Federal Court of Appeal | Cour d'appel fédérale

Date: 20261023

Dockets: A-47-25 (lead file)
A-48-25
A-117-25 (lead file)
A-118-25

Citation: 2026 FCA 177

CORAM: **ROUSSEL J.A.**
HECKMAN J.A.
WALKER J.A.

Dockets: A-47-25 (lead file)
A-48-25

BETWEEN:

SEA TOW SERVICES INTERNATIONAL, INC.

Appellant

and

C-TOW MARINE ASSISTANCE LTD.

Respondent

Dockets: A-117-25 (lead file)
A-118-25

AND BETWEEN:

SEA TOW SERVICES INTERNATIONAL, INC.

Appellant

and

2026 FCA 177 (CanLII)

C-TOW MARINE ASSISTANCE LTD.

Respondent

Heard at Ottawa, Ontario, on May 28, 2026.

Judgment delivered at Ottawa, Ontario, on October 23, 2026.

REASONS FOR JUDGMENT BY: WALKER J.A.

CONCURRED IN BY: ROUSSEL J.A.
HECKMAN J.A.

2026 FCA 177 (CanLII)

Federal Court of Appeal | Cour d'appel fédérale

Date: 20261023

Dockets: A-47-25 (lead file)
A-48-25
A-117-25 (lead file)
A-118-25

Citation: 2026 FCA 177

CORAM: **ROUSSEL J.A.**
HECKMAN J.A.
WALKER J.A.

Dockets: A-47-25 (lead file)
A-48-25

BETWEEN:

SEA TOW SERVICES INTERNATIONAL, INC.

Appellant

and

C-TOW MARINE ASSISTANCE LTD.

Respondent

Dockets: A-117-25 (lead file)
A-118-25

AND BETWEEN:

SEA TOW SERVICES INTERNATIONAL, INC.

Appellant

2026 FCA 177 (CanLII)

and

C-TOW MARINE ASSISTANCE LTD.

Respondent

2026 FCA 177 (CanLII)

REASONS FOR JUDGMENT

WALKER J.A.

[1] Sea Tow Services International, Inc. (Sea Tow) has filed four appeals from two decisions of the Federal Court, one decision addressing the substance of a trademark dispute between Sea Tow and C-Tow Marine Assistance Ltd. (C-Tow) (2025 FC 27, *per* Southcott J.) (the Trademark Decision) and a second decision awarding costs in light of the Trademark Decision (2025 FC 335, *per* Southcott J.) (the Costs Decision).

[2] Court files A-47-25 and A-48-25 are appeals of the Trademark Decision and Court files A-117-25 and A-118-25 appeal the Costs Decision (collectively, the Appeals).

[3] This Court consolidated the Appeals by Order dated May 27, 2025, and designated the appeal in Court file A-47-25 as the lead appeal of the Trademark Decision and Court file A-117-25 as the lead appeal of the Costs Decision. A copy of these reasons will be filed in each of Court files A-47-25, A-48-25, A-117-25 and A-118-25.

I. Background

[4] The parties operate similar businesses structured on similar business models. They both provide on-water services (towing, fuel delivery and repairs, etc.) to recreational boaters who purchase pre-paid memberships.

[5] Sea Tow was incorporated in 1983 in the United States and owns two Canadian trademarks, a word mark “SEA TOW” and a corresponding design mark (the Sea Tow Marks). Sea Tow states that it has continuously used the Sea Tow Marks in Canada since as early as 1985. Sea Tow first filed trademark applications for the two marks in Canada in 2002 but the applications were abandoned in 2010. On September 9, 2010, just prior to abandonment of the first applications, Sea Tow filed fresh applications for registration of the Sea Tow Marks in Canada. Those applications matured into two registrations in 2014: Canadian Trademark Registration Nos. TMA870561 (SEA TOW & DESIGN) and TMA870562 (SEA TOW) (the Sea Tow Registrations).

[6] C-Tow was incorporated in British Columbia in 2006 and has pending applications for registration of two trademarks in Canada: a word mark “C-TOW” and a corresponding design mark (the C-Tow Marks). C-Tow filed its applications for registration on November 15, 2015. C-Tow claims that it and its predecessors in title have continuously used the C-Tow Marks in Canada since 1984.

[7] The parties largely agree that the Sea Tow Marks and C-Tow Marks are confusing.

2026 FCA 177 (CanLII)

[8] On April 21, 2022, C-Tow filed an application in the Federal Court requesting an order pursuant to subsection 57(1) of the *Trademarks Act*, R.S.C. 1985, c. T-13 (the *Act*), striking the Sea Tow Registrations from the register of trademarks and declaring the Sea Tow Registrations invalid on three grounds (the Application): (1) Sea Tow was not the person entitled to secure registration of the Sea Tow Marks (para. 18(1)(d) of the *Act*); (2) Sea Tow filed its applications for registration in bad faith (para. 18(1)(e) of the *Act*); and (3) the Sea Tow Marks were not distinctive at the time the Application was commenced (para. 18(1)(b) of the *Act*).

2026 FCA 177 (CanLII)

[9] Shortly thereafter, on April 28, 2022, Sea Tow brought an action against C-Tow alleging, in part, trademark infringement and passing off in reliance on sections 19 and 20 and subsection 7(b) of the *Act*, and requesting injunctive relief (the Action). C-Tow filed a statement of defence and counterclaim in response to the Action, claiming continuous use of the C-Tow Marks since at least 1984 and disputing Sea Tow's earliest claimed use of the Sea Tow Marks. In its counterclaim, C-Tow asserted the same three grounds of invalidity of the Sea Tow Registrations as it had in the Application.

[10] Sea Tow filed a motion for summary judgment (the Motion) in the Action on September 29, 2023, following receipt of C-Tow's evidence in the Application.

[11] In large part, Sea Tow asserted in the Motion that (a) the latest possible date of its adoption (by virtue of section 3 of the *Act*) of the Sea Tow Marks was December 20, 2002, the date it first filed applications for registration in Canada, and (b) the evidence filed by C-Tow in the Application demonstrated fatal gaps in its chain of title to the C-Tow Marks such that its

earliest possible use of those marks was November 23, 2006, C-Tow's date of incorporation. In reliance on these assertions, Sea Tow argued that the Sea Tow Registrations were incontestable pursuant to subsection 17(2) of the *Act* because the Application was initiated by C-Tow more than five years after the date of the Sea Tow Registrations.

2026 FCA 177 (CanLII)

[12] The Application and Motion were heard together by the Federal Court during a two-day hearing in July 2024.

II. The Decisions under appeal

A. *The Trademark Decision*

[13] The Federal Court granted C-Tow's Application in part, declaring the Sea Tow Registrations invalid pursuant to paragraphs 18(1)(d) and 18(1)(b) of the *Act* and striking the Sea Tow Registrations from the register. The Court dismissed C-Tow's allegation of invalidity based on bad faith pursuant to paragraph 18(1)(e) of the *Act*.

