Federal Court Cour fédérale

Date: 20260223

Dockets: T-1637-25
T-1644-25
T-1645-25
T-2774-25

Citation: 2026 FC 251

Toronto, Ontario, February 23, 2026

PRESENT: The Honourable Madam Justice Furlanetto

Docket: T-1637-25

BETWEEN:

TRADEMARK BUILDING PRODUCTS INC.

Applicant

and

WINDOW WORLD INTERNATIONAL, LLC

Respondent

Dockets: T-1644-25
T-1645-25
T-2774-25

AND BETWEEN:

WINDOW WORLD INTERNATIONAL. LLC

Applicant

and

TRADEMARK BUILDING PRODUCTS INC.

Respondent

ORDER AND REASONS

I. Overview

[1] This decision involves a motion brought by Window World International, LLC [WW] under subsection 56(5) of the *Trademarks Act*, RSC 1985, c T-13 [TMA] for leave to file new evidence in the pending appeal proceedings involving the trademarks WINDOW WORLD, Registration No. TMA947806, and WINDOW WORLD & Design, Registration No. TMA947807 [collectively, the WINDOW WORLD Marks].

[2] In a decision dated March 17, 2025 [Decision], the Registrar of Trademarks [Registrar] deleted in part the services registered in association with the WINDOW WORLD Marks pursuant to section 45 proceedings initiated by the Respondent, Trademark Building Products Ltd [TBPL]. Based on the evidence filed, the Registrar deleted from the list of registered services "installation of replacement windows", while maintaining "retail store services featuring replacement windows".

[3] In T-1637-25, TBPL appeals the Registrar's finding relating to "retail store services featuring replacement windows", seeking to expunge the registrations for the WINDOW WORLD Marks in full. In T-1644-25 and T-1645-25, WW appeals the Registrar's finding deleting the services "installation of replacement windows" from the registrations. In T-2774-25, WW appeals a separate decision of the Trademarks Opposition Board [TMOB], dated June 2, 2025, which refused registration of the trademark WINDOW WORLD, filed under Trademark Application No. 1,855,788 for use in association with the following goods and services: (1)

window blinds, window shades; (2) retail store services featuring replacement windows; (3) installation of vinyl replacement and new construction windows; and (4) installation of replacement windows.

[4] While this motion was brought in respect of all four court files, WW clarified at the hearing that they were not seeking leave to file new evidence in T-2774-25. Accordingly, I shall only consider the relief sought in respect of the T-1637-25, T-1644-25 and T-1645-25 matters and the respective appeals of the Decision.

[5] In respect of the proceedings before the Registrar, WW filed three affidavits, all dated April 9, 2024: an affidavit from Charles Bauer, the trademark owner's Corporate Counsel [First Bauer Affidavit]; and two affidavits from Zach Luffman, the Director of Franchising of the trademark owner's exclusive licensee, Window World, Inc [WWI].

[6] On this motion, WW seeks leave to file three new affidavits: two further affidavits from Charles Bauer, one sworn January 5, 2026 [Second Bauer Affidavit] and one sworn January 8, 2026 [Third Bauer Affidavit]; and an affidavit from Aaron Anckner, sworn on January 5, 2026 [Anckner Affidavit]. Mr. Anckner is the Owner and Governor of AA Remodeling, LLC, d/b/a Window World of North Puget Sound, a Washington limited liability company and franchisee of WWI.

[7] For the reasons set out below, the motion is allowed in part.

II. **Test for Leave**

[8] The test for leave under subsection 56(5) of the TMA was recently considered by my colleague, Justice Nicholas McHaffie, in *Products Unlimited, Inc v Five Seasons Comfort Limited*, 2026 FC 48 [*Products Unlimited*]. As set out at paragraphs 29 and 30 of *Products Unlimited*, the determination of leave "is ultimately directed at the interests of justice and considers all relevant factors applicable in the circumstances", including: (a) the relevance, credibility, and admissibility of the evidence; (b) the materiality of the evidence; (c) the circumstances surrounding the delay in filing the evidence; and (d) whether granting leave would cause prejudice to the opposing party.

