Beukenkamp (*Claimant*) *v.* **Secretary of State** (*Respondent*)

Present: Thurlow J.—Ottawa, December 2, 16, 1969

Alien Enemy Property—Jurisdiction—Treaty of Peace (Germany) Order, 1920, s. 41(2)—Company shares of neutral vested in Custodian—Right of owner's heirs to continue proceedings without Custodian's consent—Survivor of cause of action—Whether heirs entitled without appointment of administrator—Residence of Custodian.

In 1934 *B* commenced proceedings in this court under s. 41(2) of the Treaty of Peace (Germany) Order, 1920, claiming a declaration of his right as a national of Holland to certain Canadian company shares which had become vested in the Custodian of Alien Enemy Property. The Custodian consented to the proceedings, as required by s. 41(2). *B* died in 1953 and his four children applied to be joined as plaintiffs and to continue the proceedings.

Held, *B*'s children were entitled to be joined as plaintiffs and to carry on the proceedings and for that purpose to amend the statement of claim to allege the interest to which they claim to have become entitled on *B*'s death.

1. The Treaty of Peace (Germany) Order 1920, did not take away the property rights of persons other than German nationals whose property was confiscated. Section 41(2) did not create a new cause of action but only a procedure for determining an existing cause of action with respect to a property right. That cause of action passed on the claimant's death to those thereupon entitled. The Custodian's consent to the proceedings formed no part of the cause of action, and once given extended to the claimant's successors on his death. *Secretary of State of Canada v. Alien Property Custodian of the U.S.* [1931] S.C.R. 170, considered.

2. *B*'s four children as his heirs by the law of his domicile, Holland (whose laws do not require the appointment of an administrator), were entitled to enforce their rights as *B*'s successors in this court, which has jurisdiction in all parts of Canada, although they had not obtained administration of his estate from a court of probate. While the laws of the common law provinces may call for the appointment of an administrator in such a case, the law of Quebec permits heirs to enforce their rights as successors against a resident of Quebec without the intervention of an administrator. The Custodian as a federal official can be regarded as resident in every part of Canada. *Crosby v. Prescott* [1923] S.C.R. 446; *Vanquelin v. Bouard* (1863) 15 C.B.N.S. 341, 143 E.R. 817, referred to.

MOTION.

Pierre Genest, Q.C. for applicants.

D. H. Aylen and *R. W. Law* for respondent.

THURLOW J.: This proceeding was commenced on October 6, 1934, by the filing of a statement of claim claiming a declaration of the right of the claimant to 145 shares of the Canadian Pacific Railway Company, allegedly purchased by him prior to the outbreak of the Great War, and accretions thereto which had become vested in the defendant as Custodian of Alien Enemy Property. By the statement of claim the claimant alleged that he had never been an enemy within the meaning of the Treaty of Peace (Germany) Order, 1920, and that from his birth he had been a subject or national of

Holland. The written consent of the Custodian to the proceeding, required by section 41(2) of the Treaty of Peace (Germany) Order, 1920, was filed the same day. The statement of claim was amended in 1937 and later in that year a defence and a joinder of issue were filed. By his defence the Custodian, besides denying the claimant's assertions, pleaded that the shares were

> legally and properly vested in (him) pursuant to a general vesting order of the Superior Court of the Province of Quebec, dated the 23rd day of April, 1919, and made pursuant to the provisions of the Consolidated Orders respecting trading with the enemy and confirmed by the Treaty of Peace (Germany) Order, 1920, and Amendments.

Adriaan Beukenkamp, the claimant, died in 1953 but notwithstanding the extraordinary delay, both before and since his death, in bringing the matter to a conclusion it seems sufficiently clear from the material on file that the claim was never abandoned. Application is now made for an order joining the claimant's four children as plaintiffs and authorizing them to carry on the proceedings.

The application was made on notice to the Custodian and was resisted by him on two main grounds, the second of which was put forward on two separate submissions. The first ground was that while Rules 225 to 228 of the Rules of this court provide for the carrying on of proceedings after they have abated by the death of a sole plaintiff these rules have no application where the cause of action sought to be enforced in the proceeding does not survive and that in this case the cause of action did not survive because, as I understand the submission, the right of action is purely statutory and the consent of the Custodian to the proceeding by the particular claimant is an essential fact of the cause of action itself. It was said that the claimant's property rights had been swept away by the war legislation and that what he was left with was nothing but a remedy and that only if he could get the Custodian's consent to the proceeding. Counsel went on to submit that the consent given to Adriaan Beukenkamp in 1934, and the cause of action of which it was a part, terminated at his death and that nothing short of a fresh consent, which the applicants do not have, could give them the right to commence or to carry on proceedings against the Custodian.

