

BETWEEN:

FREED & FREED LIMITED, APPELLANT,

AND

THE REGISTRAR OF TRADE MARKS, } RESPONDENT,

AND

THE GREAT WESTERN GARMENT COMPANY LIMITED, ... } OBJECTING PARTY.

1948
June 8
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Trade Marks—"Iron Man"—"The Iron King"—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(k), 23(1), 23(5) (c), 26(1) (f)—Similarity of word marks—Onus on appellant to show no reasonable probability of confusion—Registrar's decision not to be set aside lightly—Evidence of actual confusion not necessary—Tests of similarity of trade marks—Totality of trade marks to be considered—Trade marks not to be carefully analysed—Similarity of word marks a matter of first impression.

The Registrar refused the appellant's application to register "The Iron King" as a word mark for use in association with men's work trousers on the ground that the proposed word mark is confusingly similar to the objecting party's registered trade mark "Iron Man" for use in association with overalls, pants, shirts, mackinaws and leather coats. The appellant appealed from the Registrar's refusal and the objecting party was subsequently added as a party to the proceedings.

Held: That the objecting party is entitled to have the words "Iron Man" in its specific trade mark, registered under the Trade Mark and Design Act, treated as a word mark under The Unfair Competition Act, 1932, as if it had been registered as such thereunder.

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2. That when the Registrar has refused an application for the registration of a word mark on the ground that it is similar, within the meaning of section 26(1) (f) of The Unfair Competition Act, 1932, to some other word mark already registered for use with similar wares and the applicant for registration has appealed from the Registrar's decision the onus is on the appellant to show that there is no reasonable probability of confusion through the contemporaneous use of both marks in the same area in association with wares of the same kind.
3. That the Registrar's decision that the two marks are similar must not be set aside lightly.
4. That where there has been a long contemporaneous use of two marks in the same area in association with wares of the same kind the lack of evidence of confusion through such use would afford support for the conclusion that the two marks are not confusingly similar but where there has been no substantial contemporaneous use of the two marks the fact that there is no evidence of actual confusion is not of much importance.
5. That on an appeal from the Registrar's refusal to register a word mark on the ground that it is confusingly similar to an already registered word mark evidence of actual confusion is not necessary.
6. That it is essential to the valid registration of a word mark that it should be outside the scope of the implied prohibitions of section 23(1) of The Unfair Competition Act, 1932, and the onus of showing that it is so is on the applicant for the registration, whether in the proceedings before the Registrar or on an appeal from his refusal to register.
7. That it is not a proper approach to the determination of whether trade marks are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitute the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered.
8. That it is not a correct approach to the solution of the problem whether two marks are similar to lay them side by side and make a careful comparison of them with a view to observing the differences between them. The Court should not subject the two marks to careful analysis but should seek to determine the issue of similarity from the point of view of a person who has only a general and not a precise recollection of the earlier mark and then sees or hears the later one by itself.
9. That the answer to the question whether two word marks are similar must nearly always depend on first impression.
10. That the proposed word mark "The Iron King" is confusingly similar to "Iron Man".

APPEAL from the Registrar's refusal of the appellant's application to register a word mark.

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The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

C. Scott for appellant.

Alex Cattanach for Registrar.

E. G. Gowling K.C. and *J. C. Osborne* for objecting party.

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

THE PRESIDENT now (August 22, 1950) delivered the following judgment:

This is an appeal from the decision of the Registrar in refusing the appellant's application to register the words "The Iron King" as its word mark for use in association with men's work trousers on the ground that the proposed word mark is similar, within the meaning of section 26(1) (f) of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, to the objecting party's registered trade mark "Iron Man" for use in association with the sale of overalls, pants, shirts, mackinaws and leather coats.

The facts, except those relating to the issue whether the marks are similar, are not in dispute. The objecting party adopted its trade mark in 1931 and had it registered as a specific trade mark under the Trade Mark and Design Act, R.S.C. 1927, chap. 201, on February 11, 1932, in the Trade Mark Register No. 250, Folio 53,864, and has used it continuously ever since. The mark consists of the representation of an iron worker pouring molten metal from an iron maker's ladle and the words "Iron Man". The objecting party is a large manufacturer of work clothing for men and boys, such as overalls, pants, shirts, mackinaws, wind-breakers and jackets and also makes some ladies' wear. Its head office is at Edmonton, Alberta, and the most extensive part of its business is in Western Canada, but it does business all over Canada. This has been so particularly since about 1942. At the present time it sells only work pants under its trade mark "Iron Man". It advertises

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these wares under this mark very extensively in newspapers, pamphlets and periodicals and over the radio. The extent of its use of the mark is indicated by the fact that its total sales under it from 1936 to 1947 amounted to \$3,100,000. Its sales are exclusively to retailers. The objecting party's "Iron Man" pants are sold to various classes of workers, many of whom are of foreign origin and have only a slight knowledge of English.

