

BETWEEN:

HIS MAJESTY THE KING, on the
Information of the Acting Attorney
General of Canada,

PLAINTIFF;

1950
Feb. 17

AND

ALD (CANADA) LIMITED,DEFENDANT.

1951
Feb. 28

Revenue—Seizure—Forfeiture—The Foreign Exchange Control Act, S. of C. 1946, c. 53, ss. 2(1) (p), 15(a), 26, 56(1), 60—Foreign Exchange Control Regulations, s. 43B—Order in Council P.C. 5215, dated December 19, 1946—Order in Council P.C. 4678, dated November 12, 1947,—Civil Code of Quebec, Art. 1241—Forfeiture of goods under The Foreign Exchange Control Act an independent consequence of breach of the Act or Regulations—Acquittal on a charge of importing goods without a permit not a bar to proceedings for forfeiture of goods.

On December 5, 1947, the defendant imported goods from the United States, the importation of which was prohibited by section 43B of the Foreign Exchange Control Regulations as amended by Order in Council P.C. 4678, dated November 12, 1947, unless they had been shipped or were in transit to Canada on November 17, 1947, or the Minister of Finance had directed the grant of a permit for their importation. The goods were not in such transit and there was no direction by the Minister of Finance for the grant of a permit for their importation, but the defendant did obtain Foreign Exchange Control Board permits from a customs officer. Notwithstanding the issue of these permits the goods were seized by the Foreign Exchange Control Board. Subsequently the defendant was tried on a charge of having imported the goods without a permit and acquitted by a judgment of the Court of King's Bench of Quebec. Notwithstanding such acquittal proceedings were taken for a declaration of forfeiture of the goods.

Held: That the forfeiture authorized by section 60(1) of The Foreign Exchange Control Act is not conditional or dependent on the imposition of any other penalty under the Act but is a separate and independent consequence of breach of the Act or Regulations regardless of whether any other penalty has been imposed or not and whether any prosecution in relation thereto has been commenced or not.

2. That the fact that the defendant was acquitted in another court on a charge of importing the goods without a permit from the Foreign Exchange Control Board is not a bar to proceedings in this Court for forfeiture of the goods and cannot free them from liability thereto if their importation was contrary to the Act or Regulations. Whether they were so imported is for this Court to determine.
3. That since the goods were not in transit to Canada on November 17, 1947, it was essential to their lawful importation that the Minister of Finance should have directed the grant of a permit for their importation, that it was within the sole discretion of the Minister of Finance to give such a direction and that permits granted by a customs officer without such direction were invalid and that since there had been no such direction by the Minister the goods were unlawfully imported and are liable to forfeiture.

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ACTION for a declaration of forfeiture under section 60 of the Foreign Exchange Control Act.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Montreal.

John Ahern K.C. for plaintiff.

A. Watt for defendant.

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

The PRESIDENT now (February 28, 1951) delivered the following judgment:

These proceedings are brought for a declaration that certain goods imported by the defendant be forfeited to His Majesty.

The facts are not in dispute. On December 5, 1947, the defendant, which has a place of business in Montreal in Quebec, imported from the United States of America at the customs port of Lacolle in Quebec 80 Westinghouse Laundromat washing machines of the declared value of \$12,688 and 65 coinometers of the declared value of \$1,388. These goods had been delivered to a warehouse in New York City for transportation to the defendant in Montreal by truck and left there on December 3, 1947. They reached the customs port of Lacolle on December 4, 1947, and were cleared through customs, subject to amendment, the following day. On the arrival of the goods at Lacolle the defendant by attorney applied in the usual way to a customs and excise officer at Lacolle for Foreign Exchange Control Board permits to import the goods and permits on what is called Form E were issued by Mr. J. E. Boudreau, a customs and excise officer at Lacolle, purporting to act for the Foreign Exchange Control Board. Notwithstanding the issue of these permits the Foreign Exchange Control Board seized 70 of the washing machines and all of the coinometers on the ground that their importation had been contrary to section 26 of The Foreign Exchange Control Act, Statutes of Canada, 1946, chapter 53, and section 43B of the Foreign Exchange Control Regulations, as

amended by Order in Council P.C. 4678, dated November 12, 1947, Statutory Orders and Regulations, 1947—885, *Canada Gazette*, Vol. 81, Part II, page 2190.

