of section 9 is to prevent confusion between public authorities and private entities.<sup>41</sup> As stated in *College of Chiropodists*:

In my view, the intent of section 9 is to remove all the kinds of marks as listed above from the field of trade or business. It is to preclude any person from capitalizing on any well-known, respected public symbols and adopting it for his or her own wares or services. These emblems, badges or crests are associated with public institutions, not involved in trade or business, but which nevertheless are deemed to be invested with respectability, credibility and other civic virtues.<sup>42</sup>

[29] Industries is a for-profit entity which was authorized by Healthward to use the “FLUSTOPPER” mark. Healthward directly benefits from the profitability of Industries by virtue of royalties paid on products sold to third parties.<sup>43</sup> Further, it was found at trial that Industries “was well aware of the FLUSTOPPA trademark in the United States and also Vaxco’s pending approval for expansion into Canada.”<sup>44</sup> By adopting “FLUSTOPPER” as an official mark, Healthward attempts to block the expansion of Vaxco, a direct competitor of Industries, from the Canadian market.

[30] In doing so, Healthward is not acting for the benefit of the public. To the contrary, it is co-opting a mechanism of protection of official symbols to secure a greater market share for Industries. The Registrar’s decision to give notice of “FLUSTOPPER” as an official mark frustrates the purpose of section 9. To give effect to this purpose, the Supreme Moot Court should apply the government control test with a view to connect the implicated public body with the impugned official mark.

## **2. “FLUSTOPPA & Design” is a registrable trademark**

[31] The Court of Appeal correctly held that “FLUSTOPPA & Design” is a registrable trademark. The Registrar erred in refusing to register the trademark “FLUSTOPPA & Design”

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<sup>41</sup> *Council of Natural Medicine College of Canada v College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia*, 2013 FC 287 at para 91.

<sup>42</sup> *College of Chiropodists*, *supra* note 32 at para 58.

<sup>43</sup> *Trial*, *supra* note 1 at para 13.

<sup>44</sup> *Ibid.*

by citing Healthward’s “FLUSTOPPER” official mark. Given that the “FLUSTOPPER” official mark is invalid, Vaxco is entitled to register their longstanding “FLUSTOPPA & Design” trademark in Canada.

## **ISSUE 2: VAXCO IS ENTITLED TO CONTINUE USING ITS FLUSTOPPA & DESIGN TRADEMARK**

[32] Vaxco’s prior use of the FLUSTOPPA mark establishes its right to continued use even in the absence of registration.<sup>45</sup>

[33] The Court of Appeal correctly held that even if “FLUSTOPPER” is a valid official mark, Vaxco may rely on its prior use to continue using the FLUSTOPPA trademark in association with classes of goods and services it had previously used the trademark with.<sup>46</sup> Prior use in association with goods, under s. 4(1), exists in Vaxco’s online vaccination bookings which involved the transfer of property in the FLUSTOPPA vaccine. Moreover, Vaxco’s use of FLUSTOPPA in association with services provided to Canadians through Vaxco’s website, constitutes prior use under s. 4(2) of the *Act*.

### **1. Vaxco’s prior use of “FLUSTOPPA” in association with services in Canada**

[34] Vaxco has prior use in association with services. The Federal Court in *Cable Control Systems Inc v. Electrical Safety Authority* held that a party may continue to use a mark that is likely to be mistaken for an official mark, provided that the continued use is in association with the same class of goods or services as the party’s prior use.<sup>47</sup> Section 4(2) of the *Act* provides that a trademark is deemed to be “used” in association with services if the mark is used or displayed in the performance or advertising of those services.<sup>48</sup> Section 4(2) of the *Act* does not require services to be provided in the normal course of trade to constitute “use” of a trademark.

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<sup>45</sup> *Cable Control Systems Inc v Electrical Safety Authority*, 2012 FC 1272 at para 6 [*Cable Control*].

<sup>46</sup> *Appeal*, *supra* note 24 at para 11.

<sup>47</sup> *Cable Control*, *supra* note 45 at para 6.

<sup>48</sup> *Trademarks Act*, *supra* note 18, s 4(2).

