

1942
 *Nov. 27.
 *Dec. 24.

FINE FOODS OF CANADA, LIMITED }
 (PETITIONER) } APPELLANT;

AND

METCALFE FOODS, LIMITED (RE- }
 SPONDENT) } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Trade marks—Petition to expunge respondent's mark from Register—
 Whether petitioner's and respondent's marks "similar" within mean-
 ing of s. 2 (k) of The Unfair Competition Act, 1932 (Dom., c. 38).*

The appellant and respondent companies were canners of vegetables, etc.
 Appellant used the trade mark "Garden Patch", registered in 1929,
 and the trade mark "Summer Pride", which appellant commenced to

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

(1) *Spooner Oils Limited v. The Turner Valley Gas Conservation
 Board*, [1933] S.C.R. 629, at 644.

use in 1935 but which by oversight was not registered. Respondent in 1940 commenced to use, and registered, the trade mark "Garden Pride". Appellant petitioned to have respondent's said trade mark expunged from the Register, on the ground that its registration did not accurately express or define respondent's existing right in respect of the mark since respondent was not entitled to use it owing to the reasonable apprehension of confusion consequent upon its use between appellant's goods and those of respondent bearing it.

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Held: Said trade marks "Garden Patch" and "Garden Pride" were not, nor were said trade marks "Summer Pride" (assuming that the Court could take it into consideration, notwithstanding its non-registration) and "Garden Pride", "similar", within the meaning of s. 2 (k) of *The Unfair Competition Act, 1932* (Dom., c. 38); and therefore the dismissal of appellant's petition by Maclean J., [1942] Ex. C.R. 22, should be affirmed.

APPEAL from the judgment of Maclean J., late President of the Exchequer Court of Canada (1), dismissing the present appellant's petition for a direction that a certain trade mark of the respondent be expunged from the Register of Trade Marks. The material facts sufficiently appear in the judgment now reported.

O. M. Biggar K.C. for the appellant.

A. G. McHugh K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal by Fine Foods of Canada Ltd. from a judgment of the late President of the Exchequer Court dismissing a petition under section 52 of *The Unfair Competition Act, 1932*, to expunge the trade mark "Garden Pride", registered by the respondent, Metcalfe Foods Ltd., under No. NS14074 on October 17th, 1940, as applied to canned fruits, vegetables, jams, jellies and pork and beans.

The respondent, whose principal place of business is at Whitby, in the province of Ontario, commenced to make use of that trade mark in or about the month of June, 1940. Before 1929, the predecessor in title of the appellant, whose principal place of business is at Tecumseh in Ontario, commenced to use a trade mark "Garden Patch" for the purpose of distinguishing its products, which products are similar to those of the respondent, and caused the said trade mark to be registered on October 2nd, 1929,

(1) [1942] Ex. C.R. 22; [1942] 2 D.L.R. 59; 2 Fox Pat. C. 113;
1 Can. Pat. Rep. 301.

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as number 219/47728. In the year 1935, the appellant commenced to use the trade mark "Summer Pride" also for the purpose of distinguishing its products, and shortly thereafter instructed agents in Ottawa to cause the said mark to be registered but, by oversight, no registration was made.

The appellant and respondent have continued to use their respective trade marks with reference to their products, and the ground for the application to the Exchequer Court is stated in the appellant's petition as being that the registration of the respondent's trade mark "Garden Pride"

does not accurately express or define the respondent's existing right in respect of the said mark since the respondent is not entitled to use the same owing to the reasonable apprehension of confusion consequent upon its use between your petitioner's goods and those of the respondent bearing it.

Clause (k) of section 2 of *The Unfair Competition Act, 1932*, reads 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;

The learned President decided that the two trade marks "Garden Patch" and "Garden Pride" are not similar within the meaning of this clause and I agree with him. In coming to a conclusion as between the appellant's unregistered mark "Summer Pride" and respondent's registered mark "Garden Pride", the President considered that he was not entitled to take into consideration the use of the former because it was not registered. I express no opinion on this point, for, even assuming that the Court may take into consideration the unregistered mark, the two marks are not "similar" within the meaning of that expression as used in the Act.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *McHugh & Macdonald.*