

Federal Court



Cour fédérale

Date: 20260519

Docket: T-1042-25

Citation: 2026 FC 489

Ottawa, Ontario, May 19, 2026

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

GREEN GOURMAND FOODS INC.

Applicant

and

CANADA BREAD COMPANY, LIMITED

Respondent

REASONS AND ORDER

[1] The Moving Party (the respondent in the underlying application), Canada Bread Company, Limited [Canada Bread], brings this motion to strike from the Court's record the Respondent (the Applicant in the underlying application), Green Gourmand Foods Inc. [Green Gourmand]'s second Affidavit of Shane Bacher sworn and communicated on May 15, 2025 [New Bacher Affidavit].

[2] On March 31, 2025, Green Gourmand filed and had issued a Notice of Application under subsection 56(1) of the *Trademarks Act*, RSC 1985, c T-13 [TMA]. The Notice of Application seeks an Order setting aside the decision of the Trademarks Opposition Board for the Registrar of Trademarks [Registrar] rendered on January 27, 2025 [Decision], refusing Green Gourmand's trademark application No. 1,918,442 for the trademark ALLERGY SMART [Application for ALLERGY SMART], filed on September 5, 2018 and advertised on December 15, 2021. The Notice of Application also seeks an Order allowing the Application for ALLERGY SMART and seeks Green Gourmand's costs of its appeal. In its Notice of Application, Green Gourmand alleges certain errors committed by the Registrar and that the Registrar's Decision would have been different had it been presented with additional evidence, which Green Gourmand will file in its appeal before the Federal Court pursuant to subsection 56(5) of the TMA as it read on the date of filing its Notice of Application and reproduced hereinafter:

Additional evidence

56(5) On an appeal under subsection (1), **evidence in addition to that adduced before the Registrar may be adduced** and the Federal Court may exercise any discretion vested in the Registrar.

[Emphasis added.]

[3] Green Gourmand's Notice of Application was filed one day before the coming into force of the new enactment of subsection 56(5) of the TMA, which requires leave of the Court to adduce new evidence on an appeal under subsection 56(1) of the TMA [Leave Requirement]:

Additional evidence

56(5) If, on an appeal under subsection (1), **the Federal Court grants leave to adduce evidence in addition to that adduced before the Registrar**, the Court may exercise, with respect to that additional evidence, any discretion vested in the Registrar.

[Emphasis added.]

[4] In its motion to strike, Canada Bread opposes the introduction on the Court's record of the New Bacher Affidavit sworn and communicated on May 15, 2025, because the Leave Requirement applies to the New Bacher Affidavit and Green Gourmand was not granted leave by the Court to adduce this new evidence on appeal. While the Notice of Application was filed one day before the new enactment came into force, Canada Bread argues that Green Gourmand was still required to abide by the new enactment since paragraph 44(c) of the *Interpretation Act*, RSC, 1985, c. I-21 [*Interpretation Act*] provides that every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment.

[5] In addition, Canada Bread argues that paragraph 70(1)(d) of the TMA, which also came into force on April 1, 2025, clarifies that the new enactment will apply, even if the application for registration was made before June 17, 2019, the date at which section 342 of the *Economic Action Plan Act 2014, No. 1* came into force. Canada Bread argues that given the Application for ALLERGY SMART was advertised on December 15, 2021, it could under no circumstances be governed by the former enactment of the TMA. As such, Canada Bread argues it is irrelevant that the Notice of Application was filed by Green Gourmand before the new enactment came into force, as the Application for ALLERGY SMART must be "dealt with and disposed of in accordance with" the new enactment (paragraph 70(1)(d) of the TMA). For these reasons, Canada Bread argues that Green Gourmand's failure to seek the Court's leave to adduce the New Bacher Affidavit should be met with a rejection of the new evidence.

[6] In the event that the Court decides to evaluate any late request for leave to file the New Bacher Affidavit, Canada Bread also argues that the new evidence would not satisfy the admissibility criteria relating to the new evidence, arguing both its lack of materiality and the absence of justification as to why the new evidence could not have been filed earlier.

[7] In its responding motion record, Green Gourmand argues that nothing in subsection 56(5) of the TMA suggests that it applies to proceedings commenced prior to April 1, 2025. Green Gourmand submits that paragraph 70(1)(d) of the TMA clarifies that subsection 56(5) of the TMA applies to all applications whether they are filed before the day on which section 342 of the Economic Action Plan 2014 Act, No. 1 comes into force, namely June 17, 2019, or after that date. Paragraph 70(1)(d) came into force also on April 1, 2025, and subsection 70(1) only references trademark applications advertised before the day on which section 342 of the Economic Action Plan 2014 Act, No. 1 comes into force, namely June 17, 2019. Accordingly, Green Gourmand submits that paragraph 70(1)(d) is not applicable to its Application for ALLERGY SMART. Regardless, Green Gourmand submits that nothing is to affect the filing of new evidence as of right in proceedings commenced prior to April 1, 2025, which Green Gourmand characterizes as a “vested right”.

[8] Green Gourmand points out that paragraph 70(1)(d) also references, *inter alia*, section 38.1 of the TMA, which states that the Registrar may order costs. Accordingly, Green Gourmand also argues that the Trademarks Office has interpreted section 38.1 of the TMA as not interfering with vested rights to opposition proceedings commenced before paragraph 70(1)(d) came into force on April 1, 2025. Finally, Green Gourmand argues that the materiality of the New Bacher

Affidavit should not be assessed through this motion to strike but, in any event, the New Bacher Affidavit is material.

