Federal Court of Appeal | Cour d'appel fédérale

Date: 20260109

Docket: A-125-24

Citation: 2026 FCA 2

[ENGLISH TRANSLATION]

CORAM: **LEBLANC J.A.**
ROUSSEL J.A.
HECKMAN J.A.

BETWEEN:

COMITÉ INTERPROFESSIONNEL DU VIN DE CHAMPAGNE and INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ

Appellants

and

COORS BREWING COMPANY

Respondent

Heard at Toronto, Ontario, on May 13, 2025.

Judgment delivered at Ottawa, Ontario, on January 9, 2026.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: ROUSSEL J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] This appeal concerns section 45 of the *Trademarks Act*, R.S.C. 1985, c. T-13 (the Act). This provision, and more specifically subsection 45(3), authorizes the Registrar of Trademarks (the Registrar), at the request of any person or on the Registrar's own initiative, and following a

proceeding initiated by a notice to the registered owner under subsection 45(1), to expunge from the Register of Trademarks (the Register) the registration of a trademark that was not in use in Canada at any time during the period covered by that provision, where the absence of use, if that was indeed the case, was not due to special circumstances.

[2] The determination of this period is the central issue in this appeal from a judgment of the Federal Court, dated February 28, 2024 (2024 FC 169), brought by the appellants, two French public corporations.

[3] In its judgment, the Federal Court dismissed the appeal the appellants had filed under section 56 of the Act from a decision of the Registrar dated April 28, 2021 (2021 TMOB 78) (Registrar's Decision), refusing to expunge, at their request, three registrations related to beer products, namely, the trademarks "The Champagne of Beers" and "Le Champagne des Bières", as well as the label and design for "Miller High Life, the Champagne of Beers" (the Registrations).

[4] These marks and the design (the Marks) were registered on August 6, 1971, October 10, 1986, and April 3, 1987, respectively. The respondent acquired the Marks from Miller Brewing International Inc. (Miller Brewing) in October 2016 and has been the registered owner of the Marks since then.

[5] The appellants submit that the "fundamental" error committed by the Federal Court (Appellants' Memorandum of Fact and Law, Title A (iii) of the Concise Statement of

Submissions) concerns the starting point for the period of non-use that must be justified by the registered owner. According to the appellants, section 45 of the Act—and in particular, subsections 45(1) and (3), when read together—is capable of only one interpretation, according to which the owner is required to justify the absence of use of the mark at issue since the date when it was last in use in Canada. Accordingly, the appellants say the Federal Court's interpretation that section 45 establishes no fixed rule that determines the starting point of the period of non-use to be justified and that, in some cases, the date of the registered owner's acquisition of the mark may be considered that starting point, must be set aside.

[6] The appellants argue that this error tainted the assessment of the evidence the respondent furnished to excuse the absence of use of the Marks, since it was based on a truncated period of non-use, that is, one from which several years of non-use were amputated.

[7] On September 10, 2025, while this matter was still under advisement, a panel of this Court rendered judgment in *Centric Brands Holding LLC v. Stikeman Elliott LLP*, 2025 FCA 161 (*Centric Brands*), which had been heard prior to the hearing in this case. That panel accepted the validity, from a statutory interpretation standpoint, of what it referred to as the "New Owner Jurisprudence", which it described as follows:

> [30] … the principle behind the New Owner Jurisprudence is that the recent acquisition of a trademark may give rise to special circumstances contemplated in subsection 45(3) of the Act such that, in responding to a notice pursuant to subsection 45(1) in respect of the registration of the trademark, the new owner is not required to account for a period of non-use pre-dating the acquisition. In such circumstances, the task of the new owner of a registered trademark in section 45 proceedings is to establish special circumstances for non-use in the limited period from the date of acquisition to the date of the notice.

[8] In so doing, the Court in *Centric Brands* rejected the claim that the only possible interpretation of section 45 of the Act is that it imposes on a registered owner who has been served a notice under subsection 45(1) of the Act the burden of establishing that the special circumstances which excuse the absence of use have existed since the date when the mark was last in use.

[9] Given the potential impact of that decision on this case, on September 12, 2025, the Court invited the parties to file supplemental written representations. They did so on October 8 and 20, 2025 respectively.

[10] For the reasons that follow, I am of the view that, based on the decision of this Court in *Centric Brands*, the Federal Court did not err in rejecting the appellants' position that section 45 of the Act requires that the justification for the non-use of a trademark referred to in a notice under subsection 45(1) cover the entire period between the date when the mark was last in use and the date of the notice, thus ruling out the possibility, regardless of the circumstances of a given case, of considering the acquisition date of the mark at issue to be the starting point of the period to be justified.

[11] I am also of the view that the Federal Court committed no error warranting our intervention in accepting, in light of the circumstances of this case, the date of the respondent's acquisition of the Marks as the starting point for the period of non-use or in asserting that it was satisfied, based on the evidence on record, that special circumstances excused the absence of use during that period.

II. Notice pursuant to Subsection 45(1) of the Act

[12] As noted earlier, the Marks were registered in Canada a very long time ago. On October 13, 2016, in a transaction worth approximately $12 billion, the respondent acquired all of Miller Brewing's assets, which counted among them a certain number of trademarks, including the Marks.

[13] On April 3, 2017, the Registrar, at the appellants' request, issued notices for each registration under subsection 45(1) of the Act (the Notice), requiring the respondent to provide within three months an affidavit or a statutory declaration showing whether the Marks were in use in Canada at any time during the three-year period immediately preceding the date of the Notice and, if not, the date when they were last so in use and the reason for the absence of such use since that date.

