



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 255**

**Date of Decision: 2021-11-25**

**[UNREVISED ENGLISH  
CERTIFIED TRANSLATION]**

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

**9325-9935 Québec Inc.**

**Requesting Party**

**And**

**9372-0480 Québec Inc.**

**Registered Owner**

**TMA903,218 for the Dr piscine design  
mark**

**Registration**

INTRODUCTION

[1] This decision concerns a summary expungement proceeding with respect to registration No. TMA903,218 for the following trademark (the Mark):



[2] The Mark is registered for use in association with the following services:

[TRANSLATION]

Retail of swimming pool products, inflatable toys, and swimming pool accessories.  
Swimming pool maintenance; swimming pool servicing; swimming pool renovation;  
installation of swimming pool security systems; study of technical projects for swimming  
pools.

[3] For the following reasons, I find that the registration should be amended.

#### THE PROCEEDING

[4] On April 24, 2019, at the request of 9232-9935 Québec Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the *Trademarks Act*, RSC 1985 c T-13 (the Act), to 9372-0480 Québec Inc. (the Owner).

[5] The notice required the Owner to provide evidence showing, with respect to all the services specified in the registration, whether the Mark had been used in Canada at any time during the three-year period preceding the date on the notice and, if not, the date when the Mark was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is between April 24, 2016 and April 24, 2019.

[6] The definition of “use” in association with services is set out in section 4 of the Act as follows:

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

[7] In fact, in the absence of evidence demonstrating the performance of services in association with a trademark, it is nevertheless possible to demonstrate the use of this mark in the advertising of services within the meaning of section 4(2) of the Act, if the owner of the trademark was prepared and able to perform the advertised services [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)].

[8] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the Register. Although simple allegations of use are insufficient in this context to establish use of a proceeding set out in section 45 [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 63 (FCA)],

the level of evidence required to establish use in this proceeding is low [*Lang, Michener, Lawrence & Shaw v Woods Canada Ltd* (1996), 71 CPR (3d) 477 (FCTD)] and there is no need to produce evidentiary overkill [*Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTC)]. It involves establishing *prima facie* use of the Mark [*1459243 Ontario Inc v Eva Gabor International, Ltd*, 2011 FC 18].

[9] In response to the Registrar’s notice, the Owner filed the affidavit of Didier Delvil, President of the Owner, sworn on July 10, 2019.

[10] Both parties filed written representations. Only the Owner was represented at the hearing.

#### SUMMARY OF THE EVIDENCE ON FILE

[11] Mr. Delvil explains that he is a consultant in the swimming pool and spa field, has a degree from the French École des Métiers de la Piscine, is a certified swimming pool and spa inspector, and a certified swimming pool and spa operator. Mr. Delvil explains that he has been using the Mark in association with the services specified in the registration since September 1<sup>st</sup>, 2013.

[12] Mr. Delvil states that on January 15, 2018, he set up a business corporation, the Owner, to carry on his business. That same day, he assigned the Mark to the Owner. I note that the Registrar registered this assignment on February 15, 2019.

[13] Mr. Delvil states that the Owner’s (and its predecessor’s) sales figures were approximately \$100,000 for each of the years 2016, 2017, and 2018. In support of this, he attached several exhibits to his affidavit, including invoices, proof of payment, and bids to clients and potential clients. The following exhibits are the ones that stand out to me the most.

[14] First, Exhibit K, which consists of a series of invoices bearing the Mark that were issued to customers in Canada. Although some invoices are dated outside the relevant period, I note several invoices dated from the relevant period listing items related to the swimming pool and spa industry, including the following items:

[TRANSLATION]

- “Exterra project study: technical study for 1 pool...”,

- “Post-claim assessment of in-ground pool”,
- “fix a leak”,
- “Spa inspection”,
- “low swimming pool maintenance”, “swimming pool maintenance”, “outdoor swimming pool maintenance”, “indoor swimming pool maintenance” and “spa maintenance”, and
- “Calibration of Ph sensor”, “Ph – liquid” and “Replacement of Ph sensor – under warranty”.

