

Federal Court



Cour fédérale

**Date: 20260331**

**Docket: T-2261-25**

**Citation: 2026 FC 329**

**Toronto, Ontario, March 31, 2026**

**PRESENT: The Honourable Madam Justice Furlanetto**

**BETWEEN:**

**ECOVACS ROBOTICS CO., LTD.**

**Applicant**

**and**

**AMERICAN AIR FILTER COMPANY, INC.**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an appeal from a decision [Decision] of the Registrar of Trademarks [Registrar] that expunged the Appellant's AIVI design trademark (depicted below) [AIVI Mark], pursuant to section 45 of the *Trademarks Act*, RSC 1985, c T-13 [TMA].

**AIVI**

[2] The Appellant asserts that they did not file any evidence of use in response to the section 45 Notice [Notice] because they did not receive the Notice. The Appellant requests leave to file new evidence relating to the alleged use of the AIVI Mark.

[3] For the reasons set out below, it is my view that leave should be granted, allowing the new evidence to be filed. However, I will allow the application only in part as it is my view that the evidence does not establish use of the AIVI Mark by the Appellant in association with all registered goods during the relevant period.

#### I. **Background**

[4] The Appellant, Ecovacs Robotics Co, Ltd [ERCL], is the owner of Trademark Registration No. TMA1108526 for the AIVI Mark, which was registered on September 3, 2021 for use in association with the following goods [Registered Goods]:

(1) Industrial robots; Floor cleaning machines; Electric cordless floor sweepers; Rechargeable floor sweepers; Central vacuum cleaning installations; Robotic vacuum cleaners; Vacuum cleaners; Floor polishing machines; Dust filters and bags for vacuum cleaners; Carpet cleaning machines; Cordless vacuum cleaner; Steam cleaning machines; Vacuum cleaner hoses; Suction nozzles for vacuum cleaners; Vacuum cleaner attachments for disseminating perfumes and disinfectants; Road sweepers; Electric floor and window cleaning robots; Electric robots for air purifying; Robots for household cleaning; Automatic floor cleaning machines for consumer use; Automatic machines for use in the field of interior maintenance of households and commercial buildings, namely, vacuum cleaners, machines utilizing water and chemicals for cleaning floor surfaces, machines utilizing paper, fabric or cloth wipes and pads, and machines for washing, scouring, polishing, mopping and drying floor surfaces; Structural and replacement parts and accessories for automatic floor cleaning machines, vacuum cleaners, and industrial robots for use in the fields of interior maintenance of households and commercial buildings; Parts and fittings for automatic floor cleaning machines

and vacuum cleaners, namely, bins, filters and roller brushes; Parts and fittings for industrial robots, floor cleaning machines, electric cordless floor sweepers, rechargeable floor sweepers, central vacuum cleaning installations, robotic vacuum cleaners, vacuum cleaners, floor polishing machines, carpet cleaning machines, cordless vacuum cleaner, steam cleaning machines, road sweepers, electric floor and window cleaning robots, electric robots for air purifying, robots for household cleaning, automatic floor cleaning machines for consumer use.

[5] On December 16, 2024, at the request of the Respondent, American Air Filter Company, Inc, the Registrar sent the Notice to the Appellant's agent, Neomark Ltd, pursuant to subsection 45(1) of the TMA. The Appellant asserts that for "reasons unknown", it never received the Notice and therefore, did not respond.

[6] On April 30, 2025, the Registrar issued the Decision expunging the registration for the AIVI Mark for failure to file the required evidence of use of the trademark. The Decision stated:

Reference is made to the section 45 notice issued on December 16, 2024 in the above referenced matter.

You are advised that by reason of the failure to file the evidence required, the registration will be expunged from the register pursuant to section 45(4) of the Trademarks Act.

The procedure set out in section 45(5) of the Act will be followed unless a notice of appeal is filed with the Registrar and in the Federal Court within the time period set out in section 56 of the Act.

[7] On June 4, 2025, the Appellant's trademark agent informed the Registrar that it never received the Notice and requested a retroactive extension of time to file evidence, which was denied by the Registrar on June 9, 2025.