[14] In response to the Notice, on November 2, 2017, the respondent provided an affidavit to the Registrar as required under subsection 45(1) of the Act. The affidavit states that the respondent was not able to demonstrate whether the Marks had been in use in Canada during the three-year period preceding the date of the Notice and that the last time they were in use in Canada was apparently in 2012. It also indicates that when the respondent acquired the Marks in October 2016, it intended to sell the products bearing them, and it describes the steps taken to ensure their marketing and production, including obtaining the regulatory approvals required by the different provincial liquor bodies and boards. It also states that, given the scale of the transaction in which the respondent acquired the assets of Miller Brewing, including the Marks,

significant resources were invested in reviewing each asset and incorporating it into an existing intellectual property portfolio and in considering the brand strategy for those assets.

[15] I note in passing that, under subsection 45(2) of the Act, the Registrar may receive written representations from the registered owner and from the person at whose request the notice under subsection 45(1) was given. However, the Registrar may not receive any evidence other than what is submitted by the registered owner.

[16] The expungement proceeding initiated by the notice under subsection 45(1) of the Act is essentially "summary and administrative" in nature. In other words, it simply offers "an opportunity for the registered owner to show, if he can, that his mark is in use or if not, why not". Above all, it must not be mistaken for a proceeding authorizing a "trial of a contested issue of fact" or for an alternative to what is provided under section 57 of the Act to attack a trademark (*Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 at para. 55 (*Bauer*), citing *Dart Industries Inc. v. Baker & McKenzie LLP*, 2013 FC 97 at para. 13, and *Meredith & Finlayson v. Canada (Registrar of Trade Marks)* (FCA), [1991] FCJ No. 1318 (QL)).

III. The Registrar's Decision

[17] On April 28, 2021, the Registrar decided to maintain the Registrations in the Register. After reviewing the Registrar's role in expungement proceedings under section 45 of the Act, the Registrar noted that there was no evidence that the Marks were used during the three years preceding the date of the Notice and that, as a result, it had to be determined under section 45(3)

of the Act whether, in light of the test developed by this Court in *Canada (Registrar of Trademarks) v. Harris Knitting Mills Ltd.* (1985) 4 C.P.R. (3d) 488 (*Harris Knitting*) and later clarified in *Scott Paper Limited v. Smart & Biggar*, 2008 FCA 129 (*Scott Paper*), the absence of use of the Marks was due to special circumstances.

[18] The Registrar noted that this test involves the consideration of three criteria: (i) the length of time during which the trademark at issue had not been in use; (ii) whether the reasons for non-use were beyond the control of the registered owner; and (iii) whether the registered owner had the intention to shortly resume use. The Registrar also affirmed, citing *Scott Paper*, that the requirement in the second of these criteria carried the greatest weight because, if it was not satisfied, the registration at issue would have to be expunged, regardless of the outcome of the analysis of the other two criteria (Registrar's Decision at paras. 17–18).

[19] The Registrar then stated that the fundamental disagreement between the parties concerned the starting point of the period of non-use of the Marks. In this respect, the Registrar expressed the view that the acquisition of a registered trademark did not in itself constitute special circumstances within the meaning of subsection 45(3) of the Act, but that in a number of cases, a recent acquisition of a trademark had been used as the starting point for the period of non-use to be justified. However, the Registrar also noted that in those cases, the recent acquisition of the trademark was not the only factor explaining and excusing the non-use (Registrar's Decision at para. 25).

[20] Applying these criteria to the circumstances of this case, the Registrar was satisfied that the period of non-use should be calculated as of the date of acquisition of the Marks, resulting in a period of no more than six months of non-use. The Registrar said in this respect that it would be an overly burdensome approach to require a new owner of a registered trademark to justify the absence of use of the trademark by the previous owner, which in some cases could cover a period of several decades (Registrar's Decision at paras. 27 and 31).

[21] The Registrar was also satisfied that the absence of use of the Marks by the respondent during the relevant period—i.e., between the date of acquisition of the Marks in October 2016 and the date of the Notice on April 3, 2017—was due to circumstances beyond the respondent's control, namely, the requirement to obtain regulatory approval before marketing the products bearing the Marks. The Registrar was satisfied on this point, even though the respondent took steps to obtain regulatory approval only after the end of the relevant period on April 3, 2017 (Registrar's Decision at paras. 35–36). The Registrar based this finding on the fact that, in support of its request for approval, the respondent had to provide the regulatory body with samples of the products for which approval was being sought as well as the labels planned for those products (Registrar's Decision at paras. 37–38).

[22] Finally, the Registrar, based on the evidence on record, was satisfied that the respondent had demonstrated a serious intention to shortly resume use of the Marks, even though some of the steps to this end had been taken after the relevant period of non-use. According to the Registrar, consideration of this criterion cannot ignore the steps the respondent took between

December 2016 and February 2017, during the relevant period of non-use (Registrar's Decision at paras. 41–42).

IV. The Federal Court Judgment

[23] As noted above, the Federal Court did not find any grounds to intervene in the Registrar's decision, which it reviewed on the deferential standard of palpable and overriding error. Specifically, the Federal Court determined that the Registrar had made no such error in using the date of acquisition of the Marks as the starting point for the period of non-use to be justified and that special circumstances excused the absence of use of the Marks during this period.

[24] In particular, regarding the starting point for the period of non-use, the Federal Court found that the Registrar had chosen to follow a long-established line of authority on this issue, which was a choice open to the Registrar despite the existence of a diverging line of authority (Federal Court Judgment at para. 60). The Federal Court went on to say that *Scott Paper*, in which, in the absence of any evidence of prior use, the date of acquisition of the mark at issue was accepted as the starting point for the period of non-use, has to be added to the line of authority where the approach used by the Registrar has been adopted. That approach was not challenged in *Scott Paper* and this Court did not comment adversely on it. In the Federal Court's view, these were relevant considerations for the purposes of this case (Federal Court Judgment at para. 65).

