

1968
 *Oct. 23
 Nov. 18

BENSON & HEDGES (CANADA) }
 LIMITED } APPELLANT;

AND

ST. REGIS TOBACCO CORPORATION RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade marks—Registration—Opposition on ground of confusion—“Golden Circlet” in association with cigarettes—“Gold Band” previously registered with respect to cigars, cigarettes and tobaccos—Whether decision of Registrar an exercise of discretion—Appeal to Exchequer Court from Registrar’s decision—Whether Exchequer Court can substitute its decision for that of Registrar—Trade Marks Act, 1952-53 (Can.), c. 49, ss. 6(2),(5), (12)(1)(d), 37.

The appellant filed an opposition under s. 37 of the *Trade Marks Act* to the registration of the respondent’s trade mark “Golden Circlet” to be used in association with cigarettes. The opposition was on the ground that the proposed mark was confusing with the appellant’s trade mark “Gold Band” which was already registered for use in connection with the sale of cigars, cigarettes and tobaccos. The Registrar of Trade Marks rejected the opposition and granted the registration. The Exchequer Court found that the Registrar had not acted on any wrong principle or otherwise than judicially and dismissed the appeal. The Court was of the opinion that the trade marks were confusing but decided that it was precluded by the decision in *Rowntree Co. Ltd. v. Paulin Chambers Co. Ltd.*, [1968] S.C.R. 134, from substituting its conclusion for those of the Registrar under the circumstances. The appellant appealed to this Court.

Held (Cartwright C.J. dissenting): The appeal should be allowed and the registration refused.

Per Martland, Ritchie and Hall JJ: The decision as to whether or not a trade mark is confusing within the meaning of s. 6 of the *Trade Marks Act* involves a judicial determination of a practical question of fact and does not involve the exercise of the Registrar’s discretion. It was open to the Exchequer Court in the circumstances of this case to substitute its conclusion for that of the Registrar and it was not precluded from doing so by the decision in the *Rowntree* case, *supra*. The Exchequer Court has rightly found that the proposed trade mark was “confusing” with the other.

Per Pigeon J.: From what the Registrar has said, the appellate tribunal could not ascertain the grounds of his decision and therefore could not see whether they were well founded in law. It therefore became its duty to form its own opinion as to the proper conclusion to be reached. The Exchequer Court’s finding that confusion would be likely to occur was amply supported.

Per Cartwright C.J., *dissenting*: It was open to the Exchequer Court in this case to substitute its judgment for that of the Registrar and

*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Pigeon JJ.

the decision in the *Rowntree* case, *supra*, did not preclude it from so doing. The question to be determined in this case involves the exercise of personal judgment. Confusion was unlikely in this case.

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Marques de commerce—Enregistrement—Opposition pour motif de confusion—«Golden Circlet» à l'égard de cigarettes—«Gold Band» antérieurement enregistré à l'égard de cigares, cigarettes et tabacs—La décision du registraire est-elle rendue dans l'exercice d'une discrétion judiciaire—Appel à la Cour de l'Échiquier de la décision du registraire—La Cour de l'Échiquier peut-elle substituer sa propre opinion à celle du registraire—Loi sur les marques de commerce, 1952-53 (Can.), c. 49, art. 6(2), (5), 12(1)(d), 37.

La compagnie appellante a produit une déclaration d'opposition, en vertu de l'art. 37 de la *Loi sur les marques de commerce*, à l'enregistrement par la compagnie intimée de la marque de commerce «Golden Circlet» pour être employée à l'égard de cigarettes. L'opposition est fondée sur le motif que cette marque créerait de la confusion avec la marque «Gold Band» de l'appelante déjà enregistrée pour être employée à l'égard de la vente de cigares, cigarettes et tabacs. Le registraire des marques de commerce a rejeté l'opposition et a permis l'enregistrement. La Cour de l'Échiquier a statué que le registraire n'avait pas décidé d'après un faux principe ou sans discernement et elle a rejeté l'appel. Elle était d'avis que les marques créaient de la confusion mais a elle décidé que, dans les circonstances, elle était empêchée par l'arrêt dans *Rowntree Co. Ltd. c. Paulin Chambers Co. Ltd.*, [1968] R.C.S. 134, de substituer son opinion à celle du registraire. D'où l'appel à cette Cour.

