1962
Sept. 17
1963
Dec. 23

BETWEEN:

MOIRS LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND NATIONAL COUNCIL OF THE BAKING INDUSTRY RESPONDENTS.

Revenue—Sales tax—The Excise Tax Act, R S C. 1952, c. 100, as amended, ss. 29(1)(e)(v), 30 and 32(1); Schedule III to said Act—Jurisdiction of Court on appeal from the Tariff Board—Goods claimed to be exempt from tax—Meaning of onus on taxpayer seeking exemption—Foodstuffs—"Bakers' cakes and pies, including biscuits, cookies or other similar articles"—Meaning of "similar", "other similar articles", "bar goods", "confectionery", "candy bars", "candy or a substitute for candy".

The *Excise Tax Act*, R S C 1952, c 100, s. 30, imposes a sales tax on goods produced or manufactured in Canada subject to an exemption therefrom as provided for by s 32(1) in favour of the articles listed in Schedule III to the said Act, which includes under the heading "Foodstuffs" articles described as "Bakers' cakes and pies including biscuits, cookies or other similar articles".

The appellant, which manufactures chocolate and other candies, carries on its candy and confectionery business on a national scale. It also markets bread and some other bakery products on a local basis but does not manufacture biscuits However, Marvens Ltd, a biscuit manufacturer supplied the appellant in bulk with a graham sandwich which consisted of two graham biscuits with a malted cream filling, made to the appellant's specification. The appellant coated the graham sandwich with chocolate using the same equipment and kind of chocolate as it used to make its candy products. The chocolate coating constituted 30% of the weight of the finished product Appellant then packaged the graham sandwiches, two in a package, and sold them to the trade for resale to the public No article corresponding to the appellant's Graham Sandwich is manufactured by any other firm in Canada. The article in question appears to have been known in the trade as a graham sandwich and was sometimes referred to as a biscuit bar. It was marketed by the same people and in the same manner as appellant's chocolate bars and other confectionery, and it was advertised as part of its candy bar line.

The issue before the Tariff Board was whether or not the appellant's graham sandwich was a biscuit or a "similar article" within the meaning of Schedule III All three members of the Board agreed that the appellant had failed to establish that the said graham sandwich was a biscuit and two of the members thereof further held that appellant had failed to establish that the said graham sandwich fell within the meaning of the words "other similar articles" and dismissed the appeal. The third member of the Board held that the said graham sandwich was a biscuit bar and was similar to a biscuit because it contained a baked

biscuit that accounted for the larger part of its weight and he would have allowed the appeal.

The question before the Court was limited to determining whether the Board erred in law in finding that the goods in question were subject to sales tax under s 30 of the *Excise Tax Act*. The three submissions made by the appellant were—That the majority of the Board misdirected themselves through a misuse of the word "onus" and completely misunderstood the difference between the significance of the word when used in connection with the construction of a statute and its significance when employed in relation to evidence; that there was no evidence to support the finding of all three Board members that the graham sandwich was not a biscuit and the same was true of the majority finding that it was not a similar article to a biscuit and therefore not exempt from tax; and that in the alternative the Court should accept the finding of the dissenting member that the graham sandwich was a similar article to a biscuit and allow the appeal because the majority of the Board expressly declined to make a finding upon or deal with the meaning of the words "other similar articles".

Held: That the extent to which the character of the Marvens Ltd product was altered through the addition by the appellant of 30% by weight of chocolate was the pivotal fact which all members of the Board rightly considered in arriving at their conclusion.

2. That it was plain that the majority of the Board had in mind when making use of the word "onus" the strictness of statutory interpretation and the disadvantage which a taxpayer suffers when he is forced to rely on an exemption as compared to when he is free to invoke a taxing provision. There is long standing authority for describing this disadvantage as an onus. By their repeated reference to onus, the majority did not misdirect themselves by misunderstanding the significance of that word. Even if the language used indicated that the majority had a misconception as to the law, this Court should not assume that it was responsible for the determination reached unless there was no evidence to support their finding, or that nobody, if properly instructed in the law, could have reached such conclusion. The majority of the Board did not act without any evidence in determining that the Moirs graham sandwich was neither a biscuit nor an article similar to a biscuit within the meaning of the Act, nor could it be said that a person properly instructed in the law could not have reached such a conclusion.

