

**IN THE MATTER OF AN OPPOSITION by Ault Foods Limited  
to application No. 777,390 for the trade-mark CHED'R  
SPRED'R filed by Agrifoods International Cooperative Ltd./La  
Cooperative Agrifoods International Ltée**

---

On March 8, 1995, the applicant, Agrifoods International Cooperative Ltd./La Cooperative Agrifoods International Ltée, filed an application to register the trade-mark CHED'R SPRED'R based upon proposed use of the trade-mark in Canada in association with "processed cheese spread". The applicant amended its application at the examination stage to include a disclaimer of the right to the exclusive use of CHED'R apart from its trade-mark.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of October 4, 1995 and the opponent, Ault Foods Limited, filed a statement of opposition on March 4, 1996, a copy of which was forwarded to the applicant on March 20, 1996. In its statement of opposition, the opponent alleged the following grounds of opposition:

- (a) The present application does not comply with the requirements of Section 30 of the *Trade-marks Act* in that the applicant could not have been satisfied that it was entitled to use the trade-mark CHED'R SPRED'R in Canada in association with the wares described in the application given the descriptive nature of the mark, the particulars of which are set out in the second ground of opposition;
- (b) The applicant's trade-mark is not registrable in view of the provisions of Paragraph 12(1)(b) of the *Trade-marks Act* in that the trade-mark, as a whole, is clearly descriptive or deceptively misdescriptive of the character or quality of processed cheese spread, the wares in association with which it is proposed to be used. The applicant disclaimed the right to the exclusive use of the word CHED'R which is the phonetic equivalent of "cheddar", a type of cheese, and the word SPRED'R is the phonetic equivalent of the word "spreader" and the mark as a whole is clearly descriptive or deceptively misdescriptive of a cheese spread or a cheese spreader, or the like;
- (c) The applicant's trade-mark is not distinctive in that it is neither adapted to distinguish nor does it actually distinguish the applicant's wares from the wares of others as the mark is clearly descriptive or deceptively misdescriptive and therefore cannot serve to distinguish.

The applicant served and filed a counter statement in which it asserted that its application complies with the requirements of Section 30 of the *Trade-marks Act* and that its trade-mark CHED'R SPRED'R is registrable and distinctive.

The opponent filed as its evidence two affidavits of Rona Devreese while the applicant

elected not to file any evidence. The opponent alone filed a written argument and neither party requested an oral hearing. Further, during the opposition proceeding, the opponent submitted evidence of a change of name to Parmalat Foods Inc.

The first ground of opposition is based on Subsection 30(i) of the *Trade-marks Act*. While the legal burden is upon the applicant to show that its application complies with Section 30 of the *Trade-marks Act*, there is an initial evidential burden on the opponent to establish the facts relied upon by it in support of its Section 30 ground [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330; and *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R.(3d) 293]. The material time for considering the circumstances respecting the issues of non-compliance with Section 30 of the *Act* is the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R.(3d) 469, at p. 475].

The opponent has alleged that the present application does not conform to the requirements of Subsection 30(i) of the *Act* in that the applicant could not have been satisfied that it was entitled to use the trade-mark CHED'R SPRED'R in Canada in association with a "processed cheese spread" in that the trade-mark is clearly descriptive or deceptively misdescriptive of the character or quality of such wares. Subsection 30(i) of the *Act* requires that an applicant must state in its application that it is satisfied that it is entitled to "use" its trade-mark in Canada. Clearly, an applicant can use a trade-mark in Canada even though that mark may be clearly descriptive of the character or quality of the wares or services associated with the mark, bearing in mind that Subsection 12(2) contemplates the registration of trade-marks which offend the provisions of Paragraph 12(1)(b) of the *Trade-marks Act*. In any event, the opponent has not adduced any evidence to show that the applicant could not properly have been satisfied that it was entitled to use its trade-mark CHED'R SPRED'R in Canada on the basis *inter alia* that its trade-mark is not clearly descriptive or deceptively misdescriptive of a processed cheese spread. Thus, the success of this ground would be contingent upon a finding that the applicant's trade-mark offends the provisions of Paragraph 12(1)(b) of the *Trade-marks Act*.

The second ground of opposition is based on Paragraph 12(1)(b) of the *Trade-marks Act*,

the opponent alleging that the applicant's trade-mark is not registrable in that the trade-mark CHED'R SPRED'R is either clearly descriptive or deceptively misdescriptive of the character or quality of a processed cheese spread. The material date for considering a ground of opposition based on Paragraph 12(1)(b) of the *Act* is as of the date of decision [see *Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers*, 41 C.P.R. (3d) 243 (F.C.A.)] and, while the legal burden is upon the applicant to show that its trade-mark CHED'R SPRED'R is registrable, there is an initial evidential burden upon the opponent to adduce sufficient evidence which, if believed, would support the truth of its allegations that the trade-mark CHED'R SPRED'R is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares. The issue as to whether the applicant's trade-mark is clearly descriptive must be considered from the point of view of the average purchaser of those wares. Furthermore, in determining whether the trade-mark CHED'R SPRED'R is clearly descriptive of the character or quality of a processed cheese spread, the trade-mark must not be dissected into its component elements and carefully analysed, 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 pp. 27-28 and *Atlantic Promotions Inc. v. Registrar of Trade Marks*, 2 C.P.R. (3d) 183, at p. 186].

As the applicant has disclaimed the right to the exclusive use of the element CHED'R apart from its trade-mark, the applicant has effectively conceded that CHED'R, which is the phonetic equivalent of the word "cheddar", is descriptive of its wares. Further, the element SPRED'R is the phonetic equivalent of the word "spreader". The first Devreese affidavit introduces into evidence two labels for cheese spread products, one of which includes reference to the product being a "SPREADABLE CHEESE PRODUCT". The second Devreese affidavit serves to introduce into evidence photocopies of pages from dictionaries which include definitions for the words "cheddar", "spread" and "spreader". In the references relied upon by the opponent, the word "spreader" is defined *inter alia* as follows: "one that spreads: as **a**: an implement for scattering material **b**: a small knife for spreading butter" and "One who or that which spreads, as a small knife for spreading butter". Thus, while the opponent's evidence supports an argument that the applicant's mark might well describe a device for spreading a processed cheese spread, it certainly is not clearly descriptive of a "processed cheese spread". At most, the applicant's mark suggests that the applicant's wares

are a spreadable cheddar cheese product. As a result, the opponent has failed to meet the evidential burden upon it in respect of the second ground and I have therefore rejected the Paragraph 12(1)(b) ground of opposition.

As for the opponent's final ground of opposition, the legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its wares from those of others. This ground is founded on the allegation that the applicant's trade-mark CHED'R SPRED'R is clearly descriptive or deceptively misdescriptive of the applicant's wares. Having concluded that the applicant's mark is not clearly descriptive of the applicant's "processed cheese spread" as of the date of this decision, I am equally satisfied that the same conclusion applies as of the date of opposition, the material date for considering the non-distinctiveness ground. I have therefore dismissed this ground of opposition.

Having been delegated by the Registrar of Trade-marks pursuant to Subsection 63(3) of the *Trade-marks Act*, I reject the opponent's opposition pursuant to Subsection 38(8) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC THIS 14<sup>th</sup> DAY OF AUGUST, 1998.

G.W.Partington,  
Chairperson,  
Trade-marks Opposition Board.