[8] The Appellant now appeals to this Court and proposes to file the Affidavit of Xu Chang [Chang Affidavit] to demonstrate use of the AIVI Mark, in the normal course of trade, in association with the Registered Goods between December 16, 2021 and December 16, 2024 [the Relevant Period]. Ms. Chang is the IP Manager of ERCL. She describes herself as the person “responsible for brand management respecting consumer electronics, including the lines of products sold under the [AIVI] Mark.” She states that for “unknown reasons” neither the Appellant nor its trademark agent received the Notice.

[9] Ms. Chang asserts that during the Relevant Period the AIVI Mark was used as a trademark in Canada in association with its Registered Goods in the normal course of trade, without interruption. She states that ERCL sells the Registered Goods to customers across Canada, and that at all times during the Relevant Period, ERCL had control over the character and quality of the goods associated with the AIVI Mark.

[10] Ms. Chang asserts that the revenue earned by ERCL from selling the Registered Goods in Canada during the Relevant Period exceeded \$34 million. She provides a table outlining the revenue earned for each of the years from 2021 to 2024.

[11] Ms. Chang states that ERCL has offices located worldwide and that they operate their business online through sales made through third-party retailers, such as Amazon. To “demonstrate sale of the Registered Goods in Canada, during the Relevant Period”, Ms. Chang attaches as Exhibit B to her affidavit, screenshots of Amazon order details from five transactions. The transactions are dated in November and December 2024 and relate to product shipped to

different places in Canada from the Amazon seller “Ecovacs Robotics UK | Canada”. The orders relate to two products: the ECOVACS DEEBOT T30S AI Robot Vacuum and Mop, and the ECOVACS DEEBOT T30S PRO Robot Vacuum and Mop.

[12] To demonstrate how the Registrant displayed the AIVI Mark on the products and the packaging of the Registered Goods, Ms. Chang provides the following exhibits which she asserts are representative of how the AIVI Mark was used during the Relevant Period:

- Exhibit C - Select photographs of a robot vacuum that Ms. Chang asserts was sold to Canadian customers during the Relevant Period. The product is marked with “AIVI 3D”;
- Exhibit D - A PDF copy of a product information flyer which Ms. Chang asserts was distributed to Canadian customers during the Relevant Period, and which refers to “AIVI 3D 2.0”; and
- Exhibit E - PDF images of product packaging and the product contents for the DEEBOT OZMO T8 robot vacuum which refers to “AIVI” and “AIVI+” on the product package.

[13] Ms. Chang states that during the Relevant Period, the Registered Goods were sold to Canadian consumers in the product packaging identified in Exhibit E.

[14] The Respondent did not file any responding evidence in this proceeding, nor did it cross-examine Ms. Chang on the Appellant’s proposed new evidence.

## II. Issues and Standard of Review

[15] There are two issues raised by this application:

- 1) Should the Appellant be granted leave to adduce new evidence?
- 2) If so, does the Appellant's evidence demonstrate use by the Appellant of the AIVI Mark in association with its Registered Goods during the Relevant Period?

[16] I agree with the Appellant that the standard of review of the second issue is correctness. In *Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 [*Clorox*], the Federal Court of Appeal stated that when new evidence is found to be material, subsection 56(5) of the TMA provides that the Federal Court “may exercise any discretion vested in the Registrar” (at para 21). This statutory language rebuts the presumption of the reasonableness standard set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and calls for a *de novo* appeal applying the correctness standard: *Clorox* at para 21.

[17] Although subsection 56(5) of the TMA was recently amended to introduce the requirement to seek leave to file new evidence, Parliament maintained the same language that this Court “may exercise any discretion vested in the Registrar” when new evidence is found to be material and is admitted. Therefore, the Federal Court of Appeal's direction in *Clorox* to apply the correctness standard in cases such as this still applies: *Products Unlimited, Inc v Five Seasons Comfort Limited*, 2026 FC 48 [*Products Unlimited*] at paras 42-46.

### III. Analysis

#### A. *Should the Appellant be granted leave to adduce new evidence?*

[18] The test for leave under subsection 56(5) of the TMA was recently considered by my colleague, Justice Nicholas McHaffie, in *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.

[19] 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”: *Products Unlimited* at para 29. As stated by Justice McHaffie, “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.

[20] 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.

[21] The Appellant argues that it could not have previously provided the evidence it now seeks to introduce as it did not receive the Notice and did not learn about the section 45 proceedings until the Decision was issued. The Appellant asserts that the new evidence bears on the central issue of whether the Appellant was using the AIVI Mark in the normal course of trade during the Relevant Period.

