
LAMONT, CORLISS & COMPANY.....PETITIONERS;
 AND
 THE STAR CONFECTIONERY COM- }
 PANY }RESPONDENT.

1924
May 23.

*Trade-Marks—"Chocolate Croquettes"—"Person aggrieved"—Interest
—Distinctiveness.*

Held, that the words "Croquettes" or "Chocolate Croquettes" being essentially words of the French and English languages, and having direct reference to the character of the goods, cannot be regarded as distinguishing the goods of one trader from another, and therefore cannot be made the subject-matter of a trade-mark.

Semble. That the words "person aggrieved" in section 42 of the Trade-Marks and Designs Act, are synonymous with the word "interested" which relates to a person having the necessary interest to sustain an action.

PETITION to expunge trade-mark "Chocolate Croquettes" and to register the word "Croquettes" as a specific trade-mark.

May 2nd, 1924.

Action now tried before the Honourable Mr. Justice Audette at Montreal.

R. C. H. Cassels, K.C. for petitioners;

M. Solomon and T. M. Tansey for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 23rd May, 1924, delivered judgment.

This is an application, by the petitioners, to expunge from the Canadian Register of Trade-Marks, the respondent's Specific Trade-Mark

to be applied to the sale of chocolates and the like and which consists of the words "Chocolate Croquettes" enclosed in three circles,

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and to register as the petitioners' specific trade-mark, the word "Croquettes."

In the view I take of the case, it will be unnecessary to decide whether or not the user made by the petitioners, both in the United States and in Canada, prior to the respondent, of their own mark in the manner mentioned in the evidence—so mixed up with other more prominent words, features and letters and also associated and coupled with these words in large print,—could amount to a substantial user. The only two questions in this case which postulate and call for determination are:—

First: Whether the petitioners are *persons aggrieved* within the meaning of section 42 of the Trade-Marks Act, and secondly and principally: Whether the word "Croquettes" by itself or the words "Chocolate Croquettes" are susceptible of registration as a trade-mark.

Dealing with the first question, it would seem,—in view of the very wide and large definition which has been given these words *persons aggrieved* to be found in section 42—that they could be treated as being of the same meaning and synonymous with the word *interested*, that is to be understood as the fundamental rule which requires that no person can bring an action at law unless he has an interest therein, which interest, unless otherwise provided, may only be eventual. Does the word "aggrieved" here mean anything more than "interested"? C.P.C. Art. 77; Trade-Mark *Zonophone* (1); Sebastian, 5th ed. 631; In re *Apolinaris* (2); *Re Billings et al v. Canadian Billings Co.* (3). As put by Davies J. in re *Vulcan Trade-Mark* (4):

The words 'any person aggrieved' embrace anyone who may possibly be injured by the continuance of the mark on the register and to the extent it is so registerd.

This view has been adopted in Canada in the case of *Auto Sales Gum and Chocolate Co.* (5) and in other well known cases, as well as in England in *Re Powell v. Birmingham Vinegar Brewery Co.* (6) and in the numerous cases therein cited, under a similar statute using the same words. Sebastian 5th ed. 367, 372 and 386. Reading together secs. 35, 12 and 9 of the english Act, it must be found that the court

(1) [1903] 20 R.P.C. 450.

(2) [1891] 2 Ch. 186.

(3) [1921] 20 Ex. C.R. 405.

(4) [1915] 51 S.C.R. 411.

(5) [1913] 14 Ex. C.R. 302.

(6) [1894] A.C. 8.

will always expunge when the mark offends against sections 9 and 11 of this Act, that is when the mark is wanting in subject-matter, or does not possess the essential requirements to constitute a trade-mark.

In the present case the petitioners are persons interested, having a potential interest that may ripen into a practical and real subject of grievance upon an extension of their business along a certain line (C.P.C. art. 77). They are persons aggrieved. Indeed, if the respondent's trade-mark were to remain on the register, when it should not be, through the monopoly of the word "Croquettes" or "Chocolate Croquettes" being apparently vested in them, the petitioners would be deprived from using the words, and were they making use of the same, the respondent would be at liberty to prosecute them for infringement.

