
ERNEST STANLEY DALLMANAPPELLANT;

1942

AND

* May 26, 27.
* June 10.

HIS MAJESTY THE KINGRESPONDENT.

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

*Criminal law—Constitutional law—War Measures Act, 1914—Foreign
Exchange Control Board—Orders in Council establishing Board with
certain powers, prohibiting importation of property into Canada with-
out licence and providing for fine or imprisonment on summary con-*

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Bond
J., *ad hoc*.

(1) *In re Overend, Gurney, & Co.; Ex parte Swan*,
(1868) L.R. 6 Eq. 344.

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viction or indictment—Whether ultra vires or inoperative—Status of complainant—Accused not entitled to exercise option as to mode of trial—Conspiracy—Whether illegal importation an indictable offence within s. 573 Cr. C.—War Measures Act, 1914, R.S.C., 1927, c. 206, sections 2, 3 (1) (2) 4—Interpretation Act, R.S.C., 1927, c. 1.

The appellant was convicted of having imported Dominion of Canada bonds from the United States of America into Canada without having obtained from the Foreign Exchange Control Board a licence so to do and of having conspired with others so to import. The conviction was affirmed by the appellate court, St. Germain J. dissenting.—The Governor-in-Council, by ss. 1 of s. 3 of the *War Measures Act*, 1914, was authorized to make orders and regulations for the security, etc., of Canada, which were declared by ss. 2 to have the force of law. By s. 4, the Governor-in-Council may prescribe penalties, in case of violation of these orders and regulations, which may be imposed upon summary conviction or upon indictment. In September, 1939, an Order in Council (P.C. 2716) established the Foreign Exchange Control Board with certain powers. Subs. 1 of par. 22 prohibited importation of goods, etc., into Canada except under a licence granted by the Board and subs. 1 of par. 40 prescribed that any person guilty of an offence under the order would be liable on summary conviction to fine or imprisonment, or both. By an Order in Council (P.C. 3799) issued in November, 1939, the words "or on indictment" were added after the words "summary conviction".

Held that the appeal should be dismissed and the conviction of the appellant affirmed.

The contention of the appellant, that the whole of the Order in Council (P.C. 2716) was *ultra vires* because it gave power to the Board to pass regulations that only the Governor-in-Council was authorized to promulgate under the provisions of the *War Measures Act*, must fail. The Board had not passed any regulations affecting the appellant with respect to the charges against him; what the appellant did was in contravention of ss. 1 of par. 22 of the Order, which had the same force as if it had been enacted by Parliament itself.

The provisions of the Orders in Council permitting prosecutions to be either on summary conviction or on indictment are not inoperative. Section 4 of the Act permits the Governor-in-Council to prosecute by one or the other method of procedure: no objection was found with paragraph 40 as it originally stood and nothing in the Act prohibits the Governor-in-Council to act as he did by the amending order in council.

There is nothing in the order in council requiring a prosecution to be commenced by any particular official or individual, or that the latter required a special authorization from the Board. In any event, evidence disclosed that the complainant in this case had authority in fact. Moreover, the contention that an accused is the only one entitled to exercise the option as to the mode of trial cannot prevail.

Section 573 of the Criminal Code provides that "every one is guilty of an indictable offence * * * who * * * conspires with any person to commit any indictable offence." The contention of the appellant that, because par. 40 of the order states that every person guilty of an offence shall be liable "on summary conviction or on indict-

ment" the offence of importing is not an indictable offence, is unsound. The words "indictable offence" in s. 573 Cr. C. merely mean an offence, as to which conspiracy is charged, which may be prosecuted by indictment. That requirement is met by the terms of par. 40, even in cases where proceedings had been commenced under the summary conviction provisions of the Code.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming (St. Germain J. dissenting) the conviction of the appellant for having imported bonds into Canada without having obtained from the Foreign Exchange Control Board a licence so to do and for having conspired with others so to import in contravention of section 573 of the Criminal Code.

