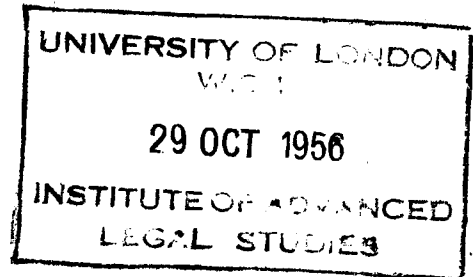


In the Privy Council.

No. 37 of 1895.



ON APPEAL
FROM THE SUPREME COURT OF CANADA.

BETWEEN
THE ATTORNEY-GENERAL FOR ONTARIO *Appellant.*
AND
(1) THE ATTORNEY-GENERAL FOR THE DOMINION
OF CANADA AND (2) THE DISTILLERS' AND
BREWERS' ASSOCIATION OF ONTARIO *Respondents.*

IN THE MATTER of certain questions referred to the Supreme Court of
Canada by HIS EXCELLENCY THE GOVERNOR-GENERAL.

SUBJECT—
PROVINCIAL JURISDICTION.
PROHIBITORY LIQUOR LAWS.

CASE FOR THE RESPONDENTS,
THE DISTILLERS' & BREWERS' ASSOCIATION
OF ONTARIO.

1. This is an Appeal from a decision of the Supreme Court of Canada,
upon a reference to that Court by His Excellency the Governor-General of Canada,
for hearing and consideration of the following questions:—

2. (i) Has a Provincial Legislature Jurisdiction to prohibit the sale within
the province of spirituous fermented or other intoxicating liquors?

- (ii) Or has the Legislature such Jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?
- (iii) Has a Provincial Legislature Jurisdiction to prohibit the manufacture of such liquors within the province?
- (iv) Has a Provincial Legislature Jurisdiction to prohibit the importation of such liquors into the province? 5
- (v) If a Provincial Legislature has not Jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such Legislature Jurisdiction to prohibit the sale by retail according to the definition of a sale by retail, either in Statutes in force in the province at the time of confederation, or any other definition thereof? 10
- (vi) If a Provincial Legislature has a limited jurisdiction only as regards the prohibition of sales, has the Legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th section of "The Canada Temperance Act" or any of them (Revised Statutes of Canada, Chapter 106, Section 99). 15
- (vii) Had the Ontario Legislature jurisdiction to enact the 18th Section of the Act passed by the Legislature of Ontario in the fifty-third year of Her Majesty's reign and intituled "An Act to improve the Liquor License Acts" as said section is explained by the Act passed by the said Legislature in the fifty-fourth year of Her Majesty's reign and intituled "An Act respecting Local Option in the matter of Liquor Selling"? 20

For convenience of reference the enactments referred to in questions (vi) and (vii) are appended to this case.

3. Pursuant to leave given by the Supreme Court under the statute in that behalf the Distillers' and Brewers' Association of Ontario (hereinafter called "the Association") were represented at the hearing before that Court. 25

4. At such hearing were also represented the Attorneys-General of Canada, Ontario, Quebec, and Manitoba.

5. In the result the Court answered all the questions in the negative in accordance with the contentions of the Association, the answers being unanimous as to questions (iii) and (iv), and by a majority as to the other questions. 30

6. From this decision the Attorneys-General of Ontario obtained leave to appeal, and on that appeal the Respondents are the Attorney-General of Canada and the Association. 35

7. The Association submits that the decision of the Supreme Court was right and should be confirmed for the reasons stated in the judgments of the majority of the Supreme Court and on the grounds following.

REASONS.

1. Upon the true construction of the British North America Act as settled by decision of the Privy Council the Provinces have no legislative authority on any matter unless it is comprised within some of the subjects enumerated in Sec. 92 of the Act. 40
2. Upon such construction as so settled, the Provinces have no such authority (even if the matter might otherwise be so comprised), in any case wherein, or to any extent whereby, the exercise of such authority would interfere with the exercise by Canada of 45

any authority comprised within any of the articles of Sec. 91 of the Act.

3. Upon such construction as so settled, the subject of the prohibition of the trade of selling intoxicating liquors, even by retail, in Canada, is not comprised within Sec. 92.

4. It is submitted that *a fortiori* the prohibition of the wholesale trade in liquors, or of the business of manufacturing or importing liquors is not comprised within Sec. 92.

5. Upon such construction as so settled, each of these subjects not being comprised within Sec. 92, is within the authority of the Parliament of Canada, under its general powers conferred by Sec. 91 "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces."

6. Among the subjects placed by Sec. 91 within the exclusive authority of Canada are the regulation of trade and commerce, the public debt, the raising of money by any mode or system of taxation, and the borrowing of money on the public credit.

By the Act, Canada became bound to pay the heavy provincial debts, and to provide for the Provinces large annual subsidies.

