

IN THE MATTER OF THE REPRESENTATION IN
THE HOUSE OF COMMONS OF CERTAIN PRO-
VINCES OF THE DOMINION CONSEQUENT
UPON THE LAST DECENNIAL CENSUS.

1903

*April 20,
21, 22.

*April 29.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Constitutional law—B.N.A. Act, 1867, s. 51—Construction—“Aggregate population of Canada.”

In determining the number of representatives to which Nova Scotia and New Brunswick are respectively entitled after each decennial census the words “aggregate population of Canada” in subsec. 4 of sec. 51 of the B.N.A. Act 1867, mean the whole population of Canada including that of provinces which have been admitted subsequent to the passing of the Act.

SPECIAL CASE referred by the Governor General in Council to the Supreme Court for hearing and consideration.

The case was referred to the court in the following form :

“Extract from a report of the Committee of the Honourable the Privy Council approved by the Governor General on the 17th April 1903.

“On a report dated 15th April 1903, from the Minister of Justice, submitting that in connection with the proposed readjustment of the representation in the House of Commons of the provinces of the Dominion, consequent upon the last decennial census, the Province of New Brunswick supported by the Province of Nova Scotia contends for a construction of section 51 of the British North America Act, 1867, different from that which has been heretofore applied and which is adopted by your Excellency’s advisers. These provin-

*PRESENT :—Sir Elzéar Taschereau C.J., and Sedgewick, Girouard, Davies, Mills and Armour JJ.

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ces have therefore asked that a reference be made to the Supreme Court of Canada for a determination of the question in difference.

“The Minister, therefore, recommends that the following question suggested by the Government of New Brunswick and approved as the Minister of Justice is informed by the Government of Nova Scotia, be referred to the Supreme Court for hearing and consideration, pursuant to the authority of the Supreme and Exchequer Courts Act, as amended by the Act 54 & 55 Victoria, Chapter 25 intituled ‘An Act to amend Chapter 135 of the Revised Statutes intituled An Act respecting the Supreme and Exchequer Courts.’

“In determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words “aggregate population of Canada, in subsection 4 of section 51 of the British North America Act 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada including that of Provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?

“The Committee submit the same for approval.

“(Sgd.) JOHN J. MCGEE,
 “*Clerk of the Privy Council.*”

Counsel :

For the Dominion of Canada : *The Honourable Charles Fitzpatrick K.C.*, Minister of Justice and Attorney General for Canada. *E. L. Newcombe K.C.*, Deputy Minister of Justice.

For the Province of Ontario : *Æmilius Irving K.C.*

For the Province of New Brunswick : *The Honourable*

William Pugsley K.C., Attorney General for the Province of New Brunswick, and *Geo. W. Allen K.C.*

For the Province of Nova Scotia: *The Honourable J. W. Longley, K.C.*, Attorney General for the Province of Nova Scotia, and *E. M. Macdonald Esq.*

For the Province of Quebec: *L. J. Cannon K.C.*, Deputy Attorney General for the Province of Quebec.

Irving K.C. for the Province of Ontario. Your Lordship read yesterday the reference that has been made to this honourable court, and it would hardly seem necessary to read it again. But as it is but a few lines and I would like to state the issue that Ontario takes upon it, I therefore, with your permission, will read it.

“In determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words ‘aggregate population of Canada’ in sub-section 4 of section 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada including that of Provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?”

That, I understand, is the question, and the issue that Ontario takes upon it is: That sub-section 4 of section 51 should be construed as meaning the population of the four original provinces of Canada and that there has been no legal change in that to the present time.

I have to beg leave to refer your Lordships to the clauses of the British North America Act which bear upon this question. The third clause of the Act provided that there should be one Dominion.

“It shall be lawful for the Queen, by and with the advice of Her Majesty’s Most Honourable Privy Coun-

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cil, to declare by Proclamation that, on and after a day herein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three provinces shall form and be one Dominion under that name accordingly."

Then follows section 4 which is as follows:

"The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the union, that is to say, on and after the day appointed for the union taking effect in the Queen's proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act."

Then the next clause says:

"Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia and New Brunswick."

The next clause I do not think is material to the issue, but I come to clause 8 which says:

"8. In the general census of the population of Canada which is required to be taken in the year one thousand eight hundred and seventy one, and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished."

That is a very important clause and bears very much upon the general question that is to follow. Then I have to ask your Lordships to allow me to go to section 51 which is the section indicated in the question submitted to your lordships.

"51. On the completion of the census in the year one thousand eight hundred and seventy one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner, and from such time as the

Parliament of Canada from time to time provides, subject and according to the following rules.”

There, your Lordships see that the census which by section 8 was to specially distinguish, the populations of the four provinces, is there again referred to as the representation of the four provinces involved in the census provided for in section 8. The rules are as follow :—

“1. Quebec shall have the fixed number of sixty five members.”

“2. There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).”

Then sub-section 3 provides for the computation in fractional numbers which I do not think it is important to trouble your Lordships with. Sub-section 4, which is the sub-section to which your Lordships' attention is particularly directed is as follows :

“(4). On any such re-adjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding re-adjustment of the number of members for the province is ascertained at the then latest census to be diminished by one twentieth part or upwards.”

Your Lordships will see there, that the number of members shall not be reduced unless the proportion which the number of a particular province bore to the number of the aggregate population of Canada, is ascertained at the then latest census to be diminished by one twentieth part or upwards. Now then the next question as I understand here is : What does “Can-

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ada" mean in that clause? At that time and up to say 1871, there was no question that by "Canada" was meant the four provinces which had been before specified under the clause to which I drew your Lordships' attention, as embraced under the term "Canada" as constituted under this Act. It says "Canada" shall be taken to mean "Canada" as constituted under this Act, and in the general census of the population of Canada the respective populations of the four provinces shall be distinguished. Well my Lords, this is as it were the first resting place. Under this Act as it stood then there could be no question but that the re-adjustment was to be of the four provinces, and of the aggregate population of those four provinces thus described here in this particular clause under the word "Canada" as the earlier clauses of the Act has contemplated might be done. Then, the following clause, section 52, may be read because it bears an important signification with reference to this.

"52. The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed."

Now, that might be taken to mean, on the first glance, that Parliament, provided it did not disturb the proportionate representation, might increase the number of members over all the provinces above what they were under the original Act. But it also is capable of being applied differently and I think we will find one of the elements of difference in the following section :

"146. It shall be lawful for the Queen by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the

respective Legislatures of the Colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces, or any of them, into the Union, and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

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I therefore say that it is on such terms and conditions in each case expressed and as the Queen thinks fit to approve, that representation in Parliament is to be accorded; now the representation of the provinces prescribed by this Act, as far as we have gone, is of these four first provinces, and if that proportionate representation which is the whole keystone of this Act be preserved, then the Parliament of Canada shall have the right to increase its number of representatives from time to time provided the proportion of representation is not disturbed. I think that is a point that cannot be got over. I think that there can be no disturbance of that arrangement. In this Act, by section 52, it was contemplated that the area of Canada as it then was should be enlarged on terms and conditions to be approved by the Queen and upon addresses to be submitted. If these terms and conditions, as we shall come to them, provide for representation in Parliament and representation in the House of Commons, then here we have laid down the rule under which it is to prevail, namely: Provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed; not the proportionate representa-

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tion of provinces that may be brought in hereafter. This is the primary condition connected with the whole of the building of the act of union.

MR. JUSTICE ARMOUR: It seems to me that you lose sight of the recital of the Act providing for the union. The union is not to consist only of these four provinces but it is to consist also of such provinces as may be brought in from time to time.

And then section 4 says: "The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on or after the union, that is to say, on or after the day appointed for the union taking effect in the Queen's proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act."

Mr. Irving: That is when there is a proclamation introducing the outlying provinces.

MR. JUSTICE ARMOUR: Suppose only one province comes in and then there was a decennial census, how is that province's representation to be ascertained? Must it not be with regard to the aggregate population of the whole?

Mr. Irving: But there would have been no census taken of it, if I understood your Lordship's premises?

MR. JUSTICE ARMOUR: I say, suppose only one province was introduced, and that after the decennial census had taken place.

Mr. Irving: Including that province.

MR. JUSTICE ARMOUR: Yes. Then how is that province's representation to be adjusted?

Mr. Irving: That province's representation was to be adjusted according to the distribution of the four original provinces

MR. JUSTICE ARMOUR: But then, the four original provinces are always to remain the same according to

your theory, and therefore you would have a stray horse in the province that was outside.

Mr. Irving: This province outside joins subject to terms, according to its proportion of the four provinces of which it is not one.

MR. JUSTICE ARMOUR: Then you would not include its population at all in ascertaining its representation; you would simply take the population of the four provinces.

Mr. Irving: Of the four provinces.

MR. JUSTICE ARMOUR: What proportion then would you give?

Mr. Irving: Whatever was the 65th as provided with reference to Quebec. Then it would get its members in that same proportion.

MR. JUSTICE SEDGEWICK: That is all that is contended for now.

Mr. Irving: That is all I am contending for now. My learned friends, however, say that there is to be a pool of the whole population.

MR. JUSTICE SEDGEWICK: And there will be representation by population in each province of Canada; that is what they are contending for.

Mr. Fitzpatrick: Of course.

MR. JUSTICE SEDGEWICK: That is the old question.

