HER MAJESTY THE QUEEN (*Plaintiff*) ..... APPELLANT;

AND

MEAD JOHNSON OF CANADA LIMITED (*Defendant*) ..... RESPONDENT.

1966

*Feb. 15
Apr. 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Dietary aid "Metrecal"—Whether exempt as "foodstuff" or taxable as "pharmaceutical"—Jurisdiction of Exchequer Court re: previous Tariff Board decision not appealed—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(cc), 30, 32, 57, 58, and Schedule III.

The Crown claimed sales tax on a product known as "Metrecal", a controlling dietary aid manufactured by the defendant company in the form of powder, biscuit, liquid and soup. The defendant company contended that "Metrecal" was exempt from sales tax as "foodstuff" by reason of s. 32 and Schedule III of the *Excise Tax Act*, R.S.C. 1952, c. 100. Before the Exchequer Court, the Crown argued that the Court did not have jurisdiction to decide whether or not "Metrecal" in powder form was exempt because the Tariff Board, in 1963, had declared that this product was subject to sales tax as "pharmaceutical", and leave to appeal that decision had already been refused by the same Court. The Exchequer Court held that it was still open for a judge of the Court in other proceedings to make a finding contrary to the finding of the

* PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

1966

THE QUEEN v. MEAD JOHNSON OF CANADA LTD.

Tariff Board and ruled that "Metrecal" in all its forms was not subject to sales tax. The Crown appealed to this Court.

Held (Ritchie J. dissenting in part): The appeal should be allowed.

Per curiam: The declaration of the Tariff Board that "Metrecal" in powder form was taxable was final and conclusive and was not subject to review by the Court.

Per Abbott, Martland, Judson and Spence JJ.: The product "Metrecal" in all its forms was not exempt from sales tax. The product was similar to and competed with the product dealt with in the *Pfizer* case (ante p. 449), and the present case could be decided on the same grounds. As held in the *Pfizer* case, it was not enough that the product should be a "foodstuff". To be exempt "Metrecal" had to be a "foodstuff" that came within a specific definition in Schedule III of the *Excise Tax Act*. In biscuit form, "Metrecal" was not a "bakers' biscuit". In powder form, it was not a base or concentrate for making a food beverage. In liquid form, it was not a drink prepared from milk or eggs. In soup form, it was still "Metrecal", not a soup.

Per Ritchie J., *dissenting in part*: The fact that this product may be "sold or represented" for one or more of the purposes described in s. 2(1) (*cc*) of the *Excise Tax Act* necessarily excludes it from exemption from sales tax if it comes within any other classes of "foodstuffs" which are described in Schedule III of the Act. "Metrecal" as soup, wafer and liquid was included in the classifications described under "foodstuffs" in Schedule III and were therefore exempt from tax.

Revenu—Taxe de vente—Produit diététique «Metrecal»—Produit est-il exempt comme «denrée alimentaire» ou taxable comme «produit pharmaceutique»—Juridiction de la Cour de l'Échiquier re: décision préalable de la Commission du Tarif dont il n'y a pas eu appel—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 2(1)(cc), 30, 32, 57, 58, et Annexe III.

La Couronne a réclamé une taxe de vente sur un produit diététique connu sous le nom de «Metrecal» et confectionné par la compagnie défenderesse sous les formes de poudre, biscuit, liquide et soupe. La compagnie défenderesse a prétendu que le produit «Metrecal» était exempt de la taxe de vente comme étant un «produit alimentaire» en se basant sur l'art. 32 et l'Annexe III de la *Loi sur la taxe d'accise*, S.R.C. 1952, c. 100. Devant la Cour de l'Échiquier, la Couronne a soutenu que la Cour n'avait pas juridiction pour décider de la question à savoir si le produit «Metrecal» sous forme de poudre était exempt parce que la Commission du Tarif, en 1963, avait déclaré que ce produit était sujet à la taxe de vente comme étant un «produit pharmaceutique», et que permission d'en appeler de cette décision avait déjà été refusée par la même Cour. La Cour de l'Échiquier a décidé qu'un juge de la Cour dans un autre procès pouvait encore déclarer le contraire de ce que la Commission du Tarif avait déclaré, et a jugé que le produit «Metrecal» sous toutes ses formes n'était pas sujet à la taxe de vente. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Ritchie étant dissident en partie.

Par la Cour: La déclaration de la Commission du Tarif que le produit «Metrecal» sous forme de poudre était taxable, était une déclaration finale et péremptoire et n'était pas sujette à revision par la Cour.

