Federal Court Cour fédérale

Date: 20260505

Docket: T-28-24

Citation: 2026 FC 594

Ottawa, Ontario, May 5, 2026

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

GRC FOOD SERVICES LTD.

Applicant

and

CHOCOLADEFABRIKEN LINDT & SPRÜNGLI AG

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an appeal by the Applicant, GRC Food Services Ltd., under section 56 of the *Trademarks Act*, RSC 1985, c T-13, challenging the decision of the Trademarks Opposition Board dated October 25, 2023. In its decision, the Board refused to register the trademark MASTER CHOCOLAT [GRC Mark] on the basis that it would be confusing with two registered trademarks of the Respondent, Chocoladefabriken Lindt & Sprüngli AG: TMA 377,673 and

TMA 837,071. These registered marks were referred to by the parties as the CHOCOLATE MASTERS Marks.

[2] Before the Board, Lindt also raised other grounds of opposition, involving addition trademarks owned by Lindt, which were not successful (non-entitlement under paragraphs 16(3)(a) and (b) and non-distinctiveness under section 2).

[3] Following the Board's decision, Lindt's CHOCOLATE MASTERS Marks were expunged. After an initial hearing in this matter, this Court determined that the expungement of the CHOCOLATE MASTERS Marks constituted new material evidence that triggered a *de novo* review. As the CHOCOLATE MASTERS Marks were the only marks underpinning the Board's rejection of GRC's application, the Court set aside the Board's decision. The Court bifurcated the proceeding, with the remaining issues to be determined following the filing of additional evidence and submissions by the parties [2025 FC 940].

[4] Following the Court's initial decision, Lindt abandoned many of the remaining grounds of opposition and narrowed the asserted marks. Lindt now only asserts two grounds of opposition:

- **Ground 1** - GRC is not entitled to registration of the GRC Mark because it would be confusing with Lindt's MAÎTRE CHOCOLATIER mark (Application No. 1,773,030), pursuant to paragraph 16(3)(a) of the *Act*.

- **Ground 2** - the GRC Mark is not distinctive within the meaning of section 2 of the *Act* because it does not actually distinguish between the goods and services of Lindt in view of the extensive use, promotion, advertising and making known in Canada of Lindt's MAÎTRE CHOCOLATIER mark.

[5] The parties agree that Lindt bears a preliminary burden of proof in relation to each ground of opposition. The burdens are as follows:

- **Ground 1** - Lindt must establish that the MAÎTRE CHOCOLATIER mark was used or made known prior to October 9, 2015, and was not abandoned at the date of advertisement of GRC's application.

- **Ground 2** - Lindt must establish that the MAÎTRE CHOCOLATIER mark was known in Canada to some extent at least, i.e., that its reputation in Canada was "substantial, significant or sufficient," or else that it was well known in a specific area of Canada so as to negate the distinctiveness of the GRC Mark.

[6] In relation to Ground 1, the Board found that no determination was necessary on the question of whether Lindt had met its initial burden of proof because a collection of marks referred to as the MASTER CHOCOLATIER Marks (which included Lindt's MAÎTRE CHOCOLATIER mark) were not confusing with the GRC Mark. In relation to Ground 2, the Board found that Lindt had not met its initial burden of proof.

[7] The first issue before me is whether I should refuse to entertain Lindt's Ground 2 opposition because Lindt made no written submissions in support of this ground. I find that, in the absence of written submissions, it was not open to Lindt to advance this ground in oral argument. Accordingly, Lindt's Ground 2 opposition will not be entertained and is therefore rejected. That said, I will nonetheless go on to consider the merits of this ground of opposition.

[8] The second issue before me is the applicable standard of review in relation to the issue of whether Lindt has met its initial burdens of proof. As the Board made no determination in relation to Ground 1, that issue must, by default, be determined on a *de novo* basis. In relation to Ground 2, I find that the applicable standard of review is the appellate standard, as the new evidence filed by Lindt could not have had a material effect on the Board's determination that Lindt had not met its initial burden of proof. However, Lindt has not identified an error by the Board in making that determination. With no asserted error, there is no basis upon which to review the Board's determination. This is yet another reason to reject Lindt's Ground 2 opposition. Notwithstanding, I will nonetheless consider this ground of opposition from a *de novo* perspective.

[9] The third issue before the Court is whether Lindt has met its initial burden of proof in relation to its Ground 1 opposition. For the reasons that follow, I find that Lindt has failed to do so because Lindt has not demonstrated use of the MAÎTRE CHOCOLATIER mark *per se* prior to the filing date of GRC's application (or at all).

