

**Neither Fish nor Fowl, but Good Yellow Margarine:  
M.F.F. Equities v. The Queen,<sup>1</sup> Statutory Interpretation,  
and the Man of Common Understanding**

The *Excise Tax Act* of Canada,<sup>2</sup> which levies a tax on the sale price of goods, exempts 'Fish and edible products thereof'. Fish oil is sometimes used to make margarine, and can constitute as high a proportion as ninety per cent — probably more — of the oil used as the main component — eighty per cent by weight — in manufacturing this butter substitute.<sup>3</sup>

The manufacturers have accordingly asked the courts whether margarine made of fish oil is 'fish' or 'an edible product of fish', so as to be tax-exempt. The undersigned writer would now invite the same judges to say whether synthetic fish made of vegetables is 'fish' or 'an edible product of fish'.

As the Act now stands, it probably answers both questions by implication. For, since 1966,<sup>4</sup> it explicitly exempts 'Oleomargarine and margarine for consumption *in the Province of Newfoundland*',<sup>5</sup> on the one hand, and, on the other, 'Vegetarian food products manufactured from vegetable and mineral ingredients to simulate meat products':<sup>6</sup> *expressio unius est exclusio alterius*.

<sup>1</sup> [1969] S.C.R. 595, (1969), 5 D.L.R. (3d) 97 (Supreme Court of Canada), affirming [1969] 1 Ex. C.R. 508, [1969] C.T.C. 29, 69 D.T.C. 5039 (Exchequer Court of Canada, *coram* Cattanach J.). The case was heard in the Supreme Court by Cartwright C.J., and Abbott, Ritchie, Hall and Pigeon JJ.; the latter delivered the unanimous opinion of the Court.

<sup>2</sup> R.S.C. 1970, c. E-13, ss. 27(1) and 29(1), read with Schedule III, Part V, No. 7. At the material time the corresponding provisions were R.S.C. 1952, c. 100, ss. 30(1) and 32(1) and Schedule III, as amended by various Acts not material here.

<sup>3</sup> [1969] S.C.R. 595, at pp. 596-7. More detail, including a history of margarine, is given in the careful and thorough reasons of Cattanach, J., esp. [1969] 1 Ex. C.R. 508, at p. 510, agreed fact no. 7, and pp. 512-516. The appellant's particular processes are detailed at pp. 510-12. The proportions used in the particular margarine concerned in the case at bar do not matter, in view of the decision of the Court as to even that margarine with the highest fish-oil content.

<sup>4</sup> A new schedule was substituted in 1966 by 14-15 Eliz. II, S.C. 1966, c. 40, s. 8, for that found in R.S.C. 1952, c. 100, as amended by various Acts.

<sup>5</sup> Now R.S.C. 1970, c. E-13, Schedule III, Part V, No. 20. Emphasis is added. Presumably no other oleomargarine would be exempt.

<sup>6</sup> *Ibid.*, No. 28. Emphasis is added. Presumably simulated fish would not be exempt.

Neither of these provisions, however, appeared in the Act in 1963 and 1964 when M.F.F. Equities paid sales tax under protest in respect of the sale of margarine whose fish oil content varied from 48 to 90 per cent. Their subsequent enactment, it is agreed — nay, insisted by the courts<sup>7</sup> — can in no way affect the meaning of the Act as it stood previously. In disposing of an action to recover sums so paid, the Supreme Court of Canada, affirming the Exchequer Court, answered the first of the two questions posed above. The second does not appear to have occurred to them.

The consumer who looks at, smells, and tastes fish oil margarine would, it is said, not think of it as a 'product of fish', and statutory language must usually, as their Lordships point out, be interpreted according to the "common understanding" of such words. What, then, will the consumer say who looks at, tastes, and smells artificial fish? If fish oil margarine is, as their Lordships hold, not a 'product of fish' because, on its face, it does not appear to be such, must not artificial fish, by parity of reasoning, be considered 'fish' because to all appearances it is indistinguishable from the natural product?

Is the only man of common understanding the one who is left to judge from appearances? What of the man of common understanding who is told the facts and invited to decide?

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<sup>7</sup>This was explicitly held by the Court. See: [1969] S.C.R. 595, at p. 598 *in fine*, and p. 599.

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