

Federal Court



Cour fédérale

Date: 20261002

Docket: T-352-26

Citation: 2026 FC 1224

Toronto, Ontario, October 2, 2026

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

PHARMA COSMETICS LABORATORIES LTD.

Applicant

and

GLEN RAVEN, INC.

Respondent

REASONS AND JUDGMENT

I. Overview

[1] Pharma Cosmetic Laboratories Ltd. [PCL] brings this application pursuant to subsection 56(1) of the *Trademarks Act*, RSC 1985, c T-13 [*Trademarks Act*] appealing a decision of a member of Trademarks Opposition Board [TMOB] dated November 27, 2025 [Decision]. In its Decision, the TMOB refused PCL's application to register its SUNBRELLA trademark [PCL

Mark] on the basis that it is confusing with the SUNBRELLA trademarks [SUNBRELLA Marks] owned by the Respondent, Glen Raven Inc. [Glen Raven] and is not distinctive.

[2] For the following reasons, I find that the Applicant has failed to raise any errors warranting this Court's intervention. The errors urged by PCL are not borne out by a careful examination of the record. Accordingly, PCL's application is dismissed.

II. Facts

A. *The PCL Mark and Glen Raven's opposition*

[3] PCL sought to register the PCL Mark in association with goods that include, "non-medicated cosmetic sun-protecting preparations; facial foundation make-up with sun-protecting compositions."

[4] The Application was opposed by Glen Raven who asserted that the PCL Mark is confusing with its SUNBRELLA Marks, which consist of word and design marks that include the word "SUNBRELLA" registered for fabrics, yarns and threads for use in producing products including sun and wind screens, canopies and beach umbrellas. Glen Raven also argued that the PCL Mark is unregistrable as it is not distinctive.

B. *The Decision*

[5] The TMOB's analysis focused on one of the SUNBRELLA Marks in particular, namely, SUNBRELLA & Design, TMA781,838 [838 Mark]:



[6] The TMOB considered this to be Glen Raven's strongest case on the issue of confusion given the scope of the goods for which it was registered.

[7] The TMOB refused PCL's application on the basis of paragraphs 38(2)(b) and 12(1)(d) of the *Trademarks Act* concluding that:

Having considered all of the surrounding circumstances, from the perspective of the casual consumer somewhat in a hurry, I find that the likelihood of confusion between the [PCL] Mark and the [838] Mark to be, at best for PCL, approximately even. Since the trademarks are nearly identical, and there is some degree of relationship between the parties' goods, I find that there is at least an even chance that consumers will infer that the parties' goods emanate from the same source. In my view, the differences in the parties' channels of trade, and the slightly longer period of use demonstrated by PCL, are not sufficient to tip the balance toward a finding of no confusion (Decision at para 47).

[8] The TMOB also found that PCL had not demonstrated that, as of the material date, PCL's mark was distinctive. It stated:

For the reasons stated above in respect of the extent to which the trademarks have become known, I am satisfied that Glen Raven's SUNBRELLA Marks have become known in Canada to a substantial extent. In my view, the reputation of the SUNBRELLA Marks established in the evidence is sufficient to meet Glen Raven's initial burden in respect of this ground.

Furthermore, I am not satisfied that, as of the material date for this ground, the [PCL] Mark was distinctive. As of the material date, the likelihood that the [PCL] Mark was confusing with at least the [838] Mark was, at best for PCL, approximately even. I reach this

conclusion for essentially the same reasons stated above in respect of the Registrability Ground, notwithstanding the earlier material date under this ground. Accordingly, I am not satisfied that the Applicant has met its legal onus to show that the [PCL] Mark actually distinguished, or was adapted to distinguish, PCL's goods from those of Glen Raven. This ground of opposition is therefore successful (Decision paras 51-52).

