

BETWEEN:

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 March 17.  
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THE CANADIAN RUBBER  
 COMPANY OF MONTREAL,  
 LIMITED ..... PLAINTIFF:

AND

THE COLUMBUS RUBBER  
 COMPANY OF MONTREAL,  
 LIMITED ..... DEFENDANT.

*Trade Mark—Infringement—Similarity of mark—Injunction—Damages.*

Plaintiff company was the duly registered owner of a general trade-mark consisting of an effigy of Jacques Cartier surrounded by the words "The Canadian Rubber Company of Montreal, Limited." The plaintiff, and its predecessor in title, had been for years large manufacturers of rubber footwear to which this mark was applied. It was established that so well-known was the mark in the trade that customers of merchants handling the plaintiff's goods in the Province of Quebec would ask for them by the name of the "Jacques Cartier," the "Canadian," or the "Sailor." In June 1912, the defendant company proceeded to manufacture and sell a class of rubber footwear stamped with the effigy of a sailor closely resembling that of Jacques Cartier in the plaintiff's trade mark, surrounded with the words, "Columbus Rubber Company of Montreal, Limited" in a scroll chiefly differing from the one used by the plaintiff in that it was rectangular in form while that of the plaintiff was round. Defendant's mark was not registered.

*Held*, that there was such a similarity between the defendant's mark and that of plaintiff as to be calculated to deceive the public into purchasing the defendant's goods for those of the plaintiff, and that the defendant should be enjoined from placing on the market and selling rubber footwear and goods bearing the mark as above described.

THIS was an action arising out of an alleged infringement of the plaintiff's trade-mark. Both an injunction and damages were asked for by the statement of claim.

The facts are stated in the reasons for judgment.

January 30th, 1913.

The case now came on for hearing before the Honourable Mr. Justice Audette at Montreal.

*T. Chase Casgrain*, K.C., and *G. S. Stairs*, for the plaintiff.

*A. Geoffrion*, K.C., for the defendant.

Mr. *Casgrain* presented the following argument:—

First of all let us consider the trade-mark which is registered. I wish to call the attention of the court to the resemblance between the two trade-marks, and also to the dissimilarity. Plaintiff company is the registered owner of a trade-mark; it has complied with the law; this trade-mark has belonged to us for a long period of years, since 1869. It is a distinctive mark in the trade, well known, and having a great value for the plaintiff, especially in the Province of Quebec.

It is important to consider the value that it has acquired up to this point of time, and to the high grade of rubbers covered by that registered mark. On the other hand you have the defendant here who did not register its trade-mark, and I submit that this is a point in our favour. I can draw the inference that if the Columbus Rubber Co. had gone to Ottawa to get this trade-mark registered, it would have failed on account of the similarity of the two trade-marks. They preferred to put this article upon the market and make it pass, as much as possible, for our popular rubber which has been known for a long while.

Take our trade-mark by itself. We have the "Jacques Cartier" rubber, which bears upon its trade-mark the figure of a man,—not only of a man but of a sailor—and your lordship will see he has a peculiar

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kind of cap on, which was in those days called a béret.

On the other hand you have the trade-mark of the defendant company. It also bears the effigy of a man—the effigy of a sailor-man,—the effigy of a man having a béret on his head. Then the bust in Exhibit 13 is of the same size as the bust in the trade-mark of the plaintiff company.

[THE COURT.—One of the witnesses spoke of a ladder being in the background.]

They are halliards. You have got to be pretty sharp to notice that, and I do not think that the ordinary man coming into a store to buy a pair of rubbers would notice that there are no halliards behind the effigy of Christopher Columbus.

Now what do the witnesses say, not only the witnesses for the plaintiff, but the witnesses for the defence, also. They say that the principal element in both trade-marks is the effigy of a man. I asked several of them this question: What would strike the the ordinary man who goes into your place to buy a pair of rubbers—what would be the principal thing that would strike him in these two trade-marks. And all of the witnesses for the plaintiff, and some of the witnesses for the defence, say that it is the effigy of a man.

Is it not strange that if there was no intent to deceive, if there was no intent to defraud the public, if there was no intent to pass off the Columbus rubber for the Jacques Cartier rubber, that the Columbus Rubber Company would have adopted not only the figure of a man, but of a sailor, an explorer, wearing an antique costume, with an antique cap on his head? Is it not strange that they should hit upon that effigy instead of some other trade-mark, which would have

been just as distinctive, if they were not intending to deceive the public, and which would have been just as good for their business, as the trade-mark they adopted.