Les Juges Abbott, Martland, Judson et Spence: Le produit «Metrecal» sous

toutes ses formes n'était pas exempt de la taxe de vente. Le produit était semblable à et faisait concurrence au produit traité dans la cause de *Pfizer* (ante p. 449), et la présente cause pouvait être décidée sur les mêmes motifs. Tel que décidé dans la cause de *Pfizer*, il n'était pas suffisant que le produit soit une «denrée alimentaire». Pour être exempté, le produit «Metrecal» devait être une «denrée alimentaire» qui tombait sous une définition spécifique de l'Annexe III de la *Loi sur la taxe d'accise*. Sous forme de biscuit, «Metrecal» n'était pas un «biscuit de boulanger». Sous forme de poudre, il n'était pas une base ou concentré pour la fabrication de breuvages alimentaires. Sous forme de liquide, il n'était pas un breuvage à base de lait ou d'œufs. Sous forme de soupe, ce n'était pas une soupe mais toujours «Metrecal».

Le Juge Ritchie, *dissident en partie:* Le fait que ce produit peut être «vendu ou représenté» comme pouvant être employé à l'un ou plusieurs des buts décrits à l'art. 2(1)(*cc*) de la *Loi sur la taxe d'accise*, l'exclut nécessairement de l'exemption de la taxe de vente s'il tombe sous l'une des autres classes de «denrées alimentaires» qui sont décrites à l'Annexe III de la Loi. «Metrecal» comme soupe, biscuit et liquide était inclus dans les classifications décrites comme «denrées alimentaires» dans l'Annexe III et était en conséquence exempt de la taxe.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], déclarant le produit «Metrecal» non sujet à la taxe de vente. Appel maintenu, le Juge Ritchie étant dissident en partie.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], declaring that the product "Metrecal" was not subject to sales tax. Appeal allowed, Ritchie J. dissenting in part.

C. R. O. Munro, Q.C., and *D. H. Aylen*, for the plaintiff, appellant.

Hon. R. L. Kellock, Q.C., and *N. M. Simpson, Q.C.*, for the defendant, respondent.

The judgment of Abbott, Martland, Judson and Spence JJ. was delivered by

JUDSON J.:—The judgment of the Exchequer Court[1] in this case decides that the product known as "Metrecal", whether in the form of powder, liquid, biscuit or soup, is not subject to sales tax. This was decided before the judgment of the same Court in the *Pfizer*[2] case. There is obvious conflict between the two judgments. As far as the biscuit is concerned, I repeat what I said in the *Pfizer* case, that the biscuit containing Metrecal is not a "bakers' biscuit" and as such, within the exemption of Schedule III.

[1] [1965] C.T.C. 339, 65 D.T.C. 5181. [2] [1965] C.T.C. 394, 65 D.T.C. 5245.

1966

THE QUEEN v. MEAD JOHNSON OF CANADA LTD.

Judson J.

It is unnecessary to repeat what I said about the composition of the product in the *Pfizer* case. Metrecal is a similar and competing product. The Tariff Board on February 25, 1963, in proceedings instituted by Mead Johnson of Canada Ltd., the present respondent, declared that Metrecal in powder form was subject to sales tax.

These proceedings were taken under s. 57(1) of the *Excise Tax Act*, which reads:

> 57. (1) Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the *Tariff Board Act* may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.

Section 57(3) makes a declaration by the Tariff Board final and conclusive subject to a right of appeal given by s. 58 on a question of law provided leave to appeal is granted by the Exchequer Court or a Judge thereof. Leave to appeal was refused on May 1, 1963.

There can be no question that the Tariff Board was within its jurisdiction in making this declaration. The question of jurisdiction which arose in *Goodyear Tire and Rubber Company of Canada Limited v. T. Eaton Co. Ltd.*[1] does not arise here. By the terms of the Act the declaration of the Tariff Board is final and conclusive.