[10] The fourth issue before the Court is whether Lindt has met its initial burden of proof in relation its Ground 2 opposition. For the reasons that follow, I find that Lindt has failed to do so because Lindt has provided no clear evidence establishing that the MAÎTRE CHOCOLATIER mark was known in Canada at least to some extent at the material time.

[11] As these initial burdens of proof have not been met, I need not go on to the consider the remaining issues — namely, (i) whether the GRC Mark would be confusing with Lindt's MAÎTRE CHOCOLATIER mark pursuant to paragraph 16(3)(a) of the *Act*; and (ii) whether the GRC Mark is not distinctive within the meaning of section 2 of the *Act*.

[12] Given my findings, both of Lindt's remaining grounds of opposition are rejected. The Registrar is directed to register the GRC Mark in accordance with GRC's application (Application No. 1,749,988).

II. Analysis

A. Issue No. 1 - Should I refuse to entertain Lindt's Ground 2 opposition because Lindt made no written submissions in support of this ground of opposition?

[13] In its written representations, Lindt made no submissions in support of its section 2 ground of opposition. Rather, Lindt merely stated, after detailing its non-entitlement submissions under paragraph 16(3)(a), that the same analysis also supports refusal under paragraph 38(2)(d)/section 2 for confusion-based non-distinctiveness. At the hearing, I raised Lindt's failure to provide written submissions and asked the parties whether, in the circumstances, Lindt should be entitled to continue to assert this ground and make oral

submissions at the hearing. Notwithstanding the absence of written submissions, I allowed Lindt to provisionally make oral submissions in the event that I determined that the section 2 opposition could be advanced.

[14] GRC opposed the Court's consideration of the section 2 opposition. GRC argued that the absence of written submissions put GRC at a disadvantage, as it was unable to make responsive submissions on this ground of opposition. Lindt requested that the Court entertain its oral submissions, without further elaboration as to why.

[15] I agree with GRC that the section 2 opposition is not properly before this Court. Only arguments included in a party's memorandum can be advanced in oral argument [*Kilback v Canada*, 2023 FCA 96 at para 41; *Sandhu v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 902 (QL) at para 4; *Sibomana v Canada*, 2020 FCA 57 at para 6].

[16] Having chosen to not make any substantive section 2 submissions in its written representations, it is not open to Lindt to raise such arguments for the first time at the hearing. To permit Lindt to articulate its section 2 opposition arguments for the first time at the hearing would be unfair to GRC because it would have no meaningful opportunity to consider the arguments and respond thereto.

[17] This determination is a sufficient basis upon which to reject this ground of opposition. However, I will nonetheless go on to consider the merits of this opposition as it relates solely to the preliminary issue of whether Lindt has met its initial burden of proof.

B. Issue No. 2 - What is the applicable standard of review for the initial burden of proof decisions?

[18] As a general rule, a statutory appeal from an administrative tribunal is reviewed on the usual appellate standards: correctness for questions of law, and palpable and overriding error for questions of fact and mixed fact and law [*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 36–37; *Housen v Nikolaisen*, 2002 SCC 33 at paras 7–8, 10, 36–37; *Yat Sun Food Products Ltd v Griffith Foods International Inc*, 2025 FC 1688 at paras 25–26; *Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at paragraphs 22–23].

[19] However, in a section 56 appeal under the *Act*, when additional evidence is filed that would have materially affected the Board's findings of fact or exercise of discretion, the Court "may exercise any discretion vested in the Registrar" and the appeal acts as a *de novo* review [*Clorox*, *supra* at paras 20–21; *Caterpillar Inc v Puma SE*, 2021 FC 974 at para 32].

[20] As such, a determination of the applicable standard of review generally turns on a consideration of any new evidence placed before the Court on appeal. As this appeal was commenced in 2024, I need not consider whether the parties should be granted leave to file any new evidence.

[21] That said, this case raises a unique preliminary "twist." When the parties appeared before this Court in March 2025 to argue the first portion of this application, the parties agreed that the Ground 1 and 2 oppositions would be determined by the Court on a *de novo* basis and the Court endorsed this approach. However, in its subsequent submissions, GRC took the position that the

agreement reached between the parties was not consistent with the applicable legal principles and that the Court must make a determination of the standard of review, based on the new evidence.

[22] Lindt responded that it was not open to GRC to resile from its agreement. Lindt argued that it would be prejudiced if the Court did not proceed on a *de novo* basis because Lindt had not included, in its submissions, arguments related to errors made by the Board in its determination of the Ground 1 and 2 oppositions. Lindt asserted that even if wrong in law, the agreement of the parties was binding. That said, Lindt argued that there was, in any event, new evidence before the Court that would engage a *de novo* review of all remaining issues.