[9] As noted by Justice McHaffie, while the same principles of materiality (*i.e.*, whether the evidence is sufficiently substantial and significant that it could have materially affected the Registrar's findings) remain relevant under subsection 56(5) of the TMA, determining leave is a distinct exercise from determining the merits of an appeal. At the leave stage, the question remains "whether the new evidence *could* have a bearing on a finding of the Registrar ... This element parallels the fourth criteria of the *Palmer* test [and] similarly parallels the requirement that evidence 'will assist the Court', a factor considered in exercising the Court's discretion to grant leave to file additional evidence pursuant to Rule 312 of the *Federal Courts Rules*": *Products Unlimited* at para 29.

[10] While recognizing that the circumstances surrounding the delay in filing evidence is an important factor that may be determinative of the question of leave, the weight given to this factor will be fact specific. As noted by Justice McHaffie, "for a period of time after the

amendment of subsection 56(5), matters will be coming before this Court on appeal that were presented to the Board at a time when the former legislation applied": *Products Unlimited* at para 29. Thus, it will be important for the Court to consider all the surrounding circumstances associated with the delay, and to approach this factor with some flexibility: *Products Unlimited* at para 29.

III. **Analysis**

[11] WW asserts that the proposed new evidence addresses gaps and deficiencies in the evidence that were highlighted by the Registrar. Accordingly, in reviewing the proposed new evidence I will first start with a review of those aspects of the Decision that pertain to the proposed new evidence and will then address the arguments made and the application of the leave test.

A. *The Second Bauer Affidavit*

[12] In the Decision, the Registrar found the evidence established that a proprietary Window Visualizer Design Center software [Visualizer] displaying the WINDOW WORLD & Design trademark was available to customers throughout Canada via WW's website, www.windowworld.com [WW website]. The Visualizer allowed "customers to upload photographs of their homes and experiment with different windows, sidings and door designs, and to obtain instant visualisations of different colour and style options" and allowed a franchisee to interact with customers during virtual consultations. The Registrar found the evidence established that from 2019 to the date of the affidavit that was before the Registrar, WW's website "had approximately 200 registered users from Canada".

[13] On the basis of these factual findings, the Registrar drew a number of inferences that it relied upon to arrive at the conclusion that there was "use" of the WINDOW WORLD Marks in association with "retail store services featuring replacement windows" during the period between August 28, 2020 to August 28, 2023 [Relevant Period]. The salient paragraphs of the Decision are as follows:

> [41] [...] Given the non-negligible overlap between this timeframe and the Relevant Period, I am prepared to infer that at least some of these 200 users in Canada registered for the Owner's website during the Relevant Period.
>
> [42] [...] I am prepared to infer from the relevant evidence as a whole that at least some of the registered users in Canada used the website and the Window Visualizer Design Center software during the Relevant Period.
>
> [43] Mr. Luffman's evidence is explicit with regard to various benefits the Window Visualizer Design Center software provided to customers. I consider these benefits to be material and akin to what might be found in a brick-and-mortar retail store [see TSA, above].
>
> [44] Even if I am mistaken in this regard, I consider the Owner's evidence demonstrates that during the Relevant Period, it advertised its retail sale services, notably via its website and print advertising distributed in Canada. I also consider the evidence to demonstrate that the Owner was willing and able to provide services akin to what might be found in a brick-and-mortar retail store to customers in Canada, at least via the Window Visualizer Design Center software, its toll-free telephone number and virtual consultations.
>
> [45] As such, I find that the Owner has shown use, pursuant to sections 4(2) and 45 of the Act, of the WINDOW WORLD & Design trademark in Canada during the Relevant Period, in association with "retail store services featuring replacement windows".