In support of his submission that the claimant's rights had been taken away and that he had been left with nothing but a limited remedy counsel relied on *Secretary of State of Canada and Custodian v. Alien Property Custodian of the United States*[1] where Lamont J. speaking for the majority of the Supreme Court after citing section 33 of the 1916 Consolidated Orders relating to the effect of vesting orders said at page 180:

> This section envisages the probability of vesting orders being made covering property belonging to a person not in fact an enemy although appearing to the

[1] [1931] S.C.R. 170.

court making the order to be so, and provides that such an order shall be valid and the property vested in the Canadian Custodian, notwithstanding that it was not in fact enemy property at the time of the vesting.

Then section 36 reads:—

> 36(1). The Custodian shall, subject to all other provisions of these orders and regulations, hold any money paid to and any property vested in him under authority of any of these orders and regulations until the termination of the present war, and shall thereafter deal with the same as the Governor General in Council may by Order in Council direct.
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> . . .

In view of these provisions the intention, in my opinion, was that the title of all property covered by the vesting orders should remain in the Canadian Custodian until after the close of the war when the rights of non-enemy owners would be provided for and justice done by an Order in Council. That Order in Council was passed and is known as the Treaty of Peace (Germany) Order, 1920. Section 33 of that Order is as follows:

> 33. All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or heretofore belonging to enemies, and in the possession or control of the Custodian at the date of this Order, are hereby vested in and subject to the control of the Custodian.
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> (2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy, such property, right or interest shall be vested in and subject to the control of the Custodian, who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

and the material part of section 34 reads:—

> 34. All vesting orders . . . and all other orders, directions, decisions and instructions of any Court in Canada or any Department of the Government of Canada made or given or purporting to be made or given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to the property, rights and interests of enemies, . . . are hereby validated and confirmed and shall be considered as final and binding upon all persons, subject to the provisions of Sections 33 and 41.

By this section the vesting orders of October 14 and October 17, 1919, which covered all the securities in question (except the debenture stock of the City of Montreal) were validated and confirmed and made binding upon all persons, subject to section 41.

Section 41(2) and (3) reads as follows:—

> (2) In case of dispute or question whether any property, right or interest belonged on the tenth day of January, 1920, or theretofore to an enemy, the Custodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration as to the ownership thereof, notwithstanding that the property, right or interest has been vested in the Custodian by an order heretofore made, or that the Custodian has disposed or agreed to dispose thereof. The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.
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> (3) If the Exchequer Court declares that the property, right or interest did not belong to an enemy as in the last preceding subsection mentioned, the Custodian shall relinquish the same, or, if the Custodian has before such declaration disposed or agreed to dispose of the property, right or interest, he shall relinquish the proceeds of such disposition.

In my opinion so far from sweeping away the rights of a person in the position in which the claimant alleged himself to be the effect of the Treaty

of Peace (Germany) Order, 1920, was to continue and preserve the property rights of persons other than those German nationals whose property was confiscated. As I view it, the cause of action of such a claimant in a proceeding of the kind contemplated by section 41(2) consisted of the facts which, when established, would entitle him to have the shares relinquished, that is to say, as applied to this case, the fact of the claimant having bought the shares before the commencement of the war and having continued to hold them until they became vested in the Custodian, coupled with the fact of his never having been an enemy within the meaning of the Treaty of Peace (Germany) Order, 1920. The consent of the Custodian to the proceeding in this Court while essential to the proceeding in my view formed no part of the cause of action itself.