[9] In advance of the hearing of Canada Bread's motion to strike on December 17, 2025, Green Gourmand filed a motion pursuant to Rule 8 of the *Federal Courts Rules*, SOR/98-106, seeking an extension of time to request leave from the Court to adduce the New Bacher Affidavit in the event that this Court found the new enactment of subsection 56(5) of the TMA is applicable. Green Gourmand submits that it is reasonable and in the interests of justice to grant the extension of time sought, if necessary, in view of (i) the recent changes to the TMA, (ii) nothing in the new enactment of subsection 56(5) of the TMA suggests that it applies to proceedings commenced prior to April 1, 2025, (iii) the lack of jurisprudence at the date of the filing of their Notice of Application, and (iv) the prejudice that Green Gourmand would suffer should the extension and leave request itself not be granted. If ever the new Leave Requirement to adduce additional evidence on an appeal does apply to the New Bacher Affidavit, Green Gourmand submits that the deadline to seek such leave has not expired, as the amended subsection 56(5) does not impose any timing restrictions for seeking such leave.

[10] Green Gourmand also submits that since their application was commenced, two decisions from the Court, namely *Yat Sun Food Products Ltd v Griffith Foods International Inc*, 2025 FC 1688 [*Yat Sun Food*] (issued on October 10, 2025) and *Big Duck Games, LLC v X-Flow Ltd*, 2025 FC 1704 [*Big Duck Games*] (issued on October 20, 2025) have addressed the issue of whether subsection 56(5) of the TMA applies to proceedings commenced prior to April 1, 2025. Green Gourmand relies on paragraph 20 of *Big Duck Games* where the Court determined that a

right to adduce new evidence on appeal from a decision of the Registrar, which was dated prior to April 1, 2025, vested as of the filing date of the Notice of Application. In *Big Duck Games*, the Court determined that Rule 301 of the *Federal Courts Rules* considers an application to have been commenced upon satisfaction of certain conditions, which includes merely listing the documentary evidence to be used at the hearing. Green Gourmand adds that Rule 306 of the *Federal Courts Rules* provides that the actual evidence may be filed at a later date. Green Gourmand argues that this is precisely the situation in the present application.

[11] Canada Bread responds that Green Gourmand misconstrues the recent case law of the Federal Court, which did not have to decide on the issue at the heart of the present matter when reaching its findings, and argues that both *Yat Sun Food* and *Big Duck Games* do not bind the Court. As such, Canada Bread argues the cases can be distinguished from the present matter. Canada Bread also responds that the four criteria in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) and the ultimate criterion of the interests of justice in *Grewal v MEI*, 1985 CanLII 5550 (FCA), [1985] 2 FC 263 require this Court to refuse to extend Green Gourmand's deadline to file its New Bacher Affidavit.

[12] For the reasons that follow, Canada Bread's motion to strike is dismissed with costs.

I. Issues

[13] This matter raises the following issues:

1. Preliminary Issue – Should the portions of the Affidavit of Alice Lee in support of Canada Bread’s motion to strike containing legal opinions be disregarded by this Court?
2. Does the Leave Requirement in the legislative amendment at Subsection 56(5) of the TMA apply to the New Bacher Affidavit?
3. If the Leave Requirement applies in this case, should Green Gourmand be granted an extension of time to seek leave of the Court and be granted leave to adduce the New Bacher Affidavit?

II. Analysis

A. *Preliminary Issue – Portions of the Affidavit of Alice Lee containing legal opinions should be disregarded*

[14] The Affidavit of Alice Lee, Vice President Legal at Canada Bread, is filed in support of Canada Bread’s motion to strike [Lee Affidavit]. The Lee Affidavit explains the grounds for the motion, including a reproduction of the relevant provisions of the TMA and the *Interpretation Act* (paras 2-7). The Lee Affidavit attaches copies of the first Shane Bacher Affidavit sworn on February 8, 2023, and the Ruopeng Song Affidavit sworn on December 6, 2022, which were filed in the opposition proceedings. The Lee Affidavit also attaches a copy of the New Bacher Affidavit.

[15] On cross-examination, Ms. Lee testified that she was not familiar with the Code of Conduct for Expert Witnesses in the Federal Court and was a representative of Canada Bread. During the cross-examination, counsel for Canada Bread indicated that Ms. Lee was not “[t]here

as a lawyer; she's [t]here as a representative of the company", and that she was a "witness of fact".

[16] As it was clearly stated by the Federal Court of Appeal, questions of domestic law are not matters upon which a court will receive opinion evidence as they are clearly fall within the court's expertise and any opinion evidence on these issues would usurp the court's role: *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 18. I agree with Green Gourmand and would disregard paragraphs 2-7 of the Lee Affidavit.

B. *The Leave Requirement in the Legislative Amendment Does Not Apply to the New Bacher Affidavit*

[17] For the reasons that follow, I am of the view that the Leave Requirement in the legislative amendment of subsection 56(5) of the TMA does not apply to the New Bacher Affidavit.

(1) Temporal Application of the Leave Requirement

[18] The issue before me in this motion is to determine the temporal application of the new Leave Requirement resulting from the legislative amendment of subsection 56(5) of the TMA and whether it applies to the New Bacher Affidavit.