[14] In addition, the Federal Court granted summary judgment in C-Tow's favour in the Motion.

[15] In the course of the Trademark Decision, the Federal Court undertook a thorough review of the evidence filed by both parties, including corporate records relating to C-Tow and its predecessors in title, Sea Tow's corporate records, voluminous affidavit evidence, excerpts from the parties' cross-examination of the various affiants, and marketing and financial evidence

relevant to the distinctiveness of the parties' trademarks at issue. The Court considered gaps and inconsistencies in the evidence, objections to certain parts of the evidence (including hearsay objections), and the changing evidence of certain witnesses, most notably Mr. Andrew Cardiff and Mr. Wayne Skinner, important witnesses in establishing C-Tow's chain of title to, and use of, the C-Tow Marks.

2026 FCA 177 (CanLII)

[16] The Federal Court made the following critical findings in its analysis of C-Tow's reliance on paragraph 18(1)(d) of the *Act*:

A. C-Tow had established, on a balance of probabilities, that it was a successor in title to users of the C-Tow Marks in Canada dating back to 1985.

B. Pursuant to section 3 of the *Act*, Sea Tow was deemed to have adopted the Sea Tow Marks on September 9, 2010, the date of filing of its second applications for registration. Use of the C-Tow Marks by C-Tow and its predecessors therefore predated Sea Tow's adoption of the Sea Tow Marks.

C. Sea Tow adopted the Sea Tow Marks with knowledge of C-Tow's previous use of the C-Tow Marks in Canada as the evidence established such knowledge as early as December 1992.

D. The Sea Tow Registrations were not, therefore, incontestable pursuant to subsection 17(2) of the *Act*.

[17] With respect to paragraph 18(1)(b), the Federal Court applied the test in *Bojangles' International LLC v. Bojangles Café Ltd.*, 2006 FC 657 at para. 34 (*Bojangles*), to determine

whether the Sea Tow Marks were distinctive at the date of filing of the Application, notwithstanding *Bojangles* involved an opposition proceeding and not an expungement proceeding. Following its assessment of the parties' evidence, the Court concluded that Sea Tow had not achieved any material acquired distinctiveness in Canada and, in any event, the C-Tow Marks had become sufficiently known in Canada to negate any distinctiveness of the Sea Tow Marks.

2026 FCA 177 (CanLII)

[18] The Federal Court made no finding as to whether the outcome of the Motion brought the Action to a conclusion.

B. *The Costs Decision*

[19] At the conclusion of the July 2024 hearing, the Federal Court reserved its decision on costs and permitted the parties to file further costs submissions following issuance of the Trademark Decision. The Costs Decision was then issued on February 20, 2025.

[20] The Federal Court awarded costs to C-Tow on a lump sum basis, rejecting Sea Tow's argument that it should be awarded costs regardless of which party prevailed in the Application and Motion. In terms of quantum, the Court noted that the parties had indicated in their pre-hearing costs submissions that costs should be awarded on a lump sum basis and that the lump sum should be quantified at 40% of the prevailing party's actual legal fees. The Federal Court considered C-Tow's detailed evidence in support of its fees incurred and awarded lump sum costs to C-Tow at approximately 40% of actual legal fees, resulting in costs in the Motion of $85,000.00 and costs in the Application of $327,000.00.

III. Chronology

[21] A number of dates are critical to understanding the issues raised in the Appeals before this Court, including dates as found by the Federal Court (certain of which are contested by Sea Tow on appeal). It is useful to set out those dates in table format and in chronological order:

DATE	**EVENT/FINDING**
1983	Incorporation of Sea Tow in the United States, under the corporate name Sea Tow Services International, Inc.
1985	C-Tow establishes continuous use of the C-Tow Marks from 1985 through predecessors in title and, following its incorporation in 2006, through its own use.
1987–1989	Sea Tow establishes use of the Sea Tow Marks in Canada through its Leamington, Ontario franchisee.
December 20, 2002	Sea Tow files its first applications for registration of the Sea Tow Marks in Canada.
November 23, 2006	Incorporation of C-Tow in Canada, under the corporate name C-Tow Marine Assistance Ltd.
September 9, 2010	Sea Tow files its second applications for registration of the Sea Tow Marks in Canada.
September 29, 2010	Sea Tow abandons its 2002 applications for registration.
February 3, 2014	The 2010 applications for registration of the Sea Tow Marks mature into the Sea Tow Registrations.
November 15, 2015	C-Tow files applications for registration of the C-Tow Marks in Canada.
April 21, 2022	C-Tow files the Application.
April 28, 2022	Sea Tow commences the Action.
September 29, 2023	Sea Tow files the Motion for summary judgment.

2026 FCA 177 (CanLII)

IV. Standard of review

[22] The applicable standard of review in these Appeals is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*): questions of law are reviewed on a standard of correctness, while the Court will intervene on questions of fact or of mixed fact and law from which no question of law is extricable only where the court below has made a palpable and overriding error. When applying the *Housen* appellate standards, a reviewing court should be careful not to be overly intrusive and extricate questions of law where the dispositive question is actually driven by the facts because so doing undercuts the deference that is owed to the trier-of-fact: *Housen* at para. 36.

V. Issues

[23] The Appeals raise the following issues:

1) Did the Federal Court err in invalidating the registrations of the Sea Tow Marks for non-entitlement under paragraph 18(1)(d) of the *Act*?

    a) What is the correct statutory interpretation of the relevant provisions of the Act?

    b) Did the Federal Court make one or more palpable and overriding errors in its factual findings regarding C-Tow's chain of title and continuous use of the C-Tow Marks in Canada?

2026 FCA 177 (CanLII)

2) Did the Federal Court err in invalidating the registrations of the Sea Tow Marks for non-distinctiveness under paragraph 18(1)(b) of the *Act*?

a) What is the correct test in Canada in an expungement proceeding for invalidating a registered trademark as non-distinctive?

b) Did the Federal Court make one or more palpable and overriding errors in its factual finding that the Sea Tow Registrations were invalid as non-distinctive?

3) Did the Federal Court err in its award of costs to C-Tow (either in failing to reverse the normal course result that costs follow the cause or in quantum)?

VI. Did the Federal Court err in invalidating the registrations of the Sea Tow Marks for non-entitlement under paragraph 18(1)(d) of the *Act*?

A. *What is the correct statutory interpretation of the relevant provisions of the Act*?

[24] At the centre of Sea Tow's appeals of the Trademark Decision is the Federal Court's analysis of section 3 of the *Act* and its interplay with subsection 17(2). Sea Tow submits that the Federal Court committed errors of law in its interpretation of the two provisions that resulted in the Court's flawed finding that Sea Tow was deemed to have adopted the Sea Tow Marks on September 9, 2010, the date of filing of its second applications for registration. These errors, Sea Tow states, undermine the Federal Court's conclusion that Sea Tow was not the person entitled to secure registration of the Sea Tow Marks in 2014 under paragraph 18(1)(d). Specifically, Sea Tow argues that the Federal Court erred by adopting a purposive interpretation of section 3 with

2026 FCA 177 (CanLII)

little attention to its text, contrary to this Court's recent decision in *Hunt v. Canada*, 2026 FCA 88, and in reading-in to the text of section 3 a requirement of non-abandonment.