Rather, such a requirement exists in section 4(1), which pertains to use in association with goods.<sup>49</sup> To establish use in association with a service, some aspect of the services must be performed or delivered in Canada.<sup>50</sup>

[35] While Vaxco’s billboard ads alone do not constitute prior use of the FLUSTOPPA mark in association with services, the FLUSTOPPA mark was prominently displayed on Vaxco’s website. On its website, Vaxco offered appointment booking services and educational materials on vaccines, including the FLUSTOPPA vaccine.<sup>51</sup>

[36] The Application Judge held that Vaxco’s appointment booking service did not constitute a prior use because the vaccination services were provided in the United States. This improperly overlooks Vaxco’s booking and educational services, which are “incidental” or “ancillary” to Vaxco’s vaccination services and delivered in Canada. These services entitle Vaxco to the continued and expanded use of the FLUSTOPPA mark within the category of “vaccination services.”

A. Vaxco’s online booking and educational services were performed/delivered in Canada

[37] Determining trademark use in Canada requires a case-by-case analysis of both the scope of services provided and the nature of the benefits conferred to Canadians.<sup>52</sup> The Federal Court of Appeal recognizes the dynamic definition of trademark “use” in light of evolving internet technologies.

[38] In *Hilton*, the Federal Court held that the delivery of Hilton’s hotel services provided materials benefits to persons in Canada. This was sufficient, the court held, to establish use of the impugned mark in association with services in Canada, even in the absence of a “bricks-

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<sup>49</sup> *Ibid*, s 4(1).

<sup>50</sup> *Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134 at para 7 [*Hilton*].

<sup>51</sup> *Trial*, *supra* note 1 at para 5.

<sup>52</sup> *Hilton*, *supra* note 50 at paras 31, 146

and-mortar” hotel in this country.<sup>53</sup> Evidence of use included the delivery of online booking services to Canadian customers for hotel stays outside of Canada.

[39] As stated by the Federal Court of Appeal in *Hilton*, determinations of “use” in association with services are highly contextual. In *TSA Stores*, the Federal Court was satisfied that accessing online information and guidance about a company’s products through their website constituted a benefit. The court analogized online information-gathering to speaking in-person with a knowledgeable company representative.<sup>54</sup>

[40] In the case at bar, the core question is whether persons in Canada derived a material benefit from Vaxco’s online booking and educational services.<sup>55</sup>

[41] Analogous to *Hilton*, Vaxco’s services have provided benefits to persons in Canada through their website. Namely, Vaxco’s use of the FLUSTOPPA mark in association with its online booking and educational services efficiently deliver services to Canadians, analogous to those that might be provided by a “bricks and mortar” vaccination clinic.

B. Vaxco’s booking and educational services are part of “vaccination services”

[42] Canadian jurisprudence favours a liberal construction of “services.” This was affirmed in *Hilton*, where the court held that “services” may include those that are “incidental” or ancillary” to the primary service identified in a trademark registration.<sup>56</sup>

[43] Vaxco’s booking and educational services are caught within the broader category of “vaccination services” as necessary, though ancillary, to vaccination. This definition of “services” applies regardless of whether a trademark is registered or unregistered. As long as the quintessential function of a trademark, the distinction of services performed by one party

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<sup>53</sup> *Ibid* at para 129.

<sup>54</sup> *Heenan Blaikie LLP v Sports Authority Michigan Inc*, 2011 FC 273 at para 19.

<sup>55</sup> *Hilton*, *supra* note 50 at para 117.

<sup>56</sup> *Ibid* at para 30.

from those performed by others, is intact, the uses of a trademark may include services that are incidental or ancillary.<sup>57</sup>

[44] At the very least, Vaxco is entitled to continue its online booking and educational services. These services necessarily feature the FLUSTOPPA mark and cannot be disassociated from vaccines and vaccination services. Therefore, grouping the ancillary and primary services in this case does not reduce the public's ability to distinguish between service providers.