[14] In the Second Bauer Affidavit, WW seeks to introduce two reports allegedly disclosing "access" data for WW's website, relating to the use of the Visualizer during the time-periods

between January 4, 2023 and August 28, 2023, and between January 4, 2023 and September 25, 2025. Mr. Bauer asserts that the first report shows 647 users from Canada accessed the Visualizer on the WW website between January 4, 2023 and August 28, 2023, and that the second report shows 2663 users from Canada accessed the Visualizer on the WW website from January 4, 2023 to September 25, 2025.

[15] WW argues that this evidence confirms the inferences made by the Registrar relating to the use of the Visualizer on the WW website by Canadian users during the Relevant Period. As TBPL challenges this finding in the T-1637-25 proceeding, WW asserts that this further evidence is relevant and probative. WW states that they did not have this historical data at the time of the section 45 proceedings and did not anticipate that such evidence would be needed until they received the Decision.

[16] The Respondent contends that the reports are hearsay. They argue that the documents provide no information as to what visitors may or may not have done while visiting the WW website, or as to what the numbers on the report mean.

[17] In my view, the merit of the Respondent's arguments would benefit from cross-examination. On its face, the evidence is relevant to the Registrar's inference in paragraph 41 of the Decision and in view of TBPL's appeal is sufficiently material to meet the second requirement of the leave test.

[18] I accept the explanation given by Mr. Bauer as to WW's technical inaccessibility to the data at the time of the section 45 proceedings. As TBPL will have full opportunity to cross-examine on this new evidence (Rule 83 of the *Federal Courts Rules*) and considering the flexibility to be provided during this transition period, I consider there to be minimal prejudice in admitting paragraphs 1-5 and Exhibit A of the Second Bauer Affidavit into the proceeding.

[19] In a separate section of the Second Bauer Affidavit (paragraphs 6-10 and Exhibits B and C), Mr. Bauer also seeks to introduce a report that purportedly shows website access from Canada between August 29, 2022 to September 25, 2025 on the franchisee's website, http://www.windowworldpugetsound.com [FR website], which is discussed in the Anckner Affidavit. Mr. Bauer asserts that this report shows that 37 active users from Canada accessed the FR website between January 4, 2023 and August 28, 2023. Mr. Bauer states that the franchisee declined to participate at the time of the section 45 proceedings and therefore this evidence could not have been provided earlier. As these paragraphs go to a separate section of the Decision, I will address these paragraphs of the Second Bauer Affidavit together with my discussion of the Anckner Affidavit below.

B. *The Anckner Affidavit*

[20] In the Decision, the Registrar found there was insufficient evidence to establish "use" of the WINDOW WORLD Marks in association with window installation services during the Relevant Period. The Decision stated as follows:

> [49] In the absence of submissions specifically on this point from the parties, I consider the ordinary commercial meaning of such services to be installation performed at the location of the customer's establishment. This is notably consistent with the

> Owner's evidence of photographs showing yard signs and other displays of various trademarks "during performance of the services", which appear to depict workers installing windows directly at customers' homes.
>
> [50] As such, although a franchisee need not necessarily be located in Canada, in this case, I consider that installation of windows at a customer's location in Canada would be required to constitute performance of the services as described in the registrations [see *Hilton*, above at para 89].
>
> [51] Although the Owner has evidenced some advertisements circulated in Canada as well as interest on the part of some existing or potential franchisees in operating in Canada, the Owner has not provided evidence of any franchisee that was willing and able to operate in Canada during the Relevant Period, much less of any having actually installed windows in Canada during such time.
>
> [52] As such, I find the Owner has failed to demonstrate use of the Marks in association with any window installation services pursuant to sections 4(2) and 45 of the Act.
>
> [emphasis added]

