

IN THE MATTER OF AN OPPOSITION by Hershey Foods Corporation to application No. 520,272 for the trade-mark CHOCO CUPS filed by Regal Imports Canada Inc., and presently standing in the name of Regal Confections Inc.

On April 11, 1984, the applicant, Regal Imports Canada Inc., filed an application to register the trade-mark CHOCO CUPS based upon proposed use of the trade-mark in Canada in association with "confectionary, namely: individually wrapped or prepackaged chocolate flavoured units". The applicant disclaimed the right to the exclusive use of the word CUPS apart from its trade-mark.

The opponent, Hershey Foods Corporation, filed a statement of opposition on May 4, 1987 in which it alleged that the applicant's application is not in compliance with Section 29 (now Section 30) of the Trade-marks Act in that the words CHOCO CUPS are not registrable in that CHOCO is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares, the word CHOCO being synonymous to the word "chocolate" and, on seeing or hearing the alleged mark CHOCO CUPS, the average Canadian consumer would expect that the product bearing such words is a chocolate one. The opponent next alleged that the applicant's trade-mark is not registrable in view of Section 12(1)(b) of the Trade-marks Act in that CHOCO is clearly descriptive or deceptively misdescriptive of the character or quality of wares described as "confectionery, namely: individually wrapped or prepackaged chocolate flavoured units" and the word CUPS has been disclaimed. As its final ground of opposition, the opponent alleged that the applicant's trade-mark is not distinctive in that it does not actually distinguish and it is not adapted to distinguish the wares of the applicant from the wares of others. Further, the opponent in respect of the non-distinctiveness ground of opposition asserted that the applicant's trade-mark is not distinctive in that it is either clearly descriptive or deceptively misdescriptive as alleged in respect of the Section 12(1)(b) ground of opposition.

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

The opponent filed as its evidence the affidavits of Mildred Joan Lusk dated January 11, 1988, February 10, 1988 and March 10, 1988 and an affidavit of Kathy Pylypiw while the applicant failed to file either evidence or a statement that it would not be filing evidence in this opposition proceeding.

The opponent alone filed a written argument and both parties were represented at an oral

hearing.

During the opposition proceeding, Regal Confections Inc. was entered as the applicant of record in respect of this application.

The opponent's first ground of opposition based on Section 30 of the Act is founded on the allegation that the applicant's trade-mark is either clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares. Accordingly, the determination as to whether the applicant's trade-mark is registrable in view of Section 12(1)(b) of the Trade-marks Act will effectively decide the first two grounds of opposition.

The issue as to whether the applicant's trade-mark CHOCO CUPS is clearly descriptive of the applicant's wares must be considered from the point of view of the average consumer or user of those wares. Further, in determining whether a trade-mark is clearly descriptive of the character or quality of the wares associated with it, the trade-mark must not be dissected into its component elements and carefully analyzed, but rather must be considered in its entirety as a matter of immediate impression (see Wool Bureau of Canada Ltd. v. Registrar of Trade Marks, 40 C.P.R. (2d) 25, at pgs. 27-28 and Atlantic Promotions Inc. v. Registrar of Trade Marks, 2 C.P.R. (3d) 183, at pg. 186).

The relevant date for considering the ground of opposition based on Section 12(1)(b) is as of the filing date of the applicant's application (April 11, 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. Also, the material date with respect to the issue of distinctiveness is as of the date of opposition (May 4, 1987). Further, while the legal burden is on the applicant to establish the registrability and distinctiveness of its trade-mark, there is an evidential burden on the opponent in respect of both of these grounds to adduce sufficient evidence which, if believed, would support the truth of the allegations set forth in the statement of opposition relating to the alleged non-registrability and non-distinctiveness of the trade-mark CHOCO CUPS. It is therefore necessary in the present case to consider the opponent's evidence in order to determine whether the opponent has met the evidential burden upon it.

In her affidavit, Kathy Pylypiw states that CHOCO CUPS as applied to candy indicates to

her candy made in the shape of chocolate cups. Ms. Pylypiw refers to exhibits A, B and C to her affidavit in stating that Choco indicates chocolate. However, the photocopies of the pages from cookbooks do not indicate the dates of the publications and, in view of the fact that the affiant's affidavit is dated February 9, 1988, almost four years after the filing date of the applicant's application and also subsequent to the date of opposition, little weight can therefore be given to this evidence. Likewise, exhibit D to the Pylypiw affidavit and the affiant's observation as to the significance of the trade-mark CHOCO CUPS to her must also be considered as of or shortly prior to the date of her affidavit.

The three Lusk affidavits seek to introduce into evidence photocopies of pages from cookbooks and other publications containing recipes for various cakes and other desserts identified by names which include the term CHOCO or the words CHOCOLATE CUPS. The packaging identified as exhibit H to the Lusk affidavit of January 11, 1988 appear to have been obtained subsequent to the material dates in this opposition and therefore cannot be given any weight with respect to the meeting of the evidential burden on the opponent. Also, several of the other exhibits either do not bear any apparent date or appear to refer to a date of publication subsequent to one, or both, material dates in this opposition. As a result, little, if any, weight can therefore be accorded to them in determining whether the opponent has met the evidential burden upon it.

With respect to the remainder of the exhibits annexed to the Lusk affidavits, the same establish that the existence of recipes for CHOCO-MINT SNAPS, CREAMY CHOCO-NUT PIE, CHOCO-TRUFFLE LAYER CAKE, CHOC-O-CHERRY CAKE, DE LUXE CHOCO-CREAM CAKE, CHOCO-DOT FUDGE CAKES, CHOCONUT BARS, CHOCODILES, CHOCOMINT COOKIES, CHOCO-NUT CAKE, CHOCO-BUTTER CRESCENTS, CHOCO COFFEE CAKE, CHOCO-PEACH CAKE, CHOCO-BANANA FLIP, CHOCO-DATE SQUARES and CHOCO-PEANUT TOPPERS. The issue in my view is whether this evidence is sufficient to meet the evidential burden on the opponent of establishing that, to the average Canadian consumer, the word CHOCO is synonymous with "chocolate" and, on seeing or hearing the trade-mark CHOCO CUPS, the average consumer of the applicant's wares would expect that those wares contain chocolate or have a chocolate flavour. Certainly, the opponent's evidence points to the fact that the term CHOCO in respect of a dessert-type recipe signifies that the recipe includes chocolate as one of its ingredients.

As to whether the applicant's wares are closely related to dessert-type recipes, I would note that "confectionary" as an adjective is defined in Webster's Third New International Dictionary as "prepared as or being a confection" and as a noun is defined as "confectionery" which, in turn, is

defined as "sweet edibles (as candy, cake, pastry, candied fruits, ice cream): things prepared and sold by a confectioner". Further, the word "confection" is defined as "a preparation esp. for human consumption made by mixing diverse ingredients as **a**: DELICACY; usu: a preparation of fruit, nuts, roots, or other morsels with sugar: SWEETMEAT, PRESERVE, CANDY". Certainly, the recipes covered in the opponent's evidence relate broadly to food products which might be categorized as "confectionary" or "confectionery". Accordingly, and at least to those persons who would use recipes, the trade-mark CHOCO CUPS might well indicate that the applicant's wares either are chocolate cups or are chocolate-flavoured cups.

Having regard to the above, I have concluded that the opponent has met the evidential burden upon it in respect of its Section 12(1)(b) ground of opposition. Further, as the applicant has failed to file any evidence in this opposition, it has failed to meet the legal burden upon it of establishing that its trade-mark is registrable.

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

DATED AT HULL, QUEBEC THIS 29th DAY OF JUNE 1990.

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