

HER MAJESTY THE QUEEN APPELLANT;

1963

AND

*Jun. 4
Oct. 1

SYDNEY LERNER AND BUCK-
LEY'S WHOLESALE TOBACCO } RESPONDENTS.
LIMITED

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC

Criminal law—Lotteries—Mail order product distribution plan—Whether scheme contrary to s. 179(1)(e) of the Criminal Code, 1953-54 (Can.), c. 51.

The respondents conducted a mail order product distribution plan whereby a participant received three cards which he sold to three friends for \$4 each. The participant returned the three cards to the respondents, each card bearing the name and address of one of the friends, together with \$12. The original participant would then receive three cartons of cigarettes of his choice. The three friends in turn would receive three cards each and, after repeating the same procedure of selling their cards, would each receive three cartons of cigarettes.

The respondents were charged under s. 179(1) (e) of the *Criminal Code* with conducting a scheme by which any person, upon payment of any sum of money, could become entitled under the scheme to receive a larger sum of money or amount of valuable security than the sum paid by reason of the fact that other persons had paid any sum of money under the scheme. The respondents were convicted, but their convictions were quashed by the Court of Queen's Bench. The Crown appealed to this Court.

Held: The appeal of the Crown should be dismissed.

A participant in the scheme did not receive anything which falls within the term "valuable security" within the meaning of s. 179(1)(e) of the Code.

Even if it could be held, contrary to what was decided by the Court of Queen's Bench, that what the participant obtained under the scheme could be regarded as constituting valuable security, the scheme would not be in contravention of s. 179(1)(e) of the Code. The essence of the scheme was that the respondents were prepared to compensate, in the form of goods, at their own expenses, for the performance of services, such as advertising and distribution of their products, which they obviously considered to be of value to them. The scheme did not, therefore, fall under s. 179(1)(e) of the Code.

APPEAL by the Crown from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec¹, quashing the respondents' convictions on a charge of conducting a lottery. Appeal dismissed.

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Ritchie JJ.

¹[1963] Que. Q.B. 91, 39 C.R. 347.

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R. Larivée, Q.C., for the appellant.

F. Kaufman, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec¹, which unanimously maintained the present respondents' appeals against their convictions on charges laid against them under s. 179(1)(e) of the *Criminal Code* which provides as follows:

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

* * *

(e) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, upon payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation, to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;

The scheme conducted by the respondents in respect of which the charges were laid is described in agreed admissions of fact as follows:

At material times the above company (i.e. Buckley's Wholesale Tobacco Ltd.) has conducted a mail order product distribution plan that operates as follows:

a) A number of people each receive a written explanation of the company's operation and an offer to participate in that operation, together with three (3) identical beige coloured cards.

b) Each of the above persons may then explain the company's operation to friends, and sell each of the three cards to a friend for a price of \$4.00.

c) Upon returning the three cards (now completed, with each one bearing the name and address of a new customer) along with the \$12.00 collected (\$4.00 for each of the 3 cards) to the company, the company sends to the original customer three (3) cartons of cigarettes (of the brand chosen by him), and it sends to each of his friends who has paid \$4.00, i.e. each new customer, a set of 3 cards.

d) Each of the above mentioned participants can then sell his three cards at a price of \$4.00 each, and upon sending the completed cards

¹[1963] Que. Q.B. 91, 39 C.R. 347.

back to the company, receives in turn three cartons of cigarettes (of the brand he chooses).

e) Thus the original participants receive three cartons of cigarettes in return for having sold the 3 cards sent to them, and each subsequent participant receives 3 cartons of cigarettes in return for having purchased a set of cards for \$4.00 and having sold those cards to three of his friends.

f) Participants who succeed in selling 2 cards, but have difficulty with the third, can return their 2 completed cards (together with the \$8.00 collected) to the company, and receive in return 2 instead of 3 cartons of cigarettes. If they then succeed in selling the third card, they receive a third carton of cigarettes.

g) Participants who have bought a set of cards (for \$4.00) but who seem to be unsuccessful in selling them are given the opportunity of returning their uncompleted cards to the company, and of choosing a premium from a number of items offered to them by the company, thereby eliminating any chance of loss to them.

h) Participants may substitute various other products for cigarettes.

i) Participants who sell their cards promptly may receive special bonuses.

The instruction sheet sent by the respondents to their customers read as follows:

Dear Customer:—

Enclosed you will find 3 cards for which you have paid \$4.00.

Please follow these instructions:

- (1) Sell these 3 cards to your customer friends at \$4.00 each.
- (2) Mail us the 3 cards with the \$12.00.

We will then mail you the 3 cartons of cigarettes (of your choice), plus 9 cards for distribution to your 3 customer friends. They, in turn, will sell these 3 cards to their friends at \$4.00 each and will then receive their 3 cartons of cigarettes.

Yours very truly,
BUCKLEY'S WHOLESALE
TOBACCO LIMITED.

P.S. Do not send cash through the mail. Send money order only, this being your receipt.

In the reasons for the judgment from which this appeal is brought, it was held that a participant in this scheme does not receive anything which falls within the term "valuable security" within the meaning of s. 179(1)(e) and, in consequence, as a participant does not receive a sum of money or valuable security, the scheme did not contravene that paragraph. I am in agreement with this conclusion.

Furthermore, I do not think that the scheme would contravene that paragraph even if that which a participant obtains under it could be regarded as constituting valuable security. His entitlement to receive property under the scheme does not arise merely by his payment of money and

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the property to which he becomes entitled is not received by him "by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation".

This is not a scheme such as that which was considered by this Court in *Dream Home Contests (Edmonton) Limited v. R.*¹, under which a number of people purchased tickets and the winner received a prize substantially more valuable than the amount which he had paid for the ticket, as a result of the moneys paid for the tickets paid for by the other contestants. In the present case the typical participant does not become entitled to obtain his cartons of cigarettes or other products upon payment of the \$4.00 fee. It is also necessary for him to persuade three other persons to enter into the arrangement which he himself has made. He thereby renders a service to the respondent company which, in turn, derives a benefit by reason of the wider advertising and distribution of the products which it has for sale and for which service it is prepared to compensate the participant in the form of goods of a value exceeding the \$4.00 fee. While the scheme in question here is different from that which was considered by this Court in *R. v. The Procter and Gamble Company of Canada, Ltd.*², and while the charge in that case was laid under different paragraphs of s. 179(1), the reasoning in that case is, I think, also applicable to the present one. The essence of the matter is that the respondent company is prepared to compensate, in the form of goods, at its own expense, for the performance of services which it obviously considers to be of value to itself. It is not conducting a scheme whereby a prize can be won by a contestant which is provided out of the funds obtained from other contestants under the scheme.

For these reasons, in my opinion, the appeal should be dismissed.

Appeal dismissed.

Attorney for the appellant: R. Larivée, Montreal.

Attorney for the respondents: J. Cohen, Montreal.

¹[1960] S.C.R. 414, 33 C.R. 47.

²[1960] S.C.R. 908, 34 C.R. 144, 34 W.W.R. 82, 128 C.C.C. 340.