

1935. IN THE MATTER OF A REFERENCE AS TO
 * May 16, 17. WHETHER PART II OF THE CANADA TEMPER-
 * June 28. ANCE ACT IS IN OPERATION IN THE COUNTIES
 OF PERTH, HURON AND PEEL, IN THE
 PROVINCE OF ONTARIO, AND, IF NOT, THE
 PROCEDURE TO BE ADOPTED TO BRING THE
 SAID PART INTO OPERATION IN THE SAID
 COUNTIES.

Intoxicating liquors—Canada Temperance Act, R.S.C. 1927, c. 196—Liquor Control Act, Ont., 1927, c. 70, as amended—Comparative restrictiveness of Dominion and Ontario legislation—Construction of s. 175 of Canada Temperance Act (first enacted in effect by s. 2 of c. 30, 1917)—Question whether Part II of Canada Temperance Act is in operation in certain counties in Ontario (in which counties the operation of the Act had been suspended prior to passing of Liquor Control Act, Ont.) and, if not, the procedure for bringing said Part II into operation in said counties.

By sec. 175 of the *Canada Temperance Act*, R.S.C. 1927, c. 196, which section was first enacted in effect by the statutes of 1917, c. 30, s. 2, it is provided that upon receipt of a petition praying for the revocation of any order in council passed for bringing Part II of the 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 by order suspend the operation of said Parts of the *Canada Temperance Act* in such city or county, such suspension "to continue as long as the provincial laws continue as restrictive as aforesaid."

Under said provisions (as enacted in 1917, c. 30, s. 2), orders in council were passed in 1920 and 1921, suspending the operation of the *Canada Temperance Act* (theretofore in force in the counties in question) in certain counties in the province of Ontario.

In 1927 the *Ontario Temperance Act*, which was in force in Ontario when said orders in council were passed, was repealed, and other provisions were substituted by *The Liquor Control Act (Ontario)*, 1927, c. 70, which Act was materially amended by statutes of Ontario, 1934, c. 26.

The Governor General in Council referred to this Court the following questions: (1) Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act*? (2) If the answer to question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in said counties? (3) If the answer to question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in said counties?

Held (Cannon and Crocket JJ. dissenting), that question 1 be answered in the negative, and question 2 in the affirmative.

Per Duff C.J. and Lamont and Davis JJ.: The condition for applying the suspension under said s. 175 is that the laws of the province

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

relating to the sale and traffic in intoxicating liquors shall be as "restrictive" of such sale and traffic as the provisions of Parts I to IV of the *Canada Temperance Act*; and the comparison required for the purposes of applying the condition is a comparison of the laws of the province with the provisions of said Parts of the *Canada Temperance Act*; there is not contemplated a process of measuring the comparative efficacy of two legislative enactments in the suppression or reduction of excessive consumption of liquor; the comparison to be instituted is between the provisions of one statute restricting the sale and traffic in intoxicating liquors and the provisions of another dealing with the same subject. And, comparing the Dominion and Ontario legislation in question, it is clear that, in point of restrictiveness, the Ontario Act makes no attempt to approach the prohibitory provisions of Part II of the *Canada Temperance Act*; the *Canada Temperance Act*, speaking broadly, has for its object the prevention of commercial dealings in intoxicating liquor within the territory in which it is in force; the Ontario *Liquor Control Act*, in its essence, is an Act for regulating the sale and consumption of such liquor, and makes provision for enabling the people to procure such liquor by the purchase of it through Government stores and other agencies. Therefore, the "provincial laws" having ceased to "continue as restrictive" as the *Canada Temperance Act*, the suspension of the operation of Parts I to IV of the *Canada Temperance Act* in the counties in question has ceased. The said words "continue as restrictive as aforesaid" should not be construed as if the words "in the opinion of the Governor in Council" were inserted therein; and no declaration by the Governor in Council is required to effect the cessation of the suspension.

As to the question of the constitutional validity of the *Canada Temperance Act*, raised in argument—Reading the order of reference in light of *Russell v. The Queen*, 7 App. Cas. 829, and *Att. Gen. for Ontario v. Att. Gen. for the Dominion* (local option reference), [1896] A.C. 348, the questions submitted should not be construed as involving any such question.

Per Cannon J. (dissenting): From the nature and provisions of the *Canada Temperance Act*, as a whole, and having regard to ss. 23 and 31 of the *Interpretation Act* (R.S.C. 1927, c. 1), the suspension under said s. 175 can cease only by proclamation to that effect by the Governor General in Council, fixing a date for such cessation of suspension. Part II of the *Canada Temperance Act* is not in operation in the counties in question.