Mr. Irving: I am contending for the same thing only it is a different way of putting it. My learned friends take the grand total or aggregate of the whole census of the Dominion of Canada and I say that it should be the aggregate of the four provinces as they were at the last decennial census.

MR. JUSTICE ARMOUR: The motive power that put the British North America Act into force was desire to obtain representation by population.

Mr. Irving: Does it say so in the recital, my lord?

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MR. JUSTICE ARMOUR: The effect of your contention would be that there would be no such thing as representation by population and the older provinces would have a certain representation according to the time when they were constituted, and the newer provinces would have a representation of their own.

MR. JUSTICE DAVIES: I understand you are only arguing so far as the unit is concerned. You say the unit is obtained by dividing the population of Quebec by the population of the old four provinces.

Mr. Irving: Yes, my Lord.

MR. JUSTICE DAVIES: And the other construction involved the division of the population of Quebec by the population of the whole Dominion.

Mr. Irving: Yes, my Lord.

MR. JUSTICE DAVIES: That is the only point between you; representation by population would still remain.

Mr. Irving: I am coming to that. If his Lordship will permit me to say so, I do not think the words "representation by population" are in this Act from one end of it to the other, and whatever the arguments may have been before, I do not think we can now import them into this Act. This is a strict question of the construction of an instrument of Government which is like a great charter.

MR. JUSTICE ARMOUR: You are entitled to look at the position of things when the British North America Act was passed in order to ascertain what they were intending to do, but you are not to alter the wording of the Act by that.

Mr. Irving: I do not know that the political question of representation by population as it was argued before Confederation ever assumed such a concrete form that one could say exactly what was to be introduced here.

MR. JUSTICE MILLS: Your contention is confined to the assumption that the word "Canada" in the British North America Act means the four provinces.

Mr. Irving: I contend that, my Lord.

MR. JUSTICE MILLS: What name would you give to the additional Territories when these Territories became Provinces? You have a larger Dominion and you have no name that you could apply to the entire Dominion.

Mr. Irving: I do not now that it is any argument in favour of the broader question, as to what are the conveniences or the inconveniences to which it may lead, unless we can find in any of the subsequent Acts anything which would lead to a different view than the view I am endeavouring to uphold now.

MR. JUSTICE MILLS: Take section 101 of the British North America Act which provides for the constitution of a general court of appeal in Canada. Would not your contention go this far, that a court of appeal created under that Act would be a court of appeal for the four provinces and not a court of appeal for any other portion of the Dominion?

Mr. Irving: I would like to look at that particular clause before I would give your lordship an answer to that if it be deemed that I should give an answer to it. Section 101 says:

"101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organisation of a general court of appeal for Canada."

MR. JUSTICE MILLS: Would that be the four provinces only?

Mr. Irving: I do not say that necessarily. I am now on the question of representation. I am not dealing with reference to any wider question. I am confined to the question of representation and I say that so far, if I have made out expressly that those four provinces

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are to be the body from which the unit is to be established among themselves and that that is to prevail everywhere, then that does not affect other questions that may arise upon other subjects, because I do not present a scheme which would be perfect as a whole. Your Lordship may say that it is extremely inconvenient. That may be so but I am not dealing with that. I am dealing with what is laid down according to the statute and its convenience or inconvenience has nothing to do with it. I say, therefore, that for other colonies coming in there is a rule preserved by which representation may be given to them. That is rather anticipating some remarks which I am going to make, but does not alter at all the fact that a general court of appeal of Canada should not apply to these provinces that may be admitted. I am only dealing now with the question of the respective representation in Parliament of the four original provinces and illustrating how other provinces might be affected, and that there is a rule existing to give them representation upon the distribution, in section 52 :

“ Provided the proportionate representation of the province prescribed by this Act is not thereby disturbed.”

Now the next in order is the Imperial Act of 1871. Prior to that there had been two Acts of the Parliament of Canada. One of them was on the surrender, or the acquisition perhaps would be at this time the proper term, of Rupert's Land. That provided for the peace, order and good government of that part of Canada, and there is also the “ order ” afterwards for giving Manitoba a constitution and a representation. It was deemed questionable, whether the Province of Canada had any power to admit or to create a new province out of the territories without special power, the

British North America Act not covering that. This Imperial Act is as follows:

“Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish provinces and territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such provinces in the said Parliament, and it is expedient to remove such doubts and to vest such powers in the said Parliament.”

The second clause is :

“2. The Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order and good government of such province and for its representation in the said Parliament.”

That was establishing a new province. Then again :

“3. The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish or otherwise alter the limits of such province upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any province affected thereby.”

“4. The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any province.”

Now then, those matters do not apply so much to Manitoba. This was for establishing new provinces,

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but in the case of Manitoba the following acts were passed by the Parliament of Canada: An Act for the temporary Government of Rupert's Land and the North West Territories when united with Canada; and an Act to Amend and continue the Act 32 and 33 Vict. ch. 3 and to establish and provide for the government of the Province of Manitoba, shall be deemed to have been—

THE CHIEF JUSTICE: Do I understand you to contend, or if I understand you well I think you do contend, that the word "Canada" in sub-section 4 applies to the four provinces only.

Mr. Irving; Yes, my Lord.

THE CHIEF JUSTICE: Do you contend that the word "Province" preceding and subsequent, extends only to the four provinces?

Mr. Irving: Only to the four provinces.

THE CHIEF JUSTICE: The word "Province"?

Mr. Irving: Yes—on any such readjustment.

THE CHIEF JUSTICE: Does that mean only for a province?

Mr. Irving: Yes.

THE CHIEF JUSTICE: That is one of the four provinces.

Mr. Irving: That is one of the four provinces.

THE CHIEF JUSTICE: And later on if in the North West Territories or British Columbia or Manitoba, or if anywhere the number should be reduced, this would not apply according to you—this applies only to the four provinces.

Mr. Irving: To the four provinces.

THE CHIEF JUSTICE: Altogether.

Mr. Irving: Altogether.

THE CHIEF JUSTICE: I do not see how you can work it out.

Mr. Irving : I have not got quite through, my Lord ; I am trying to work it out. These four provinces are to be measured in their readjustment by the aggregate of these four provinces, under the name of " Canada ". I understand that the argument on the other side will be, that the aggregate population of Canada is the aggregate of the whole of Canada whatever it may be, a dozen provinces or a dozen territories, and then that these four provinces are to be measured by the unit of Quebec divided under that grand total. Now, I come back to it being to the four provinces, and then I say : That the representation which is to be accorded to the other provinces is to be in the same proportion according to the unit that is allowed to Quebec out of the population of Canada, that is, of these four provinces.

I am now at 33 Vic. ch. 3, which is one of the Acts of Canada which was validated by the Imperial Act of 1871, and therefore it has to be read as, and is in fact, an Imperial Act to the full extent as though it were embraced in the British North America Act. The first clause of that Act deals with the boundaries of Manitoba and the second clause gives to Manitoba a constitution. This Act gives a constitution to the Province of Manitoba and section 2 deals with the application to the Province of the provisions of the British North America Act which may be said generally to apply to all the provinces, but it does not touch the question of representation. It says :

" On, from and after the day upon which the Queen, by and with the advice and consent of Her Majesty's Most Honourable Privy Council, under the 146th section of the British North America Act 1867, shall, by order-in-council in that behalf, admit Rupert's Land and the North West Territory into the union or Dominion of Canada, there shall be formed out of the same a province which shall be one of the provinces

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of the Dominion of Canada and which shall be called the Province of Manitoba."

That excludes all the special provisions relating to Ontario and Quebec or New Brunswick or Nova Scotia, but it takes all the clauses which I may say were common to all those provinces and grants them as a constitution to Manitoba, but it does not touch the question of representation which is dealt with in a separate section. It provides for representation in the Senate and it now provides for representation in the House of Commons in this manner :

"4. The said province shall be represented, in the first instance, in the House of Commons of Canada, by four members, and for that purpose shall be divided by proclamation of the Governor General into four electoral districts, each of which shall be represented by one member."

That Act was passed in 1870.

"Provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said province shall be readjusted according to the provisions of the 51st section of the British North America Act 1867."

Therefore, it provides in the case of Manitoba, that its representation shall be readjusted according to the provisions of the 51st section ; the 51st section as I am now arguing to be read as dealing with the original four provinces.

I am not at the clause giving representation to Manitoba. Follow me for a second if you please. There they say, that after 1881 the representation shall be readjusted according to the provisions of the 51st section of the British North America Act, 1867. That leaves the 51st section, as I read it, untouched. In the clause immediately but one before where they were giving a constitution to Manitoba they say this : "As

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if the province of Manitoba had been one of the provinces originally united by the said Act". Why did they not add that on here with reference to the representation, if they meant to do it? Before I get through my argument I hope I shall be able to convince your Lordships, that there is no way in which section 4 is affected, except by what is presumed to be implied. Now, this gives Manitoba an absolute constitution and it says that it shall have the use and the right to all those powers as though Manitoba had been one of the provinces originally united by the said Act. Then the next clause but one to that says that the representation shall be readjusted according to the 51st section, but it does not go on to say, as though Manitoba had been one of the provinces originally united. That is absolutely left out. These Acts are instruments of government; they have got to be read absolutely and in express terms in accordance with what is laid down and so construed. You cannot by adding to the instruments of government imply ideas.

