



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2018 TMOB 160**

**Date of decision: 2018-12-19**

**[UNREVISED ENGLISH**

**CERTIFIED TRANSLATION]**

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

**FASKEN MARTINEAU DUMOULIN LLP**

**Requesting Party**

**and**

**6892078 Canada Inc.**

**Registered Owner**

**TMA850,026 for the Oval trade-mark with  
silhouette of woman, flower. Middle with  
stylized letters**

**Registration**

[1] On May 13, 2016, at the request of FASKEN MARTINEAU DUMOULIN LLP (the Requesting Party), the Registrar sent the notice stipulated in section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to 6892078 Canada Inc. (the Owner), registered owner of registration No. TMA850,026 for “Oval with silhouette of woman, flower. Middle with stylized letters”, reproduced below (the Mark):



[2] The Mark is registered in association with the following goods and services:

Goods

[TRANSLATION] (1) Natural products for human use, namely meal substitutes in the form of meal replacement bars flavoured with peanuts, caramel cream, fruit, chocolate, apple and cinnamon, coffee, granola and chocolate chips to assist with weight loss and maintenance.

(2) Cosmetics. Massage gels, oils and lotions, essential oils for personal use and for aromatherapy. Soaps for the skin; soaking solutions for the feet and hands; moisturizing, firming, toning and softening balms, creams and lotions for the skin; milk for the skin; exfoliants for the skin; anticellulite creams and lotions; beauty masks; face and body sprays; shaving creams; hand and foot cream; sun protection creams; tanning creams and lotions; restorative eye treatments, anti-wrinkle creams, eyelid creams; skin care ointment; emulsifying preparations to moisturize, clean, exfoliate, protect and regenerate the skin and mucous membranes and to treat and prevent disorders related to aging or diseases affecting the skin and mucous membranes. Thermal cure products, namely detoxifying mud, revitalizing mud, wrappings for the body. Bath products, namely sea salt scrubs, shower gel, foaming gel, bath milk, bath beads, bath salts. Hair products, namely fixatives, gels, hair rinse goods, revitalizers, shampoos, dyes, restorative treatments for damaged hair, pomades, brushes, combs, dryers, diffuser, straightening iron. Nail care products, namely nail polish, base and finishing coat, nail files, false nails, nail enamels, acetone, treatment for brittle nails and cuticles, paraffin for hand treatment. Eyelash products, namely false eyelashes, adhesive, revitalizer, decorations for false eyelashes, mascara brushes. Hand mirrors; fabric towels; candles, pot-pourri.

Services

(1) Spa services; medical spa services; aesthetic services, namely waxing and laser depilation, manicure, pedicure, makeup, facials, nail application; hair salon; body care, namely massage therapy services, body massages, thalassotherapy, therapeutic baths, steam baths, Turkish baths, Scandinavian baths, algae cures, body showers, spray showers, saunas, lymphatic drainage, vibrotherapy, galvanotherapy, pressotherapy, body wrapping, hydrotherapy, aromatherapy treatment, botulism toxin injections, hyaluronic acid injections, laser skin rejuvenation treatment, skin imaging, laser treatment for facial veins and redness, treatment of pigment spots and rosacea; microdermabrasion, naturopathy, reflexology, algotherapy. Physical treatment to correct posture anomalies; physiotherapy, orthotherapy, pressotherapy, kinesiotherapy, namely the therapeutic use of gymnastic movements and various forms of massages. Advice and seminars in the field of aesthetic care, body care and physical fitness. Tanning services. Retail sale of cosmetics, hair products, aromatherapy products, bath products, thermal cure products, dietary supplements.

(2) Weight control program.

[3] Except where indicated to the contrary, the use of the term “Goods” in the decision refers collectively to the goods stated in (1) and (2) above. Likewise, the use of the term “Services”

refers collectively to the services stated in (1) and (2) above, otherwise individually designated as “Services (1)” and “Services (2)”, respectively.

