

Federal Court



Cour fédérale

**Date: 20190722**

**Docket: T-548-18**

**Citation: 2019 FC 961**

**Ottawa, Ontario, July 22, 2019**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**LOBLAWS INC.**

**Plaintiff**

**and**

**COLUMBIA INSURANCE COMPANY, THE  
PAMPERED CHEF, LTD., AND PAMPERED  
CHEF – CANADA CORP.**

**Defendants**

**PUBLIC JUDGMENT AND REASONS**

**I. Overview**

[1] This decision relates to an action by the Plaintiff, Loblaws Inc. [Loblaw], against the Defendants, Columbia Insurance Company [Columbia], The Pampered Chef, Ltd., and Pampered Chef – Canada Corp., asserting various causes of action under the *Trade-marks Act*, RSC 1985, c T-13 [the Act] and claiming remedies related thereto. The Defendants have counterclaimed,

seeking to have certain trademarks that are the subject of Loblaw's action declared invalid and struck from the Register, on the basis that they are not distinctive of Loblaw. This decision follows a trial of the liability issues in this action held in Toronto.



[2] Some of the evidence adduced at trial is subject to a Protective and Confidentiality Order dated April 30, 2019, in order to protect commercially sensitive confidential information of the parties. A draft confidential decision was therefore sent to the parties on June 28, 2019 to allow them to propose any redactions required for the issuance of the public version of the decision. The parties proposed redactions in correspondence from the Plaintiff's counsel dated July 11, 2019, written with the consent of counsel for the Defendants. I am satisfied that the proposed redactions appropriately balance the interests of protecting confidential information and the public interest in open and accessible court proceedings. As such, two versions of this decision, one public and the other confidential, will be issued simultaneously.

[3] For the reasons explained in greater detail below, Loblaw's claims are dismissed, and the Defendants' counterclaim is dismissed.

## II. **Background**

[4] Loblaw is a corporation incorporated under the laws of Ontario, with a principal place of business in Brampton, Ontario. It is a subsidiary of Loblaw Companies Limited [LCL], which it describes as a retailer of food, pharmacy and other products and services meeting household needs. It operates a large number of retail banners, such as Loblaw's, Shoppers Drug Mart, Provigo, Atlantic Superstore, and several others. LCL developed the companion brands

“President’s Choice” and “PC” under which many of its products and services are marketed. Loblaw is the owner of a family of registered and unregistered trademarks related to these brands which are the subject of this action, the full complement of which is set out in Schedule “A” to these Reasons (taken from Loblaw’s Amended Statement of Claim) and will be referred to as the “PC Marks.” These marks broadly consist of the following;

- A. the word mark PC, registered in relation to (1) food and kitchenware products, and (2) the operation of a reward incentive program for points which can be redeemed for various products [the PC Word Mark];
- B. the  design mark, registered in relation to (1) food and kitchenware products and (2) the following services: cooking school services, application for digital electronic devices and mobile phones for viewing recipes and nutritional information, and the operation of a reward incentive program for points [the PC Script Mark]; and
- C. the  common law mark in relation to various goods and services including housewares [the PC Circle Mark].

[5] While not directly the subject of this litigation, Loblaw also employs the following mark in connection with its “President’s Choice” brand [the President’s Choice Mark]:

*President's Choice*

[6] Columbia is a corporation subsisting under the laws of Nebraska, with a principal place of business in Omaha, Nebraska. It is the owner of a number of trademarks registered under the Act. The Pampered Chef, Ltd. has a place of business in Addison, Illinois and is the parent corporation of Pampered Chef – Canada Corp., which has its principal place of business in Markham, Ontario. The Pampered Chef, Ltd. and Pampered Chef – Canada Corp. Pampered Chef are retailers of housewares including kitchen tools, employing principally a direct marketing or multilevel marketing business model, through in-home cooking and catalogue parties and virtual or online versions of the same. They license from Columbia the trademarks (described below) that are at issue in this action. In these Reasons, consistent with usage at trial, the Defendants will be referred to collectively as “Pampered Chef.”

[7] Pampered Chef has used the trademark “Pampered Chef” in Canada for a number of years in association with the sale of housewares. In 2015 and/or 2016, Columbia filed trademark applications in Canada for the following trademarks, all of which employ a branding device that the Defendants call the “Happy Spoon”:

- A.  [the Happy Spoon Mark];
- B.  [the Long Form Mark];
- C.  ; and



[8] The latter two marks, both of which employ the Happy Spoon device between the letters “P” and “C”, have been referred to as the “Short Form Marks”. Columbia’s applications for the Happy Spoon Mark and the Long Form Mark were granted by the Canadian Trademarks Office, but Loblaw is opposing the applications for the Short Form Marks.

[9] Pampered Chef has begun to sell, distribute and advertise housewares in Canada employing, *inter alia*, the Short Form Marks. Pampered Chef also operates a reward incentive program identified as “PC Dollars”. These activities give rise to this action, in which Loblaw asserts that the Short Form Marks are identical or confusingly similar with the PC Marks and that PC Dollars is identical to the PC Word Mark. The causes of action currently being asserted by Loblaw are that Pampered Chef’s activities:

- A. constitute infringement of Loblaw’s exclusive rights to use the PC Marks throughout Canada, contrary to s 19 and 20 of the Act;
- B. have directed public attention to Pampered Chef’s goods, services and business so as to cause or be likely to cause confusion in Canada between their goods, services and business and those of Loblaw, contrary to s 7(b) of the Act; and
- C. have the likely effect of depreciating the value of the goodwill associated with the PC Marks, contrary to s 22 of the Act.

[10] Loblaw claims remedies including: (a) damages or, in the alternative, an accounting of profits; (b) punitive, aggravated and exemplary damages; and (c) various categories of injunctive relief. However, the liability and quantification issues in this action have been bifurcated, such that this Judgment and Reasons relate only to liability issues, including Loblaw's entitlement, if any, to declaratory relief, injunctive relief and delivery up. While it was originally intended that the liability phase of this action would also determine whether Pampered Chef's conduct is such as would support an award of aggravated, punitive and exemplary damages, Loblaw advised at trial that it was withdrawing its claim for such damages.

[11] Pampered Chef takes the position that none of its marks is identical to those of Loblaw and that there is no likelihood of confusion between the Short Form Marks and the PC Marks. It therefore denies liability to Loblaw under any of the causes of action asserted. Pampered Chef also counterclaims seeking a declaration that the PC Word Mark is invalid and should be struck from the Register, on the basis that it is not distinctive of Loblaw contrary to s 2 and 18(1)(b) of the Act, and an order expunging the PC Word Mark. While the PC Marks include a word mark "P.C." (i.e. with periods inserted after the "P" and the "C"), Loblaw advised at trial that it is not asserting that mark in support of its claims, and Pampered Chef confirmed that it was therefore unnecessary for the Court to address an invalidity allegation it had advanced in connection with that mark. The invalidity allegation in relation to the PC Word Mark falls within the scope of the liability phase of this action and therefore this Judgment and Reasons.

### III. Issues

[12] The list of issues identified by Loblaw, with which Pampered Chef does not disagree and which, subject to some slight re-ordering and re-articulation, I have adopted for purposes of this decision, is as follows:

- A. Is the PC Word Mark distinctive and thus valid?
- B. If so, has Pampered Chef infringed Loblaw's rights under section 19 of the Act?
- C. Has Pampered Chef infringed Loblaw's rights under section 20 of the Act?
- D. Has Pampered Chef infringed Loblaw's rights under section 22 of the Act?
- E. Has Pampered Chef violated section 7(b) of the Act?
- F. If Loblaw succeeds in establishing any of the causes of action asserted, what is the appropriate relief?

#### IV. **Evidence**

[13] The parties approached the introduction of evidence in this matter, and indeed the trial generally, very cooperatively. Much of the documentary evidence received by the Court was introduced by agreement. This was supplemented by evidence introduced through cross-examination of witnesses, largely without objection. Each of the parties also filed a substantial volume of read-ins from discovery examinations, and many facts were agreed through Agreed Statements of Facts.

[14] The parties agreed to certain factual witnesses providing their evidence in chief through affidavits, subject to cross-examination at trial. Each of the parties called its two principal witnesses of fact at trial, to provide evidence surrounding certain aspects of its business operations. By way of brief summary of Loblaw's three factual witnesses and the areas in which they testified:

- A. Ms. Cheryl Grishkewich, Loblaw's Vice President of control brand marketing, testified as to the history surrounding development of the "President's Choice" and "PC" brand, the use and advertising of the related marks, the nature and range of goods and services in connection with which the marks are used and advertised, the channels of trade in which such goods and services are available , and consumer awareness and perceptions of the brand and marks;
- B. Mr. Graham Rooza, a Senior Director, Home & Entertainment Department, at Loblaw Brands Limited (a subsidiary of Loblaw), provided testimony surrounding Loblaw's kitchenware products that are marketed under the "PC" and/or "President's Choice" brand; and
- C. Mr. Cliff Blizzard, the Wholesale Club Category Director at the National Wholesale Division of Loblaw, provided evidence as to the nature of Loblaw's Wholesale Club business, including the condiment category in that business, and the sale of products by Ventura Foods [Ventura]. (The Ventura products are relevant to this litigation because they bear third-party marks that Pampered Chef argues affect the distinctiveness of the PC Marks). Mr. Blizzard's direct evidence was provided by affidavit.



[15] Pampered Chef's factual witnesses were as follows:

- A. Ms. Sandra Kabat, Director of Canada with Pampered Chef - Canada, Corp., testified as to Pampered Chef's business, sales, channels of trade, and the role of the Independent Consultants [ICs] who represent its sales force under its direct marketing/multilevel marketing business model;
- B. Ms. Libby Hoppe, Director of Digital Marketing and Content Strategy with The Pampered Chef, Ltd., provided evidence surrounding Pampered Chef's digital marketing, including the websites of Pampered Chef and its ICs and their use of social media;
- C. Mr. Michael Stephan, a licensed investigator employed by Xpera Risk Mitigation & Investigation, provided evidence as to the results of various investigations performed at the instruction of the Defendants' counsel. These investigations included visits at Loblaw's Wholesale Club and the Wholesale Business Centre operated by Costco, as well as the purchase of Ventura products at both locations, visits to the websites maintained by both wholesale operations, Ventura, and other businesses, visits to certain of Loblaw's retail locations and the purchase of kitchen products, and visits to certain of Loblaw's websites. Mr. Stephan also assembled articles related to Loblaw and its brands, information available online surrounding recalls and complaints related to Loblaw's products, information available online related to third parties that employ in some manner the initials "PC", and information related to online activities of Pampered Chef and certain of its ICs. Mr. Stephan provided his direct evidence by affidavit; and

D. Mr. Derek MacIsaac, a licensed private investigator employed by Digital Evidence International, Inc. as a cybercrime investigations specialist, provided evidence surrounding the results of searches he was asked to perform by the Defendants' counsel, for certain keywords in posts on target Twitter accounts belonging to the parties. Mr. MacIsaac provided his direct evidence by affidavit.

[16] These witnesses and their evidence will be canvassed later in these Reasons as necessary to address the various issues in this matter. By way of preliminary comment, neither of the parties took any particular issue with the credibility of the other's factual witnesses. At least in relation to the witnesses of fact, this is not a case that turns on credibility determinations.

[17] Loblaw called the following two expert witnesses:

A. Dr. Chuck Chakrapani - Dr. Chakrapani is the President of Leger Marketing, Distinguished Visiting Professor at the Ted Rogers School of Management at Ryerson University, and Chief Knowledge Officer of the Blackstone Group in Chicago. He was qualified by agreement of the parties as an expert in marketing research and statistics, including surveys. Dr. Chakrapani was retained by Loblaw to assess whether and to what extent consumers would misidentify one of the Short Form Marks used by Pampered Chef as a mark used by Loblaw. He designed and conducted a survey to perform this assessment, the results of which are set out in his expert report; and

B. Prof. Kenneth Wong – Prof. Wong is a faculty member and the Distinguished Professor of Marketing at the Smith School of Business at Queen’s University, where he teaches marketing courses at the B. Comm. and MBA levels. He was qualified by agreement of the parties as an expert in marketing. Prof. Wong’s expert report addresses the following mandates that he was assigned by Loblaw’s counsel: (i) to provide an explanation of the importance of a brand to business and the effect of a brand on consumer behaviour; (ii) to provide an opinion on whether there is goodwill attached to Loblaw’s “PC” brand and, if so, the significance of that goodwill; and (iii) to advise whether he was able to give an opinion on the impact that Pampered Chef’s use of the Short Form Marks will have on the goodwill attached to Loblaw’s “PC” brand and, if so, to provide that opinion.

