



Wrigley Canada v. Canada, 2000 CanLII 15485 (F.C.A.)

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Docket: A-252-99

CORAM: DESJARDINS J.A.

ROTHSTEIN J.A.

EVANS J.A.

BETWEEN:

WRIGLEY CANADA

Appellant

(Plaintiff)

- and -

HER MAJESTY THE QUEEN

Respondent

(Defendant)

REASONS FOR JUDGMENT

(Delivered from the Bench at Ottawa, Ontario

on Wednesday, May 10, 2000)

EVANS J.A.

[1] The definition of "food" in section 2 of the *Food and Drugs Act*, R.S.C. 1985, c. F-27, includes chewing gum. The question to be decided in this appeal is whether a claim by a chewing gum manufacturer that use of its product prevents dental cavities thereby makes the gum a "drug" for the purpose of the Act, and hence subject to a regulatory regime that is more stringent than that applicable to "food".

[2] In a decision dated March 23, 1999 Richard A.C.J. (as he then was) dismissed a motion for summary judgment in which Wrigley Canada sought a declaration that, despite a representation that EXTRA Sugarfree Gum prevents dental cavities, the gum is a food and not a drug. The Motions Judge granted a declaration that, even though the definition of "food" in section 2 expressly includes chewing gum, such a claim would bring EXTRA Sugarfree Gum within the statutory definition of a drug. Wrigley Canada has appealed from this decision.

[3] The factual background precipitating Wrigley Canada's motion was that the company wished to claim for the chewing gum in question that it "Prevents Tooth Decay". However, the Canadian Radio-television and Telecommunications Commission has refused to accept the script for an advertisement claiming cavity fighting properties for EXTRA Sugarfree Gum, on the ground that such a claim made it a drug. Health Canada is now of the same view, although it had previously maintained the opposite position, as, indeed, had the Commission.

[4] Wrigley Canada has applied to Health Canada on two occasions for approval of EXTRA Sugarfree Gum as a drug when it is represented as preventing dental decay. The first approval was rejected in 1987, apparently on the ground that the chewing gum contained no active ingredient and, presumably, was therefore not within the definition of a drug. However, by October 1987 Health Canada had changed its mind: in a letter from an Assistant Deputy Minister of Health Canada it was said that Wrigley Canada's claim had been reassessed and the conclusion reached that a drug claim was being made.

[5] There is no evidence in the record setting out the basis of the second refusal in 1993. It could have been because the scientific research submitted with the application did not satisfy the Minister that the appellant's product prevented tooth decay. Indeed, given Mr. Woyiwada's submission to us that chewing gum could be a "substance or mixture of substances", and thus satisfy the threshold element of the statutory definition of a drug in section 2 of the Act, and Health Canada's view in October 1987, after the first refusal, that Wrigley Canada's claim for the chewing gum was a "drug claim", the Minister could hardly be heard now to say that chewing gum that is claimed to prevent tooth decay falls outside the definition of a drug.

[6] We note that the refusal of Health Canada to approve EXTRA Sugarfree Gum as a drug has not been the subject of an application for judicial review.

[7] The part of the definition of a "drug" in the *Food and Drugs Act* relevant to this appeal provides that a drug includes "any substances ... represented for use in (a) the ... prevention of disease, disorder ... in human beings ...". At first sight, at least, it would certainly appear that an advertising claim that EXTRA Sugarfree Gum not only does not cause dental cavities, but also prevents them, brings the product within the statutory definition of a drug.

[8] Statutory health standards are applicable to the sale and production of "food", and federal and provincial consumer protection legislation imposes sanctions for false advertising of any goods. However, "drugs" can only be sold after regulatory approval has been obtained on proof of their safety and efficacy: selling drugs without the necessary approval is a statutory offence.

[9] The appellant has argued that, since chewing gum is expressly included in the statutory definition of food,

and is therefore subject to the regulatory standards applicable to food, it cannot also be a drug simply because a health benefit is claimed for it.

[10] We do not find this argument persuasive. There is nothing in either the statutory definition of "food" and "drugs", or the legislative scheme as a whole, that precludes a food from also becoming a drug if a representation is made that otherwise brings it within the definition of a drug in section 2. The categories are not mutually exclusive. On the other hand, the definition of a "device" is expressly stated not to include a drug, thus making it clear that those categories do not overlap. Similar words are not found in the definition of "food".

[11] The appellant relied on subsection 3(1) of the Act to establish that a food does not become a drug merely because a claim is made that it prevents or cures diseases. This subsection provides that no person may advertise any food, device, cosmetic or drug as a cure for, or prevention of, any of the diseases or disorders listed in Schedule A of the Act. This list includes some of the most serious medical conditions to which human beings may be subject.

[12] The appellant's argument was that, on Richard A.C.J.'s reasoning, any product that was alleged to prevent or cure a Schedule A disease or disorder would automatically be a drug within the meaning of section 2. Accordingly, the inclusion of food, devices or cosmetics in subsection 3(1) would be superfluous. Their inclusion, it was argued, is a clear indication that Parliament did not regard a product that was a food as also capable of being a drug by virtue of a claim that it prevented a Schedule A disease.

[13] The appellant is no doubt correct to say that, on Richard A.C.J.'s interpretation of subsection 2(1), the meaning of subsection 3(1) is not changed by the inclusion of the words "food, devices or cosmetics". However, the presumption that Parliament does not include words in a statute unnecessarily is rebuttable by other provisions in the Act. In our view, the definition of a drug in section 2 has this effect.

[14] In addition, words that are not strictly necessary to convey a meaning may be added to the text of a statute to make the provision clearer to the reader. Hence, the inclusion of "food" removes any doubt that subsection 3(1) applies to a good that, apart from the claimed medical benefit, is a food, not a drug.

[15] The appellant also argued that, by making it an offence to advertise a product as preventing a disease listed in Schedule A, Parliament should be taken not to have prohibited advertisements claiming preventive properties with respect to diseases not included in Schedule A, such as dental decay.

[16] We do not think that this observation helps the appellant. The question is not whether it is an offence for any one to advertise such a claim for a product, but whether the appellant's chewing gum has become a drug by virtue of the representation that it prevents dental decay. This is a different question altogether. Subsection 3(1) cannot be interpreted as excluding from other regulatory provisions products that are claimed to cure or prevent diseases to which the prohibition in subsection 3(1) does not apply.

[17] Nor do we attach significance to the use of the word "article" in the statutory definition of food and "substance" in the definition of a drug. It does not unduly strain language to describe chewing gum as "a substance or mixture of substances", particularly having regard to the underlying purposes of the legislative scheme: the protection of the public through a requirement of approval before a product, for which specific medical benefits are claimed, can be marketed.

[18] For these reasons, and for those given by Richard A.C.J., the appeal will be dismissed. Since counsel for the respondent did not ask for costs, either in his memorandum, or after the above reasons for judgment were delivered in Court, costs will not be awarded.

"John M. Evans"

J.A.

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