Referring to the provisions for the proceeding Lamont J. in the same case said at page 181:

> The position taken by the Canadian authorities in enacting section 41 appears to me to be this: They say: "The war is now over, there are certain properties vested in our Custodian by orders of the court, which, it is claimed, were not enemy properties in Canada either when the vesting orders were made or when the Treaty of Peace (Germany) Order, 1920, came into force, we will, therefore, leave it to the Exchequer Court to say whether or not such is the case. If it is, our Custodian will relinquish all his claims to these properties." Leaving the determination of these disputes to the Exchequer Court necessarily implies that the court would determine the rights of the parties in cases in which vesting orders were made as of the date of the vesting and in cases in which no vesting order was made, as of the 14th of April 1920.
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> As section 41 was enacted for the purpose of doing full justice to any person, not an enemy, whose property had been vested in the appellant, the intention, in my opinion, was that the rights of the contending parties were to be determined as though the vesting orders had not been made and, in light of those considerations which should, and undoubtedly would, have guided the superior courts in making the vesting orders had all the facts relevant to the ownership of the securities, which are now before us, been before those courts. There would be no object in referring the question to the Exchequer Court if that court was bound to maintain the vesting orders.

and at page 184:

> The United States Custodian having vested in him all the interest of the enemy owner in the securities in question and having in his possession the certificates representing these securities duly indorsed, was entitled, under both Canadian and United States law, to have himself or his nominee registered as the owner thereof, provided there was no assertion by Canada of her paramount legislative power over the companies which had issued the certificates. Canada, in my opinion, did assert her paramount power when the shares were vested in the appellant by the courts under the Consolidated Orders but, as one would expect from a civilized country, she relinquishes her claim to all vested property which was not enemy property at the time of the vesting. As all the securities in question had ceased to be enemy property when vested in the appellant, the Exchequer Court, in my opinion, was right in awarding them to the United States Custodian.

Duff, J. speaking for himself and Newcombe, J. in the same case, when referring to a submission that the property of persons other than enemies

was confiscated by section 34 of the Treaty of Peace Order in cases where such property had previously been vested by an order of the court in the Custodian, said at page 196:

> To all this, the answer, I think, rests upon broad considerations. The Treaty of Peace Order was passed pursuant to the *Treaties of Peace Act, 1919*, by which it was provided that the Governor in Council might make such Orders in Council as might appear to him to be necessary to carry out the Treaty and for giving effect to any of the provisions of the Treaty. That is the purpose of the Treaty of Peace Order with which we are concerned. By the Treaty, it was provided that all property rights and interests belonging to German nationals at the date of the coming into force of the Treaty might be detained by the allied and associated powers within their territory. And it was also provided that, as between Germany and German nationals and the governments of allied and associated powers, all vesting orders and other administrative acts by the several powers dealing with the property of German nationals should be ratified and confirmed. Order 34 is obviously intended to give effect in Canada to this ratifying provision. Indeed, the Governor in Council under the statute had no authority to go beyond the Treaty. The Orders in Council authorized were Orders in Council framed for the purpose of carrying into effect the provisions of the Treaty. The scope of ss. 33 and 34 must be limited by the scope of that purpose.

I find nothing in this or in the other cases cited which persuades me to think that the right in respect of which a declaration is sought in the proceeding contemplated by section 41 was anything but the original property right which the claimant had and which was not included in what was to be confiscated (that is to say, the property of German nationals only) and I should have thought that the substantive right to the return of property in the hands of the Custodian but not confiscated would have continued to exist whether a procedure for the determination of the right had been prescribed or not. Moreover, I see no reason to think that such a substantive right does not survive on the death of the person who has it or that it does not pass to those who thereupon become entitled to his property. Here, as I see it, what section 41 gives is not a new right or cause of action but a procedure for the determination of an existing right or cause of action. The procedure thus prescribed is of course purely statutory and cannot be taken without the Custodian's consent but the cause of action, as I see it, is simply the facts showing the right and the consent of the Custodian forms no part of those facts.

Apart from this, however, the document by which the Custodian's consent to the present proceeding was given, as a matter of interpretation, does not appear to me to contemplate that the proceeding would have to be completed in the three months therein mentioned and it seems to me to follow that the consent was one to commence proceedings within three months and thereafter to continue them to their conclusion. That the plaintiff, a natural person, might not live that long was not inconceivable and as the proceeding —whether it be regarded as entirely new and special or as a modified form of ordinary procedure to determine a right—was one for a declaration in respect of a right to property, which is something capable of transmission on death to others, it seems to me that there is no persuasive reason to limit either the proceeding itself or the Custodian's consent thereto to proceedings to be carried on solely by the person named while he continued to live. Since the cause of action to be enforced in such a proceeding survives upon

the death of the claimant the proceeding contemplated by the section should I think be regarded as one that is capable of being continued after the plaintiff's death by the persons entitled to stand in his stead and the Custodian's consent, unless expressly limited by its terms, should I think be interpreted as extending to such a proceeding. As the Custodian's consent in the present case contains no wording expressly limiting the consent to a proceeding by Adriaan Beukenkamp during his life time which was not to be continued by those who might stand in his stead after his death, I do not think the consent terminated when he died or that the continuation, by the persons who became entitled upon his death to his rights, of the proceeding commenced with the appropriate consent in his life time, can be said to be carried on without the required consent. The respondent's first objection therefore fails.