Per Crocket J. (dissenting): On the true construction of said s. 175, the question as to whether the laws of any province relating to the sale and traffic in intoxicating liquors are at any time as restrictive as the provisions of Parts I to IV of the *Canada Temperance Act*, is one for the determination of the Governor in Council and not for a court. Part II of said Act is not in operation in the counties in question. The procedure to bring it into operation, is to rescind the orders in council suspending the operation of the Act in said counties, if the Governor in Council is satisfied that the provisions of the liquor laws of Ontario are not as restrictive as those of Parts I to IV of the *Canada Temperance Act*, and to promulgate the rescinding orders in the usual manner.

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REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following questions: (1) Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act*? (2) If the answer to question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in the counties of Perth, Huron and Peel in the province of Ontario? (3) If the answer to question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in the said counties?

The Order in Council referring the questions to the Court, which contains a statement of the circumstances, and references to the legislation, which led to the order of reference being made, is set out in full at the beginning of the judgment of Duff C.J.

P. M. Anderson for the Attorney General of Canada.

J. Sedgwick, K.C., and *W. B. Common, K.C.*, for the Attorney General of Ontario.

Aimé Geoffrion, K.C., *R. H. Greer, K.C.*, and *Bethune Smith* for the Moderation League of Ontario.

N. W. Rowell, K.C., and *Peter Wright* for Temperance Federations.

The judgment of Duff C.J. and Lamont and Davis JJ. was delivered by

DUFF C.J.—We have to return to His Excellency in Council our answer to questions addressed to us under the authority of section 55 of the *Supreme Court Act*. It is convenient to set out the Order in Council in full:

AT THE GOVERNMENT HOUSE AT OTTAWA

Tuesday, the 12th day
 of February, 1935.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

WHEREAS there has been laid before His Excellency the Governor General in Council a report from the Minister of Justice, representing as follows:—

Part II of the *Canada Temperance Act*, chapter 196 of the Revised Statutes of Canada, 1927, prohibits, as therein provided, the dealing with, including the sale of, with certain exceptions such as for medicinal purposes, intoxicating liquor in any county or city after that Part comes into force and takes effect in such county or city.

Part I of the said Act provides for the bringing of the said Part II into force by Order in Council on the vote of the electors of such county or city indicating a desire therefor, and also for the revocation of such Order in Council after the expiration of three years from the date of the coming into force of the said Part II and after another vote of the electors indicating a desire for such revocation.

In 1916 the Parliament of Canada enacted by chapter 19 of the Statutes of 1916 "An Act in aid of Provincial Legislation prohibiting or restricting the sale or use of Intoxicating Liquors," and in 1917 Parliament enacted by Chapter 30 of the Statutes of 1917 "An Act to amend An Act in aid of Provincial Legislation prohibiting or restricting the sale of Intoxicating Liquors," and by Section 2 thereof amended the said Act of 1916 by adding thereto as Section 4C the following:—

"4C (1) Upon the receipt by the Secretary of State of Canada of a petition, in accordance with the requirements of sections one hundred and eleven, one hundred and twelve and one hundred and thirteen of the *Canada Temperance Act*, Revised Statutes of Canada 1906, chapter one hundred and fifty-two, praying for the revocation of any order in council passed for bringing Part II of the *Canada Temperance 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 the said *Canada Temperance Act*, the Governor in Council may, without the polling of any votes, by order, to be published in the *Canada Gazette*, suspend the operation of the *Canada Temperance 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 provincial laws continue as restrictive as aforesaid.

"(2) The present Section shall apply to petitions already made and upon which no polling has yet taken place."

which section was carried into the Revised Statutes of Canada, 1927, as Section 175 of the *Canada Temperance Act*, reading as follows:—

"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 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 provincial laws continue as restrictive as aforesaid."

Part II of the said Act came into force after a vote by the electors in the Counties of Perth, Huron and Peel in the Province of Ontario on April 18, 1914, April 28, 1914, and September 1, 1915, respectively.

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The *Ontario Temperance Act*, Chapter 50 of the Statutes of Ontario, 1916, and amendments thereto, was in force in the year 1921, the said Act having the effect of prohibiting dealings in intoxicating liquors except, generally, for medicinal purposes pursuant to the provisions of the said Act.