[25] In the Motion, Sea Tow sought summary judgment in the Action primarily on the basis that it had adopted the Sea Tow Marks no later than December 20, 2002, the date Sea Tow filed its first applications for registration. On appeal, Sea Tow seeks to reach behind that date and rely on use in Canada of the Sea Tow Marks, including by its franchise operation in Leamington, Ontario in 1987–89, (a) to establish its deemed date of adoption of the Sea Tow Marks and (b) to assert that the Sea Tow Registrations are incontestable pursuant to subsection 17(2) and that the Application for expungement in reliance on paragraph 18(1)(d) cannot therefore succeed.

[26] Section 3 and subsection 17(2) of the *Act* provide as follows:

When deemed to be adopted	**Quand une marque de commerce est réputée adoptée**
3 A trademark is deemed to have been adopted by a person when that person or his predecessor in title commenced to use it in Canada or to make it known in Canada or, if that person or his predecessor had not previously so used it or made it known, when that person or his predecessor filed an application for its registration in Canada.	**3** Une marque de commerce est réputée avoir été adoptée par une personne, lorsque cette personne ou son prédécesseur en titre a commencé à l'employer au Canada ou à l'y faire connaître, ou, si la personne ou le prédécesseur en question ne l'avait pas antérieurement ainsi employée ou fait connaître, lorsque l'un d'eux a produit une demande d'enregistrement de cette marque au Canada.
…	[…]

2026 FCA 177 (CanLII)

When registration incontestable	Quand l'enregistrement est incontestable
17 (2) In proceedings commenced after the expiration of five years from the date of registration of a trademark or from July 1, 1954, whichever is the later, no registration shall be expunged or amended or held invalid on the ground of the previous use or making known referred to in subsection (1), unless it is established that the person who adopted the registered trademark in Canada did so with knowledge of that previous use or making known.	**17(2)** Dans des procédures ouvertes après l'expiration de cinq ans à compter de la date d'enregistrement d'une marque de commerce ou à compter du 1er juillet 1954, en prenant la date qui est postérieure à l'autre, aucun enregistrement ne peut être radié, modifié ou jugé invalide du fait de l'emploi ou révélation antérieure mentionnée au paragraphe (1), à moins qu'il ne soit établi que la personne qui a adopté au Canada la marque de commerce déposée l'a fait alors qu'elle était au courant de cet emploi ou révélation antérieure.

2026 FCA 177 (CanLII)

[27] The stakes in this issue are significant. The earlier the deemed adoption date of the Sea Tow Marks, the more difficult it is for C-Tow to satisfy its evidentiary burden of establishing that Sea Tow adopted the Sea Tow Marks with knowledge of C-Tow's use in Canada of the confusing C-Tow Marks. Conversely, if the date of adoption is the date of filing of the 2010 applications that matured into the Sea Tow Registrations, C-Tow is required only to establish that Sea Tow had knowledge of C-Tow's use of the C-Tow Marks in Canada as of that later date. Recall that the Federal Court made the factual finding that Sea Tow had knowledge of C-Tow's use of the C-Tow Marks in Canada no later than 1992, a finding that is not contested by Sea Tow.

[28] To properly frame Sea Tow's arguments in support of an early date of deemed adoption, it is necessary to widen the statutory analysis beyond section 3 and subsection 17(2) and to explain the basis for its 2002 and 2010 applications for registration of the Sea Tow Marks.

[29] The Application challenges the Sea Tow Registrations and the statutory advantages and protections conferred by registration of a trademark under the *Act*. An application for expungement in reliance on subsection 57(1) of the Act is on its face limited to an "order that any entry in the register be struck out or amended" on certain grounds existing "at the date of the application" for such an order.

[30] As stated above, C-Tow's application for expungement of the Sea Tow Registrations under subsection 57(1) of the *Act* was based, in part, on paragraph 18(1)(d). Paragraph 18(1)(d) provides that the registration of a trademark is invalid if, subject to section 17, the applicant for registration "was not the person entitled to secure the registration".

[31] Turning to section 17, subsection 17(2) limits the ability of an applicant to challenge a registered trademark if the applicant files its application for expungement more than five years after the date of registration. This is the situation facing C-Tow because Sea Tow obtained registration of the Sea Tow Marks on February 3, 2014, and C-Tow did not file the Application until April 21, 2022. As Sea Tow submits, subsection 17(2) affords a heightened level of protection to a registered trademark that survives unchallenged for five years but, as the Federal Court stated, the protection is not absolute. The subsection provides that the "incontestability" of the registered trademark can be defeated if "it is established that the person who adopted the registered trademark in Canada did so with knowledge of that previous use or making known" (my emphasis).

2026 FCA 177 (CanLII)

[32] It is, of course, these underlined words of subsection 17(2) that send the analysis to section 3 and the question of "adoption".

[33] Section 3 is an interpretive section. The section looks to the basis of entitlement of the trademark holder to determine the date of adoption of the trademark in question, whether registered or unregistered. Paraphrasing, a trademark is deemed to have been adopted when a person or their predecessor in title (a) begins to use the trademark in Canada, (b) begins to make it known in Canada, or (c) files, if the trademark has not been so used or made known, an application for its registration in Canada.

[34] The next step in the statutory interpretation exercise is to determine the basis on which Sea Tow applied for registration of the Sea Tow Marks. In other words, what was the basis of entitlement Sea Tow identified in its successful 2010 applications for registration?

[35] Sea Tow filed its 2010 applications in reliance on subsection 16(2) of the version of the *Act* in force between December 31, 2008 and December 30, 2013 (which I will refer to as the "*Old Act*"):

Marks registered and used abroad	**Marques déposées et employées dans un autre pays**
16 (2) Any applicant who has filed an application in accordance with section 30 for registration of a trade-mark that is registrable and that the applicant or the applicant's predecessor in title has duly registered in or for the country of origin of the applicant and has used in association with wares or services	**16 (2)** Tout requérant qui a produit une demande selon l'article 30 en vue de l'enregistrement d'une marque de commerce qui est enregistrable et que le requérant ou son prédécesseur en titre a dûment déposée dans son pays d'origine, ou pour son pays d'origine, et qu'il a employée en liaison avec des

2026 FCA 177 (CanLII)

is entitled, subject to section 38, to secure its registration in respect of the wares or services in association with which it is registered in that country and has been used, unless at the date of filing of the application in accordance with section 30 it was confusing with	marchandises ou services, a droit, sous réserve de l'article 38, d'en obtenir l'enregistrement à l'égard des marchandises ou services en liaison avec lesquels elle est déposée dans ce pays et a été employée, à moins que, à la date de la production de la demande, en conformité avec l'article 30, elle n'ait créé de la confusion :
(a) a trade-mark that had been previously used in Canada or made known in Canada by any other person;	**a)** soit avec une marque de commerce antérieurement employée ou révélée au Canada par une autre personne;
(b) a trade-mark in respect of which an application for registration had been previously filed in Canada by any other person; or	**b)** soit avec une marque de commerce à l'égard de laquelle une demande d'enregistrement a été antérieurement produite au Canada par une autre personne;
(c) a trade-name that had been previously used in Canada by any other person.	c) soit avec un nom commercial antérieurement employé au Canada par une autre personne.
(My emphasis)	(Non souligné dans l'original)

[36] Subsection 30(d) of the *Old Act* required an applicant for registration to set out in the application, among other information, the claimed basis for registration for the particular trademark and, if the trademark had not been used or made known in Canada, the name of the country in which it had been used by the applicant in association with the wares or services described in the application. This information, the claimed basis of entitlement and related information, was important in any opposition proceedings challenging the application.