MR. JUSTICE MILLS: That Act was passed immediately after the disturbance in Manitoba, and it was made a subject of discussion in Parliament, as I remember very distinctly, as to whether the Parliament of Canada could by an Act of Parliament, give to a province a constitution under which it should come into the Dominion and which would be unalterable. And so Parliament by certain resolutions that are embodied in the Imperial Act of 1871 got over the *ultra vires* provisions of this Act of 1870.

Mr. Irving: Yes my Lord, but this Act of 1870 which I have been reading having been declared valid and effectual by the Imperial Act is exactly the same as though it were a part of the British North America Act.

MR. JUSTICE MILLS: Made so by the Imperial Act.

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Mr Irving: Yes. It is the Imperial Act that I am relying upon. The Acts which I have read to you, shall be and be deemed to have been valid and effectual for all purposes whatsoever from the day on which they respectively receive the assent in the Queen's name of the Governor General of Canada. Therefore, my Lord, I do not think that this can be explained away by my learned friends. Now, my Lords, I pass to the case of British Columbia. I come to the order-in-council of the 16th May 1871 relating to the admission of British Columbia and it is to be found in the volume of the Dominion statutes of 1872, in the order-in-council in the early part of the volume numbered, in Roman numerals, LXXVII. I refer to section 8 of that, and it is repeated in every one of the addresses so that it is not necessary to refer but to one for they are all alike. It says:

"8. British Columbia shall be entitled to be represented in the Senate by three members and by six members in the House of Commons, the representation to be increased under the provisions of the British North America Act 1867."

Now, with reference to that, the minimum of British Columbia was there settled to be six members to the House of Commons, but on a change of population such as the British North America Act would recognise, it would be liable to be increased. Now the 52nd section of the British North America Act made this provision:

"52. The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed."

Therefore in the case of British Columbia, starting with six members, the Dominion Parliament has power

to increase the representation of the number of members to the House of Commons provided the proportionate representation prescribed by this Act is not thereby disturbed. Therefore so soon as British Columbia had a population which in the ratio of Quebec would entitle it to an increase this section 52 would grant it to the province of British Columbia as a right.

I now take the case of Prince Edward Island and I refer to the order-in-council in that case. It is to be found in the Dominion statutes of 1873; in the orders-in-council grouped in the front part of the volume at page 12 in Roman figures. It provides as follows :

“That the population of Prince Edward Island having been increased by 15000 or upwards since the year 1861, the Island shall be represented in the House of Commons of Canada by six members, the representation to be adjusted from time to time under the provisions of the British North America Act 1867.”

That again brings up the same provision, that it is to be readjusted under the provisions of the British North America Act. Now I believe that there is one other Act which I wish to bring to your Lordships' notice. Of course I am taking only the Imperial Acts which are the only Acts we are interested in. This Act is an Act passed in 1886, 49 & 50 Vic. ch. 35. It is an Act respecting the representation in the Parliament of Canada which for the time being formed part of the Dominion of Canada but are not included in any province. About the same period in the same month of June, there was an Act passed by the Parliament of Canada here respecting the representation of the North West Territories, and this Act that I am now about to read is merely an Act to validate that Act which was then being passed here or had been passed and it recites :

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“Whereas it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada but it is not included in any province.

“The Parliament of Canada may from time to time make provision for representation in the Senate and House of Commons or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.”

That is the general purview of the Act. Then it states that “any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act shall, if not disallowed by the Queen, be and shall be deemed to have been valid and effectual from the date at which it received the assent in Her Majesty’s name” of the Governor-General of Canada.” That refers to the Act of the Dominion of Canada which was being passed in the very same month of June and which is chapter 24.

The Imperial Act refers to this Dominion Act although it was only passed a few weeks before and they probably had not official intimation of it having been passed. It says :

“2. Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act, shall, if not disallowed by the Queen, be and shall be deemed to have been valid and effectual from the date at which it received the assent in Her Majesty’s name, of the Governor General of Canada.

“It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act 1871, has

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effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or of Members as the case may be, provided by any such Acts of the Parliament of Canada for the representation of any provinces or territories of Canada.'

HON. MR. JUSTICE MILLS: That Imperial Act was passed upon the address of the Governor General in Council of Canada to the Government at home.

Mr. Irving: Yes, my Lord. I have now referred to all the legislation or statutes bearing upon the question, and I can only reiterate that which I have stated from the beginning, is the view that I am laying before your Lordships. The word "Canada" in subsection 4 is to be construed as Canada at that particular period, and not the population of Canada as it may be enlarged from time to time.

Pugsley K.C., for the Province of New Brunswick—The question my Lords, which you are called upon to determine is, I think I may fairly say, one of the very greatest importance, not only to the smaller provinces of Nova Scotia and New Brunswick, but also to the province of Ontario. It is of special importance to the smaller provinces because, under the terms of confederation, we were granted representation relatively to our county boundaries, and New Brunswick went into confederation with a population of 250,000. It is proposed now, if the contention of my learned friend the Minister of Justice prevails with a population of 80,000 greater than at the time of confederation its representation shall be cut down from 15 members to 13 members. Starting as we did with a population of 250,000, it is proposed that now, when we have a population of 80,000 greater, the representation of the

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Province of New Brunswick shall be cut down from 15 to 13 members. That is the proposition, and we have only to look forward to the very rapid increase which is likely to take place in the Province of Quebec in view of the new territory which is being added to that province, and also of the rapid increase in the North-West; we have to look forward to the time coming, inside of 30 years at all events, when, if the view of the other side prevails, our representation in New Brunswick would be cut down to five or six members. Therefore your Lordships are called upon to deal with a question which is of very great importance indeed, looking to the future of this country.

Now, my Lords, it seems to me that there is a misapprehension as to the question of representation by population, as applying to the new provinces and the Territories. I submit that under the British North America Act there is no provision whatever for representation in Parliament of the Territories or new provinces, no provision whatever. You may search the British North America Act from beginning to end and you will find no provision with reference to the representation either of the Territories or of new provinces.

MR. JUSTICE ARMOUR: Except it comes in under the 4th clause of section 51.

Mr. Pugsley: But when any new province comes in it may or may not agree to come in under section 51. It was competent for the Imperial Parliament to provide, when Manitoba was created a province, that instead of her representation being readjusted from time to time she should have six members until her population reached 100,000 and after that she should have ten members.

MR. JUSTICE ARMOUR: If it comes in at all, it must come under the provisions of the British North America Act.

Mr. Pugsley : But not under section 51.

MR. JUSTICE ARMOUR : No, section 146.

Mr. Pugsley : I submit not, my Lord. I submit that Manitoba might have been given 50 members; that if Manitoba said: We won't come unless you agree that for all time we shall have at least 50 members in the House of Commons, she need not come into confederation unless she got that. British Columbia might have said we will not come unless you will agree that for all time we shall have ten members. She did stipulate that for all time she should have at least six members. But it was quite competent in the agreement to stipulate that she ought never to have less than twenty members, or that her representation for all time should have been 20 members, or 50 members. It seems to me, my Lords, that you will not find in the Act anything which prevents the Queen in Council, upon proper addresses being sent, providing for any representation or any mode of representation which might be agreed upon.

The Act says :

“On the completion of the census the representation of the four provinces shall be readjusted by such authority in such manner, etc.”

But Parliament is not dealing with any other province and, my Lords, it is a curious fact if you look at the history of the matter, that in framing that section 51, the first draft contained the words “each of the provinces.” Then it was changed to the representation of “the four provinces,” then when you get to the third draft it was changed back to “each province,” and finally when we get to the British North America Act it is put “the representation of the four provinces.” Your lordship will find the drafts in Pope's Confederation Documents. It is rather curious to see the way in which that expres-

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sion was changed from time to time, showing that those who had the drafting of the Act were giving to it a great deal of thought, and one can very easily see how the words "each province" were put in. Some one may say: Well, that would imply that we are making some provision for the representation of new provinces and we want to avoid any possible interpretation of the Act in that way; we are making no provision for the new territories or provinces which may come in, we are leaving that absolutely as a matter of arrangement to be come to from time to time, and therefore in order that there should be no doubt about it, in the final draft and in the Act as it was passed by the British Parliament the words "each province" were left out and the words "the four provinces" were inserted. This shows that the intention of those who framed the Act, and the intention of the British Parliament, was that they should then legislate simply for the four provinces.

Any way, my Lord, should they not do that. They were legislating for provinces all of which were pretty well settled; provinces which had been established for a great many years and in respect to which the increase of population was likely to be, perhaps not exactly the same but pretty nearly the same. Then when they come to make provision for the possible entry of new provinces by section 146 they make that provision, so far as I have said, for representation. I would like to read to your lordships section 146 and I think section 147 has a bearing also on the subject. Section 146 is:

"146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfound-

land, Prince Edward Island, and British Columbia, to admit those colonies or provinces, or any of them, into the union and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-West Territory, or either of them into the union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

Now, then my Lords, was it not competent for British Columbia to say: We will come into confederation but we will only come in on the terms that we shall have six representatives, or ten representatives, or twenty representatives.

MR. JUSTICE DAVIES: Quite competent, if you establish your first proposition: That section 51 only relates to the four provinces and does not lay down any rule for the whole.

Mr. Pugsley: It says:

"And the provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

So that the moment the order-in-council was passed agreeing that British Columbia should have six representatives and that that should never be decreased, that order-in-council had the effect of an Act of Parliament, and I submit with all deference that the representation of British Columbia can never be reduced.

