

Federal Court



Cour fédérale

Date: 20251003

Docket: T-3222-24

Citation: 2025 FC 1639

Ottawa, Ontario, October 3, 2025

PRESENT: Madam Justice McDonald

BETWEEN:

**SCHLEGEL HEALTH CARE INC.,
HOMEWOOD HEALTH INC. AND
HOMEWOOD HEALTH CENTRE INC.**

Plaintiffs

and

EDGEWOOD HEALTH NETWORK INC.

Defendant

PUBLIC ORDER AND REASONS

[Confidential Order and Reasons issued on October 3, 2025]

I. Overview

[1] On this Motion, the Plaintiffs seek an interlocutory injunction to restrain the Defendant from continuing to use the word GUARDIANS in any form. This Motion is filed in the context

of an action for trademark infringement brought by the Plaintiffs (collectively “Homewood”) — Schlegel Health Care Inc., Homewood Health Inc., and Homewood Health Centre Inc.—against the Defendant, Edgewood Health Network Inc. (EHN), for misappropriation of their trademark rights to the word GUARDIANS by using it in connection with EHN services.

[2] The Plaintiffs and the Defendant are business competitors and are the two largest providers of inpatient and outpatient mental health and addiction services in Canada. They offer services and programs specifically targeted to “guardians” (first responders, military personnel, and veterans) and their families.

[3] To obtain an injunction, the Plaintiffs must satisfy the three-part test outlined in *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR*] using the elevated “serious issue” threshold from *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*]. For the reasons below, I am not satisfied that the Plaintiffs have established a strong *prima facie* case to assert an unregistered trademark to the GUARDIANS word. I am also not satisfied that there is sufficient evidence of goodwill in the claimed mark, nor irreparable harm; therefore, I am dismissing the Plaintiffs’ Motion for an interlocutory injunction.

II. Background

A. *The Pleadings*

[4] The Plaintiff, Schlegel Health Care Inc., is a healthcare company operating facilities and providing services related to mental health and wellness, and treatment and rehabilitation for

alcohol, drug, and substance addictions. Schlegel Health Care Inc. is the sole owner of Homewood Health Inc., who is the sole owner of Homewood Health Centre Inc.. Collectively, they provide inpatient and outpatient mental health and addiction services at various locations across Canada.

[5] In the Statement of Claim, filed on November 1, 2024 and Amended on April 15, 2025, the Plaintiffs seek a declaration that Schlegel Healthcare Inc. is the owner and proprietor of the “common law trademark GUARDIANS” for their services. Homewood claims that they developed the “Guardians Program” to provide mental health and addiction treatment for first responders, military personnel, and veterans, and have used the GUARDIANS mark since 2017 to market these services.

[6] In its Statement of Defence, EHN claims to have opened its first guardians-only facility in 2021 in Peterborough, Ontario, which provides programs exclusively to the guardians population. EHN opened additional guardians-only locations in Nanaimo, British Columbia and Nictaux, Nova Scotia. The Statement of Defence claims that in April 2024 EHN began to use EHN GUARDIANS in connection with programs targeted to the guardians population.

[7] On May 8, 2024, Homewood sent a cease-and-desist letter to the Defendant, demanding they cease use of GUARDIANS. The Defendant declined to cease use of EHN GUARDIANS in a May 10, 2024 letter.

[8] The Plaintiffs seek damages and remedies against the Defendant for passing off, under subsection 7(b) of the *Trademarks Act*, RSC 1985, c T-13 (*TMA*); passing off by substitution, under subsection 7(c) of the *TMA*; and breach of sections 36 and 52 of the *Competition Act*, RSC 1985, c C-34. In the meantime, the Plaintiffs filed this Motion for interim relief.

B. *Motion relief requested*

[9] This Motion was originally filed in March 2025 and amended in June 2025. In the Amended Notice of Motion, the Plaintiffs seek an interlocutory injunction to restrain the Defendant from:

- a. directing attention to their goods, services and business in such a way as to cause or be likely to cause confusion with the goods, programs, services and facilities, and business of the plaintiffs, including the Services, by using the term EHN GUARDIANS, contrary to section 7(b) of the *Trademarks Act*, RSC, 1985, c T-13 [...];
- b. passing off its goods, programs, services and facilities as and for those of plaintiffs, including the Services, contrary to section 7(c) of the *Trademarks Act* and common law;
- c. using in any manner, any and all forms of the terms EHN GUARDIANS, GUARDIANS or any other term confusingly similar to the GUARDIANS Mark, as a trademark, trade name, or otherwise in association with their business, goods, programs, services and facilities, including without limitation, any and all use of the EHN GUARDIANS name on the internet domain at www.edgewoodhealthnetwork.com, www.ehnguardians.ca, ehnguardians.com, and other social media platforms including www.linkedin.com, www.facebook.com, www.instagram.com and www.twitter.com;
- d. marketing, advertising, selling, or offering for sale mental health, trauma and addiction services in Canada in association with the GUARDIANS Mark;

- e. using in any manner the GUARDIANS Mark to suggest to the public that the defendant's goods, services and business are organized, connected, sponsored, endorsed or somehow associated with those of the plaintiffs; and
- f. ordering, directing, including, instructing, guiding or authorizing any of the above.