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Section 26 of the Act provides, subject to subsection three thereof, which is not applicable here, that no person shall import any goods into Canada except in accordance with a permit. By section 2(1) (*p*) “permit” means “permission given by or on behalf of the Board to do any act or thing for which a permit is required under this Act”. Section 15(*a*) provides:

15. Subject to the provisions of this Act and the regulations and instructions of the Board,

(*a*) every Customs Officer shall act as agent of the Board to grant permits for exports and imports of property;

Section 35 provides for regulations by the Governor in Council for certain purposes and the Foreign Exchange Control Regulations were established by Order in Council P.C. 5215, dated December 19, 1946. By Order in Council P.C. 4678, dated November 12, 1947, passed in order to ensure that Canada's foreign exchange resources should not be dissipated for purposes disadvantageous to Canada as a whole, the Regulations were amended in several respects, one of which was by the addition of section 43B which provided:

43B. No permit shall be granted for the import of goods listed in Appendix VII unless the goods have been shipped and are in transit to Canada on November 17, 1947; provided that nothing contained in this section shall prohibit the issue of a permit in cases which in the opinion of the Minister of Finance involve unusual circumstances or might, if a permit were not granted, involve particular hardship, if the Minister in his sole discretion directs that a permit be granted.

Appendix VII sets out a list of goods for which a permit for their importation should not be granted otherwise than by a direction of the Minister of Finance, including goods under the following tariff item numbers:

ex 415 *b*—Washing Machines, domestic, with or without motive power incorporated therein.

ex 362 *c*— . . . locks and lockers, coin, disc, or token operated.

The evidence establishes that the imported goods fall within the above classes of goods and that there was no direction by the Minister of Finance for the grant of a permit for their importation.

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After the importation of the goods an information and complaint was laid against the defendant that it had imported them without a permit contrary to the Foreign Exchange Control Act and Regulations. The information and complaint was laid on July 13, 1948, by Isaie Savard, a customs officer in the district of Montreal, before René Théberge, a judge of the Court of Sessions of the Peace for the District of Montreal. It was in the following terms:

I am credibly informed and I verily believe that Ald Canada Limited, a corporation doing business in the City and District of Montreal, did:

On or about the 5th of December 1947, import without permit from the United States into Canada at Lacolle, in the Province of Quebec, 80 washing machines and 65 coin cases of the value of \$11,263, the importation of which was prohibited, thereby committing an offence against the provisions of the Foreign Exchange Control Act and regulations made thereunder.

On the trial it was proved by the Crown that the goods had been imported from the United States by the defendant but that Mr. J. G. Boudreau, a customs officer at Lacolle, had granted the defendant permits for their importation, that he was an officer of the Foreign Exchange Control Board and authorized to sign for it, but that he had not had any direction from the Minister of Finance to grant the permits. On this evidence the Court of Sessions of the Peace dismissed the charge. On an appeal to the Superior Court of Quebec, Mr. Justice Lazure heard additional evidence, namely, that the goods were not in transit to Canada on November 17, 1947, and that the permits granted by Mr. Boudreau were unlawful and found that the defendant had committed a breach of the Foreign Exchange Control Act and imposed a fine of \$200. From this conviction the defendant appealed to the Court of King's Bench of Quebec which, by a majority decision of 3 to 2, allowed the appeal, reversed the judgment of Mr. Justice Lazure and restored that of the Court of Sessions of the Peace dismissing the charge against the defendant.

Notwithstanding this judgment the plaintiff brought these proceedings for a declaration of forfeiture of the goods, relying on Section 60 of The Foreign Exchange Control Act which provides:

60.(1) Any property of any kind which any person exports or attempts to export from Canada or imports or attempts to import into Canada contrary to this Act or the regulations, or which any person buys or sells

or in any way deals with or attempts to buy or sell or in any way deal with contrary to this Act or the regulations, or the possession, ownership or control of which any person fails to declare as required by this Act, may, in addition to any other penalty which may have been imposed on any such person or to which any person may be subject with relation to such unlawful act or omission, and whether any prosecution in relation thereto has been commenced or not, be seized and detained by any Inspector or Officer and shall be liable to forfeiture at the instance of the Attorney General of Canada upon proceedings in the Exchequer Court of Canada or in any Superior Court, subject, however, to a right of compensation on the part of any innocent person interested in such property at the time it became liable to forfeiture or who acquired an interest therein subsequent to such time as *bona fide* transferee thereof for value without notice, which right may be enforced in the same manner as any other right against His Majesty.