The appellant is a manufacturer of various kinds of work trousers. It has its head office at Winnipeg, Manitoba, and does business in the principal cities and towns of western Canada but mostly in the prairie provinces. Its largest customer is The T. Eaton Company Limited to which it sells wholesale but it also has a number of other wholesale accounts. In addition it does business direct with retailers through commission agents who call on them with samples. The appellant first adopted the words "The Iron King" as a trade mark in 1935 and has used it since then but took no steps to register it until the fall of 1945. The appellant does not sell all its work trousers under its mark, only one type being sold thereunder. And it does not itself advertise its wares under its mark, any use of the mark in advertising being in the catalogues of its wholesale customers. The appellant's work trousers are cheaper than the objecting party's, the retail price of the former being from \$4.00 to \$4.50 per pair and that of the latter \$5.35.

The appellant made its application on October 24, 1945, and opposition to it was taken on behalf of the objecting party on January 4, 1946. This fact was communicated to the appellant's attorneys who made representations to the Registrar on its behalf. On September 23, 1946, the Registrar expressed the opinion that the concurrent use of the appellant's proposed mark and the objecting party's registered mark would be likely to cause confusion in the trade. Further representations having been made by the appellant's attorneys the Registrar, on September 19, 1947, maintained his decision that the proposed mark was confusingly similar to the registered one, and on October 6, 1947, took final action and formally refused the appellant's application under section 26(1) (f) of The Unfair Competi-

tion Act, 1932. It is from this refusal that the present appeal was taken, the objecting party having been subsequently added as a party to the proceedings.

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The objecting party is entitled to have the words "Iron Man" in its specific trade mark treated as a word mark under The Unfair Competition Act, 1932, as if it had been registered as such thereunder, for section 23(1) provides in part:

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23. (1) The register now existing under the *Trade Mark and Design Act* shall form part of the register maintained pursuant to this Act, and, subject as hereinafter provided, all entries therein shall hereafter be governed by the provisions of this Act, . . .

And section 23(5) (c) reads:

23. (5) Marks registered before the coming into force of this Act shall be treated as word marks or as design marks according to the following rules:—

(c) Any mark including words and/or numerals in combination with other features shall be deemed to be a design mark having the features described in the application therefor but without any meaning being attributed to the words or numerals, which shall, however, also be deemed to constitute a word mark if and so far as they would at the date of registration have been registrable independently of any defined form or appearance and without being combined with any other feature;

There can be no doubt that the words "Iron Man" would have been registrable independently within the meaning of the subsection.

Counsel for the appellant admitted that the wares to which it applied the trade mark "The Iron Man" were similar, within the meaning of section 2(l) of the Act to those dealt with by the objecting party under its "Iron Man" trade mark and submitted that there were only two points in issue, namely, that the two trade marks were not similar, and that the objecting party had lost its rights to object, if it ever had any, by acquiescence and laches on its part.

There is no substance in the latter submission. While there is evidence that the appellant used its mark since 1935 it did no advertising under that mark itself and there was no advertising of it by others prior to the issue of the Eaton catalogue in the fall of 1945. And Mr. Roscoe's evidence for the objecting party, which I accept, was that prior to 1945 he did not know that the appellant was selling goods under the trade mark "The Iron King", that his first

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knowledge of its use was in the fall of 1945 in connection with the application to register and that the objecting party then immediately instructed its solicitors to object to the registration. I find that there was no acquiescence by the objecting party in the use by the appellant of its mark and that it cannot be charged with laches.

There remains the issue of similarity of the marks. The Registrar, after giving the appellant the fullest opportunity of supporting its application and after consideration of the representations made on its behalf, concluded that the proposed word mark was confusingly similar to the objecting party's registered trade mark and, therefore, not registrable as being within the prohibition implied in section 26(1) (f) which provides:

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

(f) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares;

the word "similar" having the statutory meaning given by section 2(k) as follows:

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

(k) "Similar," in relation to trade marks, trade names or distinguishing guises, described 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;

