

BETWEEN:

RICHFIELD OIL CORPORATION ..... PLAINTIFF;

AND

RICHFIELD OIL CORPORATION }  
 OF CANADA LTD. .... } DEFENDANT.

1953  
 Apr. 14-16  
 1954  
 Nov. 19

*Trade name—Trade mark—Infringement of trade name—Expungement of trade mark—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(g), 2(h), 2(k), 2(n), 7, 8, 10, 52(1)—Similar trade name—Knowledge of plaintiff's name in Canada—Meaning of “knowingly adopts” in s. 7—Knowledge or ignorance of corporation that of its directors—Presumption of knowing adoption when trade name similar—Effect of licensing trade name—Likelihood of confusion through similar trade names not to be permitted—Use of trade mark prior to application for registration necessary—Jurisdiction of Court to expunge trade mark—Meaning of “person interested” in s. 52(1).*

The plaintiff, a Delaware corporation with its head office at Los Angeles, was incorporated in 1936. It was the successor of two prior United States corporations, each carrying the word Richfield in its corporate name, and acquired all their assets including trade marks. It carried on business as an integrated oil company including the operation of service stations. The defendant was incorporated under the laws of Canada on June 1, 1951, with its head office nominally at Vancouver. It was intended that it should operate service stations to be known as Richfield stations in the same way as service stations were operated by other oil companies but it was not organized for business and did not do any business. Prior to the date of the defendant's incorporation the plaintiff had made its name known in Canada by advertisements of its petroleum products in publications circulated in the ordinary course among potential dealers and users of similar wares in Canada. The plaintiff sued for infringement of trade name, infringement of trade mark and passing-off and prayed for injunctions. The defendant counterclaimed for expungement of the plaintiff's trade mark on the ground that it was invalid by reason of the fact that there had not been any use of it prior to the application for its registration and also because the defendant had licensed its use on products other than its own.

*Held:* That there was no evidence to support the plaintiff's allegations of infringement of trade mark and passing-off.

2. That the defendant's name is similar to the plaintiff's trade name.
3. That at the date of the defendant's incorporation the plaintiff's name was known in Canada by the advertisement of its wares in Canada in association with its trade name in printed publications circulated in the ordinary course among potential dealers in and users of similar wares in Canada.
4. That since a corporation cannot have any knowledge or be credited with ignorance of a fact otherwise than through its members it must have been intended by Parliament that when the Act speaks of the

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knowledge or ignorance of a person, including therein a corporation, it means in the case of a corporation the knowledge or ignorance of its directors which is attributed to it.

- 5. That the defendant has failed to discharge the onus cast on it by section 10 of the Act of rebutting the presumption that it knowingly adopted a trade name similar to the plaintiff's.
- 6. That although the plaintiff's conduct in allowing its trade names to be used on gasolines that were not its own but were purchased from some one else and charging a fee for such use is open to adverse comment it should not be allowed to defeat the plaintiff's claim.
- 7. That if the defendant used the name Richfield many persons in Canada to whom the plaintiff's name was known would be led to believe that the defendant was a Canadian subsidiary of the plaintiff and in the interests of both the plaintiff and the public the likelihood of such confusion should not be permitted.
- 8. That the plaintiff's trade mark was not in use prior to the application for its registration.
- 9. That this Court has jurisdiction to order the expungement of a trade mark only on the application of the Registrar or of any person interested and the defendant was not a "person interested" within the meaning of section 2(h) of the Act.

ACTION for infringement of trade name, infringement of trade mark and passing-off.

The action was tried before the President of the Court at Vancouver.

*A. Bull, Q.C.* and *C. C. I. Merritt* for plaintiff.

