Privy Council Appeal No. 2 of 1940

The Attorney-General of Ontario and others - - *Appellants*

v.

The Canada Temperance Federation and others - - *Respondents*

FROM

THE COURT OF APPEAL FOR ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1946

Present at the Hearing:

VISCOUNT SIMON
LORD THANKERTON
LORD ROCHE
LORD GREENE
LORD GODDARD

[*Delivered by* VISCOUNT SIMON]

On 1st June, 1939, the Lieutenant-Governor of Ontario in Council referred to the Supreme Court of Ontario under the provisions of the Constitutional Questions Act, R.S.Ont. cap. 130, the following question:

> " Are Parts I, II and III of the Canada Temperance Act, Revised Statutes of Canada, 1927, cap. 196, constitutionally valid in whole or in part, and if in part, in what respect? "

On 26th September, 1939, the Supreme Court by a majority (Riddell, Fisher, McTague and Gillanders JJA.) answered the question as follows:

> " This Court is of opinion (Mr. Justice Henderson dissenting) that Parts I, II and III of the Canada Temperance Act, Revised Statutes of Canada, 1927, cap. 196, are within the legislative competence of the Parliament of Canada."

Against this judgment the Attorney-General for Ontario and the Moderation League of Ontario have appealed to the Judicial Committee and their appeal has been supported by the Attorneys-General of Alberta and New Brunswick who were admitted as interveners and were represented on the hearing. The appeal was opposed by Counsel appearing for the Attorney-General of Canada and for several Temperance Federations.

The object of the appeal is to challenge the decision of this Board in the case of *Russell* v. *Reg.* [1882] 7 A.C. 829, or at any rate to deny its applicability to the Act now in question. The majority of the Supreme Court held that that decision governed the present case and obliged it to answer the question referred to it in the affirmative. The statute which was declared to be within the legislative competence of the Dominion Parliament in *Russell's* case was the Canada Temperance Act, 1878. That Act has been amended from time to time by the Dominion Parliament and has been revised and re-enacted in a consolidated form on more than one occasion under the provisions of the Acts relating to the revision of Statutes of Canada. The last revision took place in 1924 under the

provisions of the Dominion Act, 1924 (14 and 15 Geo. V. cap. 65) and now appears on the Statute Roll as the Canada Temperance Act, R.S.C. of 1927, cap. 196. The material provisions of the Act of 1927 are admittedly identical with those of the Act of 1878.

The object of the Act of 1878 was to authorise the adoption of a system of local option in regard to the sale of intoxicating liquor in counties and cities throughout the Dominion. By Part I elaborate provisions are made for bringing the Act into force within the area of any county or city. Following on a petition to the Governor-General in Council supported by a certain proportion of the electors in the area, a poll is to be taken, and if a majority supports the petition an Order in Council is passed bringing the Act into effect in that area for a minimum of three years. Amendments have from time to time been passed dealing with portions of the Dominion which were not divided into counties and substituting electoral districts as the area in such cases, but it is unnecessary to set these out in detail. Part II prohibits the sale of liquors in the areas in which the Act is brought into force, and Part III provides for prosecution and penalties, which in some cases are severe, for breaches of the Act.

The Act having been passed in 1878, its constitutional validity was challenged in 1882 in *Russell's* case (supra), which arose out of a conviction of the appellant Russell for unlawfully selling intoxicating liquor contrary to the provisions of Part II of the Act. It was argued in that case that the Act was *ultra vires* of the Dominion Parliament on the ground that the matter was one which fell within sec. 92 of the British North America Act and was therefore within the exclusive jurisdiction of the provincial legislatures. The Board, however, held that the Act did not deal with any of the matters exclusively reserved to the provinces and upheld the validity of the statute on the ground that it related to the peace, order and good government of Canada. This decision has stood unreversed for 63 years. More than that, it has received the express approval of the Board in subsequent cases. A notable instance is to be found in *A.G. for Ontario* v. *A.G. for the Dominion* [1896] A.C. 348. In that case Lord Watson, in delivering the judgment of the Board said at p. 362 " The judgment of this Board in *Russell* v. *Reg.* has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order and good government of Canada in such sense as to bring its provisions within the competency of the Canadian Parliament." After pointing out that the provisions of the Act of 1878 were in all material respects the same as those embodied in the Act of 1886, which was the statute the Board had then to consider, he continued, " The reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell* v. *Reg.* must be accepted as an authority to the extent to which it goes, namely that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion must receive effect as valid enactments relating to the peace, order and good government of Canada ". In 1883, in the earlier case of *Hodge* v. *Reg.* [1883] 9 A.C. 117, the Judicial Committee had referred to *Russell's* case without any indication of disapproval, nor is any to be found in the judgment of Lord Macnaughton in *A.G. of Manitoba* v. *Manitoba Licence Holders Association* [1902] A.C. 73, where the decisions of 1882 and of 1896 were contrasted. In many subsequent cases the case has been cited in judgments of the Board; it will be enough to mention *A.G. of Canada* v. *A.G. of Alberta* (The Insurers case) [1916] 1 A.C. 588, the *Board of Commerce* case [1922] 1 A.C. 191 and *King-Emperor* v. *Lal Sarma* [1945] A.C. 14. It was also quoted as an authority by Lord Atkin in his speech in the House of Lords in *Gallagher* v. *Lynn* [1937] A.C. 863, a case relating to the legislative powers of the Parliament of Northern Ireland.