3. That the fact that one article in a combination of articles may exceed the others in weight was insufficient *per se* to establish that the resulting product was the same in nature as the heaviest one; and furthermore there was no justification in law or in fact for saying that the nature of an edible article was to be classified according to the weight of its main ingredient

4. That in determining the nature and, *a fortiori,* the similarity of one or more edible articles, their effect on the senses could well be regarded as one of the factors meriting consideration. Judging by the Graham Sandwich filed as an exhibit, it seemed almost self-evident that the appearance, smell and taste of the original biscuit underwent a striking change; and the appellant has failed to establish that the Marvens Ltd. product remained a biscuit and that it did not become a chocolate or confectionery bar, containing a biscuit and malt cream filling.

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5. That as to whether the article in issue was of a kind or class similar to a biscuit, it was impossible to determine any satisfactory line of demarcation as to the degree of likeness necessary in order to constitute similarity. The question was essentially one of fact and there was some evidence to justify the majority finding that the article in issue was not an article similar to a biscuit.

6. That the evidence supported the view that the Moirs Graham Sandwich was a confectionery that might be classed as candy or a substitute for candy and that it was therefore a taxable article under Sec. 29(1)(*e*)(*v*) of the *Excise Tax Act*.

7. That the legislature did not intend to attribute to the words "other similar articles" in Schedule III to the said Act an interpretation so wide as to negative the effect of said Sec. 29(1)(*e*)(*v*). The majority of the Board made a finding with respect to the meaning and application of the words "other similar articles".

8. That since the ordinary meaning of the word "similar" was being considered rather than a question of legal interpretation, a mixed question of fact and law arose rather than a pure question of law. The majority did not "err as a matter of law" in finding that the Moirs Graham Sandwich was subject to sales tax.

APPEAL from a decision of the Tariff Board.

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

K. E. Eaton for appellant.

N. A. Chalmers for respondent, Deputy Minister of National Revenue for Customs and Excise.

No one for respondent National Council of the Baking Industry.

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

KEARNEY J. now (December 23, 1963) delivered the following judgment:

This appeal is from the declaration of the Tariff Board dated February 2, 1962, pursuant to leave to appeal granted by Dumoulin J. on February 27, 1962 in virtue of s. 58(1) of the *Excise Tax Act*, R.S.C. 1952, c. 100, and amendments, including S. of C. 1960, c. 30, upon the following question of law:

> Did the Tariff Board err as a matter of law in holding that an article known as "Moirs Graham Sandwich" is not exempt from sales tax under section 32 and Schedule III of the *Excise Tax Act* as a biscuit or other similar article?

The relevant portions of the aforesaid provisions of the Act read as follows:

30. (1) There shall be imposed, levied and collected a consumption or sales tax of * eight per cent on the sale price of all goods

(*a*) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,

* * *

32. (1) The tax imposed by section 30 does not apply to the sale or importation of the articles hereunder mentioned in Schedule III. 1931, c. 54, s. 15; 1945, c. 30, s. 6.

SCHEDULE III

(Repealed and New. 1960, c. 30, s. 2)

FOODSTUFFS

* * *

Bakers' cakes and pies including biscuits, cookies or other similar articles;

This appeal for a declaration of exemption from tax was brought by the appellant company, located at Halifax, N.S., with respect to the company's product, which it described as "Moirs Graham Sandwich—With melted cream filling."

The only witnesses heard were Mr. Kenneth F. Gaby, Superintendent of Marvens Ltd. at Moncton, N.B., and Mr. Jacques Desrosiers, General Sales Manager of Moirs Ltd., in Halifax, both of whom were called on behalf of the appellant.

I should perhaps here mention that counsel for the appellant declared that the National Council of the Baking Industry was joined as a respondent herein only because its name was entered as an interested party at the proceeding before the Tariff Board. The parties agreed that the said Council having declared that it had no interest in the present proceedings and having filed no appearance, no further reference to it need be made.

