IN THE MATTER OF AN OPPOSITION by Société Générale d'Avant Produits de Pâtisserie "Sogap" to application No. 568,411 for the trade-mark MIXOMOUSSE filed by 150739 Canada Inc., and assigned to A. Lassonde & Fils Inc.

On August 28, 1986, the applicant, 150739 Canada Inc., filed an application to register the trade-mark MIXOMOUSSE based upon use of the trade-mark in Canada by the applicant or its predecessor-in-title Mixofruit Inc. since at least as early as September 1985 in association with "Desserts, nommément: préparation pour mousse à consommer". Subsequent to the filing of its application, the applicant amended its claimed date of first use to at least as early as October 1985.

The opponent, Société Générale d'Avant Produits de Pâtisserie "Sogap", filed a statement of opposition on July 8, 1987, a copy of which was forwarded by the Opposition Board to the applicant on August 5, 1987. In its statement of opposition, the opponent alleged that the applicant's trade-mark is not registrable in view of the provisions of s. 12(1)(b) of the Trade-marks Act in that the applicant's trade-mark is either clearly descriptive or deceptively misdescriptive, in the English and French languages, of the character or quality of the applicant's wares. Further, the opponent alleged that the applicant's trade-mark is not distinctive in that it is not adapted to distinguish the applicant's wares from the products of other persons or companies working in the food product area and, more particularly, in the dessert production area.

The applicant, 150739 Canada Inc., filed and served a counterstatement in which it asserted that its trade-mark is distinctive and that its mark does not offend the provisions of s. 12(1)(b) of the Trade-marks Act.

The opponent elected not to file any evidence pursuant to r. 43 of the Trade-marks Regulations while the applicant filed as its r. 44 evidence the affidavit of Alain Baillargeon. As evidence allegedly in reply, the opponent filed the statutory declaration of Robert Charbonneau.

The applicant during the opposition proceeding objected to the admissibility of the Charbonneau statutory declaration on the basis that it is not strictly confined to matter in reply to the applicant's evidence, contrary to the provisions of r. 45 of the Trade-marks Regulations. The Charbonneau declaration seeks to put into evidence the results of a state of the register search conducted by the declarant and the opponent has argued that this is in response to paragraphs 6 and 12 of the Baillargeon affidavit which provide as follows:

> 6. Tel qu'il appert du registre des marques de commerce, la requérante 150739 CANADA INC. déposait une demande pour l'enregistrement de la marque de commerce **MIXOMOUSSE** en date du 28 août 1986, basée sur l'emploi de la marque. Le Registraire

assigna le numéro **568,411** à cette demande.

12. Suite à l'emploi intensif de la marque **MIXOMOUSSE** de la requérante tel que décrit au présent affidavit, ladite marque a acquis un caractère distinctif inhérent et une notoriété à travers le Canada.

In its written argument, the opponent submitted the following:

ll. Lorsque Monsieur Baillargeon mentionne le Registre des marques de commerce et le dossier 568,411 de ce registre, il fait évidemment référence à l'enregistrabilité, selon lui, de la prétendue marque de commerce MIXOMOUSSE. Ce faisait, il ouvre la porte à l'opposante pour que cette dernière scrute cette allégation d'enregistrabilité contenue au paragraphe 6 de l'affidavit de Monsieur Baillargeon. Un des moyens pour l'opposante de scruter cette allégation d'enregistrabilité est de montrer l'attitude du Registraire lorsque celui-ci a eu à procéder à l'enregistrement de marques de commerce qui incluaient les mots MIX ou MOUSSE.

12. Qui plus est, lorsque Monsieur Alain Baillargeon a fait référence au paragraphe 12 de son affidavit au "caractère distinctif" de la marque MIXOMOUSSE, la requérante a permis de scruter, examiner et contester cette allégation de caractère distinctif. Or, un moyen pour l'opposante de scruter, d'examiner et de contester cette allégation de caractère distinctif est de démontrer l'état du registre des marques relativement à l'enregistrabilité et au caractère distinctif de certains mots compris à l'intérieur de marque de commerce lorsque celle-ce est utilisée en association avec des marchandises similaires à celles de la requérante.

In my view, the Charbonneau statutory declaration is not proper rely evidence in this opposition in that it is not strictly confined to any matter contained in the Baillargeon affidavit. The reference by Mr. Baillargeon to the filing of the present application does not raise in issue the registrability of the applicant's mark. As to the opponent's second submission as set forth in paragraph 12 of its written argument, I would note that inherent distinctiveness is inherent in the trade-mark itself and is not affected by use of the trade-mark and, had it been Mr. Baillargeon's intention to have referred to the acquired distinctiveness of the applicant's mark, such a comment would be inadmissible opinion evidence and therefore could not have been relied upon by the opponent to justify the filing of state of the register evidence.

