

BETWEEN:

B. HOUDE COMPANY LIMITED,

APPELLANT;

AND

COMMISSIONER OF PATENTS,

RESPONDENT.

1934
 Jan. 15 & 22.
 Apr. 11.

Trade-Marks—Petition to register—Appeal from Registrar of Trade-Marks—“Royal Flush”—Unfair Competition Act.

Held: That the Unfair Competition Act, 22-23 Geo. V, c. 38, does not prohibit the use of the word “Royal” in a trade-mark.

2. That the use of the word “Royal” in connection with tobacco, cigars, cigarettes and cigarette papers is not misdescriptive of the character or quality of the wares, or of the conditions of their production or place of origin.

APPEAL from the decision of the Registrar of Trade-Marks refusing to register the words “Royal Flush” as a trade-mark.

The appeal was heard before the Honourable Mr. Justice Angers, at Ottawa.

O. M. Biggar, K.C., and *M. B. Gordon* for appellant.

E. G. Gowling for respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (April 11, 1934) delivered the following judgment:

On September 14, 1933, the petitioner filed with the Commissioner of Patents an application for the registration of the words “Royal Flush” as a trade-mark for use in association with tobacco, cigars, cigarettes and cigarette papers.

On November 7, 1933, the Commissioner of Patents notified the petitioner that, as the trade-mark contained the word “Royal”, it could only be registered by express warrant of His Majesty.

On November 10, 1933, the petitioner’s solicitors directed an inquiry to the Commissioner of Patents as to the statutory ground upon which, in the exercise of his jurisdiction, he reached the conclusion set out in his notification; on January 5, 1934, the Commissioner advised that registration of no trade-mark containing the word “Royal” could be granted and that authority had been given by

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Order in Council (No. 205/2555) dated December 12, 1933, for the return of the fee paid on the application.

By its petition setting forth the above recited facts and alleging besides that the said fee had been returned to the Commissioner, The B. Houde Company Limited asks for the direction of the Court for the registration of the trade-mark in question. The petition is supported by the usual affidavit, to which are attached a copy of the application for the registration of the trade-mark "Royal Flush" dated the 13th of September, 1933, a copy of the Commissioner's notice of refusal dated the 7th of November, 1933, a copy of petitioner's solicitors' letter to the Commissioner dated the 10th of November, 1933, and a copy of the Commissioner's reply to said solicitors dated the 5th of January, 1934.

The facts are not disputed and the only question to decide is whether the law prohibits the use of the word "Royal" in a trade-mark. I have reached the conclusion that it does not for the following reasons.

Sections 13 and 14 of the *Unfair Competition Act*, 1932 (22-23 Geo. V, chap. 38) enumerates the emblems or symbols which may not be adopted as a trade-mark; neither forbid the use of the word "Royal".

Counsel for the Commissioner urged that the trade-mark "Royal Flush" is misdescriptive and as such objectionable under subsection (c) of section 26. I must say that I fail to see how the words "Royal Flush" used in connection with tobacco, cigars, cigarettes and cigarette papers may possibly be misdescriptive of the character or quality of the wares or of the conditions of their production or of their place of origin.

Counsel for the Commissioner, in support of his contention, cited the case of *Carron Co's Application* (1). The Carron Company, incorporated by Royal Charter, had registered in 1881 a trade-mark. In 1909 the company applied for leave to alter its trade-mark, one of the alterations being the addition thereon of the words "Carron Company, Incorporated by Royal Charter 1773". The registrar refused to allow the alteration because of the word "Royal", relying on Rule 12 of the Trade-Marks Rules of 1906. The company appealed and the Court (Swinfen Eady, J.) upheld the registrar's decision.

Rule 12 of the Trade-Marks Rules, 1906, which were in force when the judgment in the case of Carron Co's Application was rendered, read, in part, as follows:

12. Representations of the Royal Arms or Royal Crests, or arms or crests so nearly resembling them so as to lead to mistake, or of British Royal crowns, or of the British national flags, or the word Royal or any other words, letters, or devices calculated to lead persons to think that the applicant has Royal patronage or authorization, may not appear on trade-marks the registration of which is applied for.

Rule 12 prohibits expressly the use of the word "Royal". We have no similar provision in our law. The decision in the case of Carron Co's Application is, in the circumstances, of no assistance.

In the case of *The Royal Worcester Corset Co's Application* (1) it was held that the use of the word "Royal", without reference to the place of manufacture, would suggest royal patronage and would therefore be calculated to deceive within the meaning of section 11 of the Trade-Marks Act, 1905.

Clause 11 reads thus:

11. It shall not be lawful to register as a trade-mark or part of a trade-mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous designs.

There is no provision similar or equivalent to section 11 in the Unfair Competition Act.

I must assume that the legislators, who were undoubtedly aware of rule 12—section 14 of the Unfair Competition Act seems to have been derived therefrom—intentionally omitted the word "Royal" from the list of emblems or symbols, the use of which they intended to forbid.

I may add that I cannot see how the use of the mark "Royal Flush", the name of what is commonly known as a valuable hand in the game of cards called poker, in connection with tobacco, cigars, cigarettes, and cigarette papers, could suggest Royal patronage.

I think that the petitioner is entitled to the registration of the trade-mark "Royal Flush", in accordance with its application of the 13th of September, 1933, and the Commissioner of Patents is accordingly directed to register it.

There will be no costs on the petition.

Judgment accordingly.