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In the Privy Council.

INSTITUTE OF ADVANCED
LEGAL STUDIES

No. 2 of 1940.

ON APPEAL FROM THE SUPREME COURT
OF ONTARIO.

IN THE MATTER of a REFERENCE as to the validity of Parts I, II and
III of THE CANADA TEMPERANCE ACT, R.S.C. 1927, CHAPTER 196
AND IN THE MATTER of the CONSTITUTIONAL QUESTIONS ACT, R.S.O. 1937,
CHAPTER 130
AND IN THE MATTER of the CONSOLIDATED RULES OF PRACTICE.

BETWEEN

THE ATTORNEY GENERAL OF ONTARIO AND THE
MODERATION LEAGUE OF ONTARIO - *Appellants*

AND

THE CANADIAN TEMPERANCE FEDERATION, THE
ONTARIO TEMPERANCE FEDERATION, THE
TEMPERANCE FEDERATIONS OF THE COUNTIES
OF PERTH, PEEL, HURON AND MANITOULIN
ISLAND, THE UNITED CHURCH OF CANADA, THE
SOCIAL SERVICE COUNCIL OF THE CHURCH OF
ENGLAND AND THE ATTORNEY GENERAL OF
CANADA - *Respondents.*

CASE FOR THE CANADIAN TEMPERANCE FEDERATION,
THE ONTARIO TEMPERANCE FEDERATION AND THE
TEMPERANCE FEDERATIONS OF THE COUNTIES OF
PERTH, PEEL, HURON AND MANITOULIN ISLAND.

1. This is an appeal from an opinion of the Supreme Court of Ontario
(Riddell, Fisher, McTague, Gillanders, J.J.A., Henderson J.A. dissenting)
dated the 26th September, 1939 whereby, in answer to a question submitted
to the Court by the Lieutenant-Governor of Ontario under the Constitutional

RECORD.
p. 14.
p. 6, l. 16.

RESPONDENTS' CASE
TEM. FEDERATIONS

RECORD. Questions Act, being chapter 130 of the Revised Statutes of Ontario, 1937, the Court held that Parts I, II and III of the Canada Temperance Act, being chapter 196 of the Revised Statutes of Canada, 1927, are within the legislative competence of the Parliament of Canada.

Appendix. 2. The Canada Temperance Act, passed originally in 1878 (Statutes of Canada, 41 Vict. c. 16) was frequently amended and is now re-enacted as amended in the Revised Statutes of Canada, 1927 (c. 196). Parts IV and V, dealing respectively with the import, export and manufacture of intoxicating liquors and provisions in aid of provincial legislation, have been added, but Parts I, II and III are substantially the same as the 1878 Act. Part I provides for a vote on the petition of electors in any county or city and the bringing into force of Part II of the Act by order in council and for the revocation of such an order in council. Part II prohibits, with certain exceptions, the offering or keeping for sale, the sale or barter of intoxicating liquor in any county or city in which Part II is in force, or the sending or bringing to or into any such county or city of any intoxicating liquor or the delivery therein of any intoxicating liquor so sent or brought. Part II also includes one penal section (s. 127) relating to false medical certificates. Part III imposes penalties for violations of Part II, and provides for the proper administration of the Act. 10

Record 3. The order in council submitting the question to the Supreme Court of Ontario recites a representation by the Appellant, the Attorney-General of Ontario, that the Act had been brought into operation in 17 municipalities only, but in fact it had been brought into force in 69 areas at various dates between the 2nd January, 1879 and the 8th December, 1917. In all but 4 of the areas the operation of Part II of the Act has been suspended but in Marquette (Manitoba) Lisgar (Manitoba) Manitoulin (Ontario) and Thetford Mines (Quebec) Part II has remained continuously in force from the respective dates of the orders in council bringing it into force. 20

Record. 4. By order of the Supreme Court dated the 2nd June, 1939 notice of the hearing of argument on the question submitted was given to the Respondents and other parties who might be interested, with liberty to them and to the Appellants to appear on the hearing and to file memoranda of law including references to such documentary material as they might respectively consider relevant to the question. Pursuant to such leave eight memoranda were filed. The Appellant and the Moderation League of Ontario challenged the validity of Parts I, II and III of the Act. The other Respondents, the Social Service Board of the Baptist Association of Ontario and Quebec, and the Governing Council of the Salvation Army, Canada East, supported the legislation. 30

Appendix. 5. The question was argued by the Appellants and the Respondents on the 26th, 27th, 28th and 29th June, 1939, and the Court gave its opinion on the 26th September, 1939 attaching thereto a copy of the opinion of each judge. 40

Record. 6. In his opinion Riddell, J.A., held that the Court could not reverse the decision in *Russell* against *The Queen* (1882) 7 Appeal Cases 829 (where

the Judicial Committee had held the Canada Temperance Act to be valid), and there was no evidence of change of circumstances which (it was suggested, although the learned judge did not accede to the proposition) might modify the law as laid down. RECORD.