The exhibits consisted of the following:

A copy of a letter (Ex. A-1), written by the appellant to the Deputy Minister of National Revenue, requesting a refund of sales taxes, and the appellant's letter of refusal

* In addition to the sales tax, there is a 3 per cent Old Age Security tax collected with it, making a combined tax of 11 per cent. See R.S.C. 1952, c. 200, s. 10; 1959, c. 14, s. 1(1).

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(Ex. A-2). Further correspondence, which apparently was numbered Exhibits A-3 to A-7 inclusive, had been placed before the Board but, by consent, were withdrawn.

Two product samples of the Moirs Graham Sandwich which were filed in Court retained the same numbering as they had before the Board; a wooden sample of the said graham sandwich was produced as Exhibit A-8 and another general sample thereof, uncovered and sliced, was produced as Exhibit 11. Imported samples of competing articles, made, *inter alia,* by Rowntrees and Joseph Terry and Sons, were produced as Exhibits A-9 and A-10.

The appellant company, a well and favourably known manufacturer of chocolate and other candies, carries on its candy or confectionery business on a national scale. It also markets, on a local basis, bread and some bakery products, such as Christmas or fruit cakes, which have a long shelf life. It does not manufacture biscuits. A company known as Marvens Ltd., of Moncton, N.B., manufactures and sells under its own name a full line of plain and fancy biscuits, including a chocolate mallow and potato chips, but it is said that they do not manufacture confectionery. Marvens Ltd. manufactured a graham sandwich, consisting of the two graham biscuits and malted cream filling, to the specifications of Moirs Ltd., packaged them in bulk and shipped the product to Moirs Ltd. at Halifax. Moirs enrobed the graham sandwich in the same chocolate-enrobing-machine used by them for many of their candy products, and using the same chocolate formula. The evidence indicates that, after enrobement, 30 per cent of the article, by weight, was composed of chocolate. Later, Moirs packaged the chocolate-coated graham sandwiches, placing two of them in a single wrapper, for sale to the trade, which, in turn, sold them to the public at 10¢ a package. No article corresponding to the Moirs Graham Sandwich in issue is manufactured by any other firm in Canada.

There is evidence that the Moirs Graham Sandwich is known in the trade as a graham sandwich; that it was sometimes referred to as a biscuit bar; that it was marketed by the same people and in the same manner as the appellant's various types of chocolate bars and other confectionery; and that it was advertised by the appellant as part of its candy bar line. The enrobing process and the manner in

which the graham sandwich was packaged and sold was also dealt with by the appellant's two witnesses.

There is no dispute as to the amount of the tax claimed and counsel are in agreement that the Board properly stated the issues which were before it, as appears by paragraph 2 of the declaration:

> By their pleadings the applicant and the Department narrowed the points in issue to a determination of the question of whether the goods in issue are or are not biscuits or, as submitted by the applicant in the alternative, other similar articles within the meaning of the following words of Schedule III of the Excise Tax Act.
>
> Bakers' cakes and pies including biscuits, cookies or other similar articles;

Counsel for the parties also recognized that the issues before me are narrower than those before the Board and that the jurisdiction of this Court is limited to determining whether the Board committed an error in law in finding that the goods in question are subject to and not exempt from sales tax under s. 30 of the *Excise Tax Act*.

While all three members were in agreement that the appellant had failed to establish that the Moirs Graham Sandwich was a biscuit within the meaning of the Act, as appears by the declaration, nevertheless the finding of the Board resulted in a majority decision. Two of its members, however, declared that, in their opinion, the weight of the evidence adduced on behalf of the applicant tends to show that the Moirs graham sandwiches were bar goods or confectionery, rather than biscuits or other similar articles, and dismissed the appeal. The dissenting member stated:

> My opinion is that the weight of evidence establishes that the Moirs Graham Sandwich is packaged in such a way that it is a biscuit bar rather than a biscuit, and it is generally sold as a biscuit bar. While in my opinion the applicant failed to establish that the Moirs Graham Sandwich is without question a biscuit, on the other hand the evidence regarding packaging and merchandising of the article failed to establish that the article is by its nature a chocolate bar or candy or something which would be outside the scope of Schedule III.