Under section 147 it is provided:

"147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each

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shall be entitled to a representation in the Senate of Canada of four members."

There is provision made here for representation in the Senate but none whatever for representation in the House of Commons.

Now my Lords, upon the ground of reason, subsection 4 should be construed as we are contending for, and I think that it is fair to look at what was the object of the framers of the union when they put in that saving clause. It is fair for me to call your Lordships' attention to the fact that if the contention on the other side prevails, that saving clause is not of the slightest benefit to the old provinces—you might as well not have it in there at all.

MR. JUSTICE SEDGEWICK: What is the saving clause?

Mr. Pugsley: Subsection 4. The saving clause is that the representation of a province shall not be reduced unless the proportion which its population bore to the aggregate population of Canada at the last readjustment of representation has been by the latest census diminished by one twentieth part or upwards.

Now the object of that was that even although the population of Quebec might increase more rapidly than the population of any one of the four provinces, yet that the population of the whole four must be taken together and unless one had gone back more than one-twentieth relatively to the whole it should not lose a representative. That is a departure to a certain extent from the principle of representation by population, but it was to enable these small provinces to maintain their representation. And if your Lordships look at the proceedings which took place in connection with the Quebec Conference you will see that it is put forward all the way through that subsection 4 was a safeguard which would prevent any decrease of

representation. That subsection was looked upon as an absolute safeguard. Well my Lords it is no safeguard at all if every ten years you can bring in a new province from the vast territories of the North-west. It is no safeguard at all if when you bring in a new province the whole population of that province is to be counted against you; not merely the increase but the whole population. It is argued on the other side that if, on the first of July, Assiniboia should be carved out of the North-west Territories and brought in to confederation we would be faced not merely with the increase of population in that territory since 1891, but with the total population and that that total population should count against us. It is argued upon the other side that if to-morrow Newfoundland were brought into the union, that we would not have to meet the mere increase in the population as compared to our own, but we would be met with the entire population of the Province of Newfoundland.

MR. JUSTICE GIROUARD: Suppose Newfoundland would come into confederation to-morrow and there should be a provision in the address that Newfoundland should be entitled to 25 members and that its representation should never be less than that number, do you mean to say that that would be within the provisions of the British North America Act?

Mr. Pugsley: I mean to say that it would be absolutely binding if that were agreed to by the King-in-Council, that it would have the force of an Act of the Imperial Parliament and would be binding.

Your Lordships have the right to look at the object of the saving clause. You have the right to look at the object with which that was inserted there, and if you find that the new provinces which may be brought in from time to time count against us not merely as to the increase but absolutely the whole population of

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these provinces as against our increase, why you would destroy the effect altogether of that saving clause and defeat the object with which it was put in.

Now, my Lords, there are, it seems to me three questions which your Lordships are called upon to determine here. In determining the representation to which the Provinces of Ontario, Nova Scotia and New Brunswick—they being three of the old provinces—are entitled after each decennial census, you are to take the words “aggregate population of Canada” as meaning first the population of the four provinces; or secondly, the population of the seven provinces as they are constituted today; or thirdly, the population of whole of Canada.

These are the three questions which we would like your Lordships to determine because of course in the future it may make a material difference whether it means simply the provinces, or whether it means all the territories of Canada as well. Because if the territories are to be excluded then of course it would necessarily raise for the old provinces a very important question as to what should be done when it is proposed to bring in new provinces out of the territories; to carve out new provinces from the territories. Therefore it is a very material question whether—even if we are wrong in our view that the new provinces are not to be included, as to whether the territories should be included.

Mr. Fitzpatrick: That is not material in the present issue.

Mr. Pugsley: It is in the case as submitted. It is involved in the question. It is put in the case as to whether the aggregate population of Canada means the population of the four original provinces, or the population of the whole of Canada including the new provinces which have been admitted since. It therefore

necessarily involves the determination by your Lordships as to whether it means the four provinces; whether it means the population of the whole of Canada including the territories, organised and unorganised; or whether it is limited to the population of the new provinces.

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Now, my Lords, I want to deal for a few minutes with the question as to whether you could by any possibility make "Canada" in subsection 4 mean the whole of Canada, both new provinces and territories organised and unorganised. And it seems to me that my learned friends upon the other side are driven to argue that in order to sustain their contention. If you take section 51 you will see that it is dealing with the representation of the four provinces, and when by subsection 4 it says :

"The number of representatives for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province, is ascertained at the then latest Census to be diminished by one twentieth part or upwards;"

when it says that, it seems to me that you cannot count in the population of the territories in respect to which no adjustment is to take place. How can you count in that, the population of Assiniboia and Saskatchewan and Alberta and the people living away up in the Peace River with respect to which there is to be no readjustment of representation; in respect to which this section has no application whatever. It seems to me therefore that you must give to the expression "Canada" a limited meaning in that subsection. I do not know whether it is proposed by the Government in this Redistribution Bill to take into account all the

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population of Canada or not, but it seems to me it would be a most absurd thing to say that you could do so; because you are only to take into account the population of that part of the country whose representation you are readjusting.

MR. JUSTICE SEDGEWICK: Why should the territories have representation at all?

Mr. Pugsley: They have, but it is not subject to readjustment. They will have ten representatives under the new bill but they are not entitled to that by virtue of their population.

Mr. Fitzpatrick: They are entitled to six by virtue of population.

Mr. Pugsley: Therefore it is proposed that this Parliament shall add four members to the representation of the North West Territories not based upon population at all. And there is nothing in the British North America Act and nothing in any of these subsequent Acts which allows of any readjustment of representation of the North West Territories. There is no provision for it. My learned friend will not contend that the representation in the North West Territories could be readjusted.

Mr. Fitzpatrick: Of course it could and it will.

Mr. Pugsley: You will contend that it can be readjusted.

Mr. Fitzpatrick: And will; the statute provides for it.

Mr. Pugsley: Then if Parliament gives them four more members than they are entitled to, surely that would be *ultra vires*, if they are subject to the provisions of section 51.

In section 2 of the Act of 1886 (49 & 50 Vict. ch. 35) which is an Imperial Act, I find this provision:

“ Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in

this Act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor General of Canada. It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect notwithstanding anything in the British North America Act 1867, and the number of Senators or the number of members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or Territories or Canada.

Mr. Fitzpatrick: We can give them whatever we like.

Mr. Pugsley: That is what I say; they can give them whatever they like. If Parliament thought fit to bring in Assiniboia it could give Assiniboia 20 members although the population would not entitle it to more than two. Parliament is supreme in regard to that and I am showing that there is nothing in the legislation which has been enacted by the Imperial Parliament which by fair implication can compel or induce your Lordships to take away the rights of the four original provinces.

You must find in the later statutes clear and express language to cut down the rights of the older provinces. That is our argument. I recognise of course that as to the new provinces there may be some anomalies, but while that is the case, and while, as has been said, there may be some stray sheep, yet in respect to British Columbia Parliament has made a different provision. Parliament may make different provisions as regards the other provinces but the reasonable thing to do is, as far as

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possible, to make the representation of them all subject to readjustment from time to time. They were not bound to come in under these terms and it does seem to me that your Lordships might fairly hold as to the original provinces, when you come to apply subsection 4, that the aggregate population of Canada means the four provinces which are there referred to, but having reference to the later Acts which say in respect to Manitoba, in respect to British Columbia, in respect to Prince Edward Island, that section 51 shall apply as to representation, you may very well say that in considering the representation which they will have, you will take into account the whole population of Canada. You have to give to "Canada" in subsection 4, if I am right, a limited meaning. You cannot say that "Canada" means the whole of Canada. You cannot say that it includes all the territories in respect to which there is no provision for re-adjustment.

MR. JUSTICE ARMOUR: You must contend that the word "province" in section 51 does not mean any province of Canada but means Nova Scotia and New Brunswick.

Mr. Pugsley: I do not mean in construing it generally, but only when you are construing it in reference to the rights of these four original provinces and with regard to their representation. What I contend is that then you must give to Canada the meaning of Canada as comprising these four provinces. It may be that when you are dealing with the representation of new provinces you will have to give to it a wider meaning and say that it means Canada including the new provinces which have been brought in.

MR. JUSTICE ARMOUR: I think that weakens the force of your argument.

Mr. Pugsley : Possibly it does, but it is possible that construction might have to be given to it. I submit, my Lords, that the fair way to view the matter is this : That these four provinces constitute Canada under the British North America Act and it is expressly provided that their representation shall be readjusted in that way, and that therefore, seeing that that gives them very important rights which would be most materially altered if you are going to bring in new territories, you are not going to apply a rule in respect to which you have no basis so far as the provisions for readjustment are concerned. Suppose you were to bring in Assiniboia as a province you have no figures with respect to which you can compare our increase, because it never has been in the Dominion before and then you would have to set against our increase of population its whole population. Therefore it is that before your Lordships would hold that the rights of the older provinces shall be cut down, it seems to me that you must find very clear and very express words to that effect.