The second objection was that it has not been demonstrated that the present applicants are proper parties to carry on the proceeding even if the cause of action did survive and if the proceeding can be continued. As already indicated two separate points were raised in support of this objection.

First it was said that the evidence shows, as it does, that in 1952 when Adriaan Beukenkamp had become incapable of managing his affairs, the provisional curator of his property appointed under the law of Holland, purported to assign the rights asserted by the claimant in these proceedings to one D. J. Sholtz and that if that transaction took place and was effective to transfer to the assignee the right to carry on the proceeding it would appear that the assignee—or his successor or assignee—rather than the applicants would be the proper party to carry on the action.

If the facts and the effect of the purported assignment were clear it would no doubt be appropriate to deal with this question at this stage but, as I see it, neither the facts nor the effect are clear. I do not think therefore that this is a proper occasion to decide the point. It appears to me to be a matter which can conveniently be raised as a defence and this I think is the more convenient way to raise it since its validity as an objection turns on matters of fact which are not yet before the court. It turns, as I see it, for example, on such matters as whether the claimant's rights were assignable at all having regard to the Treaty of Peace Order, whether, if so, a provisional curator under the law of Holland had authority to make such an assignment of property of his ward and whether the purported assignment was, in any event, to Sholtz as a trustee for the deceased. It is, of course, not inconceivable that when the facts are known it will appear that the purported assignment has had a very considerable and serious effect on the extent of the rights which passed to the applicants on the claimant's death. On the other hand, without deciding on any objection that may be made to the purported assignment, it appears to me to be fairly arguable that for one or more of several reasons the purported assignment was ineffective to divest Adriaan Beukenkamp of the rights which he sought to have determined in this action. If so, as seems possible, I do not think that the alleged assignment can, on the material presently before the court, avail to defeat any right the applicants may have to carry on the proceedings for the purpose

of establishing the rights, if any, to which they succeeded on the death of their father and which may now be vested in them. When the matter comes to trial they will, of course, have to establish such rights or suffer the consequences but the chance that they may fail to establish that they have rights does not appear to me to be a satisfactory or sufficient reason to deny them the opportunity to establish them if they can.

The other point taken was that even if the purported assignment was inoperative to divest the claimant of his rights a personal representative appointed by a court of probate and not the applicants would be the proper party to carry on the proceedings unless it could be shown that the certificates were in the possession of the claimant in Holland at the time of his death and had subsequently been reduced into the possession of the applicants in Holland as his heirs. In support of this proposition counsel cited *Whyte v. Rose*[2], *Morrice v. Smart*[3], *Fidelity Trust Co. v. Fenwick*[4], *Tansil v. King*[5] and *Crosby v. Prescott*[6].

It appears from these cases that, in general, only an executor or administrator clothed with authority from the probate court of the particular province can sue in the courts of a common law province to recover personal property of the deceased situate in that province. However, where a personal representative, qualified in a foreign jurisdiction, has reduced property of the deceased into his possession in that foreign jurisdiction he can invoke the process of the courts of a common law province in his own name to enforce the rights so acquired without obtaining a grant of probate or administration in the particular province. *Crosby v. Prescott.* The same seems to apply as well to an heir who has inherited directly in a foreign jurisdiction where the system of the civil law prevails and reduced the property into possession in that jurisdiction. *Vanquelin v. Bouard*[7].

In the Quebec system, in case of an intestate succession, there is no intervention of a personal representative; the heir becomes entitled immediately on death of the deceased and can bring action in his own name in the courts of that province to recover the property of the deceased situate in that province, including a debt owing to the deceased by a debtor resident in the province. The same can be said, as well, of a person who has become entitled as heir by the law of the foreign domicile of the deceased, to property of the deceased situate in Quebec.