[22] The Respondent takes no position on leave and did not cross-examine on the Chang Affidavit.

[23] In my view, the test for leave has been met and the Chang Affidavit should be allowed. The evidence is relevant as it relates to use of the AIVI Mark, which was the only issue that was before the Registrar. As there was no cross-examination on the affidavit, it is also credible and uncontradicted. Further, as the Registrar did not have any evidence of use before it, the Chang Affidavit could have materially affected the Registrar’s Decision. The Appellant asserts that it did not receive the Notice and therefore that this is the reason for the delay in filing evidence. Although the reason for not receiving the Notice is unknown, there was no contradictory evidence on this point. As such, and as the Respondent does not oppose the introduction of the

evidence into the proceeding, I find there is minimal prejudice to the Respondent in allowing the evidence as provided.

[24] Upon considering the surrounding circumstances and weighing all the factors referenced in paragraphs 29 to 30 of *Products Unlimited*, it is my view that it is in the interests of justice to grant leave to adduce the Chang Affidavit.

B. *Does the Appellant's evidence show that it used the AIVI Mark in association with all the Registered Goods in the Relevant Period?*

[25] Pursuant to a notice under subsection 45(1) of the TMA, a registered owner is required to submit "an affidavit or statutory declaration showing, with respect to all the goods or services specified in the registration ... 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".

[26] The burden on a trademark owner to demonstrate use of a trademark during the relevant period is not a heavy one: *Spirits International BV v BCF SENCRL*, 2012 FCA 131 at para 8 [*Spirits International*]; *Cosmetic Warriors Limited v Riches, McKenzie & Herbert LLP*, 2019 FCA 48 [*Cosmetic Warriors*] at para 10. An owner need only provide an affidavit or statutory declaration that sets out sufficient facts for which a reasonable inference can be drawn that the requirements of use set out in section 4 of the TMA have been met for the subject mark: *Spirits International* at paras 7-8; *Cosmetic Warriors* at para 10, citing to *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 9.

[27] While the kind and extent of evidence may vary in each case, the registered owner must show that it used the trademark during the relevant period, or that the trademark was used by another person whose use accrued to the owner's benefit: *Spirits International* at para 7. A mere statement that the trademark was used during the relevant period is not enough: *Plough (Canada) Limited v Aerosol Fillers Inc*, 1980 CanLII 4344 (FCA) at 684; *Medos Services Corp v Ridout and Maybee LLP*, 2013 FC 1006 at para 10, aff'd 2015 FCA 77. Sufficient facts must be adduced to allow the Court to find that use of the trademark in association with each of the registered goods occurred during the relevant period: *Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134 at para 10.

[28] Subsection 4(1) of the TMA provides the following definition of "use" of a trademark in association with goods:

<p>4(1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred;</p>	<p>4(1) Une marque de commerce est réputée employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces produits, dans la pratique normale du commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu'avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.</p>
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[29] In this case, while the evidence is slim it is sufficient to establish with reasonable inference ERCL's use of the AIVI Mark in association with the following Registered Goods during the Relevant Period:

Floor cleaning machines;

Robotic vacuum cleaners;

Vacuum cleaners;

Carpet cleaning machines;

Cordless vacuum cleaner;

Automatic floor cleaning machines for consumer use;

Automatic machines for use in the field of interior maintenance of households, namely, vacuum cleaners, machines utilizing water and chemicals for cleaning floor surfaces, machines utilizing paper, fabric or cloth wipes and pads, and machines for washing, scouring, polishing, mopping and drying floor surfaces.

[30] As noted earlier, Exhibit B provides order details for five transactions made through Amazon during the Relevant Period. The order details relate to two products described as: 1) "ECOVACS DEEBOT T305 AI Robot Vacuum and Mop, 11000Pa, TruEdge Adaptive Edge Mopping, Zero Tangle Technology, AI Instant Re-mop, Hot Water Mop Washing, Self-Emptying & Refilling, AI Obstacle Avoidance"; and 2) "ECOVACS DEEBOT T305 PRO Robot Vacuum and Mop, 11000Pa, TruEdge Adaptive Edge Mopping, AI Obstacle Avoidance, Zero Tangle Technology, AI Instant Re-mop, Hot Water Mop Washing, Self-Emptying & Refilling".