One of the main objects of the Act was to place the trade and commerce of the various Provinces under the general control of the central authority, and thus to promote the removal, and to prevent the creation of artificial barriers and diversities in this regard between the Provinces.

The whole system of taxation by the Provinces before confederation was, and that of Canada since has been and must long continue, indirect, and large sums had before and have since been yearly levied by duties of customs and excise in order to meet the public obligations and to maintain the public services.

The ability of Canada to accomplish these and other national objects was and is plainly dependent on her possession of exclusive powers over trade and commerce which she would not enjoy were it within the legislative authority of the Provinces to prohibit the manufacture, importation, or sale of goods, and thus while creating artificial and prejudicial barriers to trade and diversities of trade conditions to prevent Canada from obtaining the duties of Customs and Excise on which she must necessarily depend for the performance of her national obligations.

The Customs and Excise duties on liquor, like those on tobacco were before confederation as they have ever since continued a substantial and necessary part of the fiscal resources of Canada, and an intolerable condition might be produced if each of the Provinces had power to cut off from Canada her receipts from these duties within the limits of such Provinces.

It is obvious that the same Legislature which has power over these

subjects in their trade and revenue aspects should also control them in any other aspects as to which the existence of a control elsewhere might be fatal to the execution of the powers conferred for trade and revenue purposes.

- It is submitted that on the true construction of the Act, the Parliament of Canada has been granted the exclusive Legislative Authority over the subjects, as part of "the regulation of Trade and Commerce," and that thus, even if apart from such grant they or some of them might have been comprised within the assignment to the Provinces, they are yet by virtue of the grant vested in Canada.
7. Upon the true construction of the British North America Act as established by decision of the Privy Council there exists a broad distinction between an authority to prohibit trades as unlawful and an authority to prescribe conditions on which lawful trades may be conducted. And such latter authority, may, within certain limitations, be vested in the Provincial Legislatures, under the Article 'Municipal Institutions' as part of the police power or under some other Article of Sec. 92, quite consistently with the exclusive vesting in Canada of the authority to prohibit.
 8. There is here no concurrent jurisdiction; nor are there two different aspects in which the subject can be viewed so as to bring it in one aspect within Canadian, and in the other within Provincial Legislative power. It is the same subject under the same aspect.
 9. There is here no room for the contention that there may exist a Provincial Jurisdiction unless and until the Parliament of Canada occupies the field.
 10. But, if this were otherwise, yet the Parliament of Canada has already occupied the field, by legislation which provides certain conditions and limitations under and to the extent of which sales are prohibited all over Canada, and has thus in effect legislatively decided that, save under and to the extent of these conditions and limitations, sales shall not be prohibited anywhere in Canada.
 11. On the true construction of the British North America Act, as settled by decision of the Privy Council, there is in this connexion no distinction favorable to the Provinces as between wholesale and retail dealing.
 12. There is no definition of retail and wholesale dealing available for the suggested purpose, and the only defining power that can be reasonably suggested is the Parliament of Canada which would thus practically retain in its hands the control of the subject.
 13. The attempt to sustain the 18th section of the Ontario Act on the ground that it is a revival of the analogous section

of the preconfederation law must fail because the subject of that section as already shown fell after confederation within the exclusive authority of the Parliament of Canada, by which alone it could be as it has been since affected.

- 5 14. The attempt to include the subject of that section within Provincial legislative power under the head of 'Municipal Institutions' because it happened shortly before confederation to be embraced in a municipal Act by one Province must fail.

10 At the time of that legislation each province had full legislative authority, and the mode of exercising such authority whether direct or by reference to municipal bodies, was optional and changeable at pleasure. The experiment, for such it was, of entrusting municipal bodies with certain powers of prohibition had been entered on in the late Province of Canada
15 shortly before confederation. That experiment had not been attempted in either Nova Scotia or New Brunswick.

Neither in the practice of the four Provinces nor in the nature of the subject nor in the methods of the United Kingdom is to be found any consensus of views or any established
20 meaning which can be successfully invoked to show that the subject is in the British North America Act comprised within 'Municipal Institutions.'

It would be wrong to use the accident of the partial legislation referred to as ground for enlarging the phrase 'municipal institutions,' so as to vest in all the 'Provincial legislatures' to be exercised at the option of each Province either directly or through the municipalities a power so extensive and so
25 inconsistent with the general scheme of the Act.

15. It is not to be overlooked that in an important particular, namely, with reference to cities, this 18th section conflicts in
30 terms with the Canada Temperance Act.

16. On the whole, it is submitted that the answers of the Supreme Court should be approved and that the appeal should be dismissed.

APPENDIX

REFERRED TO IN PARAGRAPH 2
OF THE
CASE FOR THE
DISTILLERS' & BREWERS' ASSOCIATION
OF ONTARIO.