C. *Evidence on this Motion*

[10] The parties filed extensive records on this Motion, including the Affidavits and the documents referenced below.

[11] The Plaintiffs rely on the following affidavit evidence:

- a. David Kincaid, a proposed expert in the fields of branding valuation and marketing. His Affidavits are dated March 10, 2025, and May 27, 2025.
- b. Jared Landry, Homewood's Executive Vice-President, Growth & Strategy, swore two Affidavits, one Public and one Confidential, on March 10, 2025.
- c. Rob Schlegel, Chief Financial Officer of Schlegel, swore an Affidavit on March 10, 2025 that attached License Agreements between the Plaintiff corporations for the use of the GUARDIANS mark.
- d. Daphne Li, a legal assistant, provided an Affidavit that attached cross-examination transcripts.

[12] The Defendant EHN relies on the following affidavit evidence:

- a. Joe Manget, the Chief Executive Officer of EHN, swore an Affidavit on April 29, 2025.

- b. Dr. Rakesh Jetly, a practicing Psychiatrist and former Chief of Psychiatry with the Canadian Armed Forces, is a proposed expert. He provided an Affidavit sworn April 29, 2025.
- c. Christine Ingham, a law clerk, provided an Affidavit that attached trademark registry documents.

III. Analysis

A. *Objections to expert evidence*

[13] Before I turn to the merits of the Motion, I will address the objections to the expert evidence raised by both parties. Each side challenges the admissibility of the other's expert evidence, albeit on different grounds.

[14] While there may be valid challenges to both experts' evidence, this Motion does not turn on the admissibility or weight of either expert's report. The Plaintiffs offer Mr. Kincaid's report as evidence supporting the serious issue and irreparable harm branches of the *RJR* test. As I note below, this evidence, even if it were found admissible and reliable, is insufficient to meet the Plaintiffs' legal burden of demonstrating a strong *prima facie* case and irreparable harm.

[15] In this case, the admissibility of expert evidence is more appropriately addressed at trial, for two reasons. First, as noted above, this Motion can be disposed of without making a final admissibility ruling. Additionally, the parties did not seek a final ruling on the admissibility of expert evidence in the context of this motion. This Motion was brought for an interlocutory

injunction, and arguments regarding the admissibility of expert evidence were advanced solely in relation to that issue. Indeed, neither the Amended Notice of Motion nor the Orders sought in the parties' memoranda of argument include a ruling on the admissibility of expert evidence as desired relief. As such, I believe it is more appropriate for the trial judge, who will hear full submissions on this matter, to make any final rulings on admissibility or weight. While I may refer to the evidence of the experts in this decision, I will refrain from making any final findings regarding admissibility or weight, which are more properly addressed at trial.

B. *The RJR test*

[16] *RJR* outlines the applicable test for an interlocutory injunction. The Plaintiffs must establish: (i) a serious issue to be tried in the underlying claim; (ii) they will suffer irreparable harm if an injunction is not granted; and (iii) the balance of convenience favours granting the injunction.

[17] The parties disagree on the threshold that applies to the serious issue part of the *RJR* test. That question turns on the nature of the injunction sought. The Plaintiffs argue that they only seek a prohibitive injunction, namely, to maintain the status quo, therefore they need only establish that their claim is neither frivolous nor vexatious.

[18] In fact, the status quo the Plaintiffs seek to maintain is not the current situation, but rather the situation as it was from 2017 to 2024. On April 10, 2024, the Defendant applied for a trademark for EHN GUARDIANS. Since that time, they have used EHN GUARDIANS on

signs at their facilities, in print advertising, in marketing materials, and on websites and social media.

[19] The injunction requested by the Plaintiffs would require EHN to take steps to undo its existing use of the EHN GUARDIANS name by ceasing marketing and advertising under that name, removing or disabling its website and social media accounts using that name, and taking down signage at facilities. The requirement to take these steps to comply with an injunction indicates that the nature of the injunction sought is mandatory rather than prohibitive.

[20] The Plaintiffs rely on *Amer Sports Canada Inc v Adidas Canada Limited*, 2024 BCSC 3 [*Amer Sports*] to argue that, even if the Defendant must take positive steps such as removing a sign, that does not make this a mandatory injunction. However, *Amer Sports* is distinguishable as the trademark in that case was registered, thus giving the plaintiff the benefit of a presumption of validity and the resulting statutory protections. That is not the situation here, where the validity of the trademark is clearly in question.