[4] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of 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 such use since that date. In the case at bar, the relevant period extends from May 13, 2013 to May 13, 2016.

[5] The relevant definitions of “use” are stated in section 4 of the Act and are worded as follows:

(1) A trade-mark 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 trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[6] Concerning services, the presentation of the trade-mark in the advertisement of the services is sufficient to satisfy the requirements of section 4(2) of the Act, from the time the owner of the trade-mark offers and is ready to perform the services in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)].

[7] It is well established that section 45 of the Act has the object and scope of offering a simple, summary and expeditious procedure to clear “dead wood” from the register. Although mere allegations of use are insufficient to establish use in the context of proceedings provided for in section 45 [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 63 (FCA)], the level of evidence required in the context of these proceedings is low [*Lang, Michener, Lawrence & Shaw v Woods Canada Ltd*, 1996 CanLII 17297, 71 CPR (3d) 477 (FCTD)], and it is unnecessary to file an overabundance of evidence [*Union Electric Supply Co v Canada (Registrar of Trade-marks)* (1982), 63 CPR (2d) 56 (FCTD)]. The issue is to establish a use of

the Mark *prima facie* [1459243 Ontario Inc v. Eva Gabor International, Ltd, 2011 FC 18 (FCTD)].

[8] In response to the Registrar's notice, the Owner filed an affidavit of Issam Dweik, sworn on August 10, 2016 accompanied by Exhibits P-1 to P-5.

[9] The parties both filed written representations.

[10] Although the holding of a hearing was solicited by both parties, only the Requesting Party attended the hearing.

#### PRELIMINARY REMARKS

[11] At the hearing, the Requesting Party raised some procedural questions, discussed below.

#### **Admissibility of the Owner's evidence**

[12] The Requesting Party submits that Mr. Dweik's affidavit is inadmissible as evidence because it was submitted to the Registrar by Mr. Alexandru Mihiu of the firm Draghia Avocats. It alleges that neither Mr. Mihiu, nor the firm for which he works are registered on the *List of Trademark Agents* kept by the Canadian Intellectual Property Office and they thus did not have the capacity to address the Registrar.

[13] However, I note that the Registrar, by way of an official letter dated August 18, 2016, confirmed the designation of Mr. Mihiu as representative for service for the Mark. On the same date, by way of another official letter, the Registrar also confirmed receipt of the Owner's evidence. I note that no problem regarding the evidence submitted was raised at that time, whether by the Registrar or by the Requesting Party. In the circumstances and considering the nature of these proceedings, I find that it is unnecessary to discuss this question further and am of the opinion that Mr. Dweik's affidavit is admissible as evidence.

## **Breaches concerning the Owner's written representations**

### Copy

[14] The Requesting Party submits that it has not received a copy of the Owner's written representations.

[15] In the context of the proceedings provided for in section 45 of the Act, service is not required. What is required of a party who corresponds with the Registrar is to transmit a copy of any correspondence to the other party to the proceedings, including the written representations; and to confirm, in any correspondence addressed to the Registrar, that a complete copy has been transmitted to the other party [*Practice Notice on Section 45 Proceedings*].

[16] In his letter to the Registrar dated April 21, 2017 submitting the Owner's written representations, the new agent on the record acting on the Owner's account indicates that a copy of these representations was sent to the other party. Moreover, the Requesting Party indicated at the hearing that it had succeeded in laying hands on a copy of the Owner's written representations by its diligence in following the progress of these proceedings. In the circumstances, I see no reason to review the Registrar's decision to place the Owner's written representations on the record.

### Contents

[17] The Requesting Party also criticizes the contents of the Owner's written representations. More specifically, it points out that the Owner introduces several allegations of fact that are not otherwise supported by the evidence and that consequently should be ignored. In particular, it mentions the so-called Exhibits P-6 and P-7, which were not introduced as evidence by Mr. Dweik's affidavit and appear nowhere on the record.