[18] Pampered Chef also called two expert witnesses, intended to respond to the opinions of Loblaw’s experts:

A. Dr. Derek Hassay – Dr. Hassay is the RBC Teaching Professor of Entrepreneurial Thinking at the Haskayne School of Business in Calgary, Alberta. He was qualified by agreement of the parties as an expert in marketing, specializing in the field of direct selling and multilevel marketing. Dr. Hassay’s expert report: (i) provided background information on the direct sales channel, including how it differs from mass merchandising and any differences in the use of websites; (ii) opined on whether Dr. Chakrapani surveyed the relevant population and, if not, whether there were any material

differences between the survey participants and the relevant population including whether the relevant population would respond differently to Dr. Chakrapani's survey stimuli; and (iii) commented on conclusions in Prof. Wong's report; and

B. Dr. Ruth M. Corbin – Dr. Corbin is the Chair and former Managing Partner of CorbinPartners Inc., a marketing science company that conducts survey research, including in relation to trademarks, and other types of analysis for business decisions and dispute resolution. Dr. Corbin has also been an Adjunct Professor at the Osgoode Hall Law School of York University, where she has taught courses in Trademarks, Cognitive Science Evidence, and Judgment and Decision-making. She was qualified by agreement of the parties as an expert in marketing research and statistics, including surveys. Her expert report addresses the mandates she was assigned by the Defendants' counsel, to assess whether the survey on which Dr. Chakrapani bases the opinion in his report is reliable and valid for predicting whether use of Pampered Chef's Short Form Marks are confusing with one or more of Loblaw's PC Marks.

[19] In advance of trial, each of the parties raised with each other and with the Court certain objections related to the other's expert reports. While such objections relate not only to the weight to be afforded such reports but, in some cases, to the admissibility of the reports or portions thereof, the parties agreed that such objections would not be advanced until closing argument and would not be ruled upon until following trial. As such, each of the reports was marked as an exhibit at trial and its author subjected to cross-examination. To the extent

necessary to address the issues in this litigation, I will consider such objections and the expert evidence generally later in these Reasons.

V. **Analysis**

A. *Is the PC Word Mark distinctive and thus valid?*

[20] In closing argument at trial, Pampered Chef's counsel confirmed that, if Loblaw does not succeed in the causes of action it is asserting, the Court need not address Pampered Chef's challenge to the validity of the PC Word Mark. As explained in detail below, my conclusion is that Loblaw has not met the burden upon it to establish those causes of action. I will nevertheless briefly address Pampered Chef's invalidity allegation.

[21] Pampered Chef relies on s 2 and s 18(1) of the Act for its invalidity allegation, asserting that the PC Word Mark was not distinctive of Loblaw at the time the proceedings bringing the validity of the registrations of that mark into question were commenced. Loblaw submits that the relevant date for assessing distinctiveness for this purpose is when its action was commenced in March 2018. Pampered Chef has taken no issue with this point and, in my view, there would be no material difference in performing the assessment at that date or performing it when the counterclaim was commenced in June 2018.

[22] Under s 19 of the Act, there is a presumption that Loblaw's registrations in relation to the PC Word Mark are valid, and any doubts must be resolved in favour of the validity of the registrations (see *Bedessee Imports Ltd v Glaxosmithkline Consumer Healthcare (UK) IP*

*Limited*, 2019 FC 206 at para 13). Pampered Chef therefore bears the burden of establishing based on the evidence that the PC Word Mark lacks distinctiveness at the relevant time.

[23] Loblaw acknowledges that the PC Word Mark is not inherently distinctive. However, as found later in these Reasons in considering the claim of infringement under s 20 of the Act, the mark has acquired substantial distinctiveness in relation to food and kitchenware products and a reward incentive program. It is not necessary to repeat the evidence or analysis giving rise to that finding.

[24] Pampered Chef's allegation that the PC Word Mark is not distinctive of Loblaw is based principally on the following design mark [the Ventura Mark] registered by Ventura in 1971, more than a decade before the registrations by Loblaw of the PC Word Mark:



[25] Pampered Chef asserts that the Ventura Mark represents a stylized version of the letters “PC” and notes that Loblaw has been selling Ventura products, bearing a variant of the Ventura Mark, through its Wholesale Club banner, including placing those products adjacent to certain of its own “PC” products. Pampered Chef relies principally upon the evidence assembled by its private investigator, Mr. Stephan, which establishes such sale by Loblaw, as well as the offering for sale of the Ventura products by other vendors, including Costco expressly advertising such products as “PC” products. Loblaw has also provided Pampered Chef with certain admissions,

including the fact that Loblaw has been selling a Ventura ketchup product in a 4L bottle, bearing the variant of the Ventura Mark, since at least 2000, and that since at least 2016 several of Loblaw's Wholesale Club locations have sold the Ventura ketchup, as well as boxes of what appear to be single use packets of tartar sauce, and/or malt vinegar, displaying such mark.

[26] Loblaw also admits that it has never challenged the use, validity or registration of the Ventura Mark or any variant. Pampered Chef notes that the Federal Court of Appeal recently confirmed in *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2019 FCA 10 [*Sadhu Singh*] at paras 15-16, that it is incumbent upon a trader to protect the distinctiveness of its mark, even in the face of infringing use, or it risks such infringing use causing its mark to lose its distinctiveness.

[27] I find the evidence surrounding the Ventura Mark to have little impact upon the distinctiveness of the PC Word Mark. As an initial point, as argued by Loblaw, it is not immediately obvious that the Ventura Mark is employing the letters "PC", and there is no evidence before the Court that consumers understand that mark to represent a "PC". The only evidence on this point is that of Mr. Blizzard, who stated that neither he nor his colleagues at Wholesale Club ever understood the mark that appears on the Ventura products to represent a "PC". While the block letters "PC" do appear on some of the boxes containing individual condiment packages, this is on the bottom of the boxes, and there is no evidence that such usage would have come to the attention of consumers.

[28] The website pages of Costco and other businesses identified by Mr. Stephan as selling Ventura products refer to those products with the block letters “PC”. However, Loblaw points out that these vendors are all wholesalers which focus on foodservice companies, not on retail sale to consumers. Related thereto, the Ventura products differ from those branded with Loblaw’s PC Word Marks, as they are bulk condiments not intended for a retail consumer market. There is also no evidence of the volume of sales of the Ventura products by any of these businesses.

[29] The only evidence of the volume of sales of Ventura products relates to the sale by Loblaw itself. I agree with its characterization of the Ventura tartar sauce and malt vinegar sales figures as [REDACTED]. The Ventura brown sugar does not bear the Ventura Mark or its variant on its packaging, only on the bottom of the box. Loblaw’s sales of the 4L ketchup bottle are [REDACTED], totalling approximately [REDACTED] in 2016, [REDACTED] in 2017, and [REDACTED] in 2018, [REDACTED]. [REDACTED] and there would have been sales in previous years for which the evidence is that data was not readily available, I agree with Loblaw’s position that these sales [REDACTED] fall well short of negating the distinctiveness of the PC Word Marks for food products, let alone kitchenwares.

[30] As confirmed in *Sadhu Singh* at paras 4 and 12, the standard for a mark to be sufficiently well-known to negate the distinctiveness of another is that articulated in *Bojangles’ International LLC v Bojangles Café Ltd*, 2006 FC 657 at para 34, requiring that the former mark have a reputation that is “substantial, significant or sufficient.” The decision in *Rothmans, Benson & Hedges, Inc v Imperial Tobacco Products Ltd*, 2014 FC 300 at para 82, also reflects that the



relative volumes of sales of the respective products in question are relevant to the distinctiveness analysis. [REDACTED] (details of which are canvassed later in these Reasons). In my view, it is abundantly clear that the distinctiveness of the PC Word Marks is not negated by the evidence related to the Ventura products.

[31] Finally, I note Pampered Chef's argument that Loblaw faces a dilemma in asserting that the Short Form Marks are confusing with the PC Word Mark in that, if this is correct, then the PC Word Mark must itself be confusing with the Ventura Mark. Pampered Chef submits that such a dilemma was identified by the Supreme Court of Canada in *Johnson (SC) and Son, Ltd v Marketing International Ltd*, [1980] 1 SCR 99 [*Johnson*] at para 35. In that case, the appellant registered owner of the trademark "OFF!" brought an infringement action against the respondent, arguing that its use of "Bugg Off" was confusing. The dilemma identified by the Supreme Court was that the appellant's "OFF!" Mark was not validly registered if it was confusing with a third party's prior registered mark "BUGZOFF".

[32] However, the reasoning in *Johnson* was based on s 12(1)(d) of the Act, the effect of which is that a trademark is registrable only if it is not confusing with a registered trademark. In the present case, Pampered Chef could have framed the invalidity allegation in its counterclaim as based on confusion between the PC Word Mark and the Ventura Mark. This allegation would have invoked s 18(1)(a) of the Act, which provides that a registration is invalid if it is not registrable at the date of registration. However, Pampered Chef has not pleaded this allegation. Its counterclaim relies on an assertion that that the PC Word Mark is not distinctive of Loblaw, which assertion invokes solely s 18(1)(b) of the Act. The tests for confusion and distinctiveness

are not the same. I therefore agree with Loblaw's position that the reasoning in *Johnson* is not applicable and the dilemma identified in that case does not arise.

[33] In conclusion on this issue, were it necessary for the outcome of this action to address Pampered Chef's invalidity allegation, I would find the PC Word Mark to be distinctive and thus valid.

B. *Has Pampered Chef infringed Loblaw's rights under section 19 of the Act?*

[34] Section 19 of the Act prevents a party from using a trademark identical to a registered trademark in association with goods or services identical to the goods or services in association with which it is registered (see *Gary Gurmukh Sales Ltd v Quality Goods IMD Inc*, 2014 FC 437 [*Quality Goods*] at para 83).

[35] Loblaw asserts two categories of section 19 infringement. The first relates to Pampered Chef's use of "PC Dollars" in association with its reward incentive program. Under that program, Pampered Chef's ICs can earn rewards, described as "PC Dollars", which it can redeem for various Pampered Chef products. Loblaw argues that Pampered Chef's operation of this program represents use of Loblaw's identical trademark "PC" (i.e. the PC Word Mark), which Loblaw has registered in association with an identical service.

[36] Pampered Chef does not dispute that the services are identical. However, it argues that the marks are not identical, in that Loblaw's registered mark is "PC", while Pampered Chef's mark is "PC Dollars". Pampered Chef notes Loblaw's reliance on *Quality Goods* for the

proposition that s 19 can still be infringed, even in the case of minor differences between the two marks, where the infringing trademark takes the character or identity of the registered mark.

Pampered Chef submits that, while *Quality Goods* does state this proposition, it was wrongly decided, in that it relies on *Promafil Canada Ltée v Munsingwear Inc* (1992), 142 NR 230 (Fed CA) [*Promafil*], which was a non-use cancellation proceeding brought under s 45 of the Act. *Promafil* concluded that the use of a penguin logo on clothing, where the penguin's body type differed from that in the original registration, represented continued use of the registered mark.

[37] While Pampered Chef's argument may have merit, it is unnecessary for me to decide this legal point. Even if I were to accept Loblaw's submission that s 19 can still be infringed where there are minor differences in the marks being compared, this position would not assist it in the present case, as the difference between "PC" and "PC Dollars" is more than a minor difference.

[38] Loblaw also argues that the two marks are actually identical, in that the word "Dollars" represents merely the addition of a descriptive word after Loblaw's mark "PC". I do not agree that Pampered Chef's mark can be characterized in this manner. As Ms. Kabat confirmed in her testimony, [REDACTED]. Rather, this is a term used to refer to the rewards that its ICs earn. My conclusion is that Pampered Chef's mark is the entire phrase "PC Dollars", that this is not identical to "PC", and that there is therefore no infringement of s 19.

[39] The second category of s 19 infringement asserted by Loblaw relates to Pampered Chef's use of the Short Form Marks on a number of its kitchenware products. Pampered Chef has agreed that it sells in Canada serving bowls, cleaning cloths, kitchen utensils and a cold brew

pitcher, all of which bear or are associated with one of the Short Form Marks. One of Loblaw's registrations of the PC Word Mark is in respect of a number of food and kitchenware products, including "bowls" and "serviettes and wipes."

[40] Pampered Chef's response to this allegation is that its Short Form Marks are not identical to the PC Word Mark. Again, even if I were to accept that s 19 can be infringed in the case of minor differences, it is clear to me that the differences between the marks in question are not minor. Pampered Chef's Short Form Marks both employ the Happy Spoon brand device inserted between the letters "P" and "C". Both the insertion of the Happy Spoon and the resulting separation of the letters represent differences, and in my view sufficiently material differences, between Pampered Chef's marks and Loblaw's mark "PC" to preclude a finding that the marks are identical.

[41] I therefore find that Pampered Chef has not infringed Loblaw's rights under section 19 of the Act.

*C. Has Pampered Chef infringed Loblaw's rights under section 20 of the Act?*

[42] Loblaw's infringement allegation under s 20 of the Act relies upon s 20(1)(a), which provides as follows:

**Infringement**

**Violation**

**20 (1)** The right of the owner of a registered trade-mark to its exclusive use is deemed to be infringed by any person who is not entitled to its use under this Act and who

(a) sells, distributes or advertises any goods or services in association with a confusing trade-mark or trade-name;

**20 (1)** Le droit du propriétaire d'une marque de commerce déposée à l'emploi exclusif de cette dernière est réputé être violé par une personne qui est non admise à l'employer selon la présente loi et qui :

a) soit vend, distribue ou annonce des produits ou services en liaison avec une marque de commerce ou un nom commercial créant de la confusion;

[43] As Loblaw submits, the elements necessary to establish infringement under s 20(1)(a) are well-established, requiring it to prove that: (i) it has a valid registered trademark; (ii) Pampered Chef has sold, distributed, or advertised goods or services in association with a trademark; and (iii) the latter trademark is confusingly similar with that of Loblaw and was used without Loblaw's permission (see, e.g., *United Airlines, Inc v Cooperstock*, 2017 FC 616 [*United Airlines*] at para 30). Loblaw submits, and I agree, that only the third element, the question of confusion, is a live issue in this matter.