Counsel for the appellant submitted that the onus was on the objecting party to show that there was a likelihood of confusion if the proposed word mark was registered. I do not agree. There is no onus on the objecting party. The onus is on the appellant to show that the Registrar was in error in refusing its application. It is, I think, settled that where the Registrar has refused an application for the registration of a word mark on the ground that it is similar, within the meaning of section 26(1) (f) of The Unfair Competition Act, 1932, to some other word mark already registered for use with similar wares and the applicant for registration has appealed from the Registrar's decision the onus is on the appellant to show that there is no reasonable probability that the contemporaneous use of

both marks in the same area in association with wares of the same kind will lead to the kind of confusion referred to in section 2(k) of the Act. The rule in the United Kingdom is well established. In *Eno v. Dunn* (1) it was laid down by Lord Watson in the House of Lords that where an enactment prohibits the registration, with respect to the same goods or descriptions of goods, of a trade mark so nearly resembling a trade mark already on the register with respect to such goods or descriptions of goods as to be calculated to deceive the applicant for registration must satisfy the comptroller, or the Court, that the trade mark which he proposes to register does not come within the scope of the prohibition. He pointed out that the onus is otherwise in the case of an action for infringement. There the onus is on the party alleging infringement to show that the trade mark complained of is calculated to mislead. Lord Watson summed up the position of the applicant for registration in these words:

here he is *in petitorio*, and must justify the registration of his trade-mark by showing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, *in dubio* his application ought to be disallowed.

It follows, as Lord Watson later indicates, that if the proposed trade mark might have the effect of deceiving the public its registration should be refused. Lord Watson's statement has been fully accepted as the leading authority on the subject: *vide McDowell's Application* (2) and *Aristoc, Ltd. v. Rysta, Ltd.* (3), where Viscount Maugham put the rule thus:

it is well settled that the onus of proving that there is no reasonable probability of deception is cast on an applicant for registration of a mark.

A similar view has been taken in Canada: *vide Peggy Sage Inc. et al. v. Siegel Kahn Company of Canada Ltd.* (4); *Benskin v. Registrar of Trade Marks et al* (5); *Union Oil Company of California v. Registrar of Trade Marks* (6).

It follows from what I have said that the Registrar's decision that the two marks are similar must not be set aside lightly. In the English cases great weight is attached

(1) (1890) 15 A.C. 252 at 257.

(2) (1927) 44 R.P.C. 335 at 341

(3) (1945) A.C. 68 at 85.

(4) (1935) S.C.R. 539 at 544.

(5) (1946-47) 6 Fox Pat

C. 20 at 24.

(6) (1949) Ex. C.R. 397 at 407.

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to the Registrar's decision in such matters. For example in *McDowell's Application (supra)* Viscount Cave L.C., speaking in the House of Lords, after approving Lord Watson's statement in *Eno v. Dunn (supra)* regarding the onus of proof on the application for registration of a trade mark, said:

I would add that registration under the Acts is a matter of discretion, and, although the decision of the Registrar in the matter is by no means conclusive and under Section 8, Subsection (2) of the Trade Marks Act, 1919, the question is entirely open for the Courts, yet the fact that the Registrar, an experienced official, has decided against an application on the ground that registration might lead to confusion, must still carry considerable weight with any Court or Tribunal which has to review his decision.

A similar view should, I think, be taken in Canada but of course, 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 find no difficulty in reaching the conclusion that the appellant has not discharged the onus that rests on it and that its appeal must, therefore, fail. The evidence does not, in my opinion, support a contrary conclusion. Mr. Freed, the appellant's secretary-treasurer, testified that he did not know of any confusion resulting from the use of the two marks and had received no complaints from customers of any such confusion. And counsel for the appellant filed several affidavits by proprietors of retail stores and others in which the affiant stated that he had been selling men's trousers manufactured by the objecting party and known as "Iron Man" as well as those manufactured by the appellant and known as "The Iron King" and had not experienced any instances of confusion between the two trade marks in selling garments of the respective makes and had never had any complaints from customers that they had purchased one make while intending really to buy the other. For the objecting party Mr. Roscoe, its secretary-treasurer, admitted on cross-examination that he had no personal knowledge of actual confusion through the use of the two marks. But counsel for the objecting party filed a great many affidavits by merchants and sales-

men in British Columbia, Alberta, Saskatchewan and Manitoba, 58 of them being filed together as Exhibit J. in which the affiants made the following depositions:

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2. I have known and been familiar with the trade mark IRON MAN for more than _____ years (the number of years in each case being filled in) and have throughout such period known that when used in wares such as pants and windbreakers the said trade mark IRON MAN indicated that the wares in connection with which it is used are manufactured and sold by The Great Western Garment Company Limited of Edmonton, Alberta.

3. The use of the words THE IRON KING if used in association with men's pants would mislead me into the belief that the wares in connection with which the words THE IRON KING were being used were manufactured or sold by The Great Western Garment Company Limited.