[21] On these facts, I am satisfied that the true nature of the injunction sought by Homewood is a mandatory injunction because EHN would have to take positive steps to comply. Accordingly, the Plaintiffs must establish a strong *prima facie* case, meaning there is a *strong likelihood* that they will be successful (*CBC* paras 15–17) .

[22] The modified *RJR* test is as follows (*CBC* at para 18):

- (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
- (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
- (3) The applicant must show that the balance of convenience favours granting the injunction. [Emphasis in original.]

(1) Serious issue

(a) *Statutory passing off claim*

[23] The Plaintiffs must demonstrate a strong likelihood of their case succeeding at trial, based on the law and evidence provided. Homewood's primary claim is for passing off under subsection 7(b) of the *TMA*. While the Plaintiffs' Statement of Claim notes that they will advance claims under the *Competition Act* and subsection 7(c) of the *TMA*, they did not vigorously advance those claims for the purpose of the serious issue branch of the *RJR* injunction test. As such, my analysis will focus on the Plaintiffs' claim for passing off.

[24] Subsection 7(b) of the *TMA* outlines the cause of action for passing off, which prohibits conduct likely to cause confusion with another's goods or services. A passing off claim under the *TMA* first requires the Plaintiffs to establish they have a registered or unregistered trademark for GUARDIANS (*Nissan Canada Inc v BMW Canada Inc*, 2007 FCA 255 at para 14 [*Nissan Canada Inc*]). Here the Plaintiffs do not have a registered trademark, and therefore to rely on

subsection 7(b) of the *TMA*, they must prove, with evidence, that they have an unregistered GUARDIANS trademark.

[25] An unregistered mark is established based on the “trademark” definition in section 2 of the *TMA* and use in accordance with section 4 of the *TMA* (*Nissan Canada Inc* paras 16-17), which state:

2 ...*trademark* means
 (a) a sign or combination of signs that is used or proposed to be used by a person for the purpose of distinguishing or so as to distinguish their goods or services from those of others, or
 ...

4(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance of advertising of those services.

2 ...*marque de commerce* Selon le cas :
 a) signe ou combinaison de signes qui est employé par une personne ou que celle-ci projette d’employer pour distinguer, ou de façon à distinguer, ses produits ou services de ceux d’autres personnes;
 ...

4(2) Une *marque de commerce* est réputée employée en liaison avec des services si elle est employée ou montrée dans l’exécution ou l’annonce de ces services.

[26] Once a trademark is established under the *TMA*, the plaintiff must prove the elements of a passing off claim. They are: (1) the existence of goodwill associated with the goods, services or business; (2) deception of the public due to a misrepresentation; and (3) actual or potential damage to the plaintiff as a result of the misrepresentation (*Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at para 66 [*Kirkbi*]).

[27] In addressing the serious issue component of the *RJR* test, I will first assess the Plaintiffs' claim to an unregistered mark. I will then consider the Plaintiffs' *prima facie* case for a passing off claim. Finally, I will address the Plaintiffs' claims under the *Competition Act*.

(i) Unregistered trademark

[28] The Plaintiffs do not hold a registered trademark for the word GUARDIANS. Schlegel Health Care Inc. applied to register the trademark GUARDIANS on June 6, 2024. That application is still pending and a letter dated December 17, 2024, from the Canadian Intellectual Property Office, notes potential confusion with another pending application.

[29] The Plaintiffs' state that "use" of the claimed trademark is authorized between the Plaintiff corporations through License Agreements. Specifically, Schlegel Healthcare Inc. says it licenses the use of GUARDIANS to Homewood through the License Agreements that are attached to the Affidavit of Mr. Schlegel.

[30] Although EHN challenges the validity of the Schlegel License Agreements on various grounds, for the purpose of this Motion, the License Agreements themselves are not evidence of the "use" of the claimed trademark.

[31] The Plaintiffs state that the GUARDIANS mark arose in 2017 when Homewood began to develop the Guardians program, and they claim they began use of the mark in June 2019 at the Ravensview Facility and implemented the Guardians Program at the Homewood Health Centre [HHC] Facility in 2020. The Plaintiffs argue that it is the "use" of the trademark, and not the

registration of the trademark, that is determinative of the issues between the parties. While I accept that premise, without a registered trademark, the Plaintiffs do not benefit from the presumption of validity that adheres to a registered trademark by virtue of the *TMA*. Relatedly, the Plaintiffs' reliance on cases involving registered marks, such as *Sleep Country Canada Inc v Sears Canada Inc*, 2017 FC 148 [*Sleep Country Canada*] and *Reckitt Benckiser LLC v Jamieson Laboratories Ltd*, 2015 FC 215 [*Reckitt Benckiser*], are of limited assistance to the Plaintiffs on the issue of whether they can establish a strong *prima facie* case to claim an unregistered trademark on the word GUARDIANS.