2026 FCA 177 (CanLII)

[37] Sea Tow filed its September 9, 2010 applications for registration on the basis of registration and use in the United States under subsection 16(2). Sea Tow did not claim a date of first use in Canada or a date of making known in Canada for the Sea Tow Marks.

[38] In contrast, Sea Tow's December 20, 2002 applications for registration were based on proposed use in Canada, and not on the basis of registration and use in the United States in reliance on subsection 16(3) of the *Old Act*, and in relation to similar but not identical services as those claimed in 2010.

[39] The Federal Court considered the importance of Sea Tow's reliance on subsection 16(2) of the *Old Act* to the correct interpretation of section 3 in the Trademark Decision:

> [154] Furthermore, in relation to confusion with a mark that had previously been used in Canada or made known in Canada by any other person (as contemplated by paragraph 16(2)(a)), the assessment under subsection 16(2) is to be conducted as of the date of filing of that application. In my view, it would introduce an unwarranted inconsistency in the legislation if, in contrast, the examination under subsection 17(2) of the trademark owner's knowledge of the previous use or making known, as of the date of its application for registration, was potentially to be performed as of the date of filing of a different application. Concern about such inconsistency is enhanced by the fact that, as in the case at hand, the services in relation to which the different applications were filed may not be identical.

[40] The Federal Court did not err in assessing subsection 16(2) of the *Old Act* and the basis for registration claimed by Sea Tow in its 2010 applications in the course of its interpretation of section 3. The Court correctly referred to paragraph 18(1)(d) ("the applicant for registration was not the person entitled to secure the registration") and section 17 of the *Act* and subsection 16(2) of the *Old Act* in paragraph 152, to then conclude:

2026 FCA 177 (CanLII)

> [153] As such, it is section 16 pursuant to which Sea Tow potentially loses its entitlement. Subsection 16(2) uses both the phrase "an application" and the phrase "the application", but it is clear from the language of that subsection that both phrases reference the application leading to the particular registration entitlement to (sic) which is under consideration. This detracts from Sea Tow's arguments that the language "an application" in section 3 is intended to potentially contemplate one of multiple applications.

[41] I find no error in the Federal Court's analysis in this regard.

[42] The final sentence of the excerpt of paragraph 153 addresses Sea Tow's attempt to rely on its December 20, 2002 applications as the operative applications to ground its assertion of adoption at least as early as 2002 for purposes of subsection 17(2). Sea Tow argues that the Federal Court erred in law in failing to read the concluding words of section 3 textually such that the phrase "an application for its registration" was replaced by "the application for its registration". However, it is in reference to subsection 16(2) of the *Old Act* that the Federal Court noted the use of the words "an application" and "the application" in the course of assessing Sea Tow's argument regarding the phrase "an application for its registration" in section 3. The Court considered Sea Tow's argument, the words themselves and their use in other relevant provisions, consistent with a textual, contextual and purposive analysis of section 3.

[43] Section 3 refers to deemed adoption of a trademark when "an application for its registration" is filed. In my view, the correct interpretation of the full phrase does not turn on the word "an". If an earlier application for registration of a trademark has been abandoned and a subsequent application for registration of that trademark results in "its" registration, the text of section 3 links the trademark embodied in the application to the registration at issue. This

2026 FCA 177 (CanLII)

connection is reinforced by the French version of the provision, which uses “cette marque” (“that mark”). I find, therefore, that the text of section 3 does not support Sea Tow’s submission that its 2002 applications properly form the deemed date of adoption of the Sea Tow Marks for purposes of subsection 17(2) and an application for expungement of the Sea Tow Registrations based on paragraph 18(1)(d).

[44] The context of the Federal Court’s consideration of section 3 provides the same answer. Subsection 17(2) protects long-standing registrations unless the applicant for registration had knowledge of prior use in Canada of a confusing mark. The protection is inexorably tied to the registration and the registration is grounded on a specific application. It follows that the applicant’s knowledge for purposes of subsection 17(2) must be assessed as of the date of the specific application for registration.

[45] Finally, a purposive assessment of section 3, consistent with that undertaken by the Federal Court, confirms this interpretation. In this case, section 3 must be read in the context of subsection 57(1), paragraph 18(1)(d) and subsection 17(2) of the *Act* and with section 30 and subsection 16(2) of the *Old Act*. These provisions operate together to balance C-Tow’s challenge to the Sea Tow Registrations against the protection and qualifications of subsection 17(2). Section 3 enables a trademark holder to secure priority through a filing date despite no prior use of the trademark in Canada. Section 16 of the *Old Act* tests that priority against earlier users and subsection 17(2) restricts subsequent challenges to the registration of the trademark by requiring proof of knowledge of use of a confusing trademark when those rights crystallized: that is, the date of application for registration. Sea Tow has provided no persuasive basis for its argument

2026 FCA 177 (CanLII)

that section 3 permits the holder of a registered trademark to rely on a prior abandoned application for registration of a trademark to shield any subsequent registration maturing in respect of the same mark.

2026 FCA 177 (CanLII)

[46] Sea Tow also argues that the Federal Court erred in failing to consider section 21 of the *Act* in interpreting section 3 and subsection 17(2) but I do not agree.

[47] Section 21 is premised on a registered trademark holder being entitled to the protection of subsection 17(2). The section begins with the words, "[i]f, in any proceedings respecting a registered trademark the registration of which is entitled to the protection of subsection 17(2), …".

[48] The provision presupposes the application of subsection 17(2) in the particular case. If that protection is operative, section 21 permits the prior user of a confusing trademark to continue if that use is not contrary to the public interest. I find that section 21 is not necessary to the correct interpretation of section 3 and subsection 17(2) in the context of an application for expungement in reliance on paragraph 18(1)(d) of the *Act*. The section simply provides for an equitable balancing of the heightened subsection 17(2) protection afforded a registered trademark and the existence of limited common law rights based on prior use in certain circumstances.

[49] The Federal Court concluded its interpretation of the provisions discussed above, stating "[t]he result of the above analysis is that, but for consideration of the question whether Sea Tow

may be deemed to have adopted the Sea Tow Marks in the 1987 to 1989 period through use in connection with the Leamington franchise, the date of adoption pursuant to section 3 is September 9, 2010": Trademark Decision at para. 156.