*J. L. Farris, Q.C.* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (November 19, 1954) delivered the following judgment:

While the plaintiff brought this action for infringement of its trade name, infringement of its trade mark and passing off and sought injunctions restraining the defendant from such infringements and passing off and the defendant counter-claimed for expungement of the plaintiff's trade mark, it was apparent after the case was closed that the defendant, after its incorporation, had never been organized for business and had never done any business and that there was no evidence that could possibly support the plaintiff's allegations of infringement of trade mark or passing off. Consequently, the only issues in the case are whether the plaintiff has a cause of action against the defendant for infringement of its trade name and whether the defendant

has any right to have the plaintiff's trade mark expunged. It follows that the only evidence to be considered is that which bears on these issues.

The plaintiff was incorporated under the laws of Delaware on November 14, 1936. It was the successor of two prior corporations each carrying the word Richfield in its corporate name, the first being the Richfield Oil Company, incorporated under the laws of California on November 29, 1911, and the second the Richfield Oil Company of California, incorporated under the laws of Delaware on August 2, 1926. The plaintiff acquired all the assets of its predecessors including their various trade marks. The steps by which it did so are set out in detail in the plaintiff's answer to the defendant's demand for particulars and need not be enumerated.

The plaintiff is a fully integrated oil company, that is to say, it produces crude oil, refines it and markets and distributes a complete line of petroleum products. It deals in gasoline of various grades, oils of several kinds, lubricants, greases, solvents and other related products. It has its head office at Los Angeles in California and does business principally in the six Western States although its products are distributed in other areas. Since the beginning the plaintiff and its predecessors have been very active in the promotion of the business and bringing the name Richfield to the attention of the public. Mr. W. G. King Jr., the plaintiff's vice-president, gave an interesting account of the history of the several organizations and their activities. They made the name known by spectacular and bold advertising, such as, for example, the Richfield Beacons. They were active in connection with automobile racing and aviation. They advertised extensively through advertising agencies and their own department. This advertising includes the establishment of a news program emanating from radio station KOMO from Seattle, called the "Richfield Reporter", the oldest sustained newscast in North America, with a very large listening audience including listeners in British Columbia. There was also very extensive advertising in newspapers, magazines, periodicals and trade journals, the advertising budget exceeding \$1,500,000

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per year in some years. In addition, there was an inter-change of credit cards with the British American Oil Com-pany. In all the advertising the name Richfield was prominently featured. It appeared also on billboards and the plaintiff's various service stations. There is no doubt that the name was well known in the Pacific States to users of gasoline and oil. I shall refer later to the extent to which it was known in Canada. The plaintiff has always looked on Canada as a logical place for expansion of its activities and has plans for it. Its immediate predecessor, the Richfield Oil Company of California, was registered in British Columbia but when it went into receivership, prior to its being taken over by the plaintiff, its provincial regis-tration was withdrawn in 1937, and the plaintiff did not take out a provincial registration until after this litigation was commenced.

The defendant was incorporated by letters patent under the laws of Canada on June 1, 1951. The circumstances sur-rounding its incorporation were explained by Mr. A. G. D. Crux, a director of the defendant and its solicitor. He had attended to the incorporation, all the applicants for incor-poration being associated with him in his law firm. Mr. Crux had become interested in Richfield Petroleum Limited which had been incorporated under the laws of Canada on March 1, 1929. This company was engaged in drilling for and selling oil, first in the Turner Valley field and later in the Leduc field, and it was decided that it should expand its activities and that a new company should be formed to help raise finances and work in association with it. This led to the decision to form a new company under the name of the defendant. Mr. Crux settled on its name. The incor-poration was applied for on May 26, 1951. The Companies Branch of the Secretary of State's Department at Ottawa advised that consents to the proposed name should be obtained from Richfield Petroleum Limited and Richfield Oil Company of California. Mr. Crux communicated with the office of the Registrar of Companies at Victoria and was informed that the Richfield Oil Company of California had been struck off the provincial register on June 5, 1937, as it