[25] For the Federal Court, the line of authority the Registrar chose to follow "reflects the practical considerations associated with the acquisition of a trademark, which may include issues internal to the owner, for example integrating new staff, planning new business approaches, or developing new supply or marketing arrangements" and "factors external to the new owner, such as meeting regulatory requirements" (Federal Court Judgment at para. 68) (citations omitted).

[26] The Federal Court therefore rejected the idea that section 45 contains a "fixed legal rule that determines precisely when the period of non-use begins in all cases" (Federal Court Judgment at para. 17). In so doing, it rejected the appellants' position that it falls to the registered owner in all circumstances to justify the absence of use of the mark at issue since the date when it was last in use.

[27] According to the Federal Court, the wording of section 45 of the Act indicates that Parliament did not intend for expungement to follow automatically upon any gap in use. This is because section 45 allows a registered owner to avoid expungement simply by demonstrating use at any point during the three years preceding the notice given under subsection 45(1) or, in the case of non-use, to demonstrate special circumstances that excuse it (Federal Court Judgment at para. 68). The Federal Court notes that, according to a long-established line of authority, such special considerations may include the recent acquisition of a trademark.

[28] Regarding the Registrar's conclusion that special circumstances excused the absence of use of the Marks during the relevant period of non-use, the Federal Court, relying on this Court's decision in *One Group LLC v. Gouverneur Inc*., 2016 FCA 109 (*One Group*), began by saying

that, although the applicable test could have been set out more clearly, it was satisfied that the Registrar had "focused on the true issue—whether there were special circumstances that excused the non-use of the Marks in issue here" and that its intervention was therefore not warranted (Federal Court Judgment at paras. 100–102; *One Group* at para. 13).

[29] The Federal Court then found that there was no palpable and overriding error in the Registrar's analysis of the "true issue" in light of the evidence that was before the Registrar. The Federal Court stated the following on this point:

> [103] Turning back to the Registrar's decision in the instant case, the period of non-use was found to be minimal because the Registrar decided that it should begin from the time of acquisition. I have already dismissed the Applicants' challenge to this finding. The Registrar also found that the non-use was due to the size of the acquisition as well as the regulatory requirements that the Respondent had to meet before it could begin to use the Marks in Canada. One important finding of fact in the analysis is that the Respondent was required to submit labels that met Canadian standards as part of its application for regulatory approval, and thus its efforts to design appropriate labels were a necessary part of the approval process and therefore beyond its control. I can find no basis to disturb this finding, which is rooted in the evidence in the record.
>
> [104] Stepping back to examine the decision as a whole, I am satisfied that the Registrar understood the legal tests that needed to be applied and properly focused on the key question: Although parts of the analysis could have been written more clearly, and it would have been preferable for the Registrar to make clear and specific findings on each of the four elements of the test as set out in Scott Paper, I am not convinced that the Registrar made an error in law or in fact in the instant case.
>
> [105] Going back to the explanation in *Harris Knitting*, the Court of Appeal stated that the special circumstances must be circumstances to which the absence of use is due, and then continued:
>
> > This means that in order to determine whether the absence of use should be excused in a given case, it is necessary to consider the reasons for the absence of use and determine whether these reasons are such that an exception should be made to the general rule that the registration of a mark that is not in use should be expunged.

> [106] In my view, that is precisely what the Registrar did in the decision under appeal.
>
> [107]] Measured from the time of acquisition, the evidence supports the findings made by the Registrar: the period of non-use was not long; the Respondent needed time to deal with the large and complex acquisition and it required the approval of several provincial regulators before it could begin to use the Marks; and in order to obtain such approval certain preparatory steps were needed, including the design of appropriate labels that met Canadian requirements. The special circumstances explained the absence of use and were the reason for it. Given this, there is no basis for intervention.

[30] I note that the appellants filed evidence in support of their appeal before the Federal Court, as they were permitted to do under subsection 56(5) of the Act. That evidence ultimately turned out to be irrelevant, however, because it related to an issue that was raised in the Notice of Application but not pursued in the appellants' written or oral submissions before the Federal Court (Federal Court Judgment at para. 14).

[31] That evidence therefore has no bearing on this appeal, either on the merits or on the issue of the standard of review applicable to the treatment of this evidence.

V. Issues and Standard of Review

[32] The appellants submit that this appeal raises the following four issues:

(a) What is the applicable standard of review?

(b) [Did the Federal Court] err in law in finding that the possibility for the Registrar to replace the date of last use under [section] 45 with the date of the [acquisition of the Marks] was a question of mixed fact and law?

(c) [Did the Federal Court] err in law in accepting the Registrar's interpretation of [section] 45, which not only has no basis in law but which also opens the door to abuses by registered owners?

(d) [Did the Federal Court err] in finding that the scale of the [transaction in which the respondent acquired the Marks] and the respondent's intention to resume use of the Marks were special circumstances?

[33] In my view, the appeal raises the following two issues:

(a) Did the Federal Court err in ruling, both on the merits and on the applicable standard of review, that there is no fixed legal rule for determining precisely when the period of non-use begins and, in so doing, in rejecting the argument that the starting point of this period can only be, as the appellants submit, the last date when the mark at issue was in use and therefore cannot be the date of the registered owner's acquisition of the mark, regardless of the circumstances?

(b) If not, did the Federal Court err in concluding that there was nothing to warrant its intervention in the Registrar's finding that special circumstances justified

determining that the starting point of the period of non-use was the date of the respondent's acquisition of the Marks and excused the absence of use of the Marks during that period?

[34] It is not disputed that this appeal must be determined on the standard of review applicable to appeals, which is set out in *Housen v. Nikolaisen*, 2002 SCC 33 (*Housen*) (see also *Clorox Company of Canada, Ltd. v. Chloretec S.E.C.*, 2020 FCA 76 at paras. 18–23; *Centric Brands* at para. 18). Accordingly, questions of fact and questions of mixed fact and law (except for extricable questions of law) are to be reviewed on the standard of palpable and overriding error. As for questions of law, they are reviewable on the standard of correctness.