2026 FCA 177 (CanLII)

[50] The Court observed that any adoption by Sea Tow of the Sea Tow Marks via use by the Leamington franchisee could be material because C-Tow had only established Sea Tow's knowledge of the C-Tow Marks as of 1992.

[51] C-Tow argued before the Federal Court that Sea Tow abandoned the Sea Tow Marks after 1989 and that there followed a long period of non-use. Therefore, the previous use of the Sea Tow Marks by the Leamington franchisee could not ground adoption of the current Sea Tow Marks for purposes of section 3. Sea Tow countered with two arguments. First, Sea Tow argued that section 3 of the *Act* refers only to the date when a person "commenced" use of the mark in question and makes no reference to abandonment. Second, Sea-Tow argues that it had not, in any event, abandoned use of the Sea Tow Marks in the years following 1989.

[52] For ease of reference, Section 3 provides in part that a trademark is deemed to have been adopted by a person when that person or his predecessor in title "commenced to use it in Canada". As Sea Tow states, the section makes no reference to the impact of any subsequent abandonment of the mark in question.

[53] In interpreting section 3, the Federal Court considered the text of the section and the absence of any reference to abandonment of a mark. The Court also considered the cases

submitted by C-Tow but found that the jurisprudence did not directly establish whether abandonment must implicitly be considered in interpreting section 3: *EAB Tool Company Inc. v. Norske Tools Ltd.*, 2017 FC 898 at para. 34, *Philip Morris Inc. v. Imperial Tobacco Ltd. (No.1)*, 17 C.P.R. (3d) 289, 1987 CanLII 9840 (FCA), leave to appeal to SCC refused, 20674 (28 January 1988), and *Marineland Inc. v. Marine Wonderland & Animal Park Ltd.*, [1974] 2 F.C. 558, 1974 CanLII 2559 (FCTD) (*Marineland*). However, the Federal Court accepted C-Tow's argument that the jurisprudence cited and the provisions of the *Act* supporting the jurisprudence "are representative of the fact that the Act creates what is fundamentally a use-based regime": Trademark Decision at para. 167. The Court continued:

> [167] … This conclusion is consistent with my analysis and conclusion on the first aspect of the interpretation of section 3. Just as it is inconsistent with the purpose of the Act to conclude that it affords rights based on an abandoned application that does not necessarily reflect any use of the relevant mark, it is inconsistent with such purpose to conclude that the Act affords rights based on use that has been abandoned.

[54] With respect to Parliament's use of the words "commenced to use it in Canada" in section 3, the Federal Court stated that it was not inconsistent with the language of the provision to read the word "commenced" to connote the beginning of a use of a mark that has continued: Trademark Decision at para. 168. The Court then concluded this part of its analysis by finding that Sea Tow had abandoned its use in Canada of the Sea Tow Marks after the demise of the Leamington franchise: Trademark Decision at para. 169. This finding was based on the Federal Court's detailed consideration of Sea Tow's evidence of use in Canada in paragraphs 116–138 of the Trademark Decision.

[55] I find no error of law in the Federal Court's interpretation of section 3 in this regard.

2026 FCA 177 (CanLII)

[56] Sea Tow maintains its argument that there is no reference to abandonment in section 3 and that the Federal Court's interpretation of "commenced to use" to include continued use is inconsistent with the *Act* when read as a whole. Sea Tow asserts that, had Parliament wished to include a requirement of continued use, or non-abandonment, in section 3, it would have done so explicitly.

[57] Sea Tow refers to subsection 16(5) of the *Old Act* and the phrase "if the confusing trade-mark or trade-name was abandoned" in the context of the right to secure registration of a trademark, and to paragraph 18(1)(c) of the *Act*. Paragraph 18(1)(c) provides that the registration of a trademark is invalid if "the trademark has been abandoned".

[58] Sea Tow argues that the Federal Court's reading-in of non-abandonment to section 3 is redundant in light of paragraph 18(1)(c) and notes that C-Tow chose not to advance abandonment in its section 57 application.

[59] I do not find Sea Tow's argument persuasive. The question of abandonment for purposes of paragraph 18(1)(c) is assessed as of the date of the section 57 expungement application, in this case April 21, 2022, while expungement in reliance on paragraph 18(1)(d) is assessed as of the date of application for registration, in this case September 9, 2010. In the present case, the evidence established use by Sea Tow of the Sea Tow Marks in Canada at least as far back as 2014, meaning that an application for expungement in 2022 based on paragraph 18(1)(c) would necessarily have failed. I acknowledge that the interpretation of section 3 would not change depending on whether the underlying expungement application relied on paragraph 18(1)(c) or

2026 FCA 177 (CanLII)

18(1)(d) but, as the facts of this case demonstrate, the evaluation of abandonment in the context of section 3 to determine incontestability pursuant to subsection 17(2) does not render either section 3 or paragraph 18(1)(c) redundant.

2026 FCA 177 (CanLII)

[60] In my view, the Federal Court's interpretation of section 3 is consistent with the text of the provision and the words "commenced to use", and with the context and purpose of the *Act*, which as the Court stated, fundamentally creates a use-based regime. I agree with the Federal Court's conclusion that it would be inconsistent with such a regime to conclude that the *Act*, and subsection 17(2) specifically, affords rights based on use of a trademark that has been abandoned.

[61] I also find no palpable and overriding error in the Federal Court's factual finding that Sea Tow had abandoned the Sea Tow Marks in Canada. The test for abandonment has two parts: the trademark must have ceased to have been used and the trademark owner must have intended to abandon the mark (*Marineland* at 574; see also *Bedessee Imports Ltd. v. GlaxoSmithKline Consumer Healthcare (UK) IP Limited*, 2020 FCA 94 at para. 35 (*Bedessee Imports*), citing *Iwasaki Electric Co. Ltd. v. Hortilux Schreder B.V.*, 2012 FCA 321 at para. 21 (*Iwasaki*)). In addition, abandonment may be inferred from long disuse or from the adoption of a new mark in place of an older, unused mark: *Labatt Brewing Co. v. Molson Breweries, A Partnership*, 42 C.P.R. (3d) 481, 1992 CanLII 15483 at 490–93 (FC); see also *Iwasaki* at para. 21. Here, the Federal Court properly applied the test for abandonment and was satisfied that Sea Tow had abandoned the Sea Tow Marks in Canada. The Federal Court referred to evidence of more recent use of the Marks in Canada and was well-aware of the finding in a separate proceeding (2021 FC

550) that Sea Tow had used the Sea Tow Marks in Canada during the 2014–2017 period: Trademark Decision at para. 133. The Court also considered in detail Sea Tow's evidence of continuous use in Canada of the Sea Tow Marks in reliance on its Canadian memberships: Trademark Decision at paras. 127-135.