[23] In order to avoid any potential prejudice to Lindt, I directed the parties to provide post-hearing submissions addressing the Board's decision based on the appellate standard of review (in the event that I found that the appellate standard of review applied to the remaining issues). I have now received and considered those submissions.

[24] Contrary to Lindt's assertion, I do not accept that it is open to parties to "contract out" of the applicable standard of review and no authorities were provided to the Court in support of Lindt's assertion. The standard of review must be determined by me, not the parties, after considering the applicable legal principles and the evidence before me. It was wrong of me to endorse the agreement of the parties to determine these issues *de novo* without first considering whether, on the evidence before now before me (which had not yet been filed), the *de novo*

standard actually applied. As such, I must undertake that analysis before determining the applicable standard of review.

(1) Legal Principles Applicable to the Assessment of New Evidence

[25] To be material, the new evidence must be sufficiently substantial and significant, and of probative value [*Clorox*, *supra* at para 21]. Evidence may be material where it enhances the overall cogency of the record in a way that may have influenced the Board's conclusions on a finding of fact or exercise of discretion or where it fills gaps or remedies a deficiency identified by the Board [*Promotion in Motion, Inc v Hershey Chocolate & Confectionary LLC*, 2024 FC 556 at para 57; *Mövenpick Holding AG v Exxon Mobil Corporation*, 2011 FC 1397 at para 54, aff'd 2013 FCA 6].

[26] Evidence will not be material where it merely supplements or confirms the findings of the Board or is repetitive of evidence already on the record [*Seara Alimentos Ltda v Amira Enterprises Inc*, 2019 FCA 63 at para 24; *Tokai of Canada Ltd v Kingsford Products Company, LLC*, 2021 FC 782 at para 23].

[27] The materiality test is not whether the new evidence would have changed the Board's mind or, ultimately, the result or outcome but rather, whether it would have had a material effect on the decision. The question to ask is could this new evidence, because of its significance and probative value, have had a bearing on a finding of fact or the exercise of discretion of the Board. The materiality test is a preliminary test to determine if, on appeal, the Court will have to

reassess the evidence on a given issue, but does not involve such a reassessment up front to determine if it would ultimately change the result or outcome [*Seara*, *supra* at paras 23, 25]

[28] Importantly, even when new evidence is found to be material, this does not necessarily displace the Board's findings in respect of every issue but rather only those issues for which the evidence is provided and admitted [*Tokai*, *supra* at para 23, citing *Seara*, *supra* at para 22].

[29] Where no new evidence is adduced, or if it is determined that the new evidence is not material or sufficiently substantial and significant, the appellate standards of review remain applicable.

(2) The Evidence before the Board

[30] In order to understand the potential materiality of the "new" evidence, one must consider the existing evidence that was before the Board.

[31] In support of its opposition, Lindt had filed the affidavit of Kairen Wu, Vice President of Lindt's Canadian subsidiary. In her evidence, Ms. Wu referred to four marks collectively as the "MASTER CHOCOLATIER Marks": (i) the registered LINDT MAÎTRE CHOCOLATIER mark; (ii) the registered LINDT MASTER CHOCOLATIER mark; (iii) the unregistered MAÎTRE CHOCOLATIER mark; and (iv) the unregistered MASTER CHOCOLATIER mark.

[32] In her affidavit, Ms. Wu did not address any other registered or unregistered trademarks used by Lindt in Canada, any Lindt sub-brands or Lindt's use of multiple trademarks on a given product.

[33] Ms. Wu stated that Lindt has extensively used, advertised and promoted the collective MASTER CHOCOLATIER Marks in Canada in association with various chocolate confectionary products since at least 1999. She stated that Lindt has prominently displayed these marks on the packaging of the products, as well as in retail chocolate shops, since at least 1999.

[34] Attached as Exhibit "C" to Ms. Wu's affidavit were approximately 25 examples of product packaging that she asserted bore the collective MASTER CHOCOLATIER Marks, covering various Lindt product lines including the gold bunny, Lindor, Excellence and Swiss Classic. Each of the examples shows MAÎTRE CHOCOLATIER used in conjunction with "SUISSE," "DEPUIS 1845" and "LINDT & SPRÜNGLI."

[35] Attached as Exhibit "D" to Ms. Wu's affidavit were photographs of various Lindt chocolate shops in Canada that she asserted prominently display the MASTER CHOCOLATIER Marks and are representative of the displays in Lindt's 57 shops in Canada. In each photo, the words MAÎTRE CHOCOLATIER appear below the word LINDT and a design, and beside the words SUISSE and DEPUIS 1845.