[21] Through the Anckner Affidavit, WW seeks to introduce evidence from a US-based franchisee of WWI, Window World of North Puget Sound [WWNPS]. In the Decision, the Registrar found that WWI held an exclusive license from WW to use and sublicense others to use the WINDOW WORLD Marks with its registered services. It was undisputed that WW exerted sufficient control over WWI's use of the trademarks such that use under the license would be to the benefit of WW. The proposed evidence from Mr. Anckner indicates that as a franchisee of WWI, his company, WWNPS, is also permitted to use the WINDOW WORLD Marks in association with the services "[i]nstallation of vinyl replacement and new construction windows; retail store services featuring replacement windows; installation of replacement windows" [Services]. He states that use is permitted in the Washington State counties of Chelan,

Douglas, Skagit, Snohomish and Whatcom, and in territories where there is no franchise yet granted.

[22] Mr. Anckner states that during the Relevant Period he had discussions with WWI about establishing a franchise location in Vancouver or Victoria or performing services there, but this never materialized, and it was later determined that these locations were “not an appropriate fit” for his business.

[23] However, he states that his company’s telephone line, website, online virtual consultations, and the Visualizer are all available in Canada, and that the company’s website advertised the Services during the Relevant Period. Mr. Anckner states that if a Canadian customer from Vancouver or Victoria had contacted his company by telephone, through online virtual consultation, through the Visualizer, or by an in-store visit during the Relevant Period, his company would have sold the customer new and replacement windows. He also states his company would have offered to install the purchased windows at the customer’s location directly or through a Canadian sub-contractor.

[24] WW contends that the proposed evidence from Mr. Anckner relates directly to paragraph 51 of the Decision and to the Registrar’s finding that there was a lack of evidence of “any franchisee that was willing and able to operate in Canada during the Relevant Period”. WW refers to *Wenward (Canada) Ltd v Dynaturf Co*, 1976 CanLII 2656 (CA TMOB) [*Wenward*] in support of their argument. However, I agree with TBPL that the facts here are distinguishable from those before the TMOB in *Wenward*.

[25] *Wenward* involved services for constructing and resurfacing tennis courts. The owner of the marks was located in the United States and relied on copies of letters relating to inquiries it made for various projects in Canada. The letters indicated that the owner was prepared to send crews to construct and resurface tennis courts and other recreational services in Canada if they were awarded any contracts. On the basis of these letters, the TMOB concluded the owner was "willing and able" to provide services in Canada: *Wenward* at 25-26.

[26] In the Anckner Affidavit, there is no direct evidence from the Relevant Period indicating that WWNPS was willing and able to perform installation services for replacement windows in Canada, or that they entertained any inquiries to do so.

[27] Further, while I agree that installation services could be advertised through the FR website, there is no mention of installation services in the website information attached to the Anckner Affidavit. Rather, the word "installation" only appears under a heading titled "Additional Info".

[28] As noted by the Respondent, mere advertising of services in Canada through a website will not constitute use in association with services; there is also a requirement to show a degree of interactivity with Canadian consumers during the Relevant Period: see *Hilton Worldwide Holding LLP v Miller Thomson*, 2018 FC 895, affirmed 2020 FCA 134; *Live! Holdings, LLC v Oyen Wiggs Green & Mutala LLP*, 2019 FC 1042, affirmed 2020 FCA 120; see also, *Dollar General Corporation v 2900319 Canada Inc*, 2018 FC 778.

[29] Here, there is no evidence in the Anckner Affidavit establishing that installation services were offered to Canadians through the FR website or that Canadian consumers made inquiries about installation services by accessing the FR website.

[30] The additional evidence in the Second Bauer Affidavit that was referenced earlier does not assist with these deficiencies. Setting aside concerns as to what the report at Exhibit B of the Second Bauer Affidavit shows, even with this evidence and the access data proposed, it does not establish any connection between access to the FR website and the specific installation services in question.