2026 FCA 177 (CanLII)

[62] Notwithstanding this evidence, I find that it was open to the Federal Court, based on its finding of a long period of disuse following 1989, to infer an intention to abandon the Sea Tow Marks at that stage. I further find no error in the Federal Court's conclusion that the use in Canada of the Sea Tow Marks by the Leamington franchisee did not support a conclusion that Sea Tow had adopted the Sea Tow Marks in the 1987–1989 timeframe for purposes of section 3 and the issue of incontestability pursuant to subsection 17(2) of the *Act*.

[63] In summary, I find no merit in Sea Tow's submission that the date of deemed adoption of the Sea Tow Marks was at least as early as December 20, 2002, if not earlier in reliance on use in Canada of the Sea Tow Marks in 1987–89. I also find no error of law in the Federal Court's conclusion that the deemed date of adoption of the Sea Tow Marks by virtue of section 3 was September 9, 2010, the date of filing of Sea Tow's applications for registration that resulted in the Sea Tow Registrations. In light of the Court's uncontested conclusion that Sea Tow had knowledge of C-Tow's use of the C-Tow Marks since 1992, it follows that the Federal Court made no error in concluding that the Sea Tow Registrations were not incontestable pursuant to subsection 17(2) of the *Act*.

B. *Did the Federal Court make one or more palpable and overriding errors in its factual findings regarding C-Tow's chain of title and continuous use of the C-Tow Marks in Canada?*

[64] Sea Tow submits that the Federal Court made palpable and overriding errors in its analysis of the evidence leading to the Court's conclusion of long use by C-Tow of the C-Tow Marks. In Sea Tow's view, there were obvious and repeated gaps in C-Tow's chain of title in the years following 1985 that should have been fatal to its chain of title. Sea Tow focuses on the role of a dissolved corporation that bore the same name as C-Tow; the Federal Court's treatment of corporate records filed by Sea Tow in respect of the dissolved corporation; the Federal Court's inference of a transfer of rights in the C-Tow Marks in 1994 between the dissolution of the corporation and the incorporation of the next successor corporation; inconsistencies in C-Tow's evidence; and the continuity of the involvement of named individuals in the chain of title.

[65] In order to successfully challenge the Federal Court's findings of fact regarding C-Tow's chain of title, Sea Tow must establish one or more palpable and overriding errors in the Court's assessment of the evidence. A palpable error is an error that is obvious and an overriding error is one that goes to the very core of the outcome of the case.

[66] I find no palpable and overriding error, or series of errors that combined constitute palpable and overriding errors, in the Federal Court's assessment of the parties' evidence or its conclusion that C-Tow is a successor in title to users of the C-Tow Marks extending back to 1985: Trademark Decision at para. 109.

2026 FCA 177 (CanLII)

[67] The Federal Court concluded that the evidence presented by C-Tow, while "far from perfect" and not without short gaps, was sufficient to infer, on a balance of probabilities, that C-Tow was the successor in title to the C-Tow Marks through a series of corporations and individuals, dating back to a predecessor corporation incorporated in July 1985: *Wing Wah Food Manufactory Products Inc. v. China Brands Food Products Inc.*, 2005 FC 1611 at paras. 15–16, aff'd 2006 FCA 387; *Philip Morris Inc. v. Imperial Tobacco Ltd.*, 7 C.P.R. (3d) 254, 1985 CanLII 6439 (FCTD), aff'd 17 C.P.R. (3d) 289, 1987 CanLII 9840 (FCA), leave to appeal to SCC refused, 20674 (28 January 1988). The Federal Court explained in the Trademark Decision the nature of each parties' evidence and the weight it afforded that evidence in assessing the strength(s) of each party's arguments. Sea Tow has identified no palpable or overriding error in the Court's reasoning.

[68] The Federal Court carefully reviewed the corporate records of C-Tow and its predecessors, the sequence of relevant events, and the evidence of C-Tow members and others with knowledge of C-Tow's past operations. Equally, the Court fully considered Sea Tow's documentary and affidavit evidence responding to C-Tow's assertion of title and use since 1985. The Federal Court did not overlook material evidence, nor did it fail to consider the imperfections of C-Tow's evidence.

[69] I find that the Federal Court's analysis amply supports its finding of continuous use in Canada by C-Tow of the C-Tow Marks since 1985 through its predecessors and through its own use post-incorporation. This date pre-dates Sea Tow's 2010 deemed date of adoption of the Sea Tow Marks. As Sea Tow adopted the Sea Tow Marks with knowledge of C-Tow's prior use of

2026 FCA 177 (CanLII)

the C-Tow Marks, such knowledge dating from 1992, the Federal Court correctly concluded that C-Tow had satisfied its burden of establishing that Sea Tow was not the person entitled to secure the Sea Tow Registrations: para. 18(1)(d) of the *Act*. C-Tow was therefore entitled to a declaration of invalidity of the Sea Tow Registrations under subsection 57(1).

2026 FCA 177 (CanLII)

VII. Did the Federal Court err in invalidating the registration of the Sea Tow Marks for non-distinctiveness under paragraph 18(1)(b) of the *Act*?

A. *What is the correct test in Canada in an expungement proceeding for invalidating a registered trademark as non-distinctive?*

[70] Sea Tow submits that there are different tests for establishing the distinctiveness of a trademark depending on whether the proceeding in question involves an opposition to registration under paragraph 38(2)(d) of the *Act* or an application for expungement under subsection 57(1) and paragraph 18(1)(b) of the *Act*. Sea Tow argues that, in the present case, the Federal Court incorrectly applied the less stringent test for distinctiveness in opposition proceedings, as set out in *Bojangles*, despite the fact that it was tasked with adjudicating an application for expungement.

[71] Sea Tow asserts that the correct test for non-distinctiveness in an expungement proceeding is that formulated in paragraph 99 of *A&W Food Services of Canada Inc. v. McDonald's Restaurants of Canada Ltd.*, 2005 FC 406: is the trademark at issue "so devoid of distinctiveness that it fails to distinguish" the registrant's products or services from those of others: see also *Miranda Aluminum Inc. v. Miranda Windows & Doors Inc.*, 2010 FCA 104 at

para. 29 (*Miranda*), where this Court affirmed the Federal Court's finding that a third party's use of a confusing name "had not destroyed [the trademark's] distinctiveness".

[72] I do not agree with Sea Tow that different tests for distinctiveness apply in opposition and expungement proceedings. I find that the sole test for establishing whether or not a trademark is distinctive for purposes of the *Act* is the test formulated at paragraph 34 in *Bojangles*:

> A mark must be known to some extent at least to negate the established distinctiveness of another mark, and its reputation in Canada should be substantial, significant or sufficient.

[73] It is the burden of establishing distinctiveness/non-distinctiveness that shifts depending on the proceeding.

[74] Subsection 57(1) and paragraph 18(1)(b) of the *Act* provide that expungement proceedings may be brought if a registered trademark was not distinctive at the date of application for expungement. Under paragraph 38(2)(d), an application for the registration of a trademark may be opposed on the basis that the mark is not distinctive. Paragraphs 18(1)(d) and 38(2)(d) both embody the fundamental role of a trademark in distinguishing the source of a particular product or service from competing products or services: *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65 at para. 39.

