

**IN THE MATTER OF AN OPPOSITION by Nabisco Brands Ltd. - Nabisco Brands Ltée [now Nabisco Ltd. - Nabisco Ltée] to application No. 713,140 for the trade-mark CRISPEROOS filed by Cuda Consolidated Inc.**

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On September 21, 1992, the applicant, Cuda Consolidated Inc., filed an application to register the trade-mark CRISPEROOS based on proposed use in Canada in association with “soya based snack foods”. The statement of wares was amended at the examination stage to cover “snack foods, namely soya based chips” and the amended application was subsequently advertised for opposition purposes in the *Trade-marks Journal* of June 2, 1993.

The opponent, Nabisco Brands Ltd. - Nabisco Brands Ltée, filed a statement of opposition on September 29, 1993, a copy of which was forwarded to the applicant on December 14, 1993. Further, during the opposition, the opponent requested and was granted leave to amend its statement of opposition pursuant to Rule 40 of the *Trade-marks Regulations*. The opponent submitted as its Rule 41(1) evidence the affidavit of Karen Roy while the applicant filed the affidavits of Alex Zukovs and Harold A. Saffrey as its evidence pursuant to Rule 42(1) of the *Trade-marks Regulations*. The opponent submitted as reply evidence the affidavits of Pat B. Tremaine and Carol Barrette. The opponent alone submitted a written argument and the opponent alone was represented at an oral hearing. As well, the opponent advised the Opposition Board that it had changed its name to Nabisco Ltd. - Nabisco Ltée.

The first two grounds of opposition set forth in the amended statement of opposition are based on Subsections 30(b) and 30(e) of the *Trade-marks Act*, the opponent alleging that the present application does not contain the date from which the applicant or its named predecessor-in-title, if any, have used the trade-mark CRISPEROOS in association with the wares described in the present application and, further, that the applicant’s trade-mark is not a proposed use trade-mark in that the applicant had used its trade-mark CRISPEROOS prior to the date of filing the present application [September 21, 1992].

With respect to the first two grounds of opposition, the legal burden or onus is on the

applicant to show that its application complies with Section 30 of the *Trade-marks Act*. This includes both the question as to whether or not the applicant has filed an application which formally complies with the requirements of Section 30 and the question as to whether or not the statements contained in the application are correct. To the extent that the opponent relies on allegations of fact in support of their Section 30 ground, there is an initial burden on the opponent to prove those allegations [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330]. However, the opponent can rely on the applicant's evidence to meet the evidentiary burden upon it in respect of the Section 30 grounds.

In the present case, no evidence has been submitted by the opponent in support of its Section 30 grounds. Rather, the opponent has argued that the Zukovs affidavit meets the evidentiary burden on it. In particular, the opponent has referred to paragraph 17 of the affidavit of Alex Zukovs, Chief Operating Officer of Foodquest International Corp., formerly named Cuda Consolidated Inc., where the affiant states the following:

17. Marked as Exhibit "1" to this my Affidavit is a specimen bag of my company's product. My company's product Crisperoos has been sold at the retail level in Canada at least since the spring of 1992.

In my view, paragraph 17 of the Zukovs affidavit is unambiguous in asserting that the applicant has used the trade-mark CRISPEROOS in Canada since the spring of 1992. As a result, and following a line of decisions of the Registrar of Trade-marks which refused proposed use applications where actual use of the trade-mark was evidenced prior to the filing date [see *Tone-Craft Paints Ltd. v. Du-Chem Paint Co. Ltd.* (1969), 62 C.P.R. 283; *Airwick Industries Inc. v. Metzner* (1982), 74 C.P.R.(2d) 55; *Société Nationale Elf Aquitaine v. Spex Design Inc.* (1988), 22 C.P.R. (3d) 189; *Frisco-Findus S.A. v. Diners Delite Foods Ltd.* (1990), 26 C.P.R. (3d) 556; *La Marca Leather Corp. v. Orol Jewellery Mfg. Co. Ltd.* (1990), 28 C.P.R. (3d) 562; and *Manifatture Casucci Di Caucci Ugo & C. S.a.s. v. Casucci Clothes Inc.* (1993), 52 C.P.R. (3d) 250], I refuse the present application as not being in compliance with Section 30 of the *Trade-marks Act*. I have therefore not considered the remaining grounds of opposition relied upon by the opponent.

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

DATED AT HULL, QUEBEC, THIS 8<sup>th</sup> DAY OF AUGUST, 1997.

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