had ceased to do business in the province. The consent of Petroleum Oil Limited had already been obtained. This information was transmitted to the Companies Branch and the incorporation then went into effect. An agreement had been negotiated between Richfield Petroleum Limited and on behalf of the defendant under which the former was to confine itself to the production of petroleum and its sale to the latter which was to market the products so produced and operate gasoline and oil service stations. The agreement was executed by Richfield Petroleum Limited but not by the defendant. While the document was signed by two of its officers and its seal was affixed, its approval of the agreement was held up because of this litigation. As a matter of fact the defendant has not been organized for business and has not done any business. It has no assets and no office of its own, its registered address being Mr. Crux's law office. Mr. Crux made it quite clear, however, that the defendant intended to acquire and operate retail outlets for the sale of gasoline and oil and that such outlets would be run in the same way as the service stations of other oil companies. They would advertise Richfield gasoline and would be known as Richfield stations. The Richfield name was the one that was wanted for advertising purposes.

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This action is mainly for the purpose of determining whether the plaintiff, a foreign corporation, can prevent the defendant from doing business under a name of which Richfield forms a part.

Counsel for the plaintiff, after conceding that on the evidence no case has been made of infringement of its trade mark or of passing off, based its claim for an injunction restraining the defendant from infringement of its trade name on sections 7, 8 and 10 of The Unfair Competition Act, 1932, Statutes of Canada 1932, Chapter 38. These read as follows:

7. No person shall knowingly adopt for use as the name under which he carries on business, or knowingly adopt for use in connection with any business, any trade name which at the time of his adoption thereof is the name, or is similar to the name, in use by any other person as the trade name of a business of the same general character carried on in

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Canada, or of such a business carried on elsewhere if its name is known in Canada by reason of the distribution therein of wares manufactured or handled by such person under such trade name, or of the advertisement of such wares in Canada in association with such trade name, in any printed publication circulated in the ordinary course among potential dealers in and/or users of similar wares in Canada.

8. No person shall be entitled to continue to use in Canada any trade name which he knew, at the time of his adoption thereof, was, or was similar to, the trade name of a business of the same general character then being carried on in Canada, or of a business carried on elsewhere than in Canada if its name was then known in Canada for one of the reasons aforesaid.

10. Any person who adopts a trade mark, trade name or distinguishing guise identical with or similar to a trade mark, trade name or distinguishing guise which was in use, or in use and known as aforesaid, shall be presumed to have knowingly adopted the same unless it is established either

- (a) that, in the case of a trade mark, the ownership thereof in Canada passed to the person by whom the same was adopted, or, in the case of a trade name or distinguishing guise not being a trade mark, that the same was adopted with the consent of the person by whom the same was in use; or
- (b) that, at the time of the adoption of the trade mark, trade name or distinguishing guise, the person who adopted it was in ignorance of the use of the same or of a similar unregistered trade mark or a similar trade name or distinguishing guise, and that in adopting it the person by whom it was adopted acted in good faith and believed himself to be entitled to adopt and use it; or
- (c) that the person by whom such trade mark, trade name or distinguishing guise was adopted has continuously used the same in the ordinary course of his business and in substantially the manner complained of during the five years immediately before the commencement of the proceedings.

Section 2(n) of the Act defines "Trade name" as follows:

2. In this Act, unless the context otherwise requires:—

- (n) "Trade name" means the name under which any business is carried on, whether the same is the name of a corporation, a partnership or an individual;

And subsection (k) of the same section defines "similar", in relation to trade names, as follows:

- (k) "Similar", in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same

person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

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There is, in my opinion, no room for doubt that the defendant's name is similar, within the meaning of the Act, to the plaintiff's trade name. Counsel for the defendant stated that he was not going to argue that the names were not similar. The only dispute is whether on the facts the plaintiff is entitled to the relief sought. To succeed in its claim under section 7 the plaintiff, which carries on its business elsewhere than in Canada, must prove that its trade name was known in Canada at the time of the defendant's incorporation, within the meaning of section 7, and that the defendant knowingly adopted a trade name similar to it.