[32] The Plaintiffs' submissions did not directly address whether they first met the requirements to establish an unregistered trademark under the *TMA*. This threshold issue is explained in *Dragona Carpet Supplies Mississauga Inc v Dragona Carpet Supplies Ltd*, 2022 FC 1042 at para 90 (aff'd 2023 FCA 228) [*Dragona*] where the Court states:

The Federal Court is a statutory court, and it has “no jurisdiction apart from what is expressly conferred on it by Parliament” (*Celliers du Monde Inc v Dumont Vins & Spiritueux Inc* (1992), 42 CPR (3d) 197 (FCA) at 209). This Court cannot entertain a claim for passing off that is not grounded in the Act. Paragraph 7(b) of the Act is largely equivalent to the common law tort of passing off. However, there is an additional threshold requirement in order for a passing off claim to fall under paragraph 7(b) and, consequently, this Court's jurisdiction:

[T]he plaintiff must first prove possession of a valid and enforceable trademark, whether registered or unregistered, at the time the defendant first began directing public attention to its own goods and services: see also *Cheung v. Target Event Production Ltd.*, 2010 FCA 255 at para. 20, 409 N.R. 118; *Badawy v. Igras*, 2019 FCA 153 at paras. 2-3, 8-9. This in turn requires, given the definitions of “trademark” and “use” in sections 2

and 4 of the *Trademarks Act*, that the mark have been used by the plaintiff for the purpose of distinguishing its wares or services from those of others: *Nissan Canada* at paras. 15-18.

Sandhu Singh Hamdard Trust v Navsun Holdings Ltd, 2019 FCA 295 at para 39.

[33] Therefore, according to *Dragona*, the Federal Court does not have jurisdiction to hear a passing off claim where a plaintiff cannot prove a valid trademark under sections 2 and 4 of the *TMA*.

[34] This approach to the Federal Court's passing off jurisdiction is consistent with the Supreme Court's decision in *Kirkbi*. A central issue in *Kirkbi* was whether subsection 7(b) of the *TMA* was within Parliament's legislative jurisdiction under section 91 of the *Constitution Act, 1867*. The Court found that subsection 7(b) was *intra vires* Parliament despite encroaching on provincial legislative jurisdiction, partly because subsection 7(b) protected unregistered trademarks, and therefore its encroachment on provincial powers was limited by "other provisions" of the *TMA* (*Kirkbi* at para 26). Although unstated in *Kirkbi*, these "other provisions" clearly include sections 2 and 4 of the *TMA*, which limit the scope of unregistered trademarks, and therefore subsection 7(b).

[35] The Supreme Court in *Kirkbi* did not resolve whether the Federal Court could hear tort passing off claims, which are not grounded in sections 2 and 4 of the *TMA*, but appears to have been alive to the issue. The Supreme Court stated that subsection 7(b) "essentially codifies the common law tort of passing off" (*Kirkbi* at para 23) [Emphasis added.]. The Court's use of

“essentially” suggests that subsection 7(b) and the tort of passing off are not necessarily the exact same. The Federal Court of Appeal’s post-*Kirkbi* jurisprudence affirms that subsection 7(b) claims are not the same as the tort of passing off, and that the Federal Court can only entertain subsection 7(b) claims due to “constitutional constraints” (*Sandhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2019 FCA 295 at para 39 [*Sandhu Singh*], citing *Kirkbi* at paras 3, 26). A subsection 7(b) claim must meet the requirements of sections 2 and 4 of the *TMA*, with the Court of Appeal finding it a “legal error” to fail to consider the threshold issue (*Sandhu Singh* at para 39).

[36] The Plaintiffs’ submissions fail to address the distinction between statutory and tort passing off. Their submissions focus on “use” of a “common law trademark” and the common law tort of passing off, and do not directly address the threshold question of whether they possess a valid trademark under the *TMA*.

[37] Regardless, the Plaintiffs’ evidence does not demonstrate a strong *prima facie* case to an unregistered GUARDIANS mark. Under section 4 of the *TMA*, a trademark is deemed to be “used” if it is displayed in the performance or marketing of services. The Plaintiffs’ evidence shows that the word “Guardians” is used in conjunction with the “Guardians Program”, however, GUARDIANS is not used on its own, nor is it distinguished from the surrounding text. For example, in print materials, a HHC handout for the fall of 2020, the top and side bar descriptions are “Traumatic Stress Injury and Concurrent Program (TSICP) – Guardians”. In a July 2023 HHC handout, the description is now “Guardians Program”. In the photographs of the Plaintiffs’

trade show booths, the words “Homewood Health”, “Ravensview”, and “The Residence” are displayed prominently, while the word “Guardians” is not used in a similarly prominent manner.

[38] The principles surrounding use of a trademark in conjunction with other words are summarized in *PDM Parthian Distributer & Marketing Adviser GmbH v Brewdog PLC*, 2024 FC 891 at para 36 [*PDM Parthian*]. The test is whether “the public as a matter of first impression, would perceive the trademark per se as being used. This is a question of fact dependent on whether the trademark stands out from the additional material and whether the trademark remains recognizable” (*PDM Parthian* at para 36).

