

1963  
Sep. 30  
1964  
Mar. 10

BETWEEN:

THE SEVEN-UP COMPANY }  
(Opponent) .....

APPELLANT;

AND

JAMES D. HEAVEY, trading }  
as MUGS-UP ROOT BEER }  
COMPANY (Applicant) ... }

RESPONDENT.

*Trade Marks—Registration—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 12(1)(d) and 37—Confusion—Survey of consumers—Affidavit evidence of confusion by consumers.*

This is an appeal by the Seven-Up Company from a decision of the Registrar of Trade Marks allowing the registration of the trade mark "Mugs-Up" over the opposition of the appellant which alleged that the said trade mark was confusing with its already registered trade mark "Seven-Up" and was accordingly not registrable. In support of its allegation of confusion, the appellant produced 29 affidavits, all identical, wherein 29 persons questioned during the survey deposed to their belief that Seven-Up and Mugs-Up were made by the same company.

*Held:* That the survey on behalf of the appellant which led to the swearing of the affidavits produced at the hearing was conducted in such a manner as to be suggestive if not directly leading.

- 2. That the adverb "up" by itself is not the property of any firm or company so long as it is not hyphenated in a deceptive manner with an existing trade mark.
- 3. That "Seven-Up" and "Mugs-Up" give rise to no probable or reasonable confusion.
- 4. That the appeal is dismissed.

APPEAL from a decision of the Registrar of Trade Marks.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Ottawa.

*D. F. Sim, Q.C.* for appellant.

*R. G. McClenahan* for respondent.

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

DUMOULIN J. now (March 10, 1964) delivered the following judgment:

The Seven-Up Company filed with the Registrar of Trade Marks its opposition to the application of James D.

Heavey, trading as Mugs-Up Root Beer Co., for registration of a trade mark "MUGS-UP", in association with the sale of root beer and root beer concentrates.

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On May 24, 1961, the Registrar, after considering the literal evidence tendered and hearing counsel for both litigants, on May 17, 1961, "arrived at the conclusion that although the marks of the parties have a common component 'UP' they are in their totalities completely dissimilar", and therefore rejected the opposition pursuant to section 37 of the Act.

From this decision the Seven-Up Company dissents and produced on July 21, 1961, a notice of appeal.

After hearing the submissions of counsel for the opponent, I expressed the opinion that they were insufficient to offset the Registrar's decision.

I was then requested to withhold judgment until I had perused a list of 29 affidavits sworn to by as many consumers of soft drinks, and particularly of that carbonated non-alcoholic one called Seven-Up. These attestations, identically worded or nearly so, were obtained in the course of a survey by agents of the opponent company. The canvassers were given, in writing, some precautionary instructions, a copy of which will be found in the record, to the effect, *inter alia*, that they should be "very careful not to give the persons interviewed any leading questions or to suggest the type of answers to this questionnaire". The affidavit form itself comprises six paragraphs, two of which, paragraphs 3 and 4, read as follows:

3. That when the form was completed he asked me "Why do you think there may be a connection between 7-UP and MUGS-UP?" My reply appears on the aforesaid form: "Because they both end in—UP".
4. That I did not know that the gentleman who interviewed me was a representative of the 7-UP Company or that there was any dispute between the owners of the trade-marks 7-UP and MUGS-UP until I was asked to make this affidavit on June 19, 1963.

The test to which each deponent was put will be found annexed to the affidavit and reads thus:

These are the names of various soft drinks. Some of those in the right hand column may be made by the same companies that make those in the left hand column. Will you please match the names of the soft drinks that you think are made by the same companies?

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- |                 |                 |
|-----------------|-----------------|
| 1. COKE         | 1. HOWDY        |
| 2. PEPSI        | 2. MUGS-UP      |
| 3. 7-UP         | 3. FANTA        |
| 4. CANADA DRY   | 4. TEEM         |
| 5. ORANGE CRUSH | 5. PURE SPRING. |

Dumoulin J.

Not unexpectedly perhaps, all of the 29 consumers questioned matched "7-UP" and "MUGS-UP", tagging the latter also with No. 3. The Court remains unimpressed by a probing of this kind which, notwithstanding the would-be precautions surrounding it, must needs be suggestive if not directly leading. Moreover, I believe that a permissible inference well within the scope of judicial discretion permits one to say that if all the 29 people interviewed replied conformably to the opponent's expectations, at least as many others may have or would have said that no confusion arose in their mind between the two trade marks "SEVEN-UP" and MUGS-UP".

The deciding factor must reside in the proper interpretation given to the law itself, namely, section 12(1)(d) of the *Trade Marks Act*, 1-2 Elizabeth II, c. 49, reading:

12. (1) Subject to section 13, a trade mark is registrable if it is not  
 . . .  
 d) confusing with a registered trade mark.  
 . . .

The adverb "up" by itself is not the property of any firm or company so long as it is not hyphenated in a deceptive manner with an existing trade mark. "Seven-Up" and "Mugs-up", in my view, give rise to no probable or reasonable confusion.

For these reasons, the learned Registrar properly allowed the registration sought for in application serial No. 252-398, and this Court must dismiss (opponent) appellant's opposition with all costs allowed to the (applicant) respondent.

*Judgment accordingly.*