In this court, whose jurisdiction extends to matters arising in all parts of Canada, both systems prevail, each applying according to the province wherein the matter is considered to arise. For example, I do not think there is any rule which prevents the heir of a person who was domiciled in Quebec

[2] (1842) 3 Q.B. 493, 114 E.R. 596.
[3] (1882) 26 Sol. Jo. 752.
[4] (1921) 51 O.L.R. 23.
[5] [1947] O.W.N. 807.
[6] [1923] S.C.R. 446.
[7] (1863) 15 C.B.N.S. 341, 143 E.R. 817.

at the time of his death from bringing a petition of right in this court in his own name to enforce some right to which he succeeded on the death of the deceased. On the other hand if the domicile of the deceased was in some other province at the time of his death I should have thought it would be necessary to have a personal representative bring such a proceeding in this court, at all events if it concerned rights to personalty. In neither case as I see it is the place of residence of the heir or personal representative of any importance. What I think is of importance in determining the system that is applicable is the domicile of the deceased at the time of his death and the effect which the legal system prevailing there produces with respect to the title to his property, coupled with the circumstance that in this court, which has jurisdiction throughout Canada, the Crown in the right of Canada, as the respondent in such a proceeding, can be regarded as resident in every part of Canada. To my mind it would not be reasonable to hold that the Crown in the right of Canada for this purpose has residence only at Ottawa in the Province of Ontario.

The Custodian of Alien Enemy Property being a federal official exercising his public functions throughout Canada must, I think, in this court, like the Crown itself, be regarded as resident in every part of Canada, rather than solely in the particular province where his office accommodation happens to be established, and I can see no persuasive reason why the system prevailing in one of the common law provinces would necessarily apply in a situation such as the present. The property involved in this proceeding, that is to say, the shares of the Canadian Pacific Railway Company and the accretions thereto, can, no doubt, be regarded as having a situs in Canada and it may be possible to pinpoint that situs more particularly as being in a particular province of Canada. That, however, as I see it, is not material. The relief sought in this proceeding, which the court can award, is not the property itself in the shares and the accretions thereto, but a declaration of the right thereto. That declaration is sought against the official who has the property under his control and in whom it has become vested. He is an official who in this court is to be regarded as present in all parts of Canada and he is therefore amenable to the jurisdiction of the court in all parts of Canada. The rights asserted by the applicants accrue to them under the law of the foreign domicile of the deceased which does not interpose a personal representative. In this court their title to the rights of their deceased father, as the same has been made to appear in the material filed in support of the application, is at least equal to that of a foreign administrator who, if he brought suit in a common law province, could not succeed without a grant of administration from the courts of that province but who, if he brought it in Quebec, could succeed without any such grant. As heirs of the deceased entitled to stand in their father's stead by the law of his domicile, the applicants would, as I see it, be entitled to sue in the courts of Quebec to enforce rights to which they thus succeeded against a defendant resident there and for the same reason it appears to me that they are entitled to bring or continue in this court proceedings to enforce rights which devolved upon

them by the law of their father's domicile upon his death against a federal official who would be amenable to the jurisdiction of this court in any part of Canada.

I reach this conclusion, in the case of heirs entitled directly under the law of a foreign jurisdiction, without regard to the question of the situs in any particular province of Canada of the property involved in these proceedings but I should add that if the situs of the property involved is a consideration to be taken into account it would seem to me to be a circumstance of some importance that the head office of the Canadian Pacific Railway Company is in the province of Quebec and that the Custodian asserts his right to hold the shares under a vesting order made by the Superior Court of that province. On the other hand I do not think the situs of the share certificates at the time of the death of the deceased is of importance as since the making of the vesting order they do not seem to me to represent either the shares of an enforceable right to them but rather to be simply a part of the evidence by which the right of the claimant to the shares might be established.

It follows that the application succeeds but I think I should add before parting with the matter that nothing in these reasons should be taken as finally deciding that the applicants are the heirs of the claimant or that his rights descending upon his death to them under the law of Holland. The material presently before the court is in my view, sufficient to show the status and title of the applicants for the purposes of this motion but when the proceeding comes to trial these will be matters which it will be for the applicants to establish to the satisfaction of the court insofar as they have not been admitted.

The applicants will therefore be joined as plaintiffs and they will have to leave to carry on the proceedings and for that purpose to amend the statement of claim so as to allege the interest to which they claim to have become entitled on the death of their father to the property which is the subject matter of the declaration sought in this action. The costs of the motion will be costs in the cause.