Arrêt: L'appel doit être accueilli et l'enregistrement refusé, le Juge en Chef Cartwright étant dissident.

Les Juges Martland, Ritchie et Hall: La conclusion qu'une marque de commerce créée ou non de la confusion dans le sens de l'art. 6 de la *Loi sur les marques de commerce* nécessite une décision judiciaire sur une question pratique de fait et non pas l'exercice d'une discrétion judiciaire de la part du registraire. Dans les circonstances de cette cause, il était loisible à la Cour de l'Échiquier de substituer son opinion à celle du registraire et elle n'était pas empêchée de le faire par l'arrêt *Rowntree, supra*. La Cour de l'Échiquier a jugé avec raison que la marque en question créait de la confusion.

Le Juge Pigeon: Le tribunal d'appel ne pouvait pas, en se basant sur ce que le registraire a dit, se rendre compte des motifs de sa décision et, par conséquent constater s'ils étaient bien fondés en droit. Il lui incombait donc de former sa propre opinion sur la conclusion à laquelle il devait en arriver. Sa conclusion que les marques seraient susceptibles de créer de la confusion était amplement justifiée.

Le Juge en Chef Cartwright, dissident: Il était loisible à la Cour de l'Échiquier de substituer son opinion à celle du registraire et l'arrêt *Rowntree, supra*, ne l'empêchait pas de le faire. La question à trancher dans le cas présent nécessite l'exercice d'un jugement personnel. La confusion n'était pas probable en l'occurrence.

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APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada¹ confirmant une décision du registraire des marques de commerce. Appel accueilli, le Juge en Chef Cartwright étant dissident.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada¹, affirming a decision of the Registrar of Trade Marks. Appeal allowed, Cartwright C.J. dissenting.

John C. Osborne, Q.C., and *R. M. Perry*, for the appellant.

Donald F. Sim, Q.C., and *R. T. Hughes*, for the respondent.

THE CHIEF JUSTICE (*dissenting*):—The relevant facts and the questions raised in this appeal are set out in the reasons of my brother Ritchie.

I agree with his conclusion that it was open to Jackett P. in the circumstances of this case to substitute his judgment for that of the Registrar and that he was not precluded from doing so by the decision of this Court in *The Rowntree Company Limited v. Paulin Chambers Co. Ltd. et al.*²

It appears to me that the question whether the degree of resemblance between two trade marks in appearance or sound or in the ideas suggested by them would be likely to lead to the inference that the wares associated with such trade marks are manufactured by the same person, is one involving the exercise of personal judgment in the light of all the evidence and with particular regard to the surrounding circumstances as set out in Clauses (a) to (e) of s. 6(5) of the *Trade Marks Act* quoted by my brother Ritchie. I have no doubt that in arriving at their conclusions in the case at bar both the learned President and the learned Registrar had all these provisions in mind.

Bearing in mind the directions of s. 6(5) of the *Trade Marks Act* and assuming, contrary to the fact, in favour of the appellant that it had continuously manufactured and marketed cigarettes under its trade mark "Gold Band", I

¹ [1968] 2 Ex. C.R. 22, 37 Fox Pat. C. 83, 54 C.P.R. 49.