[36] Ms. Wu stated that almost all of the chocolate confectionary products sold by Lindt in Canada display the collective MASTER CHOCOLATIER Marks on their packing and that

between 2006 and 2018, Lindt Canada had just over $421 million in sales through its dedicated chocolate shops. She further stated that, between 2010 and 2018, Lindt Canada had over $1.8 million in sales through wholesale distribution points, such as gas stations, convenience stores, grocery stores, mass retailers (like Walmart and Loblaws) and club stores (like Costco).

[37] Ms. Wu asserted that Lindt Canada has extensively used, advertised and promoted Lindt's chocolate confectionary products bearing the MAÎTRE CHOCOLATIER mark, spending over $30 million on advertising and promotion since 2010. This included advertising and promotion at high-profile events, such as Stars on Ice, the Rogers Cup and the Toronto International Film Festival, which collectively generated over 80 million impressions of the MAÎTRE CHOCOLATIER mark. The photographs included as Exhibit "I" show MAÎTRE CHOCOLATIER used beside LINDT or, in other photos, below the word LINDT accompanied by a design and beside the words SUISSE and DEPUIS 1845.

(3) The New Evidence

[38] The only new evidence relevant to the remaining issues is the affidavit of Mona Alishah, the Interim Head of Marking of Lindt's Canadian subsidiary. Unlike Ms. Wu's evidence, Ms. Alishah's evidence is directed only to the MAÎTRE CHOCOLATIER mark.

[39] Ms. Alishah stated that, since at least 2010, the MAÎTRE CHOCOLATIER mark has appeared prominently on foil wrappers covering at least four varieties of Lindt chocolate bars sold in Canada: Excellence, Swiss Classic, Les Grandes and Creation [MC Chocolate Bars]. She states that the MAÎTRE CHOCOLATIER mark appears as part of a "lockup" with their "house

brand," the registered LINDT & Design mark (TMA 422,548), on foil wrappers as follows [MC Lockup]:

Lindt
MAÎTRE CHOCOLATIER

[40] The foil wrappers contain multiple images of the MC Lockup, an example of which is as follows:

[41] Ms. Alishah stated that the MC Lockup has, since 2010, also appeared prominently on the top layer of protective cushioning in packages of tray-packed boxed chocolates sold in Canada.

[42] Ms. Alishah stated that, since at least 2010, the MAÎTRE CHOCOLATIER mark has also appeared on shipping labels affixed to boxes of chocolate products shipped to Lindt Canada, who

then distributes the boxes (bearing the same labels) to retailers across Canada. The labels appear as follows:

[43] Ms. Alishah stated that the MC Chocolates Bars and tray-packed boxed chocolates have been sold in Canada since at least 2010, through: (a) dedicated Lindt chocolate shops; and (b) wholesale distribution points such as gas stations, convenience stores, grocery stores, mass retailers (like Walmart and Loblaws) and club stores (like Costco). Total combined sales of these products exceeded $275 million CAD between 2010-2014, $300 million CAD between 2015-2018 and $625 million CAD between 2019-2024.

[44] Ms. Alishah stated that the MC Lockup also appeared on exterior signage of Lindt shops in Canada, since at least 2009, where Lindt sells the MC Chocolate Bars, tray-packed boxed chocolates and other chocolate items. Annual sales data was provided for two retail locations, with sales in the range of $400,000 to $1.8 million CAD per year, per location, since 2009.

[45] Ms. Alishah stated that the MAÎTRE CHOCOLATIER mark has also appeared prominently on tents used for experiential marketing events and the distribution of free samples at various events in 2011, 2013 and 2015, including the Rogers Cup. In the photos included in her affidavit, MAÎTRE CHOCOLATIER appears beside LINDT or beside the LINDT & Design mark.

(4) The Alishah Affidavit is Not Material to the Initial Burden of Proof Issues

[46] Lindt asserts that the Alishah Affidavit would have materially impacted the Board's determination in relation to both grounds of opposition. Lindt points to four paragraphs of the Board's decision, which it asserts the new evidence is intended to address:

A. Paragraph 69 - the Board agreed with GRC that, on the evidence before it: (a) the words MAÎTRE CHOCOLATIER are always accompanied by the words "SUISSE DEPUIS 1845" or "DEPUIS 1845"; and (b) the term "Lindt" and "Lindt & Sprüngli" are the dominant words in the logos.

B. Paragraph 71 - Lindt notes that the Board never made a determination as to whether Lindt had met its initial evidentiary burden to demonstrate use of the collective MASTER CHOCOLATIER Marks in relation to Ground 1.