Allen K.C. follows for New Brunswick : My Lords, I have only one or two words to add to what my learned friends have said, because if I were to speak at any length I would be only going over the same ground. It seems to me perfectly clear that the original meaning of these words in sub-section 4 of section 51 of the British North America Act "population of Canada" must have been undoubtedly the population of the four original provinces. Now, unless the learned gentlemen on the other side can find equal authority in the British North America Act to change that meaning, we must still put the same construction on these words that would have been put upon them if we were now in the year 1867 instead of the year 1903. I do not think that this court will be very astute to take

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away the rights of the old provinces under some general words that may be possibly found in a statute which was passed not to affect the representation of the four provinces originally in the Dominion but passed for the purpose of giving representation to the new provinces. Unless the words are so express and so clear, in the Acts relating to Manitoba and British Columbia, that the court cannot possibly construe them in any other way than that they must affect the rights, the representative rights, of the original provinces as set forth in subsection 4 of section 51 of the British North America Act, I think the court will allow these rights to remain exactly as they were.

The particular doctrine that I wish to enforce upon your Lordships' attention, you will find in Maxwell on the Interpretation of Statutes, (3rd ed.) page 113:

"One of the presumptions is that the legislature does not intend to make any alteration in the law beyond what it declares either in express terms or by implication; or in other words beyond the immediate scope and object of the statute. In all general matters beyond the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have that meaning in their wider or usual or natural sense, would be to give them a meaning in which they were not really used. General words and phrases therefore, however wide and comprehensive in their literal sense, must be construed as strictly limited to the actual objects of the Act and as not altering the law beyond."

Therefore I take it, may it please your Lordships, that when we undertake to construe the Acts relating

to the admission of British Columbia, Manitoba or any other province into this Dominion, we must construe them having in mind the purport of these Acts, which was not the cutting down of the representation of the old provinces but the admission into the Dominion of new provinces and the provision of representation for them.

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Now, so much on that point. There is just one other point which I do not think any of my learned friends have touched upon and I would like to bring it to your Lordships' attention. It is a well known maxim in the construction of statutes that the meaning of all words in a statute are to be taken as of the very day on which the statute was passed, not as I have seen it stated somewhere or other as of the time in which you are going to put the Act in force.

Mr. Fitzpatrick: That is in the Interpretation Act.

Mr. Allen: You must find out what was the meaning of the words at the time the Act was passed.

Now I refer again to the same book Maxwell on Statutes, page 83:

"The words of a statute must be understood in the sense which they bore when it was passed."

And in the case of *Shape v. Wakefield* (1), the same principle is laid down. Now the rule that is there applied is that the words of the statute must be construed as they would have been the day after the statute was passed. Very well. The day after the passage of the British North America Act "Canada" unquestionably meant these four provinces, and the burden rests on the learned gentlemen opposite to produce some authority other than that of the British North America Act to change the meaning of this word Canada from the four provinces to the seven provinces, or to the whole of Canada whichever

(1) 22 Q. B. D. 239 at p. 242.

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they may happen to argue. I do not know which they will choose and under the authorities which I have read to your Lordships it is not enough to produce some other Acts which were passed for other purposes and affect this issue only by implication; there must be clear and unmistakable words to be found for that purpose. I will not take any more of your Lordships' time, because I feel everything has been touched upon.

E. M. Macdonald, for the Province of Nova Scotia.—My Lords, I would like to submit that having regard to the question as to what interpretation should be placed upon the meaning of this word "Canada," that there are three constructions that are open to a person who applies himself to the consideration of that subject. First, there is "Canada" as meaning the four provinces; then there is "Canada" made up of the seven provinces; and then there is "Canada" made up of all the provinces and the territories of the Dominion. It is open to interpret the word "Canada" in either one of these three ways.

On behalf of Nova Scotia I submit that the proper interpretation is the interpretation which my learned friends who have preceded me from Ontario and New Brunswick have submitted to the court. I may be pardoned if in the presentation of the few words I am going to say I have to repeat something that my learned friends have said before me. I point out to your Lordships that when we look at section 51 we find decidedly and distinctly that that section purports to deal only with the representation of the four provinces which were all parties to the confederation. In the preceding section they deal with the representation in the Senate, and the representation in the Senate is fixed definitely and positively as regards these four provinces. It then goes on to deal with the four

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partners to the confederation. It makes Quebec the unit, it provides for the increase of members, it provides for the fact that each province will have as many members as it can have by comparison with the unit from Quebec, and then this fourth and saving clause comes in, introduced by common consent of all four members of this confederation, which said: There may come a time when one portion of this confederation may increase in population abnormally and we will provide a rule amongst ourselves which will apply to these four provinces alone. To shew that that is so, when we come to deal with section 146 we find that a clear line is there laid down. Section 146 anticipates the entrance into the Dominion of the colonies of Newfoundland, Prince Edward Island and British Columbia, and it says that these colonies can be admitted upon the presentation of an address to the federal Parliament and upon the passage of an order-in-council by the federal government these provinces become part of confederation upon the terms contained in the agreement. The very important question of representation was left out for the reason that that was one of the great stumbling blocks on account of which Prince Edward Island did not come into confederation. As in the case of Newfoundland it was left absolutely open to deal with it by agreement between the Parliament of Canada and the legislatures of these provinces in future. That this was so will be gathered from the fact that when we come to look at Rupert's Land and the method that was adopted in settling with that portion of the Dominion, permission was given for Rupert's Land to come into confederation upon an address from the Parliament of Canada. That address was presented to the Parliament of Canada and an order-in-council was passed, but it was held that the address did not cover all the

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terms and conditions necessary to make a proper government. So the Imperial Parliament passed in 1868 an Act called The Rupert's Land Act which gave to the Dominion Parliament the power to confer upon that portion of this country certain rights and privileges and all the machinery of government. The federal authorities here, in 1871, came to the conclusion that even under the original address and even under this special Act, there was no power of the federal Parliament to deal with the representation of that country. If representation was a matter that was to work in all these other provinces along the same lines as section 51, why should there be a necessity for all this legislation, why was this doubt-removing Act passed by the Imperial Parliament in 1871 which expressly stated as follows:

“Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish provinces in territories admitted, or which may hereafter be admitted into the Dominion of Canada, and to provide for the representation of such provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

“Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

“1. This Act may be cited for all purposes as ‘The British North America Act, 1871.’

“2. The Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the

constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province, and for its representation in the said Parliament?"

Now, if Rupert's Land was coming into confederation, and if this system under section 51 was the system that was to govern other provinces in coming into confederation where was the necessity for this express legislation? In dealing with British Columbia, that Province joined the confederation under agreement and under petitions from the Legislature of that province and from the Dominion Parliament, and one of the provisions of that agreement (I take it verbatim) is as follows :

"British Columbia shall be entitled to be represented in the Senate by three members and by six members in the House of Commons, the representation to be increased under the provisions of the British North America Act, 1867."

Now I submit, my Lords, that if the representation of each new province in the confederation was to depend on section 51 there was no necessity for any special stipulation in any one of those agreements in regard to the matter. But in respect to British Columbia the order-in-council, which is the charter of its liberties as a member of this confederation, does not say that the representation of British Columbia can be decreased in accordance with section 51. It does not make that portion of sec. 51 applicable to all. It simply says that the representation of British Columbia can be increased in accordance with section 51. Therefore the whole of section 51 does not apply to British Columbia but only so much of it as provides for the increase of members in accordance with the subdivision of that section.

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I have been endeavouring to point out to your Lordships that the representation of each one of the provinces that came into the confederation after 1867 was a matter which was determined and fixed solely by the agreement in each particular case. These agreements specified the rights of the provinces and the rights of the Dominion, and set out in a general way that all the legislation which applied to the whole of the provinces of the Dominion should apply to each one of the provinces but when it came to the question of representation there was a specific arrangement in each case. I have ventured to call your Lordships' attention to the arrangement which was made in regard to British Columbia. In regard to Manitoba we find a general section in the agreement which made all the various portions of the Act which were common to the whole Dominion applicable to that province and, in section 4 of the Act relating to Manitoba, there is also an express provision in regard to representation where it says that, on the completion of the census in the year 1881 and of each decennial census afterwards, the representation of the province of Manitoba shall be re-adjusted according to the provisions of the 51st section of the B.N.A. Act 1867. That was a specific provision in regard to Manitoba. When we come to look at Prince Edward Island we find that the clause which was inserted in the agreement there, and which dealt with the future relations of the province to the Dominion, is contained in the following words: "The representation to be adjusted from time to time under the provisions of the British North America Act."

Now we submit that these provisions in each one of these agreements became the specific law as regards the representation of each province when these addresses were confirmed by the Order in Council; that

these orders-in-council had the effect of independent Acts of the Imperial Parliament; that each one of them stood on its own particular basis and dealt with the particular rights of a particular province, and that so far as representation was concerned it was deemed necessary to insert a clause in regard to representation in each case and it was not left to the British North America Act to work out this question alone.

I submit that section 51 applies only to these four provinces, and as one of your Lordships well said, you have to infer something in regard to that, in order to make that applicable to the new provinces and, when the charters of these new provinces were granted, Parliament dealt with this representation and treated section 51 as being the system that is worked out applicable to these four provinces, and when these new partners to confederation came in, in one case representation was to be increased and in another case the re-adjustment was to be made from time to time in each case using different language calling for different interpretation. That being so, where you have the British North America Act not dealing, as it does not deal, with the representation of the new provinces in any way, it is significant that section 147 proceeds to deal with the representation in the Senate in so far as Newfoundland and Prince Edward Island are concerned evidently on account of some special considerations, but it leaves the question of the representation of these or any of the different colonies mentioned in 146, so far as the House of Commons is concerned, as a matter to be adjusted by the agreement which may be arrived at. That being so, I submit that whatever agreement each one of these provinces made for itself, it cannot be held that they could interfere with or take away the rights of any one of the original provinces under section 51. That is a question of the construc-

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tion of statutes upon which I need not cite to your Lordships any authority.