(2) In any proceedings for forfeiture instituted under subsection one of this section the burdens of proof, which under subsection one of section fifty-six of this Act rest upon the person charged, shall rest upon the defendant.

Section 56 (1) of the Act reads as follows:

56. (1) Where any person is charged with an offence under this Act, if it is established that the said person did any act or omission for which a permit is required under this Act, it shall not be necessary to establish that the person charged did not possess a permit or had not been exempted from the applicable provisions of this Act, and the burden of proof that he possessed the necessary permit or had been exempted from the applicable provisions of the Act shall be upon the person charged.

If the defendant could have shown that the goods in question had been shipped and were in transit to Canada on November 17, 1947, or that the Minister of Finance had directed that a permit be granted for their importation it would have had a defence to these proceedings. But it cannot establish any such defence, and since the goods are otherwise within the prohibitions of section 43B of the amended Regulations they are liable to forfeiture under section 60 of the Act unless some reason to the contrary can be shown.

There is no allegation in the statement of defence that the imported goods had been shipped and were in transit to Canada on November 17, 1947, but even if there had been such an allegation the onus of proof thereof would have been on the defendant and it could not have discharged it. On the contrary, although the exporter's invoices for the goods were dated November 15, 1947, the fact is that they were not "in transit" to Canada until December 3, 1947, when they left the truck company's

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warehouse in New York, or only a short time prior thereto, when they were sent from the exporter's plant at Corona, New York, to the truck company's warehouse for transportation to the defendant in Montreal. And it might also be noted in this connection that Mr. Boudreau stated, on cross-examination, that he had made no enquiry whether the goods were in transit on or before November 17, 1947, before issuing his permits. It was not his "trouble" to know whether they were in such transit or not.

Nor is there any contention that the goods were of a class that was not covered by the Order in Council.

The only submissions for the defendant were on points of law. It was urged, in the first place, that section 60 (1) of the Act authorized a forfeiture of property only "in addition to any other penalty which may have been imposed" and that since no penalty had been imposed on the defendant there could not be any forfeiture of its property. I am unable to place such a restricted construction on the enactment. In my opinion, the forfeiture authorized by the section is not conditional or dependent on the imposition of any other penalty under the Act but is a separate and independent consequence of breach of the Act or Regulations regardless of whether any other penalty has been imposed or not and whether any prosecution in relation thereto has been commenced or not.

The main objection to the plaintiff's claim was that all the issues between the parties were raised in the proceedings before the Court of Sessions of the Peace and the subsequent appeals and were finally determined in favor of the defendant by the judgment of the Court of King's Bench of Quebec and so became *res judicata* or "chose jugée" within the meaning of Article 1241 of the Civil Code of Quebec which provides:

1241. L'autorité de la chose jugée est une présomption *juris et de jure*; elle n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement, et lorsque la demande est fondée sur la même cause, est entre les mêmes parties, agissant dans les mêmes qualités, et pour la même chose que dans l'instance jugée.

There are several reasons for not giving effect to this objection. The identities required by the article and inherent in the concept of *res judicata* are not all present in this case. The information and complaint against the

defendant in the Court of Sessions of the Peace was not the same as the basis for forfeiture of the goods in the present proceedings. In the former the charge was that of importing the goods without a permit, whereas in the latter the basis of the claim for forfeiture is that the goods were imported without *the necessary* permit, that is to say, a permit the granting of which had been directed by the Minister of Finance. It is, I think, impossible to read the reasons for judgment of the majority of the judges of the Quebec Court of King's Bench as reported in *Ald Canada Ltd. v. Savard* (1) without concluding that they were mainly concerned with the charge as laid, namely, importing the goods without a permit, and considered that, since there had been a permit, the charge as laid could not stand and that on such charge it was not permissible to look behind the permits that had been issued or question their validity. It is not for this Court to express any opinion on this judgment but it is permissible to say that if the information and complaint had been that of importing the goods without a permit granted pursuant to the direction of the Minister of Finance as required by section 43B of the amended Regulations the judgment would not necessarily have been the same. The "cause" in the two proceedings is, in my view, not the same. Nor were they brought for the same thing. In the former proceedings the Court of Sessions of the Peace had no jurisdiction to declare a forfeiture of the goods. It was concerned only with whether the defendant had committed the offence with which it was charged and was confined to the imposition of a penalty if it was found guilty. It could do nothing about the goods. On the other hand, this Court is concerned only with whether the goods are liable to forfeiture. Since it is thus clear that two of the identities required to make a judgment "chose jugée" within the meaning of Article 1241 of the Civil Code or *res judicata* as that expression is understood in the Common Law provinces are not present here, it is not necessary to consider whether the two proceedings were between the same parties acting in the same qualities.