But in 1925 *Russell's* case was commented upon in a judgment of the Judicial Committee delivered by Lord Haldane in *Toronto Electric Commissioners* v. *Snider* [1925] A.C. 396, and it is upon this comment that

the present appellants largely rely in support of their contention that it was wrongly decided. After contrasting that case with other decisions of the Board already mentioned above, Lord Haldane said at page 412 " It appears to their Lordships that it is not now open to them to treat *Russell* v. *The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in Sect. 91. . . . No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provisional competency." And later (page 412) he said " Their Lordships think that the decision in *Russell* v. *The Queen* can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked, of the general words at the beginning of Sect. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analagous ".

The first observation which their Lordships would make on this explanation of *Russell's* case is that the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the Provincial Legislatures, merely because of the existence of an emergency. Secondly, they can find nothing in the judgment of the Board in 1882 which suggests that it proceeded on the ground of emergency; there was certainly no evidence before that Board that one existed. The Act of 1878 was a permanent, not a temporary, Act and no objection was raised to it on that account. In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics* case [1932] A.C. 54 and the *Radio* case [1932] A.C. 304) then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. War and pestilence, no doubt, are instances; so too may be the drink or drug traffic, or the carrying of arms. In *Russell* v. *The Queen* Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.

It is to be noticed that the Board in *Snider's* case nowhere said that *Russell* v. *Reg.* was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

The appellants' first contention is that *Russell's* case was wrongly decided and ought to be overruled. Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a

previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion has arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, in the opinion of their Lordships, the decision must be regarded as firmly embedded in the constitutional law of Canada and it is impossible now to depart from it. Their Lordships have no intention, in deciding the present appeal, of embarking on a fresh disquisition as to relations between sections 91 and 92 of the British North America Act, which have been expounded in so many reported cases; so far as the Canada Temperance Act, 1878, is concerned the question must be considered as settled once and for all.

The second contention of the appellants was that in 1927, when the Statute now in force was enacted, there were no circumstances which enabled the Parliament of the Dominion to legislate anew. The Act of 1928 is one promulgated under the provisions of the Act of 1924 for the revision of the Statutes of Canada. Its full title is " An Act respecting the traffic in intoxicating liquors " and its short title is " The Canada Temperance Act: R.S. cap. 152 ". As has already been said, it is, in all respects material for this appeal, identical in its terms with the Act of 1878, and also with the Act of 1886 which itself was a revised edition of 1878 and was the Act in force in 1896 when the case of *A.G. for Ontario* v. *A.G. for the Dominion* (supra) was heard. It was not contended that if the Act of 1878 was valid when it was enacted it would have become invalid later on by a change of circumstances, but it was submitted that as that Act and the Act of 1886 have been repealed, the Act of 1927 was new legislation and consequently circumstances must exist in 1927 to support the new Act. Then it was said (and this apparently was the opinion of Henderson, JA. who dissented from the other members of the Supreme Court of Ontario), that no circumstances could exist in 1927 to support the Act, in view of the legislation that had been passed in the Provinces, including Ontario, for the regulation of the liquor traffic. Their Lordships do not find it necessary to consider the true effect either of sec. 5 or sec. 8 of the Act of 1924 for the revision of the Statutes of Canada, for they cannot agree that if the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could be successfully contended that the Act of 1927 which replaced it was *ultra vires*. The same ground is not covered by provincial legislation setting up a licensing system and making the sale of liquor a government monopoly. Moreover, if the subject matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must, as it seems to their Lordships, have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to necessitate the earlier statute. To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again. Once it has been decided that the Act of 1878 was constitutionally valid, it follows that an Act which replaces it and consolidates therewith the various amending Acts that have from time to time been enacted must be equally valid. It is to be noted that in 1896 Lord Watson's judgment appears to take it for granted that the position was in no way affected by the fact that the Act of 1878 had been repealed and replaced by the Act of 1886.

Accordingly their Lordships are not prepared to hold either that *Russell* v. *Reg.* was wrongly decided or that it has ceased to be a binding authority by reason that the 1878 Act has been re-enacted in 1927. It is by repeal by the Dominion Legislature, and not by appeal to the Judicial Committee, that the enactment might cease to be effective. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There should be no costs awarded in respect of the appeal.

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In the Privy Council

THE ATTORNEY-GENERAL OF ONTARIO AND OTHERS

v.

THE CANADA TEMPERANCE FEDERATION AND OTHERS

DELIVERED BY VISCOUNT SIMON

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1946