C. Paragraph 75 - the Board noted that the way the collective MASTER CHOCOLATIER Marks appear throughout the Wu Affidavit raises questions as to whether the public would perceive these marks as being used *per se*. Indeed, the Board noted only one instance in the Wu Affidavit (Exhibit I) where the terms

"LINDT MAÎTRE CHOCOLATIER" appear on their own. Consequently, the Board found that it is not clear the extent to which consumers would recognize the collective MASTER CHOCOLATIER Marks *per se,* and the degree with which they are made known in Canada as of the material date.

D. Paragraph 103 - the Board noted that the evidence pertaining to the collective MASTER CHOCOLATIER Marks does not demonstrate extensive use of these marks *per se,* such that the Board could not conclude that any of the marks were known to a sufficient extent as of the material date.

[47] Lindt asserts that the Alishah Affidavit:

A. Provides evidence of extensive use of the MAÎTRE CHOCOLATIER mark, without reference to "SUISSE DEPUIS 1845" or "DEPUIS 1845," which goes directly to Lindt's initial evidentiary burden.

B. Addresses the acquired distinctiveness of the MAÎTRE CHOCOLATIER mark and whether the public would perceive the MAÎTRE CHOCOLATIER mark as being used *per se.* Specifically, Lindt asserts that the sales evidence in the Alishah Affidavit was restricted to sales of the MC Chocolate Bars and tray-packed boxed chocolates bearing the MC Lockup (which Lockup includes the MAÎTRE CHOCOLATIER mark), whereas the sales evidence in the Wu Affidavit included other products that did not bear the MAÎTRE CHOCOLATIER mark.

[48] GRC asserts that the evidence contained in the Alishah Affidavit is no different in kind from the evidence in the Wu Affidavit and merely repeats or supplements the evidence that was before the Board. GRC notes that the Wu Affidavit showed use of the MAÎTRE CHOCOLATIER mark with another mark ("SUISSE DEPUIS 1845" or "DEPUIS 1845") and the Alishah Affidavit similarly shows use of the MAÎTRE CHOCOLATIER mark with other marks, albeit different ones. GRC asserts that sales data of marked products was already provided in the Wu Affidavit and that the sales data included in the Alishah Affidavit was simply a subset of the data already before the Board. GRC therefore asserts that the Alishah Affidavit is not material.

[49] I find that the new evidence is relevant, in that it provides the factual basis for Lindt's arguments that it has established use of the MAÎTRE CHOCOLATIER mark and that the mark has acquired distinctiveness. The evidence is also reliable in that it comes from a senior representative of Lindt's Canadian subsidiary and is supported by photographs.

[50] However, I find that the probative value of the new evidence is low, as, contrary to Lindt's assertions, it does not prove or establish use of the MAÎTRE CHOCOLATIER mark *per se* or that the MAÎTRE CHOCOLATIER mark is known in Canada to some extent at least.

[51] I agree with Lindt that, unlike the Wu Affidavit, the Alishah Affidavit provides evidence that is specific to the MAÎTRE CHOCOLATIER mark (as opposed to the collective MASTER CHOCOLATIER Marks). The Alishah Affidavit also provides evidence of use of the MAÎTRE CHOCOLATIER mark not in conjunction with "SUISSE DEPUIS 1845" or "DEPUIS 1845." It

is clear to me that this was an attempt on Lindt's part to fill the evidentiary gap identified by the Board.

[52] However, the Alishah Affidavit does not provide evidence of use of the MAÎTRE CHOCOLATIER mark on its own. In each photograph included in her affidavit, the MAÎTRE CHOCOLATIER mark appears together with LINDT or the LINDT & Design mark. While not the words "SUISSE DEPUIS 1845" nor "DEPUIS 1845," the new evidence continues to show the MAÎTRE CHOCOLATIER mark only in combination with other marks.

[53] Lindt points to the shipping label as use of the MAÎTRE CHOCOLATIER mark on its own and not as part of the MC Lockup. The shipping label shows the LINDT & Design mark on the same line as the MAÎTRE CHOCOLATIER mark, as opposed to the MC Lockup, where the MAÎTRE CHOCOLATIER mark appears below the LINDT & Design mark. Lindt asserts that there is a sufficiently large space between the LINDT & Design mark and the MAÎTRE CHOCOLATIER mark such that they do not truly appear "together." I find that there is no merit to this assertion. The space between them is minimal, such that I cannot accept that the shipping label constitutes use of the MAÎTRE CHOCOLATIER mark on its own.