² [1968] S.C.R. 134, 37 Fox Pat. C. 77, 54 C.P.R. 43.

would still be of opinion that it is unlikely in the extreme that either a retail dealer in cigarettes purchasing from a wholesaler or the average customer buying cigarettes at a tobacconist's counter would be likely to draw the inference that cigarettes contained in a package bearing the trade mark "Golden Circlet" were manufactured by the appellant. The question is one of a class in the determination of which judges will naturally differ, as is evidenced by the present case. With every respect for the opinion of those who entertain the contrary view, I find myself in agreement with the conclusion of the learned Registrar which was affirmed, although unwillingly under the supposed compulsion of the *Rowntree case*, by the judgment of the Exchequer Court.

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I would dismiss the appeal with costs.

The judgment of Martland, Ritchie and Hall JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Jackett, the President of the Exchequer Court of Canada³, dismissing an appeal from a decision of the Registrar of Trade Marks by which he had rejected the opposition filed by the appellant under the provisions of s. 37 of the *Trade Marks Act, 1952-53 (Can.)*, c. 49 (hereinafter called the Act) to the registration of the respondent's trade mark "GOLDEN CIRCLET" to be used in association with "cigarettes".

The ground of opposition which gives rise to this appeal is the allegation that the trade mark applied for is confusing with the appellant's trade mark consisting of the words "GOLD BAND" which was registered for use in connection with the sale of "cigars" in September 1928, and with respect to the sale of "cigars, cigarettes and tobaccos of every kind and description" on September 12, 1958.

Under the provisions of s. 12(1)(d) of the Act, a trade mark is not registrable if it is "confusing with a registered trade mark" and the question of whether it is confusing or not is to be determined in accordance with the standard fixed by s. 6(2) of the Act which reads as follows:

6. (2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade

³ [1968] 2 Ex. C.R. 22, 37 Fox Pat. C. 83, 54 C.P.R. 49.

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marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

I have underlined the words “would be likely to lead to the inference” as it appears to me to be clear that in opposing an application for registration, the holder of a trade mark which is already registered is not required to show that the “mark” which is the subject of the application is the same or nearly the same as the registered mark, it being enough if it be shown that the use of this mark would be likely to lead to the inference that wares associated with it and those associated with the registered trade mark were produced by the same company.

In deciding whether a trade mark is “confusing” within the meaning of the Act, both the Court and the Registrar are governed by the provisions of s. 6(5) which reads:

6. (5) In determining whether trade marks or trade names are confusing the *court or the Registrar*, as the case may be, shall have regard to all the surrounding circumstances including

- (a) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;
- (b) the length of time the trade marks or trade names have been in use;
- (c) the nature of the wares, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

In the present case, after reciting the grounds for the appellant’s opposition, the learned Registrar concluded by saying:

I have duly considered the evidence and the written arguments filed by both parties. Neither party requested a hearing. Having regard to the circumstances of the case on the basis of the evidence adduced, I have come to the conclusion that the grounds of opposition are not well founded. The marks are sufficiently different in appearance, in sound and in the ideas suggested by them to preclude confusion within the meaning of Section 6 of the *Trade Marks Act*.

The opposition is accordingly rejected pursuant to section 37(8) of the *Trade Marks Act*.

It was suggested in the argument before us that because the learned Registrar appeared to confine his reasons for rejecting the opposition to the ground that the requirements of s. 6(5)(e) had not been met, it should therefore be assumed that he had ignored the provisions of s. 6(5)(a) to (d) inclusive. In view of the fact that these grounds

are specifically dealt with in the evidence and that the Registrar expressly says that he reached his conclusion "on the basis of the evidence adduced", I do not think that this contention is tenable and, like Mr. Justice Jackett, I am unable to find that the Registrar acted on any wrong principle or otherwise than judicially.

