

1960
*Oct. 7
Nov. 21

HER MAJESTY THE QUEEN APPELLANT;

AND

THE PROCTER AND GAMBLE COM- }
PANY OF CANADA, LTD. } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA
APPELLATE DIVISION

Criminal law—Lotteries—Scheme of distributing by chance questionnaire forms to be completed and returned for value—Whether scheme for the disposition of property by chance—Criminal Code, 1953-54 (Can.), c. 51, ss. 2(32)(a), 179(1).

The respondent corporation distributed over 100,000 packages of its soap products, each package being marked with a five star seal. The corporation advertised to the public that it had enclosed a questionnaire form in 10,000 of these containers. The questionnaire sought certain information from the recipient which would be valuable to the respondent in the operation of its business. A recipient who completed the form and mailed it to the respondent was entitled to a payment of \$5 from the respondent.

The corporation was charged with three offences under s. 179(1) of the *Criminal Code*, the lotteries section. All three charges were dismissed in magistrate's court, and this decision was sustained on appeal to the Appellate Division of the Supreme Court on equal division. The Crown appealed to this Court.

Held: The appeal should be dismissed.

The contention that what was disposed of by lot or chance under the respondent's scheme was the sum of \$5 failed. It was not the money that was disposed of by chance, but a form by means of which the recipient thereof could, on compliance with the required conditions, obtain the payment.

An uncompleted questionnaire form is not an instrument "giving a right to receive money" within the definition of property in s. 2(32)(a) of the *Criminal Code*. In itself the questionnaire created no right to property.

*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

The services which the recipient of the form was asked to perform were not a mere formality, serving as a device seeking to avoid the application of s. 179(1) of the Code.

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APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division¹, affirming, on an equal division, the acquittal of the accused. Appeal dismissed.

S. A. Friedman, for the appellant.

C. W. Clement, Q.C., and *B. M. Osler, Q.C.*, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent is a corporation which manufactures soap products. On April 11, 1959, it advertised by newspaper, in Edmonton, that it had enclosed a questionnaire in 10,000 packets of its products, distributed across Canada, and identified by a five star seal on the container. Over 100,000 packages of soap products were distributed in Canada in the containers marked with the five star seal. A person who obtained a questionnaire, by purchase of a package containing it, could, by completing and mailing it to a specified address, receive the sum of \$5. The scheme was also advertised on television.

The questionnaire sought information from the recipient of it, among other things, as to the product in the package in which the questionnaire was found, the type of washing machine used, the laundry product mostly used, whether bleach was used in laundering, how certain kinds of garments were washed and concluded with a question as to the ways in which the respondent's laundry, dish washing, and house cleaning products could be improved.

The respondent was charged with three offences under s. 179(1) of the *Criminal Code*. The first was that it "did unlawfully conduct a certain scheme for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed

¹ (1959-60), 30 W.W.R. 352, 32 C.R. 137.

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to be advanced, loaned, given, sold or disposed of, to wit: Questionnaire forms each of which when completed and returned to the said Company had a value of \$5. Contrary to the Criminal Code of Canada." The second and third charges were that the respondent unlawfully advertised and that it unlawfully caused to be advertised this scheme.

Section 179(1) of the *Criminal Code* provides:

179(1) Every one is guilty of an indictable offence and is liable to imprisonment for two years who

- (a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever;

* * *

- (d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of;

* * *

The relevant definition of "property" is contained in para. (a) of subs. (32) of s. 2 of the *Criminal Code*, which reads:

(32) "property" includes

- (a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,

All three charges were dismissed by the learned Magistrate who tried the case. In the written reasons for his decision he makes the following findings:

Therefore, to sum up, I find that the forms were sent out in these packages, to various areas throughout the whole of Canada, that there was a sincere effort on the part of the company to ascertain the desires and opinions of the housewives who used their property with the intention of improving the property, the packages of soap in this case. I find that the reward was not unduly high, and that it didn't vary, and that the price of the packages didn't vary and that no extra money had to be sent in with the form, that once the questionnaire form was sent in, duly answered by the person sending it, there was no lottery or no choice of who would

win. It was a conscientious effort on the part of the company to obtain the views of the people using their product. I don't think there was any sham about the whole proceedings, and I think that the company have proved this in their evidence by calling the member of the research department of their firm to show that the answers received were treated seriously, . . .

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His decision was sustained on appeal to the Appellate Division of the Supreme Court of Alberta¹ on an equal division. The appellant has appealed from that judgment.

It is not questioned that the distribution of the questionnaire forms was determined by chance. The question is whether, because of that fact, the respondent's scheme was one for the disposition of property by chance. This involves the question as to what it was that the purchaser of a five star seal package, which contained a form, had obtained.

The contention of the appellant is that, under the respondent's scheme, what was disposed of by lot or chance was the sum of \$5. It was contended that the acquisition of the questionnaire form gave to the recipient a right to receive the sum of \$5 from the respondent.

The obtaining of a form in a package did not, however, immediately entitle the recipient to the payment. Before he could claim the payment he was required to complete the form and to mail it to the respondent. That which was disposed of by chance was not, therefore, the money, but a form, by means of which, on compliance with the required conditions, he could obtain the payment.

This brings us to the question as to whether an uncompleted questionnaire form is an instrument "giving a right to receive money" within the paragraph defining "property" in the *Criminal Code*.

I do not think that it was. Assuming that the form was an instrument, the questionnaire uncompleted, or completed but not mailed, did not confer any right to receive a \$5 payment. The form gave to the recipient an opportunity

¹ (1959-60), 30 W.W.R. 352, 32 C.R. 137.

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to obtain the payment by performing the stipulated services; i.e., completion and mailing of the form. The questionnaire constituted nothing more than an offer, but the right to receive the payment could only arise by contract, which would result if the offer were accepted in the manner which it had indicated, which involved the furnishing of information to the respondent. In itself it created no right to property.

As previously pointed out, the learned Magistrate has found, and the evidence supports the finding, that the requirement for the completion and mailing of the questionnaire form was not a sham. The services which the recipient of the questionnaire form was asked to perform were not a mere formality, serving as a device seeking to avoid the application of s. 179(1) of the *Criminal Code*. On the contrary, the evidence, accepted by the learned Magistrate, establishes that the whole plan was a genuine effort on the part of the respondent to obtain information which would be valuable to it in the operation of its business. For those services the respondent agreed to make a standard payment of \$5 in each case.

For these reasons it is my opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: The Attorney General for Alberta.

Solicitors for the respondent: Clement, Parlee, Whittaker, Irving, Mustard & Rodney, Edmonton.