[39] I do not find that the public, as a matter of first impression, would perceive the Plaintiffs’ use of GUARDIANS as a trademark. GUARDIANS is not used on its own and I do not see evidence where the word GUARDIANS is displayed or used in a manner that sets it off or distinguishes it from the surrounding text. Relatedly, there is no visual distinction in the font or colour of the word. The word is not set apart from the surrounding words in any manner and it does not appear fully capitalized as it does in the trademark application filed.

[40] For the purposes of the *RJR-CBC* test for an interlocutory injunction, I find the Plaintiffs’ have not demonstrated a strong *prima facie* case to an unregistered GUARDANS mark under the *TMA*. While this alone would be dispositive of the Motion, I will nonetheless consider the three elements of a passing off claim.

(ii) Goodwill

[41] “Goodwill” is not defined in the *TMA*. The Supreme Court has explained the concept as: “[i]n ordinary commercial use, it connotes the positive association that attracts customers towards its owner’s wares or services rather than those of its competitors.” (*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 50 [*Veuve*]).

[42] Homewood argues that it has developed substantial goodwill and reputation in the use of the GUARDIANS mark, and claims that the mark is highly distinctive of their business and services. They claim to have made significant efforts to develop, promote, and associate the GUARDIANS mark with their specialized mental health and addiction services.

[43] In support of these arguments, Homewood relies on the Public Affidavit of Jared Landry. The Public Landry Affidavit traces the development of Homewood’s use of GUARDIANS. First, Mr. Landry details the origins of the Guardians Program in 2016 through the Traumatic Stress Recovery program. Mr. Landry then describes the development of the Guardians program as of 2017, the implementation of the Guardians Program at the Ravensview Facility in June 2019, and the implementation of the Guardians Program at a HHC facility in 2020. He explains the treatment aspects of the program and the results of the program, noting “outcomes show tangible and clinically reliable improvement in symptoms.”

[44] Mr. Landry also notes in his Public Affidavit that the Guardians Program has been marketed as a service for the guardians population. Homewood marketed the program to

individuals and entities whom Homewood has referral relationships with, including healthcare professionals, community organizations involved with addictions advocacy and support, families of guardians, and government employers of guardians. The Public Landry Affidavit details and attaches copies of the Plaintiffs' advertising and marketing of the Guardians Program by way of print materials, sales presentations, and at conferences.

[45] In his Confidential Affidavit, Mr. Landry states:

41. During the six years of operations, the Guardians Program comprises between █ of Homewood's revenues at the Ravensview Facility and approximately █ of Homewood's elective program revenues at the HHC Facility, and should be assigned costs proportionate to its share of revenues, given the extensive clinical, administrative and support costs associated with delivering the Guardians Program.

42. Homewood has invested significant financial sums into the Guardians Program. In particular, █ of Homewood's approximately █ annual marketing budget is directed to promote inpatient treatment at the Ravensview Facility and the HHC Facility. Between 2021 and 2024, Homewood spent a total of approximately █ to promote admissions to the Ravensview Facility and HHC Facility. Between 2019 and 2024, the Guardians Program accounted for █ of all admissions to the Ravensview Facility and █ of all admissions to the HHC Facility.

[46] The Landry Affidavits confirm that the Plaintiffs have had positive results with their treatment programs. It is also clear that the Plaintiffs have invested significant time and expenses in promoting and marketing their programs, which, based upon the information provided, have been successful.

[47] However, the question on this interlocutory injunction is, for the purpose of making the *prima facie* case for a passing off claim, do the Landry Affidavits provide sufficient evidence of goodwill such that there is a “positive association that attracts customers” to the Plaintiffs’ services in the use of GUARDIANS?

[48] As noted above, the Plaintiffs’ evidence supporting their claim to the use of the word GUARDIANS is weak. This undermines any claim of goodwill, which must attach to clearly defined services (*BBM Canada v Research in Motion Limited*, 2012 FC 666 at para 59). I thus find that the Plaintiffs’ evidence does not demonstrate a strong *prima facie* case for sufficient goodwill in the GUARDIANS mark.

(iii) Deception of the public due to a misrepresentation

[49] As part of the passing off test, the Plaintiffs must show a misrepresentation by the Defendant that causes, or is likely to cause, confusion among the public. In this case, the confusion analysis focuses on the resemblance between the Plaintiffs’ asserted GUARDIANS mark and the Defendant’s use of EHN GUARDIANS.

[50] The test to be applied for confusion is one of first impression in the mind of a casual consumer, somewhat in a hurry, who has no more than an imperfect recollection of the prior trademark and who does not stop to consider the differences and similarities between the marks or names in issue. The confusion analysis exercise is fact and context specific in each situation (*Veuve* at para 20).