[18] I confirm that I have not taken into account additional evidence or arguments that are not supported by the evidence of record.

### **Absence of the Owner at the hearing**

[19] Finally, the Requesting Party points out that the Owner was not represented at the hearing that it expressly requested be held.

[20] Yet in the context of these proceedings, there is no penalty for an unannounced and/or unexplained absence as a party at the hearing, regardless of whether or not that party previously requested it be held.

### THE EVIDENCE OF RECORD

[21] In this brief affidavit, Mr. Dweik describes himself as a “director” of the Owner and its “duly authorized representative”.

[22] Mr. Dweik affirms that the Owner:

...

*[...] operates an aesthetics clinic offering weight loss and anti-age treatment programs (hereinafter the “Aesthetics Business”) and having three places of business [...].*

[23] Mr. Dweik proves the addresses of these three places of business, two located in Montréal (on Rue Monkland and Rue Sherbrooke respectively) and one on the South Shore of Montréal (on Boulevard Salaberry in Châteauguay), and affirms that:

...

*Since its incorporation, the Registrant has used the Trade-mark on a daily basis in association with the Aesthetics Business it operates and more particularly [...].*

[24] Mr. Dweik refers more specifically to the use of the Mark on the Owner’s business cards, on its website, on all of its advertising material, at its three places of business and on the vehicles it uses in the course of its business. He files to this effect, in support of his affidavit, a business card, an excerpt from said website, examples of advertising material, two photographs of the Owner’s places of business, and three photographs of a motor vehicle (respectively Exhibits P-1 to P-5). I will quickly review the exhibits in question.

### **Exhibit P-1**

[25] Exhibit P-1 consists of a business card. I note that it displays the Mark, the address *www.911spamedical.com*, the three addresses of the places of business of the Owner's clinic and contact information, as well as the description: "Clinique anti-âge, d'amaigrissement et de santé naturelle *Anti-Age, Weight Loss & Natural Health Clinic*".

### **Exhibit P-2**

[26] Exhibit P-2 consists of an excerpt from what Mr. Dweik affirms is the Owner's website. The excerpt filed is undated and the address of the site is not visible therein. We see the Mark, an advertisement for "lipomassages" and "lipolasers", and the same telephone numbers and email address as on the business card filed in Exhibit P-1.

### **Exhibit P-3**

[27] Exhibit P-3 consists of examples of advertising material. The Owner provides in this regard a range of documents that include discount coupons, a pamphlet and several promotional brochures describing various services, a pouch for gift certificates, and excerpts from an ethnic magazine and a local newspaper mentioning some of the services offered by the Owner. I will return to the highlights of these documents in my analysis below.

### **Exhibit P-4**

[28] Exhibit P-4 consists of what Mr. Dweik affirms are photographs showing the Mark as used at the Owner's places of business. The first photo illustrates in part the window of an entrance door displaying the Mark, a telephone number (the same as the one appearing on the business card filed as Exhibit P-1), the address *www.911slim.com*, and the description, partially legible, reproduced below:

On fait plus que vous maquiller: o[?]  
We do more than just make-up: W[?]  
Clinique d'amaig[rissement] anti-âge et sant[é] [Translation: Anti-age and health clinic]

- o Perte de poids [Translation: Weight loss]
- o Lipomassage par ende[?] [Translation: Lipomassge by [?]]
- o Traitements anti-cellulite [Translation: Anti-cellulite treatments]

- Systèmes de désintoxicatio[n] [Translation: Detoxification systems]
- Naturothérapie [Translation: Naturotherapy)
- Body sculpturing
- Lifting non chirurgical [Translation: Nonsurgical lifting]
- Soins de la peau [?] [Translation: Skin care]

[29] The second photo illustrates in part the front of a house, at the entrance of which can be seen, in particular, a sign entitled “OUVERTURE Sur rendez-vous seulement *GRAND OPENING By appointment only*”, on which the Mark also appears. The references to the telephone number and the website visible in the first photo also appear in different places in the second photo, as well as the description “Clinique anti-âge, d’amaigrissement et de santé naturelle *Anti-age, weight loss and natural health clinic*”.