[31] While WW argues that it was not necessary to establish advertising and performance of the window installation services in view of the Registrar's findings at paragraphs 37, 44, 51 and 62 of the Decision, I cannot agree. These paragraphs make no finding of fact relating to the advertisement of installation services by WWNPS, which would relate to Mr. Anckner's evidence.

[32] In this case, the after-the-fact evidence from Mr. Anckner speculating as to what his company might have done during the Relevant Period if a Canadian consumer had contacted WWNPS is insufficient to meet the relevance and materiality components of the leave test. It does not overcome the deficiency noted in the Decision – *i.e.*, it is not direct evidence from the Relevant Period of a franchisee being willing and able to provide installation services to Canadians.

[33] As such, the Anckner Affidavit and paragraphs 6-10 and Exhibits B and C of the Second Bauer Affidavit are not accepted.

C. *The Third Bauer Affidavit*

[34] In the Decision, the Registrar considered whether there were special circumstances that affected WW's use of its services in association with the WINDOW WORLD Marks during the Relevant Period. In particular, the Registrar considered WW's argument that they could not franchise during the Relevant Period because of ongoing litigation with TBPL. However, the Registrar did not find these arguments persuasive and additionally noted certain insufficiencies with WW's evidence relating to this argument. As stated in the Decision:

> [69] I agree with the Requesting Party. The evidence indicates that the Marks were not used in association with window installation services as the Owner had no franchisee willing and able to operate in Canada during the Relevant Period. The various proceedings challenging the Owner's rights in the Marks undoubtedly made it difficult for the Owner to secure such a franchisee, particularly when combined with the COVID-19 pandemic. However, I do not consider that the Owner's evidence, taken as a whole, demonstrates that such difficulties, individually or cumulatively, constitute special circumstances in the present case.
>
> [70] Notably, the Owner has not submitted specific evidence or cited any decisions to the effect that ongoing legal proceedings such as in the present case are unusual, uncommon or exceptional in the Owner's field. As such, I consider the decisions listed above cited by the Requesting Party to the effect that trademark disputes or failure to secure franchisees are generally not exceptional, uncommon or unusual in business to be applicable.
>
> [71] The ongoing legal disputes regarding the Marks undoubtedly made franchising in Canada less appealing to prospective franchises and/or more onerous on the Owner, particularly throughout the COVID-19 pandemic. However, absent more specific evidence, I consider this situation akin to unfavorable market conditions, which are not uncommon or exceptional occurrences constituting special circumstances [see

> *Lander Co Canada Ltd v Alex E Macrae & Co* (1993), 46 CPR (3d) 417 (FCTD)].
>
> [72] With regard to the Owner's position that it could not legally offer a Canadian franchise, the evidence is that it "has determined that it would be highly unethical and in contravention of [the Owner's] contractual and regulatory obligations to represent to potential Canadian franchisees that it has any rights to the Trademarks in view of the lengthy litigation" [Bauer Affidavit, para 30].
>
> [73] The Owner asserts that franchising is complex and highly regulated and mentions one Ontario Act and one New Brunswick regulation as examples. There is, however, no mention of requirements of any other provinces or territories, despite the Owner's evidence mentioning potential franchises interested in expanding into Vancouver and Quebec.
>
> [74] Moreover, the evidence does not detail the legal franchising frameworks the Owner would necessarily contravene. Mr. Bauer does not state that the Owner is required to represent to potential Canadian franchisees that it has unchallenged rights in the Marks. From the evidence, it seems that what would be legally mandated is the disclosure of any existing challenges, not a representation that none exist.
>
> [75] Furthermore, I agree with the Requesting Party that the Owner's position in this regard seems inconsistent with its own evidence of having continued to solicit and entertain discussions with franchisees to potentially operate in Canada after the Expungement Application had been initiated.
>
> [76] As such, I do not consider the evidence sufficient to establish that the Owner could not legally offer a Canadian franchise. I therefore refrain from making any finding as to whether this could constitute special circumstances in the present case.