[15] Second, Exhibit L, which consists of [TRANSLATION] “proof of invoice payments for swimming pool maintenance and service calls with delivery of chemical products or pool parts”. These proofs of payment are all dated from the relevant period and bear the Mark. The proofs of payment list several items related to the maintenance of swimming pools and spas. For example, the one dated July 31, 2016, lists the following items:

[TRANSLATION]

- “Peroxide dosing pump and installation kit”,
- “‘Oxygenia’ stabilized peroxide 20 litres”,
- “Oxygenia ‘Crystal O’ peroxide activator 150 g”,
- “Maintenance on 13/07/2016”,
- “Maintenance on 20/07/2016”,
- “Maintenance on 20/07/2016”,
- “Ph – liquid 20 litres”,
- “Clarimax 700 g”, and
- “Travel on Saturday, July 23”.

[16] Third, Exhibit N, which is a [TRANSLATION] “preliminary report” dated September 27, 2016. The report presents the Owner’s recommendations for a contract to renovate an in-ground swimming pool located in Brossard, which included replacing the swimming pool liner, repairing the swimming pool plumbing, and installing support pillars to prevent said swimming pool from collapsing. This document is accompanied by a cover letter bearing the Mark.

## ANALYSIS

[17] In its representations, the Requesting Party raises a number of deficiencies in the evidence by reviewing it, exhibit by exhibit. However, in the context of a section 45 proceeding, it is important to consider the evidence as a whole. In this respect, although many of the Requesting Party's representations—such as the fact that some exhibits are dated before the relevant period—are not without merit, I find its approach of dissecting and considering each piece of evidence filed by the Owner in isolation to be inappropriate [see *Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB)].

[18] The evidence does not have to be perfect. As noted above, a registered owner only needs to submit *prima facie* evidence of use within the meaning of sections 4 and 45 of the Act. This burden of proof is light; the evidence does not have to be the best evidence, it simply must supply facts from which a conclusion of use may follow as a logical inference [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184].

[19] Therefore, considering all the evidence filed for this proceeding, I find that the Owner has met its burden of demonstrating that the Mark is not “deadwood”.

[20] First, I consider that several items such as [TRANSLATION] “indoor pool maintenance” and “fix a leak”, which are included in the invoices and proofs of payment for Exhibits K and L, correspond to the services of “Swimming pool maintenance; swimming pool repair”. Similarly, I consider the items such as [TRANSLATION] “Post-claim assessment” and “technical study for 1 pool” to be “Study of technical projects for swimming pools” services.

[21] I also accept that the goods in the invoices and proofs of payment demonstrate the Owner's sale of swimming pool products and accessories. That said, no evidence was filed regarding the sale of inflatable toys. Furthermore, at the hearing, the Owner confirmed that it is not claiming the use of the Mark in association with the sale of inflatable toys. In the absence of evidence of special circumstances justifying non-use of the Mark, this part of the services shall be expunged from the statement of services.

[22] In light of the foregoing, and considering that the Mark appears on invoices and proofs of payment, I find that the Owner demonstrated use of the Mark within the meaning of sections 4(2) and 45 of the Act in association with the following registered services:

- “Swimming pool maintenance”
- “Swimming pool repair”
- “Study of technical projects for swimming pools” and
- “Retail sale of swimming pool products ... and swimming pool accessories”.

[23] The remaining services, that is, [TRANSLATION] “swimming pool renovation” and “installation of swimming pool security systems” are not included in the invoices or proofs of payment. However, they are included in the report filed in Exhibit N, which presents the Owner’s recommendations in the context of a contract to renovate a swimming pool.

[24] In my view, the report shows that the Owner provided the remaining services in Canada during the relevant period, and that it was prepared and able to perform them. Therefore, I find that the Owner demonstrated use of the Mark within the meaning of sections 4(2) and 45 of the Act in association with the remaining services, that is, [TRANSLATION] “swimming pool renovation” and “installation of swimming pool security systems”.

#### DISPOSITION

[25] For the reasons set out above, and pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be amended pursuant to section 45 of the Act to expunge “and inflatable toys”.

[26] The statement of services shall read as follows:

Retail sale of swimming pool products and swimming pool accessories. Swimming pool maintenance; swimming pool servicing; swimming pool renovation; installation of swimming pool security systems; study of technical projects for swimming pools.

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Eve Heafey  
Hearing Officer  
Trademarks Opposition Board  
Canadian Intellectual Property Office

Certified translation  
Beau Brock

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**DATE OF HEARING:** November 9, 2021

**APPEARANCES**

Eva Derhy For the Registered Owner

No one appearing For the Requesting Party

**AGENTS OF RECORD**

Eva Derhy For the Registered Owner

No agent appointed For the Requesting Party