But I want to submit further that that is the most natural interpretation to be placed upon the Act. As I have said, there are three interpretations that may be placed upon the word "Canada"; the four provinces, or the seven provinces, or Canada as it exists territorially or geographically. I submit with confidence that it cannot be argued that the computation of the aggregate population of Canada is to include the population of these territories as well because, within the purview of this Act and within the purview of the different provinces that were added to this confederation and which were in contemplation, there was no regard to territory in the position in which our North West Territories are to-day. If the other is to be taken it can only be that we must read into section 51—instead of saying the representation of the four provinces, you must say the representation of the seven provinces; and if that is so you have an unnatural condition of affairs. You reach out into the realm of uncertainty. It may be that it is wise from a certain standpoint to have regard to representation by population, but at the same time this Act must be interpreted in the light of the parties who were partners to it originally, and they might very well have said, and I submit they did say, that uncertain as they were as to the development of the rest of the country, and having regard only to certain provinces some of which had not come into confederation, they would observe this system of representation so far as the original provinces were concerned, and each province that came in afterwards was to be dealt with equitably. But the original partner said that if conditions later on arise by which representation by population under an increased immigration or anything of that kind would create new

conditions, then a new principle can be applied by the Imperial Parliament under the new conditions. I submit that if you take the total population of the four provinces and treat that as the aggregate and work out the proportion of each province alone, excluding the new provinces that come in, you have a fairer system than if you entered into the realm of uncertainty as to whether the territories or the new provinces have a right to be counted in. The territories cannot come in; they do not come in under the Imperial Act. The only representation the territories have in the Federal Parliament is by virtue of the permissive Act enabling Parliament to give them representation. They are not members of confederation. They do not work out their rights under section 92 or in any of the other ways in which provincial legislatures work out their rights. They have no status as members of the confederation at all, and it would be a violation of the original theory on which confederation was based if the Territories were to be permitted to be counted into the computation today, and by so doing deprive any one of the original provinces from the advantages which they gained under section 4.

I do not want to take up too much time and I submit my Lords, in conclusion, that if you take the population of the original four provinces of confederation as the total you have a clear and definite working of the statute which can give the re-distribution of representation for all times. Up to the present, and so far as we can foresee, it is fair and equitable all around. It is clear and definite. You preserve the integrity of the original four provinces unaffected by any legislation regarding new provinces and you will not affect the original four provinces in any way.

*Cannon K.C.* for the Province of Quebec: May it please your lordships, as the Province of Quebec fully

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indorses the position taken by the Dominion in this case, and shares the interpretation of the section which has been given to it by the Minister of Justice of Canada, it will be probably as well that I should wait until the Minister of Justice of Canada has submitted a case and, if I have any further case to make particular to the Province of Quebec, if it is agreeable to the court I might then be heard.

*Fitzpatrick K.C.* for the Dominion of Canada :—Perhaps at the outset my Lords, I ought to say there is no provision in the British North America Act with reference to the representation of the provinces except possibly section 37 which provides for the representation of the four original provinces, so that the question of the number of representatives given to a province when it comes into the Dominion is a matter of absolutely no concern. That which is important and that which is necessary because it is provided for by the Act is a re-adjustment of the representation on the occasion of each decennial census, and that is what we are called upon to deal with here. This reference comes before your Lordships as the result of the scheme of representation prepared under section 51 of the British North America Act. This section I submit respectfully to your Lordships is a section with the action of which we have absolutely nothing to do, which we can neither amend so as to extend nor so as to restrict its provisions. Section 51 is an enactment of the Imperial Parliament which is absolutely beyond our jurisdiction and control in so far as the Parliament of Canada is concerned, and the whole question with which we are concerned to-day is simply to see how, in the operation of this act, the re-distribution of the representation of the provinces is to be made. I may say my Lords that, so far as my knowledge goes, a question of this sort now



Comes before your Lordships for the first time. You have had, no doubt, frequently to consider questions in which the relative powers of the Federal Parliament and the provincial parliaments were at issue, but in all my knowledge at no time have you been called upon to consider the question of the relative rights of the provinces as between themselves.

Now, it is not necessary for me to say to your Lordships that this is an exceedingly important matter. It is important because, on the solution of this question, depends the whole principle upon which the British North America Act is founded, that is to say, the principle of the relations which are to exist with respect to representation as between the provinces. It is a matter of vital importance to each province of course that it should be sustained, or maintained rather, in the enjoyment of those powers conferred by the British North America Act. But it is a matter of no less importance to the provinces that they should be maintained in the rights conferred upon them with respect to their representation. Now, I will proceed immediately to state the construction that it has been my duty to advise the Government to place on section 51 of the British North America Act. Section 51 provides :

“On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner and from such time, as the Parliament of Canada from time to time provides, subject and according to the following rules.”

I take it, my Lords, to be a settled rule of construction that a word used in a statute is to have as far as possible the same meaning throughout the whole statute, and I say it is a rule of construction that the

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same word repeated in a section of a statute should undoubtedly have the one meaning. Now my Lords, what is the meaning of the word "Canada" in this section 51, first paragraph. The construction I put on it is this my Lords, that as the original Parliament consisted of 181 members as provided by the statute, the Parliament of Canada is a variable term which is to be construed at the time of each decennial census with respect to its representation and with respect to the area of country over which it has supreme legislative control. It is a term which is to be construed in one way in 1871, in another way in 1881 and in another way in 1891. But it is to be construed at the time you seek to put that section into operation.

Now I say, moreover, my Lords, that the words "four provinces" are to be construed also at the time of each decennial census and if in 1871 there were but four provinces in the Dominion, then of course the meaning of the term is clear. If to these original four provinces another province is added, then it means five provinces and so on at the time of each decennial census, it will mean the number of provinces at that time subject to the legislative control of Canada.

An Act speaks for the present; it is always speaking. I need not refer your Lordships to section 3 of the Interpretation Act "the law shall be considered as always speaking." I admit, my Lords, that there is no similar provision in the English Interpretation Act of 1889 but that is not a new rule. That was an old rule of construction which has been laid down as a proper rule in the case of *Ex parte Pratt* (1), and your Lordships will find it adopted in *Elbert on Legislative Methods and Forms*, page 248. I shall not weary your Lordships with reading the clauses, I simply refer you to the authorities.

(1) 12 Q. B. D. 334.

Now, my Lords, my reason for stating that the word "Canada" in section 51 is applicable to Canada as we have it to-day, and for stating that the "four provinces" are not to be read as four provinces, but are to be read as seven provinces as we have it to-day, my reason for stating that is that the evident intention of the British North America Act was to include all the British provinces and territories in North America. That was the clear and evident intention of those who passed the Act and the provisions of that Act were to be made applicable to all these provinces and territories when they came within its operation. The British North America Act itself did not constitute the Dominion of Canada. The British North America Act made provision for a federation to be constituted a Dominion by statute, a Dominion that was to be brought into being as a result in the first instance of the Queen's proclamation, and the limits of which might be varied and extended at any time under the provisions of section 146 of the Act. The Act itself is so framed, the terms of it are so broad, that they are intended to apply to all these provinces and territories leaving it to time to work out the periods at which these provinces and territories would come within its operation. Now, that that is the construction to be put on it is apparent from the terms used in the Act itself. Your Lordships will find that the preamble of the Act provides :

"Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom."

That is the first part of the enactment. Then the fourth paragraph reads :

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“ And whereas it is expedient that provision be made for the eventual admission into the union of other parts of British North America.”

In the first instance four provinces were considered in this provision. It is provided in the preamble that it is intended that all the other provinces shall come in.

Then, my Lords, you will find that section 3 makes provision for the consolidation or rather the federating into one Dominion of the four original provinces. That is to be done by proclamation.

Then, my Lords, section 146 makes provision for the bringing into the confederation of the other provinces which were in contemplation at the time the Act was passed, that is to say, Newfoundland, British Columbia and Prince Edward Island, and the Act further makes provision for the bringing into the confederation of the territories so that there should be but one Dominion as referred to in the preamble of the Act, and this is provided under section 4 to which I shall have occasion later to refer.

Now section 3 to which I referred a moment ago, says :

“ It shall be lawful for the Queen, by and with the advice of Her Majesty’s Most Honourable Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada.”

“ Under the name of Canada;” the name of the Dominion is to be Canada.

“ And on and after that day those three provinces shall form and be one Dominion under that name accordingly.”

So that until such time as the proclamation issued, this Act was not applicable to these provinces.

Then you have got section 4 in which the term "Canada" may be considered as having been defined. Section 4 says :

"The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the union, that is to say, on and after the day appointed for the union taking effect in the Queen's Proclamation, and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act."

Not Canada as constituted under section 3, by authority of the proclamation. Thus, my Lords, you must not only consider the four original provinces as they are brought in under section 3 of the royal proclamation, but you have also to consider the other provinces and territories as they may be brought in under section 146 of the British North America Act.

If you take section 146, my Lords, you will find that it provides :

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those Colonies or provinces, or any of them into the union."

That is to say, to bring them into the union which is provided for by section 4.