Under the provisions of the said Section 4C, Orders in Council dated 12th November, 1920, 12th November, 1920, and 24th March, 1921, were passed suspending the operation of the provisions of the *Canada Temperance Act* in the said Counties of Perth, Huron and Peel, respectively, and providing that such suspensions were to continue as long as the provincial law remained as restrictive as the *Canada Temperance Act*. Such suspensions became effective on 30th November, 1920, 30th November, 1920, and 12th April, 1921, respectively.

By the *Liquor Control Act (Ontario)*, being Chapter 70 of the Statutes of Ontario, 1927, *The Ontario Temperance Act* was repealed, and other provisions were substituted respecting the dealing with intoxicating liquors and the sale and purchase thereof by permit in accordance with such provisions. The said *The Liquor Control Act (Ontario)* was brought into force by proclamations by Sections, and on the dates as follows: Sections 1 to 31, inclusive, 37 to 41, inclusive, 43, 68, and 69, on April 6, 1927; Sections 70 and 94 on May 26, 1927; Sections 32 to 36, inclusive, 42, 44 to 67, inclusive, 71 to 92, inclusive, and 95 to 146, inclusive, on June 1, 1927, and Section 93 on March 14, 1928.

By the *Liquor Control Act, 1934*, being Chapter 26 of the Statutes of Ontario, *The Liquor Control Act (Ontario)* was amended, particularly with respect to the sale of beer and wine; such amendments were brought into force by proclamation on July 12, 1934.

By a decision of the Court of Appeal of the Province of New Brunswick in the case of *Sheehan v. Shaw* (1), the Court held in effect:—

(a) That the question of deciding whether *The Intoxicating Liquor Act, 1927 (N.B.)*, is as restrictive as the *Canada Temperance Act* is one for the decision of the Governor in Council, and not for the decision of that Court.

(b) That the *Canada Temperance Act* having been suspended in a certain county it will continue suspended until the Governor in Council advises that the said *Intoxicating Liquor Act, 1927*, is not as restrictive as to the sale and traffic in intoxicating liquors as the *Canada Temperance Act*, or it will continue suspended if no action is taken by the Governor in Council in regard to the matter.

Considerable legal opinion, including that of the Department of Justice, is in conflict with the decision of the Court of Appeal in New Brunswick.

AND WHEREAS the Minister of Justice is of the opinion that it is expedient that the questions in controversy respecting the interpretation of Section 4C of Chapter 19 of the Statutes of 1916, as enacted by Section 2 of Chapter 30 of the Statutes of 1917 and of Section 175 of the *Canada Temperance Act* and whether or not Part II of the *Canada Temperance Act* is in operation in the said Counties, should be referred to the Supreme Court of Canada for hearing and consideration;

THEREFORE His Excellency the Governor General in Council, in the exercise of the powers conferred by Section 55 of the *Supreme Court*

Act, is pleased, hereby, to refer to the Supreme Court of Canada for hearing and consideration the following questions:

Question 1—

Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act*?

Question 2—

If the answer to Question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in the said Counties of Perth, Huron and Peel?

Question 3—

If the answer to Question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in the said Counties?

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E. J. LEMAIRE,
 Clerk of the Privy Council.

The first question for examination in logical order concerns the construction of section 175. The condition with which we are concerned under which a suspension, by force of that section, comes into operation is embodied in the words,

* * * 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 meaning of these words, in our opinion, is that the laws of the province relating to the sale and traffic in intoxicating liquors shall be as "restrictive" of such sale and traffic as the provisions of Parts I to IV of the *Canada Temperance Act*. Moreover, the comparison required for the purposes of applying the condition is a comparison of the laws of the province with the provisions of the Parts of the *Canada Temperance Act* mentioned. We do not think that these words contemplate a process of measuring the comparative efficacy of two legislative enactments in the suppression or the reduction of excessive consumption of intoxicating liquor. The comparison to be instituted is between the provisions of one statute restricting the sale and traffic in intoxicating liquors and the provisions of another dealing with the same subject.

As regards the two statutes now before us, we think there is no difficulty, for reasons we shall presently give, in reaching a conclusion without resort to evidence touching the practical operation of the statutes; but, before explaining these reasons, it is necessary to consider the decision

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of the Supreme Court of New Brunswick in *Sheehan v. Shaw* (1).

The advisers of His Excellency have had some doubts about that decision and it is because of these doubts that the interrogatories set out in the Order in Council are now before us. The question concerns the final clause of section 175, which is in these words:

* * * such suspension to commence ten days after the date of the publication of such order and to continue as long as the provincial laws continue as restrictive as aforesaid.

