

Court File No.

**FEDERAL COURT**

B E T W E E N:

(Court Seal)

BIG DUCK GAMES, LLC

Applicant

-and-

X-FLOW LTD.

Respondent

APPLICATION UNDER Section 56 of the *Trademarks Act*  
and Rule 300(d) of the *Federal Courts Rules*

Trademark Registration No. TMA924,809

**NOTICE OF APPLICATION**

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date \_\_\_\_\_ Issued by \_\_\_\_\_  
(Registry Officer)

Address of  
local office: 180 Queen Street West, Suite 200  
Toronto ON M5V 3L6

TO: **The Administrator**  
Federal Court  
180 Queen Street West, Suite 200  
Toronto, ON M5V 3L6

AND TO: **X-Flow Ltd.**  
480-601 West Cordova Street  
Vancouver, BC V6B 1G1

AND TO: **The Registrar of Trademarks**  
Canadian Intellectual Property Office  
50 Victoria Street, Phase I  
4<sup>th</sup> Floor  
Gatineau, Quebec K1A 0C9

(served via the Federal Court Registry  
pursuant to Rule 133 of the *Federal Courts  
Rules*)

## APPLICATION

1. This application is an appeal under Section 56 of the *Trademarks Act*, RSC 1985, c. T-13 (the “*Trademarks Act*”) and Rule 300(d) of the *Federal Courts Rules* SOR/98-106 (the “*Federal Courts Rules*”) from notices of the Registrar of Trademarks (the “**Registrar**”) dated September 18 and December 19, 2024 in respect of a Section 45 Expungement Proceeding (defined below) against the registration of the trademark FLOW (the “**Mark**”), which is the subject of Canadian Trademark Registration No. TMA924,809 (the “**Registration**”)

### THE APPLICANT MAKES THIS APPLICATION FOR:

2. An Order:
- (a) permitting the filing of this Notice of Application as being made within two months from the date on which notice of the decision to expunge was dispatched by the Registrar, or alternatively granting an extension of time to file this Notice of Application pursuant to subsection 56(1) of the *Trademarks Act* and/or Rule 8 of the *Federal Courts Rules*;
  - (b) granting this application and the within appeal;
  - (c) setting aside the Registrar’s decision(s) to expunge the Registration from the Register;
  - (d) directing the Registrar to maintain the Registration on the Register;
  - (e) costs of this application; and
  - (f) such further and other relief as this Honourable Court finds just.

**THE GROUNDS FOR THE APPLICATION ARE:**

**Applicant was not aware of the underlying Section 45 Expungement Proceeding**

3. The Applicant (“**Big Duck Games**” or “**Applicant**”) is the owner of the Registration issued on January 5, 2016. The Registration covers the Mark in association with “software for playing computer games for use on mobile and cellular phones” and “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.”

4. The respondent (“**X-Flow**” or “**Respondent**”) requested the Registrar of Trademarks to forward a notice under Section 45 of the *Trademarks Act* (“**Section 45 Notice**”) to the Applicant with respect to the Registration, leading to commencement of an expungement proceeding under Section 45 of the *Trademarks Act* (“**Section 45 Expungement Proceeding**”). The Section 45 Notice is dated May 9, 2024, and required the Applicant to furnish evidence of use of the Mark during the three year period preceding the date of the Section 45 Notice ( i.e., from May 9, 2021 to May 9, 2024) (“**Relevant Period**”).

5. Big Duck Games did not receive the Section 45 Notice.

6. Based on the documents on the Trademarks Document Retrieval Service (“**TDRS**”) in respect of the Registration, the mailing label for the Section 45 Notice was addressed to 18685 NE 56th Ct. Redmond, WA 98052, UNITED STATES OF AMERICA (“**Washington Address**”). Big Duck Games was previously a Washington Limited Liability Company with the Washington Address as its principal address, but it was converted to a Florida Limited Liability Company on April 12, 2016, with a new principal address of 95 Merrick Way 3<sup>rd</sup> Floor, Coral Gables, FL 33134, UNITED STATES OF AMERICA (“**New Address**”). Moreover, the Washington Address was the *home address* of the owners of Big Duck Games prior to 2016. That home was sold in August 2016, following which it was no longer the company’s address. Any mail

received at the Washington Address was forwarded to the company's New Address for a one year period (until 2017), but such mail forwarding subsequently ceased.

7. There was no agent of record for the Registration at the time of the Section 45 Notice. Mr. Sheldon Lazarovitz, was the agent of record for the Registration, and retired on or about December 1, 2023. Big Duck Games was unaware of their agent's retirement. As such, no new agent was appointed for the Registration and the Registration did not have an agent of record during the Section 45 Expungement Proceeding.