III. Issues and Standard of Review

[9] PCL submits that the TMOB erred in the following four ways in its analysis related to the nature of the parties' goods as part of the confusion analysis:

- A. The TMOB erred in law in its consideration of Glen Raven's registered goods;
- B. The TMOB erred in law in finding that the use of the SUNBRELLA Marks by unlicensed third-party manufacturers can accrue to the benefit of Glen Raven;
- C. The TMOB erred in law in its application of the doctrine of concurrent use;
- D. The TMOB made a palpable and overriding error in finding that Glen Raven's distribution of branded sunscreen in the United States supports a finding that the parties' goods are related; and

[10] PCL also submits that the TMOB erred in rejecting PCL's ground of opposition based on non-distinctiveness of the PCL Mark.

[11] The appellate standard of review applies to PCL's appeal of the Decision (*Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at para 23 [*Clorox*]). According to this standard, questions of law and extricable questions of law are reviewed on a standard of correctness for which no deference is owed (*Clorox* at para 23). Questions of mixed fact and law

are reviewable on a standard of palpable and overriding error, which is a highly deferential standard that requires the identification of a reviewable error that goes to the very core of the outcome of the case (*Clorox* at para 38 citing *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46).

[12] Glen Raven objects to PCL raising issues (B) and (D) as it says that these are new issues that were not raised before the TMOB (citing *Quan v Cusson*, 2009 SCC 62 at paras 36-37 [*Quan*]; *Eli Lilly Canada Inc v Teva Canada Limited*, 2018 FCA 53 at paras 44-45). PCL disagrees and suggests that the issues arise from the Decision itself and therefore could not have been anticipated.

[13] Based on the limited excerpts of certified copies of the Applicant's written submissions to the TMOB that I have been given by Glen Raven for the first time in a compendium at the hearing, I am unable to find on a balance of probabilities that the issues are new given the limited record I have before me.

[14] Notably, a Court is not barred from considering new issues on appeal where it is in the interest of justice to do so and where the court has a sufficient evidentiary record to allow it to make the necessary findings of fact (*Quan* at para 37). In this case, I find that it is in the interests of justice to consider issues (B) and (D) despite Glen Raven's objection and I find that there is a sufficient evidentiary record to do so.

IV. Analysis

A. *The TMOB's consideration of the registered goods*

[15] PCL submits that the TMOB failed to consider the SUNBRELLA Marks as registered in conducting the confusion analysis as required by paragraph 12(1)(d) of the *Trademarks Act* thereby committing “an overarching error of law” in the TMOB’s confusion analysis.

[16] PCL emphasizes that in analysing confusion under paragraph 12(1)(d) of the *Trademarks Act*, it is the statement of goods in Glen Raven’s registration that governs the analysis of the paragraph 6(5)(d) factor and not the goods with which it has actually used the SUNBRELLA Marks (citing *Arterra Wines Canada Inc v Sundial Growers Inc*, 2021 TMOB 67 at para 66 [Arterra]). PCL suggests that the registered goods associated with the SUNBRELLA Marks are limited to fabrics, yarns, and threads and it was therefore an error of law for the TMOB to rely on evidence of use relating to umbrellas, sun screens, canopies or other finished products using such fabrics.

[17] I consider this issue to involve a question of mixed fact and law reviewable on a standard of palpable and overriding error.

[18] Contrary to PCL’s assertion, the goods listed in Glen Raven’s registration are not limited to fabrics and expressly include fabric for use in the manufacture of various shade products. The statement of goods reads:

(1) Fabrics sold in the piece for use in producing awnings, sun and wind screens, tents, canopies, boat covers and tops, indoor and outdoor furniture, beach umbrellas, area rugs, draperies, sheers, and window treatments.

(2) Fabrics sold in the piece for use in producing awnings, sun and wind screens, tents, canopies boat covers and boat tops, indoor and outdoor furniture, beach umbrellas, area rugs, draperies, sheers, window treatments, bags, clothing, draperies, curtains, upholstery, wearing apparel, handbags, and sportswear.

[19] The TMOB made no error in its understanding of the statement of goods. By way of example, the TMOB states in the Decision, “[m]any of the products for which Glen Raven’s fabrics are used, such as sun screens, canopies, and beach umbrellas...” (Decision at para 30).

[20] As was the case in *Arterra*, the statement of goods is essentially the same as the goods with which Glen Raven’s SUNBRELLA Marks have been used (*Arterra* at para 66).

