

Federal Court



Cour fédérale

Date: 20251020

Docket: T-417-25

Citation: 2025 FC 1704

Toronto, Ontario, October 20, 2025

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

BIG DUCK GAMES, LLC

Applicant

and

X-FLOW LTD.

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This appeal is brought by Big Duck Games, LLC [Big Duck Games] pursuant to subsection 56(1) of the *Trademarks Act*, RSC 1985, c T-13 [Act]. The appeal relates to a decision of the Registrar of Trademarks [the Registrar] dated September 18, 2024 [Decision] ordering the expungement of Trademark Registration No. TMA924,809 [FLOW Registration] under section 45 of the *Act*.

[2] For the reasons that follow, this application is granted in light of the new evidence adduced by Big Duck Games. The new evidence explains why Big Duck Games did not respond to the notice issued to it under section 45 of the *Act* [Notice] and provides evidence of use that is sufficiently substantial, significant and probative such that it would have materially affected the Registrar's decision to expunge the FLOW Registration. Subject to minor amendments to the list of goods in the FLOW Registration which Big Duck Games has consented to, the evidence tendered is sufficient to establish a *prima facie* case of use of the word mark "FLOW" [the FLOW Mark] in connection with the Goods in the normal course of trade in Canada during the Relevant Period.

II. Facts

A. *The FLOW Registration*

[3] The FLOW Mark is registered for use in association with the following goods:

- (1) Software for playing computer games for use on mobile and cellular phones; and
- (2) Computer games; software for playing computer games; video games; software for playing video games; software for playing console games; downloadable video and computer games for mobile phones, smart phones, and mobile computers; video games for mobile phones, smart phones, mobile computers, consoles, wireless devices, and portable and handheld electronic communications devices [collectively, the Goods].

B. *The Section 45 Proceeding*

[4] At the request of the Respondent, X-Flow Ltd. [Respondent], the Registrar issued the Notice advising that a section 45 proceeding had been commenced on May 9, 2024, in respect of

the FLOW Registration. The Notice required Big Duck Games to show use of the FLOW Mark in Canada in association with the Goods at any time within the three-year period immediately preceding the date of the Notice, being May 9, 2021 to May 9, 2024 [Relevant Period].

C. *The Registrar's Decision*

[5] When Big Duck Games did not respond to the Notice, the Registrar issued the Decision expunging the FLOW Registration. As explained in the new evidence filed by Big Duck Games on this application, it did not respond because it was not aware of the section 45 proceeding until after the deadline for responding to the Notice and after the Registrar had issued its Decision.

D. *The New Evidence*

[6] Big Duck Games' new evidence consists of the following affidavits [collectively, the Affidavits]:

- (1) The affidavit of Stephen McArthur [McArthur] sworn February 14, 2025 [McArthur Affidavit]

[7] McArthur is a United States attorney who coordinates Big Duck Games' global trademark portfolio, including in Canada.

[8] The McArthur Affidavit provides evidence related to the filing of the application for the FLOW Mark on behalf of Big Duck Games on December 3, 2014 [FLOW Application] and the circumstances which led to the failure of Big Duck Games to receive the Notice: a Zip Code error; change of address for Big Duck Games; and the retirement of the Canadian trademark

agent who filed the FLOW Application in 2023. According to McArthur, it wasn't until January 2025, when he was conducting a routine status check of Big Duck Games' global trademark portfolio that he discovered that the FLOW Registration had been expunged in Canada.

[9] It is McArthur's evidence that at all relevant times, Big Duck Games was using the FLOW Mark in Canada and had an ongoing intention to pursue the FLOW Registration.

(2) The affidavits of Michael J. Newman [Newman] sworn February 14, 2025 and April 21, 2025 [collectively, the Newman Affidavits]

[10] Newman is the co-founder and Chief Executive Officer of Big Duck Games which he describes as a mobile games studio which creates video games, especially puzzle games for mobile and smart phones, computers, tablets, mobile computers, wireless devices and portable and handheld electronic communications devices.

[11] Big Duck Games' main game title is "Flow Free" and relevant titles of the "FLOW Family" games that were launched before or during the Relevant Period include: (i) Flow Free; (ii) Flow Free: Hexes; (iii) Flow Free: Warps; (iv) Flow Free: Bridges; (v) Flow Fit; and (vi) Flow Fit: Sudoku [collectively, the Games].

[12] According to the Newman Affidavits, the software for the Games was available during the Relevant Period to Canadian customers and potential customers for download as a mobile application (for iOS and Android devices) and as a computer application (for Microsoft). The FLOW Mark was used in association with the Games and appeared at both the point of download

of the Games in the Apple app store, Google app store, Microsoft store and on the title screen of the Games when downloaded.