8. As a result, the Applicant did not receive notice of the Section 45 Expungement Proceeding and was unable to take action and file evidence to prevent the expungement of the Registration.

9. On or about September 18, 2024, the Registrar provided a further notice that stated, "by reason of the failure to file the evidence required, the registration will be expunged from the register pursuant to section 45(4) of the *Trademarks Act*". This notice too was not received by Big Duck Games as it too appears to have been sent to the Washington Address.

10. Then, on or about December 19, 2024, the Registrar issued a further notice advising that the Mark "was expunged as of December 19, 2024 under the provisions of section 45 of the *Trademarks Act*". This notice too was not received by Big Duck Games as it also appears to have been sent to the Washington Address.

11. Big Duck Games only became aware of the expungement and the above-noted notices on January 30, 2025, when its U.S. counsel conducted a routine status check of its trademark registrations and applications in Canada. Canadian counsel for Big Ducks Games was immediately retained to file a Notice of Application in relation to the Section 45 Expungement Proceeding.

### **Big Duck Games Used the Mark During the Relevant Period**

12. Big Duck Games is the developer and publisher of a puzzle game titled 'Flow Free' for mobile phones, smart phones, mobile computers, consoles, wireless devices, and portable and handheld electronic communications devices ("**Game**").

13. During the Relevant Period, the software for the Game was available to Canadians for download as an application on iOS and Android devices, on Amazon and via Microsoft. The Mark (i.e., the word "FLOW") appeared on the title screen of the Flow Free game once downloaded, and was also prominently displayed on the application screen home page at the point of download.

14. Since 2012, there have been approximately 9.96 million total downloads of the Game in Canada. Moreover, by the end of the Relevant Period, an average of 170,000 active monthly users were playing the Game in Canada.

15. The FLOW Mark is a valuable trademark owned and used by Big Duck Games during the Relevant Period in association with the Game. Big Duck Games earns over ten thousand dollars in revenues per month in Canada in association with this Game.

### **Present Application**

16. As detailed above, the decision to expunge the Mark was based on the lack of evidence of use filed by Big Duck Games in response to the Section 45 Notice. The Registrar's decision to expunge the Registration was "by reason of the failure to file the evidence required" (September 18, 2024 notice) and "under the provisions of section 45 of the *Trademarks Act*" (December 19, 2024 notice). However, no evidence was filed because Big Duck Games had not received the Section 45 Notice, nor the two notices subsequently issued by the Registrar.

17. At all relevant times, Big Duck Games had a continuing intention to pursue this application and the Registration, this matter has merit, and there is no prejudice to the Respondent. Further there is no purported delay by Big Duck Games as it acted immediately upon becoming aware of the status of its Registration.

18. This application will be supported by evidence of use to be filed by Big Duck Games pursuant to Rule 306 of the *Federal Courts Rules* and subsection 56(5) of the *Trademarks Act*. This evidence would have materially affected the decision to expunge the Registration if it had been before the Registrar.

19. The Applicant relies on sections 4, 45 and 56 of the *Trademarks Act* and Rules 3, 8, 300(d) and 306 of the *Federal Courts Rules*.

**THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

- (a) The Trademarks Office file with respect to Canadian Registration TMA924,809 including all documents (or certified copies of documents) on file in the Registrar's office relating to the Section 45 Expungement Proceeding.
  - (b) Such further and other supporting affidavit and documentary exhibits as the Applicant may serve and file under Rule 306 of the *Federal Courts Rules* and subsection 56(5) of the *Trademarks Act*;
  - (c) Such further and other material as counsel may advise and this Honourable Court may permit;
20. The Applicant requests that this application be heard at Toronto, Ontario.

**REQUEST UNDER RULE 317 OF THE FEDERAL RULES**

21. The Applicant requests that the Registrar send to the Applicant, and to the registry of the Federal Court, a certified copy of the following material that is not in the possession of the Applicant, but is in the possession of the Registrar:

- (a) All documents on file in the Trademarks Office relating to Canadian Registration TMA924,809.

February 7, 2025



---

**DLA PIPER (CANADA) LLP**  
Barristers & Solicitors  
Bay Adelaide - West Tower  
Suite 5100 - 333 Bay Street  
Toronto ON M5H 2R2

Sangeetha Punniyamoorthy  
Tel: 416.862.3366  
sangeetha.punniyamoorthy@dlapiper.com

Cristina Mihalceanu  
Tel: 416.862.3384  
cristina.mihalceanu@dlapiper.com

Solicitors for the Applicant