5

Revised
Statutes of
Canada, 1886,
Cap. 106.

(I.)

Section 99 of the Canada Temperance Act referred to in the Question Number (*vi*) is as follows:—

“ 99. From the day on which this part of this Act comes into force and takes effect in any County or City, and for so long thereafter as the same continues in force therein, no person shall within such County or City, by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly on any pretence or upon any device, sell or barter or in consideration of the purchase of any other property, give to any other person any intoxicating liquor. 10 15

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

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

(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 ; or 20

(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 25

(d) Any license of any other description whatsoever ;

“ 3. Provided always that the sale of wine for exclusively sacramental purposes may, on the certificate of a clergymen affirming that the wine is required for sacramental purposes be made by druggists and vendors thereto specially licensed by the Lieutenant-Governor in each Province ; but the number of such licensed druggists and vendors shall not exceed one in each Township or Parish or two in each Town, or one for every four thousand inhabitants in each City. 30 35

“ 4. Provided also that the sale of intoxicating liquor for exclusively medicinal purposes or for *bonâ fide* use in some art, trade or manufacture, may be made by such licensed druggists and vendors ; but such sale when for medicinal purposes shall be in quantities of not less than one pint, to be removed from the 40

premises, and shall be made only on the certificate of a medical man having no interest in the sale, affirming that such liquor has been prescribed for the person named therein ; and when such sale is for its use in some art, trade or manufacture, the same shall be made only on the certificate signed by two Justices of the Peace, of the good faith of the application, accompanied by the affirmation of the applicant that the liquor is to be used only for the particular purposes set forth in the affirmation ; and such druggist or vendor shall file the certificates and keep a register of all such sales indicating the name of the purchaser and the quantity sold, and shall make an annual return of all such sales, on the Thirty-first day of December in every year, to the collector of Inland Revenue within whose revenue division the County or City is situated :

“ 5. Provided also, that any producer of cider in the County may, at his premises, and any licensed distiller or brewer, having his distillery or brewery within any County or City, may, at such distillery or brewery, expose and keep for sale such liquor as he manufactures thereat, and no other ; and may sell the same thereat but only in quantities not less than ten gallons, or in the case of ale or beer, not less than eight gallons at any one time, and only to druggists and vendors licensed as aforesaid, or to such persons as he has good reason to believe will forthwith carry the same beyond the limits of the County or City, and of any adjoining County or City in which this part of this Act is then in force, and to be wholly removed or taken away in quantities not less than ten gallons, or in the case of ale or beer, not less than eight gallons at a time.

“ 6. Provided also, that any incorporated Company authorised by law to carry on the business of cultivating and growing vines and of making and selling wine and other liquors produced from grapes, having their manufactory within such County or City, may thereat expose and keep for sale such liquor as they manufacture thereat and no other ; and may sell the same thereat, but only in quantities not less than ten gallons at any one time, and only to druggists and vendors licensed as aforesaid or to such persons as they have good reason to believe will forthwith carry the same beyond the limits of the County or City and of any adjoining County or City in which this part of this Act is then in force and to be wholly removed and taken away in quantities not less than ten gallons at a time.

“ 7. Provided also, that manufacturers of pure native wines made from grapes grown and produced by them in Canada, may when authorised so to do, by license from the Municipal Council, or other authority having jurisdiction where such manufacture is carried on, sell such wines at the place of manufacture in quantities of not less than ten gallons at one time except when sold

for sacramental or medicinal purposes when any number of gallons from one to ten may be sold.

“ 8. Provided also, that any merchant or trader, exclusively in wholesale trade and duly licensed to sell liquor by wholesale, having his store or place for sale of goods within such County or City, may thereat keep for sale and sell intoxicating liquor but only in quantities not less than ten gallons at any one time, and only to druggists and vendors licensed as aforesaid, or to such persons as he has good reason to believe will forthwith carry the same beyond the limits of the County or City and of any adjoining County or City in which this part of this Act is then in force, to be wholly removed and taken away in quantities not less than ten gallons at a time. 5 10

“ 9. In any prosecution against a producer, distiller, brewer, manufacturer, merchant, or trader under this section it shall lie upon the defendant to furnish satisfactory evidence of having good reason for believing that such liquor would be forthwith removed beyond the limits of the County or City, and of any adjoining County or City in which this part of this Act is then in force, for consumption outside the same.”—41 20
Vic. c 16, s 99.

(II)

Ontario 53
Vic. c. 56.