(a) *Applicable legal principles*

[19] In *R v Archambault*, 2024 SCC 35 [Archambault], their most recent decision on the temporal application of new legislation, the Supreme Court of Canada explains the presumption

that Parliament does not intend to interfere with vested rights or privileges in enacting a legislative amendment:

To ensure the certainty of the legal consequences attaching to facts and conduct predating a legislative amendment, “a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction” (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at pp. 282-83, citing *Spooner Oils Ltd. v. Turner Valley Gas Conservation*, [1933] S.C.R. 629, at p. 638; see also *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at para. 33). Legislation that affects substantive rights can only apply prospectively to cases in which these rights have not yet vested (*R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at para. 87).

Archambault at para 28; see also para 208.

[20] The Supreme Court further confirmed that the presumption against interference with vested rights and the exception based on the immediate application of purely procedural provisions are now codified in the *Interpretation Act*: *Archambault* at paras 30, 209. Specifically, sections 43 and 44 of the *Interpretation Act* reproduced below:

Effect of repeal

43 Where an enactment is repealed in whole or in part, the repeal does not

[...]

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

Repeal and substitution

44 Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section call the “new enactment”, is substituted therefor,

[...]

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

[...]

(ii) in the enforcement of rights, existing or accruing under the former enactment, and

(iii) in a proceeding in relation to matters that have happened before the repeal;

[21] *Archambault* clarified that, in keeping with the structure of sections 43 and 44 of the *Interpretation Act*, the first question to consider in determining the temporal application of a new legislation is whether the legislative amendment is “purely procedural in nature”: *Archambault* at paras 32, 210. Then, if the legislative amendment at issue may affect a right or privilege that vested under the prior enactment, the time at which that right or privilege vested must be determined. Only if the right has actually vested prior to the coming into force of the legislative amendment will the previous legislation be presumed to apply: *Archambault* at paras 32 (per Rowe and Côté JJ) 216, 225-226 (per Karakatsanis J, dissenting but not on this point).

(b) *Relevant Cases of the Federal Court*

[22] The temporal application of the Leave Requirement was recently considered by both Justice Fuhrer in *Yat Sun Food* and Justice Whyte Nowak in *Big Duck Games*.

[23] In both *Yat Sun Food* and *Big Duck Games* involving applications commenced before April 1, 2025, the filing of new evidence as of right before the Federal Court under previous

subsection 56(5) of the TMA was held to be a right or a privilege: *Yat Sun Food* at para 46; *Big Duck Games* at paras 19-20. Therefore, the central issue to determine was *when* that right actually vested into the party seeking to file the new evidence as of right.

[24] In *Yat Sun Food*, the applicant had filed its new evidence before the Leave Requirement came into force on April 1, 2025. Applying *Archambault*, Justice Fuhrer found that the appellant had a vested right or privilege to file new evidence as of right “having regard to the state of the law at least as of the time it filed the evidence in question, if not as of the time it filed its Notice of Application”: *Yat Sun Food* at para 46. However, the exact date of actual vesting of the right was left unresolved in *Yat Sun Food*, because *Yat Sun Food*’s new evidence was deemed filed with the Court on January 20, 2025, when the previous subsection 56(5) of the TMA was still in effect: *Yat Sun Food* at para 46.

[25] In *Big Duck Games*, like in the case before me, the Notice of Application was filed before April 1, 2025, but the new evidence was only filed after the Leave Requirement came into force. Justice Whyte Nowak found that it is of no moment that the new evidence in the application before her was filed after April 1, 2025, because *Big Duck Games*’ right or privilege to file new evidence without leave vested on March 31, 2025, since Rule 301 of the *Federal Courts Rules* considers an application to have been commenced upon satisfaction of certain conditions, which includes merely listing the documentary evidence to be used at the hearing of the application (Rule 301(f) of the *Federal Courts Rules*). In reaching this conclusion, Justice Whyte Nowak also considered Rule 306 of the *Federal Courts Rules* that the actual evidence may be filed at later date. As such, in view of its vested right, *Big Duck Games* was subject to the previous

version of subsection 56(5) of the TMA and it was not required to seek leave of the Court to file its new evidence: *Big Duck Games* at para 20, citing *Archambault* at para 32.

(c) *Am I bound by Yat Sun Food or Big Duck Games by Virtue of Horizontal Stare Decisis?*

[26] In responding submissions and during the hearing, Canada Bread argued that neither *Yat Sun Food* nor *Big Duck Games* decided whether the new enactment was purely procedural or if it interferes with a vested right. Canada Bread submits that *Yat Sun Food* says so explicitly: *Yat Sun Food* at para 42.

[27] Canada Bread then argued the *Big Duck Games* decision does not bind this Court because it can be distinguished on its facts. Canada Bread submits that *Big Duck Games*' reasoning is premised on the fact that there was a previous Order of the Court dated March 31, 2025, granting the applicant an extension of time to file the new evidence. As such, Canada Bread argues that in *Big Duck Games*, the right to file the new evidence on appeal vested with the March 31, 2025 Court Order and not by application of the previous subsection 56(5) of the TMA. Canada Bread states the Court Order had "priority over any 'generic' disposition, in a way that the order created a 'vested right' or 'vested privilege' as of the time where the prior enactment was in force which allowed for the new evidence to be filed without the need to be granted leave".

[28] I agree with Canada Bread that, in *Yat Sun Food*, Justice Fuhrer explicitly noted that it was not necessary, in the case before her, to decide the question of whether the new Leave Requirement was purely procedural: *Yat Sun Food* at para 41. However, Justice Fuhrer also

explicitly held that the applicant had a vested right or privilege of simply filing evidence without seeking leave of the Court: *Yat Sun Food* at para 46.

