



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2013 TMOB 67**  
**Date of Decision: 2013-04-12**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Borden Ladner Gervais LLP against  
registration No. TMA693,746 for the trade-mark  
CHOCOLATES CAFÉ & Design in the name of S.A.  
CONFISERIE LEONIDAS société anonyme**

[1] At the request of Borden Ladner Gervais LLP the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on February 9, 2011 to S.A. CONFISERIE LEONIDAS société anonyme, the registered owner of registration No. TMA693,746 for the trade-mark CHOCOLATES CAFÉ & Design (the Mark), shown below.



[2] The Mark is registered for use in association with the following wares and services:

**Wares:** Fruits conservés, séchés et cuits; fruits confits; zestes de fruits; pulpes de fruits; noix de cocos séchées; noix préparées; pommes chips; gelées comestibles, confitures, compotes; oeufs, lait et produits laitiers nommément lait, yaourt, crème, babeurre, fromage à la crème, fromage, crème glacée, lait glacé, boissons non-alcoolisées au chocolat; huiles et graisses comestibles; pâtes à tartiner; café, thé, cacao, sucre, riz, tapioca, sagou, succédanés du café; farines nommément farine de blé, avoine, riz, épeautre, pomme de terre, kamut, lin, soya; préparations faites de céréales nommément pain, brioches, quatre-quarts, cake, biscuits, bagels, galettes; pain, pâtisserie et confiserie

nommément bâtons fourrés à la crème, bâtons fourrés à la pâte (d'amande, de noix, de fraises), bonbons, caramels au beurre, caramels au chocolat, dragées, chocolat, pralines, glaces à rafraîchir comestibles; miel, sirop de mélasse; levure, poudre pour faire lever nommément levure chimique; sel, moutarde; vinaigre, sauces (condiments) nommément sauce au chocolat, sauce au caramel, sauce brune, sauce béarnaise, sauce bourguignonne, sauce blanche, sauce pour poissons, sauce à la king; épices

**Services:** Services de restauration (alimentaire) nommément exploitation de cafés-restaurants, salons de thé, bistros, cafétérias, restaurants (libre-service), restaurants à service rapide et permanent (snack-bars); services de traiteur.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and services specified in the registration at any time within the three year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is between February 9, 2008 and February 9, 2011.

[4] For the purposes of this decision, the relevant definition of “use” is that set out in section 4(2) of the Act:

4 (2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[5] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of a section 45 proceeding [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd v Lang Michener et al* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the wares or services specified in the registration during the relevant period.

[6] In response to the Registrar’s notice, the Registrant filed the statutory declaration of Philippe Gruwez, the Registrant’s CEO, declared September 5, 2011. Both parties filed written arguments; an oral hearing was not held.

[7] In its written argument, the Registrant concedes non-use of the Mark in association with all of the wares and services except “services de restauration (alimentaire) nommément exploitation de cafés-restaurants”. No special circumstances have been demonstrated that would excuse the absence of the use of the Mark in association with the wares and services for which non-use was conceded. As a result these wares and services will be deleted from the registration for the Mark.

[8] My decision will thus focus solely on a determination of whether the Mark was used in Canada during the Relevant Period in association with “services de restauration (alimentaire) nommément exploitation de cafés-restaurants”.

[9] Mr. Gruwez explains that during the Relevant Period the Registrant sold products to a reseller, namely Mr. De Meersman, who then sold these products in Canada through various establishments, including the following three establishments in Toronto which operate under the Mark:

- (a) a café-restaurant at Loblaw Forest Hill operated by Chocolate Collingwood Inc. which has been operating since December 11, 2008;
- (b) a café-restaurant at 2901 Bayview Avenue operated by 7052766 Canada Inc. which has been operating since January 4, 2008; and
- (c) a café-restaurant at 484 Danforth Avenue operated by 1834073 Ontario Inc. which has been operating since 2010.

[10] Since these café-restaurants are operated by third parties, the Registrant is under an obligation to establish that it exerted the necessary degree of care and control over the services offered by these café-restaurants in order to comply with section 50 of the Act.

