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BETWEEN:
 CANADA CRAYON COMPANY } PETITIONER;
 LIMITED }
 AND
 PEACOCK PRODUCTS LIMITED...RESPONDENT.

Trade-marks—Expunging—Failure to register trade-mark within period prescribed by Unfair Competition Act.

Petitioner commenced the use of the word "Peacock" and the representation of a peacock as a trade-mark in July, 1926, but failed to apply for registration of such trade-mark until April 7, 1934. On February 21, 1933, respondent, acting in good faith, obtained registration of its trade-mark, similar in appearance to that of petitioner, which it had been using since December, 1932. The Unfair Competition Act, 22-23 Geo. V, c. 38, came into force on September 1, 1932. Petitioner applied to have respondent's trade-mark expunged or amended.

Held: That, since petitioner had not applied for registration of its trade-mark within six months from the date on which the Unfair Competition Act came into force, as required by s. 4 of said Act, the action should be dismissed.

PETITION by petitioner herein to have respondent's trade-mark expunged from the Register of Trade-Marks, or amended.

The petition was heard before the Honourable Mr. Justice Angers, at Ottawa.

G. E. Maybee for petitioner.

O. M. Biggar, K.C., for respondent.

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

ANGERS J., now (April 9, 1936) delivered the following judgment:

This is a motion by Canada Crayon Company Limited, a corporation having its head office in the town of Lindsay, in the province of Ontario, asking that the registration by Peacock Products Limited, a corporation having its head office in the city of Winnipeg, in the province of Manitoba, of a trade-mark consisting of the "representation of a peacock on a limb appearing in a circle supported by scrolls resting on a panel" be struck out or amended on the ground that the entry as it appears on the register does not accurately express or define the existing rights of the

person appearing to be the registered owner of the mark, to wit Peacock Products Limited, inasmuch as (1) the said Peacock Products Limited had not, at the date of its application for registration, used the said trade-mark in Canada on the wares defined therein and (2) it was not, in any event, the first to use or make known in Canada the said trade-mark.

The facts are briefly as follows:

In or about the month of August, 1925, James Walter Gravestock, of the town of Lindsay aforesaid, commenced business in the city of Toronto, in the province of Ontario, as manufacturer and distributor of chalks and crayons under the firm name of Canada Crayon Company.

On or about September 30, 1927, Canada Crayon Company Limited was incorporated by letters patent of the Dominion of Canada and the company succeeded to the business of the firm Canada Crayon Company. Its head office was first located in the city of Peterborough and in the year 1933 moved to the town of Lindsay.

When he commenced business as Canada Crayon Company in 1925 or shortly thereafter, Gravestock adopted the word "Peacock" as a trade-mark to be applied to crayons and on or about July 13, 1926, he started to use the said trade-mark and continuously used it until the organization of Canada Crayon Company Limited, at which time the trade-mark together with the other assets of the firm were acquired by the latter. The trade-mark has since been used continuously and extensively by the company. In 1926 Canada Crayon Company adopted a design for use in connection with the sale of crayons which was applied to cartons; it consisted *inter alia* of the word "Peacock" and the representation of a peacock. The design so adopted was altered in 1927 by substituting the name of the company for the name of the firm.

The first cartons bearing the trade-mark "Peacock" appear to have been delivered to Canada Crayon Company by A. E. Long & Company Limited, of Toronto, on November 5, 1926: See exhibit B to the affidavit of Gravestock.

Produced as exhibit A to said affidavit is an invoice of Legge Bros. & Jones Engravers Limited, of Toronto, which, according to Gravestock's statement, is a charge for changing the plate for the trade-mark by substituting the name of the company for that of the firm.

1936

CANADA
CRAYON
CO. LTD.v.
PEACOCK
PRODUCTS
LTD.

Angers J.

1936
 CANADA
 CRAYON
 CO. LTD.
 v.
 PEACOCK
 PRODUCTS
 LTD.
 Angers J.

A catalogue of Canada Crayon Company Limited, which Gravestock in his affidavit states was published in 1928, was marked as exhibit D. It illustrates various products, including drawing crayons, checking crayons, marking crayons, railroad crayons, textile mills crayons and carpenters' chinks. Gravestock says that subsequently the products of the company were extended and that at the present time (June 11, 1935) the wares manufactured and sold by the company comprise wax crayons, school chalk, dustless blackboard crayons, railroad crayons, carpenters' chalk, mill crayons, lumber crayons, marking crayons, composition pressed drawing crayons, pastel crayons, coloured blackboard crayons, modelling clay and birthday candles.

Sample packages of "Peacock" drawing crayons manufactured and sold by Canada Crayon Company Limited were filed as exhibits E and F. Gravestock declares that, with the exception of the substitution of the name of the company for that of the firm and of the addition in 1928 of the striped label on the crayons, the packages and labels similar to exhibits E and F have been used since 1926 by the firm and since 1927 by the company. Gravestock adds that on or about April 1, 1933, the company adopted and used a third carton, a sample whereof was filed as exhibit G.