After observing that if the graham sandwich is a biscuit bar it remains to be decided whether it falls within the category of "other similar articles", the dissenting member, in the penultimate paragraph of his declaration, continued, in part, as follows:

> The Moirs Graham Sandwich is similar to a biscuit because it contains a baked biscuit that accounts for the larger part of its weight. . . .

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The dissenting member was accordingly in favour of maintaining the appeal.

In dealing with the unanimous finding of the Board in respect of the nature of the article in issue counsel for the appellant limited himself to simply declaring that he disagreed with the conclusions reached by the third member, who, later, dissented on the question of similarity but attacked the declaration of the other two members on the ground that they misdirected themselves and committed an error in law, because, as appears by their repeated reference to "onus", they completely misunderstood the difference between the significance of the word "onus" when used in connection with the construction of a statute and when employed in relation to evidence.

The appellant also contended that evidence was lacking to justify the finding by the three members of the Board that the Moirs Graham Sandwich, having lost its original character by reason of the addition of the chocolate to it, was no longer a biscuit and that *a fortiori* the same was true with respect to the majority finding that it was not a similar article to a biscuit and therefore not exempt from tax.

In the event of failing on the above-mentioned submissions, counsel for the appellant urged, as an alternative argument, that this Court should accept the dissenting member's declaration that the graham sandwich was a similar article to a biscuit and maintain the appeal because the majority expressly declined to make a finding upon or deal with the meaning of the words "other similar articles".

To revert to the first question of law, namely, "Did the majority misdirect itself through its alleged misuse of the word 'onus'?"—the first reference thereto appears in the fourth paragraph at page 1 of the majority declaration and reads as follows:

> The graham sandwich had been declared subject to the tax imposed by Section 30(1) of the *Excise Tax Act*. The onus rests upon the applicant to bring itself within the exemptions provided for by Section 32(1) of the said Act.

Counsel for the appellant conceded that little fault could be found with the above-mentioned reference to onus but stated that it was acceptable only as a general statement.

The next reference to onus is found in paragraph 4 at page 2 of the declaration; leaving out non-essentials, it states:

> Counsel for the applicant relied heavily on the judgment of Cartwright J. in *Universal Fur Dressers and Dyers Ltd. v. The Queen*, [1956] S.C.R. 632 in his submission that the applicant had discharged its onus. He argued by analogy that the applicant had established that the graham sandwich, as produced by Marven's, remained throughout a biscuit and, therefore, fell within the provisions of Schedule III.

Counsel for the appellant respectfully suggested that the above declaration indicated that the Board was under a misapprehension as to the point in his submission, which, he considered, was supported by the *Universal* case and which he described as follows:

> If the product in question was a biscuit, its character as such would not be altered by any treatment given it in advertising literature or in the manner in which it was marketed.

I do not think the Board was misled, as indicated above, because, disregarding any evidence in respect of advertising and literature, I am of opinion that the extent to which the character of the Marvens product was altered through the addition by Moirs of 30 per cent, by weight, of chocolate was the pivotal fact which all members of the Board rightly took into consideration in arriving at their conclusion.

A third reference to the word in issue is found in the last paragraph at page 2 of the majority declaration and in the first paragraph of the following page, which paragraphs read as follows:

> In *Universal Fur Dressers & Dyers Ltd. v. The Queen* the appeal was argued with respect to the application of Section 80A of the *Excise Tax Act*. The onus was clearly upon the respondent in that appeal and that appeal is distinguishable from the present appeal where the onus lies upon the applicant. The principle of law is clear. It was enunciated by Lord Cairns in *Partington v. Attorney General*, L.R. 4 H.L. 100 at page 122, and was adopted by Angers J. in *The King v. Biltrite Tire Company*, [1937] C.L.R. Exchequer Court 1 at page 11, following the statement by Duff J. (later Sir Lyman Duff) in *Versailles Sweets Limited v. The Attorney General of Canada*, [1924] C.L.R. Supreme Court 466 at 468:
>
> The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v. Attorney General.*
>
> "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hard-

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> ship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute".

