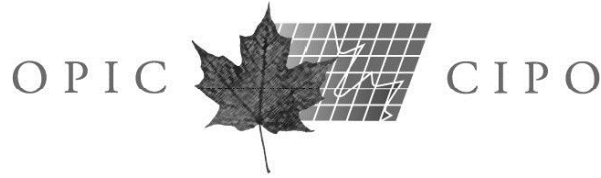


Editor's Note: Corrigendum release on January 21, 2015. Original decision has been corrected with text of corrigendum appended.



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

**Citation: 2014 TMOB 268**  
**Date of Decision: 2014-12-01**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by McMillan LLP against registration  
No. TMA526,801 for the trade-mark MCLEAN & Design  
in the name of Produits Alimentaires Berthelet Inc.**

[1] On November 26, 2012 at the request of McMillan LLP (the Requesting Party) the Registrar forwarded a notice (the notice) under section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to Produits Alimentaires Berthelet Inc. (the Registrant), concerning registration No. TMA526,801 for the trade-mark MCLEAN & Design (the Mark) as illustrated below:



[2] It covers:

Food products, namely beverage crystals, jelly powders, puddings, colourants, flavouring, pie fillings, nuts, ground peanuts, bread crumbs, baking powder, meringue, products for use in dairy bars, namely: sauces and toppings for sundaes, sauces and toppings for cones, milk shake syrups, syrups and concentrates for slush drinks (the Wares).

[3] The Registrant claimed also as a feature of the Mark the word McLean in brown, the number 1894 in white and the band 1894 in red.

[4] In response to the notice, the Registrant filed the affidavit of Alain Breault together with Exhibits AB-01 to AB-06.

[5] Only the Registrant filed brief written representations and no hearing was held.

[6] For the reasons that follow I conclude that registration No. TMA526,801 ought to be amended to delete: beverage crystals, nuts, ground peanuts, bread crumbs and baking powder.

#### The law

[7] The notice requires the Registrant to show whether the Mark had been used in Canada in association with the Wares 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 use since that date. The relevant period in this case is any time from November 26, 2009 to November 26, 2012 (the Relevant Period).

[8] Section 45 proceedings are simple, expeditious and serve the purpose of clearing the register of “deadwood”; as such, the threshold test to establish use of the Mark is quite low [see *Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)].

[9] A simple allegation of use of the Mark is not sufficient to evidence its use in association with the Wares within the meaning of section 4(1) of the Act. There is no need for evidentiary overkill. However, any ambiguity in the evidence filed shall be interpreted against the owner of the Mark [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (4th) 62 (FCA)].

[10] I therefore must determine if I am satisfied that the evidence to be described afterward enables me to conclude that the Mark had been used by the Registrant in Canada in association with the Wares during the Relevant Period. If there is no evidence of use of the Mark during the Relevant Period, I must determine if the Registrant has established special circumstances that

would justify the non-use of the Mark during the Relevant Period in association with all or some of the Wares [see section 45(3) of the Act].

### The evidence

[11] Mr. Breault describes himself as the Registrant's Vice-President and its duly authorized representative. He starts his affidavit by making a bald statement that the Mark has been used by the Registrant or by its duly authorized distributors in Canada in association with the Wares. He states that the Registrant has more than 130 clients in at least 5 Canadian provinces as it appears from the Registrant's sales report for the period of January 1, 2010 to December 31, 2012. The sales figures are provided on an annual basis per client but there is no breakdown per product.

[12] Mr. Breault filed samples of purchase orders, order confirmations and invoices (Exhibits AB-01 and AB-03) issued by the Registrant during the Relevant Period which illustrates the sale of the following wares in association with the Mark:

Jelly powders, puddings, pie filling, sauces and toppings for sundaes, sauces and toppings for cones, milk shake syrups and syrups and concentrates for slush drinks.