[51] The question in this case is, as a matter of first impression, would the consumer of EHN GUARDIANS services be likely to think, on a balance of probabilities, that the source of the services is the same source as Homewood's GUARDIANS services (*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 41 [*Masterpiece*]).

[52] The confusion test is analyzed with reference to the factors provided in subsection 6(5) of the *TMA*, in the context of "all the surrounding circumstances". These factors are: (a) the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known; (b) the length of time the trademarks or trade names have been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks or trade names in appearance or sound or in the ideas suggested by them.

[53] The Plaintiffs' claim, that EHN GUARDIANS is likely to cause public confusion, is supported by the degree of resemblance, which is the factor "often likely to have the greatest effect on the confusion analysis" (*Masterpiece* at para 49). Considering this, I accept that there is a likelihood that customers will confuse the Plaintiffs' claimed GUARDIANS mark with the Defendant's EHN GUARDIANS program due to their similar appearance or resemblance.

[54] Furthermore, the Plaintiffs' claim is supported by the similarity of the services offered by the parties and the nature of their trade, subsection 6(5) factors (c) and (d). Both parties provide mental health and addiction services to similar populations—military personnel, veterans, first responders, and their families. The parties share common referral sources and often compete for

the same government contracts. These factors weigh in favour of the argument that there is the potential for confusion based on a “casual consumer somewhat in a hurry” (*Masterpiece* at para 56).

[55] But several factors militate against the Plaintiffs’ claim that EHN GUARDIANS would likely cause confusion among the public. One such factor is the cost of the services. The Supreme Court explained in *Masterpiece* that the more expensive the product, the more care a potential purchaser will take, resulting in a less likely chance of confusion between competing services (*Masterpiece* at para 70). In this case the evidence demonstrates that the cost of the in-patient programs offered by both the Plaintiffs and the Defendant are significant and can be in the \$70,000 – 90,000 range.

[56] Additionally, I note that the customers are not typically individuals—although I accept that they could be—but the evidence demonstrates that the majority of patients admitted to the Plaintiffs’ programs are referred by medical professionals or by the organization that is funding the treatment such as the Royal Canadian Mounted Police or Veterans Affairs. Medical professionals and such organizations are more likely to be familiar with the service providers and thus less likely to confuse the services of Homewood and EHN. This factor also militates against confusion.

[57] There is conflicting evidence regarding the remaining factors, namely the inherent distinctiveness of the trademark to Homewood’s services and the length of use. On these factors,

I am not satisfied that the Plaintiffs have provided sufficient evidence to *prima facie* establish these factors in their favour.

[58] The Plaintiffs claim use dating back to 2019 and submit that customers came to associate the GUARDIANS mark with Homewood's specialized mental health and addiction treatment programs. However, after reviewing the Plaintiffs' evidence from their websites, social media posts, emails, and marketing materials, I do not see the word GUARDIANS used in a distinctive manner in conjunction with their services. As noted in the goodwill analysis above, the word is not used on its own, or with a distinct font, distinct size, or distinct colour. This evidence does not demonstrate that the word GUARDIANS is displayed or used in a manner that sets it apart from the surrounding words in any distinctive manner.

[59] How long the word GUARDIANS has been used by the Plaintiffs is unclear from the evidence. Both the Plaintiffs and the Defendant started to use the same word in connection with their services within a similar time frame, which could be a coincidence or by design. The Plaintiffs allege that the Defendant misappropriated the word. In his Public Affidavit, Jared Landry states:

148. Seeing the significant success of Homewood's Guardians program, Edgewood quickly evolved its services to now offer programming dedicated to the Subject Patient Population. Edgewood also claims to have evolved their programming to treat concurrent mental health and addiction conditions simultaneously.

[60] For their part, EHN explains how they started to use the word EHN Guardians in the Confidential Affidavit of Mr. Manget:

19. In early 2024, EHN undertook a major rebranding initiative to create a shared identity and better brand cohesion across its facilities based on names, logos, and colours. This branding initiative was launched in the Spring of 2024 and included: (i) confirming EHN/EHN Canada as a mother brand, (ii) confirming the E DESIGN as a main logo, (iii) adopting a number of sub-brands including EHN GUARDIANS, and (iv) changing facility names to adopt facility brands....

20. As described above, guardians share many similar mental health challenges stemming from occupational stresses. During its rebranding exercise, EHN chose to adopt and use EHN GUARDIANS for the EHN Products and Services targeted to this population. The term “guardians” (“gardiens” in French) is used by our industry as a shorthand or more simple way to encompass the population comprising military, veterans and first responders....

[61] During cross examination, Mr. Manget confirmed that EHN was aware that Homewood was using the word GUARDIANS for its mental health and addiction treatment program, although he thought “their Guardians program is quite recent.”