[44] The burden is on Loblaw to establish a likelihood of confusion, as opposed to a mere possibility (see, e.g. *BBM Canada v Research In Motion Limited*, 2012 FC 666 [*BBM*] at para 30). Likelihood must be proven by Loblaw on a balance of probabilities (see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 [*Veuve Clicquot*] at para 14).

[45] As explained in *Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22 [*Mattel*] at para 51, confusion between trademarks is defined in s 6(2) of the Act and arises if it is likely in all the surrounding circumstances, as set out in s 6(5), that a prospective purchaser will be led to the

mistaken inference “... that the wares or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.”

[46] Pursuant to s 6(5), in making the determination whether or not trademarks are confusing, the Court is required to consider all the surrounding circumstances including: (a) the inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time the trademarks have been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks in appearance or sound or in the ideas suggested by them.

(1) Section 6(5)(e) – Degree of Resemblance

[47] As the Supreme Court of Canada indicated in *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 [*Masterpiece*] at para 49, the confusion analysis should start with the degree of resemblance between the marks under s 6(5)(e), as this is the factor that is often likely to have the greatest impact. If the marks do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. Conversely, after the Supreme Court found in *Masterpiece* at para 104 a strong resemblance between the marks at issue, it concluded based on that factor that a consumer would likely be confused and stated that the remaining question was whether any of the other circumstances reduced the likelihood of confusion to the point that confusion was not likely to occur.

[48] Resemblance is defined as the quality of being either like or similar, with the term “degree of resemblance” employed in s 6(5)(e) recognizing that marks with some differences may still result in likely confusion (see *Masterpiece* at para 62). It must also be borne in mind that the test for confusion is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the mark at a time when he or she has no more than an imperfect recollection of the prior trademarks and does not pause to give the matter any serious consideration or scrutiny, nor to examine closely the similarities and differences between the marks. The test does not contemplate a careful examination of competing marks or a side-by-side comparison (see *Masterpiece* at para 40).

[49] *Masterpiece* also explains at paragraphs 45 to 46 that, while some of the s 6(5) factors that guide the confusion analysis will be the same for each of the trademarks at issue, others will require that each mark be considered separately. In that case, the degree of resemblance was one such factor, and I agree with Loblaw’s position that separate consideration of that factor is required in the case at hand as well. I understood both parties to have approached their submissions in this matter on the basis that the arguments in favour of the degree of resemblance are the strongest as between Pampered Chef’s Short Form Marks and Loblaw’s PC Word Mark. Indeed, as between the two Short Form Marks, I would regard the version bearing the most degree of resemblance to the PC Word Mark to be the Short Form Mark which does not include the circle design element, i.e.:



[50] I will therefore analyse first the degree of resemblance between this mark and the PC Word Mark and will subsequently consider the extent to which that analysis differs as between other sets of marks that must be considered in connection with the confusion determination.

[51] Section 6(5)(e) sets out three bases upon which to evaluate the degree of resemblance between the marks: appearance, sound, and ideas suggested by the marks. Loblaw takes the position that the PC Word Mark is identical to Pampered Chef's marks in all of these areas. I will consider first the easiest basis to assess, the degree of resemblance in sound. I agree with Loblaw that the marks are identical in sound, i.e. that there would be no pronunciation of the design elements of Pampered Chef's marks and that each would be pronounced "PEE SEE".

[52] Turning to the degree of resemblance in appearance, Loblaw makes the point that, because the PC Word Mark is a word mark, Loblaw's registrations entitle it to use the mark "PC" employing any style of lettering. The confusion analysis must therefore be undertaken with that principle in mind (see *Masterpiece* at para 55). I accept that no distinction between the marks should be drawn based on the style of lettering employed in Pampered Chef's mark. That is, the lettering can be regarded as identical.

[53] However, I disagree with Loblaw that overall the Marks are identical in appearance. As previously noted in connection with the s 19 analysis, the letters in Pampered Chef's mark are not adjacent to each other as they are in the PC Word Mark, and Pampered Chef's mark includes the Happy Spoon design element between the letters.



[54] Loblaw relies on *Seara Alimentos Ltda v Amira Enterprises Inc*, 2019 FCA 63 [*Seara*] at para 36 to support its argument that the addition of simple design elements does not attenuate the degree of resemblance between two marks. In *Seara*, the Federal Court of Appeal took no issue with the conclusion by the Trade Mark Opposition Board [TMOB] that there was a high degree of visual resemblance between the appellant's two word marks and the respondent's word and design mark, notwithstanding the additional design element in the latter. However, I also note the comment by the Federal Court of Appeal that the new evidence introduced by the appellant when before the Federal Court did not particularly focus on the additional design element but rather upon differences in the products and industry segments relevant to the confusion analysis. I regard the conclusion in *Seara* as to the insignificance of the design element to turn on the particular facts of that case.

[55] That interpretation is consistent with the decision in *Domaines Pinnacle Inc v Constellation Brands Inc*, 2016 FCA 302 [*Domaines Pinnacle*], in which the Federal Court of Appeal found to be reasonable the TMOB's conclusions that the visual element of the appellant's word and design mark (employing the word "Pinnacle") and the respondent's word mark "Pinnacles" was sufficiently different, and that confusion was unlikely to occur between them, which conclusions appear to have been based significantly on the distinguishing role of the design element.

[56] In the present case, the parties disagree as to whether it is the letters "P" and "C" or the Happy Spoon that represents the "striking or unique" or "dominant" feature of Pampered Chef's mark. As explained in *Masterpiece* at paras 83-84, while the Court should not tease out or

analyse each portion of a mark alone, as that is not how it is encountered by the consumer, consideration of a trademark as a whole also does not mean that a dominant component of a mark which would affect the overall impression of an average consumer should be ignored. Loblaw submits that the letters “PC”, being the only word or language component of Pampered Chef’s mark, represent the dominant component.

[57] Pampered Chef takes the opposite position. It notes that, while Loblaw argues that its PC Word Mark has significant acquired distinctiveness, Loblaw acknowledges that, as it is composed solely of two letters of the alphabet, the mark is inherently lacking in distinctiveness. The latter conclusion is also supported by case law canvassed in my consideration of distinctiveness later in these Reasons. Therefore, argues Pampered Chef, the more inherently distinctive Happy Spoon represents the more dominant feature. It also notes that the Happy Spoon is the spatially central component of the mark and is somewhat larger in size than the “P” and “C” on either side.

[58] In my view, the arguments of both parties on this particular issue have merit, and it is not necessary to choose definitively between them in order to assess the degree of visual resemblance between the marks. Similar to the assessment by the Registrar in *SK Corp v Safety-Kleen Systems Inc*, 2014 FC 140 [*SK Corp*] of the applicant’s mark “SK” with a butterfly design (explained by the Court at para 41), it may be that there is no dominant feature as between the letters and the design component in Pampered Chef’s mark. However, regardless of whether the Happy Spoon is the most striking feature of the mark, I regard it as a significant feature, because of its prominent placement in the mark. Such prominence, and the fact that it is a design feature

which is absent from the PC Word Mark, reduce the degree of resemblance between the two marks. Similar to the manner in which the degree of visual resemblance was expressed in *Domaines Pinnacle*, I regard “the visual element of the two marks [...] sufficiently different” that the degree of resemblance is not particularly strong.

[59] I turn to the ideas suggested by the marks. Pampered Chef submits that its mark means “Pampered Chef” and that Loblaw’s mark means “President’s Choice”. However, as noted by Loblaw, the required assessment relates to how the consumer will perceive the marks, not to the owner’s intention in choosing the mark (see, e.g., *Responsive Brands Inc v 2248003 Ontario Inc*, 2016 FC 355 at para 49). Particularly in relation to Pampered Chef, where there is little evidence of acquired distinctiveness (as canvassed later in these Reasons) related to the Happy Spoon or the Short Form Marks, there is little basis to conclude that its mark on its own means “Pampered Chef” to a consumer. I prefer Loblaw’s position that the marks of both parties suggest little in the way of ideas other than the letters they employ. However, in my view, this does not mean that the meanings suggested by them are the same but rather that they suggest very little meaning. Therefore, the “ideas suggested” component of the degree of resemblance analysis does not particularly assist either party.

[60] In summary, considering together the three components of the degree of resemblance analysis, the marks are identical in sound but have significantly less resemblance visually, and the ideas suggested by them add little to the analysis. I note Loblaw’s reference to *SK Corp*, where the Court at paragraph 43 rejected the appellant’s argument that similarities in the pronunciation of the marks should not overcome other differences in the confusion analysis. I

accept that the degree of resemblance in sound can be a significant component of the analysis, depending on the overall circumstances of the case. The evidence of Loblaw's advertising employing the PC Word Marks (canvassed in the course of the acquired distinctiveness analysis below) includes substantial spoken word marketing, such that the identical sound is relevant. However, the evidence indicates much more visual use of the marks. As such, I consider this to be the more significant component of the degree of resemblance analysis. Therefore, overall, my conclusion is that Pampered Chef's mark bears some resemblance to the PC Word Mark but that the degree of resemblance is not particularly strong.

[61] Examining briefly the other registered marks at issue in this matter, it is clear that no other two marks bear a greater degree of resemblance than do the two marks analyzed above. Pampered Chef's Short Form Mark which includes the circle design element bears less resemblance to the PC Word Mark than does the Short Form Mark analyzed above, because the circle design element further distinguishes it from the word mark. Similarly, Loblaw's PC Script Mark bears less resemblance to the Short Form Marks than does its PC Word Mark, because the PC Script Mark employs the script design which further distinguishes it from the Short Form Marks.

## (2) Section 6(5)(a) – Inherent and Acquired Distinctiveness

[62] Section 6(5)(a) of the Act references both the inherent distinctiveness of the trademarks and the extent to which they have become known, commonly referred to as acquired distinctiveness. As with the degree of resemblance under s 6(5)(e), it is necessary to consider

separately Loblaw's PC Word Mark and its PC Script Mark, as they have different levels of inherent and acquired distinctiveness.

[63] Loblaw acknowledges that the PC Word Mark does not have inherent distinctiveness because it is composed of two letters of the alphabet. This is consistent with authorities relied upon by Pampered Chef (see, e.g. *BBM* at para 40; *Acklands Ltd v Anamet Inc*, 112 FTR 234 [*Acklands*] at para 14).

[64] The parties' submissions do not focus significantly on the inherent distinctiveness of the PC Script Mark, although Loblaw argues that it has some inherent distinctiveness in that, as explained in the evidence, the stylized "P" and "C" in that mark are intended to represent of the handwriting of Dave Nichol, who was Loblaw's President when the "President's Choice" food brand was launched in 1984. While the principle described in *BBM* and *Acklands* still applies to the PC Script Mark, i.e. its inherent distinctiveness suffers because it is composed of two letters of the alphabet, it is more inherently distinctive than the PC Word Mark, because of its use of the script.

[65] Turning to acquired distinctiveness, Loblaw submits, and I accept, that a mark that is not inherently distinctive may still acquire a high degree of distinctiveness through use in the marketplace, if it is shown that the mark has become known to consumers as originating from one particular source (see, e.g., *United Artists Pictures v Pink Panther Beauty Corp*, [1998] 3 FC 534 (FCA) at para 24; *Julia Wine Inc v Marques Metro*, 2016 FC 738 at paras 34-36). The factors that courts consider in determining whether a mark enables its owner to distinguish its

products or services from those of others include sales, publicity and use (see, e.g., *Kamsut Inc v Jaymei Enterprises Inc*, 2009 FC 627 at para 49; *Cartier Inc v Cartier Optical Ltd/Lunettes Optical Ltée*, (1988), 17 FTR 106 at para 68).

[66] Loblaw introduced at trial a substantial volume of evidence as to its use and publicity of its marks and sales of products and services associated therewith. As with inherent distinctiveness, it is necessary to assess separately the PC Word Mark and PC Script Mark. However, I will canvas the evidence collectively, pointing out necessary differences where applicable. Little of this evidence is challenged by Pampered Chef.

[67] As previously noted, Loblaw introduced the “President’s Choice” brand in 1984. Ms. Grishkewich, Loblaw’s Vice President of control brand marketing, explained that the value proposition associated with the brand was to provide to Canadian consumers something more than national brands in terms of quality or features and to do so at a better price. She described the “President’s Choice” and “PC” brands as, in essence, the same brand, and used by the company interchangeably. While the brand began in the 1980s in relation to food products, over the course of the subsequent 35 years it expanded into a wide range of products and services, including approximately [REDACTED] different food products, approximately [REDACTED] kitchenware products, houseware products, pet products, floral and garden products, and baby products. The “PC” brand is also used in conjunction with a cooking school, a reward incentive program, banking, online shopping, and a charity.

[68] Delving into that evidence with somewhat more granularity, while Loblaw uses both its President's Choice Mark and PC Marks on its [REDACTED] different food products, it is agreed that at least [REDACTED] food products feature only the PC Script Mark and not the President's Choice Mark. The evidence includes a Brief of Photographs of PC Products, which demonstrates use of the PC Script Mark and, in some but fewer cases, use of the PC Word Mark on product packaging.