B. *The TMOB’s consideration of “branding through” to the consumer*

[21] PCL submits that the TMOB erred by considering use by unlicensed third-party manufacturers of finished goods incorporating Glen Raven’s fabrics as use by Glen Raven when subsection 50(1) of the *Trademarks Act* limits consideration to licensed use.

[22] The relevant portion of the Decision reads:

...[I]n view of the fact that Glen Raven’s fabrics are branded through to the consumer, meaning the fabric’s branding appears on the products that are related to PCL’s goods through concurrent use, I consider Glen Raven’s goods to be sufficiently related to PCL’s goods to support a finding of confusion (Decision at para 30).

[23] First, PCL asserts that, “branding through to a consumer” is not a legal test for use of a trademark and Glen Raven’s evidence related to products manufactured by unlicensed third parties. Without this evidence, PCL submits that the purported connection between the parties’ goods is not made out.

[24] I do not agree that the TMOB treated “branding through to the consumer” as a legal test. As the TMOB noted, the phrase “branding through to a consumer” was introduced by Glen Raven’s Chief Marketing Officer [CMO] to describe how hang tags or other sewn-in tags bearing SUNBRELLA Marks are seen by the end consumer on the fabrics used in third-party shade products (Decision at para 9). The TMOB’s conclusion on the overlap in the nature of the parties’ goods was based on this evidence in conjunction with the TMOB’s finding of concurrent use.

[25] Nor is it accurate to say that Glen Raven’s evidence was restricted to unlicensed use.

Glen Raven’s CMO stated in his affidavit:

Glen Raven has licensed the SUNBRELLA mark to numerous entities. In most cases, those licensing agreements relate to use of the SUNBRELLA mark in wholesalers’ or retailers’ advertising. The Canadian licensees include manufacturers such as Hauser, retailers of SUNBRELLA fabric such as Trican Corp., and retailers of finished products that incorporate SUNBRELLA fabric.

[26] Glen Raven’s evidence includes photos of its 838 Mark hangtag on the fabric of an awning beside a hangtag from the third-party manufacturer of the awning.

[27] It was the evidence of Glen Raven’s CMO, that Glen Raven strictly enforces licensing agreements to protect the consumer goodwill associated with the SUNBRELLA brand and its license includes a provision allowing it to audit and approve any use of the SUNBRELLA Marks and products that are made from SUNBRELLA fabrics.

[28] Considering this evidence, I do not consider the TMOB to have committed an error of mixed fact and law as its finding of use is consistent with caselaw finding that the permanent application of a trademark to goods manufactured by a third party can constitute “use” within the meaning of the *Trademarks Act* (*GNR Travel Centre Ltd v CWI, Inc*, 2023 FC 2 at para 61-66).

[29] While PCL suggests that the CMO explicitly states that the licenses apply to “advertising,” again this characterization of the evidence is not accurate. While slim, the CMO’s evidence refers to the use of the SUNBRELLA Marks in association with goods involving the transfer of the property in or possession of the goods and it addresses how goodwill accrues as a result of the depiction of the SUNBRELLA Marks on third-party products.

[30] Second, PCL submits that the TMOB made a palpable and overriding error because the evidence does not show any relationship between the SUNBRELLA Marks with umbrellas. It emphasizes that Glen Raven’s evidence purporting to depict the 838 Mark on third-party products show pillows and cushions and not umbrellas. Again, this is not accurate. The TMOB relied on a statement by Glen Raven’s CMO that the third-party manufacturers that use the SUNBRELLA fabrics include those “who use the fabrics to produce various shade products, including canopies, beach umbrellas, patio umbrellas, cabanas, pergolas and canopies...”

(Decision at para 9). PCL's objection therefore goes to the weight given to this evidence, which is not a basis for this Court's interference.

[31] PCL's final related submission is that the TMOB's error in considering use by third-party manufacturers led it to consider the wrong end consumer in its confusion analysis. PCL insists that the "end consumer of the shade product" is not the consumer to be considered in assessing confusion; rather, the average consumer is the third-party manufacturer of the shade products who would not be confused by the source of the parties' products. I disagree: the casual consumer for the test for confusion is not the same consumer who is relevant to an assessment of channels of trade. In this case, the casual consumer is a consumer of PCL's sunscreen preparations bearing the PCL Mark, who has an imperfect recollection of the 838 Mark (*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 20). The TMOB made no error of law or mixed fact and law in this regard.