[62] Overall, the evidence more strongly favours the Plaintiffs’ position that they started to use GUARDIANS in conjunction with their Guardians Program at Ravensview before the Defendant’s use of EHN GUARDIANS. However as noted above, the Plaintiffs’ use of the word evolved, and it was not until more recently that it was used in a more distinctive manner.

[63] Overall, the evidence as to when the Plaintiffs and when the Defendant started to use the word GUARDIANS in a distinctive manner is in conflict. Thus, I cannot determine with enough certainty that the Plaintiffs have a sufficiently strong *prima facie* argument that they have

established use of the word Guardians in a distinctive manner prior to the Defendant's use of EHN GUARDIANS.

[64] There is the additional factor that the Defendant's use their mark with the prefix "EHN". They argue that this factor bears heavily in their favour in the distinctiveness analysis. In this regard, I note that the Supreme Court has observed: "[i]t has been held that for purposes of distinctiveness, the first word is important" (*Masterpiece* at para 63).

[65] On a preliminary consideration, there is some evidence that the Defendant's use of EHN GUARDIANS may cause public confusion. In that sense, most of the subsection 6(5) factors—especially the degree of resemblance, overlap in services, shared trade channels, favour the Plaintiffs. However, I am not satisfied that the Plaintiffs have established prior use on a *prima facie* basis.

(iv) Actual or potential damage

[66] On the third part of the passing off test, the plaintiff must prove damages, which cannot be presumed. The Plaintiffs argue that loss of control and distinctiveness of the trademark, due to the Defendant's confusing mark, is sufficient to satisfy this part of the test. However, this submission is premised on there being a valid trademark, which the Plaintiffs have not yet established. Likewise, the Plaintiffs are not assisted by cases where the validity of the trademark was not disputed (*Sleep Country Canada; Habbous v Arc Physio Health Ltd*, 2025 FC 297).

[67] Turning to the expert evidence, the Plaintiffs rely upon the Affidavit of Mr. Kincaid, who states that loss of the GUARDIANS brand is “virtually impossible to regain” and would lead to depreciation of goodwill that is “very difficult to calculate in financial terms”. Mr. Kincaid opines that EHN’s branding strategy diluted Homewood’s distinctiveness in the market. He explains that distinctiveness drives brand differentiation and customer loyalty, and that damage to this “point of difference” undermines consumer decision-making throughout the brand funnel—from awareness to purchase.

[68] On cross examination Mr. Kincaid admitted that the harm was not impossible to quantify, and he conceded that a proper brand valuation could be conducted. He confirmed that Level5 Strategy, his own firm, could provide such a valuation if requested, however that request was not made.

[69] Additionally, the Plaintiffs have provided no evidence of lost sales or actual financial impact. Put another way, the Plaintiffs have offered no evidence to establish that customers purchased the Defendant’s services instead of their services.

[70] On the current record, I am not satisfied that the Plaintiffs have met the evidentiary burden to establish actual or potential damage because of the alleged misrepresentation. The expert’s language is qualified, the alleged harm appears quantifiable, and there is no evidence of actual loss.

(b) *Claims under the Competition Act*

[71] I will briefly address the Plaintiffs' allegations under the *Competition Act*, where the Plaintiffs argue they have suffered loss or damage as a result of the Defendant's false or misleading representations, contrary to subsections 52(1) and 52(1.1) of the *Competition Act*, and seek damages under section 36 of the *Competition Act*.

[72] Arguments in support of this ground were not advanced in detail at the hearing of the Motion for the injunction. In any event, based upon the record, I cannot conclude that the Plaintiffs have established exclusive rights to the term GUARDIANS to support a claim under section 52 of the *Competition Act* nor have they established that the Defendant's use of EHN GUARDIANS constitutes a materially false or misleading representation. Furthermore, it appears that equitable remedies, including injunctions, are unavailable under the *Competition Act* (*TFI Foods Ltd v Every Green International Inc*, 2020 FC 808 at para 19).

[73] Accordingly, the claim under the *Competition Act* is not made out for the serious issue branch of the *RJR* injunction test.

(c) *Conclusion on serious issue*

[74] In summary, on a preliminary assessment of the evidence, I am not satisfied that the Plaintiffs have established a strong *prima facie* case for passing off under subsection 7(b) of the *TMA* or under the *Competition Act*. The evidence does not demonstrate sufficient use for an unregistered mark, nor sufficient goodwill in the GUARDIANS mark to support a passing off

claim. While some degree of confusion with EHN GUARDIANS may be arguable, the evidence of resulting harm is weak and speculative.

[75] Further, the validity of the Plaintiffs' claim to an unregistered mark in GUARDIANS is disputed. In this regard I note the following from *BMW Canada Inc v Nissan Canada Inc*, 2005 FC 1708 at para 12:

It is well established that where an interlocutory injunction is sought to enforce an intellectual property rights [*sic*] and where the validity and existence of that right are seriously contested, the Court will be very hesitant to grant the injunction.