[75] The term "distinctive" in relation to a trademark is set out in section 2 of the *Act* as any mark "that actually distinguishes the goods or services in association with which it is used by its

2026 FCA 177 (CanLII)

owner from the goods or services of others or that is adapted so to distinguish them". Section 2 does not define the word "distinctive" differently depending on type of proceeding. The inquiry into distinctiveness in opposition and expungement proceedings turns on the extent to which a mark is known in the marketplace and whether that knowledge suffices to negate the distinctiveness of another mark: *Sadhu Singh Hamdard Trust v. Navsun Holdings Ltd.*, 2019 FCA 10 at para. 17 (*Sadhu Singh Trust FCA*), aff'g *Sadhu Singh Hamdard Trust v. Navsun Holdings Ltd*., 2018 FC 42 (*Sadhu Singh Trust FC*), leave to appeal to SCC refused, 38550 (11 July 2019). In my view, it follows that there is one test to determine whether, at the relevant date, a trademark is distinctive.

[76] The decision in *Bojangles* was made in an opposition proceeding but, in its analysis of the test for distinctiveness, the Federal Court relied on prior jurisprudence in expungement proceedings (see, e.g., *Motel 6, Inc. v. No. 6 Motel Limited and John Van Edmond Beachcroft Hawthorne*, [1982] 1 F.C. 638 (FCTD), 1981 CanLII 4710) and in opposition proceedings (see, e.g., *E. & J. Gallo Winery v. Andres Wines Ltd.*, [1976] 2 F.C. 3 (FCA), 1975 CanLII 2322): *Bojangles* at paras. 8, 29–32. In *Sadhu Singh Trust FC* (at para. 30), the Federal Court rejected the respondent's argument that *Miranda* had altered the *Bojangles* test (acknowledged by this Court at paragraph 5 of *Sadhu Singh Trust FCA*).

[77] Returning to the present case, I conclude that the Federal Court correctly identified and applied the legal test for distinctiveness for purposes of expungement pursuant to paragraph 18(1)(b) of the *Act* as that set forth at paragraph 34 of *Bojangles*. Its analysis centred on whether the presence and reputation of the C-Tow Marks in the Canadian marketplace were sufficient to

2026 FCA 177 (CanLII)

negate the distinctiveness of the Sea Tow Marks and was grounded in the definition of "distinctive" in the *Act* and the jurisprudence.

[78] As part of its submissions regarding the applicable test for distinctiveness, Sea Tow emphasized that a person bringing an expungement proceeding bears the burden of establishing non-distinctiveness. Sea Tow argues, however, that the Federal Court effectively reversed the burden of proof and placed that burden on Sea Tow by stating it would apply the "*Bojangles* standard".

[79] In making this argument, Sea Tow fails to distinguish between the test for non-distinctiveness and the burden of proof in expungement proceedings that fell squarely on C-Tow as the person seeking expungement of the Sea Tow Registrations: *Remo Imports Ltd. v. Jaguar Cars Ltd.*, 2007 FCA 258 at paras. 26, 32; *Bedessee Imports* at paras. 18, 23.

[80] I find no indication in the Trademark Decision that the Federal Court improperly reversed the burden of proof for establishing non-distinctiveness for purposes of section 57 and paragraph 18(1)(b) of the *Act*. To the contrary, the Federal Court explicitly agreed at paragraphs 198–99 of that Trademark Decision that C-Tow, as the party seeking expungement, bore the burden of establishing non-distinctiveness of the Sea Tow Marks. The Federal Court then stated, "but I do not find that difference [of where the burden resides] to suggest any basis to conclude that the *Bojangles* test is not equally applicable to both types of proceedings". Sea Tow has not persuaded me of any error in the Federal Court's analysis in this regard.

2026 FCA 177 (CanLII)

B. *Did the Federal Court make one or more palpable and overriding errors in its factual finding that the Sea Tow Registrations were invalid as non-distinctive?*

[81] Sea Tow submits that the Federal Court made palpable and overriding errors in disregarding evidence, failing to infer that C-Tow was trading on Sea Tow's reputation by registering the domain names "seatowcanada.com" and "seatow.ca" in 2015 and 2017, and in omitting to consider whether the Sea Tow Marks were partially distinctive.

[82] I am not persuaded by Sea Tow's submissions.

[83] I find no palpable and overriding error in the Federal Court's factual conclusions that C-Tow had established a significantly stronger and more sustained marketplace presence in Canada than Sea Tow and that "the C-Tow Marks have become sufficiently known in Canada to negate the distinctiveness of the Sea Tow Marks": Trademark Decision at para. 212. The Federal Court's review of the parties' evidence reveals no palpable error; in fact, it reveals no error, palpable or otherwise.

[84] The Federal Court noted that distinctiveness can only be acquired by use of a trademark in Canada and that the relevant date for assessing distinctiveness of the Sea Tow Marks in this case was April 21, 2022, the date of filing of the Application. The Court acknowledged that it is rare that a single party can cause the loss of distinctiveness and recognized that confusing marks may yet be distinctive but explained why that was not so on the evidence in this case. The Federal Court reviewed in some detail the parties' respective Canadian membership lists, revenues and advertising endeavours, properly focussing on the Canadian market. The Federal

2026 FCA 177 (CanLII)

Court also found that C-Tow's adoption of the domain names described above did not materially alter its distinctiveness analysis and, finally, addressed and dismissed Sea Tow's argument of partial geographic distinctiveness in Canada.

2026 FCA 177 (CanLII)

[85] In my view, it was open to the Federal Court to make the findings of fact it did and to conclude that C-Tow was entitled to an order striking the registrations of the Sea Tow Marks based on paragraph 18(1)(b) of the *Act*. Sea Tow's submissions to the contrary amount to a disagreement with the Federal Court's meticulous review of the evidence and fail to establish a basis for this Court's intervention.

[86] For all of the foregoing reasons, I would dismiss Sea Tow's appeals of the Trademark Decision. The Federal Court did not err in concluding that the Sea Tow Registrations were invalid based on paragraphs 18(1)(b) and (d) of the *Act* and that C-Tow was therefore entitled to an order pursuant to section 57 of the *Act* striking the Sea Tow Registrations from the register.

VIII. The Costs Decision

[87] As it did before the Federal Court, Sea Tow submits that the Federal Court should have deviated from the general rule that costs follow the event because C-Tow's conduct during the proceedings favours a costs award to Sea Tow regardless of outcome. Sea Tow also argues that the Federal Court erred in the quantum of its costs award in any event by failing to take into account C-Tow's incorrect and changing evidence that, together with other aspects of C-Tow's conduct, occasioned significant added work.

[88] It is well settled that a costs decision is an inherently discretionary decision and entitled to deference on appeal: *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 126. Absent error in principle or an award that is plainly wrong, an appellate court must refrain from intervening: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 247, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[89] Sea Tow has established no such error.