There is no doubt that the plaintiff's name was known in Canada at the date of the defendant's incorporation. Much evidence was adduced to prove that the "Richfield Reporter" had a large listening audience in Canada, but this would not be sufficient to satisfy the requirement of section 7. To do so the plaintiff must show that its name was known in Canada either by the distribution therein of wares manufactured or handled by it under its trade name or by the advertisement of its wares in Canada in association with its trade name in any printed publication circulated in the ordinary course among potential dealers in and/or users of similar wares in Canada.

The evidence establishes that more than twenty years ago the plaintiff's predecessor, the Richfield Oil Company of California, distributed its gasoline and oil in Canada. The first distribution was made through the Paragon Oil Company which owned bulk plants in Vancouver and its vicinity. It bought some products and received others on consignment. The products were distributed through service stations known as Richfield service stations. These were painted in the usual Richfield colors and carried the customary Richfield insignia and signs. The products were all identified as Richfield products. Many witnesses were called on behalf of the plaintiff to prove this distribution.

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Certainly, to them the Richfield name was known in Canada at the time of such distribution, and subsequently. The evidence establishes that the first shipment of Richfield products to the Paragon Oil Company was in April, 1929. There is no evidence of any distribution of Richfield's products in Canada prior to that date. The arrangement with the Paragon Oil Company continued until early in 1930 when it got into difficulties. The next distribution was through the Dominion Oil Company, starting in 1931. This company purchased Richfield gasoline, oils and greases and distributed them through service stations in Vancouver and Victoria. These used the Richfield trade marks, that is to say, the Richfield Eagle, on its pump and globes and generally the same advertising as Richfield service stations used in the United States. The arrangement with the Dominion Oil Company continued until 1933.

From that date and until 1945, when the plaintiff made its arrangement with the United Oil Company, to which I shall refer later, there was no distribution of Richfield products in Canada. While the evidence shows that the plaintiff's trade name was known in Canada to certain persons by reason of the distribution referred to and remained known notwithstanding the lapse of time since it took place it seems to me, although the matter is not entirely clear, that the section contemplates knowledge of the name by reason of distribution at or near the time specified in the section, and not a distribution made so long ago. But it is not necessary to decide the question in view of the evidence relating to the advertisement of the plaintiff's products.

Evidence of advertisements of Richfield gasoline oil in printed publications circulated in Canada in the ordinary course was given by Mr. A. A. Wilkie, the sales manager of the Vancouver Magazine Service, Mr. C. Shaw, the manager of the Canadian operations of the Miller Freedman Publications, and Mr. Karl Jorgenson, an advertising agent from Los Angeles. This shows extensive advertising of the plaintiff's products in papers, magazines and trade journals all circulating in Canada, such as the Pacific



Edition of the Wall Street Journal, the Seattle Post Intelligencer and the American Weekly, the Seattle Times, The Spokesman Review, The West Coast Lumberman, The Timberman, Aviation Week, Western Aviation, Western Canner and Packer and Pacific Builder and Engineer. It was argued by counsel for the defendant that there was no evidence that anyone in Canada had seen the advertisements in these publications. I cannot accept this submission. It seems to me that the plaintiff has satisfactorily proved that the plaintiff's trade name was, at the date of the defendant's incorporation, known in Canada by reason of the advertisements referred to, within the meaning of section 7, and that its requirements in this connection have been met.