[29] I disagree with Canada Bread that *Big Duck Games* can be distinguished on its facts so easily. Relying on *Archambault* and Rules 301(f) and 306 of the *Federal Courts Rules*, Justice Whyte Nowak held that the right to file new evidence without leave vested before April 1, 2025 from the deemed filing of the Notice of Application and stems from the pleading's reliance on new evidence:

[20] In this case, I consider Big Duck Games' right or privilege to file new evidence as of right to have vested on March 31, 2025, when a judge of the Federal Court issued an order extending the time for the filing of Big Duck Games' Notice of Application dated February 7, 2025, to that same date. Given that the Notice of Application pleads Big Duck Games' reliance on new evidence in support of its appeal of the Registrar's Decision, it is of no moment in my view, that Big Duck Games' actual evidence was filed after April 1, 2025, since Rule 301 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] considers an application to have been commenced upon satisfaction of certain conditions, which includes merely listing the documentary evidence to be used at the hearing of the application (Rule 301(f)). Pursuant to Rule 306 of the *Federal Courts Rules*, the actual evidence may be filed at a later date. Accordingly, in view of its vested right, Big Duck Games is subject to the previous version of subsection 56(5) of the Act and it is not required to seek leave of this Court to file its new evidence (*Archambault* at para 32).

[30] It just so happened that in *Big Duck Games*, the Notice of Application was deemed filed as of February 7, 2025 through the Order of the Court issued on March 31, 2025 on the extension of time motion. Canada Bread's argument on the Court Order having priority over any generic disposition ignores the rest of the findings of the above paragraph 20 of *Big Duck Games*. In *Big Duck Games*, Justice Whyte Nowak did not find that the right vested by the filing of the actual

evidence, but rather when the Notice of Application was deemed filed by the Court: *Big Duck Games* at para 20.

[31] It is clear from my reading of *Big Duck Games* that the right to file new evidence without leave vested upon the filing of the Notice of Application with that pleading relying on new evidence in support of its appeal of the Registrar's decision. In the case at bar, as it was in *Big Duck Games*, the Notice of Application was filed before the Leave Requirement came into force on April 1, 2025 and contained a pleading that "the Registrar's decision would have been different had it been presented with additional evidence which the Applicant will file on this appeal pursuant to subsection 56(5) of the *Trademarks Act*": Green Gourmand's Notice of Application at para 8. As Justice Whyte Nowak stated, given that Big Duck Games relied on the new evidence in their Notice of Application, "it is of no moment, in my view, that [the] actual evidence was filed after April 1, 2025": *Big Duck Games* at para 20. Further, as in *Big Duck Games*, the new evidence in this case was filed after the Leave Requirement came into force. Therefore, I find that the relevant, determinative facts in both the *Big Duck Games* and the matter before me are very similar, if not identical.

[32] *Big Duck Games* determined that the filing of new evidence without leave is a substantive right, which vested upon the filing of the Notice of Application alleging that new evidence would be relied upon in the appeal, and the imposition of a Leave Requirement to file new evidence interferes with this right. Green Gourmand therefore argues that this is determinative of the issue before me and that I am bound by horizontal *stare decisis*.

[33] I agree with Green Gourmand that I am bound by horizontal *stare decisis* applicable to decisions of the same level of court and that none of the conditions precedent to depart from horizontal *stare decisis* apply here. The Supreme Court in *R v Sullivan*, 2022 SCC 19 [*Sullivan*] gave guidance as to when a lower court may depart from the principles of horizontal *stare decisis*, providing the only “three narrow circumstances” when courts should depart from a binding decision of the same level of court:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached *per incuriam* (“through carelessness” or “by inadvertence”); or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

Sullivan at para 75.

[34] The first circumstance, being that the rationale of an earlier decision has been undermined by subsequent appellate decision, clearly does not apply here: *Sullivan* at para 76. Further, there is no indication before me that the *Big Duck Games* decision was rendered in “exigent circumstances” or that it was an “immediate decision” such that the third circumstance would apply here: *Sullivan* at para 78.

[35] The second circumstance arises when the earlier decision was reached without considering a relevant statute or binding authority. For this circumstance to apply, I must find that if the previous Court had considered some authority, either a binding legal precedent or a relevant statute, the Court would have come to a different decision, because the inadvertence struck at the essence of the decision.

[36] I do not find myself in this second circumstance here. First, *Big Duck Games* discusses both *Archambault* and *Yat Sun Food*. These two decisions contain all the relevant legal provisions and jurisprudence I would have applied in my own analysis on the temporal application of the Leave Requirement. Furthermore, Canada Bread has not shown that a binding legal precedent or relevant statute would have necessarily changed the decision if it had been considered. As stated by the Supreme Court of Canada, “[i]t cannot be merely that a missing authority was not mentioned in the reasons, it must be shown that the authority affected the judgement”: *Sullivan* at para 77.

[37] Being bound by horizontal *stare decisis* in *Yat Sun Food* and *Big Duck Games*, I conclude that Green Gourmand was not required to seek leave of the Court to file its New Bacher Affidavit because its right to do so vested when their Notice of Application was deemed to have been filed, which Notice of Application included a similar reference to “any further affidavit evidence and documentary exhibits as counsel may suggest” in its list of documentary evidence to be used at the hearing of the application (as per Rule 301(f)) of the *Federal Courts Rules*).

[38] Nevertheless, I will briefly address the parties’ other submissions for completeness.