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(1) (1949) B.R. 607.

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Furthermore, the words of section 60 (1) of the Act are explicitly against the defendant's contention.

Thus the fact that the defendant was acquitted in another court on a charge of importing the goods without a permit from the Foreign Exchange Board is not a bar to proceedings in this Court for forfeiture of the goods and cannot free them from liability thereto if their importation was contrary to the Act or Regulations. Whether they were so imported is for this Court to determine. The weight of judicial authority affords support for this view: vide *La Foncière Compagnie d'Assurance de France v. Perras et al* (1); *McLean v. Pettigrew* (2); *Bureau v. The King* (3); *The King v. Pacific Bedding Company Limited* (4); *The King v. Davis* (Ex. C. February 25, 1950, unreported).

Counsel for the defendant also challenged the jurisdiction of this Court to look behind the permits granted by Mr. Boudreau or question their validity. It was argued that someone had to determine whether the goods were covered by the Order in Council and whether they had been shipped and were in transit on November 17, 1947, and decide accordingly whether a permit should be granted, that Mr. Boudreau, a customs and excise officer at the port of entry, was, under section 15 of the Act, the proper agent of the Foreign Exchange Control Board for that purpose, that if the permits granted by him were invalid they were revocable only by the Board, but that until such revocation they must be considered valid, that the administration of the Act and Regulations was a matter for the Board through its officers, and not for the Court, that the Court could not review the reasons that moved Mr. Boudreau to grant the permits, that he had evidence, namely, the exporter's invoices, from which he might have concluded that the goods were in transit on November 17, 1947, and that he might have decided that the goods were not on the prohibited list. This argument is very similar to that which prevailed with the majority of the Court of King's Bench of Quebec. But whatever force such an argument may have had in respect of the information and complaint that was before that court, I am unable to accept it in

(1) (1943) S.C.R. 165.
 (2) (1945) S.C.R. 62.

(3) (1948) Ex. C.R. 257;
 (1949) S.C.R. 367.
 (4) (1950) Ex. C.R. 456.

these proceedings. Here, as I have pointed out, the issue is not simply whether the defendant imported the goods without a permit but rather whether the importation was within the prohibitions of section 43B of the amended Regulations. In my judgment, the answer to this question is plainly in the affirmative. The goods were of a class whose importation was prohibited by the section unless one of the conditions exempting them from such prohibition was present and no such condition was present. The goods were not in transit on November 17, 1947, and Mr. Boudreau did not, as a matter of fact, even purport to decide that they were. Moreover, it was not for Mr. Boudreau to decide whether a permit should be granted. It was within the sole discretion of the Minister of Finance to direct that a permit should be granted and there was no such direction. Consequently, the permits granted by Mr. Boudreau were issued without authority and are invalid. The statutory conditions for a lawful importation of the goods were thus wholly absent. It could not have been intended that goods the importation of which was prohibited except with a permit directed by the Minister of Finance should be lawfully imported through the grant of a permit by a customs officer without any such direction. The language of section 43B of the amended Regulations is incapable of any construction leading to such a result. The express prohibitions of the section could not be defeated by the unauthorized act of a customs officer. Since the goods were not in transit to Canada on November 17, 1947, it was essential to their lawful importation that the Minister of Finance should have directed the grant of a permit for their importation and there was no such direction. That being so, the goods were unlawfully imported and are liable to forfeiture, and the Court must so declare. Under the law as it stood under section 43B of the amended Regulations the Court has no discretion to do otherwise.

There will, therefore, be judgment declaring that the goods described in the Information are forfeited to His Majesty and that His Majesty is entitled to costs.

Judgment accordingly.

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