
{ 1944
 Jan. 20 } BETWEEN :
 — FOOD MACHINERY CORPORATION APPELLANT.
 { 1946
 March 5 } AND
 — THE REGISTRAR OF TRADE MARKS } RESPONDENT.

Word mark "Food Machinery Corporation"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, c. 38, ss. 26 (1) (b), 26 (2)—Meaning of "constitute or form part of the name"—Meaning of "word mark otherwise registrable"—Section 26 (2) not an exception to section (26) (1) (b)—Use of name of firm or corporation as a word mark prohibited but use of part of name permitted—Possible difference between trade mark and name of owner—French version of statute at variance with English version creating ambiguity—Presumption in favour of reasonable interpretation—True meaning of statute prevails over apparent meaning of words—Presumption in favour of consistency and against repugnancy—Repeal by implication not favoured.

Appellant applied for registration of "Food Machinery Corporation" as a word mark under section 26 (2) of The Unfair Competition Act, 1932, notwithstanding the prohibition of section 26 (1) (b), and appealed from the refusal of the Registrar of Trade Marks to grant such application. Appeal dismissed.

Held: That subsection (2) of section 26 is not an exception to subsection (1) (b) but relates to subject matter that falls completely outside its prohibition. Subsection (2) is simply declaratory that the prohibition against the registration as a word mark of "the name" of a firm or corporation does not extend to the use of a series of letters or numerals constituting or forming "part" of such name. Part of the name may be used although the use of the whole name is prohibited.

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2. That where two constructions are advanced for either the French or English text of a statute, one subject to objection and the other free from it, that construction which is free from objection, according to the recognized canons of construction should be adopted, even although the language of the other text is at variance with it and in accord with the objectionable construction; the objectionable construction is not rendered free from objection by reason of such accord and is not entitled to any support from it.
3. That the proposed word mark "Food Machinery Corporation", being the name of the appellant corporation, is excluded from registration by section 26 (1) (b) and does not come within the ambit of section 26 (2).

APPEAL from the refusal of the Registrar of Trade Marks to register "Food Machinery Corporation" as a word mark.

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

R. S. Smart K.C. for appellant.

W. P. J. O'Meara K.C. for respondent.

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

THE PRESIDENT now (March 5, 1946) delivered the following judgment:

The appellant was incorporated under the laws of the State of Delaware. On March 5, 1943, it applied to the Registrar of Trade Marks for the registration of "Food Machinery Corporation" as a word mark in association with the wares specified in its application. On November 10, 1943, the Registrar refused the application and from such refusal this appeal is taken.

The appeal depends on section 26 of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38. The Registrar took the view that the proposed word mark,

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being the name of a corporation, was excluded from registration by subsection (1), paragraph (b), which provides:

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

(b) is not the name of a person, firm or corporation;

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but the appellant contends that, notwithstanding such provision, it is registrable under subsection (2), which reads:

26. (2) An application for the registration of a word mark otherwise registrable shall not be refused on the ground that the mark consists of or includes a series of letters or numerals which also constitute or form part of the name of the firm or corporation by which the application for registration is made.

The controversy centres around the relative clause in section 26 (2), "which also constitute or form part of the name of the firm or corporation by which the application for registration is made". Counsel for the appellant read the words "constitute or form part of the name" as meaning "constitute the name or form part of the name". In his view the two verbs "constitute" and "form" do not each have the same direct object and do not equally govern what follows in the clause, the verb "constitute" having "the name" as its direct object and the verb "form" governing, "part of the name". From this he argued that section 26 (2) is an exception to section 26 (1) (b) and allows the registration of the proposed word mark, even although it is the name of a corporation and notwithstanding the prohibition of section 26 (1) (b). He contended that section 26 (2) permits the registration of the name of a corporation, if it meets the requirements of being a "word mark otherwise registrable", that is to say, if it has "become adapted to distinguish" within the meaning of the definition of a trade mark in section 2 (*m*) and if it is not subject to any of the prohibitions of section 26 (1), and argued that the proposed word mark met both of these requirements, namely, that it was "adapted to distinguish" and that it was not subject to any of the prohibitions of section 26 (1), having been excepted from section 26 (1) (b) by section 26 (2).