## **2. Vaxco's prior use of "FLUSTOPPA" in association with goods in Canada**

[45] Vaxco has prior use of its FLUSTOPPA mark in association with goods by virtue of vaccination bookings on Vaxco's website. A trademark is "used" in association with goods if it is in any manner associated with the goods so as to give notice of the association to the person to whom property in, or possession of, the goods is being transferred. The transfer of property in, or possession of, the goods must occur in the normal course of trade.<sup>58</sup>

### **A. Transfer of property in the vaccines through online booking**

[46] The Applications Judge erred in finding that Vaxco did not have prior use in association with its FLUSTOPPA vaccines because Vaxco had never sold its vaccines in Canada prior to Healthward's notice of adoption and use of FLUSTOPPER. While there was no transfer of possession of the FLUSTOPPA vaccine in Canada, there was a transfer of property when persons in Canada paid to book vaccinations through Vaxco's website. When Canadians booked vaccinations on Vaxco's website, they reserved both the service of vaccination and the vaccine product. This reservation of the vaccine is in itself a form of property in the good. During the online booking process, the FLUSTOPPA mark is prominently displayed on

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<sup>57</sup> *Kraft Ltd v Canada (Registrar of Trade Marks)*, [1984] 2 FC 874, 1 CPR (3d) 457 at paras 8–9.

<sup>58</sup> *Trademarks Act*, *supra* note 18, s 4(1).

Vaxco’s website to give the consumer notice of the association between the mark and the vaccine.<sup>59</sup>

[47] This liberal construction of “property” in section 4(2) of the *Act* is supported by the common law. The Federal Court in *HJ Heinz Co* held that property in wares, unlike their actual possession, is a legal construct that is more readily subject to different constructions for the purpose of statutory interpretation.<sup>60</sup> Moreover, the increasing prevalence of online commercial transactions favours this interpretation. In the modern digital age, online commercial transactions have become a trusted, conventional method of securing property in goods and services. This is especially true in the context of the surge in online commerce in the wake of the COVID-19 pandemic. The consequence of this norm is that transfer of property in goods often does not happen at the same time or even the same place as the transfer of possession.

[48] There may be a concern that this liberal interpretation of “use” will make it too easy for foreign businesses to acquire trademark protections in Canada. However, recent major amendments to the Act have created a modernized and more globally integrated trademark regime. Bill C-31, which came into force in June 2019, was intended to increase the ease of doing business in Canada for both Canadian and non-Canadian businesses.<sup>61</sup> Under the recent amendments, foreign applicants no longer must prove use to register a trademark in Canada.<sup>62</sup> Restricting Vaxco’s trademark rights by imposing a strict use requirement is antithetical to Canada’s new trademark regime.

### **3. Policy considerations favour a finding of prior use**

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<sup>59</sup> *Trial*, *supra* note 1 at para 5.

<sup>60</sup> *Ridout & Maybee LLP v HJ Heinz Co Australia Ltd*, 2014 FC 442 at para 47.

<sup>61</sup> Canadian Intellectual Property Office, *Proposed Amendments to the Trade-marks Regulations* (Consultation Document) (Ottawa: Industry Canada, 2017), online: *CIPO* <[www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04254.html](http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04254.html)>.

<sup>62</sup> Canadian Intellectual Property Office, *Guide to Transitional Provisions of Bill C-31* (Guide) (Ottawa, Industry Canada, 2020) online: *CIPO* <[www.ic.gc.ca/eic/site/CIPOinternet-internetopic.nsf/eng/wr04455.html](http://www.ic.gc.ca/eic/site/CIPOinternet-internetopic.nsf/eng/wr04455.html)>.

[49] If the court finds Vaxco had no prior use under sections 4(1) and 4(2) (which is expressly denied), policy considerations support Vaxco's continued use of its FLUSTOPPA & Design mark in association with vaccines and vaccination services. The continued use rule from *Cable Control Systems* is a common law rule amenable to modification and to the creation of exceptions. The rule should be applied in support of the policy underpinnings of the *Act*.

