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INSTITUTE OF ADVANCED  
LEGAL STUDIES

No. 2 of 1940.

In the Privy Council

44889

ON APPEAL FROM THE COURT OF APPEAL  
FOR ONTARIO.

IN THE MATTER of a reference as to the validity of Parts I, II and III of  
the Canada Temperance Act, Revised Statutes of Canada, 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 FOR ONTARIO AND THE  
MODERATION LEAGUE OF ONTARIO .. ..

*Appellants,*

AND

THE CANADA TEMPERANCE FEDERATION; THE  
ONTARIO TEMPERANCE FEDERATION; HURON  
COUNTY TEMPERANCE FEDERATION; MANI-  
TOULIN TEMPERANCE FEDERATION; PEEL  
TEMPERANCE FEDERATION; PERTH TEMPER-  
ANCE FEDERATION; THE UNITED CHURCH OF  
CANADA; THE COUNCIL FOR SOCIAL SERVICE  
OF THE CHURCH OF ENGLAND IN CANADA;  
AND THE ATTORNEY-GENERAL OF CANADA ..

*Respondents.*

CASE OF THE APPELLANT,  
THE ATTORNEY-GENERAL FOR ONTARIO.

1. This is an appeal from the judgment of the Court of Appeal for Ontario (Riddell, Fisher, Henderson, Gillanders, McTague, J.J.A.) dated the 26th day of September, 1939, on a reference by the Lieutenant-Governor for Ontario under the Constitutional Questions Act, Revised Statutes of Ontario, 1937, Chapter 130. The subject of the reference and of this appeal is the power of the Parliament of Canada to enact Parts I, II and III of the Canada Temperance Act, Revised Statutes of Canada, 1927, Chapter 196.

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p. 6, l. 16.

2. Part I of the Act consists of a group of sections, namely, sections 5 to 117 inclusive, providing for proceedings for bringing Part II of the Act into force. These proceedings are commenced by petition to the Governor in Council and a form of petition is set out in Form A in the Schedule to the Act. The petition requests that a vote of the electors of the particular county or city sought to be affected by the petition may be taken for or against its adoption. The petition is to be deposited in a public place where it may be examined by the public. It is to be addressed to the Secretary of State of Canada and it must be shown that it has been signed by at least one-quarter of all the electors of the county or city in question; that it has been publicly deposited for examination; and that notice of such deposit has been given in two newspapers published in or nearest to the county or city by two insertions in each paper.

3. Upon these provisions being complied with the Governor in Council may issue a proclamation providing for the taking of a poll. All persons qualified to vote at an election of a member of the House of Commons in the particular county or city are entitled to vote upon the question provided for by the proclamation. Part I also lays down the procedure for taking the vote.

4. By section 62 it is provided that if one-half or more of all the votes 20 polled are against the petition the same shall be deemed not to have been adopted, and the returning officer shall make his return to the Governor in Council accordingly. By section 63 if more than half of all the votes polled are for the petition, the petition shall be deemed to have been adopted.

5. Part I also contains provisions for the preservation of peace and good order in connection with the taking of the vote and provides penalties for infractions of the provisions of this Part of the Act. It also gives the superior courts of record of the various provinces jurisdiction to entertain actions to set aside proceedings in connection with the taking of the vote.

6. By section 110 provision is made for bringing the Act into force by 30 Order-in-Council in a county or city where a petition has been adopted, and by section 111 it is provided that such Order-in-Council shall not be revoked until after the expiration of three years from the date of the coming into force under it of Part II, and no petition for revocation of such Order-in-Council shall be submitted to be voted upon sooner than thirty days before the expiration of such three years. Provision is made for the taking of a vote upon a petition to revoke any Order-in-Council bringing Part II into force and the provisions of the Act relating to the taking of a vote upon a petition to bring Part II into force are made applicable.

7. Section 117 makes similar provision for a petition to the Governor 40 in Council for the repeal of a by-law passed by the Council of any county or city in the Provinces of Ontario or Québec under the provisions of the

Temperance Act of 1864, which Statute was enacted by the Legislature of the Province of Canada prior to Confederation.

8. Part II of the Act consists of sections 118 to 127 inclusive. By section 118 it is provided that from the day upon which Part II comes into force in any county or city and while the same continues in force, no person shall, except as is specially provided in Part II, by himself, his clerk, servant or agent,

“ (a) expose or keep for sale, within such county or city, any intoxicating liquor ;

10 “ (b) directly or indirectly on any pretense or upon any device, within any such county or city, sell or barter, or, in consideration of the purchase of any other property, give to any other person any intoxicating liquor ;

“ (c) send, ship, bring or carry or cause to be sent, shipped, brought, or carried to or into any such county or city, any intoxicating liquor ; or

“ (d) deliver to any consignee or other person, or store, warehouse, or keep for delivery, any intoxicating liquor so sent, shipped, brought or carried.