[54] Lindt asserts that the Alishah Affidavit demonstrates, through the various photos of the MC Lockup, the storefront photos and the promotional photos, use of the MAÎTRE CHOCOLATIER mark *per se*. For the reasons that follow, I am not satisfied that the new evidence accomplishes that goal. Lindt has not established use of MAÎTRE CHOCOLATIER mark *per se.*

[55] Lindt further asserts that the sales evidence in the Alishah Affidavit demonstrates the acquired distinctiveness of the MAÎTRE CHOCOLATIER mark. However, for the reasons that follow, I am not prepared to infer from the sales data alone that the MAÎTRE CHOCOLATIER mark was known in Canada at least to some extent at the material date.

[56] In light of the above, I find that the new evidence is not material because it could not have had a bearing on the Board's determination that Lindt had not met its initial burden of proof in relation to its Ground 2 opposition. I need not make a determination in relation to the Ground 1 opposition, as the Board no determination of that issue.

(5) The Resulting Standards of Review

[57] For the initial burden of proof in relation to Lindt's Ground 1 opposition, the Board made no decision on that issue. While I could send the matter back to the Board to determine, I find that little point would be served in doing so in light of the Board's other findings. In the absence of a decision from the Board to review, there is no basis upon which to apply an appellate standard. As such, I must decide this issue *de novo*.

[58] As the new evidence is not material to the issue of whether Lindt met its initial burden of proof in relation to its Ground 2 opposition, the applicable standard of review is the appellate standard. However, Lindt has not asserted any error made by the Board in its determination that Lindt had not met its initial burden of proof. In the absence of an asserted error, there is no basis upon which to review the Board's determination. This is yet another basis upon which to reject Lindt's Ground 2 opposition.

[59] However, even if the *de novo* standard of review applied, I would still dismiss Lindt's Ground 2 opposition because I find that Lindt has failed to meet its initial evidentiary burden.

C. Issue No. 3 - Did Lindt meet its initial burden of proof on its Ground 1 opposition?

[60] The parties agree that, in order to meet its initial burden of proof, Lindt has to establish that the MAÎTRE CHOCOLATIER mark was used or made known prior to October 9, 2015, and was not abandoned at the date of advertisement of the Application (in this case, May 2, 2018) [*1587431 ONTARIO LTD, operating as DRIVETIME v 1850420 Ontario Inc, operating as DRIVETIMEOTTAWA*, 2017 TMOB 1 (CanLII) at para 14].

[61] There is no assertion that the MAÎTRE CHOCOLATIER mark has been abandoned, nor are there any temporal disputes.

[62] As I have already determined, there is no evidence before me of use of the MAÎTRE CHOCOLATIER mark on its own. Rather, the evidence is limited to Lindt's use of the MAÎTRE CHOCOLATIER mark in conjunction with other marks owned by Lindt. Lindt asserts that it has demonstrated use of the MAÎTRE CHOCOLATIER mark, within the meaning of subsection 4(1) of the *Act*, because "MAÎTRE CHOCOLATIER" appears on the foil wrapping of the MC Chocolate Bars (as part of the MC Lockup), the top cushions of tray-packed boxed chocolates (as part of the MC Lockup), shipping labels (beside the LINDT & Design mark), exterior store signage (below the LINDT & Design mark) and various advertising and promotional materials (below or beside the LINDT & Design mark, beside the LINDT mark and sometimes below the LINDT & Design mark together with the words "SUISSE DEPUIS 1845").

[63] It is important to note that nothing precludes an owner from using more than one trademark at the same time in association with a good or service [*AW Allen Ltd v Warner-Lambert Canada Inc*, 6 CPR (3d) 270].

[64] Here, the dispute turns on whether Lindt's goods bearing the words "MAÎTRE CHOCOLATIER," together with other marks, constitute use of the MAÎTRE CHOCOLATIER mark *per se*. Lindt asserts that it does. GRC asserts that it does not.

[65] The use of a trademark in combination with additional material constitutes use of the mark *per se* as a trademark if the public, as a matter of first impression, would perceive the mark *per se* as being used as a trademark. This is a question of fact dependent on such factors as whether the mark stands out from the additional material (such as by the use of different lettering or sizing) or whether the additional material would be perceived as purely descriptive matter or as a separate trademark or trade name, such that the mark remains recognizable [*Nightingale Interloc Ltd v Prodesign Ltd*, 2 CPR (3d) 535 at 538; *PDM Parthian Distributer & Marketing Adviser GmbH v Brewdog PLC*, 2024 FC 891 at para 36; *Registrar of Trade Marks v CII Honeywell Bull*, 4 CPR (3d) 523].