A. The Purpose of Section 9 (prohibited marks including official marks)

[50] Policy considerations favour a finding that Vaxco's application for regulatory approval of the FLUSTOPPA vaccine constitutes prior use. As indicated above, the purpose of section 9 is to prevent parties from capitalizing on the goodwill associated with official marks in the context of trade or business. Vaxco is not a business riding the coattails of a well-respected public symbol. Vaxco's FLUSTOPPA trademark predates Healthward's public notice of adoption and use of FLUSTOPPER by nearly two decades. Vaxco filed for regulatory approval long before Healthward's notice of adoption and use. Vaxco immediately started selling its FLUSTOPPA vaccine in Canada after receiving regulatory approval. These facts indicate that but for the regulatory requirements, Vaxco would have started selling its FLUSTOPPA vaccines in Canada before Healthward obtained its official mark. Obtaining regulatory approval is an expensive endeavour so Vaxco's filing of an application for regulatory approval demonstrates a firm decision to use the FLUSTOPPA mark in Canada.

B. Canadian Trademark Principles and Fair Competition

[51] In *Mattel, Inc. v. 3894207 Canada Inc.*, the Supreme Court of Canada stated as follows:

Trademark law rests on principles of fair dealing. It is sometimes said to hold the balance between free competition and fair competition. Fairness, of course, requires consideration of the interest of the public and other merchants and the benefits of open competition as well as the interest of the trademark owner in protecting its investment in the mark. Care must be taken not to create a zone of exclusivity and protection that overshoots the purpose of trademark law.<sup>63</sup>

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<sup>63</sup> 2006 SCC 22 at paras 21–22

[52] The Appellant argues that revoking Healthward’s official mark will impede the government’s ability to achieve public policy objectives in rolling out and administering vital vaccines.<sup>64</sup> This statement is baseless and is not supported by Canadian trademark law. Health Canada’s conditional funding agreement with Healthward does not empower the government to manage the rollout of FLUSTOPPER vaccines. Should the Supreme Moot Court find that Healthward’s official mark is valid, it would effectively be endorsing an attempted monopolization of flu vaccination in Canada.

[53] It is in the public interest for the government and for courts to promote fair competition, which supports increased access to goods and services. This is particularly important in the field of healthcare, where having different options is integral to the delivery of treatment plans. The Appellant agrees that it is pivotal for consumers to receive their desired vaccine. This could not be more topical, as Canadians continue await the delivery of COVID-19 vaccines from a select few producers.

[54] Healthward’s relationship with Industries is also cause for suspicion. Industries’ knowledge of Vaxco’s activities, and its subsequent use of a nearly identical mark for vaccination, exploits the official marks regime and reflects anti-competitive behavior. Industries is a private, for-profit entity whose interests are aligned with Healthward’s. Industries is not only an affiliate of Healthward, but is “chief among Healthward’s affiliated organizations.” Industries has been a direct competitor of Vaxco and was well aware of Vaxco’s FLUSTOPPA trademark and Vaxco’s pending approval for expansion into Canada. While Vaxco was waiting for regulatory approval, Healthward lobbied the government into a funding agreement and then purported to assume public authority status. Healthward’s

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<sup>64</sup> *Appellant Factum*, *supra* note 34 at paras 56–58.

subsequent adoption of the “FLUSTOPPER” mark was an outright attempt to block Vaxco’s entrance into the Canadian market.

[55] Fair competition requires consideration of the interests of the trademark owner in protecting its investment in their mark. Vaxco has made significant investments in preparation to enter the Canadian market with its FLUSTOPPA & Design vaccine. For instance, the fee for filing an application for regulatory approval alone reaches hundreds of thousands of dollars.<sup>66</sup> The Respondent asks the Supreme Moot Court to consider the intent of the legislature in enacting section 9 of the *Act*. These underlying principles of Canadian trademark law should inform the application of trademarks common law principles. Protection of the official marks regime also lends protection to the government institutions which stand to be exploited by undue appropriation of their authority. This issue is particularly pronounced in this case, where the potential misconduct of Healthward was brought in issue by the Court of Appeal.