(d) *Transitional Provision – paragraph 70(1)(d) of the TMA*

[39] In addition to the new Leave Requirement, the amendments included a transitional provision that may provide guidance to this Court. The relevant transitional provision is found at subsection 70(1) of the TMA reproduced hereinafter [Transitional Provision]:

Application advertised

70(1) An application for registration that has been advertised under subsection 37(1) before the day on which section 342 of the *Economic Action Plan 2014 Act, No. 1* comes into force shall be dealt with and disposed of in accordance with

[...]

(d) subsections 9(3) and (4), sections 36.1, 38.1 and 45.1, and subsection 56(5), as enacted by the *Budget Implementation Act, 2018, No. 2*.

[40] Canada Bread argues the Transitional Provision clarifies that the Leave Requirement will find application, even if the application for registration was made before June 17, 2019, the date at which section 342 of the *Economic Action Plan 2014 Act, No. 1* came into force. Canada Bread states that, in this case, the ALLERGY SMART Application was advertised on December 15, 2021 and could thus under no circumstances be governed by the former enactment of subsection 56(5) of the TMA.

[41] I disagree with Canada Bread that the Transitional Provision “clarifies” the temporal application of the Leave Requirement in the case before me.

[42] While it is clear that a reading of the Transitional Provision confirms the applicability of certain sections of the TMA (including subsection 56(5) of the TMA) to applications for registration that were made prior to June 17, 2019, the ALLERGY SMART Application was made on December 15, 2021. As such, the Transitional Provision provides no clear legislative intent regarding the new temporal application of subsection 56(5) to the ALLERGY SMART Application and to the case before me.

[43] In addition, the Transitional Provision was not in force until April 1, 2025. Therefore, the Transitional Provision cannot affect the rights of a party that vested prior to its enactment absent clear legislative intent to the contrary. Here, I am of the view that Green Gourmand's right or privilege to file new evidence as of right vested as of March 31, 2025 when it filed its Notice of Application alleging that the Registrar's Decision would have been different had it been presented with additional evidence which it will file on this appeal pursuant to the previous provision of subsection 56(5) of the TMA and referring to "any further affidavit evidence and documentary exhibits": Green Gourmand's Notice of Application at para 8.

[44] I agree with Green Gourmand who submits that generally, legislation should not be construed as having a retrospective or retroactive effect unless it is expressly or by necessary implication required by the language of the legislation: *Gilead Sciences, Inc v Canada (Health)*, 2016 FC 231 at para 105 [*Gilead*]; aff'd 2016 FCA 140. The Federal Court of Appeal in *CI Mutual Funds Inc v Canada (CA)*, 1999 CanLII 9339 (FCA), [1999] 2 FC 613 at para 17 held that "common sense suggests that provisions which 'are deemed to have come into force on' a certain date apply to all actions which commenced after that date".

[45] I am not satisfied that paragraph 70(1)(d) expressly or necessarily implies such a retrospective or retroactive effect so as to deprive an applicant of its right to file new material evidence as of right in an application appealing a decision of the Registrar after an applicant clearly expressed its intent to rely on such new evidence prior to the coming into force of the new provision of subsection 56(5) of the TMA. This is consistent with this Court's decision in *Yat Sun Food* that held that paragraph 70(1)(d) of the TMA does not, or should not be read to,

operate as to deprive a party of the right to file new material evidence on its appeal of a decision: *Yat Sun Food* at para 34.

(e) *Green Gourmand's Right to File New Evidence Without Leave Vested on March 31, 2025*

[46] In the event that I am wrong and I am not bound by my colleagues in *Yat Sun Food* and *Big Duck Games*, I nevertheless would have come to the same conclusion after my own analysis, which is set out below.

[47] In the absence of an applicable transitional provision, *Archambault* teaches that the first question to consider in determining how a new legislation applies temporally, is whether the legislative amendment is “purely procedural”: *Archambault* at para 32.

[48] At the hearing, Canada Bread argued the Leave Requirement is purely procedural and does not affect a party's right to file new evidence; it merely confirms the procedure to be followed in order to assert the right. In other words, the Leave Requirement does not prohibit *Green Gourmand* to file new evidence, it simply modifies the procedure to be followed to do so.

[49] At the hearing, Canada Bread relied on *R v Chouhan*, 2021 SCC 26 [*Chouhan*]. In *Chouhan*, the Supreme Court discussed the abolition of peremptory challenges by changes to the *Criminal Code* and held that the abolition of peremptory challenges of a juror is a change to the jury selection procedure that exists only to serve the *Charter* protected right to a fair trial by an independent and impartial jury: *Chouhan* at para 94. The Court clarified that the loss of a

perceived procedural advantage does not equate to a negative impact on a substantive right:

Chouhan at para 95. Indeed, the Court held:

[96] While the subjective importance of the peremptory challenge to the accused is undeniable, the mere fact that a procedure was important or advantageous to one party does not, without more, render the procedure substantive. The Court of Appeal for Ontario has held, correctly in our view, that even where a procedure operates more favourably to the accused than its replacement, there is no vested interest, and by extension, no substantive right to a specific procedure (*Peel (Police) v. Ontario (Special Investigations Unit)*, 2012 ONCA 292, 110 O.R. (3d) 536, at para. 72). The ancient character of peremptory challenges does not displace this principle.

[97] The jurisprudence demonstrates conclusively that legislation can confer a significant benefit on the accused or the Crown but nevertheless remain procedural.

[...]

[98] We highlight these examples to demonstrate that procedural rights are often no less important than substantive rights from the perspective of the accused person. In both *Wildman* and *Bickford*, the accused no doubt each expected and hoped that their trials would proceed under the old evidentiary rules, and the change in law may have paved the way for their convictions. Nevertheless, changing those rules of evidence merely altered the manner in which accused persons conducted their defence and did not deprive them of a defence, which would have affected a substantive right, as was the case in *Dineley*.