A different grammatical construction was put forward by counsel for the respondent. He read the words "consti-

tute or form part of the name” as meaning “constitute part of the name or form part of the name”. In his view both of the verbs “constitute” and “form” have the same direct object and each governs all that follows in the clause.

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There are several reasons why the respondent’s construction should be adopted. In the first place it is the natural grammatical one. The conjunction “or” is commonly used to introduce an alternative and it is so used in the preceding part of the subsection, for example, “includes” is an alternative to “consists of ” and “numerals” an alternative to “letters”. As I read the relative clause, “form” is an alternative to “constitute”. Both verbs are in the same clause; each has the same subject, which relates back to each of the alternatives “letters” and “numerals”; and I see no grammatical reason why each should not govern all that follows in the clause. That seems to me to be its simple grammatical construction. Counsel for the appellant, however, put the conjunction “or” between the verb “constitute” on the one hand and the group of words “form part of” on the other. It was only by such a construction that he could prevent the verb “constitute” from governing “part of the name”, just as the verb “form” does, and make it govern only “the name”, and thus lay the foundation for his argument that, while section 26 (1) (b) expressly forbids the registration of the name of a corporation as a word mark, section 26 (2) permits it; for that is what the argument really amounts to. Such an antithesis between two subsections of the same section ought not to be attributed to Parliament unless it is necessary to do so and, if two grammatical constructions of the relative clause are possible, that which reasonably avoids such an antithesis should be preferred.

A proposed word mark is subject to a number of tests of registrability. In the first place, it must be a “word mark” within the meaning of the definition in section 2 (o) of the Act, and must also meet the requirement of the definition of a trade mark in section 2 (m), namely, that it is a “symbol which has become adapted to distinguish”. That means that it must have acquired the quality of distinctiveness before it can be registered. Dis-

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tinctiveness is an essential requirement: *Fisher v. British Columbia Packers Ltd.* (1). But distinctiveness by itself is not the only requirement. It is also necessary that there should be no prohibition against its registration. Subsection (1) of section 26 provides that a word mark shall be registrable if it does not come within any of the prohibitions specified in its six paragraphs; if the proposed word mark does come within any of such prohibitions, then it is not registrable, notwithstanding its distinctiveness. Paragraph (b) prohibits the registration as a word mark of the name of a person, firm or corporation. The proposed word mark "Food Machinery Corporation" is the name of the appellants corporation. Even if it be assumed that it has distinctiveness, it is not registrable because it falls within the prohibition of section 26 (1) (b), expressed in clear and unmistakable terms.

Now we come to subsection (2). It deals with an application for the registration of a "word mark otherwise registrable". The mark applied for must have distinctiveness and also be "otherwise registrable". If its registration is prohibited by any of the paragraphs of subsection (1), then it is not "otherwise registrable", and falls outside the scope of the subsection. The kind of word mark contemplated by subsection (2) is, in my opinion, indicated by its concluding words "part of the name of the firm or corporation by which the application for registration is made". If the proposed word mark is "the name" of a person, firm or corporation its registration is prohibited by section 26 (1) (b), but if it consists of or includes a series of letters or numerals which also constitute or form "part of the name" of the applicant firm or corporation, then its registration is not to be refused on that ground. Section 26 (1) (b) forbids the registration of "the name" of the corporation, but section 26 (2) allows the use of "part of the name". This is, I think, the expressed intention and declared purpose of subsection (1) (b) and subsection (2) when read together. On this construction, subsection (2) is not an exception to subsection (1) (b) at all, but relates to subject matter that falls completely outside its prohibition. Subsection (2) is

simply declaratory that the prohibition against the registration as a word mark of "the name" of a firm or corporation does not extend to the use of a series of letters or numerals constituting or forming "part" of such name. Part of the name may be used although the use of the whole name is prohibited.

