



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2011 TMOB 176
Date of Decision: 2011-10-04

**IN THE MATTER OF AN OPPOSITION by
Dairy Farmers of Canada / Les Producteurs
Laitiers du Canada to application
No. 1,389,114 for the trade-mark RICOTTA
FRESCA in the name of Grande Cheese
Company Limited.**

[1] On March 28, 2008, Grande Cheese Company Limited (the Applicant) filed an application to register the trade-mark RICOTTA FRESCA (the Mark) based upon proposed use of the Mark in Canada in association with “cheese; cheese namely ricotta cheese”. The application, as revised, states that the English translation of the term FRESCA is FRESH.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of December 3, 2008.

[3] On May 4, 2009, Dairy Farmers of Canada / Les Produits Laitiers du Canada (the Opponent) filed a statement of opposition. The grounds of opposition can be summarized as follows:

1. The application does not conform to the requirements of s. 30 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) in that i) the Applicant, at the time of the filing of the opposed application, was already using the Mark in Canada in association with the applied-for wares; ii) the trade-mark proposed to be used is not the Mark; and

- iii) alternatively or cumulatively, the Applicant never intended to use the Mark in Canada in association with the applied-for wares;
2. The Mark is not registrable pursuant to s. 12(1)(c) of the Act in that it is the name in Italian of the wares in connection with which it is proposed to be used;
 3. The Mark is not registrable pursuant to s. 12(1)(e) of the Act in that it is a mark of which the adoption is prohibited by s. 10 of the Act since RICOTTA FRESCA has, by ordinary and bona fide commercial usage become recognized in Canada as designating a kind or quality of cheese; and
 4. The Mark is not distinctive of the wares of the Applicant pursuant to s. 2 of the Act since the Mark does not actually distinguish the applied-for wares, nor is it adapted to so distinguish them.

[4] The Applicant filed and served a counter statement in which it denied the Opponent's allegations.

[5] Both the Opponent and the Applicant elected not to file any evidence.

[6] Only the Applicant filed a written argument. An oral hearing was not requested.

[7] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidentiary burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Ltd v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.); and *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)].

[8] None of the pleaded grounds can succeed in the absence of evidence. The lack of evidence means that the Opponent has not met its initial burden in respect of any of the grounds. Each of the grounds of opposition is accordingly dismissed.

[9] In view of the foregoing and pursuant to the authority delegated to me under s. 63(3) of

the Act, I reject the opposition pursuant to s. 38(8) of the Act.

Annie Robitaille
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office