In the course of his reasons for judgment in the Exchequer Court, the learned President, having reviewed the evidence, expressed himself as follows:

Giving all due weight to the decision of the Registrar, who, I realize, has had infinitely more experience in this very specialized field than I have had, when I have regard to all the surrounding circumstances, including

- (a) the fact that the trade mark "GOLD BAND", while it is not what is apparently referred to as a strong mark, had, before the respondent's application, become very well known in Canada, and the fact that the trade mark "GOLDEN CIRCLET" was not known at all,
- (b) the fact that the trade mark "GOLD BAND" had been used in Canada for at least six years before the application was made, and the fact that the trade mark "GOLDEN CIRCLET" has not been used at all
- (c) the fact that cigars and cigarettes are closely related wares,
- (d) the fact that the wares in question are ordinarily sold by the same retailer over the same counter, and
- (e) the fact that there is a very substantial resemblance between the trade mark "GOLD BAND" and the trade mark "GOLDEN CIRCLET" (when they are considered on a first impression basis and not by way of a detailed comparison) in appearance, sound and the ideas suggested by them,

I cannot escape the conclusion that if those two trade marks were used in the same area it would be very likely to lead to the inference that the wares associated with them were manufactured by the same person and thus that, by virtue of section 6(1), the one is 'confusing' with the other for the purposes of the *Trade Marks Act*.

If, therefore, it were my duty on this appeal to come to a conclusion as to what the Registrar should have decided, and to substitute my conclusion for his if I come to a different one, I would allow this appeal.

Mr. Justice Jackett, however, treated the decision of this Court in *The Rowntree Company Limited v. Paulin Chambers Co. Ltd., et al.*⁴ as a binding authority which precluded him from interfering with the conclusion reached by the Registrar of Trade Marks on such an application unless it could be shown that the Registrar had "proceeded on some wrong principle or that he failed to exercise his discretion judicially".

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In the *Rowntree* case the application for registration of the Trade mark SMOOTHIES in respect of candy had been refused by the Registrar on the ground that it was confusing with the Rowntree Company's registered trade marks SMARTIE and SMARTIES, but in the Exchequer Court Mr. Justice Gibson reached the opposite conclusion and allowed the registration.

On appeal to this Court it was found that in determining the question of confusion the Registrar of Trade Marks had directed himself in accordance with the provisions of s. 6 and had therefore adopted the proper approach to the question before him, whereas the finding of Mr. Justice Gibson that there was "no probability of confusion" between the trade mark applied for and the registered trade marks and his further finding that the meaning of the words "Smoothies" and "Smarties" is "entirely dissimilar" were based in large measure on the definition of these words in Webster's 3rd New International Dictionary. In this regard the Court expressed the opinion that the essential question to be determined did not necessarily involve the resemblance between the dictionary meaning of the words used in the trade mark applied for and those in the registered trade marks and concluded:

It is enough . . . if the words used in the registered and unregistered trade marks are likely to suggest the idea that the wares with which they are associated were produced or marketed by the same person. This is the approach which appears . . . to have been adopted by the Registrar of Trade Marks.

The appeal might well have been disposed of on this basis without further comment but in the course of his argument before this Court, counsel for Paulin Chambers Company Limited made the following submission:

In respondent's submission, the learned trial judge, who by reason of s. 55(5) of the *Trade Marks Act* was entitled to exercise any discretion vested in the Registrar, correctly came to the conclusion that the trade marks are not confusing.

This contention was made the subject of very full argument on both sides and it was accordingly dealt with in the reasons for judgment where it was said:

It is contended on behalf of the respondent that the conclusion reached by the learned trial judge should not be disturbed having regard to the terms of s. 55(5) of the Act which provides that 'on the appeal . . . the Court may exercise any discretion vested in the Registrar'. I do not, however, take this as meaning that the Court is entitled to sub-

stitute its view for that of the Registrar unless it can be shown that he proceeded on some wrong principle or that he failed to exercise his discretion judicially.

