

IN THE MATTER OF AN OPPOSITION BY General Foods  
Inc. to application No. 516,703 for the trade-mark  
SCOOP N' BAKE filed by Tradition Fine Foods Ltd.

On February 10, 1984, the applicant, Tradition Fine Foods Ltd., filed an application to register the trade-mark SCOOP N' BAKE based upon proposed use of the trade-mark in Canada in association with "cake and muffin mixes". The applicant disclaimed the right to the exclusive use of the word BAKE apart from its trade-mark. During the opposition proceeding, the applicant amended the statement of wares in its application to cover "frozen and refrigerated cake and muffin mixes".

The opponent, General Foods Inc., filed a statement of opposition on August 15, 1985 in which it alleged that the applicant's trade-mark is not registrable and not distinctive in that the trade-mark SCOOP N' BAKE is either clearly descriptive or deceptively misdescriptive of the character of the applicant's wares. Further, the opponent alleged that the applicant's trade-mark is not registrable and not distinctive, and that the applicant is not the person entitled to its registration, in view of the registration and prior user by the opponent of the trade-mark SHAKE 'N BAKE, registration No. 155,577, covering "coating mix for sea food, poultry and meat; coating mix for fruit and vegetables; dinner mix comprising mainly a starch component, a dry sauce mix and a seasoned coating mix".

The applicant served and filed a counter statement in which it denied the opponent's grounds of opposition.

The opponent filed as its evidence the affidavit of P. Bruce Hunter while the applicant submitted as its evidence the affidavit of Peter Glowczewski who was cross-examined on his affidavit, the transcript of the cross-examination forming part of the record in this opposition. Further, leave was granted to the opponent pursuant to Rule 46(1) of the Trade-marks Regulations to submit as further evidence a certified copy of the opponent's registration for the trade-mark SHAKE 'N BAKE, registration No. 155,577.

Leave was granted to the opponent to amend its statement of opposition pursuant to Rule 42 of the Trade-marks Regulations in order to reflect the amendment made by the applicant to its statement of wares and the applicant subsequently submitted a revised counter statement in response to the amended statement of opposition.

Both parties submitted written arguments and an oral hearing was not conducted in respect

of this opposition.

The first issue in this opposition is whether the applicant's trade-mark SCOOP N' BAKE is either clearly descriptive or deceptively misdescriptive of the character of "frozen and refrigerated cake and muffin mixes", contrary to Section 12(1)(b) of the Trade-marks Act. The material date for considering this ground of opposition is as of the filing date of the applicant's application (February 10, 1984). In this regard, reference may be made to the decisions in Oshawa Group Ltd. v. Registrar of Trade-marks, 46 C.P.R. (2d) 145, at pg. 147 and Carling Breweries Limited v. Molson Companies Limited et al, 1 C.P.R. (3d) 191, at pg. 195. Further, while there is a legal burden on the applicant to establish the registrability of its trade-mark, there is an evidentiary burden on the opponent to adduce sufficient evidence which, if believed, would support the truth of the allegations set forth in its statement of opposition.

With respect to the 12(1)(b) issue, the applicant in its written argument submitted that "there is no character or quality of frozen cake and muffin mixes that is clearly described by the trade mark SCOOP N' BAKE. Rather, the trade mark is highly suggestive of a method of using the product, i.e. a scoopful of the dough can be put in a cake or muffin tray and baked in an oven, to make cakes or muffins". Initially, I would observe that the applicant disclaimed the word BAKE apart from its trade-mark in response to such a disclaimer requirement based on Section 12(1)(b) which was raised during the examination stage of this application.

In my view, the trade-mark SCOOP N' BAKE is clearly descriptive of the character of the applicant's wares which differ from other cake or muffin mixes which involve other steps in their preparation, such as mixing or the addition of other ingredients. As a result, the average purchaser of the applicant's SCOOP N' BAKE cake and muffin mixes would immediately react to the trade-mark as indicating that one need only scoop the product into a muffin tin or cake container and then bake the product in order to obtain the desired cake or muffins.

I would also note the following comments of the then Registrar of Trade-marks in American Home Products Corp. v. Stuart House Canada Ltd., 36 C.P.R. (2d) 204 where the Registrar commented as follows at pages 207 and 208 with respect to the issue as to whether the trade-mark DRY-FRY is clearly descriptive of an aerosol spray can of vegetable oil for use as a sticking preventative on cooking utensils:

In view of the above, I have concluded that the applicant's trade-mark SCOOP N' BAKE is clearly descriptive of the character of the wares covered in the applicant's application, contrary to Section 12(1)(b) of the Trade-marks Act. Accordingly, I have not considered the other grounds of opposition relied upon by the opponent.

I refuse the applicant's application pursuant to Section 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 31<sup>ST</sup> DAY OF JANUARY, 1990.

G.W.Partington,  
Chairman,  
Trade Marks Opposition Board.