Toronto
Apr. 11

BETWEEN:

CHATEAU-GAI WINES LIMITED .....APPLICANT;

AND

LE GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE .. } RESPONDENT.

Trade Marks—Jurisdiction—Foreign sovereign state not submitting to court—Originating notice to strike out entry in trade mark register—Whether service valid—Trade Marks Act, S. of C. 1952-53, c. 49, s. 56(1)—Amendment.

This Court has no jurisdiction to entertain an action against a foreign sovereign state which does not submit to its jurisdiction. (*The Christina,* [1938] 1 All E.R. 719). Hence purported service of an originating notice of motion on the Government of France to strike out as null its registered trade mark will be set aside. The Exchequer Court of Canada has however jurisdiction under s. 56 of the *Trade Marks Act* to strike out an inaccurate entry from the Trade Marks register and the court may authorize amendment of the originating notice so that it neither is nor appears to be a proceeding against the Government of France. Proceedings so amended should not be served

except pursuant to a special order of the court. It is not likely that such a direction would be given but the court would probably direct that the Registrar of the court bring the proceedings to the attention of the Deputy Attorney General of Canada with the suggestion that the Secretary of State for External Affairs consider whether they should be brought to the attention of the Government of France as a matter of courtesy.

APPLICATION.

Harold G. Fox, Q.C. for applicant.

C. W. Robinson, Q.C. for respondent.

JACKETT P. (*orally*):—This is an application for an order setting aside the originating Notice of Motion whereby these proceedings were instituted, and the service of that originating Notice of Motion, on the ground that the named respondent is a foreign sovereign state and, declining to submit to the jurisdiction of this Court or to accept service of the proceedings, is not liable to be impleaded in this Court.

The originating Notice of Motion was filed in this Court on March 23, 1967 and reads as follows:

COURT NO. B1367

IN THE EXCHEQUER COURT OF CANADA

BETWEEN:

CHATEAU-GAI WINES LIMITED .....APPLICANT;

AND

LE GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE ..... } RESPONDENT.

ORIGINATING NOTICE OF MOTION

(Filed this 23rd day of March, A.D. 1967)

TAKE NOTICE that pursuant to section 56 of the Trade Marks Act a motion will be made on behalf of the Applicant herein before this Court at a time and place to be fixed by a judge thereof;

FOR AN ORDER directing that the whole of the entry in the Trade Mark Register maintained pursuant to the Trade Marks Act and relating to Registration No. N.S. 2709, Register 7, registered June 10th, 1933, by the Respondent herein be struck out for the reasons and on the grounds and facts set out in the Statement of Facts delivered herewith.

Dated at Toronto, Ontario, this 22nd day of March, 1967.

McCarthy & McCarthy
330 University Avenue
Toronto, Ontario
Solicitors for the Applicant.

1967

CHATEAU-GAI WINES LTD. v. GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE

Jackett P.

As appears from the Statement of Facts referred to in the originating Notice of Motion, the position taken is that the registered trade mark in question is wholly invalid.

I have no doubt that the originating Notice of Motion cannot be entertained in the form in which it has been filed unless the Government of the Republic of France submits to the jurisdiction of this Court for that purpose. The law on the point, as I understand it, is well settled and not open to doubt. It is expressed by Lord Maugham in *The Christina*[1] where he says

> My Lords, it is not in doubt that an action *in personam* against a foreign government will not be entertained in our courts unless that government submits to the jurisdiction. The rule was founded on the independence and dignity of the foreign government or sovereign, or, to use the language of the future Lord Esher, M.R., delivering judgment in the great case of *The Parlement Belge (1880) 5 P.D. 197, at p. 207*:
>
> > . . . the real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority
>
> This immunity, be it noted, has been admitted in all civilised countries, on similar principles, and with nearly the same limits.