20 “ 2. Paragraphs (c) and (d) of subsection one of this section shall not apply to any intoxicating liquor sent, shipped, brought or carried to any person or persons for his or their personal or family use, except it be so sent, shipped, brought or carried to be paid for in such county or city to the person delivering the same, his clerk, servant, or agent, or his master or principal, if the person delivering it is himself a servant or agent.

“ 3. No act done in violation of the provisions of this section shall be rendered lawful by reason of

“ (a) any license issued to any distiller or brewer ;

30 “ (b) any license for retailing on board any steamboat or other vessel, brandy, rum, whiskey, or other spirituous liquors, wine, ale, beer, porter, cider, or other vinous or fermented liquors ;

“ (c) any license for retailing on board any steamboat or other vessel, wine, ale, beer, porter, cider or other vinous or fermented liquors, but not brandy, rum, whiskey or other spirituous liquors ; or

“ (d) any license of any other description whatsoever.”

9. Provision is made by sections 119 and 120 for the sale by licensed persons of wine and intoxicating liquor for sacramental, medicinal and 40 industrial purposes.

10. By section 121 it is provided that producers of cider in a county or city and licensed distillers or brewers having their distilleries or breweries

**Record.** in the county or city may at their distilleries or breweries sell liquor of their own manufacture in quantities of not less than ten gallons, or in the case of ale or beer, not less than eight gallons at any one time. Such sales may be made to druggists and licensed vendors or to any person whom the seller has good reason to believe will forthwith carry the purchase beyond the limits of the county or city and of any adjoining county or city in which Part II of the Act is then in force, and will not carry or send or cause the same to be carried or sent into any county or city in which the same is to be dealt with in violation of any provincial law. By sections 122 and 123 similar provision is made for the sale of wine in quantities of not less than ten gallons at any one time.

**11.** By section 124 provision is made for the sale by wholesalers of intoxicating liquor at their places of business within the county or city in quantities of not less than ten gallons at any one time to the same class of purchaser as in the case of sales by distillers and brewers.

**12.** By section 125 the onus of establishing in evidence the belief set forth in sections 121 to 124 inclusive is placed upon the vendors mentioned in those sections.

**13.** By section 126 it is provided that the Act is not to interfere with the purchase or sale by legally qualified physicians, chemists or druggists of, among other things, spirituous liquors or alcohol for exclusively medicinal purposes or industrial use. Section 127 is a penalty section.

**14.** Part III of the Act consisting of sections 128 to 152 inclusive makes provision for prosecutions for violations of the Act

**15.** By Order-in-Council dated the 1st day of June, 1939, the Lieutenant-Governor for Ontario referred to the Court of Appeal for Ontario the following question for hearing and consideration :—

p. 6, l. 16.

“ Are Parts I, II and III of the Canada Temperance Act, Revised Statutes of Canada, 1927, Chapter 196, constitutionally valid in whole or in part, and if in part, in what respect ? ”

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p. 14, l. 25.

**16.** On the hearing of argument before the Court of Appeal for Ontario on the 26th, 27th, 28th and 29th days of June, 1939, The Attorney-General of Canada, The Attorney-General for Ontario, The Moderation League of Ontario, The Canada Temperance Federation, The Ontario Temperance Federation, The Huron County Temperance Federation, Manitoulin Temperance Federation, Peel Temperance Federation, Perth Temperance Federation, The United Church of Canada and The Social Service League of the Church of England in Canada, were represented by counsel.

**17.** Counsel for The Attorney-General for Ontario and for The Moderation League of Ontario submitted that the question should be answered in 40

the negative, while counsel for The Attorney-General of Canada and the various bodies represented on the hearing submitted that the question should be answered in the affirmative. On the hearing of the appeal the Court of Appeal was supplied with a list compiled by the Secretary of State of Canada showing the municipalities in which Part II of the Act had ever been brought into force, the dates when brought into force and the dates when suspended. This list showed that Part II had never been brought into force in any county or city in three of the nine provinces of Canada ; that it had been brought into force in thirty counties or cities in the Province of Ontario ; nine in the Province of Quebec ; two in the Province of Manitoba ; eleven in the Province of New Brunswick ; thirteen in the Province of Nova Scotia ; and four in the Province of Prince Edward Island. The list also showed that Part II is in force in four counties in the Province of Ontario ; one city in the Province of Quebec ; two electoral districts in the Province of Manitoba ; a total of seven municipalities only throughout the Dominion of Canada.

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p. 13.