[13] I wish to note that I only listed the wares that were sold in association with the Mark as on the invoices other products were sold in association with other trade-marks. Also most of the products bear a code number and I was able to associate it with the code number appearing on the product list which appears on the Registrant's website (Exhibit AB-02).

[14] Mr. Breault alleges that distribution agreements are the subject of ongoing negotiations for many months or have been concluded for the sale of the Wares in association with the Mark in order to distribute them in Canadian cities in British Columbia, Alberta and Manitoba. He further states that many clients are regional distributors. The Wares are sold in dairy bars, grocery stores or distributed in hotels, cafeterias and hospitals.

[15] He alleges that sales of the Wares in association with the Mark are generally conducted via the Internet through the Registrant's website where all the Wares associated with the Mark

can be purchased by the clients. He filed some extracts of the website and in particular the pages listing products available for sale in association with the Mark. I note that on a page filed there is a listing of the trade-marks owned by the Registrant. Also, the list of products appearing on the pages filed identifies various products with their packaging bearing the Mark such as:

Flavouring, pie fillings, meringue, sauces and toppings for sundaes, sauces and toppings for cones, milk shake syrups and syrups and concentrates for slush drinks.

[16] He filed photocopies of labels bearing the Mark (Exhibit AB-04) appearing on the packaging of jelly powders, sauces and toppings for cones and fillings.

[17] Mr. Breault states that the Mark is advertised and promoted by way of pamphlets and he filed a sample of such pamphlet entitled '*Produits pour Bars Laitiers-Guide de l'Opérateur 2012*' (Exhibit AB-05). The Mark appears on each page of the document.

[18] Mr. Breault concludes his affidavit by stating that there is sufficient evidence of use of the Mark in Canada by the Registrant in association with the Wares during the Relevant Period. He adds that the use of the Mark will increase in Canada because of the new agreements with distributors.

#### Analysis of the Registrant's evidence

[19] I am satisfied that the evidence described above established that there has been use of the Mark in Canada in association with the following wares during the Relevant Period:

Food products, namely: jelly powders, puddings, flavouring, pie fillings, , meringue, products for use in dairy bars, namely: sauces and toppings for sundaes, sauces and toppings for cones, milk shake syrups, syrups and concentrates for slush drinks.

[20] There is no evidence of use of the Mark in association with beverage crystal, colourants, nuts, ground peanuts, bread crumbs and baking powder. The Registrant simply argues in its written representations that the evidence described above shows use of the Mark in association with the Wares during the Relevant Period. The Registrant has not provided any facts that could be considered as 'special circumstances' explaining the non-use of the Mark in association with

those wares during the relevant Period [see section 45(3) of the Act]. The registration will have to be amended to delete those wares from it.

Disposition

[21] Pursuant to the authority delegated to me under section 63(3) of the Act and in accordance with section 45 of the Act, the registration will be amended to delete the following wares:

beverage crystal, colourants, nuts, ground peanuts, bread crumbs and baking powder.

The amended statement of wares will read:

Food products, namely: jelly powders, puddings, flavouring, pie fillings, ,  
meringue, products for use in dairy bars, namely: sauces and toppings for sundaes,  
sauces and toppings for cones, milk shake syrups, syrups and concentrates for slush  
drinks.

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Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

**Citation: 2012 TMOB 268**

**Date of Decision: 2015-01-21**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by McMillan LLP against registration  
No. TMA526,801 for the trade-mark MCLEAN & Design  
in the name of Produits Alimentaires Berthelet Inc.**

[1] It has been brought to my attention that the citation reference and the date of my decision in this matter have been incorrectly identified as 2012 TMOB 268 and 2012-12-01 respectively. As the decision was rendered on December 1, 2014 the citation and the date of the decision is corrected to now read:

Citation: 2014 TMOB 268

Date of decision: 2014-12-01

[2] The first page of the aforesaid decision has been corrected to reflect this correction.

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Jean Carrière  
Member

Trade-marks Opposition Board

Canadian Intellectual Property Office