In respect of the above excerpt counsel for the appellant claimed that it was inappropriate for the majority to refer to the *Universal* and *Versailles* cases and that they misdirected themselves in so doing since neither of these two cases made any mention of "onus". The said counsel did concede, however, that the majority was right in saying that the defendant in the *Universal* case was contesting the applicability of a charging section contained in the *Excise Tax Act,* while, in the present case, the appellant is invoking an exception clause contained in the said Act.

The last reference to onus is contained in the second paragraph at page 3 of the declaration, which paragraph reads thus:

> The evidence adduced on behalf of the applicant tends to show that the Moirs graham sandwich was bar goods or confectionery rather than biscuits or other similar articles Consequently, the Board finds, on the weight of the evidence, that the applicant has failed to discharge its onus and bring itself within the terms of the exemption in conformity with the clear principle of law that a taxpayer seeking to enjoy the benefits of an exemption in a taxing statute must bring himself squarely within the terms of the exempting provision in the statute.

In my opinion, from a study of the four above-mentioned references made to the word "onus", and particularly the last one, it becomes increasingly plain that what the majority had in mind and what they were referring to was the strictness of statutory interpretation and the disadvantage which a taxpayer suffers when he is forced to rely on an exemption compared to when he is free to invoke a taxing provision. Moreover, there is long-standing authority for describing the above-mentioned disadvantage as an onus. See the following observations of Cameron J. and the authorities referred to by him in *The Credit Protectors (Alberta) Limited v. The Minister of National Revenue*[1]:

> Again the appellant urges that the said section should be interpreted in as generous a fashion as possible in order to give the benefit of the exempting section to the appellant. With this contention, I cannot agree. The onus is on the appellant to prove that it clearly comes within the provisions of

[1] [1947] Ex C R. 44 at 47

the exempting section 7(*a*). It seeks the benefit of an exceptional provision in the act and must comply with its context. . . .

In the unreported case of *The Dentists' Supply Co. of New York v. The Deputy Minister of National Revenue*, dated June 16, 1960, Thorson P. stated at page 6:

> There is also the fact that on an appeal to the Tariff Board the onus of proof necessary to establish the appellant's appeal so far as it is based on matters of fact lies on the appellant and it would be within the competence of the Board to dismiss an appeal on the ground that such onus has not been discharged.

See also the recent case of *Consolidated Denison Mines Ltd. et al. v. Deputy Minister of National Revenue*[1]. The case was one in which leave to appeal had been granted under the *Customs Act* from a majority declaration of the Tariff Board that certain imported articles called "rock bolts" are not exempt under Section 32 of the *Excise Tax Act* and are therefore properly subject to sales tax under s. 32 of the Act. The case is distinguishable, in many respects, from the instant one, but in reversing the said declaration the learned judge stated at page 310:

> I have, therefore, come to the conclusion that the appellants have discharged the onus lying on them to establish that there is an error in law in the decision under appeal.

I am accordingly of the opinion that by their repeated reference to onus the majority did not misdirect themselves by misunderstanding the significance of the said word, as claimed by counsel for the appellant. Furthermore, even if the language used by the majority in the paragraphs in question discloses that they had a misconception as to the law, this Court should not assume that such misconception was responsible for the determination reached, unless there was no evidence to support their finding, or that nobody, if properly instructed in law, could have reached such conclusion.

Kellock J., in rendering judgment for the Court in *Canadian Lift Truck Co. Ltd. v. The Minister of National Revenue (Customs & Excise)*[2], which concerned an appeal on the Customs' side wherein leave to appeal on a question of law under the *Customs Act* was still required, stated:

> The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly

[1] [1963] C.T.C. 290.

[2] [1956] 1 D.L.R. (2nd) 497, 498.

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instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.

While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of the law has been responsible for the determination: *Edwards v. Bairstow,* [1955] 3 All E R. 48.

For reasons which appear in my treatment of the next topic I think it cannot be said that the majority acted without any evidence in determining that the Moirs Graham Sandwich was neither a biscuit nor an article similar to a biscuit within the meaning of the Act, nor that a person properly instructed in law could not have reached such a conclusion.