There was also an affidavit by W. C. Cox that he had complaints from customers who had purchased "Iron King" pants from him under the impression that they had purchased the superior quality "Iron Man" pants. And there were other affidavits strongly indicative of the likelihood of confusion if the two marks were used.

Counsel for the appellant argued that there was no evidence of any actual confusion through the use of the two marks and that in view of the long user of the appellant's mark the absence of any evidence of confusion was most significant that there was no likelihood of confusion in the future. There is no doubt that where there has been a long contemporaneous use of two marks in the same area in association with wares of the same kind the lack of evidence of confusion through such use would afford support for a conclusion that the two marks are not similar within the meaning of section 2(k) of the Act. But that is not the situation here. It is true that Mr. Freed stated that the appellant's trade mark was adopted in 1935 and has been used since then. There is also some evidence in affidavits filed on behalf of the appellant of user since 1937. But the extent of such user was not precisely established. The appellant did not advertise its goods under its trade mark at all, and my impression of the evidence as a whole is that there was no substantial use of its trade mark prior to the issue of the Eaton's fall catalogue for 1945. This is borne out by Mr. Roscoe's statement that he had no knowledge of its use prior to the fall of 1945. And there are also the affidavits of T. S. Dixon,

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R. J. McLeod and D. A. Sprung all with knowledge of the clothing trade, in which they state that they had no knowledge of any trade mark with the word "Iron" in it associated with men's work trousers, etc., other than the objecting party's trade mark "Iron Man". If there had been any substantial contemporaneous use of the appellant's mark it is most unlikely that these persons would not have heard of it.

Where there has been no substantial contemporaneous use of the two marks the fact that there is no evidence of actual confusion through such use as there has been is not of much importance. In *The British Drug Houses Ltd. v. Battle Pharmaceuticals* (1) I expressed the opinion that in a motion to expunge a word mark on the ground that it was confusingly similar to a previously registered word mark it was not necessary that there should be any evidence of actual confusion since the issue was not whether there had been confusion but whether confusion was likely to occur. I see no reason why a similar principle should not be applicable here. That being so, and the onus on the appellant being as stated the affidavit evidence adduced by counsel for the objecting party assumes considerable importance. The fact that so many persons have sworn that they would be misled by the use of the words "The Iron King" on men's pants into thinking that the pants were those made by the appellant cannot be lightly dismissed. Indeed, I find no difficulty in accepting their evidence. Such evidence really goes farther than is necessary for the rejection of the appellant's application, for, as Lord Watson suggested in *Eno v. Dunn* (*supra*), the application to register a trade mark should be disallowed if confusion might happen through its use or if there is doubt whether confusion would happen or not; to be registrable the mark must be clearly outside the scope of the prohibitory enactment. And similarly in Canada, it is essential to the valid registration of a word mark that it should be outside the scope of the implied prohibitions of section 23(1) of The Unfair Competition Act, 1932, and the onus of showing that it is so is on the applicant for the registration, whether in the proceedings before the Registrar or on an appeal from his refusal to register. In view of the evidence to

(1) (1944) Ex. C.R. 239 at 244.

which I have referred I am unable to see how the appellant could successfully contend that it has discharged the onus of showing that there is no reasonable probability of confusion through the use of its proposed mark and I find that it has not done so.

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Nor can the appellant successfully meet the tests that ought to be applied in determining whether two word marks are confusingly similar. It cannot be too strongly stressed that it is not the likely effect of the use of the two marks on the mind of the judge that is in issue. The fact that he himself would not be confused is immaterial. What is to be determined is whether there is a likelihood of confusion in the minds of dealers in and/or users of the goods on which the marks are used. This means that the judge must endeavor to free himself as far as he can from a subjective approach to the issue of likelihood of confusion and seek to project himself into the position of dealers in and/or users of the goods with a view to determining the likelihood of confusion in their minds. And even if the circumstances should be such that dealers in the goods, whether wholesalers or retailers, would not be likely to be confused that is not enough to dispose of the issue, for there might be confusion in the minds of users of the goods, in which case the marks would have to be considered as confusingly similar.

There have been many cases in which trade marks have been held similar: *vide* the lists of such similar marks in Kerley on Trade Marks 6th Edition, at pp. 295-304, and Fox on Canadian Law of Trade Marks and Industrial Designs, at pp. 80-88. But such cases are not helpful in determining the similarity or otherwise of particular marks, except so far as they express or illustrate general guiding principle. This warning was sounded by Lord Russell of Killowen in *The Coca-Cola Co. of Canada, Ltd. v. Pepsi Cola Co. of Canada, Ltd.* (1) in these words:

except when some general principle is laid down, little assistance is derived from authorities in which the question of infringement is discussed in relation to other marks and other circumstances.