Not only was Chouinard trying to deceive the ordinary retail customers of the plaintiff company, but he was trying to steal the jobbers and dealers from the company, and he knew if he adopted this word "Columbus" with the figure of Columbus, that he was taking a name which was well known to the dealers in rubbers, and in connection with the trade-mark could easily be mistaken.

My learned friend says that the word "Columbus" was not known to the ordinary purchaser. But here we have in this very room one of the boxes in which the Jacques Cartier rubbers are sold, which bears the name of "Columbus" upon it.

[THE COURT.—I do not know that it would appeal to the purchaser. He would not be shown the box?]

In a great many instances the rubbers are sent to the purchaser, in the box.

Here is another peculiar fact, another element which goes to show the intent to defraud, that Chouinard not only took our registered trade-mark but he took a well-known name which was used in connection with our trade-mark, the word "Columbus." All of this goes to show that his intent was to take from us the trade we earned for the quality we sold under the name of "Jacques Cartier."

It was an excellent rubber. It was a popular rubber. It had obtained a reputation as a first-class article, and fifty per cent. of the people who went into the stores asked for the "Jacques Cartier" rubbers.

Now, there is no doubt there are some dissimilarities in this trade-mark. The defendant company here, and Chouinard, know the law of trade-marks; and they

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know that if they are caught infringing a trade-mark that there is a penalty—that they may be sued in damages—therefore, they have steered as close to the line as possible. They have adopted our trade-mark with a certain number of dissimilarities. For instance the first thing they adopt is the effigy of a man—a sailor man—which I spoke of. Your lordship will notice we have a belt around the effigy of the man with the words Canadian Rubber Company in it.

[THE COURT.—A scroll?]

A scroll. And they have a scroll around their effigy also, containing the words “The Columbus Rubber Company of Montreal, Limited.” And outside of that there is a little difference, that is the square marks above these lines. You take the general appearance, and what do you find? You find a man, and a round scroll in our device; and in the other you find a round scroll, and almost the very words we use. We say “The Canadian Rubber Company of Montreal”. and they say “The Columbus Rubber Company of Montreal.” Why do they say that? That is another indication that they want to infringe our trade-mark. They put on words which look as much as they can like ours.

The differences are small differences, they are not differences which will be noticed by the ordinary man who goes to buy the “Jacques Cartier” rubber. They will not be noticed by the man who buys one or two pairs of rubbers a year. Suppose I buy one or two pairs of rubbers a year, I want to buy the “Jacques Cartier”. I go into a store and say I want a pair of “Jacques Cartier” rubbers, and the shop-keeper gives me a pair of the “Columbus” rubbers. What strikes me first is the figure of a man on the rubber. Does your lordship think I will look at the superscription?

I will not do so unless I suspect fraud or something illegal. Does your lordship think I will look to see whether there are halliards in the background? Or a difference between the caps? Or whether one man has his hand up to his face, or if he has his hand across his bosom? I am an ordinary man coming to a store once or twice a year to buy a pair of rubbers. I will see whether there is an effigy on the rubber. If there is an effigy on the rubber, I will come to the conclusion that it is a "Jacques Cartier" rubber, and I will buy it. Now, I think that is the test. It is not what the man who is an expert in the trade will do.

[THE COURT.—It is what the incautious, the unwary man will do.]

Yes. I say we have every element here in the make-up of this fraudulent trade-mark, to be able to say to the court that there was a desire and an intention on the part of the Columbus Rubber Co. to imitate our trade-mark, and to palm off their goods on the market for the goods of the Canadian Rubber Co. which had a good reputation, and had a great sale on the market.

I rely on the opinion of Burbidge, J., in *Boston Rubber Shoe Company v. Boston Rubber Co.* (1)—"The fraud that entitles the owner of the trade-mark to redress need not consist in an intention to deceive on the part of the defendant, but may consist in an actual deception, or in the creation of a probability of deception, independently of any fraudulent intention."

This dictum of Mr. Justice Burbidge is supported by all the authorities. I go further. I say that the fraudulent intention is manifest. With all the

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surroundings, all the incidents, the make-up of the trade-mark, the words used, the general conformation of the whole thing, go to show that there was an intention to defraud. But the court did not go as far as that, and it said that proof of this intention is not absolutely necessary provided that there may be a probability of deception.

Cites *Upper Assam Tea Co. v. Herbert & Co.* (1); *Edwards v. Dennis*; (2); *Lambert v. Goodbody*; (3); *Paine v. Daniel & Sons' Breweries*; (4); *Seixo v. Provezende*; (5);

In several of these cases it was decided that the adoption of a single characteristic, or a distinctive particular from the plaintiff's mark, and its use alone, or with other matter, may well be an infringement of the entire mark.