The Supreme Court of New Brunswick held that the suspension of the operation of Parts I to IV of the *Canada Temperance Act* effected by an Order in Council, published pursuant to this section, does not come to an end until the Governor in Council has declared that "the provincial laws do not continue as restrictive as aforesaid."

Ex facie, the suspension continues so long, and only so long as "the provincial laws continue as restrictive as aforesaid." "As restrictive as aforesaid" means, we think, according to the natural and grammatical import of the words, as restrictive of the sale and traffic in intoxicating liquors as the provisions of Parts I to IV of the *Canada Temperance Act*. The words "continue as restrictive as aforesaid," which the Legislature has selected, seem to imply that the suspending order is conclusive as regards the validity of the assumption upon which it is based, viz., that the provincial laws are, in the material respects, as restrictive as the provisions of the *Canada Temperance Act*, and that this conclusiveness continues to attach to the order so long as the several legislative enactments remain unchanged; but, it would, we think, be a non-natural reading of the words to construe them as if there were inserted after "continue", the phrase "in the opinion of the Governor in Council". This view is strengthened by reference to the circumstance that no method is provided for calling the matter to the attention of the Governor in Council, or for the manner in which the opinion is to be expressed or announced. If such had been the intent of the section, we cannot doubt that some procedure with reference to such matters would, in conformity with the legislative practice of the Parliament of Canada, have been laid down.

There is not much difficulty as to the scope of the phrase "sale and traffic in intoxicating liquors." The heading of Part II of the Act is "Traffic in Intoxicating Liquors." The sections of that Part (sections 118 to 127 inclusive) indicate very clearly that "traffic" comprises commercial dealings in intoxicating liquor, including, not only the sale or barter of the same, but also the exposing or keeping for sale of such liquor, the sending, shipping, bringing, carrying of such liquor into the territory in which the prohibitions of the Act are operative, the delivery to any consignee or other person, or the storing, warehousing or keeping for delivery any such liquor so sent, shipped, brought or carried. These and similar matters seem to be the matters contemplated by the phrase "sale and traffic in intoxicating liquors." Such, it may be observed, are the matters in respect of which the prohibitions and restrictions of the Act are imposed. The probable intention would appear to be that it is in relation to such matters that the restrictiveness of the provincial laws is to be compared with the restrictiveness of the *Canada Temperance Act*.

The language employed does not suggest that the Legislature is envisaging a comparison between the feasibility or efficacy of the respective methods prescribed by the two systems of legislation for bringing the prohibitions and restrictions of the several enactments into operation. It was ingeniously argued that these last mentioned matters must be contemplated as subjects of comparison by reason of the reference to Part I of the *Canada Temperance Act*. But that reference is otherwise quite easily explicable. The prohibitions in Part II are conditionally expressed. The introductory words of section 118 are these:

From the day on which this Part comes into force and takes effect in any county or city, and for so long thereafter as, and while the same continues or is in force therein, * * *

The enactment by virtue of which Part II comes into force, and by virtue of which the conditional prohibition takes effect, is to be found in Part I; and it was, no doubt, considered that, this enactment of Part I being the necessary complement of Part II, the omission of all reference to Part I in section 175 might leave that section incomplete and obscure.

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To compare, then, the respective systems of restriction created by the statutes, we have to consider: First of all, the provisions of Part II of the *Canada Temperance Act* may fairly be described as prohibitory; and it is, perhaps, better to quote here section 118 in full:

118. From the day on which this Part comes into force and takes effect in any county or city, and for so long thereafter as, and while the same continues or is in force therein, no person shall, except as in this Part specially provided, by himself, his clerk, servant or agent,

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

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;
- (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.

There are certain exceptions in the subsequent sections of Part II. Provision is made, for example, for the sale of wine for sacramental purposes; for the sale of intoxicating liquor for exclusively medicinal purposes, and for use in good faith in some art, trade or manufacture; and then there are provisions authorizing the sale by licensed distillers and brewers within the area in which the prohibition is in force, as well as by wholesale merchants and traders on the condition that such sales shall be in quantities of not less than ten gallons at any one time, and then only to druggists and vendors specially licensed by the Lieu-

tenant Governor in Council in the province, or to persons whom the seller has good reason to believe will forthwith carry the same beyond the limits of the territory in which the prohibition is in force.