C. *Did the TMOB err in its consideration of concurrent use?*

[32] PCL submits that the TMOB misconstrued the doctrine of concurrent use of goods in two ways, each of which constitutes an error of law.

[33] The relevant portion of the Decision reads:

I agree with PCL in that "offering protection from the sun", on its own, is too tenuous a connection to support a finding of confusion. However, there is a somewhat deeper connection between the parties' goods. Many of the products for which Glen Raven's fabrics are used, such as sun screens, canopies, and beach umbrellas, are typically used concurrently with preparations containing sunscreen, such as PCL's goods. Concurrently-used

goods such as these could be considered as being related, creating a likelihood that consumers would infer that the goods come from a common source [see *Kamsut, Inc v Jaymei Enterprises Inc*, 2010 TMOB 196 at para 55]. And in view of the fact that Glen Raven's fabrics are branded through to the consumer, meaning the fabric's branding appears on the products that are related to PCL's goods through concurrent use, I consider Glen Raven's goods to be sufficiently related to PCL's goods to support a finding of confusion (Decision at para 30).

[34] First, PCL submits that "[c]oncurrent use cannot, in and of itself, lead to a conclusion that goods are related." PCL suggests that the TMOB erred in treating the doctrine as a strict rule, which could lead to absurd results.

[35] I do not consider the TMOB to have committed such an error. The TMOB based its finding based on the common function the parties' goods perform in providing protection from the sun and a "deeper connection" based on a finding that the casual consumer would "typically" use sunscreen with shade products like sun screens and beach umbrellas made with Glen Raven's fabrics which display the SUNBRELLA Marks. As Glen Raven submits, this finding was open to the TMOB on the factual record and is entirely consistent with judicial authorities of this Court, which hold that a likelihood of confusion may be heightened where the goods in issue are often used together (*Vivo Mobile Communication Co, Ltd v Garmin Switzerland GmbH*, 2022 FC 1410 at para 56 [Vivo] citing *Tokai of Canada Ltd v Kingsford Products Company, LLC*, 2021 FC 782 at para 87).

[36] Second, PCL submits that the TMOB applied faulty logic in finding overlap between the parties' goods. According to the Applicant:

The Applicant sells its SUNBRELLA-branded sunscreen products to direct consumers or through distributors such as dermatologists, estheticians, and beauty salons, whereas the Respondent sells its SUNBRELLA-branded fabrics to manufacturers. Because of the discrepancy between the person from whose point of view confusion is to be assessed, there cannot be considered to be a connection between the goods.

[37] This argument is not only based on an incorrect identification of the consumer from whose perspective the confusion analysis is conducted, but it is also directed to the nature of trade (or channels of trade). The TMOB acknowledged that the nature of the trade of the parties' goods do not overlap and therefore favoured PCL in the confusion analysis (Decision at para 35). In considering the nature of the goods themselves as part of the confusion analysis, the caselaw makes clear that a finding of concurrent use may be made even where the goods are "intrinsically different" (*Schwan's IP, LLC v Sobeys West Inc*, 2017 FC 38 at para 22) or from different classes (*Vivo* citing *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 65).

[38] Accordingly, I find that the TMOB made no reversible error in its application of the doctrine of concurrent use.

D. *Did the TMOB err in its assessment of Glen Raven's evidence of promoting branded sunscreen products in the United States?*

[39] Finally, PCL submits that the TMOB made an error of mixed fact and law in making the following finding:

Furthermore, the relationship between the parties' goods is further evidenced by Glen Raven's distribution of directly-overlapping sunscreen preparations, in association with its SUNBRELLA Marks, as promotional items. While PCL is correct to note that there is no evidence of any such distribution in Canada, the fact

that Glen Raven has promoted its SUNBRELLA-branded fabrics in this manner speaks to the nature of the goods, and supports the conclusion that these fabrics and sunscreen preparations are connected in the minds of consumers (Decision at para 31).