VI. Analysis

A. *The Federal Court did not err, be it on the merits or on the applicable standard of review, in ruling that there is no fixed legal rule that determines precisely when the period of non-use begins*

(1) The Merits of the Issue

[35] To the extent that it concerns the scope of section 45 of the Act, the issue of whether there is a fixed legal rule that determines when the period of non-use begins is obviously a question of law. More particularly, the Court must determine whether, as the appellants contend, the starting point for the purpose of justifying the period of non-use under section 45 is necessarily the date when it was last in use or whether, as the Federal Court decided, there is no

such fixed rule under section 45 and therefore, depending on the circumstances of the case, the starting point may be another date, such as the date the registered owner acquired the mark.

[36] This is clearly the perspective raised by the issue in this appeal, and there is no doubt that it must be considered on the standard of correctness. This is in fact how, in *Centric Brands*, this Court characterized the issue of whether the New Owner Jurisprudence was valid as a means for establishing special circumstances based on the date of change of ownership, not the date when last in use, to avoid expungement of the mark at issue (*Centric Brands* at para. 19).

[37] As noted earlier, this issue is, for all intents and purposes, at the heart of this appeal.

[38] The appellants submit a number of arguments in support of their position on this issue. They maintain that the Federal Court decision on this point:

(a) disregards the clear wording of section 45 and illegally alters it, in that the wording:

i. in no way provides that, depending on the circumstances, a shorter period of non-use or a period with a different starting point may be considered in cases where the registered owner does not furnish a date when it was last in use, which constitutes an omission that can only lead to expungement of the mark;

ii. clearly states that the relevant factor is the absence of use of the mark, not merely the absence of use by the registered owner; and

iii. does in fact establish a fixed legal rule that determines precisely when the period of non-use begins, in that this period is calculated as of the date when the mark was last in use;

(b) runs contrary to the cardinal principle animating trademarks according to which the right to a trademark, unlike other forms of intellectual property (namely, copyrights, patents and industrial designs), may be preserved only by use, hence the well-known saying, "use it or lose it" (*Mattel, Inc. v. 3894207 Canada Inc*., 2006 SCC 22 at para. 5);

(c) is based on a line of authority that stems from an inaccurate reading of the 1993 decision in *Arrowhead Spring Water Ltd. v. Arrowhead Water Corp.* (1993), 47 C.P.R. (3d) 217 (F.C.T.D.) (*Arrowhead*); and

(d) encourages non-compliance with the Act as well as abuse, by placing the registered owner in a more advantageous position than the previous owner, which cannot be what Parliament intended.

[39] In my view, *Centric Brands*, which according to the doctrine of horizontal *stare decisis* is binding on this panel of the Court, settles this issue by authorizing a more flexible reading of section 45 of the Act than that advanced by the appellants. In so doing, it permits the date of acquisition of a registered mark to be used, depending on the circumstances, as the starting point of the period of non-use of the mark that requires justification.

[40] Before a more detailed discussion of *Centric Brands*, it is worth reproducing section 45 of the Act:

Registrar may request evidence of use	**Le registraire peut exiger une preuve d'emploi**
45 (1) After three years beginning on the day on which a trademark is registered, unless the Registrar sees good reason to the contrary, the Registrar shall, at the written request of any person who pays the prescribed fee — or may, on his or her own initiative — give notice to the registered owner of the trademark requiring the registered owner to furnish within three months an affidavit or a statutory declaration showing, with respect to all the goods or services specified in the registration or to those that may be specified in the notice, whether the trademark was in use in Canada at any time during the three-year period immediately preceding the date of the notice and, if not, the date when it was last so in use and the reason for the absence of such use since that date	**45 (1)** Après trois années à compter de la date d'enregistrement d'une marque de commerce, sur demande écrite présentée par une personne qui verse les droits prescrits, le registraire donne au propriétaire inscrit, à moins qu'il ne voie une raison valable à l'effet contraire, un avis lui enjoignant de fournir, dans les trois mois, un affidavit ou une déclaration solennelle indiquant, à l'égard de chacun des produits ou de chacun des services que spécifie l'enregistrement ou que l'avis peut spécifier, si la marque de commerce a été employée au Canada à un moment quelconque au cours des trois ans précédant la date de l'avis et, dans la négative, la date où elle a été ainsi employée en dernier et la raison pour laquelle elle ne l'a pas été depuis cette date. Il peut cependant, après trois années à compter de la date de l'enregistrement, donner l'avis de sa propre initiative.
Form of evidence	**Forme de la preuve**
(2) The Registrar shall not receive any evidence other than the affidavit or statutory	**(2)** Le registraire ne peut recevoir aucune preuve autre que cet affidavit ou cette

declaration, but may receive representations made in the prescribed manner and within the prescribed time by the registered owner of the trademark or by the person at whose request the notice was given.

déclaration solennelle, mais il peut recevoir des observations faites — selon les modalités prescrites — par le propriétaire inscrit de la marque de commerce ou par la personne à la demande de laquelle l'avis a été donné.

Service

(2.1) The registered owner of the trademark shall, in the prescribed manner and within the prescribed time, serve on the person at whose request the notice was given any evidence that the registered owner submits to the Registrar. Those parties shall, in the prescribed manner and within the prescribed time, serve on each other any written representations that they submit to the Registrar.

Signification

(2.1) Le propriétaire inscrit de la marque de commerce signifie, selon les modalités prescrites, à la personne à la demande de laquelle l'avis a été donné, la preuve qu'il présente au registraire, et chacune des parties signifie à l'autre, selon les modalités prescrites, les observations écrites qu'elle présente au registraire.

Failure to serve

(2.2) The Registrar is not required to consider any evidence or written representations that was not served in accordance with subsection (2.1).