The reason for this warning is clear, for each case must stand on its own facts. The issue whether the trade marks in any given case are similar is a question of fact and the

(1) (1942) 59 R.P.C. 127 at 133.

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determination of fact in one case can have no bearing in another case where the trade marks in question are different.

Counsel for the appellant submitted that the marks in question on this appeal are not similar in that, although the word "Iron" is the same in both, the words "King" and "Man" are different and, therefore, the two marks are not similar. There are, in my judgment, several reasons for thinking that this analysis of the issue is erroneous. In the first place, breaking up the marks into their elements and concentrating attention on those that are different and concluding that because there are differences in the elements the marks are not similar is contrary to a principle that has been regarded as cardinal ever since the case of *Re Christiansen's Trade Mark* (1), namely, that in determining whether one trade mark is similar to another it is the totality of the mark rather than any element in it that must be considered. In *The British Drug Houses, Ltd. v. Battle Pharmaceuticals (supra)*, after discussing *Christiansen's case (supra)*, I put the rule as follows:

It is, I think, firmly established that, when trade marks consist of a combination of elements, it is not a proper approach to the determination of whether they are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade Marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered.

Counsel's submission also runs counter to another principle that is closely related to the one just stated, namely, that it is not a correct approach to the solution of the problem whether two marks are similar to lay them side by side and make a careful comparison of them with a view to observing the differences between them. The Court should not subject the two marks to careful analysis but should seek to determine the issue of similarity from the point of view of a person who has only a general and not a precise recollection of the earlier mark and then sees or hears the later one by itself. If such a person would be likely to think that the goods on which the later mark appears are put out by the same person as the goods sold

(1) (1886) 3 R.P.C. 54.

under the former mark of which he has only a general and not a precise recollection the Court may properly conclude that the marks are similar: *vide Sandow Ld's Application* (1). The reason for this rule is clear. Careful analysis of the marks with a view to ascertaining the differences between them merely serves the purpose of pointing out the differences in the marks but does not answer the question whether they are similar. Marks may be similar although there are differences between them. Indeed, they cannot be similar unless there is some difference. Similarity connotes difference for if there were no difference there would be identity, not similarity.

The proper test to be applied has been laid down by high authority. In the *Coca-Cola v. Pepsi Cola* case (*supra*) Lord Russell of Killowen, delivering the judgment of the Judicial Committee of the Privy Council, put the test to be applied in cases where there was no evidence of actual or probable confusion in these words:

In these circumstances the question for determination must be answered by the Court, unaided by outside evidence, after a comparison of the Defendant's mark as used with the Plaintiff's registered mark, not placing them side by side, but by asking itself whether, having due regard to relevant surrounding circumstances, the Defendant's mark as used in similar (as defined in the Act) to the plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections.

It should be noted that in the present case there is some evidence of confusion or its likelihood. And in *Aristoc, Ld. v. Rysta, Ld.* (*supra*) the House of Lords decided that the question whether two marks are similar must be answered by the judge on whom the responsibility lies as a matter of first impression. They adopted as a fair statement of the duty cast upon the Court the following passage from the dissenting judgment of Luxmoore L.J. in the Court of Appeal (2):

The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of section 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution.

(1) (1914) 31 R.P.C. 196.

(2) (1943) 60 R.P.C. 87 at 108

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The Court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

Lord Luxmoore's statement was expressly approved by Kerwin J., giving the judgment of the Supreme Court of Canada, in *Battle Pharmaceuticals v. The British Drug Houses Ltd.* (1) and must be regarded as the leading authority on the subject.

It is perhaps easier to apply the test of first impression to single words, such as those in question in the *Aristoc* case (*supra*), than in the case of word marks consisting of more than one word, but the principle involved is the same.

Applying the tests I have mentioned and seeking to view the issue as free from a subjective approach as possible I am of the opinion that the contemporaneous use of the two marks in the same area in association with work trousers would be likely to cause users of them to infer that the same person assumed responsibility for their character or quality and I find, accordingly, that the appellant's proposed word mark is similar to the objecting party's registered mark, within the meaning of section 2(k) of the Act. The Registrar was, therefore, right in refusing the appellant's application.

Even if there were any doubt as to the similarity of the two marks,—and I have none—the appellant's appeal would fall for failure to discharge the onus upon it.

For the reasons given the appeal will be dismissed with costs to the objecting party as against the appellant. There will be no costs to or against the Registrar.

Judgment accordingly.