"And on addresses from the Houses of the Parliament of Canada to admit Rupert's Land and the Northwest Territory or either of them, into the union, on such terms and conditions in each case as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act; and the

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provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

Now, my Lords, it is outside the question to discuss this question as to whether British Columbia came in with the number of representatives that it ought to have had under the constitution or not. That is outside the question we are now considering. But my construction of section 146 is this, that the Queen had the right by order-in-council to legislate in the way and subject to the limitations contained in section 146. The order-in-council became and had the effect of an Imperial Act of Parliament so long as the powers conferred by section 146 were exercised subject to the limitations contained in section 146. Legislation by order-in-council is an exceptional legislation and can only be exercised subject to the limitations in the power authorising the legislation to be had in that form. An Act of the Imperial Parliament, might modify, alter or amend the British North America Act, might absolutely repeal the Act or alter any of the terms or provisions of it, but the order-in-council cannot do that. The order-in-council can only legislate in so far as its provisions are within the provisions of the Act, and it would not be competent with respect to the imperial order-in-council for them to pass an order-in-council which would have for effect the altering or the amending of the provisions of the Act. That order-in-council ought to be made subject to the provisions of the Act and under the control of all the provisions of the British North America Act, so that no order-in-council could be passed that could in any way affect this section 51 of the Act.

Now, my argument therefore is that section 4 must be construed as meaning Canada as it may be from

time to time constituted under the provisions of the British North America Act and the Canada of to-day is composed of the several provinces which form the Dominion of Canada.

If that is not the meaning of the word, if that is not the construction to be put upon it, take section 91 of the Act.

“It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada.”

What is the meaning of the word “Canada” there? Does that not mean the provinces and territories subject to the legislative jurisdiction of Canada.

If your Lordships will look at section 8, it says:

“In the general census of the population of Canada which is hereby required to be taken in the year one thousand eight hundred and seventy-one and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished.”

According to the construction put on section 51 by my learned friends it would be necessary to construe that, as being the population of Canada restricted to the four provinces, and that you are under an obligation to distinguish between the respective populations of the four provinces but not to go any further, and as a result you would be forced to the conclusion that there is no provision for any census in Canada beyond the four original provinces.

MR. JUSTICE ARMOUR: Complaint is made that you are taking into consideration the territories that are not provinces at all, unless you read section 4 “a province” as covering “a territory.”

*Mr. Fitzpatrick*: I may say to your Lordships that that is not a matter, as I shall have occasion to show,

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that is of importance. The method of distribution in regard to the territories is not of importance.

*Mr. Pugsley* : It is not now perhaps, but it might be ten years to come.

MR. JUSTICE DAVIES : The answer will determine it and it might be of immense importance.

*Mr. Fitzpatrick* : It is of importance for the future but dealing with it in a practical way as a practical legislator, I say, as I shall have occasion to point out when I consider the scheme now proposed, that whether you take the territories or not, the fact with respect to the numerical representation is not affected.

MR. JUSTICE DAVIES : At present.

*Mr. Fitzpatrick* : At present it is not, but of course it would be exceedingly interesting for the future that it should be considered and I submit, as far as I am concerned, that I want to take the word "Canada" in the sense in which it is used in the first paragraph of section 51. The Parliament of Canada means the Parliament having legislative jurisdiction over the whole of Canada including territories as well as provinces.

I submit that your Lordships have to read all the British North America Act together, the Acts of 1867, 1871 and 1886 ought to be read together and considered together, one amending the other, and your Lordships will find in the Act of 1886 provision is made for the representation of the territories.

MR. JUSTICE ARMOUR : Does it make any provision with regard to the readjustment ?

*Mr. Fitzpatrick* : No, my lords, but it is interesting from this standpoint that the Imperial Act was passed in June, 1886, and an Act had been passed in the previous May, assented to on the 2nd of June, where provision was made and the subsequent Act confirms the Act of the Parliament of Canada. I shall have occasion to refer to that afterwards and your Lordships



will have to read all the Acts, Canadian and Imperial, to see the bearings of this issue.

With your Lordships' permission, I had perhaps better dispose of this question of the territories at once, with respect to its application to the question now before you. If we eliminate the territories, that is to say, eliminate the population of the territories in our estimate of representation, the position would be—I shall not weary your Lordships to take the figures, for I presume that your lordships will want me to submit to you afterwards the figures in written form—if you eliminate the population of the territories, in your computation of the representation of the provinces, the result would be that Ontario would very nearly escape a decrease but not quite.

The population in Ontario in 1891 was 2,114,321. The population of the Dominion eliminating the population of the territories exclusive of the population of the territories, was 4,734,272. Now, that would be expressed by the decimal fraction  $\cdot 446$ .

In 1901, the population of Ontario was 2,182,946. The population of the Dominion in 1901, eliminating the population of the territories, was 5,159,666. That would be expressed by the decimal fraction  $\cdot 423$ .

The result would be that the difference between the representation in 1891 and 1901 is the difference between these two decimals, which is  $\frac{23}{100}$ , so you see that is a diminution.

Now we come to Nova Scotia. In 1891 the population of Nova Scotia was 450,396. The population of the Dominion was 4,734,272. That would represent the decimal fraction  $\cdot 951$ .

In 1901, the population of Nova Scotia was 459,574, and the population of the Dominion 5,159,666. That would be expressed by the decimal fraction  $\cdot 891$ .

That would be a diminution of 60 or more from the one-twentieth part of  $\cdot 951$ .

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New Brunswick, in 1891, had a population of 321,263. The population of the Dominion was 4,734,272. The decimal fraction would be .678. In 1901, the population of New Brunswick was 331,120. The population of the Dominion was 5,159,666. That would represent the decimal fraction .642. That would be a diminution of .036 and that of course would be more than a twentieth part.

Now with respect to Prince Edward Island, I shall not weary your Lordships with the details but in either alternative, whether you include the territories or not, and if you give to the word Canada in the fourth subsection of section 51 the construction contended for by my friends, or if you eliminate the territories, it is perfectly immaterial; Prince Edward Island loses in any case, so that your Lordships see with respect to the practical effect of this legislation, whether you include the territories or eliminate the territories, the result is the same. The provinces would lose their proportion of representation and the only point on which my learned friends can save Ontario, New Brunswick and Nova Scotia, the only point on which they can save the representation of these three provinces, would be that your Lordships would come to the conclusion that the word "Canada" in the fourth subsection of section 51 means exclusively the four original provinces. We may as well put the question clearly now. If your Lordships came to that conclusion the representation would be affected.

Now, as I said a moment ago, my Lords, we have section 146 which makes provision for a rounding off of the confederation or for including in the confederation the provinces that originally contemplated coming in. That is to say Newfoundland and Prince Edward Island. As your Lordships are aware, taking the matter up historically, at the conference at Char-

lottetown, Newfoundland and Prince Edward Island were represented as part of the Maritime Provinces. Therefore for the purpose of giving effect to the original intention of the parties, section 146 contains the necessary provisions but not only do they provide at the time for these two provinces, but they also make provision for the carrying out of the intention of the Act, the intention expressed by Sir John A. Macdonald at the time of the Quebec resolution, and which you will find expressed by Lord Carnarvon when he introduced the British North America Act in the House of Lords. That is to say, the same day in Canada would be included all the provinces and territories of North America that owed allegiance to the British flag, and for that purpose section 146 is extended beyond this and includes British Columbia which was then a Crown colony, and the North-West Territories and Rupert's Land, and it is provided that these provinces of Newfoundland and Prince Edward Island shall come in upon addresses of their legislatures and from the Houses of Parliament of Canada, that British Columbia shall come in upon addresses of the Legislatures of Canada and British Columbia, and that the territories shall be brought in upon addresses from the Houses of Parliament and Canada. Acting on the powers conferred by that section, 33 Vict., ch. 3 of the statutes of Canada, was passed in 1870. That statute provides by section 1 that:

“ On, from and after the date upon which the Queen by and with the advice and consent of Her Majesty's most Honourable Privy Council, under the authority of the 146th section of the British North America Act, 1867, shall, by order-in-council in that behalf, admit Rupert's Land and the North-West Territory into the union or Dominion of Canada—”

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Here are the words of importance to which I wish to draw your Lordships' attention:

"There shall be formed out of the same a province, which shall be one of the provinces of the Dominion of Canada."

That is to say, you shall carve out of the North-West Territories and Rupert's Land a province that shall be one of the provinces of the Dominion of Canada. This is the legislation of 1870. That is the Province of Manitoba.

THE CHIEF JUSTICE: Previous to that Rupert's Land and the territories had been admitted into the Dominion.

*Mr. Fitzpatrick*: By order-in-council, not as a province merely as territories, my lord. They had no representation or anything of that sort. They simply came in for the purpose of being administered.

Section 2 provides that Manitoba:

"On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to, or only to affect one or more, but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act."

Acting under the powers conferred by section 146 of the British North America Act, this Province of Manitoba was carved out of the territories of Rupert's Land and the North-West Territories, and made a province of the Dominion and special provision is made

that the provisions of the British North America Act, with the exception I pointed out a moment ago, shall be made applicable to Manitoba as if Manitoba was one of the original provinces in the Dominion.

But that is not all my Lords. Your Lordships will find in section 4 this further provision with respect to representation, that is, the question now in hand :

“ The said province shall be represented, in the first instance in the House of Commons of Canada, by four members, and for that purpose shall be divided by proclamation of the Governor General into four electoral districts, each of which shall be represented by one member : Provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said province shall be readjusted according to the provisions of the fifty-first section of the British North America Act, 1867.”