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This difference of treatment between the whole name of a firm or corporation and part of such name rests on reasonable grounds. I am not aware of any case, since statutory provision was made for the registration of trade marks, where the name of a corporation has been recognized as a trade mark, except where it has been represented "in a special or particular manner", as allowed by the English Act, but there are many cases where "part of the name" has been used in or as a trade mark. Under the definition of a trade mark as a "symbol which has become adapted to distinguish" there may be ground for argument that there is a possible difference between a trade mark and the name of its owner. Certainly, not all names have the distinctiveness required of a trade mark. This is clearly recognized in the case of the names of persons and it has been held in a number of cases that, while a surname can be distinctive, particularly when it is not a common one, applications for the admission of surnames to registration as trade marks should be regarded with care. Similar considerations of principle are to some extent applicable in the case of firm or corporation names. There are words in the name of a corporation, for example, such as "company", or "corporation" or "limited" that are not "adapted to distinguish" and are not suitable for trade mark use. But there are other parts of a corporation's name, that may be eminently suited for use in or as the kind of symbol that a trade mark must be, and against which there can be no objection. There are many such illustrations; for example, "Coca Cola" is a well known trade mark of The Coca Cola Company of Canada Limited. The name of the corporation is prohibited from registration as a word mark, but the fact that "Coca Cola" consists of or includes a series of letters which also constitute or form "part of the name" of the corporation does not exclude it from

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registration. It may well be that such a mark would be registrable, even if section 26 (2) had not been enacted, but its enactment puts the matter beyond dispute. It is that kind of a mark, that may be part of the name of a firm or corporation, that is contemplated by section 26 (2).

The respondent's construction of the relative clause is in accord with this construction of the two subsections of section 26, which is, I think, a reasonable one, giving full effect as it does to both subsections without any inconsistency or repugnancy between them, and I can see no objection to it. The same cannot be said of the appellant's construction. It is open to several serious objections which I shall deal with, but before I do so, reference should be made to a novel question that has arisen.

Counsel for the appellant relies upon the French version of section 26 (2) in support of his construction of the words in dispute. The words "which also constitute or form part of the name of the firm or corporation" are rendered in the French text as follows, namely, "qui constituent aussi le nom de la firme ou corporation, ou en font partie". The grammatical meaning of the French text appears to be clear and accords with the appellant's construction. My own opinion of the English text is that its meaning is also clear, but two constructions of it have been advanced, one of which is objectionable and the other free from objection. Quite frequently the French and English texts of a statute are compared with one another with a view to clarifying its meaning, for Parliament speaks in two languages each entitled to equal respect. I have not been able to find any authority on the specific question that has arisen in this appeal; if there is any ambiguity it is because of the divergence between the two texts, and it seems to me that the Court should deal with the matter as it would deal with any other question of ambiguity, namely, seek to ascertain the true intent of Parliament, following the guidance of the canons of construction recognized as applicable in such cases. Under the circumstances, it would, I think, be sound to hold that where two con-

structions are advanced for either the French or English text of a statute, one subject to objection and the other free from it, that construction which is free from objection, according to the recognized canons of construction, should be adopted, even although the language of the other text is at variance with it and in accord with the objectionable construction; the objectionable construction is not rendered free from objection by reason of such accord and is not entitled to any support from it.

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Where the meaning of words is clear, effect must be given to them regardless of their consequences and in such cases no problem of interpretation or construction arises. Here Parliament has spoken in two languages with a variance of meaning between its French and English statements. Such a situation calls for the guidance of settled canons of interpretation and construction. One of these is the presumption in favour of a reasonable interpretation, which Maxwell on the Interpretation of Statutes, 8th Edition, page 169, puts as follows:

In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles, should, in all cases of doubtful significance, be presumed to be the true one.

It is elementary that, in the first instance, the grammatical and ordinary sense of words is to be adhered to but this is not possible in the present case where such sense is not the same in the French and English texts of section 26 (2). The circumstances under which the grammatical and ordinary sense may be modified and the extent to which such modification may go are well established. Maxwell, at page 3, describes as a fundamental principle the statement of Lord Wensleydale in *Grey v. Pearson* (1):

in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

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This was approved by Lord Blackburn in *Caledonian Railway Co. v. North British Railway Co.* (1). The rule was put more positively by Burton J. in *Warburton v. Loveland* (2):

I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further.