In the present case the learned President construed this paragraph as deciding that in reviewing findings of fact made by the Registrar as well as in reviewing any exercise of his discretion, the Exchequer Court could only interfere on the ground that there had been an error in principle or a failure to act judicially. It is not difficult to appreciate this misunderstanding of the passage, but it should be made plain that this Court was there concerned exclusively with the effect to be given to the words 'on the appeal . . . the Court may exercise any discretion vested in the Registrar' as these words occur in s. 55(5) of the Act. It is to be observed that in the paragraph directly following the passage above quoted, reference is made to the decision of Lord Evershed *In the Matter of Broadhead's Application for Registration of a Trade Mark*⁵, in which he cited the well-known statement made by Lord Dunedin in *George Banham and Company v. F. Reddaway and Company Limited*⁶, where he said:

Now it is true that an appeal lies from the decision of the Registrar, but, in my opinion, unless he has gone clearly wrong, his decision ought not to be interfered with. The reason for that is that it seems to me that to settle whether a trade mark is distinct or not—and that is the criterion laid down by the statute—is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case.

In my view, the decision as to whether or not a trade mark is confusing within the meaning of s. 6 of the Act involves a judicial determination of a practical question of fact and does not involve the exercise of the Registrar's discretion. The provisions of s. 49(7), (9) and (10) which are concerned with the registration of a person as a registered user of a trade mark, afford illustrations of cases in which a discretionary power is vested in the Registrar, but this is not such a case.

I adopt what was said by Lord Dunedin in the last-quoted passage as applying to an appeal from a decision of the Canadian Registrar of Trade Marks on the question of whether or not an application for the registration of a trade mark should be refused on the ground that it is con-

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⁵ (1950), 67 R.P.C. 209.

⁶ [1927] A.C. 406 at 413.

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fusing with a registered trade mark, subject, however, to the qualification expressed by Lord Wright in *In the Matter of an Application by J. & P. Coats Limited for Registration of a Trade Mark*⁷, where he commented on Lord Dunedin's statement, saying, at page 375:

With great respect to the learned Lord, the word 'clearly' may perhaps be regarded as tautologous. If, in the view of the Court, examining all the circumstances, the Registrar has gone wrong, then that must mean that he has gone clearly wrong. The only matter to observe is that *prima facie* the Registrar's decision will be regarded as correct.

In my view the Registrar's decision on the question of whether or not a trade mark is confusing should be given great weight and the conclusion of an official whose daily task involves the reaching of conclusions on this and kindred matters under the Act should not be set aside lightly but, as was said by Mr. Justice Thorson, then President of the Exchequer Court, in *Freed and Freed Limited v. The Registrar of Trade Marks et al*⁸:

... reliance on the Registrar's decision that two marks are confusingly similar must not go to the extent of relieving the judge hearing an appeal from the Registrar's decision of the responsibility of determining the issue with due regard to the circumstances of the case.

I am accordingly of the opinion that it was open to Mr. Justice Jackett in the circumstances of this case to substitute his conclusion for that of the Registrar and I do not think that he was precluded from doing so by the decision of this Court in *The Rowntree Company Limited v. Paulin Chambers et al., supra*.

The learned President has made an extensive review of the evidence and has stated in the clearest terms his reasons for finding that if the two trade marks here in issue

... were used in the same area it would be very likely to lead to the inference that the wares associated with them were manufactured by the same person and thus that, by virtue of section 6(1), one is 'confusing' with the other for the purposes of the *Trade Marks Act*.

I am in full agreement with the reasoning and conclusion of Mr. Justice Jackett in this regard and I have nothing to add to what he has said.

⁷ (1936), 53 R.P.C. 355.

⁸ [1950] Ex. C.R. 431 at 437, 11 Fox Pat. C. 50, 14 C.P.R. 19, [1951] 2 D.L.R.7.

I would accordingly allow this appeal and give effect to the opposition filed by the appellant with the result that the respondent's application for registration of the trade mark in the words "GOLDEN CIRCLET" is refused.

The appellant will have its costs of this appeal and of the appeal to the Exchequer Court of Canada.

PIGEON J.:—I agree with Ritchie J. and wish to add the following.