Absence de signification

(2.2) Le registraire n'est pas tenu d'examiner la preuve ou les observations écrites qui n'ont pas été signifiées conformément au paragraphe (2.1).

Effect of non-use

(3) Where, by reason of the evidence furnished to the Registrar or the failure to furnish any evidence, it appears to the Registrar that a trademark, either with respect to all of the goods or services specified in the registration or with respect to any of those goods or services, was not

Effet du non-usage

(3) Lorsqu'il apparaît au registraire, en raison de la preuve qui lui est fournie ou du défaut de fournir une telle preuve, que la marque de commerce, soit à l'égard de la totalité des produits ou services spécifiés dans l'enregistrement, soit à l'égard de l'un de ces

used in Canada at any time during the three year period immediately preceding the date of the notice and that the absence of use has not been due to special circumstances that excuse the absence of use, the registration of the trademark is liable to be expunged or amended accordingly.

produits ou de l'un de ces services, n'a été employée au Canada à aucun moment au cours des trois ans précédant la date de l'avis et que le défaut d'emploi n'a pas été attribuable à des circonstances spéciales qui le justifient, l'enregistrement de cette marque de commerce est susceptible de radiation ou de modification en conséquence.

Notice to owner

(4) When the Registrar reaches a decision whether or not the registration of a trademark ought to be expunged or amended, he shall give notice of his decision with the reasons therefor to the registered owner of the trademark and to the person at whose request the notice referred to in subsection (1) was given.

Avis au propriétaire

(4) Lorsque le registraire décide ou non de radier ou de modifier l'enregistrement de la marque de commerce, il notifie sa décision, avec les motifs pertinents, au propriétaire inscrit de la marque de commerce et à la personne à la demande de qui l'avis visé au paragraphe (1) a été donné.

Costs

(4.1) Subject to the regulations, the Registrar may, by order, award costs in a proceeding under this section.

Frais

(4.1) Sous réserve des règlements et dans le cadre d'une procédure visée au présent article, le registraire peut, par ordonnance, en adjuger les frais.

Order of Federal Court

(4.2) A certified copy of an order made under subsection (4.1) may be filed in the Federal Court and, on being filed, the order becomes and

Ordonnance de la Cour fédérale

(4.2) Une copie certifiée de l'ordonnance sur les frais peut être déposée à la Cour fédérale. Dès le dépôt de cette copie, l'ordonnance est assimilée à une ordonnance

may be enforced as an order of that Court.	rendue par cette cour et peut être exécutée comme telle.
Action by Registrar	**Mesures à prendre par le registraire**
(5) The Registrar shall act in accordance with his decision if no appeal therefrom is taken within the time limited by this Act or, if an appeal is taken, shall act in accordance with the final judgment given in the appeal.	**(5)** Le registraire agit en conformité avec sa décision si aucun appel n'en est interjeté dans le délai prévu par la présente loi ou, si un appel est interjeté, il agit en conformité avec le jugement définitif rendu dans cet appel.

[41] In paragraphs 8 and 9 of its decision, the Federal Court of Appeal began by reviewing the general legal principles applicable to section 45 proceedings, adopting those the Federal Court had identified, namely, that section 45 is a summary procedure that aims to remove "deadwood" from the Register, and that absence of use of a mark can be penalized by expungement unless the registered owner is able to establish special circumstances. As for the principles applying more specifically to whether or not such circumstances exist, the Court, once again citing the Federal Court judgment, provided the following list:

> A. The general rule is that absence of use of a trademark by the owner during the relevant period will be penalized by expungement, and the exception will apply only if the special circumstances are the reason for the non-use of the trademark (*Scott Paper* at paras. 21–22, *Harris Knitting* at para. 10);
>
> B. Special circumstances are circumstances not found in most cases of absence of use of a trademark (*Scott Paper* at para. 22, *Harris Knitting* at para. 10);
>
> C. Factors to consider in determining whether special circumstances exist that excuse non-use include (i) the length of time during which the trademark has not been in use, (ii) whether the non-use was due to circumstances beyond the registered owner's control, and (iii) whether there was an

> intention to resume use of the mark in the near term (*Harris Knitting* at para. 11).

Centric Brands at para. 9

[42] The Court also found it useful to recall the following principles:

(a) Registered owners may not hold on to a registration notwithstanding that the mark is no longer in use.

(b) The burden of proof on the registered owner subject to section 45 proceedings is not a heavy one, however.

(c) Such proceedings are summary and administrative in nature.

(d) It is not the appropriate vehicle for a trial of a contested issue of fact.

(e) The usual penalty for non-use is expungement, and there is a threshold to meet before the exception for special circumstances applies.

(f) To be “special”, the circumstances must be unusual, uncommon or exceptional.

(g) Plans for future use of the mark at issue do not in themselves explain the period of non-use and therefore cannot amount to special circumstances.

Centric Brands at paras. 22, 25–27

[43] The Court went on to discuss the validity of the New Owner Jurisprudence and considered whether the principle was a means for establishing special circumstances to avoid

expungement of a trademark registration pursuant to subsection 45(3) of the Act (*Centric Brands* at para. 19). In this regard, it noted that, under this principle, recent acquisition of a trademark may give rise to special circumstances contemplated in subsection 45(3) of the Act such that, in responding to a notice pursuant to subsection 45(1) of the Act, the new owner "is not required to account for a period of non-use pre-dating the acquisition" (*Centric Brands* at para. 30).

[44] The Court noted that the Federal Court had applied this principle several times since 1993, including in the instant case, which provided a substantial discussion of the principle (*Centric Brands* at para. 31). It also noted that, even though the New Owner Jurisprudence had been applied for over 30 years, this Court had never explicitly confirmed its validity, yet it had accepted its application without substantive comment in *Bereskin & Parr v. Fairweather Ltd.*, 2007 FCA 376, and *Scott Paper*. The Court saw it as giving its implicit approval of this line of authority in those two cases (*Centric Brands* at para. 35).