[69] Ms. Grishkewich testified as to sub-brands or product lines that have been developed by Loblaw over the years, which all feature the PC Script Mark on the front of the packaging and, in some cases, the PC Word Mark. In relation to the PC Organics line, introduced in 2001 and now including approximately [REDACTED] products, she stated that most often the PC Word Mark appears on the packaging. She provided the same testimony with respect to the PC Splendido line of products sourced from Italian vendors. In relation to the PC Blue Menu line, introduced in 2005 and now consisting of approximately [REDACTED] different products intended to represent healthier food choices, she testified that it is typical for the PC Word Mark to appear on packaging. The PC Free From line was introduced in 2007, currently including approximately [REDACTED] items consisting of meat products raised without the use of antibiotics or hormones. Ms. Grishkewich testified that the best practice is to include the PC Word Mark on product packaging for that line. With respect to PC Black Label, a line of more premium or artisanal products introduced in 2011 and featuring approximately [REDACTED] items, Ms. Grishkewich explained that its packaging features only the PC Script Design and not the President's Choice Mark. She provided no evidence with respect to the PC Word Mark appearing on those products.

[70] Ms. Grishkewich also testified that the PC Word Mark appears on shelf labels below each PC product in every Loblaw retail banner. In larger format stores that carry a wide assortment of products, that would represent thousands of shelf labels. There are 2400 stores nationwide.

[71] The evidence surrounding use of Loblaw's marks on kitchenware products was provided principally by Mr. Rooza. The evidence at trial includes a Brief of Insider's Reports. The Insider's Report is a marketing publication employed by Loblaw between 1983 and 2015. It is agreed that products shown in the Insider's Reports reflect products for sale at the time of publication of the report. This evidence demonstrates that Loblaw has sold kitchenware products since the 1980s and shows use of both the PC Script Mark and the PC Word Mark. Mr. Rooza testified that Loblaw currently sells close to [REDACTED] kitchenware products, and it is agreed that these products bear either the President's Choice Mark or the PC Script Mark. Mr. Rooza explained that the PC Script Mark is typically employed on the kitchenware products and on a lot of their packaging, sometimes "floating," sometimes in a square, and commonly in a circle. The PC Script Mark in a circle has been employed on product packaging since 2001 or 2002.

[72] Mr. Rooza testified that the PC Word Mark also appears on some of the products, in particular on the product tags of appliances, but he could not quantify how many products bear this mark. He stated that many times the PC Word Mark appears on the side or back of packaging. Again, this was not quantified, although Loblaw introduced into evidence a Brief of Photographs of Kitchenware Products, which shows examples of this use of the PC Word Mark. As with Loblaw's food products, the PC Word Mark also appears on shelf labels associated with



the kitchenware products on store shelves. Mr. Rooza testified that over 1900 of Loblaw's stores carry kitchenware products.

[73] As additional evidence of use of the PC Marks, Loblaw introduced a Brief of Signage, which demonstrates the use of in-store signage to advertise products. The photographs in this exhibit show many examples of use of the PC Script Mark and, to a lesser extent, use of the PC Word Mark.

[74] Loblaw also introduced evidence demonstrating use of the "PC" brand in relation to various categories of services. PC Financial offers a PC MasterCard credit card. Loblaw introduced a line of services using the PC Script Mark under the PC Financial brand in 1998. The evidence at trial includes a Brief of Flyers, which provides examples of advertising and therefore use of the PC Script Mark and PC Word Mark in connection with these services. Loblaw has also operated a series of loyalty programs (PC Points, PC Plus, and PC Optimum) with which the PC Word Mark is used. It operates a PC Cooking School in various retail banners, which Ms. Grishkewich testified has [REDACTED] customers each year and teaches more people to cook in Canada than anyone else. The Brief of Flyers demonstrates that both the PC Script Mark and the PC Word Mark are used in the advertising and performance of this service. Ms. Grishkewich stated that the PC Word Mark is used frequently to promote classes and sign up customers.

[75] In 2005, Loblaw introduced PC Insurance, offering home and auto insurance, which Ms. Grishkewich testified is frequently advertised using the PC Word Mark. PC Travel was introduced in 2015 to offer travel products and services to Canadians online. It is operated under

PC Financial, and both the PC Word Mark and the PC Script Mark are used in the advertising and performance of the service. Loblaw operates a member-based subscription service called PC Insiders, providing extra benefits to those who subscribe. Both the PC Word Mark and PC Script Mark are used in the advertising and performance of this service. Loblaw also operates an online e-commerce grocery pickup and delivery service under the brand PC Express, which currently has approximately [REDACTED] customers. It is agreed that Loblaw's online grocery sales totalled over [REDACTED] in 2018 and almost [REDACTED] in 2017.

[76] In connection with publicity, Loblaw spent approximately [REDACTED] in advertising relating to the "PC" and "President's Choice" brands from 2015 to 2018, not including in-store flyers. This advertising included the Insider's Reports, of which [REDACTED] physical copies were distributed each year between 1983 and 2015. As previously noted, the copies of the Insider's Reports introduced in evidence show use of both the PC Script Mark and the PC Word Mark in connection with Loblaw's products, including kitchenware products. This includes the PC Home line of products, introduced in 2002, which Mr. Rooza explained created a unified collection of houseware products which encompassed kitchenware as well as products for other rooms of the house.

[77] Loblaw also advertises its products and services on billboards. It is agreed that, in 2017, Loblaw's advertising of the PC Script Mark and the President's Choice Mark on billboards generated over [REDACTED] impressions and that, approximately [REDACTED] of the time, such advertisements contained only the PC Script Mark, not the President's Choice Mark. Loblaw distributes weekly flyers across its various retail banners, both in store and via home

delivery, totaling over [REDACTED] flyers each year from 2015 to 2018. Ms. Grishkewich testified that it is very common for the flyers to use the PC Word Marks which Loblaw submits, and I agree, is evidenced in the Brief of Flyers.

[78] Loblaw also uses both the PC Script Mark and the PC Word Mark in radio and television commercials. Its budget for radio is typically between [REDACTED] and [REDACTED] per year, and it usually spends [REDACTED] annually on television ads. As confirmed by Ms. Grishkewich, “PC” is stated orally in such ads.

[79] In connection with digital marketing, Loblaw advertises its products on the websites of its many retail banners including pc.ca. Ms. Grishkewich testified that, while both the PC Marks and the President’s Choice Marks are used, the best practice is to use the PC Marks. She also stated that the PC Word Mark is frequently used. Loblaw has been advertising PC Home products online since 2005 and has been selling PC kitchenware products online since 2014. The annual web traffic to the kitchenware sections of its retail banners has increased each year. Approximately [REDACTED] people visit the pc.ca website each year. Loblaw promotes its products and services on social media, including employing a range of hashtags, at least [REDACTED] of which would have “PC” in them. It also uses other forms of digital marketing, such as ads on YouTube, and search engine marketing.

[80] Loblaw also employs a public relations strategy, engaging with “influencers”, such as media personalities or online influencers, to have that individual talk or write about its brand and

products, generating [REDACTED] of impressions each year. The PC Word Mark is used most often, but it depends on the medium involved, which may result in use of the PC Script Mark.

[81] Finally, turning to sales, Loblaw's sales were [REDACTED] in kitchenware and [REDACTED] in food in 2016, [REDACTED] in kitchenware and [REDACTED] in food in 2017, and [REDACTED] in kitchenware and [REDACTED] in food in 2018. The food sales figures relate to all "PC" and "President's Choice" products. Focusing upon the [REDACTED] food products that bear only the PC Script Mark, not the President's Choice Mark, the sales have been over [REDACTED] each year since 2016. Loblaw also has further sales in the [REDACTED] of dollars for other PC-branded products and services, such as housewares, baby products, pet food and supplies and its cooking school.

[82] It is clear based on this evidence that the PC Script Mark has a very high level of acquired distinctiveness. Loblaw describes this mark as famous and, judged by the use, publicity, and sales, this is an apt characterization. Based on the evidence canvassed above, the levels of use, publicity and sales in connection with the PC Word Mark are less than that of the PC Script Mark, particularly in connection with the kitchenware products, and the precise difference is difficult to quantify. I nevertheless accept that the evidence supports a conclusion that the PC Word Mark has significant acquired distinctiveness, although somewhat less than that of the PC Script Mark.

[83] There is substantially less evidence surrounding the acquired distinctiveness of Pampered Chef's marks. This is perhaps not surprising, given that the Short Form Marks and other marks

employing the Happy Spoon device were developed through a relatively recent rebranding exercise commenced in 2015. Pampered Chef began selling rebranded products in 2016. While the number of products bearing the Short Form Marks has been growing each year since then, they still represent only a portion of Pampered Chef's product line. The evidence is that [REDACTED]. [REDACTED], representing [REDACTED] orders, since launching its new branding, the evidence is that [REDACTED]. This represents sale of approximately [REDACTED] products. (The evidence for the sale of products bearing the Short Form Marks is expressed in terms of number of products sold, rather than number of orders placed.)

[84] These figures are obviously orders of magnitude lower than those related to Loblaw's sales. Indeed, Pampered Chef's submissions do not particularly focus on establishing acquired distinctiveness on the part of its Short Form Marks. The sales figures are sufficient to support a conclusion that these marks will have some developed some level of acquired distinctiveness in the approximately three years that they have been in use. It could also be concluded that the use of the Happy Spoon device in the marks confers upon them some level of inherent distinctiveness. However, when compared with the level of distinctiveness that the PC Marks have acquired, it is clear that the s 6(5)(a) factor strongly favours Loblaw, somewhat less so in connection with Loblaw's PC Word Mark than its PC Script Mark, but still strongly.

### (3) Section 6(5)(b) - Length of Time the Trademarks Have Been in Use

[85] The facts surrounding this factor are not controversial. As previously noted, Loblaw has used its PC Marks in association with food and kitchenware products since the 1980s, and

Pampered Chef has been using its Short Form Marks only since 2016, with the number of products so branded escalating each year since then. This factor strongly favours Loblaw.

(4) Section 6(5)(c) - Nature of the Goods, Services or Business

[86] Loblaw submits that the parties sell highly similar kitchenware goods, with no particular distinction as to look or style. It refers to efforts by Pampered Chef to distinguish its goods as being of better quality or higher price than those of Loblaw. However, in its written and oral closing submissions, Pampered Chef focused very little upon this factor. There was minimal evidence at trial surrounding the quality of the products of either party and, in my view, there is no basis to distinguish their goods based on quality. Similarly, while I accept that the pricing of some of Pampered Chef's goods reaches higher levels into the hundreds of dollars, Ms. Kabat confirmed in cross-examination that [REDACTED]. Loblaw also notes [REDACTED].

[87] The similarity of the goods sold by the parties favours Loblaw. As Loblaw notes, this can be an important consideration in determining whether confusion is likely to result (see *Reynolds Presto Products Inc v PRS Mediterranean Ltd*, 2013 FCA 119 at paras 26-29; *Precision Door & Gate Service Ltd v Precision Holdings of Brevard Inc*, 2012 FC 496 [*Precision*] at para 34).

[88] In connection with s 6(5)(c), presumably in recognition that this factor includes the nature of the "business," Loblaw also makes submissions related to the similarity in the parties' customers. There was considerable controversy on this point at trial. Ms. Grishkewich testified that Loblaw's target audience is [REDACTED], more specifically, [REDACTED]. With respect to kitchenware, Mr. Rooza referred to Loblaw's target customer as [REDACTED]. To similar

effect, the discovery evidence of Jane Miller (Director, Field Success Leader for The Pampered Chef, Ltd.), introduced by Loblaw under Rule 288, is that, [REDACTED]. At trial, each of the parties made frequent reference to a document entitled [REDACTED]. Thus far, there is little divergence in the parties' respective customer bases.

[89] However, Pampered Chef emphasizes that [REDACTED]:

[REDACTED]

[90] Pampered Chef therefore seeks to distinguish its customers from those of Loblaw, [REDACTED] and based on what the parties referred to as psychographic factors, [REDACTED]. While I appreciate that [REDACTED] demonstrates these differences between the parties' respective "target" customers, by definition the target markets are aspirational and do not necessarily reflect the actual customer base. [REDACTED], as it of course sells to anyone who is willing to buy. Indeed, the results of a survey of its customers conducted by Pampered Chef, upon which Ms. Kabat was questioned in cross-examination, describes [REDACTED].

[91] Ms. Kabat also confirmed in cross-examination that neither Pampered Chef nor its ICs conducts any screening of potential customers to identify or include only those of a particular income level or those who like direct sales parties. I appreciate that, as argued by Pampered Chef's counsel, there may be some self-selection on the part of its customers, in that those who enjoy direct sales parties may be more likely to attend a Pampered Chef event. However, in my view, the evidence does not support a conclusion that there are material differences in the customer bases of the two parties.

[92] As such, all considerations to be taken into account under s 6(5)(c) of the Act favour Loblaw.

(5) Section 6(5)(d) - Nature of the Trade

[93] Both parties devoted considerable attention to this factor at trial. At its simplest, Pampered Chef's position is that the parties' channels of trade are different, in that Loblaw sells its goods through a traditional retail model, principally through bricks and mortar stores, while Pampered Chef sells principally through a direct selling/multilevel marketing model, employing Independent Consultants as its sales force. In response, Loblaw notes in part that the s 6(5)(d) factor is "nature of the trade," of which the channel of trade is only a component, and argues that the nature of the trade of the parties is similar if both target the same consumers (see *Precision* at para 34). However, the similarities in the customer bases have already been taken into account in my analysis of Loblaw's argument under s 6(5)(c) above.