### **Exhibit P-5**

[30] Exhibit P-5 consists of three photographs of a motor vehicle, visibly registered in Québec, on which are displayed, in particular, the Mark, a description similar to those found on the business card filed in Exhibit P-1 and in the second photo filed in Exhibit P-4, and the same telephone number and website address as are found in Exhibit P-4.

### ANALYSIS

[31] In its representations, the Requesting Party challenges several aspects of the Owner’s evidence. In general, it alleges deficiencies in the evidence, arguing that Mr. Dweik’s affidavit is imprecise, vague and subject to many interpretations. Reviewing the evidence exhibit by exhibit, it insists that none of these exhibits constitutes value evidence of use of the Mark during the relevant period, in association with the Goods or the Services.

### **Use in association with the Goods**

[32] Concerning the Goods covered by the registration, I agree with the Requesting Party that Mr. Dweik does not provide any evidence of use of the Mark relating to the Goods during the relevant period or at a given time. Mr. Dweik’s affidavit is silent on this subject and the sparse mentions of goods I note in examining all of the evidence instead concern the sale of goods displaying different trade-marks, such as “RIVAGE” and “BATH FAIRY”.

[33] The Owner also presented no fact that can be considered as a special circumstance justifying the failure to use the Mark in association with the Goods during the relevant period. The Goods therefore will be expunged from the registration.

### **Use in association with the Services**

[34] Concerning the Services covered by the registration, Mr. Dweik affirms that, since its constitution, the Owner has used the Mark daily in association with its Aesthetics Business, as proved more specifically by Exhibits P-1 to P-5.

[35] As mentioned by the Requesting Party, the date of constitution of the Owner is not specifically indicated in the evidence. The Owner submits that Mr. Dweik's assertion that the Mark was used "daily" since its constitution implies that it was also used during the relevant period. The Owner argues, in particular that, even if it did not provide its date of constitution, it is obvious that it could not have initiated or participated in the registration process of the Mark without having been duly constituted in advance.

[36] However, during the examination of a new application for registration, the Act does not impose the responsibility on the Registrar to authenticate the applicant's name or existence in fact, nor to ensure that the applicant's corporate status is in good standing. Therefore, I cannot subscribe to the argument that any presumption exists to the effect that a company is duly constituted simply due to the fact that it has filed an application for registration of a trade-mark. That being said, considering the evidence as a whole, I nonetheless find it reasonable to infer that by affirming that the Owner has used the Mark "since its constitution", Mr. Dweik meant "even before the application for registration" that led to the registration covered by these proceedings, to which he refers expressly in his affidavit.

[37] The Owner also submits that Mr. Dweik's affidavit, even if it appears general, meets all the criteria of section 45 of the Act. More specifically, he argues that both this document and the exhibits attached to it clearly show the use of the Mark in association with the Services during the relevant period.

[38] I agree with the Requesting Party that it is possible to note various deficiencies when each of the exhibits submitted by the Owner is examined individually and meticulously.

However, I remind the parties that in the context of the proceedings contemplated in section 45 of the Act, it is important to consider the evidence as a whole. In this sense, even though several of the Requesting Party's representations are not without merit, its approach consisting of dissecting and considering in isolation each item of evidence submitted by the Owner, appears inappropriate in my opinion [see *Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB)].

[39] The evidence does not have to be perfect. As indicated above, a registered owner only must present *prima facie* evidence of use within the meaning of sections 4 and 45 of the Act. This evidential burden is light; the evidence only has to present facts based on which a conclusion of use can be inferred logically [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184].

[40] Thus, considering all of the evidence filed in the course of these proceedings, I find that the Owner met its burden of proving that the Mark does not constitute "dead wood", at least for part of the Services (1) and for all of the Services (2).