As stated by Kellock J., (*supra*), "The nature and kind of thing is a question of fact."

Dealing first with the evidence concerning the nature of the article in issue, it is important to recall that we are not here concerned with the original Marvens product but with the product which emerged after passing through the manufacturing plant of the appellant, and, in my opinion, it behooved the appellant to have recourse to other and more convincing tests than simply the one which established the presence of 30 per cent, by weight, of chocolate in the Moirs product, since little of some commodities, when mixed with others, sometimes goes a long way in determining the nature of the resulting combination, and I think it can reasonably be said that chocolate is such a commodity—particularly in the absence of any evidence to the contrary.

Although the appellant, as already mentioned, furnished evidence of the percentage of chocolate content, by weight, of the Moirs Graham Sandwich, no evidence was produced as to how the remaining 70 per cent was divided, by weight or otherwise, between the graham wafer and the malt cream respectively. Furthermore, the fact that one article in a combination of articles may exceed the others in weight is, in my opinion, insufficient *per se* to establish that the resulting product is the same, in nature, as the heaviest one.

Cameron J. in *W. T. Hawkins Ltd. v. The Deputy Minister of National Revenue*[1], (Affirmed in the Supreme Court of Canada, May 7, 1959, but not reported.) in considering a product described as "Magic-Pop", consisting of popping corn and a small quantity of salt placed in a solidified block of shortening, stated:

> In my opinion, the appellant was producing an entirely new article—an article which contained within itself all the ingredients necessary for a householder to use in the preparation of popcorn—in effect a "ready-mix" article. The mere fact that it was named "Magic-Pop" did not by itself result in the making of the new product for any such fancy name could be given to any article without changing its nature. Whether it be named "Magic-Pop" or something else, the new product is not mentioned or included in any of the articles specified in Schedule III.
>
> It is submitted, also, that as popping corn is the main ingredient of "Magic-Pop", the article produced by the appellant should be classified as popping corn. There is no general authority in the taxing section or in the schedule for classifying an article according to its main ingredient. I find in the schedule one instance only in which the exemption from tax is based on the main content of the article, namely, "fruit juices which consist of at least 95 per cent. of pure juice of the fruit". If Parliament had intended that articles generally should be classified according to their main ingredient, it would have made provision accordingly.

I consequently consider that there is no justification in law or in fact for saying that the nature of an edible article is to be classified according to the weight of its main ingredient.

I think that, in the determination of the nature—and, *a fortiori,* the similarity—of one or more edible articles, their effect on the senses could well be regarded as one of the factors meriting consideration. No sample of the sandwich biscuit, as delivered by Marvens to the appellant, was filed; but the members, having been invited to taste samples of the Moirs Graham Sandwich, one such sample was filed as Exhibit A-11 and a part of it has been broken open so as to reveal its contents. Judging by the said exhibit, it seems almost self-evident that the appearance, smell and taste of the original biscuit underwent a striking change, and I consider that the appellant has failed to establish that the Marvens product remained a biscuit and that it did not become a chocolate or confectionery bar, containing biscuit and malt cream filling.

Was the article in issue of a kind or class similar to a biscuit?

[1] [1958] Ex. C.R. 152 at 157, 158.

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In my opinion, it is impossible to determine any satisfactory line of demarcation as to the degree of likeness necessary in order to constitute similarity. The question is essentially one of fact concerning which varied opinions may be justifiably expressed.

According to the Shorter Oxford Dictionary, 3rd ed., "similar" is defined as follows:

> Of the same substance or structure throughout; homogenous. Having a marked resemblance or likeness; of a like nature or kind.

In Webster's New International Dictionary it is defined as "having characteristics in common; very much alike."

For reasons which I mentioned, in connection with the nature of the Moirs Graham Sandwich it was a very different article from that which the appellant purchased from Marvens. I think it could be said that the enrobement which it underwent served to successfully disguise the original product and made it almost unrecognizable.

Was it similar to other biscuits?