[11] In his affidavit, Mr. Gruwez provides details as to the nature of the control exercised by the Registrant over both the products sold in these café-restaurants and, more importantly, over the operation of the café-restaurants themselves. Specifically, Mr. Gruwez states that the Registrant exercises control over the equipment used in operating the café-restaurants and it sets standards of cleanliness, preservation, storage, hygiene, packaging and presentation of products which are followed by the third parties in operating the café-restaurants in association with the Mark. I am satisfied that the evidence is sufficient to find that the Registrant exercised the

necessary degree of care and control to comply with section 50 of the Act such that the use by the third parties accrues to the Registrant.

[12] I must now determine whether the evidence is sufficient to support a finding that the Registrant used the Mark during the Relevant Period.

[13] Mr. Gruwez attaches to his affidavit photographs of the Danforth Avenue and Bayview Village stores where he states that the Mark is displayed on menus, at the counter and on the glass door at the entrance of the café (Exhibit B). Mr. Gruwez states that the photographs are representative of the manner in which the Mark has been so used in Canada at these café-restaurants since they began operating. I note that the photographs are of such poor quality that I am unable to see the Mark.

[14] Mr. Gruwez states that the café-restaurants operating under the Mark sell pralines, drinks, waffles and cakes all of which are primarily consumed on the premises using dishes (i.e. mugs, cups and plates) which display the Mark. In support of this statement, Mr. Gruwez attaches to his affidavit photographs of these dishes which clearly display the Mark (Exhibit C). Mr. Gruwez also includes an image of a sticker which is representative of the stickers used in wrapping food sold at the café-restaurants (Exhibit C). The sticker also clearly displays the Mark. I am satisfied that the images of dishes and stickers which are displayed in the performance of the services are sufficient to establish use of the Mark in accordance with section 4(2) of the Act.

[15] Mr. Gruwez also attaches to his affidavit an advertisement dated December 11, 2008 bearing the Mark and making reference to the Bayview Village café-restaurant (Exhibit D). Mr. Gruwez states that this advertisement is representative of the manner in which the café-restaurants operating under the Mark have always promoted their services. I am satisfied that this advertisement also establishes use of the Mark in accordance with section 4(2) of the Act in the Relevant Period.

[16] Mr. Gruwez also provides sales figures consistent with a finding that sales were made through the café-restaurants during the Relevant Period (paragraph 14 and Exhibit A).

[17] Based on the foregoing, I am satisfied that the Registrant has established use of the Mark in association with “services de restauration (alimentaire) nommément exploitation de cafés-

restaurants” in Canada during the Relevant Period and thus the registration for the Mark will be maintained for these services.

### Disposition

[18] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be amended to delete the following wares and services:

Fruits conservés, séchés et cuits; fruits confits; zestes de fruits; pulpes de fruits; noix de cocos séchées; noix préparées; pommes chips; gelées comestibles, confitures, compotes; oeufs, lait et produits laitiers nommément lait, yaourt, crème, babeurre, fromage à la crème, fromage, crème glacée, lait glacé, boissons non-alcoolisées au chocolat; huiles et graisses comestibles; pâtes à tartiner; café, thé, cacao, sucre, riz, tapioca, sagou, succédanés du café; farines nommément farine de blé, avoine, riz, épeautre, pomme de terre, kamut, lin, soya; préparations faites de céréales nommément pain, brioches, quatre-quarts, cake, biscuits, bagels, galettes; pain, pâtisserie et confiserie nommément bâtons fourrés à la crème, bâtons fourrés à la pâte (d'amande, de noix, de fraises), bonbons, caramels au beurre, caramels au chocolat, dragées, chocolat, pralines, glaces à rafraîchir comestibles; miel, sirop de mélasse; levure, poudre pour faire lever nommément levure chimique; sel, moutarde; vinaigre, sauces (condiments) nommément sauce au chocolat, sauce au caramel, sauce brune, sauce béarnaise, sauce bourguignonne, sauce blanche, sauce pour poissons, sauce à la king; épices

[Services de restauration (alimentaire) nommément exploitation de] ... salons de thé, bistros, cafétérias, restaurants (libre-service), restaurants à service rapide et permanent (snack-bars); services de traiteur.

[19] As a result, the amended statement of wares for the Mark will read as follows:

Services de restauration (alimentaire) nommément exploitation de cafés-restaurants

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Andrea Flewelling  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office