Section 18 of the Statute passed by the legislature of Ontario in the 53rd year of Her Majesty's reign, referred to in Question Number 7 is as follows :

“ 18. Whereas the following provision of this section was at the date of Confederation in force as a part of The Consolidated Municipal Act (29 and 30 Vic., cap. 51, sec. 249, sub-sec. 9), and was afterwards re-enacted as sub-sec. 7 of sec. 6 of 32 Vic., cap. 32, being The Tavern and Shops' Licence Act of 1868, but was afterwards omitted in subsequent consolidations of The Municipal and the Liquor License Acts, similar provisions as to local prohibition being contained in the Temperance Act of 1864 (27 and 28 Vic., cap. 18), and the said last-mentioned Act having been repealed in Municipalities where not in force by The Canada Temperance Act, it is expedient that Municipalities should have the powers by them formerly possessed ; it is hereby enacted as follows :— 25 30 35

“ The Council of every Township, City, Town and incorporated Village may pass by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment : Provided that the by-law before the final passing thereof has been duly approved of by the Electors of the Municipality in the manner provided by the sections in 40

that behalf of the Municipal Act: Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the Legislature of the Province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of The British North America Act, and which the subsequent legislation of this Province purported to repeal."

The explanatory Act passed in the 54th year of Her Majesty's reign also referred to in Question Number 7 is as follows:— Ontario 54
Vic. c. 46.

" Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows:—

" 1. It is hereby declared that the Legislature of this Province by enacting Section 18 of the Act to improve the Liquor License Laws, passed in the 53rd year of Her Majesty's reign, chapter 56, for the revival of provisions of law which were in force at the date of the British North America Act, 1867, did not intend to affect the provisions of Section 252 of the Consolidated Municipal Act, being chapter 51 of the Acts passed in the 29th and 30th years of Her Majesty's reign by the late Parliament of Canada, which enacted that 'No tavern or shop license shall be necessary for selling any liquors in the original packages in which the same have been received from the importer or manufacturer; provided such packages contain respectively not less than five gallons or one dozen bottles,' save in so far as the said section 252 may have been affected by the 9th Sub-Section of Section 249 of the same Act, and save in so far as licenses for sales in such quantities are required by the Liquor License Act; and the said Section 18 and all By-Laws which have heretofore been made or shall hereafter be made under the said Section 18 and purporting to prohibit the sale by retail of spirituous, fermented or other manufactured liquors, in any tavern, inn, or other house or place of public entertainment, and prohibiting altogether the sale thereof in shops and places other than houses of public entertainment, are to be construed as not purporting or intended to affect the provisions contained in the said Section 252, save as aforesaid, and as if the said section 18 and the said by-laws had expressly so declared.

" 2. Whereas doubts have arisen as to the power of this Legislature to enact the provisions of the said section 18 or of the said section as explained by this Act, and it is expedient to avoid a multiplicity of appeals involving the said question, the Lieutenant-Governor in Council is to refer to the Court of Appeal for Ontario under authority of the Act for expediting the decision of Constitutional and other provincial questions, the question of the constitutional validity of the said section 18 and its true construction, effect and application.

" 3. The reference under this Act to the Court of Appeal by the Lieutenant-Governor in Council is to be heard in priority to any other cause or matter in said Court, unless the Court otherwise orders.

“ 4. In case any by-law passed under said section 18 is quashed before the passing of this Act the application may be reheard by the High Court of Justice, at the instance of the Municipality which passed said by-law by motion on ten days’ notice served on the relator, or within such further time as may be allowed by a judge of the High Court and the Court shall make such order for the rescission of the order to quash and as to costs as to the Court shall seem meet. 5

“ 5. The limit as to the time for appealing from the judgment or order of any Court, in the case of quashing a by-law, or any other judgment, shall not apply to an appeal against a judgment or order quashing a by-law passed under the said Section 18. 10

“ 6. Where any such by-law has been quashed or has been passed and shall not be quashed before the determination of the questions referred under this Act, by the Lieutenant Governor in Council, to the Court of Appeal, the License Commissioners, under the Liquor License Acts, are not to grant licenses to any new applicants, and may only extend the duration of any existing license, from time to time, for any specified period of the year, not exceeding three months at any one time in their discretion, upon payment of a sum not exceeding the proportionate part of the duty payable for such license for a year. 15 20

“ 7. All proceedings to quash by-laws passed under the authority of said Section 18, or the enforcement of orders for payment of costs thereon shall be suspended, and no proceedings to quash other such by-laws shall be instituted until after the final determination of the questions to be referred as hereinbefore provided.” 25

In the Privy Council.

No. 37 of 1895.

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BETWEEN
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ONTARIO *Appellant.*

AND
(1) THE ATTORNEY - GENERAL
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PROHIBITORY LIQUOR LAWS.

Case for the Respondents,
THE DISTILLERS' & BREWERS'
ASSOCIATION OF ONTARIO, AND
APPENDIX.

LINKLATER, HACKWOOD, ADDISON & BROWN,
2, Bond Court,
Walbrook, E.C.