The affidavit of Gravestock discloses that the numbers of crayons sold by the firm and the company in the cartons aforesaid from 1926 to 1934 were as follows:

1926	296,544
1927	256,704
1928	696,768
1929	3,199,872
1930	3,783,408
1931	3,866,112
1932	4,374,144
1933	2,355,840
1934	2,936,448

The evidence does not disclose the figure of these sales.

Gravestock says that "Peacock" crayons have been sold throughout Canada from the date of adoption of the said trade-mark and that the word "Peacock" and the representation of a peacock had, long prior to December 15, 1932, which is the date of the alleged first use by Peacock Products Limited of its trade-mark, become gener-

ally recognized by dealers in and users of the class of wares in association with which the said trade-mark has been used as indicating that Canada Crayon Company Limited assumes the responsibility for their character and quality. The deponent adds that the use of the word "Peacock" or the representation of a peacock by any person other than Canada Crayon Company or Canada Crayon Company Limited in connection with crayons or similar wares would be likely to deceive the public.

On April 7, 1934, Canada Crayon Company Limited filed an application for registration of a trade-mark consisting of the word "Peacock," alleging that the mark had been first used in or about the month of August, 1925. The certificate of registration was, upon petition dated May 16, 1935, amended to mention the date of first use as being "on or about the 13th day of July, 1926." Registration of the trade-mark was granted under No. N. S. 2912, on April 7, 1934.

Gravestock's affidavit goes on to state that on or about December 1, 1934, it came to the attention of Canada Crayon Company Limited that Peacock Products Limited was selling modelling material in a carton bearing the words "Peacock Brand" and the representation of a peacock and that this carton was similar in appearance to the one used by Canada Crayon Company Limited in connection with the sale of "Peacock" crayons; a sample of "Peacock Brand" modelling material was filed as exhibit H.

The affidavit then refers to an extensive correspondence between petitioner's patent attorneys and Peacock Products Limited, the outcome of which was that the latter advised the said attorneys that it had registered a trade-mark consisting of the representation of a peacock on a limb appearing in a circle supported by scrolls resting on a panel, registration No. N. S. 490, dated February 21, 1933, and that it had no intention to discontinue using the said trade-mark.

The trade-mark in question was registered by Peacock Products Limited for use in connection with "the manufacture of inks of all kinds, adhesives of all kinds, crayons, white and coloured and wax coloured crayons, water colour paints, plastic modelling compounds, jig-saw puzzles, railroad chalk, lumber crayons, billiard chalk, carpenters' chalk,

1936

CANADA
CRAYON
CO. LTD.

v.

PEACOCK
PRODUCTS
LTD.

Angers J.

1936
 CANADA
 CRAYON
 CO. LTD.
 v.
 PEACOCK
 PRODUCTS
 LTD.
 Angers J.

nest eggs, marking crayons, school and office supplies other than paper and manufactures of paper.”

The application of Peacock Products Limited for registration of its trade-mark mentions the 15th of December, 1932, as the date of first use.

Gravestock, in his affidavit, states that he verily believes that Peacock Products Limited, at the time of the adoption of its trade-mark as well as at the time of its application for the registration thereof, knew that the trade-mark “Peacock” and the representation of a peacock was in use in Canada by Canada Crayon Company Limited because of the extensive use of the said trade-mark by the company and in particular because of extensive sales made by it in the city of Winnipeg where Peacock Products Limited has its head office. The affidavit contains a list of 21 stores in which the wares of Canada Crayon Company Limited are alleged to have been sold.

A second affidavit by Gravestock bearing date the 12th of July, 1935, states that the affiant has made inquiries in the trade and that he is informed and verily believes that Peacock Products Limited has used a label bearing the representation of a peacock on inks since the year 1933 and on modelling material since the spring of 1934 and that to the best of his knowledge it has not used this label on other wares.

An affidavit signed by F. S. Peacock, president and general manager of Peacock Products Limited, dated September 14, 1935, was put in evidence on behalf of respondent.