[35] In the Third Bauer Affidavit, Mr. Bauer refers to certain passages of legislation allegedly from British Columbia, Ontario, New Brunswick, Alberta, Manitoba and Prince Edward Island relating to franchising. However, he does not attach any of the legislation to his affidavit. Nor provide any other explanation in association with these passages.

[36] In the Third Bauer Affidavit, Mr. Bauer also refers to a pending trademark application filed by TBPL in Canada to register WINDOW WORLD for use in association with overlapping services, and to ongoing proceedings with TBPL in the Federal Court (T-1325-21). Limited information is provided with respect to these proceedings, and no documents are attached. Mr. Bauer asserts that WWI is unable to offer any franchises in Canada because of these ongoing matters, although he suggests that he continues to advertise franchising opportunities. He refers to having 200 franchise locations in the United States and to possible damage to these US franchisees, and to any potential Canadian franchisees, if he were to misrepresent the status of WW's trademarks rights in Canada.

[37] WW asserts that the Third Bauer Affidavit speaks to the gaps in the evidence highlighted in the paragraphs above and argues as such, that this evidence is material and relevant. No explanation is given as to why the evidence contained within the Third Bauer Affidavit was not provided during the section 45 proceedings.

[38] In my view, the Third Bauer Affidavit does not meet the materiality aspect of the leave test. The legislation referenced is insufficient as excerpted to establish any legal obligations. Further, the remainder of the affidavit does not address the primary deficiency noted in paragraph 74 of the Decision, namely that the evidence did not detail "the legal franchising frameworks the Owner would necessarily contravene". Nor did it state that WWI was required to represent to potential Canadian franchisees that WW had unchallenged rights in the WINDOW WORLD Marks. The additional evidence proposed does not advance WW's arguments and, in my view, if before the Registrar could not have altered the Decision.

[39] Additionally, there is no explanation given as to why this evidence was not provided earlier, particularly in view of WW's awareness of the issues and the nature of the evidence that was already provided relating to the alleged inability to franchise during the Relevant Period. In this context, it is my view that further flexibility cannot be extended.

[40] For all these reasons, the Third Bauer Affidavit is not admitted.

IV. **Conclusion**

[41] The motion accordingly is allowed in part, with paragraphs 1-5 and Exhibit A of the Second Bauer Affidavit permitted and the remainder of the proposed evidence refused.

V. **Costs**

[42] TBPL requested costs in the amount of $10,000, irrespective of the outcome of the motion. WW made no specific submissions on costs, leaving it to the discretion of the Court.

[43] As success was divided on this motion and considering that this is one of the first cases dealing with the new leave requirement under subsection 56(5) of the TMA, in my view it would be most appropriate to award costs in the cause.

ORDER IN T-1637-25, T-1644-25, T-1645-25 AND T-2744-25

THIS COURT ORDERS that:

1. The motion is allowed in part.

2. Window World International LLC is granted leave to serve and file Paragraphs 1-5 and Exhibit A of the Second Bauer Affidavit.

3. The remainder of the motion is dismissed.

4. Costs are awarded in the cause.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1637-25, T-1644-25, T-1645-25 AND T-2774-25
DOCKET:	T-1637-25
STYLE OF CAUSE:	TRADEMARK BUILDING PRODUCTS INC. v WINDOW WORLD INTERNATIONAL, LLC
AND DOCKETS:	T-1644-25 T-1645-25 T-2774-25
STYLE OF CAUSE:	WINDOW WORLD INTERNATIONAL. LLC v TRADEMARK BUILDING PRODUCTS INC.
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 30, 2026
ORDER AND REASONS:	FURLANETTO J.
DATED:	FEBRUARY 23, 2026

APPEARANCES:

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Peter Pribil	FOR THE RESPONDENT (T-1637-25) FOR THE APPLICANT (T-1644-25, T-1645-25, T-2774-25)

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