[90] I first find no basis to conclude that the Federal Court erred in principle or was wrong to award costs to C-Tow as the prevailing party. Sea Tow's submissions to this effect are not persuasive and are better considered as submissions in support of its challenge to the quantum of the costs award.

[91] Sea Tow argues that C-Tow's "evolving" evidence of its chain of title to the C-Tow Marks caused delay and unnecessary legal costs and that the Federal Court erred in finding that "Sea Tow had the benefit of C-Tow's updated evidence": Costs Decision at para. 37.

[92] By way of context, following the filing of Sea Tow's Motion, C-Tow filed its responding evidence and sought leave of the Federal Court to amend its evidence previously filed in the Application (the Rule 312 Motion). Sea Tow submits that, at that juncture, C-Tow should have discontinued the Application and simply defended the Motion. Sea Tow highlights a number of observations made by the associate judge in his order (the Rule 312 Order) granting the Rule 312 Motion and notes that C-Tow did not appeal those findings.

2026 FCA 177 (CanLII)

[93] The Federal Court addressed these arguments in the Costs Decision. The Court acknowledged the overlap between the Application and the Motion and the evolution of C-Tow's evidence leading to the Rule 312 Motion. The Federal Court referred to the Trademark Decision and its finding that C-Tow did not rely on Mr. Cardiff's changing evidence to establish its chain of title prior to 2008. The Court stated that there had been no deliberate effort to present misleading evidence but acknowledged that this latter fact was not determinative of whether C-Tow should be penalized through costs. In other words, the Federal Court was well aware of the potential for cost consequences as a result of the Rule 312 Motion: Costs Decision at paras. 31–37.

2026 FCA 177 (CanLII)

[94] Further, the Federal Court's use of the phrase "the benefit of C-Tow's updated evidence" must be read in context. The Federal Court stated:

> [37] My finding that the evolution of Mr. Cardiff's evidence did not represent a deliberate effort to mislead the Court is favourable to C-Tow but is not necessarily determinative of the question whether it should be penalized through costs. Rather, I find compelling C-Tow's submission that, once Sea Tow had the benefit of C-Tow's updated evidence (and in particular C-Tow's abandonment of the 1997 Corporation as a link in its chain of title), it was available to Sea Tow to withdraw the Motion that had been premised on the earlier version of C-Tow's chain of title narrative. However, Sea Tow chose not to do so and rather continued to pursue the Motion and its defence of the Application to adjudication. Having failed to prevail in these proceedings, I am not convinced that the history of the proceedings militates in favour of a result other than costs awards in C-Tow's favour.
>
> (My emphasis)

[95] With respect to Sea Tow's reliance on the Rule 312 Order, the statements and findings of the associate judge in his order are limited to that Order. It is an interlocutory order that addresses evidentiary matters; it does not address the merits of the underlying proceeding and

does not bind the judge hearing the matter. In addition, the associate judge's statements regarding prejudice are limited to his application of the test under Rule 312 and whether Sea Tow would be prejudiced by the admission of the new evidence. Finding that there would be prejudice, the associate judge not only ordered costs to Sea Tow but also afforded Sea Tow the opportunity to file further evidence.

2026 FCA 177 (CanLII)

[96] Sea Tow submits that the Federal Court erred in failing to reduce its award of costs to C-Tow in light of C-Tow's unsuccessful reliance on paragraph 18(1)(e) of the *Act*: that the Sea Tow Registrations were invalid because the applications for registration were filed in bad faith. Sea Tow argues that assertions of bad faith are not like other grounds and often involve damaging allegations.

[97] The *Act* specifically contemplates expungement proceedings grounded on an allegation of bad faith in the filing of an application for registration. C-Tow was entitled to challenge the Sea Tow Registrations on the basis of paragraph 18(1)(e) and the mere fact it was unsuccessful does not automatically result in costs consequences. The cases cited by Sea Tow in its appeal memorandum involved independent allegations of bad faith and dishonesty against an opposing party, that were found in one case to be entirely baseless and repeatedly asserted despite a warning from the court regarding possible costs implications: *Gordon v. Canada*, 2019 FC 1348 at para. 13. In my view, they are distinct legally and factually, and inapplicable in the present case.

[98] In summary, the Federal Court followed the well-established principle that costs generally follow the event and considered Sea Tow's arguments that it should deviate from that principle. The Court reviewed the course of the proceedings, and acknowledged the evolution of C-Tow's evidence in certain respects (notably the Rule 312 motion), but concluded that the parties had both played roles in the conduct of the various stages of the proceedings and had accepted the associated litigation risks.

[99] I find no error in principle or other error in the Federal Court's analysis that would justify our intervention and no basis to reverse or vary the Federal Court's awards of costs to C-Tow in respect of the Motion ($85,000) and the Application ($327,000).

IX. Conclusion and costs in the Appeals

[100] Accordingly, I would dismiss Sea Tow's appeals in each of court files A-47-25, A-48-25, A-117-25 and A-118-25.

[101] I would award costs to C-Tow in the lump sum of $20,500.00 plus applicable taxes in respect of all of the Appeals.

[102] Sea Tow was required to post security for the Federal Court costs award and for the estimated costs of the Appeals pursuant to an order of this Court dated July 22, 2025. Those amounts are held by a surety by way of a bond.

2026 FCA 177 (CanLII)

[103] In light of my proposed disposition of the Appeals, I would direct the Court's Registry to make a demand in writing to the Surety (Travelers Insurance Company of Canada) via registered mail in accordance with the Tender of Payment Into Court dated September 5, 2025 filed by Sea Tow;

(a) directing that the amount of the bond be released in favour of C-Tow or C-Tow's solicitors Smart & Biggar LLP;

(b) further directing that the Surety should contact C-Tow's solicitors Smart & Biggar LLP at ewmiller@smartbiggar.ca concerning the process for releasing the funds; and

(c) enclosing with the demand in writing a true copy of these reasons for judgment and the judgments of this Court in these Appeals.

"Elizabeth Walker"
J.A.

"I agree.
Sylvie E. Roussel J.A."

"I agree.
Gerald Heckman J.A. "

2026 FCA 177 (CanLII)

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-47-25 (LEAD FILE) A-48-25 A-117-25 (LEAD FILE) A-118-25
STYLE OF CAUSE:	SEA TOW SERVICES INTERNATIONAL, INC. v. C-TOW MARINE ASSISTANCE LTD.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 28, 2026
REASONS FOR JUDGMENT BY:	WALKER J.A.
CONCURRED IN BY:	ROUSSEL J.A. HECKMAN J.A.
DATED:	OCTOBER 23, 2026

APPEARANCES:

R. Scott MacKendrick Sarah Hébert-Tremblay	FOR THE APPELLANT
François Guay Kwan T. Loh Emily Miller	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robic LLP Montréal, Quebec	FOR THE APPELLANT
Smart & Biggar LLP Vancouver, British Columbia	FOR THE RESPONDENT

2026 FCA 177 (CanLII)