I now come to the important question whether the defendant knowingly adopted a trade name similar to that used by the plaintiff. During the course of the argument I expressed doubt whether a corporation such as the defendant could have knowingly adopted its corporate name. The term "knowingly adopts" connotes knowledge prior to adoption. Consequently, even if it could be said that a corporation had adopted the name under which it was created the question arose whether it could have done so with knowledge prior to such adoption. Until its incorporation it did not exist and could not have any knowledge. While the matter is not free from difficulty, I have come to the conclusion that this construction of the term should not prevail. If it were so construed it would mean, in effect, that section 7 could not apply to a corporation. But Parliament did not intend such an exclusion, for section 2(g) of the Act makes it clear that the word "person" in section 7 does include a corporation. There is a way out of the difficulty. Since a corporation cannot have any knowledge or be credited with ignorance of a fact otherwise than through its members it must have been intended by Parliament, since the word "person" includes a corporation, that when the Act speaks of the knowledge or ignorance of a corporation it means the knowledge or ignorance of its directors which is attributed to the corporation. In the case

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of the defendant the person who had the most to do with its incorporation was Mr. Crux. It is to his knowledge or ignorance that we must look for it is to be deemed that of the defendant. In paragraph (7) of the statement of defence the defendant admitted that it adopted the corporate name of Richfield Oil Corporation of Canada Ltd. for the purpose of carrying on its business. I have already found that this name is similar to the plaintiff's name. These facts subject the defendant to the onus imposed by section 10 of the Act. The effect of this is that the defendant is presumed to have knowingly adopted a trade name similar to the plaintiff's unless it can establish one of the sets of facts specified in paragraphs (a), (b) or (c) of section 10. The only paragraph that could possibly apply to the defendant is paragraph (b). To discharge the onus placed on the defendant by this paragraph it must establish two facts, namely, one, that at the time of the adoption of the trade name it was in ignorance of the use of a similar trade name, and the other, that in its adoption it acted in good faith and believed itself to be entitled to adopt and use the name.

In this connection the defendant must be bound by whatever knowledge Mr. Crux had. Such knowledge is to be attributed to it. Mr. Crux said that he knew of the plaintiff corporation as Richfield of California, but I have no hesitation in finding that he knew the name Richfield as the distinctive part of the name of a corporation in the United States dealing in gasoline and oil. He was a frequent visitor to Southern California. He knew the Richfield service stations and had heard of the "Richfield Reporter." Moreover, I am not wholly satisfied that he can meet the second part of the requirement of paragraph (b). In his solemn declaration in support of the application for incorporation of the defendant he stated that the proposed name of the Company was not that of any known company, incorporated or unincorporated, or of any partnership or individual, or any name under which any known business was being carried on, or so nearly resembling the same as to deceive except that of Richfield Petroleum Limited, but he

omitted to mention that he knew of an organization in the United States carrying on business under a name of which the word Richfield was the distinctive part. Moreover, the correspondence which he had with Mr. Brittingham is suggestive that he thought that the adoption of the name Richfield by the defendant put it in a strong bargaining position for negotiating a business relationship with the plaintiff. On the evidence I find that the defendant has failed to discharge the onus cast on it by section 10 of rebutting the presumption that it knowingly adopted a trade name similar to the plaintiff's. It follows that the plaintiff has made out a case against the defendant of breach of the prohibition of section 7 and that it is entitled to restrain the defendant from infringing its trade name, unless the defendant can show some reason why the plaintiff should not be given such relief.

The defendant's main defence to the plaintiff's claim was that it had licensed United Oil Limited, a company carrying on business in Vancouver, to use its trade name on products which were not Richfield products, that by so doing it had deceived the public and that its conduct had the effect of defeating its claim. The facts relating to the arrangement between the plaintiff and United Oil Limited may be outlined briefly. It is set out in two letters from the plaintiff, one dated August 30, 1945, and addressed to Mr. H. L. Bevan, the president of United Oil Limited, and the other dated April 23, 1946, and addressed to United Oil Limited. By the first letter the plaintiff granted permission to United Oil Limited to use certain trade names in the sale and distribution in Canada of petroleum products purchased from it, together with the trade name "Richfield" and "all Richfield insigne and trade marks" to be used in connection with specified gasolines and oils. The permission was to terminate at such time as United Oil Limited discontinued purchasing and selling petroleum products purchased from the plaintiff. It was also provided in the agreement that "you may at present and until further notice, use the trade names 'Richfield Hi-Octane' and 'Richfield Ethyl' on