[31] The order details indicate that the transactions were from an "Amazon Seller Central", who is identified as "ECOVACS ROBOTICS UK | Canada".

[32] In proceedings under section 45, a registrant must show that during the relevant period, it used the subject mark or that it was used by another person whose use accrued to the registrant's benefit: *Spirits International* at para 7. Use may be satisfied where goods pass through an intermediary (*i.e.*, a wholesaler or retailer) (*Manhattan Industries Inc v Princeton Manufacturing Ltd*, 1971 CanLII 2144 (FC) at 16-17) or by a licensee if the registrant shows that it has, under the licence, direct or indirect control of the character or quality of the goods as contemplated by subsection 50(1) of the TMA (*Spirits International* at para 7).

[33] As noted earlier, Ms. Chang states that ERCL was responsible for the sale of the Registered Goods to customers across Canada and is the entity that earned revenue from those sales. She indicates that ERCL was the entity that “prominently displayed” the AIVI Mark on products and packaging during the Relevant Period and confirms that ERCL at all times had control over the character and quality of the goods associated with the AIVI Mark. As noted by the Respondent, Ms. Chang does not specifically explain the nature of the Amazon seller. However, from what is said in the affidavit as to the sale of Registered Goods by ERCL and their control over the AIVI Mark on the goods, in my view, a reasonable inference can be drawn that the Ecovacs seller identified on the Amazon orders is a seller related to ERCL that is involved in the chain of distribution.

[34] Ms. Chang states that the goods sold on the Amazon orders “feature” the AIVI Mark. Although the images of the product on the Amazon orders are too small to show that the products bear the AIVI Mark, Ms. Chang provides larger photographs of the products sold to Canadian customers during the Relevant Period at her Exhibit C. She does not expressly state

that the photographs at Exhibit C relate to the products sold at Exhibit B; however, in my view, this is understood from reading the affidavit and from a comparison of the images.

[35] The photographs at Exhibit C show “AIVI 3D” displayed directly on the goods. The Respondent argues that this is not use of the AIVI Mark as the addition of “3D” in association with AIVI is significant and suggestive of a whole new dimension or feature.

[36] It is well established that cautious variations in the use of a registered trademark are permitted under the law, as long as the same dominant features are maintained and the differences are not such that they would mislead an unaware purchaser: *Promafil Canada Ltée v Munsingwear Inc*, 1992 CanLII 12831 (FCA) at 71; *Clic International Inc v Convenience Food Industries (Private) Limited*, 2011 FC 1338 at para 14.

[37] In this case, the whole of the registered mark has been maintained and remains as the dominant and distinctive element of the mark as used. While the addition of “3D” suggests that there is an additional feature to the product, I do not agree that the addition of this descriptive element would create a different association or impression with the unaware purchaser, or that the unaware purchaser would be misled or confused as to the source of the goods because of this change. In my view, Exhibits B and C taken together show that the AIVI Mark was marked on Registered Goods sold in the normal course of trade during the Relevant Period.

[38] In addition to the photographs at Exhibit C, Exhibit E shows that the AIVI Mark was displayed on product packaging for goods sold during the Relevant Period. Ms. Chang states that

the “Registered Goods were sold to Canadian consumers in the product packaging of Exhibit E”. The representative product packaging at Exhibit E shows AIVI prominently displayed at several places on the package. Although the representative product package refers to a different model (DEEBOT OZMO T8) than the models described in Exhibit B, the Chang Affidavit states that it is a copy of the product packaging that was used for Registered Goods sold to Canadian customers during the Relevant Period. The product packaging indicates that AIVI is associated with the object identification and avoidance features of the robot vacuum and mop. As this feature is also found in the models at Exhibit B, I am satisfied that this is representative of the product packaging for the models sold through the order details at Exhibit B.

[39] Taken together, in my view, the evidence establishes use of the AIVI Mark during the Relevant Period. However, it does not show use of the AIVI Mark in association with all Registered Goods identified in the registration.

[40] The Applicant acknowledged that certain of the Registered Goods should be deleted from the registration (*i.e.*, those associated with window cleaning, central vacuum cleaning installations, vacuum cleaner hoses, and electric robots for air purifying). However, the Applicant’s suggested list of deletions was more limited than that proposed by the Respondent.