7. Fisher J.A. in his reasons for judgment also held that the validity of the Act had been finally determined in *Russell* against *The Queen* (1882) 7 Appeal Cases 829. After referring to contentions that the Act was invalid the learned judge pointed out that expressions of opinion by different members of the Judicial Committee of the Privy Council indicating that *Russell's Case* was not properly decided were *obiter dicta* and that no member would go so far as to state that it was wrongly decided. If the decision was based on then existing conditions and on a great emergency because of those conditions the question now arising is what are the present conditions, and the Court had not been furnished with any evidence establishing improved conditions or the entire passing of the crisis. The only evidence of conditions in other provinces was of provincial legislation dealing with intoxicating liquors and the amendments of the Canada Temperance Act, and if the Court has any right to express an opinion any changed conditions in other provinces should be before the Court. The Privy Council might reverse *Russell's Case* but the Court has no right, in his opinion, to enter into the moral and social value of the Act and its effect or the changed conditions and circumstances, that being a question for Parliament. The principle of *stare decisis* was another formidable ground precluding the Court from expressing an opinion on *Russell's Case*.
8. Henderson J.A. dissented and reviewed earlier legislation and public records which in his opinion indicate the conditions and circumstances in which the Act was passed in 1878. After setting out *verbatim* the statement in the memorandum of the Appellants, the Moderation League of Ontario, on the Parliamentary position from 1873 until the passing of the Act, and referring to other matter in the memorandum as showing the view which in 1878 existed as to the propriety of the legislation, the learned judge cited *Russell's Case*, where the legislation was upheld as being for the peace order and good government of Canada, and noted that counsel for the appellant there admitted that if the Act applied to the whole of Canada without local option it would be within the power of the Dominion Parliament. After referring to and discussing cases where *Russell's Case* had been considered, the learned judge said that the question was one of fact on the determination of which must rest the jurisdiction of parliament. Temperance, which he described as the antithesis of teetotalism and of prohibition, had, in his view, made great strides since 1878 and although the evil created by prohibitory laws and the consequent illicit trafficking was yet by no means completely cured it did not amount to an emergency such as that described by Lord Haldane in *Snider's Case* [1925] Appeal Cases, 396. In every Province except Prince Edward Island (where there is a prohibitory law) the sale of liquor has been made a government monopoly and the traffic is regulated and controlled by government commissions or boards. The learned judge accordingly thought

p. 16, l. 31-
p. 18, l. 22.

p. 16, l. 43-
p. 17, l. 22.
p. 17, ll. 28-31.

p. 17, ll. 31-
45.

p. 17, l. 45-
p. 18, l. 2.

p. 18, ll. 3-4.
p. 18, ll. 5-
12.

p. 18, ll. 14-
20.

p. 18, l. 23-
p. 29, l. 42.

p. 19, l. 1-
p. 23, l. 13.

Appendix.
p. 23, l. 18-
p. 26, l. 34.

Record.
p. 22, ll. 15-21.

p. 22, ll. 22-25.
p. 22, ll. 30-33.

p. 23 l. 1-p. 28,
l. 19.

p. 28, ll. 37-42.
p. 28, l. 43-
p. 29, l. 10.

p. 29, ll. 11-
18.

p. 29, ll. 19-
21.

RECORD. that the emergency, if any existed, has wholly passed away and that the only foundation of *Russell's Case* no longer exists. Nor in his view could the Act be supported as criminal law because the Act is not in pith and substance a criminal statute.

p. 29, ll. 22-38.

p. 29, l. 43-
p. 31, l. 35.
p. 30, ll. 4-8.

p. 30, ll. 9-23.

p. 30, ll. 24-29.

p. 30, l. 30-

p. 31, l. 22.

p. 31, l. 36.