There are also exceptions in relation to the purchase or sale by legally qualified chemists, physicians or druggists of officinal medical preparations, patent medicines, or for pharmaceutical preparations containing alcohol but not intended for use as beverage; of methylated spirits for pharmaceutical and mechanical uses; of spirituous liquors or alcohol for exclusively medicinal purposes; or for *bona fide* use of some trade, art or manufacture.

Turning now to the *Liquor Control Act* of Ontario (R.S.O. 1927, ch. 257, as amended by the statutes of 1934, ch. 26). It is perfectly obvious from an inspection of its provisions that it does not aim at the prohibition of the sale and traffic in intoxicating liquors in the sense of the *Canada Temperance Act*. The purpose of the original Act was, broadly, to establish a government monopoly in the sale of liquor, but to provide, by means of government shops chiefly, liquor for sale which might be purchased by retail with virtually no limit as to quantity by persons possessing permits issued under the statute, which permits could be obtained upon the payment of a small fee by any resident of the province of twenty-one years of age.

Very important changes were introduced by the statute of 1934, especially in relation to the permit system, and a multiplication of agencies for the sale of wine and beer. As we are only concerned with the statute as amended, we proceed at once to summarize the law as it now stands.

A Board, known as the Liquor Control Board of Ontario, is constituted by the statute (section 3) and is charged with the administration of the Act, "including the general control, management and supervision of all Government liquor stores."

The Board (section 9) is empowered to buy and sell liquor, to control the possession, sale, consumption, transportation and delivery of liquor in accordance with the provisions of the Act and the Regulations; to establish liquor stores; to make provision for the maintenance of warehouses for beer, wine or liquor; to grant, refuse, sus-

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pend and cancel permits for the purchase of liquor; to appoint officials to issue and grant permits under the Act; and generally to do all things which the Board may deem necessary or advisable for the purpose of carrying into effect the provisions of the Act and the Regulations. The Board is empowered (section 10), with the approval of the Lieutenant Governor in Council, to make regulations not inconsistent with the statute, for carrying out the provisions of the Act, for the efficient administration thereof; and such regulations on publication in the Ontario Gazette shall have the same force as if enacted in the statute itself.

Two classes of permits are provided for (s. 37); individual permits and special permits. Individual permits are granted to individuals of the full age of 21 years having resided in the province for the period of at least one month immediately preceding the date of his making the application. Individual permits may be granted to non-residents for a period not exceeding one month. Special permits, when authorized by the regulations, may be granted to enable the applicant to purchase liquor for some specified purpose; and, by the Regulations (No. 8), permits of this character are authorized. But, for the purchase of beer and wine, no permit is necessary.

By section 37 (5) the Board is authorized so to provide by regulation, and Regulation No. 1 is in the following terms:

1. A person other than the holder of an authority under the Act, unless he is prohibited by law or by a regulation or order of the Board, may under the supervision of the Board purchase beer, wine and native wine from a vendor, brewer, brewer's agent, or the holder of a Native Wine license as the case may be without any individual or special permit being necessary therefor, and beer, wine and native wine so purchased may be had, possessed, given and consumed in the residence of the purchaser.

Then, in addition to Government stores, the Act, since the amendment of 1934, provides for a number of agencies through which liquor may be distributed. These are distillers, brewers, wineries, standard hotels and beverage rooms.

By section 51 of the Act, distillers may sell their products "to the Board" or "as the Board may direct."

By section 45, brewers may be licensed:

(a) to keep for sale and sell beer to the Board;

- (b) to deliver beer on the order of the Board or of a vendor to any person named in such order at the address therein stated.
- (c) to keep for sale and sell beer under the supervision and control of the Board and in accordance with this Act and the regulations.

And, by force of Regulations Nos. 1 and 45 to 49, brewers may sell and keep for sale beer; and a brewer or brewer's agent may accept orders by telephone for the sale of beer, or to the holder of an authority under the Act, and may sell and deliver the beer so ordered.

There are similar provisions for the sale of native wines by the manufacturers thereof.

Then, by section 69 (1) the Board may issue "authorities" for the sale of beer and wine in standard hotels and in such other premises as the Regulations may provide and define. And, by Regulations 156 and 157, the Board may issue "authorities" for the sale and consumption of beer and wine with meals in the dining rooms of standard hotels and clubs, in railway dining cars, in steamship dining rooms and in military messes; and of beer without meals in the beverage rooms of standard hotels, in clubs, in railway dining cars, in steamships and in military messes.