#### Use in association with the Services (1)

[41] Although the facts advanced therein are limited, objectively interpreted and considered as a whole, the evidence filed by the Owner presents more than mere allegations of use and allows sufficient reasonable inferences to be drawn in view of concluding the use of the Mark in association with part of the Services (1) during the relevant period. In my opinion, the overlapping items of evidence submitted sufficiently establish connections that can corroborate the accuracy of the facts put forward in Mr. Dweik's affidavit and cover, at least to some extent, the less precise elements of the assertions it contains.

[42] For example, when I examine Exhibit P-3, out of the dozen documents submitted as advertising material, I more specifically retain three promotional brochures with complete dates clearly attached to the relevant period, namely "Promotions de printemps" (Spring promotions), "Promos d'automne" (Fall promos) and "Promotions d'hiver" (Winter promotions), expiring respectively on June 15, 2015, December 1, 2015 and March 1, 2016. They contain all the descriptions overlapping part of the Services (1) (several of which overlap throughout the

promotions). The brochures also refer to a telephone number (the same as the one appearing on Exhibits P-1, P-2, P-4 and P-5) and to a website (also corresponding to the one appearing on Exhibits P-4 and P-5).

[43] A fourth promotional brochure, entitled “Promotions d’ouverture” (Opening promotions) (describing services mostly overlapping those advertised in the three promotional brochures discussed above), bears an expiration date in numerical format, “01.06.2016”, and mentions the addresses of the Owner’s three places of business. Since the Owner’s advertising material is mostly bilingual, I do not have more information allowing me to determine with certainty whether the promotions expire on January 6, 2016 or June 1, 2016 and thus to situate this promotional brochure clearly within the relevant period. Whatever the case maybe, considering this brochure in light of the other documents filed in looseleaf under Exhibit P-3, particularly including an undated pamphlet mentioning the addresses of the places of business on Rue Monkland and Boulevard Salaberry, and a discount coupon associated with this promotion mentioning “Pour mieux vous servir maintenant 3 succursales” (To serve you better Now 3 branches) with the address of each of the Owner’s three places of business, for which one of the promotions applies only to the Rue Sherbrooke branch in Montréal, I conclude that the business on Rue Sherbrooke is the latest of the Owner’s branches to have launched its activities. In other words, the “Promotions d’ouverture” (Opening promotions) advertised in the promotional brochure displaying the expiration date “01.06.2016” are intended to mark the opening of a third branch complementing the services already offered via the Owner’s other two branches, located on Rue Monkland and Boulevard Salaberry.

[44] Indeed, although Mr. Dweik does not specify the opening date of each of his three branches, nor to which of the three branches the photographs of the two places of business filed under Exhibit P-4 are specifically attached, the factual backdrop that emerges from all of the evidence leads me to conclude that at least two of the Owner’s three branches were active during the relevant period.

[45] Based on the elements emerging from the three promotional brochures that can be attached clearly to the relevant period discussed above, including the language used therein (such as, for example: "Profitez dès maintenant! [de] 3 sessions de [...]") [Take advantage now (of) 3

sessions of....), “Achetez un produit corporel ou de bain et obtenez une thérapie de bain ou une session de hammam gratuite” [Purchase a body or bath product and get a free bath therapy or a free hammam session]; “Perdez du poids [...]” (Lose weight)), the price lists (promotional vs. regular) indicated in the brochures, etc., I find it reasonable to conclude that the Owner was ready to provide at least the services advertised in the brochures during the relevant period.

[46] In this regard, although I agree with the Requesting Party that Mr. Dweik did not provide details as to how these brochures were distributed or the place of their distribution, I see no reason, in this case, to conclude that they were not distributed and not to trust Mr. Dweik’s assertion that such advertising material was, in fact, used by the Owner in the course of the operation and advertising of its Aesthetics Business [for a similar conclusion, see *K-2 Corp v 4164652 Canada Inc*, 2014 TMOB 58, at paragr 19].