[...]

[101] We are fortified in this conclusion by the views of our colleague, Abella J., at paras. 159 to 166 of her reasons. If, as she says, all that has changed since the amendments' enactment is that discretion has shifted from that of the parties (in the exercise of peremptory challenges) to the judge (in the "vigorous exercise" of the stand-aside power), this tends to affirm the amendments' procedural quality. As *Dineley* makes clear, "new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights" (para. 10 (emphasis added)). On our colleague's account, this is precisely what has occurred here: the substantive content of the right to a fair trial is unchanged, but the procedure by which it is

delivered has changed. There is, consequently, no basis for construing these amendments as anything but procedural.

Chouhan at paras 96-98, 101 [Emphasis added.]

[50] According to *Canada Bread*, the effect of the Leave Requirement is similarly procedural in nature. In fact, *Canada Bread* argues that provisions relating to evidence do not directly concern the existence of a right, but rather the procedure by which the right is asserted. Notably, *Canada Bread* referred to *Howard Smith Paper Mills v The Queen*, 1957 CanLII 11 (SCC), [1957] SCR 403, which was aptly summarized by Justice Cromwell in *R v Dineley*, 2012 SCC 58 [*Dineley*] at para 60 (Dissenting, but not on this point):

[60] I turn now to the jurisprudence of this Court that relates more specifically to evidentiary matters. In *Howard Smith*, the question was whether an amended provision of the *Combines Investigation Act* applied in a prosecution for a conspiracy alleged to have been completed before the amendment came into force. The effect of the provision was to make admissible in evidence documents described as “inter-office memoranda” and to deem them to be *prima facie* evidence against the corporation in whose possession they were found and also against the persons named in them: *Combines Investigation Act*, R.S.C. 1927, c. 26, s. 41, as enacted by S.C. 1949 (2nd Sess.), c. 12, renumbered and amended by S.C. 1952, c. 39. The Court unanimously held that this provision was procedural and therefore applied to a trial held after it came into force. As Cartwright J. put it, at p. 420: “While [the provision] makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only . . .” (emphasis added). Thus, evidence that before the enactment would not have been cogent evidence of guilt became such evidence as a result of the enactment, yet the Court concluded nonetheless that the enactment was procedural in nature and applied to the proceedings. Simply making inculpatory evidence admissible that was previously inadmissible did not “take away” a defence.

[Emphasis in original.]

[51] In *Chouhan*, the reasons of Justice Moldaver and Justice Brown drew some general guidance from Justice Cromwell’s above-mentioned summary:

Broadly speaking, procedural amendments depend on litigation to become operable: they alter the method by which a litigant conducts an action or establishes a defence or asserts a right. Conversely, substantive amendments operate independently of litigation: they may have direct implications on an individual’s legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal.

Chouhan at para 92.

[52] With that being said, I must note that in *Archambault*, Justice Côté and Justice Rowe agreed with the reasons of Justice Karakatsanis that even legislative amendments that are procedural in nature may nevertheless affect a substantive right such that the presumption that Parliament did not intend to interfere with vested rights or privileges applies: *Archambault* at paras 2, 39 (per Rowe and Côté JJ), 157, 204, 208 (per Karakatsanis J, dissenting but not on this point). This was the case for the amendment to section 535 of the *Criminal Code* limiting the availability of preliminary inquiry to the most serious cases: *Archambault* at para 42.

[53] Both *Archambault* and *Dineley* cautioned against a rigid categorization of purely procedural legislative amendments without considering the effects of the legislative amendments on the “vested or substantive rights”: *Archambault* at para 39 citing *Dineley* at para 10.

[54] As such, the question is not as simple as it may seem and *Archambault* recognizes that that this determination is a “delicate matter”. In *Archambault*, the Supreme Court of Canada

confirmed the two conditions to be made out by an individual claiming a vested right or privilege:

First, the individual's legal situation must be "tangible and concrete rather than general and abstract" (para. 37). The mere possibility of availing oneself of a statute is not a basis for arguing that a vested right exists; "the right must be vested in a specific individual" (para. 39). Second, the individual's legal situation must be sufficiently tangible and constituted at the time the new legislation comes into force; in other words, the situation must have materialized to some degree (paras. 37 and 40).

Archambault at para 44 (per Rowe and Côté JJ), citing *Dirkanian*; see also *Archambault* at paras 227-229 (per Karakatsanis J, dissenting but not on this point).

[55] A right can only vest in an individual when the legal situation is sufficiently constituted, meaning that the conditions precedent to the exercise of a right must have been fulfilled, even if not all procedural steps required to exercise the right were taken before the legislative amendment came into force: *Archambault* at paras 45 (per Rowe and Côté JJ), 227-229 (per Karakatsanis J, dissenting but not on this point).

[56] Therefore, in the case before me, I must determine whether the filing of the new evidence as of right under the previous provision of subsection 56(5) of the TMA crystalized when Green Gourmand filed its Notice of Application with its particular pleadings as discussed above, or whether the filing of the new evidence's filing with the Court is a condition precedent to the exercise of that right. This is no small task because "[t]he difficulty therefore lies in distinguishing, on the one hand, what are simply the necessary procedural steps for exercising the right from, on the other, the conditions precedent to the exercise of the right. Only the latter must be fulfilled for the right to vest.": *Archambault* at para 45.