[41] Based on the evidence submitted, I agree with the Respondent that the product orders, product flyer, and product packaging show use of the AIVI Mark in association with robot vacuums and mops for household use, but not industrial use, and does not depict or suggest use for commercial applications. As set out earlier, the product descriptions of the models sold

through the transactions at Exhibit B refer to a robot vacuum and mop that uses hot water, and that mops, washes, self-empties, and refills. The robot vacuum and mop in the flyer at Exhibit D is shown working on a household floor. Similarly, the robot vacuum and mop model shown on the packaging at Exhibit E is described as including additional TrueMapping technology that maps the home.

[42] There is no evidence of use of the AIVI Mark on industrial goods or for commercial applications. Nor is there any evidence of the sale of parts, filters, bags, or other accessories for vacuums, separate from the vacuums themselves. Thus, all goods relating to industrial and commercial use, parts, and other applications must be deleted from the registration. The only goods that can be maintained are:

Floor cleaning machines;

Robotic vacuum cleaners;

Vacuum cleaners;

Carpet cleaning machines;

Cordless vacuum cleaner;

Automatic floor cleaning machines for consumer use;

Automatic machines for use in the field of interior maintenance of households, namely, vacuum cleaners, machines utilizing water and chemicals for cleaning floor surfaces, machines utilizing paper, fabric or cloth wipes and pads, and machines for washing, scouring, polishing, mopping and drying floor surfaces.

[43] For these reasons, the appeal will be allowed in part, with the changes noted.

[44] As no costs were requested by the Respondent, none shall be awarded.

**JUDGMENT IN T-2261-25**

**THIS COURT'S JUDGMENT is that:**

1. The Appellant is granted leave to file the Affidavit of Xu Chang, sworn July 24, 2025.
  
2. The application is allowed in part. The April 30, 2025 decision of the Trademarks Registrar expunging TMA1108526 is set aside and Trademark Registration No. TMA1108526 will be restored with the statement of goods amended to delete the following goods from the registration:

Industrial robots; Electric cordless floor sweepers; Rechargeable floor sweepers; Central vacuum cleaning installations; Floor polishing machines; Dust filters and bags for vacuum cleaners; Steam cleaning machines; Vacuum cleaner hoses; Suction nozzles for vacuum cleaners; Vacuum cleaner attachments for disseminating perfumes and disinfectants; Road sweepers; Electric floor and window cleaning robots; Electric robots for air purifying; Robots for household cleaning; Automatic machines for use in the field of interior maintenance of commercial buildings, namely, vacuum cleaners, machines utilizing water and chemicals for cleaning floor surfaces, machines utilizing paper, fabric or cloth wipes and pads, and machines for washing, scouring, polishing, mopping and drying floor surfaces; Structural and replacement parts and accessories for automatic floor cleaning machines, vacuum cleaners, and industrial robots for use in the fields of interior maintenance of households and commercial buildings; Parts and fittings for automatic floor cleaning machines and vacuum cleaners, namely, bins, filters and roller brushes; Parts and fittings for industrial robots, floor cleaning machines, electric

cordless floor sweepers, rechargeable floor sweepers, central vacuum cleaning installations, robotic vacuum cleaners, vacuum cleaners, floor polishing machines, carpet cleaning machines, cordless vacuum cleaner, steam cleaning machines, road sweepers, electric floor and window cleaning robots, electric robots for air purifying, robots for household cleaning, automatic floor cleaning machines for consumer use.

3. There is no order as to costs.

"Angela Furlanetto"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2261-25

**STYLE OF CAUSE:** ECOVACS ROBOTICS CO., LTD. v AMERICAN AIR FILTER COMPANY, INC.

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE

**DATE OF HEARING:** MARCH 3, 2026

**JUDGMENT AND REASONS:** FURLANETTO J.

**DATED:** MARCH 31, 2026

**APPEARANCES:**

Luke McIvor FOR THE APPLICANT

Cynthia Mason FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Blaze IP FOR THE APPLICANT  
Barristers and Solicitors  
Hamilton, Ontario

Mason Professional Corporation FOR THE RESPONDENT  
Barristers and Solicitors  
Kanata, Ontario