The dissenting member attached a great deal of importance to "chocolate grahams" or "chocolate mallows" made, packaged and sold on its own account by Marvens and which, he stated, were generally recognized as biscuits. No samples of the aforesaid chocolate mallows were filed but they were described as consisting of a single graham wafer on which marshmallow was superimposed and then the whole was coated with chocolate of a different texture to that of the Moirs sandwich.

Without knowing to what extent marshmallow with chocolate-coating characterized the article, it is impossible to determine whether such product should be regarded as confection that may be classed as a candy or a substitute for candy, or whether it is a biscuit properly so called, as the evidence is insufficient for the purpose. Nothing was said with regard to its shape, and, as the dissenting member declared, the majority of the Board obviously were not impressed by its alleged similarity to a biscuit.

As to whether the dissenting member's view that the Moirs Graham Sandwich is similar to a biscuit, because it contains a baked biscuit that accounts for the larger part of its weight, would constitute some evidence of similarity, I express no opinion. On the other hand, if one of the majority were of the same opinion as that of the dissenting

member, I would not disturb the finding, since I think it would amount to what is commonly called "a jury verdict", with which, I consider, this Court has no jurisdiction to interfere. I consequently find there was some evidence to justify the majority finding that the article in issue was not an article similar to a biscuit.

Counsel for the appellant further argued that, even if it were conceded that the product in question is neither a biscuit nor similar to a biscuit, as it consists of bar goods or confectionery, it would still be exempt, because bar goods and confectionery are in the same category as biscuits and are not mutually exclusive.

"Bar goods" appears by the evidence to be a trade name which is now known to many outside of those in that trade, but, in any event, I found no dictionary definition of it. The word "confectionery" is defined in Webster's Third International Dictionary (Unabridged) as follows:

Confectionery: 1. sweet edibles (as candy, cake, pastry, candied fruits, ice cream). things prepared and sold by a confectioner. 2. the confectioner's art or business. 3. a shop where confectionery is made, sold or served.

The Encyclopaedia Britannica apparently regards "confectionery" as synonymous with "candy", and we find under the title: "CONFECTIONERY MANUFACTURE" in Volume 6, p. 224, a lengthy description in these terms:

Confectionery Manufacture: For centuries man has devoted time and effort to perfecting the skills of confectionery manufacture, the art of properly blending various agricultural products into an attractive, palatable food known as candy

Further on, after a description of various classifications of candy, including marshmallow-coated candies, under the title "Candy Bars" one reads:

Because of their tremendous popularity, candy bars require a separate classification and can be defined as individually wrapped candies usually selling in the U.S for 5 and 10 cents, many of them having catchy names unrelated to the nature of the confection. The three most popular types are (1) plain chocolate with or without nuts: (2) chocolate-coated simple and compound centres such as nut rolls (fudge centre rolled in caramel and nuts, then chocolate-coated), nougat-caramel combination and hard candy-peanut butter combination and (3) nonchocolate-coated (solid nut bars, caramel, toffee, fudges, etc.). The possible combinations for candy bars are practically endless.

Counsel for the parties agreed that the taxation period involved in the present case ran from March 15, 1957 to

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August 10, 1960 and that the significance of the word "confectionery" was the subject-matter of some correspondence which has been exchanged between the parties.

As appears by Exhibit A-1, the treasurer of the appellant wrote to the Deputy Minister of National Revenue in the following terms:

Dear Sir:

On March 15th, 1957, the excise tax on candy, chocolate and confectionery was repealed. In repealing the excise tax, the following wording was deleted from the taxing schedule of the statute:

> Candy, chocolate, chewing gum and confectionery may be classed as candy or a substitute for candy.

We are advised that in deleting the above wording from the statute, it was no longer possible to tax a substitute for candy and therefore it was necessary to cancel Circular No. 46, dated March 1st, 1956.

On the basis of the above we have paid sales tax in error on our Graham Sandwich and propose to deduct the amount so paid from our current payment.

Yours very truly,

(sgd.) C. H. IVEY, Treasurer.

As appears by Exhibit A-2, the Minister's reply was as follows (leaving out non-essentials):

Gentlemen:

This will acknowledge your letter, May 9, 1960 concerning your "Graham Sandwich" product.