I therefore find the proceedings were rightly instituted by the petitioners.

Coming now to the second question as to whether the word "croquettes" by itself, or the words "chocolate croquettes" are susceptible of registration as a trade-mark, it will be well to first inquire into the meaning and character of these words.

The word "croquette" is one which essentially belongs to the French language and which has found its way into the English language. By reference to Larousse (Nouveau Larousse) dictionary, we will find that "Croquette" is a *boulette de pâte ou de hachis saupoudrée de chapelure de pain, trempée dans les oeufs et frite*:—*Croquette de riz, de pommes de terre, de cervelle*, and it also means:

Tablette de chocolat très petite et très mince.

That is the word "Croquette" by itself means a chocolate croquette. In the New English Dictionary—Murray—we find the following definition of the word croquette:

(C. f. *croquer* to crackle under the teeth, to crunch)—A ball or mass of rice, potato or finely minced meat or fish, seasoned and fried crisp.

No one can monopolize the French or the English languages,—the two official languages in Canada,—nor can any one have a monopoly in the name of anything.

A word having direct reference to the character of the goods cannot be the subject of a trade-mark.

Distinctiveness is the cardinal requirement for a trade-mark to be good and valid, and distinctiveness means that

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the word, symbol or device shall be used or adapted to distinguish the goods of the proprietor of the trade-mark from those of other persons, owners of similar or other goods.

I may repeat here some observations I had occasion to make in the *Aspirin* case (1):

Our Canadian Trade-Mark Act provides, by section 5, what shall be deemed to be a trade-mark, and section 9 provides for its registration, which does not confer any new right but merely gives a *locus standi* in the courts to enforce its rights. Then by subsection (e) of section 11, it is provided that the minister may refuse to register any trade-mark "if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking"

—which essentials are not defined in the Act. *The Standard Ideal Co. v. The Standard Sanitary Mfg. Co.* (2).

Having found that the words "croquettes" or "chocolate croquettes" are both English and French words having direct reference to the character of the goods,—without any distinctiveness—and applying the judgment of the *Standard Ideal* case (*ubi supra*), it must be found, without attempting to define "the essentials necessary to constitute a trade-mark properly speaking," that these words form part of the English and French languages and cannot be apt or appropriate for distinguishing the goods of one trader from those of another. They have no distinctiveness to identify the product of any particular trader.

The trade-mark already on the register and the trade-mark sought herein to be registered do not, either of them, contain

the essentials necessary to constitute a trade-mark properly speaking
 —a valid trade-mark.

The trade-mark on the Register must be expunged and the registration of the word "Croquettes" as a trade-mark is refused.

This finding is in accordance with the decision of the Supreme Court of Canada in *Parlo v. Todd* (3).

Now there remains the question of costs. The petitioners succeed in expunging the respondent's trade-mark; but they fail in their application to register their own. I take it to be a sound and sensible principle that parties ought not, even if found to be substantially right in the actions instituted by them, to add to the expenses of a case by

(1) [1923] Ex. C.R. 65, at p. 74.

(2) [1911] A.C. 78 at 84.

(3) [1888] 17 S.C.R. 196.

fighting issues in which they are in the wrong. It may be, however, reasonable as regards their own interest, and may perhaps help them in the conduct of the action, that they should raise issues in which in the end they are defeated; but the party who does so does it in his own interest, and I think he ought to do it at his own expense. *Badische Anilin und Soda Fabrik v. Levinstein* (1); *Treo Co. v. Dominion Corset Co.* (2).

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Under all the circumstances of the case on the question of costs, I think justice will be done by allowing the petitioners only half costs—that is to say half of the total amount of the bill of costs as taxed according to the practice of the court.

I have therefore come to the conclusion, for the reasons above set forth to adjudge and order that the specific trade-mark No. 131, Folio 30050, registered on the 15th December, 1921, consisting of the words “chocolate croquettes” as applied to the sale of chocolate be expunged from the Register of the Canadian Trade-Marks, and that registration of the word “croquettes,” as sought by the petitioners, be refused. The whole with costs as above mentioned.

Judgment accordingly.