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gasolines which you will purchase from Standard Oil Company of California, it being understood that the said Company has consented to said rebranding". By the letter of April 23, 1946, it was agreed that United Oil Limited would pay to the plaintiff for the privilege of using its trade names the sum of  $\frac{1}{4}$  cent for each imperial gallon of gasoline sold by United Oil Limited in Canada, either domestically or for export therefrom, under the trade names "Richfield", "Richfield Hi-Octane" and "Richfield Ethyl". This agreement was to be applicable to all gasolines which were not purchased directly by United Oil Limited from the plaintiff and to all such gasolines sold by United Oil Limited under the said trade names on and after May 1, 1946. This arrangement ran until October, 1949. During its currency United Oil Limited sold 9,256,856 gallons of gasoline on which it paid fees and the fees came to a total of \$23,142.14.

Counsel for the defendant contended that the plaintiff's act in licensing United Oil Limited to use its trade names and trade marks on petroleum products that were not Richfield products but were purchased from the Standard Oil Company defeated the plaintiff's claims for infringement of trade name and trade mark. As already mentioned, we are not here concerned with any issue of infringement of trade mark but only with that of infringement of trade name. In support of his submission counsel referred to *Bowden Wire Ld. v. Bowden Brake Company Ld.* (1) and *Robert Crean & Co., Ltd. v. Dobbs & Co.* (2). These are both trade mark cases. Counsel said that he did not have any trade name cases on the subject but submitted that the same principles should apply as in the case of trade marks.

While I must say that I consider that the plaintiff's conduct in allowing United Oil Limited to use its so-called trade names "Richfield", "Richfield Hi-Octane" and "Richfield Ethyl" on gasolines that were not its own but were purchased from some one else and to charge a fee for such use is open to adverse comment, I have come to the conclusion that it should not be allowed to defeat the plaintiff's

(1) (1914) 31 R.P.C. 385.

(2) [1930] S.C.R. 307.

claim against the defendant. Mr. King said that there was nothing unusual in the agreement made with United Oil Limited and that it was a common practice in the United States to make such agreements, particularly when a certain standard of quality was specified. In the present case the plaintiff was satisfied that the Standing Oil Company's gasoline was equal in quality to anything on the market, so that the plaintiff's reputation would not suffer by allowing Standard Oil Company's gasoline to be sold under the Richfield name. It should also be noted that the permission applied to two classes of gasoline, "Richfield Ethyl", a premium gasoline and "Richfield Hi-Octane", a second structure quality gasoline. It also appears that the reason for the arrangement was that it was uneconomical for United Oil Limited to purchase its supplies from the plaintiff. As an indication that the arrangement was not an unusual one Mr. King stated that the plaintiff had for some years manufactured all of the refined oil products marketed in British Columbia by the British American Oil Company and sold under its name. Moreover, if the objection to the practice is that the public was deceived I see no reason why the defendant should be allowed to mislead the public by its use of the name Richfield, for there is, in my opinion, no doubt that if it did use the name many persons in Canada to whom the plaintiff's name was known would be led to believe that the defendant was a Canadian subsidiary of the plaintiff. In the interests both of the plaintiff and of the public the likelihood of such confusion should not be permitted. I find some support for this conclusion in the decision of the Judicial Committee of the Privy Council in *J. H. Coles Proprietary Ltd. (in Liquidation) v. Need* (1). I, therefore, find that the plaintiff is entitled to an injunction restraining the defendant from using or trading under the name of Richfield Oil Corporation of Canada Ltd. in connection with the production, distribution or sale of gasoline, oil or other petroleum products or in that connection using or trading under any name including the

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(1) (1933) 50 R.P.C. 379.

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word Richfield or any title or description including such word, or otherwise colorably resembling or similar to the name of the plaintiff.