However, the judgment under appeal holds that Metrecal in all its forms is not subject to sales tax and that it is still open for a Judge of the Exchequer Court in other proceedings to make a finding contrary to the finding of the Tariff Board. The judgment also holds that Metrecal is a foodstuff, that it is not a pharmaceutical and that even if it is a pharmaceutical, the fact that it is also a foodstuff exempts it from tax. The ratio is contained in the following paragraph of the reasons for judgment:

> In any event, however, irrespective of whether the various forms of "Metrecal" are pharmaceuticals, the fact that they are also foodstuffs within Schedule III to the *Excise Tax Act* in my opinion exempts them from sales tax. It is my respectful opinion that, on a true interpretation of the Act, once it is found that an article is a foodstuff, then in order for it not to be exempt from taxation by reason of its being a pharmaceutical also there would have to be in Schedule III or elsewhere in the Act clear words denying the article exemption from sales tax by the employment of such words as "other than a pharmaceutical", as was done in the case of farm and forest products listed in Schedule III.

[1] [1956] S.C.R. 610, 56 D.T.C. 1060, 16 Fox Pat. C. 91, 28 C.P.R. 25, 4 D.L.R. (2d) 1.

In my opinion, the error in this ratio is that it is not enough that the product should be a foodstuff. Before it can be exempt, it must be found to be a foodstuff that comes within a specific definition in Schedule III. In biscuit form it is not a "bakers' biscuit". In powder form it is not a base or concentrate for making a food beverage. In liquid form it is not a drink prepared from milk or eggs. In soup form it is still "Metrecal", not a soup. The case can therefore be decided on the same grounds as those delivered in this Court in the case of *Pfizer*.

It is true that the Tariff Board when it held that "Metrecal Powder" was subject to tax said that it was a pharmaceutical. I have already stated that I think that this finding was conclusive. But whether or not the case had ever been before the Tariff Board, the result would be the same. I think that "Metrecal" in all its forms is not within Schedule III.

I would allow the appeal with costs both here and in the Exchequer Court. Judgment should be entered for the amount of taxes claimed and the penalties in accordance with s. 48(4) of the Act.

RITCHIE J. (*dissenting in part*):—I have had the privilege of reading the reasons for judgment of Mr. Justice Judson who has outlined the circumstances giving rise to this appeal and I agree with him that the refusal of the learned President of the Exchequer Court to grant leave to appeal to that Court in respect of the respondent's claim for exemption for "Metrecal powder" is not reviewable in this Court in the present proceedings and that the declaration of the Tariff Board in this regard is to be treated as final and conclusive.

Mr. Justice Gibson, however, has determined in the judgment from which this appeal is taken, that the respondent's product Metrecal in the form of a soup, a biscuit and a liquid is exempt from sales tax under the provisions of s. 32 and Schedule III of the *Excise Tax Act*.

As I have indicated in the *Pfizer*[1] case I do not think that the fact that these products may be *"sold or represented"* for one or more of the purposes described in s. 2(1)(*cc*) of the Act necessarily excludes them from exemption from sales tax if they come within any of the

[1] Ante p. 449.

1966

THE QUEEN v. MEAD JOHNSON OF CANADA LTD.

Ritchie J.

classes of "Foodstuffs" which are described in Schedule III of the Act.

It appears to me to be convenient to deal separately with the three forms in which the product is marketed:

1. Metrecal Soup:

The respondent claims that Metrecal tomato soup, split pea soup and clam chowder come within the exemption provided for "soups" by the terms of the Schedule. In this regard it is to be noted that more than 95 per cent of the constituents of each of these products consist of water, milk and its derivatives and tomato paste, split peas or clam meat and juice as the case may be. The remaining 5 per cent or less of the product consists mainly of a mixture of vitamins, minerals and chemicals. Mr. LeRiche, whose evidence on behalf of the respondent in this regard was uncontradicted, having testified that "corn oil is derived from corn, 10 per cent of corn is oil" and that butter fat is derived from milk, went on to describe the ingredients contained in the various metrecal soups as follows:

> Milk solids, derived from milk. Corn oil, the same as we said before. Butterfat, the same. Salt is a food, a pure chemical substance. Iodized salt, salt with another chemical added. Calcium caseinate, derived from milk. Vitamins, made synthetically, and minerals. Black pepper is a natural flavour. Tomato paste, derived from tomatoes. Peas, self-explanatory. Onion powder, derived from onions. Monosodium glutamate, a chemical substance which improves the flavour. Ham flavour, I don't know whether this is synthetic or not. Clam meat, minced, and potatoes, clam juice and water.

The product is assembled and packaged by General Milk Products Limited who are manufacturers of milk products, evaporated milk and similar products, and who supply the skim milk and butter fat to go into the Metrecal soup, while the remaining materials are supplied by the respondent company.