The questions of law before this Court on this appeal, upon which the dissent in the court below was based, are sufficiently set out in the reasons for judgment now reported.

The appeal to this Court was dismissed.

Henry Winfield K.C., Lucien Gendron K.C. and S. D. Rudenko for the appellant.

G. Fauteux K.C. for the Attorney-General for Quebec.

R. Genest K.C. and P. Brais K.C. for the Attorney-General for Canada.

The judgment of the Court was delivered by

KERWIN J.—The appellant was convicted of having imported Dominion of Canada bonds from the United States of America to Canada without having obtained from the Foreign Exchange Control Board a licence so to do, and of having conspired with others so to import. An appeal from that conviction was dismissed by the Court of King's Bench, province of Quebec, appeal side, with Mr. Justice St. Germain dissenting. The appellant now appeals on the questions of law upon which that dissent was based.

The first four grounds of appeal refer to the charge of importing as to which the *War Measures Act*, R.S.C., 1927, chapter 206, and Order in Council P.C. 2716 as amended by Order in Council P.C. 3799 require consideration. By section 2 of the Act, the issue of a procla-

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mation is to be conclusive evidence that a state of war exists. Such a proclamation was issued and, therefore, by subsection 1 of section 3, the Governor in Council might do and authorize such acts and things, and make from time to time such orders and regulations as he might deem necessary or advisable (*inter alia*) for the security, defence, peace, order and welfare of Canada. By subsection 2 of section 3, all orders made under the section are to have the force of law, and by section 4:—

4. The Governor in Council may prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and may also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment.

Order in Council P.C. 2716 was accordingly issued on September 15th, 1939. Provision was made therein for the establishment of the Foreign Exchange Control Board, which was given certain powers, and by subsection 1 of paragraph 22:—

22. (1) No person shall import any goods, currency, securities or other property into Canada except under and in accordance with the terms of a licence granted by the Board; provided that this subsection shall not apply to any property which has been shipped to Canada from the Country of export prior to the date on which this Order comes into force.

By subsection 1 of paragraph 39, every person is guilty of an offence who

(d) violates or attempts to violate any other provision of this Order or any regulation of the Board.

And by subsection 1 of paragraph 40:—

Every person guilty of an offence under this Order shall be liable on summary conviction to a fine not exceeding Two Thousand Dollars or to imprisonment for not more than one year, or to both fine and imprisonment.

By a subsequent Order in Council (P.C. 3799, dated November 29th, 1939), this subsection was amended by adding after the words "summary conviction" the words "or on indictment".

The first ground of appeal is thus stated in the appellant's factum:—

The substantive offence of which appellant has been convicted, was illegally created by an enactment of the Governor-in-Council delegating without right to the Foreign Exchange Control Board the power of con-

trolling "Foreign Exchange", which power was already delegated to the Governor-in-Council by an Act of Parliament, namely: *The War Measures Act*, Chapter 206, Revised Statutes of Canada, 1927.

Under this heading, it was argued that the whole of Order in Council P.C. 2716 was *ultra vires* because the Foreign Exchange Control Board might, it was suggested, pass regulations that only the Governor in Council was authorized to promulgate under the provisions of the Act. That argument is founded upon the maxim *delegata potestas non potest delegari*. However, it appears that the Board has not passed any regulations affecting the appellant with respect to the charges against him. What he did was in contravention of subsection 1 of paragraph 22 of the Order in Council. It has already been pointed out that by subsection 2 of section 3 of the Act, all orders made under that section have the force of law and, therefore, the paragraphs of the Order in Council establishing the Board and requiring that a licence to import be obtained from the Board have the same force as if they had been enacted by Parliament itself. The power of Parliament, and hence of the Governor in Council, to do this is beyond question. In that connection reference need only be made to the decision of this Court in *In re Gray* (1), and to the decisions of the Privy Council therein referred to in *The Queen v. Burah* (2), *Hodge v. The Queen* (3), and *Power v. Appollo Candle Company* (4). The other paragraphs of the Order in Council need not be considered because, even if any question could be raised as to them, they do not imperil the validity of the Order in Council at large and do not affect the particular offence charged and the particular proceedings taken in this case (*Rex v. Nat Bell Liquors Ltd.* (5) and the maxim relied on can have no application.