Fortunately, these proceedings do not raise the question concerning which there has been so much debate, and which all the judges of the Supreme Court of Canada in *Flota Maritima Browning de Cuba S.A. v. The Republic of Cuba*[2] held to be still undecided, as to whether the additional rule that property of a foreign power cannot be impleaded, seized or detained applies to property held by the foreign sovereign power for commercial purposes as well as to property held by it for public purposes. The contrast between the two rules is to be found near the end of the judgment of Locke and Judson JJ. in the latter case at page 609, which reads, in part,

> In my opinion, the law applicable in these circumstances is as it is stated in *Compania Naviera Vascongado v. S S. Cristina, (1938) A C. 485 at p. 490,* in the following terms:
>
> > The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

[1] [1938] 1 A.E R. 719 at p. 737. [2] [1962] S C.R. 598.

> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

In *Rahmtoola v. Nizam of Hyderabad, (1958) A.C. 379 at p. 394,* Viscount Simonds adopted that statement as accurately stating these proceedings of international law.

> The question as to whether the law extends to property only used for the commercial purposes of the sovereign does not arise in the present matter and I express no opinion as to it.

In this case it has been made to appear to the Court that the named respondent does not submit to the jurisdiction of this Court in respect of this matter. The matter cannot therefore be permitted to proceed as a matter in which, in form at least, relief is being sought, or might appear to be sought, as against the Government of the Republic of France.

That is not, however, the end of the matter. The question as to what is the essential nature of the matter remains to be considered. The relief sought is neither a judgment that the applicant is entitled to any relief from the Government of the Republic of France nor a judgment that would in any way affect any property that belongs to or is in the possession of that Government or in which that Government has any interest. The relief sought is relief that this Court has jurisdiction to give under section 56 of the *Trade Marks Act*,[1] which reads in part:

> 56. (1) The Exchequer Court of Canada has exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that an entry in the register be struck out or amended on the ground that at the date of such application 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.

This must be read with section 2(*n*) which defines "register" to mean the register kept under section 26, which reads in part:

> 26. (1) There shall be kept under the supervision of the Registrar a register of trade marks and of transfers, disclaimers, amendments, judgments and orders relating to, and of registered users of, each registered trade mark.

What we have then is an application to this Court to exercise its statutory jurisdiction to order that an entry be struck out of this domestic trade mark register on the basis that there is no "existing rights" in the person appearing to be the registered owner.

[1] S. of C 1952-53, c. 49.

1967

CHATEAU-GAI WINES LTD. v. GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE

Jackett P.

In my view, the Court's jurisdiction to police the Trade Mark Register cannot be dependent upon its having jurisdiction over all persons who have, or might be suggested to have, some interest in the maintenance of the register in a particular form. Certainly, the Registrar must be able to apply under section 56 where he is of the view that there is an entry that is invalid. What the Registrar can do, under section 56, "any person interested" can do. The authority extends to them in the same terms.

The order will therefore be that the originating Notice of Motion be set aside ten days from this date unless, within that time, an order be obtained from the Court amending the originating Notice of Motion and the Statement of Facts to change their form so that they neither are, nor have the appearance of being, a proceeding against the Government of the Republic of France.

As the proceeding in its present form is, apparently, if not actually, a proceeding *in personam* against a foreign government, and as such a proceeding is not only contrary to both international law and domestic law but is unauthorized by the Rules of this Court, any act that may have been effected as a purported service of such proceeding is hereby declared to be a nullity and set aside.

In the event that the proceedings are amended so as to be unobjectionable as to form, there should, in my view, be no further attempt at service of them unless it is made pursuant to a special order of the Court which, in my view, it is not likely that the Court would be inclined to grant. I should myself be inclined, if the proceedings are so amended, to order that the Registrar bring them to the attention of the Deputy Attorney General of Canada with the suggestion that the Secretary of State for External Affairs may desire to consider whether they should be brought to the attention of the Government of the Republic of France, in some appropriate way, as a matter of courtesy, and an indication that there will be a reasonable delay in the carrying on of the proceedings in this Court to provide the Government of the Republic of France with an opportunity of deciding whether it desires to take any action with regard thereto.

As the Government of the Republic of France has not submitted to the jurisdiction of the Court, there will be no order as to costs.