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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

No. 2 of 1940.

ON APPEAL FROM THE COURT OF APPEAL
FOR ONTARIO.

APPELLANT'S CASE
M. L. 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 THE PROVINCE OF
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 SOCIAL SERVICE LEAGUE
OF THE CHURCH OF ENGLAND; AND THE
ATTORNEY-GENERAL OF CANADA

Respondents.

CASE FOR THE APPELLANT,
THE MODERATION LEAGUE OF ONTARIO.

1. This is an appeal from the opinion of the Court of Appeal for ^{Record.}
Ontario in the matter of a Reference by the Lieutenant-Governor in Council p. 14.
for hearing and consideration of the following question :—

(1) " Are Parts I, II and III of The Canada Temperance Act,
" R.S.C. 1927, Chapter 196, constitutionally valid in whole or in part,
" and if in part, in what respect ? "

Record.
pp. 14-15.

2. A majority of the Judges in the Court of Appeal (Riddell, Fisher, McTague and Gillanders, J.J.A.) answered the question in the affirmative, considering themselves bound to so answer by the decision in *Russell v. The Queen* [1882] 7 A.C. 829. Henderson J. A., answered the question in the negative.

3. Part II of the Act prohibits the sale of intoxicating liquor in any county or city from the time such Part is brought into force therein. Part I provides the procedure for bringing it into force. If more than half the votes polled are in favour of the Petition, Part II is brought into force by order of the Governor in Council (Sec. 110). Part III. of the Act provides 10 penalties. Part IV contains prohibitions on importation, exportation and manufacture of intoxicating liquor which may be made effective by proclamation of the Governor in Council on a resolution passed by the Legislature of a province in which a law is in force prohibiting the sale of intoxicating liquor for beverage purposes. Part V contains restrictions on inter-provincial transactions to violate provincial prohibitory laws.

4. No question is raised as to the validity of Parts IV and V but Part V contains an important section 175 (first enacted in 1917, cap. 30, sec. 2) which should be considered in connection with Parts I, II and III of the present Act. It reads:—

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“ 175. Upon the receipt by the Secretary of State of Canada of a
“ petition, in accordance with the requirements of sections one hundred
“ and twelve, one hundred and thirteen and one hundred and fourteen
“ of this Act praying for the revocation of any Order-in-Council passed
“ for bringing Part II of this Act into force in any city or county, if the
“ Governor in Council is of opinion that the laws of the province in
“ which such city or county is situated, relating to the sale and traffic
“ in intoxicating liquors, are as restrictive as the provisions of Parts I
“ to IV, both inclusive, of this Act, the Governor in Council may, without
“ the polling of any votes, by order, to be published in the Canada 30
“ Gazette, suspend the operation of the said Parts of this Act in such
“ city or county, such suspension to commence ten days after the date
“ of the publication of such order and to continue as long as the pro-
“ vincial laws continue as restrictive as aforesaid.”

5. This Reference raises a question similar to one discussed but not answered by the Supreme Court of Canada on a reference by the Dominion arising under Section 175. The Chief Justice of Canada, speaking for the majority of the Court, said (1935 S.C.R. at 505):—

“ On the argument counsel on behalf of the Provinces of Ontario
“ and Quebec raised the question of the constitutional validity of the 40
“ Canada Temperance Act. Reading the Order of Reference in light of
“ the decision in *Russell v. The Queen* [1882] 7 A.C., 829, and of the
“ judgment of the Judicial Committee on the Local Option Reference

“in 1896 (*Attorney-General for Ontario v. Attorney-General for the Dominion* [1896] A.C. 348), we have no doubt that the interrogatories addressed to us ought not to be construed as involving any such question. At the request of counsel, we stated, however, that we should mention, in the judgment, the fact of the argument having been advanced; we now do so accordingly.”

Record.

6. *Russell's case* has been accepted as a decision but its correctness has never been fully considered in the light of decisions of the Judicial Committee defining the jurisdiction of the Dominion Parliament over commercial trans-
10 actions within a province. It can only be supported as emergency legislation valid while it can be shown affirmatively that the emergency continues. Chief Justice Duff made observations with regard to it in *Board of Commerce case* (1920) 60 S.C.R. at 507, and in the *Natural Products Marketing case* (1936) S.C.R. 421, and Lord Haldane commented on it in *Toronto Electric Commissioners v. Snider* [1925] A.C. at 412.

7. *Russell's case* was decided on incorrect admissions and assumptions and in the absence of the Provinces, circumstances, having regard to the opinions expressed by Lord Cairns (*Ridsdale v. Clifton* (1877) 2 P.D. at 307), Lord Watson (*Tooth v. Power* [1891] A.C. at 292) and Lord Halsbury (*Reid*
20 *v. Bishop of London* [1892] A.C. 644) that invite a review of the reasons for the decision.

8. In the Court of Appeal, Riddell J.A., referring to *Russell's case*,
said: “This decision, I have for fifty years thought might be reversed by a
“body with that power; but while it has been considered in many cases,
“it has never been reversed; and we must take it that it is binding authority.”
Fisher J.A., said that in his view there are only two methods open, one is to
obtain, if possible, a decision of the Privy Council reversing *Russell v. The Queen*,
and the other is to have Parliament enact legislation to repeal the
Act. He could see no escape from the conclusion that an Act, valid when
30 passed, remains valid until the Act is repealed or declared ultra vires by the
Courts. McTague J.A., with whom Gillanders J.A. agreed, said: “Were it
“not for the decision in *Russell v. The Queen* [1882] 7 A.C. 829, having in
“mind subsequent decisions of the Privy Council, I should have no difficulty
“in holding that in present conditions the Parts of the Act questioned are
“ultra vires of the Dominion Parliament.” Henderson J.A., after a careful
review of relevant decisions and the pertinent facts, said: “It seems manifest
“to me that the emergency, if any existed, has wholly passed away and that
“the foundation and only foundation upon which *Russell's case* can be
“supported no longer exists.”

p. 16, l. 13,
et seq.p. 18, l. 3,
et seq.p. 30, l. 9,
et seq.

p. 29, l. 19

40 This Appellant submits that the Court of Appeal reached a wrong conclusion and that the answer to the question submitted should be in the negative for the following amongst other

REASONS.

1. Because traffic in the sale of liquor in a province as a subject matter of legislation is exclusively within provincial jurisdiction.
2. Because the Act, if valid when passed, was emergency legislation and invalid in normal times.
3. Because when emergency legislation is brought into question it must be shown affirmatively that the emergency continues.
4. Because the facts assumed in *Russell's case* cannot now be assumed and do not exist.
5. Because the decision in *Russell's case* was in part at least based upon an admission of Counsel which ought not to have been made.
6. Because the question asked relates to the Act passed in 1927 (which includes Section 175) and to 1927 conditions and not to the Act passed in 1878 and to conditions at that time.
7. Because the original broad general purpose recited in the Act of 1878 is no longer its true purpose since the Act aims at regulating matters entirely local to the province.
8. Because in each of the provinces of Canada there is now either total prohibition or government control whereby the traffic is regulated suitably to the needs of the province.
9. Because the Act has never been in force except in a few scattered municipalities throughout Canada and is now in force in only seven of them.
10. For the other reasons given by the Honourable Mr. Justice Henderson.

W. N. TILLEY.

BETHUNE L. SMITH.

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THE UNITED CHURCH OF CANADA,
AND THE SOCIAL SERVICE LEAGUE
OF THE CHURCH OF ENGLAND, AND
THE ATTORNEY-GENERAL OF
CANADA *Respondents.*

CASE FOR THE APPELLANT,
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