[45] The Court went on to reject the argument, similar to the one raised by the appellants in this case, that the New Owner Jurisprudence is inconsistent with section 45 of the Act "in that it permits a new owner to avoid the requirement to address non-use of the trademark in question during the period prior to its acquisition", whereas it follows from the wording of section 45, and subsection 45(1) in particular, "that special circumstances excusing the absence of use must cover the period from the date of last use" (*Centric Brands* at para. 39).

[46] According to the Court, "there is nothing in the text, the context or the purpose of section 45 that excludes the possibility that a recent arms' length acquisition of a trademark may

constitute special circumstances such that the acquirer could be relieved of the obligation to provide evidence of use, or justify a period of non-use, prior to the acquisition", adding that the acquisition of a trademark "may itself indicate that it is not deadwood" (*Centric Brands* at para. 40).

[47] The Court subsequently distinguished subsections 45(1) and (3) of the Act, affirming that the former sets out the requirements for a trademark owner's response, while the latter provides for expungement in the case of non-use that is not excused by special circumstances (*Centric Brands* at para. 40). More specifically regarding subsection 45(3), the Court noted that what constitutes special circumstances is not further defined there or elsewhere in the Act. It stated that a recent acquisition of a trademark will not automatically result in the application of the New Owner Jurisprudence any more than it will exclude that possibility. Ultimately, whether or not special circumstances exist to excuse a period of non-use is a question of mixed fact and law, which will attract deference on appeal (*Centric Brands* at para. 43).

[48] According to the principle of horizontal *stare decisis*, the Court normally follows its prior decisions, as this ensures certainty, consistency, and predictability of the law (*Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 9 (*Miller*); *Feeney v. Canada*, 2022 FCA 190 at para. 16; *Chen v. Canada*, 2023 FCA 146 at paras. 10–11 (*Chen*); *Patel v. Dermaspark Products Inc.*, 2025 FCA 145 at paras. 31–32).

[49] This principle is specifically tied to the fact that decisions of a panel of this Court are decisions of the Court as a whole. In other words, when a panel of appellate judges speak, they

do so not for themselves, but for the Court in its entirety (*Chen* at para. 10). Accordingly, the Court will overrule the decisions of another panel only in "exceptional circumstances". This can occur if "the previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed" (*Miller* at para. 10).

[50] The appellants maintain that *Centric Brands* has no impact on this case. In their view, the decision deals only summarily with the New Owner Jurisprudence and does so in the context of the "exceptional circumstances" of that case. They further maintain that the decision [TRANSLATION] "clearly departs from certain fundamental principles of trademarks law", including "use it or lose it" and the principle that imposes an obligation on a registered owner who receives a notice under subsection 45(1) to justify not only the absence of use of the mark since becoming owner but also, and above all, the absence of use of the mark since the date when it was last in use (Supplemental Written Representations of the appellants, October 8, 2025, at paras. 10 and 13).

[51] According to the appellants, *Centric Brands* only implicitly accepted the application of this principle, without expressly commenting on or dealing in any depth with the countervailing arguments. The decision therefore cannot be reconciled with this Court's earlier decisions in *Harris Knitting* and *Scott Paper*. The appellants reiterate that the three-year period provided for in subsection 45(3), which they assert is merely a grace period, should not, for the purposes of justifying a period of non-use, be confused with the period starting as of the date the mark was last in use and extending to the date the notice was given under paragraph 45(1), which

represents the true period of non-use that must be excused by special circumstances to avoid expungement of the mark's registration.

[52] They also reiterate that the line of authority that gave rise to the New Owner Jurisprudence stemmed from an inaccurate reading of the decision in *Arrowhead*.

[53] Finally, they repeat that the reason systematically invoked by the Registrar to support choosing the date of acquisition of a mark as the starting point for the period of non-use—namely, that it would be too onerous to require the registered owner to furnish the date the mark was last in use—is without basis in section 45 or anywhere else in the Act.

[54] With respect, I cannot agree with the appellants' arguments concerning the impact of *Centric Brands* on this appeal. It seems clear and unequivocal that, in settling the issue of the starting point of the period of non-use under section 45 of the Act, the Court rejected the argument that the starting point had to be the date when the mark was last in use. Instead, it ruled that section 45 could be interpreted, in the appropriate circumstances, to allow the starting point to be the date of acquisition of the mark at issue, thereby relieving the registered owner of the burden of having to excuse the absence of use before the acquisition.

[55] In *Centric Brands*, this Court expressly considered the validity of the New Owner Jurisprudence. The fact that it stated the opinion that the principle had already received implicit approval in *Harris Knitting* and *Scott Paper* takes nothing away from the fact that the Court has now expressly recognized its validity. That was the central purpose of the first issue it put forth,

arising as it did in a context where the New Owner Jurisprudence had never actually been validated by this Court even though it had been applied for over 30 years.

[56] Accordingly, an analysis of the text, the context and the purpose of section 45 revealed to the Court that there was nothing that "excludes the possibility that a recent arms' length acquisition of a trademark may constitute special circumstances such that the acquirer could be relieved of the obligation to provide evidence of use, or justify a period of non-use, prior to the acquisition" (*Centric Brands* at para. 40).

[57] Thus, the Court in *Centric Brands* considered essentially the same arguments as those the Court has used in this case to address the issue, central to both matters, of the starting point of the period of non-use for the purposes of the requirement to excuse an absence of use under subsection 45(3) of the Act.

[58] I would add that the circumstances in *Centric Brands* were not exceptional, contrary to the appellants' submission. In that case, there had been a change of ownership of the mark at issue, and the Federal Court had found that it could validly apply the New Owner Jurisprudence. The issue, however, was whether the New Owner Jurisprudence applied in the circumstances of the case, given that the acquisition of the mark, confirmed in an agreement signed before the date of the notice, took effect only after that date. The Federal Court answered this question in the negative.