It is confirmed that effective March 15, 1957, the *excise tax* applicable to "Candy, chocolate, chewing gum and confectionery that may be classed as candy or a substitue for candy" was repealed.

In the matter of *sales tax,* however, Section 29(1)(*e*) of the Excise Tax Act was amended, effective March 15, 1957, to read as follows:

29 (1)

(*e*) "producer or manufacturer" includes (v) any person who wraps, packages, puts up in boxes or otherwise prepares for sale candy, chocolate, chewing gum or confectionery that may be classed as candy or a substitute for candy, otherwise than in a retail store for the purpose of sale in such store.

Seeing that, in virtue of s. 29(1)(*e*)(*v*), the product of any person who wraps up in boxes or otherwise prepares for sale candy or confectionery that may be classed as a substitute for candy is subject to sales tax, it seems to me that *a fortiori* a manufacturer of candy who purchases articles, such as cherries or biscuits, which are exempt from sales tax and who, apart from preparing them for sale in the manner indicated, immerses one in a clear hard candy mix-

ture and the other in one consisting of chocolate, cannot expect to escape the incidence of sales tax.

I consider that, in addition to Exhibit A-1, other evidence in the record serves to support the view that the Moirs Graham Sandwich is a confectionery that may be classed as candy or a substitute for candy and that it is therefore a taxable article.

In respect of the last remaining issue I will begin by saying that, if I came to the conclusion, as suggested by counsel for the appellant, that the majority, unlike the dissenting member, disqualified themselves by declining or neglecting to deal with the meaning of or making a finding with respect to "other similar articles", I would refer the record back to the Board with a direction that such a finding should be made.

The majority declared:

> By reason of the imprecise wording of the exemption in issue, it is extremely difficult to determine with precision the meaning of the words used; in particular the words "or other similar articles". The intention of the legislature is not made clear since the words used are not precise and unambiguous. Broad dictionary definitions are given for the meaning of the words "pies" and "cakes". A narrower definition is given for "baker". However, it is far from clear that the exemption is to be interpreted with the extended and very general wording, "including biscuits, cookies or other similar articles", modified by the word "bakers".

The dissenting member's statement is as follows:

> As my colleagues have pointed out, it is difficult to interpret the exact meaning of the exemption in Schedule III because the words "or other similar articles" broaden it to an imprecise degree. Nevertheless, when "Bakers' cakes and pies" are extended to include "biscuits" and "cookies", and further extended to include "other similar articles", it is clear that a wide interpretation of this exempting provision was intended by the legislature.

The above indicated difficulty is not uncommon in cases of this kind. As Kerwin J. (as he then was) observed in *Rogers Majestic Corporation Ltd. v. The Corporation of the City of Toronto*[1], which was an appeal on a stated case,

> Whether there is a question of law or the construction of a statute upon which an appeal lies to the Court of Appeal is not always free from difficulty. Probably no satisfactory definition can be framed so as to cover all the circumstances.

I do not think the legislature intended to attribute to "other similar articles" an interpretation so wide as to nega-

[1] [1943] S.C.R. 440 at 446.

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tive the effect of s. 29(1)(*e*)(*v*). The majority, as suggested by counsel for the appellant, did not "wrestle" with the meaning of the above-mentioned words as did the minority. But they did consult dictionary definitions, and, after examining the wording of the exemption and weighing the evidence before them, came to a conclusion contrary to that of the dissenting member.

As has been previously noted, the majority found that

> The evidence adduced on behalf of the applicant tends to show that the Moirs graham sandwich was bar goods or confectionery rather than biscuits or other similar articles.

Consequently, I do not think it can be said with justification that the majority failed to consider or make a finding with respect to meaning and application of the phrase in question.

In my opinion, no pure question of law arises in respect of the phrase "other similar articles", and we are more concerned with the ordinary meaning to be attributed to the word "similar" than with a question of legal interpretation. I think at most this issue gives rise to a mixed question of fact and law and in either event I consider that the majority did not "err as a matter of law" in finding that the Moirs Graham Sandwich was subject to and not exempt from sales tax.

For the foregoing reasons I would dismiss the appeal with costs.

Judgment accordingly.