Let me call attention to two leading cases in the Supreme Court of Canada, *Barsalou v. Darling*, (6) and *DeKuyper v. Van Dulken*, (7).

What the court said in the *Barsalou* case was this: What appealed to the eye was the head, and that the defendant by taking the head of a unicorn, which resembled the head of a horse, had fraudently imitated the registered trade-mark of the other party, and therefore he should be condemned. This is a judgment of the Supreme Court of Canada, in 1881, which has never been reversed—there being only one Judge dissenting—Henry, J. That case is very strong in our favour. If you compare that case with the present case what do you see? There is no head of a horse here, but there is the head of a man. There is the head or bust of a sailorman—and what would strike the eye in that case would be the horse's head, and in

(1) (1890) 7 R. P. C. 186.

(2) (1890) 30 Ch. D. 454.

(3) (1902) 19 R. P. C. 377.

(4) (1893) 2 Ch. 567; 10 R. P. C. 71.

(5) (1886) 1 Ch. 192.

(6) (1882) 9 S. C. R. 677.

(7) (1895) 24 S. C. R. 114.

this case it would be the sailorman, the bust of the sailorman. The dissimilarities between the two trade-marks of Jacques Cartier and Columbus, are certainly not as great as those which existed between the two marks in *Barsalou v. Darling*.

In the *DeKuyper* case there were dissenting judgments of two judges, Taschereau and Gwynne, but they went much further than the other three judges who confirmed the judgment of the court. The two judges who dissented in the Supreme Court were of opinion that the label in the form of a heart in both cases formed a part of the trade-mark, and that the fact that the defendant put upon his bottles of gin a heart shaped label was an infringement of the trade-mark of DeKuyper although the heart shaped label had not been registered. These two judges said that is part of the whole device. What the court agreed upon was that there was a deception in the whole get-up.

Mr. *Stairs*, followed for the plaintiff, contending that the ultimate test of infringement, is that the resemblance between two marks is so close that an incautious purchaser would be deceived. (*Johnstone v. Orr-Ewing* (1).

Mr. *Geoffrion*, for the defendant, argued that the word "Columbus" could not possibly be confounded with the word "Jacques Cartier" by the most incautious customer. The cases on the question are numerous, but there is no doubt about the principle which they all affirm, namely, that the resemblance must be such as would be likely to cause the one mark to be mistaken for the other, so that the goods of the defendant might be bought for those of the plaintiff. (*Cope v. Evans*,) (2). The distinction between the plaintiff's mark and that of the defendant in the

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(1) (1882) 7 App. Cas. 219.

(2) (1874) 13 Eq. 138; 30 L. T. 292.

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present case is manifest and clear. The *Barsalou* case (1) does not apply because in that case there was evidence of fraud, which is wholly missing here. So long as the defendant has no intention of stealing the plaintiff's trade and the similarity is not very close between the marks, even in England in passing off cases the courts will refuse an injunction. (*Payton & Co. v. Snelling, Lampard & Co.*) (2)

Mr. *Casgrain* replied.

AUDETTE, J., now (March 17th, 1913) delivered judgment.

This action was instituted for the purpose of enjoining the defendant from placing on the market and selling rubber footwear and rubber goods bearing a trade-mark in any way resembling the plaintiff's trade-mark, and for damages for such alleged infringement of the plaintiff's registered trade-mark.

The plaintiff company was incorporated in 1866, by a special Act of the old Province of Canada, 29 & 30 Vic. Ch. CXI under the name of "The Canadian Rubber Company of Montreal." Subsequently thereto, to wit, in 1905, it acquired, under Section 11 of Ch. 15, 2 Ed. VII. a Dominion charter, and from that date on continued to do business under the name of "The Canadian Rubber Company of Montreal, Limited."

On the 3rd of December, 1869, the plaintiff acquired from the Canadian Rubber Company, by assignment, the rights to the general trade-mark, bearing the effigy of Jacques Cartier surrounded by the following words, "Canadian Rubber Company," which was applied to rubber shoes and other rubber goods manufactured by the said company.

(1) (882) 9 S.C.R. 677

(2) (1901) A. C. 108.

On the 6th December, 1869, the plaintiff obtained the registration of the said trade-mark, in Trade-Mark Register, No. 1, folio 62.

On the 25th September, 1912, the plaintiff obtained from this Court, under the provisions of Sec. 43 of the Trade-Mark and Design Act, leave to add and alter its trade-mark by prefixing to the words "Canadian Rubber Company," the word "The", and adding thereto the words "of Montreal, Limited." The said addition and variation has been duly registered in the Department of Agriculture, and the amendments made accordingly on the 30th September, 1912.