18. By the judgment of the Court of Appeal dated the 26th day of September, 1939, the opinion of the majority (The Honourable Mr. Justice Riddell, Acting Chief Justice, The Honourable Mr. Justice Fisher, The Honourable Mr. Justice McTague and The Honourable Mr. Justice Gillanders) was that Parts I, II and III of the said Act were constitutionally valid while the dissenting opinion of The Honourable Mr. Justice Henderson was that the said Parts I, II and III of the said Act were beyond the competence of the Parliament of Canada.

p. 14.

19. The Honourable Mr. Justice Riddell was of opinion that the decision in *Russell v. The Queen*, 7 Appeal Cases, 829, was binding on the Court of Appeal and accordingly the question should be answered in the affirmative.

pp. 15-16.

20. The view of The Honourable Mr. Justice Fisher was that so long as the decision in *Russell's case* stands, Parts I, II and III must be considered as law until repealed by Parliament.

pp. 16-18.

21. The opinion of The Honourable Mr. Justice McTague, concurred in by The Honourable Mr. Justice Gillanders, was that the said Parts of the Act must be considered as valid in view of the decision in *Russell's case*. Their Lordships say, however, that were it not for the decision in that case they should have no difficulty in holding, having regard to subsequent decisions, that under present conditions the Parts of the Act questioned are ultra vires the Dominion Parliament as infringing upon matters exclusively within provincial jurisdiction. Such legislation on the part of Parliament depending, in their Lordships' view, upon the opening words of section 91, can only be justified where something in the nature of a national emergency exists.

pp. 29-31.

22. The Honourable Mr. Justice Henderson in his dissenting judgment held that the Parts of the Act questioned were ultra vires the Dominion

pp. 18-20.

Parliament ; that the original Canada Temperance Act of 1878 was enacted under very difficult circumstances from those existing in 1927 ; and that it could not reasonably be contended that any condition of national emergency existed in 1927 when the Parts of the Act questioned were passed, so as to call for the exercise by the Dominion of its powers of legislation under the opening words of section 91 of The British North America Act relating to the peace, order and good government of Canada.

23. The Appellant respectfully submits that the judgment of the majority of the Court of Appeal is wrong and that on the true construction of the relevant provisions of The British North America Act and of the said 10 Parts I, II and III of the said Canada Temperance Act, the said Parts of the last mentioned Act are beyond the competence of the Parliament of Canada to enact.

### REASONS.

1. Because the legislation in question falls within the exclusive powers committed to the Provincial Legislatures under section 92 of The British North America Act and particularly Heads 13 and 16 and is excluded from the powers conferred upon the Parliament of Canada by section 91 of the said Act. 20
2. Because the majority of the Court of Appeal erred in considering the question concluded by the decision in *Russell v. The Queen*, 7 Appeal Cases, 829.
3. Because the dissenting judgment of The Honourable Mr. Justice Henderson is right.
4. Because the decision in *Russell v. The Queen* is based upon an admission by counsel engaged in that case and is not a binding authority.
5. Because neither The Attorney-General of Canada nor the Attorneys-General of any of the provinces of Canada were 30 represented upon the argument of *Russell's case*.
6. Because the national emergency assumed in subsequent decisions of the Judicial Committee to have existed at the time of the passing of the original Canada Temperance Act in 1878 cannot be assumed either to have existed or to have continued to exist in 1927.
7. Because the decision in *Russell's case*, being based upon facts and circumstances assumed to exist, is a decision as to facts only and cannot form the basis for the application 40 of the doctrine of stare decisis.

8. Because, it is submitted with respect, the decision in *Russell v. The Queen* was wrongly decided and ought not to be followed.
9. Because as all the provinces of Canada have passed legislation either controlling or prohibiting the sale of intoxicating liquor, a national emergency cannot be assumed to exist in relation to the traffic in intoxicating liquor.
10. Because legislation of the character of Parts I, II and III of the Canada Temperance Act, Revised Statutes of Canada, 1927, Chapter 196, falls within the legislative powers of the Dominion Parliament only, if at all, when conditions of national emergency exist throughout the Dominion calling for the exercise of such power and no such conditions are shown to have existed in 1927.

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R. L. KELLOCK.

C. R. MAGONE.

Of Counsel for The Attorney-General  
for Ontario.

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FEDERATION, HURON COUNTY TEM-  
PERANCE FEDERATION, MANITOULIN  
TEMPERANCE FEDERATION, PEEL  
TEMPERANCE FEDERATION, PERTH  
TEMPERANCE FEDERATION, THE  
UNITED CHURCH OF CANADA AND  
THE COUNCIL FOR SOCIAL SERVICE  
OF THE CHURCH OF ENGLAND IN  
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**CASE OF THE APPELLANT,  
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