9. McTague J.A. doubted the right of the Attorney-General of Ontario to refer to the Court a Dominion statute for consideration of its validity. Apart from *Russell's Case* he would have no difficulty in holding Parts I, II and III of the Act to be *ultra vires* of the Dominion Parliament, but *Russell's Case* held that the Act was *intra vires* and subsequent amendments do not take the Act out of that decision, which has never been over-ruled. In his opinion the reasoning of Henderson J.A. was open to the Privy Council but not to the Supreme Court of Ontario because of the doctrine of *stare decisis*. 10

10. Gillanders J.A. agreed with the majority of the Court, without giving separate reasons.

Appendix.

11. These Respondents respectfully call attention to the following facts :

p. 49, ll. 24-46.

p. 46, l. 1-
p. 48, l. 2.

p. 50, ll. 18-34.

(a) Since 1878 prosecutions under the Act and cases interpreting its terms have proceeded in the Courts on the basis of its validity.

(b) The validity of the Act has been repeatedly affirmed in the Supreme Court of Canada and in the Privy Council. 20

(c) The statement of the Judicial Committee in the judgment delivered by Lord Haldane in *Snider's Case*, to the effect that *Russell's Case* can only be supported on the ground that the Act was dealing with a national emergency, was not necessary to the decision of *Snider's Case*, has no foundation in the language of the judgment in *Russell's Case* and, in these respondents' respectful submission, is inconsistent with the decisions that the Act did not fall within any of the classes of subjects assigned exclusively to the provincial legislatures and so fall within the introductory words of section 91. These decisions (*Russell's Case*; *Attorney General for Ontario against Attorney General for the Dominion* [1896] Appeal Cases, 348, and *Attorney General for Canada against Attorney General for Alberta* [1916] 1 Appeal Cases 588 at page 595) are reinforced by the judgment in *Attorney General of Manitoba against Manitoba Licence Holders' Association* [1902] Appeal Cases 73, which held that provincial local option legislation was justified under section 92 by head 16 (matters of a merely local or private nature) rather than by head 13 (property and civil rights). 30

p. 53, ll. 5-19.

(d) The validity of Parts IV and V of the Act has not been questioned and their validity has been affirmed in the Supreme Court. It is respectfully submitted that sections 155, 157, 158, 162 and 175 show that Parts I, II and III are necessary to the operation of Parts IV and V, and so are themselves valid as necessarily ancillary to Parts IV and V. 40

12. These respondents respectfully submit that the Act is also within the powers of the Parliament of Canada as being legislation in relation to criminal law. The Act is designed to promote public order, safety and morals by subjecting those who contravene the Act to punishment, and is analogous to legislation restricting the sale of narcotic drugs, explosive substances, firearms and obscene matter. The desirability of such legislation in the case of intoxicating liquor is a question of policy of which the Parliament of Canada is the sole judge.

13. These respondents also respectfully submit that, on whatever grounds it rested, the validity of the Act as passed in 1878 is beyond doubt, and that the Act cannot be repealed either automatically by change of circumstances or by the decision of a court of law declaring the Act to have become invalid by reason of a change of circumstances, but that the Act remains in force until repealed by the Parliament of Canada.

14. These respondents, therefore, respectfully submit that the judgment of the Supreme Court of Ontario was right and should be affirmed for the following amongst other

REASONS

1. Because the Canada Temperance Act is not legislation in relation to any matter coming within the classes of subjects enumerated in section 92 of the British North America Act.
2. Because the Canada Temperance Act is a law for the peace order and good government of Canada in relation to matters not coming within the classes of subjects by the British North America Act assigned exclusively to the legislatures of the provinces.
3. Because in pith and substance the Canada Temperance Act is criminal law.
4. Because the validity of Parts I, II and III of the Canada Temperance Act was established in 1882 by the judgment in *Russell* against *The Queen* and there are no sound reasons for overruling that judgment.
5. Because the materials before the Supreme Court of Ontario do not justify any finding of a material change in circumstances between the passing of the Canada Temperance Act in 1878 and the present time.
6. Because the Act validly enacted by the Parliament of Canada remains in full force and effect until repealed by that legislature.
7. Because of the other reasons set out in the case of the Attorney General of Canada.
8. Because of the other reasons given by the judges comprising the majority in the Supreme Court of Ontario.

Which is

FRANK GAHAN.

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Act, R.S.C. 1927, Chapter 196.

AND IN THE MATTER of the Constitutional
Questions Act, R.S.O. 1937, Chapter 130,

AND IN THE MATTER of the Consolidated Rules of
Practice.

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ATTORNEY GENERAL OF CANADA

Respondents.

CASE FOR THE TEMPERANCE
FEDERATIONS.

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