

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

R. McKay, K.C., for the defendant.

Edward Bayly, K.C., for the Police Magistrate.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that it was contended that the order in council upon which the prosecution was based was illegal, because no power to make it was conferred upon the Governor in Council by the War Measures Act, 1914, upon which only it was sought to be supported. The offence with which the defendant was charged was one based upon the order in council, and one which admittedly could be created under the powers conferred upon the Governor in Council by sec. 6 of the Act; but it was contended that the provisions of sec. 10 restricted the powers conferred by sec. 6 to such an extent that the order in council, in so far as it provided for the manner of prosecution for offences created by it, was *ultra vires*.

The learned Chief Justice quoted the provisions of the order in council, Consolidated Orders, respecting Censorship, May 21, 1918, Canada Gazette, vol. 51, June 8, 1918, pp. 4296, 4297: Order II., sec. 2 (1), prohibiting all persons from receiving or having in their possession any book or document containing objectionable matter; Order III., sec. 1 (1), making it an offence to contravene any of the provisions of these Orders; sec. 3 (1), providing a penalty; and sec. 3 (2), providing that such penalty may be recovered or enforced either by indictment or by summary proceedings and conviction under the provisions of Part XV. of the Criminal Code. (These Consolidated Orders are republished in the Canada Gazette, November 16, 1918, vol. 52, p. 1683 et seq., for the purpose of correcting the former publication as to the date, which should be May 22, 1918.)

The learned Chief Justice was unable to consider that enough was said in sec. 10 of the Act to take away the whole effect of the wide and plain words of sec. 6—"and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe."

To give effect to the defendant's contention would be to make the order in council nugatory as to all penalties and make all that have been imposed illegal because no lawful means of imposing them has been prescribed under sec. 10.

The decision on the question of *ultra vires* should thus be against the defendant.

The Chief Justice was, besides, not fully convinced that prohibition would lie in such a case as this.

If the Court had no power, that ended the matter; if the Court had power, and a discretion, no sufficient reason had been shewn why the case should not be left to take the ordinary course of a criminal case under the Criminal Code.

*Appeal dismissed with costs.*