[59] This Court overturned the Federal Court's decision, finding that it had made an unduly restrictive application of the New Owner Jurisprudence. Nothing in the facts of *Centric Brands* affects the conclusions of the Court confirming that a registered owner could, in any given case and in appropriate circumstances, rely on the New Owner Jurisprudence to establish the starting point of the period of non-use subject to justification.

[60] Clearly, the appellants disagree with the decision of this Court in *Centric Brands*. This panel requires more, however, to depart from it. It must be persuaded that the decision is manifestly wrong because the Court in that matter overlooked a relevant statutory provision or a case that ought to have been followed.

[61] Despite the able representations of counsel for the appellants, this burden has not been met.

(2) Standard of review applicable by the Federal Court

[62] The appellants criticize the Federal Court for failing to apply the correctness standard to the Registrar's decision on the starting point of the period of non-use because it was seized of a statutory appeal. Since *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, they say, the standard of review set out in *Housen* must be applied to such decisions of the Registrar. Therefore, the Federal Court had to consider this issue, which in their view is a question of law, on the standard of correctness.

[63] The following nuance should be considered with this argument. Once the Federal Court was satisfied on the basis of its earlier decisions that there was no fixed legal rule that determines the starting point for the period during which the absence of use of a mark must be excused, the issue of whether the circumstances of this case justified using the recent date of acquisition of the Marks by the respondent as the starting point for the period of non-use became a question of mixed fact and law. In this regard, in applying the standard of palpable and overriding error within the meaning of *Housen*, the Federal Court made no error, regardless of how it might be characterized.

[64] Regarding whether or not such a fixed rule exists, the appellants contend that the Federal Court misunderstood their position in this respect, which led it to characterize every aspect of the issue as questions of mixed fact and law and therefore to apply the standard of palpable and overriding error to them. The respondent, for its part, is of the view that the appellants were vague as to the actual content of their claims and consequently cannot fault the Federal Court for having misunderstood them.

[65] Whatever the case may be, I am of the view that this argument is of no assistance to the appellants. Even if the Federal Court did err in its choice of standard to apply to this aspect of the issue concerning the starting point of the period of non-use—that is, whether or not a fixed legal rule exists that determines when the period begins—the interests of justice would not be served by setting the decision aside and referring the matter back to the Federal Court.

[66] Indeed, this issue was settled by *Centric Brands*, a decision by which I consider myself bound. That means that referring this matter back to the Federal Court would change nothing in the judgment it rendered in this case, since the New Owner Jurisprudence was an avenue available to it in law.

[67] Furthermore, under subparagraph 52(b)(i) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, when this Court sits in appeal from a decision of the Federal Court, it is empowered to "give the judgment...that the Federal Court should have given". Here, the Court had in hand everything it needed to deal with and dispose of the issue of the applicability of the New Owner Jurisprudence to establish the starting point of the period of non-use in the context of proceedings initiated under section 45 of the Act.

B. *The Federal Court did not err in finding that there were no grounds to interfere with the Registrar's decision concluding that special circumstances justified using the date of the respondent's acquisition of the Marks as the starting point of the period of non-use and excused the absence of use of the Marks during that period*

[68] Once it is settled whether section 45 creates a fixed rule that determines when the period of non-use begins and whether that provision therefore authorizes using the date of acquisition of the mark at issue by the registered owner as the starting point, there can be no doubt whatsoever that this second issue raises a question of mixed fact and law that must be considered on the standard of palpable and overriding error, since it involves applying a legal analysis to a set of facts (*Housen* at para. 26).

[69] The appellants have focused most of their efforts on seeking the Court's intervention to [TRANSLATION] "bring an end to this practice as sanctioned by [the Federal Court]" (Memorandum of fact and law of the appellants at para. 130). The "practice" referred to here is the interpretation of section 45 of the Act to allow the starting point of the period of non-use for the purposes of justification to be the date of the registered owner's acquisition of the mark at issue.

[70] Accordingly, the appellants have proposed the following two scenarios to address whether special circumstances existed to excuse the absence of use of the Marks:

(a) The Court accepts their interpretation of section 45, which means that the respondent's failure to provide a date when the mark was last in use is fatal and must therefore result in the expungement of the Registrations;

(b) In the alternative, the dates of the Registrations are used as the starting point of the period of non-use, which means that, insomuch as the respondent was not able to explain the non-use of the Marks prior to their acquisition in October 2016—that is, over a period of several decades—this lack of evidence cannot reasonably excuse the absence of use and must therefore result in the expungement of the Marks.

[71] The appellants argue that, in both cases, finding otherwise would constitute an error of law or a palpable and overriding error.

[72] However, since neither of these scenarios apply, they are not useful for determining:

(a) whether the acquisition of the Marks by the respondent constituted special circumstances justifying using that date as the starting point for the period of non-use, and whether the absence of use of the Marks between the date of acquisition and the date of the Notice was also due to special circumstances; and

(b) whether the Federal Court had committed a palpable and overriding error in ruling that it saw no reason to interfere with the Registrar's findings on these two issues.

[73] In paragraphs 30 to 32 of their supplemental representations on the potential impact of *Centric Brands* on this case, which the appellants filed with the Court on October 8, 2025, they argue that, on the date of the Notice, the respondent had not yet decided to move ahead with marketing the products bearing the Marks because it was still gauging consumers' interest in them. They submit that the respondent did not set the marketing process in motion until after that date and argue that, on the basis of *Scott Paper*, this means that neither the Federal Court nor the Registrar before it could conclude that special circumstances existed to excuse the absence of use of the Marks, whatever the period of non-use at issue.