The Act, of course, contains very stringent provisions designed to prevent the sale of intoxicating liquor and the consumption of it otherwise than as authorized and permitted by the Act. Nevertheless, the enactment in its essence is an Act for regulating the sale and consumption of such liquor. It cannot be seriously argued that, in point of restrictiveness, any attempt is made to approach the prohibitory provisions of Part II of the *Canada Temperance Act*. The respective objects of the two enactments are in that respect opposed to one another. The one statute, speaking broadly, has for its object the prevention of commercial dealings in intoxicating liquor within the territory in which it is in force. The other makes provision for enabling the people to procure such liquor by the purchase of it through Government stores and the other agencies mentioned above.

On the argument counsel on behalf of the provinces of Ontario and Quebec raised the question of the constitutional validity of the *Canada Temperance Act*. Reading the Order of Reference in light of the decision in *Russell*

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v. *The Queen* (1) and of the judgment of the Judicial Committee on the *Local Option Reference* in 1896 (2), 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.

The conclusion seems to be that Interrogatory No. 1 must be answered in the negative; and, for the reasons already given, Interrogatory No. 2 should be answered in the affirmative.

CANNON J. (dissenting)—I had the advantage of perusing the carefully prepared opinions of my Lord the Chief Justice and of my brother Crocket. I cannot escape the conclusion that Parliament has left to the Executive and the Secretary of State the enforcement of the *Canada Temperance Act* and that they must take the necessary steps to bring to the knowledge of these counties the enforcement, suspension, revocation or revival of the Act, from a given date to be published in the *Canada Gazette* through a proclamation of the Governor General in Council.

It is essential, specially in the case of a penal statute, that the subjects be notified of the date from which they are bound to obey it. It appears from sections 9, 10, 110, 116, 175 of the *Canada Temperance Act* that the time of the bringing into operation of the provisions of the statute, of their revocation or of their suspension, is, after certain formalities, to be fixed at the discretion of the Governor General in Council. A formal announcement, under the great seal, of what the Governor General in Council wishes to make known to the subjects is a proclamation. This was needed to fix a date for the suspension of the Act. It is also needed to fix a date from which the Act will again operate in these counties, if the Governor General in Council is satisfied and deems it advisable so to do.

(1) (1882) 7 App. Cas. 829.

(2) Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348.

Parliament, in this instance, has left the necessary measure preliminary to the enforcement of the Act, its suspension and revival to the executive powers of the Crown, i.e., the Governor General in Council. Promulgation of an Act is not necessary when Parliament makes it enforceable on the day of its sanction, because all citizens are supposed to be present or represented in Parliament and, as a consequence, to know what takes place there; but when, as in this case, the commencement of the enforcement is conditional and requires a vote of the electors and a proclamation, the Act cannot be enforced without complying with those requirements and, specifically, without bringing to the knowledge of the citizens in the interested area, the date after which they must comply with its requirements.

Now, section 23 of the *Interpretation Act*, R.S.C., 1927, ch. 1, enacts:

23. When the Governor General is authorized to do any act by proclamation, such proclamation is understood to be a proclamation issued under an order of the Governor in Council; but it shall not be necessary that it be mentioned in the proclamation that it is issued under such order.

We may also apply, as a guiding principle in this matter of interpreting section 175 of the *Canada Temperance Act*, what is found in s. 31 (g) of the same *Interpretation Act*:

31. In every Act, unless the contrary intention appears: * * * *

(g) if a power is conferred to make any rules, regulations or by-laws, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, regulations or by-laws and make others;

I cannot conceive that Parliament ever contemplated that the suspension of the Act would be discontinued not from a date to be fixed by proclamation of the Governor General in Council, but would be left to the possible divergent opinions of Justices of the Peace or Police Court judges, with the necessary resultant state of incertitude for the populations concerned. Parliament has directed that proclamations should be issued when the executive has to take action to put the Act in force in a given territorial division of Canada. Under section 31(e) of the *Interpretation Act*, "if a power is conferred * * * the power may be exercised * * * from time to time as occasion requires." This is an occasion that requires that such

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powers as are necessary to enable the executive to enforce the revival of the Act "shall be understood to be also given" under sub-section (b) of the same section 31.

I would, therefore, answer as follows the questions put to us:

QUESTION 1—Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act*?

Answer: *Ex facie*, according to the *wording* of the Acts, the Provincial Act, as amended in 1934, is not more restrictive of the sale and traffic of intoxicating liquors *quâ* the consumer; but it establishes and protects a monopoly and control of such sale and traffic within the Province under very drastic penalties. As to the actual *working* of the Acts, in the three counties interested, I am not in a position to answer this pure question of fact, having no elements before me to make any comparative study of results.