As my brother Fauteux has pointed out in *Dorval v. Bouvier*⁹, the rule that an appellate court should not review the evidence in view of substituting its appreciation for that of the trial judge unless he is clearly wrong, is subject to the following qualification, namely, that his reasons must be explicit enough to enable the appellate tribunal to assess their legal value ("encore faut-il, cependant, . . . que ces raisons soient en termes suffisamment explicites pour permettre à une Cour d'appel d'en apprécier la valeur au point de vue juridique").

This condition was fully met in the "Smoothies" and "Smarties" case¹⁰, the Registrar having indicated as follows on what basis he found the two marks "confusing":

The nature of the wares and the nature of the trade in both cases is identical and the wares are distributed through the same channels of trade. Both marks are slang terms commonly used to describe a 'smart aleck' or a 'smooth operator'.

In the instant case, however, the reasons given by him do not indicate what weight he gave to each of the factors that he considered and, especially, they do not reveal on what basis he concluded that the obvious similarities between the two marks were unlikely to lead to the inference that the wares to which they would be applied were manufactured by the same person. In effet, the Registrar did not really give explicit reasons: he summarized the case and stated his conclusion. From what he said, the appellate tribunal could not ascertain the grounds of his decision and therefore could not see whether these were well founded in law. Under those circumstances it became its duty to form its own opinion as to the proper conclusion to be reached.

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⁹ [1968] S.C.R. 288.

¹⁰ [1968] S.C.R. 134, 37 Fox Pat. C. 77, 54 C.P.R. 43.

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Having had the advantage of reading the reasons of the Chief Justice I find myself, with the greatest respect, unable to concur in his opinion that confusion is unlikely. In my view, the situation in this case is almost identical with that which obtained in *The Matter of Broadhead's Application*¹¹. The mark sought to be registered was "Alka-vescent". The opposition came from "Alka-Seltzer". The Court of Appeal upheld the objection although the latter trade mark was admittedly "weak" because "Alka" being descriptive could not be monopolized any more than "Gold" can be in the circumstances of the present case. It was held that confusion was likely to arise because the idea suggested by the two marks was substantially the same, "vescent" being intended to suggest "effervescent" and "Seltzer" meaning a particular kind of effervescent mineral water. Here the situation is almost exactly the same. There is no substantial difference between "gold" and "golden" and a "circlet" is a kind of "band". Of course, the sound of the second word is different as in the English case, but I think this was rightly considered by the learned President as insufficient to avoid any risk of confusion when the meaning is similar.

It is no doubt true that if one examines both marks carefully, he will readily distinguish them. However, this is not the basis on which one should decide whether there is any likelihood of confusion.

The tribunal must bear in mind that the marks will not normally be seen side by side and guard against the danger that a person seeing the new mark may think that it is the same as one he has seen before, or even that it is a new or associated mark of the proprietor of the former mark. (Halsbury's Laws of Canada, 3rd ed., vol. 38, No. 989, p. 590).

In *The Matter of McDowell's Application*¹², Sargant L.J. said at p. 338:

Even if the very slight distinction between "Nujol" and "Nuvol" were noticed, yet, having regard to the ordinary practice of large producers to register a series of similar marks to denote various grades of their produce, it seems to me highly probable that an inference of identity of origin would be drawn.

The practice referred to in this quotation is sanctioned by the provisions of s. 15 of the *Trade Marks Act* respecting "associated trade marks" and it should be borne in mind in considering the issue of confusion.

¹¹ (1950), 67 R.P.C. 209.

¹² (1926), 43 R.P.C. 313.

In the present case there is a distinct possibility that "Go'den Circlet" would appear as a sort of diminutive of "Gold Band", especially on account of the meaning of "circlet". This, as well as the other considerations above stated, in my opinion, further supports the learned President's finding that confusion would be likely to occur.

I would dispose of the appeal as proposed by my brother Ritchie.

Appeal allowed with costs, CARTWRIGHT C.J. dissenting.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent: McCarthy & McCarthy, Toronto.

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