[94] As an initial point, Loblaw argues that there is some overlap in the parties' channels of trade, in that there is evidence of both selling its products through booths at public events such as trade shows and fall fairs. Loblaw notes Ms. Kabat's evidence that, while Pampered Chef does not track this information and believes its ICs attend such events relatively infrequently, they occur perhaps a couple of dozen times per year. Loblaw refers to both it (promoting its PC Blue Menu line) and Pampered Chef having a booth at the National Women's Show in 2017. However, Ms. Kabat also testified that Pampered Chef's principal goal when it attends such events is the recruitment of ICs, not the sale of its products. In my view, the evidence indicates



that trade shows and fall fairs are sufficiently immaterial to both companies' business that their occasional participation in such events is immaterial to the confusion analysis.

[95] Loblaw's principal argument in response to Pampered Chef's position is that the differences in the channels of trade upon which Pampered Chef relies are more theoretical than real, as both parties sell their product over the internet and the majority of Pampered Chef's business is now conducted online through its ICs' activity in social media, rather than through traditional in-home sales parties.

[96] Loblaw notes that both it and Pampered Chef sell their products through their respective websites. Approximately [REDACTED] of the [REDACTED] Pampered Chef products displaying the Short Form Marks that have been sold since its rebranding were sold through its website without the involvement of a Pampered Chef IC. If one were to consider instead the [REDACTED] orders representing the overall sales by Pampered Chef since its rebranding, i.e. sales that include products that are not branded with the Short Form Marks, [REDACTED] of the orders were sold through its website. Loblaw's online grocery business generated revenue of approximately [REDACTED] in 2017 and, between January and November of 2018, approximately [REDACTED]. While this may not be a perfect "apples to apples" comparison, these figures appear to represent just under [REDACTED] of Loblaw's overall food sales of products branded as "President's Choice" or "PC" in comparable periods.

[97] For each of the parties, these figures represent [REDACTED]. However, Pampered Chef also emphasizes a difference in the manner in which each party uses its website. In relation to

Pampered Chef's Canadian website, Ms. Kabat explained that there are two key parts. One part, called Consultants Corner, is consultant-facing, accessible only following a secure login, and provides the ICs with product information, branding materials, and other information to facilitate the running of their businesses. The other part is public, accessible by a customer or potential consultant, and provides information about Pampered Chef's products, parties, and the business opportunity it provides. However, I understand from the testimony of Ms. Kabat and Ms. Hoppe that, as will be explained in more detail below, most of Pampered Chef's online sales are placed through the individual websites of its ICs, not through its corporate website. Pampered Chef's counsel describes the sales function of the corporate website as intended for its "super customers", i.e. customers already familiar with Pampered Chef and its products who access the website to place orders.

[98] This explanation is consistent with Dr. Hassay's evidence. His report provided background on the direct sales channel and how it differs from mass merchandising, including differences as to how websites are used. Loblaw noted a pre-trial objection in relation to this portion of Dr. Hassay's report, on the basis that this evidence was beyond the scope of a responding report. However, he explained at trial that this background formed the foundation to his opinions in relation to the reports of Loblaw's experts, Dr. Chakrapani and Prof. Wong. I accept this characterization and, given that (as explained later in these Reasons) I have declined to exclude Dr. Chakrapani's report as requested by Pampered Chef, I also take Dr. Hassay's evidence into account. He explains that mass merchandisers use websites focused on e-commerce to drive sales, while direct sellers use their websites to recruit and educate their sales

force, engage their high involvement customers and, to a lesser extent, sell products to their loyal customers.

[99] Pampered Chef therefore takes the position that the mere fact that a portion of each party's sales is made through its website does not represent an overlap in its channels of trade, particularly as a consumer will be aware which company's website it is visiting. This argument is supported by the submission that the sales function of the Pampered Chef corporate website is directed at the "super customer," who will be aware that he or she is visiting a Pampered Chef website and is unlikely to be confused, when encountering a Short Form Mark on the website, into thinking that the product with which the mark is associated is a Loblaw product.

[100] Moreover, independent of the "super customer" argument, Pampered Chef submits that the branding on its website so clearly identifies it as the site of Pampered Chef that any customer visiting the site will understand that that products associated with the Short Form Mark shown on the site are those of Pampered Chef. In other words, a customer seeing the "P" and the "C" on the website will realize that these are the initials of Pampered Chef and will not be confused.

[101] I consider this argument to be compelling. The landing page for the website, and several other pages including the landing page for the "Shop" portion of the website, were introduced into evidence at trial, All these webpages display Pampered Chef's Long Form Mark in the upper left-hand corner of the page, on a banner which remains when one moves from page to page. Some of the webpages display photographs of particular products which bear the Short Form Mark, but always with the Long Form Mark shown as described above. In my view, the display

of the Long Form Mark is sufficiently prominent that it would be apparent to any customer visiting the website that it is operated by Pampered Chef. I therefore agree with Pampered Chef's argument that, with the context represented by the Long Form Mark on the same page, employing the Happy Spoon as does the Short Form Mark, the customer is likely to associate the latter with Pampered Chef and is therefore unlikely to be confused into thinking that the relevant product is that of Loblaw.

[102] The analysis is similar to the conclusion by Justice O'Reilly in *A&W Food Services of Canada Inc v McDonald's Restaurants of Canada Limited*, 2005 FC 406 [A&W] at paras 81-82, when taking into account the nature of the trade in considering the likelihood of confusion between A&W's "Chicken Grill" sandwich and McDonald's "Chicken McGrill." Justice O'Reilly held that it was very unlikely that a person who purchased a "Chicken Grill" at A&W would think that the product came from McDonald's, notwithstanding the similarities in the names. This conclusion is premised on the fact that the fast food customer knows that he or she is at an A&W when making the purchase. Applying the analysis to the online space, it is apparent to me that a customer visiting the Pampered Chef website would be aware that he or she is on Pampered Chef's site and would be unlikely to encounter confusion.

[103] However, as previously noted, sale through its corporate website represents only a relatively small portion of Pampered Chef's sales. Its sales are effected principally through the efforts of its IC salesforce. A great deal of the evidence and argument at trial surrounded the use by Pampered Chef and its ICs of social media to attract customers and effect sales. The thrust of Loblaw's argument surrounding this sales channel is that that the manner in which the ICs in

particular use or can use social media is such that the customer first encountering Pampered Chef's Short Form Mark will not necessarily have previously or simultaneously seen Pampered Chef's name or the Long Form Mark which includes the name.

[104] In considering this argument, I note as an initial point Pampered Chef's position that, whether conducting business in-person or online, its use of its IC sales force in a direct selling/multi-level marketing model represents a channel of trade that is not employed by Loblaw. In the Defendants' Agreed Statements of Facts, Loblaw has agreed that it does not sell its products through direct sales channels, multilevel marketing, catalogues, or independent consultants. Nor does it currently plan to sell its products through direct sales channels or multilevel marketing. While there was evidence at trial as to Loblaw's use of various social media platforms to market its products, this is performed through corporate social media accounts (and there was limited reference to the use of online "influencers"), not through the social media activity of individual independent direct sellers. Pampered Chef notes that the assessment of likelihood of confusion should take into account actual channels of trade, not possible future channels which there is no business plan to pursue (see *Alticor Inc v Nutravite Pharmaceuticals Inc*, 2004 FC 235 [*Alticor*] at para 43 and 45, aff'd 2005 FCA 269).

[105] I agree that this is a significant factor in the confusion analysis in the case at hand. In *Alticor*, in addition to making the point that speculative future channels of trade should not be considered, Justice Snider treated the nature of the trade as one of the primary factors contributing to her conclusion that there was no likelihood of confusion between the defendant's mark NUTRAVITE and the plaintiff's mark NUTRALITE. In that case, the goods sold by the

parties in association with those marks were largely identical, but the plaintiff sold only through a multilevel marketing program and the defendant sold only through third party retail outlets as well as its own website. While the plaintiff sold its products online through its independent sales force (analogous to Pampered Chef's ICs), Justice Snider explained at paragraph 44 that these online sales were an extension of the multi-level marketing program. Analyzing the effect of the parties' different channels of trade at paragraphs 43 to 46, Justice Snider concluded that the possibility of confusion was remote. The hypothetical customers of the plaintiff's products would be aware of how to buy the products and would not expect them to be available through the defendant's distinct sales channels.

[106] There are some distinguishing factors between *Alticor* and the case at hand, including in particular the fact that the Court did not find the plaintiff's mark to have either inherent or acquired distinctiveness. Also, the parties' respective channels of trade in *Alticor* were the reverse of those in the case at hand, i.e. it was the plaintiff which was the direct seller. It could be argued that Justice Snider's analysis, to the effect that customers with awareness of the plaintiff's mark would also be aware that its product are only available through a direct sales force, is not quite as compelling when applied in the other direction, i.e. in considering the sales channel awareness of customers of a traditional retailer.

[107] In that respect, I have considered Loblaw's reliance on authorities to the effect that, if the senior mark is well known in Canada, a distinction in the nature of the trade become less important (see, e.g., *Maple Leaf Gardens Ltd v Leaf Confections Ltd*, [1999] FCJ No 1321 at para 30), which Loblaw couples with an argument that its customers do not necessarily realize

that the “President’s Choice” and “PC” brands are proprietary brands available only at stores owned and operated by Loblaw. Ms. Grishkewich testified to this belief on the part of Loblaw, attributable to the fact that its products are sold across its large number of retail banners, which are themselves distinctly marketed. Ms. Grishkewich testified that Loblaw’s customers may believe that “President’s Choice” and “PC” are national brands available everywhere. Her testimony was supported by a survey, described as “store matching data question,” which Ms. Grishkewich explained demonstrates that, while people understand they can purchase “President’s Choice” products in Loblaw’s stores, [REDACTED].

[108] However, I do not regard this evidence as supporting a conclusion that customers may believe that “President’s Choice” or “PC” products are available through a direct sales or multi-level marketing channels. Loblaw sells through a traditional retail sales channel, albeit through a number of different banners, and the survey evidence to which Ms. Grishkewich refers all relates to [REDACTED]. Overall, I consider the trade channel analysis in *Alticor* to be applicable to the present case and to be a compelling factor, strongly favouring Pampered Chef.

[109] Pampered Chef advances the additional argument that, even in context of sales ultimately resulting from ICs’ social media activity, the use of Pampered Chef’s name and Long Form Logo is sufficiently prevalent that customers will understand that products associated with the Short Form Mark are those of Pampered Chef. I understand the evidence to be that each IC operates a website with formatting similar to the sales portion of Pampered Chef’s corporate website, i.e. displaying the Long Form Logo in a banner at the top of each web page. It is on those IC websites that the sales transactions take place. However, Loblaw’s argument focuses principally

on the ICs' use of social media platforms, principally Facebook but to a lesser extent Instagram and Twitter, as a means of marketing Pampered Chef's product.

[110] Loblaw adduced evidence at trial to support its position that a significant portion of Pampered Chef's sales result from some initial form of social media activity, as opposed to traditional at-home parties. The evidence is that [REDACTED]. Similarly, [REDACTED]. However, Ms. Kabat explained that [REDACTED].

[111] If one were to consider instead the 95,000 orders representing overall sales by Pampered Chef since its rebranding, i.e. sales that include products that are not branded with the Short Form Marks, approximately 25% were purchased as a result of in-home kitchen parties, 22% were purchased as a result of catalogue parties, and 10% were as a result of a virtual party. Given the evidence that the figure for catalogue parties includes both in-home and virtual, it appears that somewhere between 10% and 32% of the 95,000 orders resulted from some form of virtual event conducted by an IC through the Facebook platform.

[112] In fact, in absolute numbers of events, Ms. Kabat confirmed in cross-examination that [REDACTED]. In answering questions surrounding Pampered Chef's [REDACTED], Ms. Hoppe confirmed that [REDACTED] which she explained refers to [REDACTED].

[REDACTED]. Regardless of which of the above sets of figures one takes into account, I accept that the evidence supports Loblaw's position that [REDACTED]. This is consistent with Ms. Hoppe's testimony, surrounding Pampered Chef's marketing plans, that [REDACTED].



[113] Pampered Chef adduced evidence as to the policies governing its ICs' activities, on social media and otherwise, intended to establish that the manner in which those activities are conducted will result in customers knowing that they are interacting with a Pampered Chef IC. Its Consultant Policy Guide [Policy Guide], in a section entitled "Marketing, Advertising and Publicity Policies," refers to the importance that ICs know how to appropriately represent themselves and the proper ways to use Pampered Chef's logos and trademarks. In relation to identification, the Policy Guide reads as follows:

[REDACTED]

[114] Pampered Chef relies on this requirement not only in connection with ICs' online activities but also in connection with how it approaches in-home parties, where Ms. Kabat testified, albeit based on limited personal experience, that the practice is for the IC to introduce himself or herself at the beginning of the party as an IC for Pampered Chef.