QUESTION 2—If the answer to Question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in the said counties of Perth, Huron and Peel?

Answer: No.

QUESTION 3—If the answer to Question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in the said counties?

Answer: A proclamation should be issued bringing to the knowledge of these counties the date fixed by Order in Council terminating the suspension of the Act.

CROCKET, J. (dissenting)—With the greatest deference, I am of opinion that on the true construction of s. 175 of the *Canada Temperance Act* the question as to whether the laws of any province relating to the sale and traffic in intoxicating liquors are at any time as restrictive as the provisions of Parts I to IV of the *Canada Temperance Act* is a question for the determination of the Governor in Council and not for this or any other court.

As I read s. 175, as it stands in the Revised Statutes of Canada, 1927, it empowers the Governor in Council, when a petition is received from the electors of any city or county

in accordance with the provisions of ss. 112, 113 and 114, praying for the revocation of any Order in Council previously passed bringing Part II of the *Canada Temperance Act* into force in such city or county, to suspend, by order to be published in the *Canada Gazette*, the operation of the provisions of the *Canada Temperance Act* in such city or county without the polling of any votes for and against as required by ss. 112, 113 and 114, provided

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;

and enacts that, if and when an Order in Council is so passed and published, such suspension shall commence ten days after the date of the publication of such order and continue as long as the provincial laws continue as restrictive as aforesaid.

It will be observed that, while the Governor in Council is empowered to declare the suspension of the Act on the condition designated, the enactment itself provides when the suspension shall commence and how long it is to continue. The crucial question therefore is: What was the intention of Parliament as indicated by the words of the enactment "to continue as long as the provincial laws continue as restrictive as aforesaid?"

It seems to me to be manifest that, when read in connection with the antecedent text of the section, as, of course, they must be, the last words must be taken to intend, in the event of the provincial liquor laws being altered after the publication of an Order in Council suspending the operation of the *Canada Temperance Act* in any city or county, so as to render them less restrictive than the provisions of the *Canada Temperance Act*, that the suspension should continue until it is so adjudged and declared by some competent authority. Otherwise it would be quite unintelligible. It would be impossible for anyone to know whether the *Canada Temperance Act* was or was not in force in a city or county at any time or whether the provincial liquor laws were or were not in force.

Assuredly Parliament did not intend that the suspension should automatically cease upon the passage and coming into force of any provincial legislation in any way amending the provincial liquor laws, for it has plainly indicated

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that the suspension shall continue "so long as the provincial laws continue as restrictive as the provisions of the *Canada Temperance Act*". It is this provision which on its very face necessitates an adjudication by some authority at some time as to whether the provincial laws have ceased to be as restrictive in comparison with the provisions of the *Canada Temperance Act* as when the suspension of the latter Act was proclaimed. Is it to be supposed that it was intended by Parliament that such adjudication should be made by this Court or by the Supreme Courts of the different provinces? I cannot for a moment think so. Is it to be supposed that it intended that it should be left to a Police or Stipendiary Magistrate or to two Justices of the Peace to make the adjudication on such a question before issuing his or their warrant or summons charging an alleged offender with a violation of any one or more of the provisions of the *Canada Temperance Act*, the operation of which has been declared by the Governor in Council to have been suspended? I cannot, for my part, read the last words of the section in connection with its preceding text, to which the concluding words themselves expressly refer, as denoting an intention that the life of an Order of the Governor in Council suspending the operation of such an Act as the *Canada Temperance Act* in a city or county with all its provisions for the prosecution and punishment of offenders by fine and imprisonment should depend upon the view of a local Police or Stipendiary Magistrate as to the relative restrictive character of the provisions of that Act and the provisions of the provincial liquor laws. That, however, it seems to me, must be the result if the phrase "to continue as long as the provincial laws continue as restrictive as aforesaid" is to be construed, standing by itself, according to its strict grammatical meaning, without reference to the text of the whole enactment, as excluding the power of the Governor in Council to rescind or cancel all or any of the suspension orders he has made under the provisions of s. 175, upon the occurrence of the condition which calls for such action.