[66] The issue of use of the MAÎTRE CHOCOLATIER mark *per se* was raised squarely by the Board. The Board found that it was not clear whether the public would perceive the MAÎTRE CHOCOLATIER mark (among others) as being used *per se*. Lindt now asserts that the Alishah Affidavit directly addresses this issue. Yet, for reasons unknown to me, Lindt chose to make no

written submissions on this issue. It was only at the hearing that Lindt addressed this issue for the first time.

[67] Lindt now argues that the average consumer would interpret the MC Lockup as use of two separate trademarks — (i) the MAÎTRE CHOCOLATIER mark; and (ii) the LINDT & Design mark. Lindt notes that the MAÎTRE CHOCOLATIER mark has different sizing and lettering and appears on a different line from the LINDT & Design mark. Lindt argues that a consumer would recognize that MAÎTRE CHOCOLATIER is a "sub-brand" to the Lindt house brand, just like Lindt's other sub-brands, such as the gold bunny, Excellence and Swiss Classic.

[68] GRC asserts that Lindt has failed to file any evidence that shows use of the MAÎTRE CHOCOLATIER mark *per se* prior to the filing date of GRC's application. The words MAÎTRE CHOCOLATIER never appear on their own. Rather, GRC asserts that in all examples of asserted use relied upon by Lindt, the words MAÎTRE CHOCOLATIER are used as part of Lindt's registered LINDT MAÎTRE CHOCOLATIER mark. GRC asserts that there is no evidence before the Court that would support a finding that the public, as a matter of first impression, would perceive the MAÎTRE CHOCOLATIER mark *per se* as being used as a trademark. Rather, GRC asserts that the public would view the examples provided by Lindt as use of the registered LINDT MAÎTRE CHOCOLATIER mark.

[69] I am not satisfied that Lindt has demonstrated use of the MAÎTRE CHOCOLATIER mark *per se*. Lindt argues that the consumer would recognize that MAÎTRE CHOCOLATIER is a sub-brand to the Lindt house brand. However, there is no evidence before me regarding the

public's perception of MAÎTRE CHOCOLATIER, let alone evidence that consumers would view it as a sub-brand. The concept of it being a sub-brand was only raised for the first time by counsel at the hearing. Lindt's own witnesses, Ms. Wu and Ms. Alishah, do not refer to MAÎTRE CHOCOLATIER as a sub-brand, yet alone as a sub-brand that would be recognized by the public as a matter of first impression. Ms. Wu stated in her affidavit that "Lindt and its chocolate confectionary products are extremely well-known in Canada," which is a statement that I accept. However, there is no similar evidence from either Ms. Wu or Ms. Alishah regarding the MAÎTRE CHOCOLATIER mark or "sub-brand."

[70] Lindt relies on the Board's decision in *Matsushita Electric Industrial Co, Ltd v Libra Importing Co Ltd doing business as Stirling Importers*, 8 CPR (3d) 512, which it states is analogous to this case. In *Matsushita*, the applicant sought to register the trademark AUDIOSOUND in association with various goods. The opponent filed a statement of opposition on the basis that it would be confusing with their registered trademark AUTOSOUND, which was registered in association with goods of a similar nature. The applicant asserted that the opponent had not established use of its trademark AUTOSOUND but had only shown use of the trademark PANASONIC AUTOSOUND. The Board found as follows:

> […] Although it is true that the opponent's trade mark AUTOSOUND invariably appears in conjunction with its trade mark PANASONIC, the appearance of these two marks on the wares as shown in ex. J to the Urabe affidavit is such that the mark AUTOSOUND is positioned below the mark PANASONIC and in a different size and style of lettering. Furthermore, the trade mark AUTOSOUND is identified with a subscripted encircled R. Finally, from a review of the opponent's evidence and, in particular, ex. J to the Urabe affidavit, it would appear that the average consumer would react to the opponent's packaging as employing the opponent's house mark PANASONIC in conjunction with the opponent's product mark AUTOSOUND.

> Thus, I find that the average consumer would react to the foregoing as use of the opponent's mark AUTOSOUND alone. […]

[71] Lindt argues that the Board found that use of the sub-brand AUTOSOUND was established even though it was only used with the house mark, which is similar to the circumstances here. I reject this assertion. In *Matsushita*, the Board had affidavit evidence as to how the public perceived the AUTOSOUND sub-brand, and where the AUTOSOUND mark appeared with the house mark, AUTOSOUND was identified with a subscripted encircled R. There is no such evidence of public perception in this case. There is also no use of a registered trademark symbol next to MAÎTRE CHOCOLATIER, although this is not surprising given that it is not a registered trademark. Had such a symbol been useable, it certainly would have signaled to the public that MAÎTRE CHOCOLATIER was a separate trademark.