And this was approved by Lord Fitzgerald in *Bradlaugh v. Clark* (3). The second statement focuses attention upon the necessity of ascertaining and giving effect to the "expressed intention or any declared purpose of the statute" and makes the departure from the grammatical and ordinary sense of the words obligatory in the face of such necessity. If the apparent meaning of words offends against the true meaning of the statute as a whole, the true meaning must prevail. This rule was strikingly put by Pollock C.B. in *Waugh v. Middleton* (4):

It must, however, be conceded that where the grammatical construction is quite clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that, however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning, shall prevail in spite of the grammatical construction of a particular part of it.

No departure from the grammatical and ordinary sense of the English text of section 26 (2) is involved in the respondent's view of its meaning for it is in accord with the reasonable construction of the two subsections of section 26 which has been outlined. The same cannot be said of the appellant's construction. It is, I think, a distortion of the grammatical meaning of the English text, and its adoption would run counter to the reasonable construction referred to, for it would enable every firm or corporation to register its full name as a word mark, notwithstanding the express prohibition against such a registration contained in section 26 (1) (b). Such a result would, in my

(1) (1881) 6 A.C. 114 at 131.

(3) (1883) 8 A.C. 354 at 384.

(2) (1828) 1 Hud. & Bro. 623
 at 648.

(4) (1883) 8 Ex. 352 at 356.

opinion, be an unreasonable one under the circumstances and could not have been intended by Parliament. It follows from the rejection of the appellant's construction of the English text on this ground that the French text must fall with it, for although its grammatical meaning appears to be plain, it is clear from the contents of section 26 that it cannot be the true meaning, for it also runs counter to the "expressed intention and declared purpose" of the two subsections of section 26 when read together.

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It was said long ago in *The King v. Berchet* (1) to be a known rule in the interpretation of statutes

that such a sense is to be made upon the whole, as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction, they may all be made useful and pertinent.

And this was described in *The Queen v. Bishop of Oxford* (2) as a "settled canon of construction".

Effect should be given as far as possible to every part of an Act. Counsel for the appellant contended that section 26 (2) is an exception to section 26 (1) (b) but his argument makes it more than that, for it nullifies section 26 (1) (b) altogether so far as the name of a firm or corporation is concerned.

Moreover, the adoption of his construction and the French text would result in a complete antithesis between two subsections of the same section which it would be unreasonable to attribute to Parliament. It could not have intended to prohibit the registration of the name of a firm or corporation as a word mark in one subsection of section 26, and then permit it in the next subsection. Such a view violates "the settled canon of construction" just referred to.

The appellant's construction runs directly against the recognized presumption in favour of consistency and against repugnancy, which Maxwell, at page 139, puts as follows:

An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of a proper operation without it.

(1) (1688) 1 Shower 106 at 108. (2) (1879) 4 Q.B.D. 245 at 261.

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Nor should it be held that section 26 (2) repeals section 26 (1) (b) by implication. There is nothing in section 26 (2) referring to section 26 (1) (b) or indicating in any way that it shall not be in force, and there is no need for implying its repeal. Maxwell states the applicable rule, at page 147, as follows:

repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the Statute book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention.

The appellant's construction and the French text make for unnecessary inconsistency and repugnance between the two subsections of section 26, whereas such consequences are reasonably avoided by the respondent's construction.

In my view, it is quite clear that, while section 26 (1) (b) prohibits the registration of the name of a firm or corporation as a word mark, section 26 (2) declares that the fact that part of the name of a firm or corporation is used in or as a proposed word mark is not a bar to its registration.

That being so, and the proposed word mark "Food Machinery Corporation" being the name of the appellant corporation, it is excluded from registration by section 26 (1) (b) and does not come within the ambit of section 26 (2). The Registrar was, therefore, right in refusing the application and the appeal must be dismissed. In accordance with the usual practice in appeals from the Registrar there will be no order as to costs.

Judgment accordingly.