I now come to the defendant's counterclaim in which it seeks to expunge the plaintiff's Canadian trade mark "Richfield" on the ground that it had not been used prior to its registration. The trade mark referred to is a specific trade mark registered in the Trade Mark Register No. 208 Folio 45534 under the Trade Mark and Design Act, R.S.C. 1927, Chapter 201, by the Richfield Oil Company of California on January 23, 1929, which was assigned to the plaintiff on March 13, 1937, the assignment being registered on February 21, 1938. The trade mark consists of a shield upon which there appear the word "Richfield" and the words "The Gasoline of Power" in a rectangular border. The trade mark was to be used in connection with the manufacture and sale of motor spirits. The application for its registration was made on August 17, 1929. There had been a previous application for the registration of the word Richfield and the representation of a spread eagle similar to that used by the applicant in the United States but the representation of the spread eagle had to be eliminated because of a prior registration of a similar representation and the shield was substituted. Thus the trade mark that was registered was a different trade mark from the plaintiff's predecessor's trade mark in the United States. In the application of August 17, 1928, the statement was made that the applicant verily believed that the specific trade mark was theirs on account of having been the first to make use of the same. This statement is not correct. At the date of the application the trade mark had not been used by the Richfield Oil Company of California anywhere. Certainly, it had not been used in Canada. The first distribution of Richfield petroleum products in Canada was made to the Paragon Oil Company in April, 1929. Indeed it was not incorporated until February 2, 1929. Thus the trade mark could not have been used in Canada prior to that date. It is thus established that the trade mark in question was not in use prior to the application for its

registration. If I had to decide the question I would find that the plaintiff's trade mark was invalid. *Vide Robert Crean & Co. Ltd. v. Dobbs & Co.* (1); *J. H. Munro Limited v. Neaman Fur Company Limited* (2); *Lime Cola Company v. The Coca-Cola Company* (3). That makes it unnecessary to consider the effect of the licensing to United Oil Limited on its validity.

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But, as I see it, I need not decide the question of validity. If the defendant had ever used a trade mark similar to the plaintiff's trade mark it would have had a good defence to an action for infringement of trade mark on the grounds stated but it by no means follows that it has a right to have the plaintiff's trade mark expunged. That right depends on section 52 of The Unfair Competition Act, 1932, which provides:

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52. (1) The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

Thus, this Court has jurisdiction to order the expungement of a trade mark only on the application of the Registrar or of any "person interested". It must, therefore, be shown in the present case that the defendant is a "person interested", within the meaning of the Act. The term "person interested" is defined by section 2(h) as follows:

2. In this Act, unless the context otherwise requires:—

(h) "Person interested" includes any person directly affected by any breach of any provision of this Act; any person who, by reason of the nature of the business carried on by him and the ordinary mode of carrying on such business, may reasonably apprehend that the goodwill of such business may be adversely affected by any entry in the register of trade marks, or by any act or omission or contemplated act or omission contrary to the provisions of this Act; and, in respect of any such act, omission or entry in the register relating to or affecting any right vested in any trade union or commercial association or in the administrative authority of any country, state, province, municipality or other organized administrative area, includes such trade union, such association and such administrative authority, and also any person authorized from time to time by the union, association or administrative authority to make use of the mark;

(1) [1930] S.C.R. 307.

(2) [1947] Ex. C.R. 1.

(3) [1947] Ex. C.R. 180.

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In my judgment, the defendant does not come within this definition. It has no right to use the word "Richfield" as a trade name and could not be adversely affected by anything that the plaintiff has done. It would still be open to the plaintiff to cure the defect in its right to the trade mark in question. I, therefore, find that the defendant was not a "person interested", within the meaning of the Act, and that this Court has accordingly no jurisdiction to order the expungement sought. The defendant's counterclaim must therefore, be dismissed.

Consequently, there will be judgment that the plaintiff is entitled to an injunction as specified and that the defendant's counterclaim is dismissed. The plaintiff is entitled to the costs of the claim and of the counterclaim.

*Judgment accordingly.*

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