



# Canadian Intellectual Property Office

## THE REGISTRAR OF TRADEMARKS

**Citation:** 2023 TMOB 045

**Date of Decision:** 2023-03-09

## IN THE MATTER OF A SECTION 45 PROCEEDING

**Requesting Party:** Marks & Clerk Canada

**Registered Owner:** Metro Jet Wash Corporation

**Registration:** TMA797,235 for METRO JET WASH MJW ODOUR SOLUTIONS Design

### INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA797,235 for the trademark METRO JET WASH MJW ODOUR SOLUTIONS Design (the Mark) as shown below:



[2] The Mark is registered for use in association with the following services: industrial, commercial and residential garbage chute, compactor, bin and parking lot cleaning, power washing and odour control services.

[3] For the reasons that follow, I conclude that the registration ought to be amended to delete “garbage chute, compactor, bin and parking lot cleaning, power washing”.

### **THE PROCEEDING**

[4] At the request of Marks & Clerk Canada (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on February 5, 2021 to the registered owner of the Mark, Metro Jet Wash Corporation (the Owner).

[5] The notice required the Owner to show whether the Mark was used in Canada in association with each of the services listed 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 this case, the relevant period for showing use is February 5, 2018 to February 5, 2021 (the Relevant Period). In the absence of use, the registration is liable to be expunged, unless the absence of use is due to special circumstances.

[6] The relevant definition of use in the present case is set out in section 4(2) of the Act as follows:

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 response to the Registrar’s notice, the Owner furnished the Affidavit of Brian De Carli, the Vice President of the Owner, sworn on August 17, 2021, together with Exhibits A and B.

[8] Neither party submitted written representations. Both parties attended a hearing, which was held in conjunction with section 45 proceedings in relation to registration Nos. TMA797,234 and TMA797,241. Separate decisions will issue in each proceeding.

### **THE EVIDENCE**

[9] Mr. De Carli describes the Owner as a property maintenance company and an industry leader in waste equipment cleaning and states that the Owner works to solve odour issues in residential, commercial and industrial buildings, offering a full range of

products, equipment and odour neutralizing and deodorizing solutions. He asserts that the Mark has been in continuous use by the Owner in Canada in association with the services listed in the registration since 2009.

[10] Mr. De Carli states that the Mark is displayed on stickers placed at the residential, commercial and industrial sites serviced by the Owner in order to provide convenient contact information for property managers and superintendents. As Exhibit A, he provides photographs of stickers displaying the Mark which he states were placed at over 100 customer premises throughout the Relevant Period. The stickers depict the Mark, provide contact information, including a telephone number with a 416 area code, and reference “Odour Control Systems, Sales & Service”.

[11] Mr. De Carli states that the Mark is displayed on the Owner’s trucks used by employees to attend at customer premises. As Exhibit B, he provides a photograph of a truck which displays the Mark and references “Odour Control System, Sales, Service and Rentals”. He states that the Owner’s trucks displayed the Mark consistently through the Relevant Period.

[12] Mr. De Carli states that the Owner had sales of the services offered in association with the Mark of over \$850,000 during the Relevant Period.

[13] Mr. De Carli also states that the Owner spent approximately \$85,000 in the Relevant Period on advertising for the services offered in association with the Mark. He states that the advertising consisted of print advertisements in industry magazines and directories, trade show displays, promotional material and sponsorship of industry golf tournaments. He did not provide examples of any such advertisements.

### **ANALYSIS AND REASONS FOR DECISION**

[14] 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. The evidence in a section 45 proceeding need not be perfect; indeed, the Owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act. This burden

of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184].

[15] Based on the evidence as set forth above, I am satisfied that the Owner displayed the Mark in the advertisement and performance of “industrial, commercial and residential odour control services” in Canada during the Relevant Period.

[16] Accordingly, I conclude that the Owner has shown use of the Mark in association with such services within the meaning of sections 4(2) and 45 of the Act.

[17] With respect to “garbage chute, compactor, bin and parking lot cleaning, power washing”, the Requesting Party submits that there is no evidence of use of the Mark in Canada in association with those services and that they should be deleted from the registration.

[18] In response, the Owner relies on *Spirits International BV v BCF SENCRL*, 2012 FCA 131 to say that I can make reasonable inferences from factual allegations and on *Kvas Miller Everitt v Compute (Bridgend) Ltd* (2005), 47 CPR (4th) 209 to say that I must consider the evidence as a whole. The Owner goes on to submit that the assertion by Mr. De Carli that the Owner used the Mark in association with the services listed in the registration coupled with other statements in his affidavit, for example the statement to the effect that the Owner is a property maintenance company and an industry leader in waste equipment cleaning, provides the necessary factual allegations to permit a reasonable inference that all of the services listed in the registration were offered in association with the Mark. I do not agree.

[19] While Mr. De Carli does state that the Owner is a property maintenance company and an industry leader in waste management equipment cleaning, that does not provide a sufficient factual basis to infer that the specific services namely “garbage chute, compactor, bin and parking lot cleaning, power washing” services were offered in association with the Mark during the Relevant Period. Indeed, Mr. De Carli goes on to state that the Owner “works to solve odour issues in residential, commercial and industrial buildings, offering a full range of products, equipment and odour neutralizing

and deodorizing services” which is consistent with what is shown in the Exhibits which only reference odour control systems, sales and services. Further, while Mr. De Carli speaks of advertising for the services listed in the registration, he has not provided any examples of such advertising.

[20] While the burden of proof in a section 45 proceeding is light, the Owner must still provide facts from which a conclusion of use may follow as a logical inference. In this instance, and based on the evidence as a whole, I am not satisfied that it has done so.

[21] Accordingly, I am not satisfied that the Owner has established use of the Mark in association with “garbage chute, compactor, bin and parking lot cleaning, power washing” services within the meaning of sections 4(2) and 45 of the Act. As there is no evidence of special circumstances to justify non-use, the registration will be amended accordingly.

#### **DISPOSITION**

[22] Pursuant to the authority delegated to me under section 63(3) of the Act, and in compliance with the provisions of section 45 of the Act, the registration will be amended to delete “garbage chute, compactor, bin and parking lot cleaning, power washing”.

[23] The amended statement of services will read as follows: “industrial, commercial and residential odour control services”.

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Robert A. MacDonald  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

# Appearances and Agents of Record

**HEARING DATE:** 2023-02-15

## **APPEARANCES**

**For the Requesting Party:** Michael O'Neill

**For the Registered Owner:** David Reive

## **AGENTS OF RECORD**

**For the Requesting Party:** Marks & Clerk

**For the Registered Owner:** Miller Thomson LLP