[13] Attached as exhibits to the Newman Affidavits are screenshots that depict how the FLOW Mark appeared on:

- (i) devices of customers and potential customers in Canada at the point of download of the Games from the Apple app store for iOS devices and the Google Play Store for Android devices and the Microsoft store for computer applications;
- (ii) the title screen of the Free Flow game when downloaded by customers in Canada on an iOS device, Android device and personal computer; and
- (iii) the user interface displayed to Canadian customers and potential customers at the point of download for some of the Games within the app stores for iOS and Android devices.

[14] While these representative screenshots were taken in April 2025, Newman confirms that they “accurately and reliably” represent the use of the FLOW Mark that was displayed to customers in Canada at the point of download of the Games during the Relevant Period.

[15] The Newman Affidavits also attach the following representative evidence of use of the FLOW Mark during the Relevant Period from the Wayback Machine:

- (i) a June 20, 2023 printout from Big Duck Games’ website <https://www.bigduckgames.com> providing information on how the Games can be downloaded, including by Canadian customers; and
- (ii) a June 19, 2023 printout of a subpage of the website related to the Flow Free game.

[16] According to the Newman Affidavits, the approximate number of downloads of Flow Free in Canada in the Relevant Period was 676,000 on iOS devices, over 213,000 on Android devices and 575 from the Microsoft Store.

III. Preliminary Issue

[17] At the hearing of this appeal, Counsel for Big Duck Games candidly raised an issue not addressed in its written submissions related to amended subsection 56(5) of the *Act* which now requires leave to file additional evidence on appeal of a decision of the Registrar to the Federal Court.

[18] Big Duck Games takes the position that leave to file its new evidence is not required as its appeal was commenced prior to April 1, 2025, the date on which the amendment to subsection 56(5) of the *Act* came into force. Alternatively, Big Duck Games made submissions as to the test that should govern the granting of leave to file new evidence, which it submits it has met.

[19] The temporal application of newly enacted subsection 56(5) was recently considered by Justice Fuhrer in *Yat Sun Food Products Ltd v Griffith Foods International Inc*, 2025 FC 1688 [*Yat Sun Food*]. In that case, like here, the appellant's Notice of Application was filed *before* April 1, 2025; however, the parties' evidence was filed as part of their records *after* April 1, 2025. Justice Fuhrer held that based on the appellant's affidavits of service which predated April 1, 2025, the appellant was deemed to have filed its new evidence before the change to subsection 56(5) of the *Act*. Applying the Supreme Court's decision in *R v Archambault*, 2024 SCC 35 [*Archambault*], Justice Fuhrer found that the appellant had a vested right or privilege to file new

evidence as of right “having regard to the state of the law at least as of the time it filed the evidence in question, if not as of the time it filed its Notice of Application” (*Yat Sun Food* at para 46).

[20] In this case, I consider Big Duck Games’ right or privilege to file new evidence as of right to have vested on March 31, 2025, when a judge of the Federal Court issued an order extending the time for the filing of Big Duck Games’ Notice of Application dated February 7, 2025, to that same date. Given that the Notice of Application pleads Big Duck Games’ reliance on new evidence in support of its appeal of the Registrar’s Decision, it is of no moment in my view, that Big Duck Games’ actual evidence was filed after April 1, 2025, since Rule 301 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] considers an application to have been commenced upon satisfaction of certain conditions, which includes merely listing the documentary evidence to be used at the hearing of the application (Rule 301(f)). Pursuant to Rule 306 of the *Federal Courts Rules*, the actual evidence may be filed at a later date. Accordingly, in view of its vested right, Big Duck Games is subject to the previous version of subsection 56(5) of the *Act* and it is not required to seek leave of this Court to file its new evidence (*Archambault* at para 32).

IV. Issues and Standard of Review

[21] This appeal therefore raises the following issues:

- A. Is the new evidence submitted by the Applicant material?
- B. If the new evidence is material, does it establish use of the FLOW Mark in association with the Goods during the Relevant Period?

V. Analysis

A. *The new evidence is material*

[22] As the Applicant has led new evidence on this appeal under former subsection 56(5) of the *Act*, this Court must first consider the materiality of that evidence and determine whether the evidence is sufficiently substantial, significant and probative such that it would have materially impacted the Registrar's Decision (*Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at para 21 [*Clorox*]; and *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 at para 27).

[23] To be material, new evidence must add something of significance to the evidence that was originally before the Registrar including by remedying a deficiency identified by the decision maker (*Centric Brands Holding LLC v Stikeman Elliott LLP*, 2024 FC 204 at para 25).