[47] Thus, by correlating the services described in these three promotions with the Services (1) and bearing in mind the principle whereby “one is not to be astutely meticulous when dealing with language used in a statement of wares” [*Levi Strauss & Co v Canada (Registrar of Trade-marks)* (2006), 51 CPR (4th) 434 (FCTD)], I find the evidence of record sufficient to conclude the use of the Mark within the meaning of section 4(2) of the Act in association with the following services during the relevant period:

Aesthetic services, namely laser depilation, manicure, pedicure, facials; body care, namely body massages, therapeutic baths, steam baths, Turkish baths, saunas, body wrapping, botulism toxin injections, hyaluronic acid injections, laser skin rejuvenation treatment, treatment of pigment spots and rosacea; microdermabrasion, naturopathy. Retail sale of cosmetics, bath products.

[48] For the balance of the Services (1), even though the evidence contains details concerning several of them, I am not ready to draw the inferences necessary for their maintenance due to the lack of more precise dates or allegations of facts allowing me to attach them to the relevant period. Not having any fact that can be considered as a special circumstance justifying their lack of use, these services are therefore expunged from the registration of the Mark.

## Use in association with the Services (2)

[49] I am satisfied that the Owner has proved the use of the Mark within the meaning of section 4(2) of the Act in association with the Services (2) during the relevant period, particularly due to the consistency that emerges from all the exhibits referring thereto, and the corresponding language used by Mr. Dweik in his affidavit. For example, a correlation can be established between these services and the [TRANSLATION] “weight loss clinic” described in almost all of Exhibits P-1 to P-5. Likewise, I find that a correlation can be established between these services and the different promotions specifically aimed at weight loss described in the three promotional brochures dated from the relevant period and filed under Exhibit P-3 discussed above.

## DECISION

[50] Consequently, in exercising the authority delegated to me pursuant to the provisions of 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 the statement of goods in its entirety, as well as the following descriptions from the statement of services:

“Spa services; medical spa services; aesthetic services, namely waxing [...], makeup, [...] nail application; hair salon; body care, namely massage therapy services, [...] thalassotherapy, [...] Scandinavian baths, algae cures, body showers, spray showers, [...] lymphatic drainage, vibrotherapy, galvanotherapy, pressotherapy, [...] hydrotherapy, aromatherapy treatment, [...] laser skin rejuvenation treatment, skin imaging, laser treatment for facial veins and redness [...]; reflexology, algotherapy. Physical treatment to correct posture anomalies; physiotherapy, orthotherapy, pressotherapy, kinesiotherapy, namely the therapeutic use of gymnastic movements and various forms of massages. Advice and seminars in the field of aesthetic care, body care and physical fitness. Tanning services. Retail sale of [...] hair products, aromatherapy products, [...] thermal cure products, dietary supplements. [...].”

[51] The amended statement of services will be worded as follows:

(1) Aesthetic services, namely laser depilation, manicure, pedicure, facials; body care, namely body massages, therapeutic baths, steam baths, Turkish baths, saunas, body wrapping, botulism toxin injections, hyaluronic acid injections, laser skin rejuvenation treatment, treatment of pigment spots and rosacea; microdermabrasion, naturopathy. Retail sale of cosmetics, bath products.

(2) Weight control program.

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Annie Robitaille  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

Certified true translation  
Arnold Bennett

**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS REGISTERED IN THE CASE**

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**DATE OF HEARING:** 2018-08-22

**APPEARANCES**

No appearance

FOR THE REGISTERED OWNER

Amélie Béliveau

FOR THE REQUESTING PARTY

**AGENT(S) IN THE CASE**

BENOÎT & CÔTÉ INC.

FOR THE REGISTERED OWNER

FASKEN MARTINEAU DUMOULIN LLP

FOR THE REQUESTING PARTY