[57] In *Archambault*, the Supreme Court of Canada disagreed as to when an accused's right to a preliminary inquiry vests. Rowe and Côté JJ held that it vests at the time charges are laid (para 3). Martin J found that the date of the offence was the preferable option (para 103). In reasons written by Karakatsanis J, Wagner CJ, O'Bonsawin and Moreau JJ held it was at the time the request is made (para 248). While Jamal and Kasirer JJ agreed with Karakatsanis J that a right to a preliminary inquiry can vest at the time the request is made because all conditions precedent are met, they added the right vested in that particular case because of a local practice in Quebec where accused persons typically reserve their election as to the mode of trial so that they can examine the evidence to be disclosed (para 85). However, there was substantial agreement that a legal interest has "vested" when all the facts or conditions precedent have occurred: *Archambault* at paras 45 (per Rowe and Côté JJ), 83 (per Kasirer J), 216 (per Karakatsanis J, dissenting but not on this point). When Green Gourmand filed its Notice of Application with its above-described pleadings specifically asserting it would be filing new affidavit and documentary exhibits that would have changed the Registrar's Decision, the vesting of its right to file evidence as of right is certain and not conditional on any future events, meaning that inevitably, it would decide to exercise its right to file evidence upon the filing of its Applicant's Record. Green Gourmand chose to exercise the right by filing its Notice of Application and the filing of the evidence is not a condition precedent to the exercise of the right.

[58] If anything, *Archambault* makes clear that the *Interpretation Act* prevails.

[59] In its written submissions, Canada Bread argues that Green Gourmand was still required to abide by the new enactment since paragraph 44(c) of the *Interpretation Act* provides that every proceeding taken under the former enactment shall be taken up and continued under and in

conformity with the new enactment in so far as it may be done consistently with the new enactment. At the hearing, Canada Bread argued that the *Interpretation Act* is clear that under subparagraph 44(d)(ii), when a former enactment is repealed and replaced by a new enactment “the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the enforcement of rights, existing or accruing under the former enactment.” Canada Bread submits that since the Leave Requirement is a change in procedure, Green Gourmand ought to have sought leave prior to the filing of its new evidence.

[60] Canada Bread submits that the characterization of the Leave Requirement as being purely procedural is consistent with the legislative intent of Parliament in enacting the new Leave Requirement. Effectively, the changes to section 56 of the TMA were part of the goal to improve the efficiency of trademark dispute resolution:

The objective of this Order is to bring into force the remaining amendments to the *Trademarks Act* (the Act) intended to strengthen, modernize and enhance the efficiency and effectiveness of Canada’s trademark regime, in alignment with the 2018 Intellectual Property (IP) Strategy. It addresses key stakeholder concerns by introducing, among other things, the requirement to show use to enforce a trademark within the first three years after registration, a mechanism to withdraw official marks that are owned by entities that no longer exist or are not public authorities, improve the efficiency of trademark dispute resolution [...]

and:

Section 226: removal of the automatic right to file additional evidence in appeals of the Registrar’s decisions at the Federal Court.

Canada Gazette Part II, Vol. 159, No. 5, at pp 887 and 889.

[61] Green Gourmand argues that their right to file new evidence before the Federal Court vested through the issuance of their Notice of Application, on March 31, 2025. As such, they

submit their new evidence should be subject to the TMA in force at the time the Notice of Application was filed, thereby granting them the right to file new evidence before this Court without leave.

[62] Green Gourmand argues that paragraph 44(c) of the *Interpretation Act* referenced by Canada Bread provides that the proceeding under the former section 56 of the TMA continues as much as it is consistent with the new provision; it does not make the new subsection 56(5) of the TMA broadly retrospective. At the hearing, Green Gourmand relied on paragraph 43(d) of the *Interpretation Act* to argue that the Leave Requirement affected their right to file new evidence without leave, which they claim was acquired or accrued under the previous provision of subsection 56(5) of the TMA at the moment they filed their Notice of Application. Green Gourmand explains that because their Notice of Application was filed on March 31, 2025 under the previous provision, their acquired right to file new evidence cannot be subject to the Leave Requirement, which came into force on April 1st, 2025.

[63] On a clear reading of *Archambault*, I must not decide whether to apply sections 43 or 44 of the *Interpretation Act*. As previously explained, *Archambault* clarifies that a procedural amendment may still interfere with a vested right, and the structure of sections 43 and 44 of the *Interpretation Act* requires that when an amendment may affect a right or privilege under the prior enactment, the time at which that right or privilege vested must be determined: *Archambault* at para 32.

[64] I conclude that Green Gourmand's right to file its New Bacher Affidavit as of right vested when their Notice of Application was commenced and deemed filed with the Court,

which Notice of Application included both (i) a reference to “any further affidavit evidence and documentary exhibits as counsel may suggest” in its list of documentary evidence to be used at the hearing of the application (as per Rule 301(f) of the *Federal Courts Rules*) and (ii) a reliance on and an assertion of affidavit evidence, which it plead would have resulted in a different Decision of the Registrar. I am of the view that this amounts to clear evidence that the right actually vested prior to the coming into force of the legislative amendment.

[65] The jurisprudence on Rule 301 is instructive in the case before me convincing me that it matters not that Green Gourmand did not specifically list the New Bacher Affidavit by name with any particularity in its Notice of Application. I note that Justice Lafrenière held in *Simpson Strong-Tie Company, Inc v Peak Innovations Inc*, 2008 FC 52 [*Simpson Strong-Tie*] that:

[5] In theory, Rule 301(f) could be viewed as requiring an applicant to list each and every document that will be relied upon at the hearing of the appeal, including the names of the deponents who will be providing affidavit evidence. However, in practice, **such specificity is neither mandated, nor required, by the Rules.**

[Emphasis added.]