Therefore from that date the plaintiff's registered trade-mark consists of the effigy of Jacques Cartier, surrounded by the following words "The Canadian Rubber Company of Montreal, Limited," and it is applied to the rubber shoes and may be applied to the other goods manufactured and sold by them, as shewn upon the two stamps attached to the Certificate of the Department of Agriculture, bearing date the 15th October, 1912, and filed herein as plaintiff's Exhibit No. 2.

The defendant's plea resolves itself into a general denial respecting the infringement complained of.

It is established beyond controversy by the evidence in this case, that the plaintiff's trade-mark is a very valuable one, that it has been in existence and used for a great number of years, that the plaintiff company were carrying on a large business, and that during several years their rubbers were the only rubbers on the market, with the exception of some American rubbers. Their rubbers are known by the name of "Jacques Cartier" among the French speaking population, and they are also known as the "Canadian" and the "Sailor" among the English speaking community.

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Now, Joseph Chouinard, who is the president and the general manager of the defendant, had been in the rubber business for a great number of years before his company began to manufacture in June, 1912; although it does not appear from the evidence that his goods were on the market before October or November of that year. Therefore he was perfectly acquainted with that trade, and obviously knew of the large business carried on by the plaintiff company and also of the good quality of the "Jacques Cartier" rubbers manufactured by them. How does he proceed to make the trade-mark of the defendant company? On this point we have no evidence, but the rational inference is manifest. He would appear to have taken the plaintiff's trade-mark as a model from start to finish, to have studied their price-list and their several marks. And consistently with the idea that he might imitate as closely as possible, without making a servile imitation, he starts by looking for the effigy of a man, who at the same time should be a sailor, and a sailor of historical fame if possible,—who should also wear an antique costume, with a *béret* or some such head-wear, as was customary to wear in the centuries gone by, and also identical with the one worn in the Cartier effigy. Coupled with that also, he seeks a great discoverer, of historical fame, and he finally arrives at the conclusion to select Columbus. The choice was a happy and easy one, as after all it was also suggested to Mr. Chouinard from his knowledge that the plaintiff was also selling a rubber under the name of Columbus, a mark which was not however protected by registration. Then he required a name for his company, and a general get-up for his design. Well, by selecting "The Columbus Rubber Company of Montreal, Limited," he had only to strike off the

word "Canada" from the plaintiff's trade-mark and substitute therefor the word "Columbus." A happy hit, indeed! Having done so much, he probably realized he had come very close to the plaintiff's trade-mark, and that he had better make a change from the scroll of the plaintiff's mark which is round, to a square one, of rectangular shape; with a few ornamental deviations. Even on this rectangular scroll one is inclined to ask if he did not copy from the rubber "Royal," another rubber manufactured by the plaintiff, whereon the scroll is also more or less square and of a somewhat rectangular form. Therefore the conclusion must be that the defendant's trade-mark, which is not registered, has all the elements taken either from the actual registered trade-mark of the plaintiff or from some of their marks not protected by registration.

There were so many names and so many designs the defendant could have selected, and he was so well *au fait* with the rubber trade and the several marks on the market, that at first sight it seems there was no excuse for imitating so closely as he did the plaintiff's trade-mark, unless explained by his desire and this apparent view to appropriate, as much as possible, the benefit attached both to the good reputation as to quality of the plaintiff's goods covered by their trade-mark and to the large business carried on by them.

Now, what are the essential characteristics of a trade-mark, if not the general appearance of the mark as a whole, its get-up and all of its *ensemble*? As Sebastian puts it, the appeal is to the eye. What is that, at first sight, strikes the eye on looking at either trade-mark, if not the effigy of a man? So much so, indeed, as has already been said that a large proportion of the public call the plaintiff's trade-mark by what

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strikes their eye,—they call it the “Jacques Cartier.” The very name of the effigy on the rubber. Others call it the “Sailor.” Here again a term which would equally well apply to the defendant’s trade-mark, and which applied to both is again suggested by the effigy.

There is a last and third name under which it is known among the English-speaking element and that is the word “Canadian.” We have a witness, Paiment who sold the “Columbus” to persons asking for the ‘Jacques Cartier’ or the “Canadian,” because he said, he could equally well tell his customers it was a “Canadian”, as the “Columbus” and the “Jacques Cartier” were manufactured in Canada. And it is manifest to justify this assertion he could show on each trade-mark, they were both from Montreal, hence both “Canadians.”