[24] I accept Big Duck Games' evidence that it did not receive the Notice and that this explains its failure to file any evidence in the section 45 proceeding. I also find that the new evidence is significant and probative of Big Duck Games' use of the FLOW Mark in Canada during the Relevant Period. As this evidence clearly fills the gap noted in the Decision, it would have materially affected the Decision of the Registrar (*Smooth Payment Inc v Klarna Bank Ab*, 2024 FC 1274 at para 29 [*Smooth Payment*]).

B. *The new evidence demonstrates use in the Relevant Period*

[25] Having found that Big Duck Games' new evidence is material, the Court may conduct a *de novo* appeal by coming to its own conclusion on the issues to which the new evidence relates and exercising any discretion vested in the Registrar (*Smooth Payment* at para 29 and *Clorox* at para 21 and *Seara Alimentos Ltda v Amira Enterprises Inc*, 2019 FCA 63 at para 22).

[26] Evidence describing use of the trademark must address the necessary elements of subsection 4(1) of the *Act*: (i) the transfer of property in or possession of the Goods; (ii) in the normal course of trade; (iii) with the trademark visibly and prominently displayed in connection with the Goods (*Sim & McBurney v en Vogue Sculptured Nail Systems Inc*, 2021 FC 172 at para 20 [*Sim & McBurney*]). The mere assertion by the owner that the trademark was in use is not sufficient; rather, the owner must “show” how, when and where the mark is being used (*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448 at para 44).

[27] I find that the Affidavits provide the requisite evidence of use of the FLOW Mark in the normal course of trade during the Relevant Period in respect of the registered Goods, with one exception related to physical consoles.

[28] The representative screenshots show that the FLOW Mark appeared at the point of download in the app stores, on the title screens and on the Big Duck Games website, which list Big Duck Games as the developer and publisher. The FLOW Mark is prominently displayed including as a registered mark in the phrase “connect matching colours with pipe to create a

Flow®.” The new evidence contains data showing that the main title (Flow Free) has over 100 million downloads in Canada in the Relevant Period, which has been considered evidence of use at the time of transfer taking into account the unique nature of software products (*Specialty Software Inc v Bewatec Kommunikationstechnik GMBH*, 2016 FC 223 at para 20). While downloading the mobile application for the Games is free, the new evidence also includes representative invoices during the Relevant Period showing revenues derived from the mobile applications in Canada for add-ons such as “hints” and special packages.

[29] I acknowledge that much of the new evidence is from outside the Relevant Period coupled with what could otherwise be taken as a bald assertion that it is representative of the use of the FLOW Mark in the Relevant Period. However, this is understandable given the nature of the Goods at issue: what appeared historically on a mobile device at any point in time is not capable of capture by the Wayback machine. Ultimately, I am guided by previous decisions of this Court which emphasize that the use threshold is not stringent, and an owner need only establish a *prima facie* case of use (*Sim & McBurney* at paras 14-15), which I consider has been made out, except in respect of physical consoles, for which no evidence of use was provided.

VI. Costs

[30] Big Duck Games seeks costs of this appeal citing the decision in *Hi-Star Franchise Systems, Inc v Stemp & Company*, 2019 FC 222 [*Hi-Star*]. I find this authority to be distinguishable on the basis that unlike in *Hi-Star*, the Respondent cannot be accused of engaging in gamesmanship, nor did it put Big Duck Games to extra work: neither affiant was

cross-examined by the Respondent, and the Respondent did not provide either written or oral submissions on this appeal. Accordingly, no costs shall be awarded.

VII. Conclusion

[31] The finding of use by this Court in connection with the FLOW Mark is sufficient to allow the appeal, set aside the Registrar's Decision and maintain the Registration except with respect to physical consoles, which shall be struck from the list of goods in the FLOW Registration.

JUDGMENT in T-417-25

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed and the decision of the Registrar dated September 18, 2024, is set aside;
2. The list of goods in Registration No TMA924,809 shall be amended to read:
 - (1) Software for playing computer games for use on mobile and cellular phones; and
 - (2) Computer games; software for playing computer games; video games; software for playing video games; downloadable video and computer games for mobile phones, smart phones, and mobile computers; video games for mobile phones, smart phones, mobile computers, wireless devices, and portable and handheld electronic communications devices.
3. There is no order as to costs.

"Allyson Whyte Nowak"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-417-25

STYLE OF CAUSE: BIG DUCK GAMES, LLC v X-FLOW LTD.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 14, 2025

JUDGMENT AND REASONS: WHYTE NOWAK J.

DATED: OCTOBER 20, 2025

APPEARANCES:

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FOR THE APPLICANT

No one appeared

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