[115] The Policy Guide also provides rules for use of Pampered Chef logos, which Ms. Kabat explained referred to logos intended to be used with an IC's name or signature. The logos set out in this portion of the Policy Guide employ either the Short Form Mark or the Long Form Mark, and the rules states that the IC must use his or her name and proper title as set out earlier in the Policy Guide (e.g., Independent Consultant for Pampered Chef) at all times when promoting his or her business.

[116] In connection specifically with the conduct of business online, the Policy Guide includes various prohibitions and prescriptions, including stating that ICs may only send bulk emails,

newsletters or other standardized communications promoting Pampered Chef or its products to subscribers who have opted in or requested to receive communications from the IC. In relation to groups or group pages on social media sites, the Policy Guide states that, if the IC creates a consultant group on a social networking site that is primarily dedicated to the IC's Pampered Chef business, the IC must privatize the group. While there was no evidence at trial interpreting this latter provision, I read it as related to groups of consultants, as opposed to a group that a consultant would set up for customers to join. However, I accept that the evidence at trial, provided principally by Ms. Kabat, speaking to a training video for ICs, was that the practice is for virtual parties to be set up as private Facebook groups.

[117] In response to Pampered Chef's reliance on these policies and practices, Loblaw introduced evidence of instances where they have not been followed. For example, there was considerable attention at trial to a virtual party named "Lise's Virtual PC Party." This was one of several pages of virtual parties on a printout from a Facebook search, shown to Ms. Kabat in cross-examination, at least some of which she agreed were public parties that anyone could join. Ms. Kabat agreed that Lise's Virtual PC Party was a public Facebook group. Loblaw's counsel also identified through cross-examination of Ms. Kabat certain pages from a printout of Lise's Virtual PC Party which showed Facebook posts of images displaying the Short Form Logo, in some cases in association with Pampered Chef products, without the Long Form Logo or the Pampered Chef name appearing on the same page. The Pampered Chef name does appear in other posts, including in the initial post where the IC appears to have created the Facebook group. However, Loblaw's counsel elicited from Ms. Kabat the acknowledgment that the Facebook algorithm operates in a manner such that not everyone will see all the posts.

[118] Although Ms. Kabat noted that Lise's Virtual PC Party appeared to relate to an American IC, she also identified in cross-examination a printout from the Facebook page of a Canadian consultant described as "PC Lynne Anne." Again, Ms. Kabat confirmed that the Facebook page is public and identified a post within the page that shows the Short Form Logo and certain Pampered Chef Products, without the Long Form Logo or Pampered Chef's name appearing in the same post. The Long Form Logo or Pampered Chef's name does appear in various other posts.

[119] Loblaw submits that, while Pampered Chef has policies that it claims are intended to regulate its ICs' social media activities, those policies are not monitored or enforced. Loblaw points to the examples of Facebook groups that are public rather than private and to evidence demonstrating that several ICs use online names or virtual party names which include the letters "PC". Examples include "PC Lynne Anne" and "Lise's Virtual PC Party" as referenced above. In cross-examination, Loblaw's counsel referred Ms. Kabat to a section of the Policy Guide which prohibits ICs from using Pampered Chef's name or any of its trademarks as part of an email address, domain name or profile on social media. As reflected in the transcript of Ms. Miller's discovery examination, during that discovery Pampered Chef's counsel confirmed the company's position to be that [REDACTED].

[120] Loblaw takes the position that Pampered Chef has admitted to very little enforcement of its policies, that the only enforcement reflected in the evidence was following Loblaw's identification of violations over the course of this litigation, and that even then the enforcement was minimal. In connection with the fact that some of the evidence relied on by Loblaw related

to American consultants, it submits that the policies and enforcement practices are the same in both the United States and Canada.

[121] Pampered Chef's principal position on the evidence and arguments advanced by Loblaw, related to the ICs' social media activity, is that such evidence and arguments do not result in Loblaw meeting its burden to demonstrate a likelihood of confusion. However, during closing submissions, Pampered Chef also raised two technical points which it considers to prevent Loblaw from relying on the ICs' social media activities and its position that Pampered Chef does not enforce the ICs' compliance with the Policy Guide.

[122] First, Pampered Chef submits that Loblaw has not pleaded vicarious liability on the part of Pampered Chef for activities of its ICs conducted in violation of the Policy Guide. Pampered Chef argues that, in order to advance such an allegation, Loblaw was at a minimum required to identify in its pleadings the group of individuals whose activities give rise to vicarious liability (see *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 38; *Hud v Canada (Attorney General)*, 2014 FC 1090 at para 38) and to plead that Pampered Chef is liable for those activities through a legal theory such as vicarious liability, reckless disregard or non-enforcement.

[123] In response to this argument, Loblaw recognizes that it has not pleaded vicarious liability and submits that its position does not rely on such a theory. Rather, it asserts that Pampered Chef has furnished its ICs with the marketing material that they use in their social media activity, including images which show Pampered Chef products in combination with the Short Form

Marks, and that the company's overall business model intends and facilitates the ICs acting as they do.

[124] As this issue arose only in the course of closing submissions, and the parties provided minimal argument and briefing on the legal principles surrounding theories of liability for the activities of third parties and related pleading requirements, I am reluctant to speak definitively to this issue if not required to do so. I do have difficulty with Loblaw's position that its arguments do not engage such an issue, when it is expressly relying on arguments that Pampered Chef's ICs are not complying with the company's policies and that the company's monitoring and enforcement of such policies are inadequate. However, I appreciate that, as explained by Loblaw's counsel in his oral closing, Loblaw's arguments do not turn solely on such non-compliance. Loblaw submits that, even with the rules imposed by Pampered Chef respected, there is still potential that customers who accept an invitation to join a Facebook group that represents a virtual party may not know that he or she is in a Pampered Chef environment.

[125] For instance, even if the IC who creates a virtual party introduces himself or herself at the outset as an IC for Pampered Chef, Loblaw submits that the operation of the Facebook algorithm is such that each person who accepts the invitation to join the group does not necessarily see all the posts in the group and therefore does not necessarily see that introduction. As an initial point on this argument, I note that Pampered Chef takes issue with the Court's reliance on Ms. Kabat's evidence as to how the Facebook algorithm works, because she has not been qualified as an expert in this area. In my view, the particular evidence Ms. Kabat provided on this issue is admissible and can be given some weight. She is the senior Pampered Chef representative in

Canada, her role includes [REDACTED], and it is clear that [REDACTED]. While Ms. Kabat did not profess to be an expert in the operation of Facebook, she appeared certain in providing her evidence that the operation of the Facebook algorithm is such that not every member of a Facebook group or follower of a Facebook user sees every post by that group or user. This evidence is based on her experience in an area germane to her responsibilities, and I am content to rely on that testimony.

[126] However, I do not consider Ms. Kabat's evidence to provide sufficient detail surrounding the operation of the Facebook algorithm to support the particular point advanced by Loblaw as explained above. If the IC's initial introduction includes a reference to being an IC for Pampered Chef in compliance with the Policy Guide, for instance in the invitation to join a Facebook group for purposes of a virtual party, it is not clear to me that those who accept the invitation and join that group would not necessarily see the invitation and initial introduction.

[127] On the subject of invitations, Loblaw also submits that, while the evidence includes an example of an invitation to a virtual party with accompanying text that refers to "Pampered Chef," the evidence is that ICs are at liberty to make changes to that text or to use other text. However, Ms. Hoppe's evidence was that, in her experience, ICs would almost always use the text provided.

[128] Even if I were to consider the evidence of ICs failing to comply with the Policy Guide, in my view much of it is not particularly material. Loblaw focused significantly on Pampered Chef's failure to enforce its rules prohibiting its ICs from using Pampered Chef's name or any of

its trademarks as part of an email address, domain name or profile on social media. However, Loblaw acknowledges that employing the letters “PC” in ICs’ social media profiles or groups (e.g. “PC Lynne Anne”, “Lise’s Virtual PC Party”, and “Brooke PC Szczepanski”) does not represent use of the Short Form Marks which are the subject of its infringement action. At most, this represents part of the surrounding circumstances to be taken into account in the confusion assessment. The same analysis applies to evidence at trial that Pampered Chef has used some hash tags (i.e. social media conversation aggregators) that include the letters “PC”.

[129] The Facebook posts which show Pampered Chef’s products in combination with its Short Form Marks, on public groups in apparent contravention of the practice prescribed by the company to make such groups private, are potentially more material, because they do display the marks that are the subject of this action. It is at this stage that the second technical point raised by Pampered Chef in its closing submissions becomes germane. Pampered Chef submits that, because the Facebook posts do not occur at the point of sale, they represent advertising of Pampered Chef’s goods, and advertising, in connection with goods as opposed to services, does not represent “use” of a trademark for purpose of the Act. Pampered Chef argues that, as such advertising does not represent “use” of the mark, it cannot represent infringement under s 20(1)(a) of the Act, or for that matter the basis of a claim under s 7(b) or s 22.

[130] This argument turns on the definition of “use” provided as follows in s 4 of the Act:

**When deemed to be used**

4 (1) A trade-mark is deemed to be used in association with

**Quand une marque de commerce est réputée employée**

4 (1) Une marque de commerce est réputée

goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces produits, dans la pratique normale du commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu'avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.

### **Idem**

(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.

### **Idem**

(2) Une marque de commerce est réputée employée en liaison avec des services si elle est employée ou montrée dans l'exécution ou l'annonce de ces services.

[131] The parties agree that the effect of s 4 is that, while advertising of a service with a mark can represent use of the mark, advertising of goods with a mark does not so qualify. Rather, to represent use in association with goods, the mark must be on the goods themselves or their packages or otherwise associated with the goods at the time property or possession is transferred, often referred to as the point of sale. Where the parties disagree is surrounding the import of this principle in the context of an infringement allegation under s 20(1)(a) of the Act, which it will be recalled reads as follows:

### **Infringement**

**20 (1)** The right of the owner of a registered trade-mark to its exclusive use is deemed to be infringed by any person who is

### **Violation**

**20 (1)** Le droit du propriétaire d'une marque de commerce déposée à l'emploi exclusif de cette dernière est réputé être



not entitled to its use under this Act and who	violé par une personne qui est non admise à l'employer selon la présente loi et qui :
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(a) sells, distributes or advertises any goods or services in association with a confusing trade-mark or trade-name;

a) soit vend, distribue ou annonce des produits ou services en liaison avec une marque de commerce ou un nom commercial créant de la confusion;

[132] Pampered Chef relies on Justice Teitelbaum's decision in *Cie Générale des Établissements Michelin – Michelin & Cie v CAW – Canada*, [1997] 2 FC 306 (FC, TD) [*Michelin*], to the effect that infringement under s 20(1)(a) requires that the trademark be “used” within the meaning of s 4 of the Act. In response, Loblaw points out that the language of paragraph (a) of s 20(1) expressly refers to advertising goods or services as representing infringement. However, I read paragraph 29 of *Michelin* as having considered and rejected this argument.

[133] Loblaw also asserts that, provided there is some context of “use” for purposes of s 4, infringement can be found where the advertising of goods represents a consumer's first encounter with a mark, even if the role of the mark when first encountered does not itself represent use of the goods. In that respect, I understand Loblaw to be attempting to distinguish *Michelin* to some extent, as that was a case where there was no use of the mark at all, while in the present case it is clear that Pampered Chef is using its Short Form Marks within the meaning of s 4, even if employing the marks in advertising on social media is not itself such use. I should note that I do not understand Loblaw to be arguing that such social media use represents “use” for purposes of s 4, and I believe the evidence is clear that customers' purchase of the goods does

not take place on the social media platform but rather, typically, on the IC's website to which the customer is directed by a link on the social media platform or by contacting the IC.

[134] Loblaw submits that its position that, provided there is some use, advertising that does not itself represent use can nevertheless represent the first impression which should be assessed for likelihood of confusion, is supported by the principles explained by Justice Rothstein in *Masterpiece* at paragraphs 70 to 74 as follows:

70 The focus of this question is the attitude of a consumer in the marketplace. Properly framed, consideration of the nature of the wares, services or business should take into account that there may be a lesser likelihood of trade-mark confusion where consumers are in the market for expensive or important wares or services. The reduced likelihood of confusion is still premised on the first impression of consumers *when they encounter* the marks in question. Where they are shopping for expensive wares or services, a consumer, while still having an imperfect recollection of a prior trade-mark, is likely to be somewhat more alert and aware of the trade-mark associated with the wares or services they are examining and its similarity or difference with that of the prior trade-mark. A trade-mark, as Binnie J. observed in *Mattel*, is a shortcut for consumers. That observation applies whether they are shopping for more or less expensive wares or services.

71 It is not relevant that, as the trial judge found, consumers are "unlikely to make choices based on first impressions" or that they "will generally take considerable time to inform themselves about the source of expensive goods and services" (para. 43). Both of these — subsequent research or consequent purchase — occur *after* the consumer encounters a mark in the marketplace.

72 This distinction is important because even with this increased attentiveness, it may still be likely that a consumer shopping for expensive goods and services will be confused by the trade-marks they encounter. Careful research and deliberation may dispel any trade-mark confusion that may have arisen. However, that cannot mean that consumers of expensive goods, through their own caution and wariness, should lose the benefit of trade-mark protection. It is confusion when they encounter the trade-marks that is relevant. Careful research which may later remedy

confusion does not mean that no confusion ever existed or that it will not continue to exist in the minds of consumers who did not carry out that research.