Now, what does the evidence disclose? It shows that the general outline of the two trade-marks are alike and that the ordinary incautious and unwary purchaser, who may buy two or three pairs of rubbers yearly, looks at the effigy. They do not buy from the name but from the portrait of Jacques Cartier. Such purchaser does not really know the name of the respective company. And a large majority of them know the “Jacques Cartier” mark and they ask for the “Jacques Cartier” rubber, or the “Sailor” or the “Canadian.” Now when the two marks are not side by side, and that is the test, is it not obvious that one rubber could be sold for the other? On that point we have the evidence of McIver who went to two distinct shops in Montreal and asked for a “Jacques Cartier” rubber and was given a “Columbus”. When asked if it was a “Jacques Cartier” the clerk answered in the affirmative. Then we have Paiment who says that in that part of

the city where he sells that three-quarters of the time the "Jacques Cartier" is asked for. He knows the Columbus since about November last, and says, that, according to him, about half of the purchasers could be deceived and he has himself, about ten times, sold a "Columbus" for a "Jacques Cartier" that were asked, when the "Jacques Cartier" stock was, in his estimation, getting low. He considers that what strikes one in the two trade-marks, is the effigy of the sailor.

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It is also contended by witness McKechnie that it would be easy to sell a "Columbus" for a "Jacques Cartier" to an ordinary purchaser, because the word "Columbus" is also known to be one of the marks sold by the plaintiff company, although not protected by registration.

Witness Daoust is also of opinion that the public could mistake one mark for the other. It is the effigy of the man that strikes the eye.

Then Pilon, a witness heard-on behalf of the defendant, says that the majority of the public ask for "Jacques Cartier," and that he does not know what would happen if one mark was tried to be passed off for the other.

The general trend of the evidence is to the effect that the "Jacques Cartier" is a well-known mark, selling well and very much asked for on the market, and that the principal element of the plaintiff's trade-mark is the effigy of the sailor. Leclerc, one of the defendant's witnesses admits having said the two trade-marks (*se ressemblent*) looked like one another.

In this case, as in the case of *Barsalou v. Darling*, (1) the appeal is to the eye. What appealed to the eye in the Barsalou case was the head—the head of the horse and the head of the unicorn—although somewhat

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dissimilar. In the present case what appeals to the eye is the effigy of the man. In both the plaintiff's and the defendant's trade-marks, it is a man, the bust of a man, a sailor, explorer, both of historical fame, wearing antique dress and cap, with great resemblance in the general get-up of the trade-mark. If there is infringement in the Barsalou case, *a fortiori*, the infringement must be found in the present case.

Now, as said by Sebastian (p. 151) (1), for the purpose of establishing an infringement it is not necessary that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, it is sufficient to show that the resemblance is such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs (2).

There can be no doubt that an unfair competition in trade is created by the use of the defendant's trade-mark, in violation of the rights of a rival trader in the same class of goods. Further, such a design or get-up applied on rubber tends to make it less clear, with an additional chance for confusing one mark with the other.

While the two marks are not identical, there is such a close imitation in the design and get-up of the defendant's mark that one readily realizes how easily the ordinary purchaser could be deceived and misled to buy the defendant's goods for that of the plaintiff's. With this strong probability of deception the plaintiff is obviously entitled to relief and to have his trade-mark duly protected as against a rival competitor in the same class of goods, who has no right directly or

(1) *Law of Trade-Marks*, 5th. Ed.

(2) See *per* Lord Chelmsford in *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

indirectly to appropriate to himself the benefit derived from a well known trade-mark having a good reputation, commanding a large business, and in existence for a great number of years, protected as it is by registration.

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There will be judgment as follows, to wit:—

1. The defendant is declared to have infringed the plaintiff's trade-mark.

2. There will be a reference to the Registrar of this Court to ascertain the damages suffered by the plaintiff in the premises; and it is ordered and adjudged that the defendant do pay to the plaintiff the amount of the damages when so ascertained.\*

3. The defendant, its servants, agents, and employees are further enjoined from placing on the market and selling rubber footwear and rubber goods bearing its present trade-mark or any trade-mark in any way resembling the plaintiff's trade-mark mentioned in this case.

4. The plaintiff will have also the costs of the action, including the costs of the reference.

*Judgment accordingly.*

Solicitors for plaintiff: *Casgrain, Mitchell,  
McDougall & Creelman;*

Solicitors for defendant: *Geoffrion & Cusson.*

\*EDITOR'S NOTE:—The Registrar proceeded with the reference so directed by the learned judge, and on the 4th day of June 1913, filed his report whereby he found for the plaintiff in the sum of \$100 nominal damages. Judgment was subsequently entered against the defendant for such amount with the costs of the trial and reference.