[40] PCL submits that this finding erroneously “inverts the temporal record” by treating Glen Raven’s distribution of sunscreen in 2015 as evidence of an existing connection between the goods, when this distribution occurred in the United States *after* Glen Raven was aware of the use of the PCL Mark in connection with sunscreen products in Israel in 1997 and in Canada in 2010. PCL relies on the authority of *Beyond Restaurant Group LLC v Wang*, 2020 FC 514 [*Beyond Restaurant*], to suggest that the Court should not countenance evidence generated by a “junior user” such as Glen Raven to strengthen its case after becoming aware of a “senior user’s” prior claim to the mark (*Beyond Restaurant* at paras 35-36).

[41] Again, I agree with Glen Raven that the record does not support PCL’s position. As Glen Raven points out, there is no evidence in the record regarding Glen Raven’s knowledge of the PCL Mark. What evidence there is on the record tends to support an inference to the contrary: the TMOB found that PCL’s sales of its goods in Canada have been “fairly minimal” and the PCL Mark has not become known in Canada “to any more than a minimal extent” (Decision at para 40). Based on this evidence, Glen Raven cannot be said to have committed the offense identified in *Beyond Restaurant*, and the TMOB did not err in considering this evidence in its *Trademarks Act* subsection 6(5) analysis.

E. *Did the TMOB err in finding the PCL Mark is not distinctive?*

[42] The TMOB concluded as follows on the issue of distinctiveness under section 2 of the *Trademarks Act*:

Overall, I consider this factor to favour a finding of confusion. While the Mark is somewhat more inherently distinctive than Glen Raven's [838] Mark, Glen Raven has used and promoted its goods in connection with the [838] Mark in Canada to a significant degree. I find that the [838] Mark has become known to a substantial extent in Canada, more so than the [PCL] Mark (Decision at para 41).

[43] PCL did not identify any separate error in the TMOB's analysis under section 2 of the *Trademarks Act* except to say that it is in error to the extent that it is based on the TMOB's faulty confusion analysis. Given that I have found that the TMOB committed no reversible error in its confusion analysis, there is no basis to intervene in this aspect of the Decision. Moreover, given that PCL is not challenging the finding that Glen Raven's SUNBRELLA Marks have become known in Canada to a substantial extent, PCL cannot meet its burden to show that the TMOB erred in rejecting this ground of opposition.

V. Conclusion

[44] PCL has failed to demonstrate any error of law in connection with the TMOB's analysis under paragraph 12(1)(d) (and by extension section 2 of the *Trademarks Act*), nor has it shown that the Decision contains a palpable and overriding error in the analysis related to the nature of the parties' goods. Accordingly, this application is dismissed with costs.

VI. Costs

[45] Based on its success, Glen Raven is entitled to its costs. It has submitted a Bill of Costs calculated at both the mid end of Tariff B, Table 3, Column 2 (\$7,000.00) and the higher end of Column 3 (\$12,000.00). Glen Raven suggests that a higher calculation of costs is justified by virtue of PCL having raised new issues on appeal and in view of a number of statements in its written argument that are without any evidentiary foundation or ignore evidence. I do not agree that elevated costs are justified on these bases. Ultimately, the Court was unable to conclude that PCL had raised new issues on appeal, and I do not consider PCL to have sought to mislead the Court with its reading of the evidence. This was a standard, hard-fought appeal.

[46] Glen Raven has also provided support for disbursements in the amount of \$2,095.56 for travel and accommodation for attending the hearing in Ottawa. I agree that the Tariff allows for the recovery of both fees and disbursements and counsel has provided the necessary support for these disbursements in accordance with Tariff B, subsection 1(4) such that they are properly included.

JUDGMENT in T-352-26

THIS COURT'S JUDGMENT is that:

1. The appeal herein is dismissed; and
2. The respondent is entitled to costs and disbursements in the amount of \$9,095.56.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-352-26

STYLE OF CAUSE: PHARMA COSMETICS LABORATORIES LTD. v
GLEN RAVEN, INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 22, 2026

REASONS AND JUDGMENT: WHYTE NOWAK J.

DATED: OCTOBER 2, 2026

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