[76] That is very much the situation here where the Defendant challenges the validity and existence of the mark claimed by the Plaintiffs.

[77] On this Motion, I am not making any final determination on the merits of the claim, nor on the strength of the evidence. That is for the trial judge. I am simply making findings at this preliminary stage of the matter, based upon the evidence and the submissions of the parties relative to the applicable test for injunctive relief. I am not satisfied that the Plaintiffs have established a strong *prima facie* case on the elements of their passing off claim.

[78] The Plaintiffs' failure to meet the serious issue part of the test is a sufficient basis to deny this injunction. However, I will nonetheless assess the other branches of the test.

(2) Irreparable harm

[79] Irreparable harm refers to the nature of the harm rather than its scope or reach; it is generally described as a harm that cannot be adequately compensated in damages or cured (*RJR* p 341). As explained in *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16:

General assertions cannot establish irreparable harm. They essentially prove nothing:

...

Accordingly, “[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight”...

Instead, “there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted” [Citations omitted.]

[80] Many of the Plaintiffs’ submissions in support of irreparable harm overlap their arguments regarding damages arising from the alleged passing off. The irreparable harm alleged by the Plaintiffs is described in their submissions as:

The plaintiffs’ damages would be impossible to calculate because they have been denied the chance to operate their business in a clear market absent EHN’s use and appropriation of the GUARDIANS Mark. Moreover, the loss of goodwill due to the loss of the distinctiveness of the unique GUARDIANS Mark – particularly in a highly emotional and personal category of services such as mental health – once lost, is virtually impossible to regain, thus causing irreparable harm to the plaintiffs. Trust is a key factor in the decision to attend a mental health and addictions treatment program, and it is intrinsic to the client’s understanding of the services and the quality of the programs delivered by the plaintiffs, especially the Guardians program in association with the GUARDIANS Mark. [Footnotes omitted.]

[81] They rely upon *Sleep Country Canada*, *Reckitt Benckiser*, and *Amer Sports* to support these submissions. However, as noted above, these cases concern registered trademarks, where trademark owners benefit from a presumption of validity and need not establish goodwill to assert infringement. As the Plaintiffs do not hold a registered trademark, these cases do not assist the Plaintiffs.

[82] The Plaintiffs rely upon the expert opinion evidence of Mr. Kincaid to submit that being denied a clear market and losing reputation and distinctiveness in this emotionally driven sector causes irreparable harm. The Plaintiffs frame the inability to grow their brand without market confusion as irreparable harm. They have provided financial evidence on the marketing and promotion activities they had undertaken.

[83] Notably however, there is no evidence that the Plaintiffs have suffered loss of sales or loss of market share. While I appreciate that the Plaintiffs' claim is forward looking on the risk to their brand, considering the parties have co-existed and presumably competed in the marketplace while both using the GUARDIANS word for at least 1 year, I would have expected some evidence of financial impact if indeed there is irreparable harm. The Kincaid report does not provide any financial analysis or assessment of any alleged losses. I presume such evidence were available, it would have been highlighted by Mr. Kincaid.

[84] There is insufficient evidence to support the irreparable harm claim. In any event, I am satisfied that if harm is established it can be adequately calculated and therefore compensated in

damages. The evidence of damage is speculative and minimal, which weighs against finding irreparable harm.

(3) Balance of convenience

[85] Having concluded that the Plaintiffs have not satisfied the first two branches of the injunction test, in my view, the balance of convenience favours the Defendant. The validity of the Plaintiffs' claim to the GUARDIANS mark is uncertain and their irreparable harm claim is largely speculative and unquantified. The Defendant has provided details of the costs related to branding, signage, domain purchase, marketing, and operational disruption if it is restrained from using its mark.

[86] Given the uncertainty over the Plaintiffs' trademark rights, the balance of convenience favours the Defendant.

IV. Conclusion

[87] For the reasons outlined above, I am not granting the injunctive relief sought as the Plaintiffs have not satisfied the heightened *CBC* test.

[88] As the successful party, the Defendant is entitled to costs. If the parties cannot agree on costs, they may file submissions not exceeding 5 pages. The Defendant's costs submissions shall be served and filed by Monday, October 20, 2025. The Plaintiffs' submissions shall be served and filed by Monday, October 27, 2025.

ORDER IN T-3222-24

THIS COURT ORDERS that:

1. The Plaintiffs' Motion for an interlocutory injunction is dismissed.
2. If the parties are unable to agree on costs, they may file costs submissions as set out in the Reasons.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-3222-24

STYLE OF CAUSE: SCHLEGEL HEALTH CARE INC. ET AL V
EDGEWOOD HEALTH NETWORK INC.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JULY 15, 16 AND 17, 2025

**CONFIDENTIAL ORDER
AND REASONS:** MCDONALD J.

DATED: OCTOBER 3, 2025

**PUBLIC ORDER AND
REASONS:** MCDONALD J.

DATED:

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