

1929

\*Oct. 14.

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HENRY K. WAMPOLE & CO. v. HERVAY CHEMICAL  
CO. OF CANADA

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Trade-marks—Infringement—Packings common to the trade—Form, size  
or colour—“Get-up”*

APPEAL from the judgment of the Exchequer Court of Canada, Audette J. (1), dismissing with costs the appellant's action to restrain the respondent from infringing its trade-marks.

For some years previous to the date of appellant's registration of its trade-marks in question in this case, it had been common to the trade, including the respondent, to market cod liver oil in pink or red packings, similar to the appellant's. The respondent's package complained of however bore his name prominently at the top. This was so also of the label on the bottle itself inside. Appellant's outside package also bore the name "Wampole" in large letters at top. This being the essential characteristic of the two trade-marks.

The trial judge (1) held that the two trade marks were perfectly distinct and not liable to create deception.

At the conclusion of the argument of counsel for the appellant before this court, and without calling on counsel for the respondent, the court orally delivered judgment dismissing the appeal with costs.

*Appeal dismissed with costs.*

*O. M. Biggar K.C.* and *H. A. O'Donnell* for the appellant.  
*J. L. Perron K.C.* for the respondent.

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\*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.