#### **V. ORDER REQUESTED**

The respondent respectfully requests that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 26th day of January 2021

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Team No. 7R

Counsel for the Respondent

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<sup>66</sup> See Health Canada, *Final Report: Fees for Drugs and Medical Services*, Catalogue No H164-261 (Ottawa: Health Canada, 2019), online: *Health Canada* <[www.canada.ca/en/health-canada/services/publications/drugs-health-products/fees-drugs-medical-devices.html](http://www.canada.ca/en/health-canada/services/publications/drugs-health-products/fees-drugs-medical-devices.html)>.

## VI. TABLE OF AUTHORITIES

AUTHORITY	PINPOINT
<b>LEGISLATION</b>	
<i>Trademarks Act</i> , RSC 1985, c T-13.	ss 4(1), 4(2), 12(1)(e), 9(1)(n)(iii)
<b>JURISPRUDENCE</b>	
<i>Vaxco Ltd v Healthward Canada</i> , 20 TCCIP 1222.	paras 1–13, 16, 17, 19, 20, 22–26
<i>Vaxco v Healthward Canada</i> , 2020 CAIP 333.	paras 7–14
<i>Canadian Jewish Congress v Chosen People Ministries, Inc</i> , 2002 FCT 613.	paras 28, 48, 53
<i>Ontario Assn of Architects v Assn of Architectural Technologists of Ontario</i> , 2002 FCA 218.	para 59
<i>Canada (Registrar of Trade Marks) v Canadian Olympic Association</i> , [1983] 1 FC 692, 1982 CanLII 3031 (FCA).	paras 2, 10
<i>College of Chiropractors of Ontario v Canadian Podiatric Medical Assn</i> , 2004 FC 1774.	paras 58, 91
<i>TCC Holdings Inc v Families as Support Teams Society</i> , 2014 FC 830.	para 27
<i>Techniquip Ltd v Canadian Olympic Assn</i> , (1998) 80 CPR (3d) 225 (Fed TD), aff'd (1999) 3 CPR (4th) 298 (Fed CA).	page 233
<i>Council of Natural Medicine College of Canada v College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia</i> , 2013 FC 287.	para 91
<i>Cable Control Systems Inc v Electrical Safety Authority</i> , 2012 FC 1272.	para 6
<i>Miller Thomson LLP v Hilton Worldwide Holding LLP</i> , 2020 FCA 134.	paras 7, 30, 31, 117, 129, 146
<i>Heenan Blaikie LLP v Sports Authority Michigan Inc</i> , 2011 FC 273.	para 19

<i>Kraft Ltd v Canada (Registrar of Trade Marks)</i> , [1984] 2 FC 874, 1 CPR (3d) 457.	paras 8, 9
<i>Ridout &amp; Maybee LLP v HJ Heinz Co Australia Ltd</i> , 2014 FC 442.	para 47
<i>Mattel, Inc v 3894207 Canada Inc</i> , 2006 SCC 22.	paras 21, 22

<b>SECONDARY MATERIALS</b>	
Canadian Intellectual Property Office, <i>Proposed Amendments to the Trade-marks Regulations</i> (Consultation Document) (Ottawa: Industry Canada, 2017), online: <i>CIPO</i> < <a href="http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04254.html">www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04254.html</a> >.	
Canadian Intellectual Property Office, <i>Guide to Transitional Provisions of Bill C-31</i> (Guide) (Ottawa, Industry Canada, 2020) online: <i>CIPO</i> < <a href="http://www.ic.gc.ca/eic/site/CIPOinternet-internetopic.nsf/eng/wr04455.html">www.ic.gc.ca/eic/site/CIPOinternet-internetopic.nsf/eng/wr04455.html</a> >.	
Health Canada, <i>Final Report: Fees for Drugs and Medical Services</i> , Catalogue No H164-261 (Ottawa: Health Canada, 2019), online: Health Canada < <a href="http://www.canada.ca/en/health-canada/services/publications/drugs-health-products/fees-drugs-medical-devices.html">www.canada.ca/en/health-canada/services/publications/drugs-health-products/fees-drugs-medical-devices.html</a> >.	

<b>OTHER</b>	
<i>Factum for the Appellant, Team 6A.</i>	paras 18, 23, 56–58