

SUTHERLAND, J.

JULY 14TH, 1916.

CANADIAN HEATING AND VENTILATING CO. LIMITED
v. T. EATON CO. LIMITED AND GUELPH
STOVE CO. LIMITED.

Industrial Design—Registration—Infringement—Want of Novelty—Passing off—Imitation—Evidence—Right of Action against Seller—Trade Mark and Design Act, R.S.C. 1906 ch. 71, Part II., secs. 31, 35, 36, 45.

Action for a declaration that the defendants had infringed the plaintiffs' registered industrial design for a stove of the type of the "Quebec Heater," by manufacturing and selling stoves of the same pattern as the plaintiffs' stoves; for an order directing that all such stoves in the possession of the defendants and the patterns thereof should be broken up and destroyed; and for an injunction and an account.

The action was tried without a jury at Toronto.

H. W. Mickle, for the plaintiffs.

G. W. Mason and F. C. Carter, for the defendants.

SUTHERLAND, J., read a judgment setting out the facts. In *Findlay v. Ottawa Furnace and Foundry Co. Limited* (1902), 7 Can. Ex. C.R. 338, he said, the defendants had procured one of the plaintiff's stoves and caused a model to be made of it, with some minor alterations chiefly in the ornamentation and manufacture of the stove; and it was found that the weight of evidence went to shew that the defendants' design was an obvious imitation of the plaintiff's. In the present case, the plaintiffs asked that a like finding should be made; but, the learned Judge said, he had come to the conclusion from the evidence that the defendants' stove was not an imitation of or modelled from the plaintiffs' stove, but was an independent attempt by the defendant stove company to improve their own stove, keeping it as distinct as possible from the plaintiffs' and not seeking to imitate, but to differentiate. The defendant stove company had succeeded in doing so. Though there were similarities in size and general appearance, the differences were marked and distinct.

In Part II. of the Trade Mark and Design Act, R.S.C. 1906 ch. 71, dealing with industrial designs, there is no definition of a "design."

Reference to *Hecla Foundry Co. v. Walker Hunter and Co.*