The affidavit states that the company was organized under the laws of the province of Manitoba and that it has its head office at the city of Winnipeg; that in or about October, 1932, the deponent, on behalf of Peacock Products Limited, had a search made of the register of trade-marks and he was advised that the representation of a peacock and the words “Peacock Products” were available for registration for school supplies; that, as a result, on or about December 15, 1932, his company commenced to use the trade-mark covered by the application which, on February 21, 1933, he caused to be filed with the Registrar of Trade-marks, the said trade-mark consisting of the representation of a peacock on a limb appearing in a circle sup-

ported by scrolls resting on a panel for use in connection with the manufacture and sale of the wares, a list whereof is hereinabove reproduced; that a certificate of registration was issued to Peacock Products Limited on August 2, 1933, under No. N. S. 490; that on or about December 31, 1934, Peacock Products Limited received a communication from the solicitors for Canada Crayon Company Limited, advising that the latter was the owner of a registered trade-mark which had been applied to the sale of crayons for many years and requesting Peacock Products Limited to discontinue the use of its trade-mark; that, following this communication, the deponent wrote to the Commissioner of Patents and received a reply dated January 16, 1935. The letter of the Acting Commissioner reads in part as follows:

In reply I beg to say that your trade-mark, No. 490, was filed on February 21, 1933, recorded on August 5, 1933, and registered in the name of the Peacock Products Limited. Trade-mark No. 2912 was filed on the 7th of April, 1934, and was recorded on December 12, 1934. During the examination of this application the trade-mark examiner failed to locate the prior registered trade-mark No. 490.

Your attention is directed to the fact that the registered trade-mark No. 2912 of the Canada Crayon Company, Limited, gives the date of first use as August, 1925, whereas the date of first use of your trade-mark No. 490 was given as of December 15, 1932.

Peacock declares that, until he received the letter from the solicitors for Canada Crayon Company Limited, he was not aware that the latter had used as a trade-mark the word "Peacock" or the representation of a peacock. He adds that he is informed and verily believes that the only use made by Canada Crayon Company Limited of its trade-mark is in connection with the manufacture and sale of one line of its wax crayons, as appears from a circular produced as exhibit B.

The affidavit further discloses that Peacock Products Limited was organized in 1933, commenced to do business in September of the same year and has continued to do business ever since; that from the date of the adoption of its trade-mark it has made a continuous use thereof on all its lines of goods and that the sales have been substantial; that, at the time of the receipt of the first notice from the petitioner's solicitors, Peacock Products Limited was doing an average yearly business of \$23,000; that of this amount approximately \$17,000 worth of the goods sold were sold under the trade-mark complained of by the peti-

1936

CANADA
CRAYON
Co. LTD.
v.
PEACOCK
PRODUCTS
LTD.

Angers J.

1936
 CANADA
 CRAYON
 Co. LTD.
 v.
 PEACOCK
 PRODUCTS
 LTD.
 Angers J.

tioner, and if the company were forced at this time to discontinue the use of its trade-mark it would suffer substantial losses.

It is clear from the evidence that the use of its trade-mark by Canada Crayon Company Limited anticipated the use of its own by Peacock Products Limited by approximately six years. The prior use in a case of this nature, however, seems to me to have no materiality.

The Canada Crayon Company Limited commenced to use the word "Peacock" and the representation of the peacock some time in July, 1926, but failed to apply for a trade-mark until April 7, 1934.

In the meantime, to wit on February 21, 1933, Peacock Products Limited, apparently in good faith, obtained the registration of its trade-mark.

The case is governed by section 4 of The Unfair Competition Act. The relevant provisions of section 4 read as follows:

4. (1) The person who, in association with wares, first uses or makes known in Canada, as provided in the last preceding section, a trade-mark or a distinguishing guise capable of constituting a trade-mark, shall be entitled to the exclusive use in Canada of such trade-mark or distinguishing guise in association with such wares, provided . . . that in compliance with the provisions of this Act he makes application for the registration of such trade-mark within six months of the date on which this Act comes into force,

(2) The use of a trade-mark or a distinguishing guise capable of constituting a trade-mark by a person who is not registered as the owner thereof pursuant to the provisions of this Act shall not confer upon such person any right, title or interest therein as against the person who is registered as the owner of the same or a similar trade-mark or distinguishing guise.

(3) Notwithstanding the provisions of subsection one of this section, the person who first uses or makes known in Canada, in association with wares a trade-mark or a distinguishing guise capable of constituting a trade-mark, may apply for and secure registration thereof after the expiration of any of the periods of six months specified by subsection one, provided the same or a similar trade-mark or distinguishing guise has not been registered by another for use in association with the same or similar wares,

The Unfair Competition Act came into force on September 1, 1932; Canada Crayon Company Limited, as we have seen, filed its application for registration of its trade-mark on April 7, 1934, i.e., more than nineteen months after the coming into force of the Act.

In view of the petitioner's failure to seek the registration of its trade-mark within six months from the 1st of

September, 1932, date on which the Unfair Competition Act came into force, the registration of the respondent's trade-mark was quite in order. I do not think, in the circumstances, that Canada Crayon Company Limited is justified in asking that the trade-mark of Peacock Products Limited be removed from the register. In fact, I believe that, with the trade-mark of Peacock Products Limited on the register, the trade-mark of Canada Crayon Company Limited should not have been registered.

There will be judgment dismissing the motion with costs.

Judgment accordingly.

1936
CANADA
CRAYON
Co. LTD.
v.
PEACOCK
PRODUCTS
LTD.
Angers J.