Both the applicant and the opponent filed written arguments and the opponent alone was represented at an oral hearing.

During the opposition proceeding, the applicant assigned its rights in the trade-mark MIXOMOUSSE to A. Lassonde & Fils Inc., the present applicant of record.

The opponent's first ground of opposition is that the applicant's trade-mark is not registrable in view of the provisions of Section 12(1)(b) of the Trade-marks Act in that the trade-mark MIXOMOUSSE is either clearly descriptive or deceptively misdescriptive in the English or French

languages of the character or quality of the applicant's "desserts, nommément: préparation pour mousse à consommer". The material date for considering this ground of opposition is as of the filing date of the applicant's application (August 28, 1986). 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 the legal burden is on the applicant to establish the registrability of its trade-mark, there is an evidential 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.

The opponent in respect of the evidential burden upon it has relied upon dictionary definitions for the words MIX and MOUSSE. In this regard, the word "mix" as a noun is defined in Webster's Third New International Dictionary as " a commercially prepared mixture of dry ingredients for a food usu. requiring the addition of only water or sometimes eggs and cooking or baking <roll--> <soup --> <cake made from a packaged --> <an instant pudding -- that needs only milk and mixing>". As a verb, the word "mix" is defined as "intermingle thoroughly <--the flour with a little water>". Also, the word "mousse" is defined in Webster's Third New International Dictionary as "a frothy dessert".

However, the applicant's trade-mark is MIXOMOUSSE and the only evidence relied upon by the opponent which is directed to the applicant's trade-mark when considered in its entirety is exhibit A-1 to the Baillargeon affidavit (represented below) which, as was submitted by the agent for the opponent at the oral hearing, establishes that the applicant itself considers the mark MIXOMOUSSE as identifying the wares associated with the trade-mark in that, apart from the trade-mark, there is no indication on the label as to the nature of the wares, nor does the label include a picture or representation of the wares from which the average consumer might otherwise identify the type of product associated with the trade-mark.

While I agree with the opponent that there is no indication as to the nature of the wares associated with the trade-mark MIXOMOUSSE on the applicant's label, it is apparent that the mark MIXOMOUSSE, or at least a variant thereof, is being used as a trade-mark on the labels. However, in my view, the mark as shown in the applicant's labels is a variant of the trade-mark sought to be registered in that the words MIX and MOUSSE are separated by what appears to me to be a circle design rather than the letter "O". Nevertheless, the opponent has not alleged a s. 30 ground of opposition and, in any event, the mark MIXOMOUSSE appears on the invoices forming exhibit A-2 to the Baillargeon affidavit and the invoices use such descriptions as `Mousse chocolat "Mixomousse"' or `Mousse neutre #200 "Mixomousse"' to identify the nature of its wares.

Apart from the above, the applicant's invoices appear to indicate that the applicant's wares are sold to a specialized clientele who place written or telephone orders for the applicant's wares, as opposed to the applicant's products being sold to the general public off the shelf in a grocery store or supermarket. As a result, I do not consider that the applicant's labels support the opponent's position that the trade-mark MIXOMOUSSE is either clearly descriptive or deceptively misdescriptive of the wares covered in the applicant's application.

In view of the above, and as no admissible evidence has been adduced that the average consumer of the applicant's wares would perceive the applicant's trade-mark MIXOMOUSSE when considered in its entirety as possessing either a descriptive or misdescriptive significance in either the English or French languages in relation to mixes for making mousse, I have concluded that the opponent has failed to meet the evidential burden upon it and I have therefore rejected the opponent's first ground of opposition.

With respect to the second ground of opposition, the legal burden is on the applicant to establish that its trade-mark is distinctive. However, there is again an evidential burden on the opponent to establish the facts being relied upon by it in respect of this ground. As in the case of the first ground of opposition, the opponent has not adduced any admissible evidence in this opposition in support of this ground of opposition.

At the oral hearing, the agent for the opponent referred to the applicant's labels and invoices as referring to an entity identified as MIXOFRUIT or MIXOFRUIT (150739 CANADA INC.) in support of its argument that a person other than the applicant has used the trade-mark MIXOMOUSSE, such that the trade-mark is not distinctive of the applicant. However, the applicant's application does identify Mixofruit Inc. as a predecessor-in-title and the use of MIXOFRUIT (150739 CANADA INC.) is consistent with MIXOFRUIT being used as a trading style by the applicant. In any event, the opponent has not relied upon misuse by the applicant of the trade-mark at issue as a basis for challenging the distinctiveness of the trade-mark MIXOMOUSSE. As a result, I reject the opponent's second ground of opposition.

Having rejected each of the opponent's ground of opposition, I reject the opponent's opposition pursuant to s. 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 31ST DAY OF JANUARY 1991.

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