73 Indeed, before source confusion is remedied, it may lead a consumer to seek out, consider or purchase the wares or services from a source they previously had no awareness of or interest in. Such diversion diminishes the value of the goodwill associated with the trade-mark and business the consumer initially thought he or she was encountering in seeing the trade-mark. Leading consumers astray in this way is one of the evils that trade-mark law seeks to remedy. Consumers of expensive wares or services and owners of the associated trade-marks are entitled to trade-mark guidance and protection as much as those acquiring and selling inexpensive wares or services.

74 For these reasons, it was an error to discount the likelihood of confusion by considering what actions the consumer might take after encountering a mark in the marketplace. The trial judge should have instead limited his consideration to how a consumer, upon encountering the Alavida mark in the marketplace, with an imperfect recollection of the Masterpiece Inc. mark, would have reacted. Because consumers for expensive retirement residence accommodation may be expected to pay somewhat more attention when first encountering a trade-mark than consumers of less expensive wares or services, cost is not irrelevant. However, in circumstances where a strong resemblance suggests a likelihood of confusion, and the other s 6(5) factors do not point strongly against a likelihood of confusion, then the cost is unlikely to lead to a different conclusion.

[Emphasis added]

[135] Loblaw submits that it would be inconsistent with *Masterpiece* not to consider whether a consumer first encountering one of Pampered Chef's Short Form Marks on social media would be confused into thinking that he or she was seeing Loblaw's mark, resulting in the consumer being diverted to considering Pampered Chef's products. Loblaw notes that Justice Rothstein explains at paragraph 73 that leading consumers astray in this manner is one of the evils that trademark law seeks to remedy. Loblaw explains that this is precisely the sort of confusion that

concerns it in the present case. That is, it recognizes that, by the time a consumer purchases a Pampered Chef product on the website of one of its ICs, the consumer may well have been exposed to sufficient Pampered Chef content to be aware which company is the source of the product. However, Loblaw is concerned that the consumer be diverted into considering Pampered Chef's products by a mark that initially confuses the consumer into thinking it is encountering Loblaw's brand. It therefore argues that the analysis contemplated by *Masterpiece* must be performed when the mark is first encountered, even if that represents examination of the effect of the mark at a stage in the commercial process before it is being used for purposes of s 4.

[136] As with the issue canvassed above surrounding pleading of vicarious liability, this issue considering the interaction of s 4 and s 20(1)(a) arose only in the course of closing submissions, as a result of which the Court has been provided with minimal briefing on the relevant legal principles and applicable authorities. I am therefore reluctant to reach a conclusion on this issue if not required to do so and, in my view, such a conclusion is unnecessary. Even if I were to take into account the instances of appearance of the Short Form Marks in the social media space upon which Loblaw relies, and the inference that other similar instances occur or can occur, this still represents only one component of the overall circumstances surrounding how the consumer may encounter the Short Form Marks.

[137] As Loblaw submits, it would not be possible to conclude that there is no possibility of a customer encountering the Short Form Mark without previously or simultaneously encountering the Long Form Mark or some other use of Pampered Chef's name. However, such a conclusion is not necessary for the overall evidence surrounding how Pampered Chef deploys its marks to

favour Pampered Chef in the confusion analysis. As previously noted, I consider the trade channel analysis, akin to that performed in *Altacor*, to strongly favour Pampered Chef, and on balance I consider the evidence as to the use of Pampered Chef's name and Long Form Logo overall to support further the conclusion that customers are not likely to be confused when they encounter the Short Form Marks.

#### (6) Surrounding Circumstances

[138] The analysis required by s 6(5) of the Act mandates consideration not only of the statutorily prescribed factors but also all surrounding circumstances. The principal surrounding circumstances advanced by the parties and not yet assessed are: (i) the conclusion of the Registrar of Trade-Marks in connection with Pampered Chef's applications to register the Short Form Marks; (ii) Dr. Chakrapani's survey evidence; and (ii) evidence as to lack of actual confusion between the parties' marks.

[139] Pampered Chef notes that its applications to register the Short Form Marks were reviewed by two separate examiners, and the parties agree that the Canadian Intellectual Property Office did not cite any trademarks, whether owned by Loblaw or owned by any other party, as confusing with either of the Short Form Marks. There is case law establishing that such an absence of confusion is a surrounding circumstance supporting a conclusion of a lack of confusion (see, e.g., *McCallum Industries Ltd v HJ Heinz Co Australia Ltd*, 2011 FC 1216 at para 52, aff'd 2013 FCA 5). However, Loblaw argues that it is not unusual for approvals by examiners to be overturned either by the Trademarks Opposition Board or the Court, and I am conscious that the Court has the benefit of a substantially more extensive record and related

argument than did the examiners. In my view, the conclusions of the examiners, while relevant, should not be afforded any significant weight in this particular case.

[140] Turning to the survey performed by Dr. Chakrapani, it will be recalled that he was retained by Loblaw to design and conduct a survey to assess whether and to what extent consumers would misidentify one of the Short Form Marks used by Pampered Chef as a mark used by Loblaw. Pampered Chef raised several objections to both the admissibility of his evidence and the weight to be afforded to it, but the parties agreed that such objections would not be ruled upon until following trial. Pampered Chef supported its objections with the evidence of its experts, Dr. Hassay and Dr. Corbin. Loblaw in turn raises objections as to the admissibility of certain portions of the evidence of Dr. Hassay.

[141] Pampered Chef raises three principal concerns with Dr. Chakrapani's survey: (i) that he surveyed the wrong population; (ii) that he was uninformed as to how Pampered Chef's customers would encounter the Short Form Marks in the real world and therefore failed to build necessary contextual cues into his survey; and (iii) that there was a lack of care and attention paid to the survey and its results, including failure to exclude guesses from the results. As I understand Pampered Chef's position, the first two concerns go to admissibility and the third to weight.

[142] With respect to the relevant population, confusion must be determined by reference to the persons who are likely to make a purchase of the wares in question (see, e.g., *BBM* at para 34). Pampered Chef argues that Dr. Chakrapani surveyed the wrong population, because he failed to

take any measures, either before or after the survey, to screen participants to ensure that the results reflected certain psychographic factors that Pampered Chef considers to be attributable to its customer base. These attributes are whether the survey participants cook, have attended direct sales parties, have ever purchased products through direct sales catalogues, have ever purchased kitchen tools, or might do so in the next six months.

[143] In advancing this position, Pampered Chef relies in part on the evidence of Dr. Hassay and Dr. Corbin. As previously noted, I have rejected Loblaw's objection that Dr. Hassay's evidence explaining the direct sales channel was not admissible because it was beyond the scope of a responding report. This evidence represented background to his response to Dr. Chakrapani's report. I also reject Loblaw's objection to the admissibility of Dr. Hassay's opinion on whether Dr. Chakrapani surveyed the relevant population. Loblaw argues that he is not qualified to give this opinion, as he is an expert in marketing, but not market surveys. Having listened to the evidence as to his qualifications, I am satisfied that he has sufficient experience in this area that his opinions are admissible. The fact that surveys are not the focus of his work goes to weight.

[144] However, it is unnecessary for me to rely on the opinions of either Dr. Hassay or Dr. Corbin regarding Dr. Chakrapani's survey as, in my view, it is clear from the factual evidence at trial that there was no requirement for Dr. Chakrapani to screen survey participants for the psychographic factors identified by Pampered Chef in order to make his survey relevant. These attributes largely relate to [REDACTED]. I have previously concluded based on Ms. Kabat's evidence that [REDACTED] and that [REDACTED].

[145] With respect to contextual cues, I consider Pampered Chef's concerns to have more merit, but I find them to go to weight rather than admissibility. As canvassed above in these Reasons, there was a substantial quantity of evidence adduced at trial surrounding contextual cues (such as use of Pampered Chef's Long Form Logo or its name) and whether a consumer may encounter such cues before or at the time the consumer encounters the Short Form Mark. As such, the relevance of Dr. Chakrapani's survey results turns significantly on whether the consumer is presented with such contextual cues. His survey is relevant in circumstances where the consumer does not encounter any such cues which, as I have found above, could possibly occur. However, it would not be relevant in circumstances where the cues are present. I therefore find the survey results admissible but only relevant to the limited circumstances described above and therefore to be of limited weight. Having reached that conclusion, it is unnecessary for me to consider the other arguments advanced by Pampered Chef to the effect that limited weight should be afforded to the survey.

[146] The results of the survey were that, when a participant was shown an image of one of three Pampered Chef products bearing one of the Short Form Marks, between 11% and 17% (depending on the product) demonstrated some level of misidentification of the mark as associated with "President's Choice." This evidence favours Loblaw in the confusion analysis, but, because of the limited relevance of the survey, not to any material extent.

[147] Finally, Pampered Chef relies substantially on the lack of evidence of actual confusion. It refers the Court to the following statement by the Federal Court of Appeal in *Christian Dior SA v Dion Neckwear Ltd*, 2002 FCA 29 at para 19:



[A]n opponent is a[t] great risk if, relying on the burden of proof the applicant is subject to, it assumes that it does not need to file any evidence of confusion. While the relevant issue is “likelihood of confusion” and not “actual confusion”, the lack of actual confusion is a factor which the courts have found of significance when determining the “likelihood of confusion”. An adverse inference may be drawn when concurrent use on the evidence is extensive, yet no evidence of confusion has been given by the opponent.

[148] Loblaw notes that evidence of actual confusion is not necessary to establish likelihood of confusion (see *Mattel* at para 55) and emphasizes what it submits is a relatively brief period of time that the parties’ wares bearing the relevant marks have co-existed in the market. Loblaw refers to the fact that Pampered Chef’s goods branded with the Short Form Marks have been sold only since 2016, with initially only 22 such products on the market, ramping up to approximately 80 products in 2018. While Pampered Chef refers to the [REDACTED] in sales of products since the rebranding, Loblaw argues that the relevant sales volume is the approximately [REDACTED] in sales of only the products branded with the Short Form Marks.

[149] In my view, the relevant sales volume is the [REDACTED]. As canvassed in detail above, Loblaw bases its arguments in support of there being a likelihood in confusion in part on the social media activity of Pampered Chef’s ICs, some of which represents advertising of products using the Short Form Marks. However, the activity identified by Loblaw includes not only the use of images of products that are branded with the Short Form Marks on the products themselves or their packaging, but also images that employ the Short Form Marks in other manners (for instance in an image displaying a product and, separately, the Short Form Mark). Loblaw’s argument that such social media activity could give rise to confusion necessarily

engages the marketing and sales of products that are not themselves branded with the Short Form Mark. Therefore, the entire [REDACTED] in sales is relevant.

[150] In any event, even if one were to consider only [REDACTED] sales volume, this is still a substantial volume. Further, and notwithstanding the fact that the rebranded products have been in the market for only 2 to 3 years, Pampered Chef submits that there are particular circumstances in the present case which make the lack of evidence of actual confusion particularly significant, because such evidence would likely have been available if the allegation of likely confusion was justified.

[151] Pampered Chef notes that Loblaw has a robust customer service department and trademark enforcement program. Admissions by Loblaw reflected in the Agreed Statement of Facts filed by the Defendants confirm that Loblaw actively monitors for infringing trademarks, its employees are generally aware of the importance of protecting its trademarks, and its employees are trained to report potentially confusing marks and sign a Code of Conduct requiring it to report instances of confusion. Also, in connection with this litigation, Loblaw has conducted certain reviews of data available to it and confirmed that it has identified no instances of actual confusion between the parties' marks. This includes review of its social media platforms, without identifying any instance of anyone who has indicated confusion or made any statement associating Pampered Chef or its marks with Loblaw or its marks or any other reference to Pampered Chef or its marks, products or services. Loblaw has also reviewed its customer service department, again without finding any record of any consumer referring to Pampered Chef or its marks, products or services.

[152] I note the evidence of Pampered Chef's investigator, Derek MacIssac, who provided evidence surrounding the results of searches he was asked to perform by Pampered Chef's counsel, for certain keywords in posts on target Twitter accounts belonging to the parties. With respect to certain of Loblaw's Twitter accounts, he searched all posts and comments for certain keywords related to Pampered Chef. With respect to Pampered Chef's Twitter account, he searched all posts and comments for certain keywords related to Loblaw and President's Choice. These searches identified no results indicative of confusion. Loblaw argues that the cross-examination of Mr. MacIsaac revealed several shortcomings in his methodology, such as the existence of a large number of Twitter accounts of Loblaw's various retail banners that were not searched, and the absence of a search for "PC" as a keyword. I find merit to these arguments. While Mr. MacIsaac's evidence does contribute to the overall absence of any evidence of actual confusion, it does so only to a minimal extent.

[153] Finally, I have considered Loblaw's submission that the sort of confusion about which it is concerned, i.e. that consumers be diverted into considering Pampered Chef's products by a mark that initially confuses the consumer into thinking it is encountering Loblaw's brand, would not result in such a consumer complaining. Loblaw submits that such a consumer may be content with the product it ultimately purchases from Pampered Chef and have no reason to complain, but Loblaw will nevertheless have suffered the "evil" described in *Masterpiece* of having the consumer diverted to that purchase. However, I regard this argument as largely speculative and find it difficult to conclude that this sort of scenario could not result at least in some social media comment by the consumer.