[72] In *Sealy Canada Ltd v Simmons Canada Inc*, 2012 TMOB 63, the Board considered whether the opponent had shown use of its mark BLACK LABEL COLLECTION only or had shown use of both its BLACK LABEL and BLACK LABEL COLLECTION marks. The Board noted that the evidence showed that the BLACK LABEL mark appeared on the headrests, foot sashes and pillowcases in a larger and more dominant font than the word COLLECTION. Further, the ® symbol appeared after the words BLACK LABEL. In that case, the Board was satisfied that the evidence as a whole (which was more than just differences in the appearance of words) showed illustrative examples of both of the opponent's BLACK LABEL and BLACK LABEL COLLECTION marks.

[73] I acknowledge that, in the MC Lockup or other examples of MAÎTRE CHOCOLATIER appearing together with LINDT or the LINDT & Design mark, MAÎTRE CHOCOLATIER appears in a different font and size, like in *Matsushita* and in *Sealy*. However, I find that the differences in appearance of the words does not, without more, lead me to conclude that Lindt has established that the public, as a matter of first impression, would perceive MAÎTRE CHOCOLATIER *per se* as being used as a trademark [*Elevenate AB v Elleaime SAS*, 2023 TMOB 094 at para 21]. Based on the limited evidence before me, I find that the immediate impression of the words MAÎTRE CHOCOLATIER is that they are descriptive of Lindt's mastery or perfected skills as a chocolatier.

[74] Accordingly, I find that Lindt has failed to demonstrate use of the MAÎTRE CHOCOLATIER mark *per se* prior to the filing date of GRC's application (or at all).

D. Issue 4 - Did Lindt meet its initial burden of proof in relation to its Ground 2 opposition?

[75] Under paragraph 38(2)(d) of the *Act*, an application for the registration of a trademark may be opposed on the basis that the mark is not distinctive. To succeed on this ground of opposition, Lindt has the initial burden to establish that, as of the date the statement of opposition was filed, its MAÎTRE CHOCOLATIER mark was known in Canada to some extent at least, i.e., that its reputation in Canada was "substantial, significant or sufficient," or else that it was well known in a specific area of Canada so as to negate the distinctiveness of the GRC Mark [*Motel 6, Inc v No 6 Motel Ltd et al* , 56 CPR (2d) 44; *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657 at para 33].

[76] In either case, it is not enough for Lindt to simply assert that its trademark was known. There must be clear evidence of the extent to which it was known [*Bojangles*, *supra* at para 33; *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2019 FCA 10].

[77] I have no written submissions from Lindt on this issue. Lindt's submissions at the hearing were very limited and made no reference to the applicable jurisprudence. Lindt relies on the significant sales of the products bearing the MC Lockup as evidence of the extent to which the MAÎTRE CHOCOLATIER mark was known in Canada.

[78] However, I have already determined that Lindt has not established use of the MAÎTRE CHOCOLATIER mark *per se* because the public would not perceive the words MAÎTRE CHOCOLATIER as they appear in the MC Lockup, or otherwise on the Lindt products, as being a separate trademark. If there is no use of the MAÎTRE CHOCOLATIER mark *per se*, I fail to see how the mark can be known in Canada. While there is certainly evidence of extensive sales of products that bear the words MAÎTRE CHOCOLATIER (together with the predominant LINDT & Design mark), I am not prepared to infer from this sales evidence alone that the MAÎTRE CHOCOLATIER mark was known in Canada.

[79] Like the Board, I find that there is no clear evidence establishing that the MAÎTRE CHOCOLATIER mark was known in Canada at least to some extent at the material time. As such, this is another basis on which to reject this ground of opposition.

III. Conclusion

[80] For the reasons above, Lindt's remaining grounds of opposition are rejected. The Registrar is directed to register the GRC Mark in accordance with GRC's application (Application No. 1,749,988).

IV. Costs

[81] The parties have agreed that the successful party should be awarded their costs incurred from May 26, 2025, onward (after my earlier decision in this matter), fixed in the all-inclusive amount of $5,000. As GRC was successful, it shall be awarded its costs in that amount.

JUDGMENT in T-28-24

THIS COURT'S JUDGMENT is that:

1. The Respondent's remaining grounds of opposition are rejected.

2. The Registrar is directed to register the trademark MASTER CHOCOLAT, in accordance with Application No. 1,749,988.

3. The Respondent shall pay to the Applicant its costs of the proceeding from May 26, 2025, to the date of this Judgment, fixed in the amount of $5,000, inclusive of taxes and disbursements.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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