The second ground of appeal is thus put by the appellant:—

The said Order in Council, dated the 15th September, 1939, as amended by that of the 29th November, 1939, seeing that it did not prescribe in what manner and by what courts the penalty enacted for the commission of the said substantive offence was to be imposed—that is to say, whether these penalties were to be imposed after proceeding by way of summary conviction or whether by way of indictment—is inoperative as regards the prosecution for said offence.

(1) (1918) 57 Can. S.C.R. 150.

(3) (1883) 9 A.C. 117, at 132.

(2) (1878) 3 A.C. 889, at 904.

(4) (1885) 10 A.C. 282, at 289.

(5) [1922] 2 A.C. 128, at 137.

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The argument is that the Governor in Council must prescribe how alleged violators of the orders or regulations shall be prosecuted. That is, he may state that such violators shall be prosecuted by summary conviction or he may state that they shall be prosecuted upon indictment, but he may not give to someone else an option which, by the Act, was conferred only upon himself. No objection is found with paragraph 40 as it originally stood and we fail to see anything in the Act to prohibit the Governor in Council acting as he did, by the amending Order in Council. Section 4 of the Act permits the Governor in Council to prescribe one or more methods of procedure. The decision in *The King v. Singer* (1) can have no application. All that was there decided was that no penalty or other mode of punishment being expressly provided for infraction of an Order in Council, that particular Order in Council, on its construction, did not fall within the term "Act of the Parliament of Canada" as used in section 164 of the Criminal Code.

The third ground of appeal is as follows:—

The complainant had no authority to make the choice of procedure to be followed in connection with the complaint lodged against appellant, and, moreover, could not optate to proceed by way of indictment rather than by way of summary conviction.

It was suggested that the complainant, Constable Desaulniers, required a special authorization from the Foreign Exchange Control Board. There is nothing in the Orders in Council under review requiring a prosecution to be commenced by any particular official or individual and in any event evidence was adduced to indicate that the constable had authority in fact.

However, the gist of this ground of appeal is that the appellant is the only one entitled to exercise the option as to the mode of trial. It would be strange if that were so as it would mean that a person against whom it was decided to prefer charges would first have to be found in order to ascertain his wishes in that regard; and we are clearly of opinion that this contention cannot prevail.

(1) [1941] S.C.R. 111.

In view of the conclusions already reached, it is necessary to deal only with the appellant's fifth ground of appeal which relates to the conviction for conspiracy. That conviction is based upon section 573 of the Criminal Code:—

Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

It is said that the importation of the bonds into Canada is not an indictable offence within the meaning of this section because paragraph 40 of P.C. 2716 as amended does not provide that every person guilty of an offence under the order shall be liable on indictment to fine, etc. If paragraph 40 did read in that way, there could be no complaint in view of the provisions of section 28 of the *Interpretation Act* (R.S.C., 1927, chapter 1):—

28. Every Act shall be read and construed as if any offence for which the offender may be

(a) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;

(b) punishable on summary conviction, were described or referred to as an offence; and
all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.

2. Every commission, proclamation, warrant or other document relating to criminal procedure, in which offences which are indictable offences, or offences, as the case may be, are described or referred to by any names whatsoever, shall be read and construed as if such offences were therein described and referred to as indictable offences, or offences, as the case may be.

It is contended that because paragraph 40 states that every person guilty of an offence shall be liable "on summary conviction or on indictment", the offence of importation is not an indictable offence. In our view that contention is unsound since all that is meant by "indictable offence" in section 573 of the Criminal Code is that the offence as to which a conspiracy is charged may be prosecuted by indictment. That requirement is met by the terms of paragraph 40 even in cases where proceedings had been commenced under the summary conviction provisions of the Code.

The appeal should be dismissed.

Appeal dismissed.

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