[154] Ultimately, I read the law surrounding actual confusion to require consideration of the extent to which the particular circumstances of an individual case suggest that the lack of evidence of actual confusion is probative of the likelihood of confusion that is the actual test. I regard the circumstances canvassed above to support a conclusion that, in the present case, the lack of such evidence is very probative of the likelihood of confusion.

#### (7) Conclusion on Infringement

[155] Taking into account all the s 6(5) factors and the surrounding circumstances, the degree of resemblance between the Short Form Marks and the PC Word Mark warrants consideration of the other factors, and the acquired distinctiveness of the PC Word Mark strongly favours Loblaw, as does the length of time its mark has been in use and the similarity in the parties' goods and customers. However, the nature of the trade, taking into account both the differences in the channels of trade and the reduction of the likelihood of confusion resulting from the evidence surrounding the use of Pampered Chef's name and Long Form Logo in pursuing its channels of trade, strongly favours Pampered Chef. Taking those considerations into account, in combination with what I have found to be the very probative nature of the lack of evidence of actual confusion, my conclusion is that, despite very capable advocacy by Loblaw, it has not discharged the burden upon it of establishing a likelihood of confusion between the Short Form Marks and the PC Word Mark.

[156] Finally, turning to whether there is a likelihood of confusion with the PC Script Mark, the principal differences in the analysis, relative to considering the PC Word Mark, are that the PC Script Mark has a higher level of both inherent and acquired distinctiveness but a lower degree of

resemblance with Pampered Chef's Short Form Marks. These differences do not alter the basis for the above conclusion that a likelihood of confusion has not been established.

[157] I therefore find no infringement under s 20(1) of the Act.

*D. Has Pampered Chef infringed Loblaw's rights under section 22 of the Act?*

[158] Loblaw acknowledges that, while the test for depreciation of goodwill under s 22 differs from the test under s 20, and does not require establishment of confusion, the circumstances of this case are such that, if it does not succeed under s 20, this will be largely determinative of the s 22 claim. This is because the depreciation of goodwill that Loblaw is asserting under s 22 relates to alleged erosion of the distinctiveness of Loblaw's PC Marks, which is tied to the consumer associating or identifying Pampered Chef's product as that of Loblaw. I concur with this analysis and, given my findings in relation to confusion, similarly find no infringement under s 22.

[159] I should note that I understand the evidence of Prof. Wong was introduced by Loblaw in support of its s 22 claim in order to establish goodwill associated with the PC Marks. Given that the s 22 claim fails for reasons unrelated to the requirement to establish goodwill, it is unnecessary for me to consider the opinions of Prof. Wong.

*E. Has Pampered Chef violated section 7(b) of the Act?*

[160] Loblaw again acknowledges that, if confusion is not established in connection with s 20, the passing off claim under s 7(b) also will not succeed. There is one distinction, in that s 7(b)

permits consideration of the common law mark PC Circle Mark. Loblaw argues that, if the Court had found the PC Word Mark to be invalid for lack of distinctiveness, then the PC Circle Mark would become relevant to the confusion analysis, because (due to the circle design element) it fits somewhere between the PC Word Mark and PC Script Mark in terms of degree of resemblance with the Short Form Marks (and, presumably, in particular with the Short Form Mark which also includes the circle design element). However, as the PC Word Mark has not been found to be invalid, no consideration of the PC Circle Mark is required, and my conclusion is that Pampered Chef has not violated s 7(b).

F. *If Loblaw succeeds in establishing any of the causes of action asserted, what is the appropriate relief?*

[161] As Loblaw has not succeeded in any of the causes of action asserted, there is no need to address the claimed relief.

## VI. Costs

[162] During closing argument, both parties agreed that my decision on costs should be reserved until following the decision on the merits, to give the parties an opportunity to attempt to reach agreement on costs, in lieu of which each will have an opportunity to make relatively brief written submission on how costs should be addressed. My Judgment will so reflect.

**JUDGMENT IN T-548-18**

**THIS COURT’S JUDGMENT is that:**

1. The Plaintiff’s action is dismissed.
2. The Defendants’ counterclaim is dismissed.
3. The parties are afforded 14 days from the date of this Judgment either to reach agreement on costs and so advise the Court or to serve and file their respective written submissions on costs, limited to 5 pages each plus any necessary evidentiary support.

“Richard F. Southcott”

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Judge




**Schedule "A"**

No.	Trademark	Registration Number	Goods and Services
CA-1	PC SCRIPT DESIGN	TMA501993	(1) Peanuts. (2) Pudding. (3) Hot dogs. (4) Cooking pans. (5) Jackets. (6) Boxed macaroni and cheese. (7) Fish and tortilla chips. (8) Ice cream. (9) Fruit juice and soup. (10) Lamb and hors d'oeuvres namely frozen or non-frozen assorted appetizers. (11) Christmas lights and Christmas crackers namely party favours. (12) Vegetables. (13) Cheese. (14) Chicken and seafood. (15) Natural spring water. (16) Candy. (17) Tea. (18) Egg nog, beef, pizza and model train sets. (19) Hand and body lotion, margarine and corn oil. (20) Iced tea and potatoes. (21) Lemonade, snack bars namely cereal bars and knife block. (22) Chocolate confections. (23) Household cleaner and disinfectant. (24) Truffles and mincemeat. (25) Pork. (26) Mousse and pate. (27) Sour cream, honey and wild bird feed. (28) Cheesecake, flowering bulbs, golf putter and carving board.
CA-2	PC SCRIPT DESIGN	TMA432448	(1) Mayonnaise. (2) Facial tissues. (3) Potato chips. (4) Ketchup. (5) Corn chips. (6) Yogurt dip, yogurt spread, sunflower oil, salad dressings, crackers, rice cakes, breakfast cereal and vinegar. (7) Peanuts. (8) Pies. (9) Turkey, ice cream makers and seasonings. (10) Bread, cookies, granola bars and rice. (11) Laundry detergent and peanut butter. (12) Safflower oil. (13) Jam, olive oil, wine glasses, roasting racks and pasta.



No.	Trademark	Registration Number	Goods and Services
CA-3	PC DESIGN	TMA396623	<p>(1) Soft drinks.</p> <p>(2) Food products, namely sauces, syrups, condiments, spices, coffee, nuts, popcorn, frozen prepared meals, cooking products, namely canola oil, pet food, namely dog food, cat food; fire logs, barbecue starter; gloves, video and audio cassettes, candles.</p> <p>(3) Paper napkins.</p> <p>(4) Dishwashing detergent.</p> <p>(5) Shampoo, conditioner, hair spray.</p> <p>(6) Toilet tissues.</p> <p>(7) Frozen juices.</p> <p>(8) Film.</p> <p>(9) Bar soap.</p> <p>(10) Liquid hand soap, fertilizer, soil conditioners and plant food.</p>
CA-4	PC	TMA376222	<p>(1) Sauces.</p> <p>(2) Jams and jellies; candy toppings; cookies and crackers; mustard; spreads, namely peanut butter, almond, cheese, pate, and mousse; salad dressings; dishware, namely china dinnerware and plastic dinnerware, bowls, mugs, and liquor glasses; desserts, namely cakes, sorbet, puddings, shortbread and crisps.</p> <p>(3) Carbonated beverages; fruit and vegetable juice; mineral water; coffee; chocolate drink mixes; butter; dog food; breakfast cereals; tarts; cooking oil; spices; nuts; granola bars; prepared meals, namely prepared quiche, lasagna, casserole dishes; fresh and prepared seafood; prepared poultry; prepared meats; fresh, frozen and canned vegetables; cheese; desserts, namely, cakes, cheesecake, pound cake, Christmas rings, and shortbread; bread; fire logs.</p> <p>(4) Natural spring water; tea; butter; yogurt; two-ply garbage bags; laundry detergent; potato chips; copper pan tin lining; bathroom tissue; serviettes and wipes; popcorn; fresh, frozen and canned fruit; sausages; fresh poultry; fresh and prepared beef; fresh and prepared pork; vinegar; ketchup; olives; coffee whitener; honey; bath products, namely hand soap, bath soap, bath gel, bath splash and bath beads; beauty aids; namely shampoo, conditioner, facial spray and beauty lotion; pharmaceuticals, namely vitamins; placemats; bird food.</p> <p>(5) Milkshakes; whipped dressing; mulch; lawn fertilizer; manure; cat food; dishwashing liquid; tortilla chips; chocolate confections, sugar confections and medicated confections; bacon; kitchen utensils, namely measuring cups, colanders, and nut/lobster crackers; lawn seed; paint and stain; waffles; rice cakes; rice; cat litter; pizza.</p>

No.	Trademark	Registration Number	Goods and Services
CA-5	P.C.	TMA376221	<p>(1) Sauces.</p> <p>(2) Jams and jellies; candy toppings; cookies and crackers; mustard; spreads, namely peanut butter, almond, cheese, pate, and mousse; salad dressings; dishware, namely china dinnerware and plastic dinnerware, bowls, mugs, and liquor glasses; desserts, namely cakes, sorbet, puddings, shortbread and crisps.</p> <p>(3) Carbonated beverages; fruit and vegetable juice; mineral water; coffee; chocolate drink mixes; butter; dog food; breakfast cereals; tarts; cooking oil; spices; nuts; granola bars; prepared meals, namely prepared quiche, lasagna, casserole dishes; fresh and prepared seafood; prepared poultry; prepared meats; fresh, frozen and canned vegetables; cheese; desserts, namely, cakes, cheesecake, pound cake, Christmas rings, and shortbread; bread; fire logs.</p> <p>(4) Natural spring water; tea; butter; yogurt; two-ply garbage bags; laundry detergent; potato chips; copper pan tin lining; bathroom tissue; serviettes and wipes; popcorn; fresh, frozen and canned fruit; sausages; fresh poultry; fresh and prepared beef; fresh and prepared pork; vinegar; ketchup; olives; coffee whitener; honey; bath products, namely hand soap, bath soap, bath gel, bath splash and bath beads; beauty aids; namely shampoo, conditioner, facial spray and beauty lotion; pharmaceuticals, namely vitamins; placemats; bird food.</p> <p>(5) Milkshakes; whipped dressing; mulch; lawn fertilizer; manure; cat food; dishwashing liquid; tortilla chips; chocolate confections, sugar confections and medicated confections; bacon; kitchen utensils, namely measuring cups, colanders, and nut/lobster crackers; lawn seed; paint and stain; waffles; rice cakes; rice; cat litter; pizza.</p>
CA-6	PC Script Design	TMA671833	<p>(1) Dinnerware, cutlery, vases; glass and ceramic containers; bowls, latte glass mugs, decanters, wine coolers, teapots, coffee pots, chinaware, ceramic serveware, rice scoops, bottles, bottle openers, coasters, ice buckets, wine glasses, martini glasses, beer glasses, tumblers, knife sets, steak knife sets, martini shakers, pots and pans, salt and pepper shakers, salad bowls, kitchen utensils, can openers, juicers, small appliances, rolling pins, grills.</p> <p>(2) Napkin rings, placemats, oven mitts, aprons, tea towels.</p> <p>(3) Picture frames, paper towel holders, incense, incense burners, candles, candle holders, glass hurricane lamps, ceramics, lamps, Chinese lanterns, rugs, decorative boxes.</p> <p>(4) Bed and bath products, sheets, duvets, pillows, polar fleece blankets, towels, robes, slippers, soap, face cloths, sponges, towel stands and holders, bamboo ladder, shower curtains, bath mats, mirrors, shower hooks.</p> <p>(5) Dining trays and stands, chairs, cushions, tables.</p> <p>(6) Hammocks, lawn chairs, garden tools, flower pots, flower pot holders, camping gear, hampers, lidded storage sets.</p> <p>(7) Tissue boxes, clothes drying racks, laundry bags, door mats, torches, toys, garbage cans, notebooks, bags, brushes, brooms, buckets.</p>
CA-7	PC Script	TMA950754	(1) Cooking school services.
CA-8	PC SCRIPT	TMA918663	(1) Application for digital electronic devices and mobile phones for viewing recipes and nutritional information.

No.	Trademark	Registration Number	Goods and Services
CA-9	PC DESIGN	TMA658907	(1) Barbecues and barbecue accessories, namely rotisseries, barbecue smokers, smoking chips, smoker boxes, multi-purpose barbecue baskets, kebab baskets, rotisserie baskets, barbecue utensils, and barbecue gloves.
CA-10	PC Script Design	TMA583052	(1) Computer networking and information services namely providing access to information of the applicant and third parties via a global computer network system; on-line services, namely on-line information regarding retail and food distribution; on-line customer information services regarding the applicant's products and services; advertising of on-line services.
CA-11	PC design	TMA463285	(1) Beer. (2) Wine.
CA-12	PC	TMA595855	(1) Operation of a reward incentive program for points which can be redeemed for various products.
CA-13	PC SCRIPT DESIGN	TMA515516	(1) Operation of a reward incentive program for points which can be redeemed for various products.
CA-14			Various goods and services including housewares.
CA-15			Various goods and services including housewares.
CA-16			Various goods and services including housewares.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-548-18

**STYLE OF CAUSE:** LOBLAWS INC., AND COLUMBIA INSURANCE COMPANY, THE PAMPERED CHEF, LTD, AND PAMPERED CHEF – CANADA CORP.

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 6-10, 16, 17, 2019

**PUBLIC JUDGMENT AND REASONS** SOUTHCOTT, J.

**DATED:** JULY 22, 2019

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