The reasonable and logical interpretation, in my view, is that Parliament, having empowered the Governor in Council to make the suspension order, if satisfied that the

provincial liquor laws were as restrictive as the provisions of the *Canada Temperance Act*, that order should continue in force until it should be rescinded or revoked in the usual manner by the Governor in Council who made it, when in the opinion of the Governor in Council the provisions of the provincial laws should cease to be as restrictive as the provisions of the *Canada Temperance Act*. That is the interpretation which the Appeal Division of the Supreme Court of New Brunswick placed upon it in November, 1927, when required, in the special stated case of *Sheehan v. Shaw* (1), to construe it in order to determine whether the *Canada Temperance Act* was then in force in the County of Carleton, in which county the Governor in Council had declared its suspension. Any other construction would leave both the federal and provincial liquor laws in such a state of confusion and uncertainty as to practically destroy their efficacy, and create such an anomaly in the practice governing the making and rescinding of Orders in Council and their promulgation as well as in the application and enforcement of the criminal and quasi-criminal laws of the country as could not well be imputed to the intention of Parliament.

I entirely concur in the interpretation which the Court of Appeal of the Province of New Brunswick placed on the enactment in question in 1927 in *Sheehan v. Shaw* (1) and in its conclusion, as stated by Sir Douglas Hazen, the learned Chief Justice of that Court, that the question as to whether the liquor laws of any province were as restrictive as the provisions of the *Canada Temperance Act* is one for the decision of the Governor in Council on the recommendation of the Secretary of State and not for the decision of the Supreme Court of such province, and that the suspension of the operation of the provisions of that Act, as declared by the Governor in Council, must be held to continue in force until it is cancelled or dealt with by the Governor in Council. Though the concluding phrase does not expressly say so, I think the whole section clearly implies it. It is certainly not incapable of being read in a way which will avoid such a patent anomaly as that which must result from the suggested alternative in-

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(1) 54 N.B.R., 192.

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terpretation, without doing any violence to the grammatical meaning of the quoted phrase with which the section ends. The highest courts throughout the Empire have again and again held that certain words must be understood as intended to be incorporated in statutory enactments notwithstanding that the enactments have not expressly used them. Indeed, I think it will be found that, generally speaking, whenever adherence to the strictly grammatical meaning of isolated phrases in a statutory enactment leads to a patent absurdity or repugnance, they have never hesitated to discard the strictly grammatical meaning by reading into the enactment such words as will make it intelligible and reasonable, as being necessarily understood or implied.

The decision of the Appeal Division of the Supreme Court of New Brunswick has never been challenged during the seven or eight years which have since elapsed, with the result that in the majority of the counties of that province where the *Canada Temperance Act* was formerly in force, the provisions of the New Brunswick *Intoxicating Liquor Act* have consistently been enforced in all those counties as well as in the other counties of New Brunswick as the recognized law of the entire province, many alleged offenders having in the meantime been punished by heavy pecuniary fines and severe imprisonment penalties under the provisions of the last mentioned Act.

We are now asked by the Governor in Council to re-open this most important question on this reference. The formal order of reference sets forth the effect of the decision of the Court of Appeal of New Brunswick in the case referred to and, singularly enough, states that "considerable legal opinion, including that of the Department of Justice, is in conflict with the decision of the Court of Appeal in New Brunswick."

Being of opinion, for the reasons already stated, that it is entirely a question for the decision of the Governor in Council on the recommendation of the Secretary of State as a matter of governmental responsibility, I respectfully beg to be excused from answering Interrogatory No. 1.

Interrogatory No. 2 is one which clearly falls within the terms of s. 55 (b) of the *Supreme Court Act*, concerning,

as it does, the interpretation of an enactment of the Dominion Parliament, and involves no intervention by this Court in the exercise of governmental responsibility. Whether Interrogatory No. 1 be answered by other members of the Court in the affirmative or in the negative, I should, for the reasons already stated, answer Interrogatory No. 2 in the negative.

To Interrogatory No. 3 my answer is: By rescinding the Orders in Council suspending the operation of the *Canada Temperance Act* in the counties named, if the Governor in Council is satisfied that the provisions of the liquor laws of Ontario are not as restrictive as those of the *Canada Temperance Act*, and promulgating the rescinding orders in the usual manner.

Question No. 1 answered in the negative. Question No. 2 answered in the affirmative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Ontario: *I. A. Humphries.*

Solicitors for the Moderation League of Ontario: *Smith, Rae, Greer & Cartwright.*

Solicitors for Huron County Temperance Federation, Perth Branch of the Ontario Temperance Federation, and Peel Temperance Federation: *Rowell, Reid, Wright & McMillan.*

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