In my view, if these products contained nothing but milk and milk products, tomatoes, split peas or clam chowder and water, they would undoubtedly be "soups" within the meaning of the exemption contained in Schedule III and the question to be determined is whether they lose the character of a soup because certain vitamins, minerals and chemicals are added in accordance with the respondent's directions. As I have indicated, I do not think that the fact that the ingredients supplied by the respondent may be beneficial in the treatment of "overweight" and that the

product is "sold or represented" as having this quality, affects the matter, and, with the greatest respect for those who hold a different view, I am further of the opinion that a product which contains such a high percentage of ingredients normally found in "soups" does not cease to come within that category as specified in Schedule III of the *Excise Tax Act* by reason of the fact that a small quantity of other ingredients is added with a view to producing the effect of controlling obesity. I am therefore of opinion that Metrecal "soups" are one of the "Foodstuffs" classified as being exempt from sales tax under the provisions of Schedule III of the *Excise Tax Act*.

2. Metrecal Wafers:

The question of whether these so-called wafers are "bakers' biscuits . . . or similar articles" within the meaning of Schedule III is almost identical with that which was considered in the *Pfizer* case.

These so-called wafers are baked in a baker's oven, cooled and packaged by George Weston Limited who are described in the evidence as " . . . manufacturers of bakery goods generally . . . cookies, biscuits, breads, cakes". The constituents of the wafer are described by Mr. LeRiche as follows:

> Soybean protein, sir, derives from the soybean, and this would be mainly the original product. Wheat flour is the original wheat, with a great deal of the bran removed. Sugar is a chemical substance derived from either sugar-beet or sugar-cane. Calcium caseinate is a derivative from milk. Molasses is the end product or an end product in the manufacture of sugar. Corn oil is derived from corn; ten per cent of corn is oil. Coconut oil is self-explanatory. Yeast, this is derived from the brewing industry. Lecithin is a chemical that is also a food substance. Cottonseed flour is self-explanatory, and wheat bran also. Iodized salt is one of the chemical substances which are now being added to our food. *Cinnamon is a spice. Ammonium bicarbonate* is known as baking powder. Flavours, that is another self-explanatory item. Vitamins and minerals are orignal in foodstuffs, but now mainly synthetic.

It appears to me that the respondent's formula for the making of these wafers is in the nature of a recipe for the making of a biscuit which is alleged to be beneficial to those suffering from obesity. It is baked by a bakery company and I cannot see that its alleged quality as a weight reducer deprives it of its character as a "bakers' biscuit". Even if the chemicals, minerals and vitamins which form part of the recipe differentiate the Metrecal wafer from nearly all other "bakers' biscuits" in my view it nevertheless remains a "bakers' biscuit" or at least an

1966

THE QUEEN v. MEAD JOHNSON OF CANADA LTD.

Ritchie J.

article so similar thereto as to come within the phrase "similar articles" as used in Schedule III of the Act.

3. Metrecal Liquid:

The respondent seeks exemption for this product on the ground that it comes under the category "Drinks prepared from milk or eggs" for which an exemption is provided by Schedule III.

The formula for this product specifies the following milk products in the proportions noted:

Milk Solids, Non Fat (From fresh skim milk)	15.7
Butterfat (From fresh whole milk or cream)	0.6
Water (supplied largely by the skim milk)	78.08.

I do not think that the words "Drinks prepared from milk..." can be taken to mean "drinks consisting exclusively of milk" and I take the view that the fact that something over 90 per cent of this product is produced from milk is sufficient to bring it within the exemption. I do not think that addition of other ingredients, including flavouring, which have been supplied in accordance with the formula developed by the respondent, alters the essential quality of the drink as being one that was prepared from milk.

As I have indicated, I am of opinion, for the reasons stated by Mr. Justice Judson, that it was not open to Mr. Justice Gibson, nor is it open to this Court on the present appeal, to disturb the declaration made by the Tariff Board in respect to Metrecal "powder" and I would accordingly allow the appeal to the extent of setting aside the finding made by Mr. Justice Gibson that Metrecal "powder" is one of the foodstuffs listed in Schedule III and direct that the judgment herein of the Exchequer Court be varied accordingly. In all other respects I would dismiss this appeal.

In view of the fact that the respondent has been substantially successful it should have its costs of the appeal to this Court.

Appeal allowed with costs, RITCHIE J. *dissenting in part.*

Solicitor for the plaintiff, appellant: E. A. Driedger, Ottawa.

Solicitors for the defendant, respondent: Blake, Cassels & Graydon, Toronto.