[74] Here, the appellants ask the Court to reweigh the evidence, in the hopes that it will reach a conclusion that corresponds with their own on this point. I note, however, that an appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying

facts or because it "takes a different view of the evidence" (*Housen* at paras. 23–24; *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 38).

[75] Here, the appellants were required to establish that the Federal Court and the Registrar before it could not reach any conclusion other than their own on this point without committing a palpable and overriding error.

[76] Again, this burden was not met here.

[77] The Federal Court summarized the Registrar's decision on whether or not special circumstances existed to excuse the absence of use of the Marks:

> [89] In applying these principles to the facts of the instant case, the Registrar summarized the evidence on the regulatory regime that governed liquor sales, noting that it is provincially regulated and the Respondent therefore required approval from various provincial liquor licensing bodies before it could use the trademark. This requirement was found to be beyond the Respondent's control. As to the timing of the actual regulatory application processes, the Registrar observed that while Molson Canada filed the applications after the relevant period, its preparatory work including the development of product packaging had commenced before the notice was issued. The Registrar accepted that the Quebec regulator required the submission of finished product packaging with Canadian specific labelling, and noted that product packaging and labels were also submitted to the Ontario and British Columbia regulators.
>
> [90] As to the serious intention to shortly resume use, the Registrar reviewed the evidence about the preparatory steps taken by the Respondent, including the development of preliminary product concepts, surveys of the consumer market, preparation of a launch plan as well as the development of Canadian packaging and the initiation of the regulatory application process. The Registrar noted that the first production of canned beer under the Marks was scheduled in October 2017, and product launches were planned before the end of 2017. Based on these efforts, the Registrar found that the Respondent had "provided a sufficient factual basis substantiating its serious intention to quickly resume use of the Subject Trademarks."

> [91] In conclusion, the Registrar stated "I find that a fair review of the whole of the [Respondent's] evidence is sufficient to show special circumstances excusing the absence of use of the Subject Trademarks as required by section 45(3) of the Act."
>
> …
>
> [103] Turning back to the Registrar's decision in the instant case, the period of non-use was found to be minimal because the Registrar decided that it should begin from the time of acquisition. I have already dismissed the Applicants' challenge to this finding. The Registrar also found that the non-use was due to the size of the acquisition as well as the regulatory requirements that the Respondent had to meet before it could begin to use the Marks in Canada. One important finding of fact in the analysis is that the Respondent was required to submit labels that met Canadian standards as part of its application for regulatory approval, and thus its efforts to design appropriate labels were a necessary part of the approval process and therefore beyond its control. I can find no basis to disturb this finding, which is rooted in the evidence in the record.

[78] The Federal Court then concluded:

> [107] Measured from the time of acquisition, the evidence supports the findings made by the Registrar: the period of non-use was not long; the Respondent needed time to deal with the large and complex acquisition and it required the approval of several provincial regulators before it could begin to use the Marks; and in order to obtain such approval certain preparatory steps were needed, including the design of appropriate labels that met Canadian requirements. The special circumstances explained the absence of use and were the reason for it. Given this, there is no basis for intervention.

[79] Both the Federal Court and the Registrar were perfectly aware that the efforts to market the products bearing the Marks extended past the date of the Notice but, in light of the evidence on record, they were of the opinion that this could be explained by the short period of non-use established as spanning from the date of acquisition of the Marks to the date of the Notice, i.e., from October 2016 to April 2017; by the scale and complexity of the transaction at the origin of this acquisition; and by the regulatory approvals that had to be obtained to be able to use the

Marks, requiring the respondent to take certain preparatory steps that were essential to the filing of the requests for approval.

[80] They concluded that these circumstances indicated, first, that the respondent had the intention to shortly resume use of the Marks and, second, that the absence of use of the Marks was due to circumstances beyond the respondent's control. They found that these could be characterized as special circumstances within the meaning of subsection 45(3) of the Act.

[81] I see nothing here that would allow the Court to intervene, and the appellants have not persuaded me otherwise. In other words, I discern no palpable and overriding error in the findings of the Federal Court or of the Registrar on the issue of special circumstances excusing the absence of use of the Marks during the period found to be applicable in this case.

[82] Moreover, in *Centric Brands*, this Court ruled that the activities performed by the registered owner after the transaction closed and it became the official owner of the mark at issue, and thus after the date of the Notice served on the owner under subsection 45(1) of the Act, "suggests that there would have been use of the Mark if that period had not been so short" (*Centric Brands* at para. 62). In my opinion, this provides further support for the findings of the Federal Court and the Registrar on this issue.

[83] Finally, I would add that *Scott Paper* is of no assistance to the appellants in this respect. In that case, although the date of acquisition of the mark at issue was chosen as the starting point for the period of non-use, the time elapsed between that starting point and the date of the notice

under subsection 45(1) of the Act, according to the scenario most favourable to the owner of the mark, was 13 years, not 6 months as in the present matter. This Court found that the absence of use was due to the owner's deliberate decision not to use the mark for that entire period (*Scott Paper* at para. 26) and that a mere intention to resume use of the mark did not constitute special circumstances within the meaning of subsection 45(3) of the Act.

[84] Clearly, in terms of the factual matrix, the scenario in *Scott Paper* was quite different from the instant case for the purposes of assessing the facts to determine whether special circumstances exist to excuse a period of non-use, despite that decision's teachings on the applicable test.

VII. Conclusion

[85] For all of these reasons, I would dismiss the appeal, with costs in favour of the respondent.

"René LeBlanc"
J.A.

"I agree.
Sylvie E. Roussel J.A."

"I agree.
Gerald Heckman J.A."

Certified true translation
Vera Roy, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

François Guay Christopher A. Guaiani	FOR THE APPELLANTS
R. Nelson Godfrey Monique Couture	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Smart & Biggar LLP Montreal, Québec	FOR THE APPELLANTS
Gowling WLG (Canada) LLP Vancouver, British Columbia	FOR THE RESPONDENT