See also *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 at paras 40-41 (where the Federal Court of Appeal noted that evidence is supplied in the parties’ affidavits at a later stage in the proceedings under Rules 306 and 307 of the *Federal Courts Rules*).

[66] Given that Green Gourmand was deemed to have “commenced its application” on March 31, 2025, I am of the view they have satisfied all conditions precedent to file new evidence as of right under the previous enactment of subsection 56(5) of the TMA, meaning that the right vested at that time. More specifically, the conditions precedent resulted from the Notice of

Application pleading “this application will be supported by [...] any further affidavit evidence and documentary exhibits as counsel may suggest and this Honourable Court permits” and “the Registrar’s Decision would have been different had it been presented with additional evidence which the Applicant will file on this appeal pursuant to subsection 56(5) of the Act”: Green Gourmand’s Notice of Application at paras 8 and 10. In its Notice of Application filed with the Court and issued on March 31, 2025, Green Gourmand did not need to specifically rely on the New Bacher Affidavit for its right to have vested: Rule 301(f) of the *Federal Courts Rules*; *Simpson Strong-Tie* at para 5.

[67] I find that Green Gourmand’s legal situation, as of March 31, 2025, is both tangible and concrete, and sufficiently constituted at the time the legislative amendment of subsection 56(5) of the TMA came into force: *Gilead* at para 104 citing *Dikranian v Quebec (Attorney General)*, 2005 SCC 73 at paras 39-40. I conclude that Green Gourmand was not required to seek leave of the Court to file its New Bacher Affidavit because its right to do so vested when their Notice of Application was deemed to have been commenced that included a reference to “any further affidavit evidence and documentary exhibits as counsel may suggest” in its list of documentary evidence to be used at the hearing of the application and a pleading that “the Registrar’s Decision would have been different had it been presented with additional evidence which the Applicant will file on this appeal”. Such a particularised Notice of Application satisfies all the conditions precedent to Green Gourmand’s right to file new evidence as of right before the Court.

C. *Given the Leave Requirement does not apply in this case, Green Gourmand does not need to be granted any extension of time*

[68] Given my finding that the new Leave Requirement does not apply to the New Bacher Affidavit, I need not address Canada Bread's other arguments on its motion to strike nor the materiality of the New Bacher Affidavit at this preliminary stage of the proceeding. Nor do I need to address Green Gourmand's motion for an extension of time to file leave, which is moot.

III. Costs

[69] Green Gourmand requests a lump sum award be granted to it in the total amount of \$12,615.95 calculated according to Column IV of Tariff B, inclusive of disbursements, and attaches a Bill of Costs as well as two invoices for a court reporter relating to the cross-examination of Ms. Lee. One of the invoices concerns a cancellation fee for \$1,017 for Ms. Lee's previously scheduled cross-examination that was scheduled on a rush basis due to Canada Bread's scheduling of its motion made returnable on Tuesday, June 3, 2025, which the court could not accommodate on that date. Green Gourmand submits that Canada Bread should be responsible for the appointment cancellation fees as costs thrown away for not confirming with the court that the motion can be heard on the date. Green Gourmand also argues that the *Yat Sun Food* and *Big Duck Games* cases, both rendered in October 2025, confirmed Green Gourmand's position and yet, Canada Bread still proceeded with its motion to strike, which is a factor for consideration under Rule 400(3)(k) of the *Federal Courts Rules*.

[70] In view of Green Gourmand's submissions, I am of the view that costs in accordance with Column IV of Tariff B and its disbursements are reasonable and appropriate in the circumstances and grant Green Gourmand the lump sum requested in the total amount of \$12,615.95, inclusive of disbursements.

IV. Conclusion

[71] For these reasons, I find that Green Gourmand's right to file new evidence without leave vested on March 31, 2025 when it filed its Notice of Application in which it stated its intention to support its application on appeal of the Registrar's Decision by filing new evidence.

[72] Canada Bread's motion to strike the Shane Bacher Affidavit is dismissed with costs payable to Green Gourmand forthwith in the total amount of \$12,615.95. Canada Bread is granted an additional two (2) months from the date of this Order and Reasons within which to conduct the cross-examination of Mr. Shane Bacher on the New Bacher Affidavit.

[73] Given that the parties made written and oral submissions in both English and French and the proceedings were conducted in both official languages, this Order and Reasons were made available simultaneously in both official languages (i.e. once the translation was completed).

ORDER in T-1042-25

THIS COURT ORDERS that:

1. Canada Bread's motion to strike the Shane Bacher Affidavit is dismissed with costs payable to Green Gourmand forthwith in the total amount of \$12,615.95.
2. Canada Bread is granted an additional two (2) months from the date of this Order and Reasons within which to conduct the cross-examination of Mr. Shane Bacher on the New Bacher Affidavit.

"Ekaterina Tsimberis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1042-25

STYLE OF CAUSE: GREEN GOURMAND FOODS INC. v CANADA
BREAD COMPANY, LIMITED

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 17, 2025

COST SUBMISSIONS IN WRITING RECEIVED ON
JANUARY 15, 2026

REASONS AND ORDER: TSIMBERIS J.

DATED: MAY 19, 2026

APPEARANCES:

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ME JULIANNA FELENDZER	
ME WILLIAM ARCHAMBAULT	FOR THE RESPONDENT
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