

Federal Court of Appeal affirms new trademark owners not required to account for non-use

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Authors: [Mat Brechtel](#), [Jenna Aljarrah](#), [Kevin Bushell](#)

Key Takeaways

- The Federal Court of Appeal clarified subsection 45 of the *Trademarks Act*, finding new owners only needed to account for six months of non-use post-acquisition.
- The Court determined special circumstances can excuse non-use, allowing the acquisition date to be the starting point for assessment.
- The decision offers commercial certainty for new trademark owners, minimizing their administrative burden regarding pre-sale non-use.

The Federal Court of Appeal recently released its decision in *Comité interprofessionnel du vin de champagne v. Coors Brewing Company*,^[1] providing guidance regarding the interpretation of subsection 45 of the *Trademarks Act*. The Court affirmed that there is no obligation on new owners to account for non-use prior to the acquisition of the trademarks in question.

The new owner only needed to account for non-use for a period of six months since it acquired its trademarks. As the new owner was navigating regulatory requirements and taking concrete steps towards using the trademarks during that time, the Court was satisfied that there were special circumstances to excuse the non-use.

Background

The respondent, an American brewery and beer company, acquired three trademarks as part of a multi-billion-dollar transaction in October 2016, and has since been the registered owner of the trademarks.

Section 45 is an administrative tool for removing unused “deadwood” trademarks from the Register. It allows the Registrar to issue a notice to registered trademark owners requiring them to prove use in Canada during the preceding three years or provide reasons for its non-use. Under subsection 45(3), if use is not shown, the trademarks will be expunged. Only “special circumstances” can excuse a lack of use.

The appellants requested the Registrar to issue notices to the respondent, under section 45, for the three trademark registrations.

Affidavit of the respondent

The respondent's affidavit confirmed the trademarks were last used in Canada in 2012. However, the respondent also stated that it acquired the trademarks in October 2016, and intended to sell products bearing the trademarks. Despite this intention, due to the scale of the transaction and regulatory hurdles, the respondent claimed it could not commence use of the trademarks prior to the section 45 notice.

Reasons of the Registrar and Federal Court

The Registrar considered whether the absence of use was excused by special circumstances in light of the test set out in *Scott Paper Limited v. Smart & Biggar*.^[2]

The test involves the consideration of three criteria:

- the length of time during which the trademarks at issue had not been in use
- whether the reasons for non-use were beyond the control of the registered owner
- whether the registered owner had the intention to shortly resume use

The Registrar was satisfied that the period of non-use should be calculated as of the date of acquisition of the trademarks, not the date of last use. For Coors, that meant only a period of six months of non-use was considered. For that period, the Registrar was satisfied that the delay was beyond the respondent's control, and that it had demonstrated a serious intention to shortly resume the use of the trademarks.

The Registrar noted 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.

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 in light of evidence provided to the Registrar.

The Federal Court of Appeal's reasons

The Federal Court of Appeal upheld the Federal Court's decision and confirmed there is no rigid rule that the period of non-use to be accounted for must begin on the last use date. In certain circumstances, the acquisition date may be used as the starting point for assessing special circumstances that excuse a new owner's absence of use.^[3]

In referring to its recent decision of *Centric Brands Holding LLC v. Stikeman Elliott LLP*, the Court confirmed that a recent arm's-length acquisition can constitute special circumstances such that a new owner need not account for pre-acquisition non-use of a trademark when responding to a notice under section 45.^[4]

The Court agreed with the Federal Court that the application of special circumstances to the facts is a question of mixed fact and law reviewed for palpable and overriding error, and that the Registrar's application of special circumstances was reasonable.

Unlike in *Scott Paper* — where non-use persisted for many years due to a deliberate choice — the six-month period in *Comité*, combined with regulatory constraints and concrete steps toward relaunch, supported the Registrar's finding of special circumstances.^[5]

Finally, the Court reiterated that section 45 is a summary, administrative mechanism to clear “deadwood”; the section is not a forum for a full factual trial and, as such, the owner’s evidentiary burden is not heavy.

Given the above reasoning, the Court dismissed the appeal and all three trademark registrations remain on the Register.

Conclusion

This case builds on the growing recognition of the Federal Court that purchasers of trademarks will be insulated from pre-sale non-use.

The Federal Court of Appeal has reaffirmed that a new owner need only justify non-use from the date of trademark acquisition.

This decision favours the new trademark owners, provides commercial certainty, and reduces the administrative burden of acquiring old trademarks for newly-registered owners that intend to renew use of trademarks post-acquisition.

[1] *Comité interprofessionnel du vin de champagne v. Coors Brewing Company*, 2026 FCA 2 [Comité].

[2] *Scott Paper Limited v. Smart & Biggar*, 2008 FCA 129 [Scott Paper].

[3] *Comité* at paras. 35–57.

[4] *Centric Brands Holding LLC v. Stikeman Elliott LLP*, 2025 FCA 161 at para. 30.

[5] *Comité* at paras. 83–84.