Now my Lords, when this Act was passed, doubts were expressed in the Commons here as to whether or not the Parliament of Canada had the power to infringe on the provisions of the British North America Act, to such an extent as to give this province with its limited population four members which was out of all proportion to the number of its population. That is to say it was an interference with the principle of representation by population, and when you come to look at the debates, if your Lordships would be interested in doing that, that is the point taken. Doubts were expressed and as a result a statute was prepared, passed by the Parliament of Canada and sent home to the Imperial Government and they were asked there to enact Imperial legislation for the purpose of getting rid of the constitutional objection urged against this Act. As a result of that, the Manitoba Act as it is familiarly called, the British North America Act of

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1871, was passed. I shall not worry your Lordships with a recital of the details of that Act, but you will find in that Act special provision made for the confirmation in its entirety of this Act of the Dominion of Canada. Therefore as the result of the British North America Amending Act of 1871, the provisions of this Act, 33 Vict. ch. 3, are incorporated in the British North America Act and the British North America Act is amended *pro tanto*.

Therefore, 33 Vict. ch. 3 gathers from the Act of 1871 the same force and effect as if it was an Imperial Act and if there is any repugnancy between the two this Act of 1871 shall be considered as amending the other.

With respect to Manitoba section 51 must be construed to read instead of "four provinces," "five provinces," and the Parliament of Canada must be read as including Manitoba. Then in passing I will draw your Lordships' attention to the fact that not only the first paragraph of section 51 is amended, but section 8 which provides for the census is also amended, and in the general census of the population of Canada which is required to be taken in the year one thousand eight hundred and eighty-one and every tenth year thereafter, the respective populations of the *five* provinces are to be distinguished.

And your Lordships will have occasion to see the importance of that when I come to draw attention to the use of the words "population of Canada," the words to be construed here in subsection 4 of section 51; of the effort that must be made to give to these words "population of Canada" in subsection 4 an entirely different meaning from what they have in section 8 in respect to the census.

Then you will find that an order-in-council is passed at Windsor, on the 6th of May 1871, always

under the terms of section 146 of the British North America Act, which provides :

“Whereas by addresses from the Houses of Parliament of Canada and British Columbia respectively, of which addresses copies are contained in the schedules to this order annexed ”

and so on.

And these are the words of importance :

“Her Majesty by and with the advice and consent of Her Majesty’s Privy Council declares that on, from and after the 20th day of July 1871 the said Colony of British Columbia shall be admitted into and become part of the Dominion of Canada.”

That is, become part of the Dominion which is established as one Dominion by the British North America Act.

Then your Lordships will see what are the terms and conditions under which British Columbia comes in It is provided that

“British Columbia shall be entitled to be represented in the Senate by three members and by six members in the House of Commons. The representation to be increased under the provisions of the British North America Act, 1867.”

Section 10 provides :

“The provisions of the British North America Act 1867 shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only affect one and not the whole of the provinces now comprising the Dominion and except so far as the same may be varied by this minute), be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the Colony of British Columbia had been one of the provinces originally united by the said Act.”

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Now, my Lords, I am not concerned at the present time with the question as to whether or not six members should have been assigned to British Columbia at the outset. But I ought to say in passing that the number of representatives which may be granted to a province when it originally comes in, is to be fixed arbitrarily. There is no means under the British North America Act to determine the number of members to which a province is entitled. The only means we have is the aid of the census, but you will find whatever may be the number of representatives granted to a province when it first comes in, provision is afterwards made that at the decennial census the readjustment is to take place, and that is the provision of section 51, which as I said operates automatically, and if there is any amendment made to the operation of section 51, as the result of the passing of the order-in-council under which British Columbia comes into confederation, I submit and it is not necessary to go further, that it is an exceedingly serious matter to say that British Columbia or any province could come in and, as the result of an order-in-council, have more favourable conditions than any province already in. At any rate the question is not up now. It does not affect the issue but is a mere matter of academic interest.

Now, you have British Columbia brought in in 1871, and when British Columbia comes in under the order-in-council for which provision is made by section 146, and when it is stated that British Columbia is to be one of the provinces of the Dominion and is to be considered as if it had been one of the provinces from the beginning, as if it had been one of the original provinces, entitled to all the rights, subject to all the obligations of the original provinces, what does that mean? If that is out of the proper limits, if that order-



in-council with the restriction I pointed out a moment ago has the effect of Imperial Legislation, the result is with respect to the British North America Act, that those portions of it which are repugnant are amended and instead of having five provinces we have six, British Columbia having come in, and then you have British Columbia forming part of the one Dominion, subject to the jurisdiction of the Parliament of Canada having all the rights of the other provinces and subject to have its representation readjusted under the provisions of that Act, that is to say, under the one provision which has reference to readjustment, section 51. I trust I have made my meaning clear as far as I have gone.

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Then, if we have dealt with British Columbia, let us get down to Prince Edward Island which came in under an order-in-council of the 6th of June 1873. There you will find that the two first paragraphs are absolutely in terms the same as the paragraphs with respect to British Columbia, but there is a slight difference with respect to the question of representation. With respect to Prince Edward Island, the words used are :

“That the population of Prince Edward Island having been increased by 15,000 or upwards since the year 1861, the Island shall be represented in the House of Commons of Canada by six members.” The same as British Columbia :

“The representation to be re-adjusted” (instead of to be increased from time to time) under the provisions of the British North America Act, 1867.

Then, my Lords, the second next paragraph in it on page XIII is absolutely in terms the same, contains the same words as those to which I had occasion to refer a few moments ago in connection with British Columbia, and you will there find again the words :

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“Be applicable to Prince Edward Island in the same way and to the same extent as they apply to the other provinces of the Dominion and as if the Colony of Prince Edward Island had been one of the provinces originally united by the said Act.”

The same argument applies here, and the position I take is the same, that is, up to the present time we have the four original provinces with the addition of Manitoba making it five, and of British Columbia making it six, and now of Prince Edward Island making it seven, and as a result the first paragraph of section 51 is to be amended so as to read “seven provinces” and the Parliament of Canada is to be construed as meaning thereafter the Parliament of Canada which includes the seven provinces and of course the territories which had come in before.

Now the order-in-council to which I referred with respect to the territories, is that of date the 3rd of June 1870.

Then on the 25th of June, 1886, you find the last amendment to the British North America Act passed by the Imperial Parliament which makes provision for the Parliament of Canada to provide for the representation of the territories.

Your Lordships will bear in mind that on the 2nd of June of the same year, an Act providing for the representation of the North-West Territories had been passed by the Parliament of Canada. Some doubts it appears had been expressed with respect to the right of the Dominion of Canada to pass such legislation and it was to give validity to that legislation that this Imperial Act was passed. But I draw attention to the last paragraph of this Act of 1886 which makes provision for all the British North America Acts to be read together. I do not know if it was necessary but as a matter of precaution the three Acts are to be read together, the

Acts of 1867, 1871 and 1886 so that they form but one Act thereafter.

MR. JUSTICE SEDGEWICK: Could you suggest any reason why they did not ask for Imperial validating legislation in respect to British Columbia, whereas they did in respect to Manitoba?

*Mr. Fitzpatrick*: There is something very curious in respect to that. I think that with respect to British Columbia the question of the representation was also discussed in the House. Your Lordships will find it, if you are interested, in the discussions in the House of Commons on the validity of this British Columbia Act and the same doubts with respect to its validity were expressed because of the fact that a disproportionate number of representatives were given to British Columbia. It was stated by eminent authorities, Sir Alexander Galt and Hon. Edward Blake and some others, that this was an infringement, but I want to draw attention to this. If your Lordships will remember in 1870 a memorandum was prepared by Sir John A. Macdonald, then Minister of Justice, to which reference was made by the Attorney General from New Brunswick, drawing attention to the doubts expressed with respect to the validity of the Manitoba Act of 1870, and asking for confirmatory legislation which resulted in the passing of the Act of 1871. In that Act, in the order-in-council then prepared, I would like to draw attention to this curious feature. Sir John Macdonald points out that:

“There is in the Act no provision whatever for the representation in the Senate or House of Commons of Rupert’s Land or the North western Territory or British Columbia.”

He draws attention to the fact that the same difficulty might possibly arise with respect to British

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Columbia as has arisen with respect to Manitoba, and in his conclusion he says :

“ Under these circumstances, as the question as to the constitutionality of the Act of the Canadian Parliament has been raised, and as the doubt may cause grave disquiet in the territories which have been or may hereafter be added to the Dominion ; and in order also to prevent the necessity of repeated applications to the Imperial Parliament for legislation respecting the Dominion, the undersigned has the honour to recommend that the Earl of Kimberley be moved to submit to the Imperial Parliament at its next session a measure ;

“ 1. Confirming the Act of the Canadian Parliament, 33 Vict. ch. 3, above referred to, as if it had been an Imperial statute, and legalising whatever may have been done under it, according to its true interests.

“ 2. Empowering the Dominion Parliament from time to time to establish other provinces in the North-western Territory, with such local Government, Legislature and constitution as it may think proper, provided that no such local Government or Legislature shall have greater powers than those conferred on the local Governments and Legislatures by ‘ The British North America Act, 1867,’ and also empowering it to grant such provinces representation in the Parliament of the Dominion. The Acts so constituting such provinces to have the same effect as if passed by the Imperial Parliament at the time of the union.

“ 3. Empowering the Dominion Parliament to increase or diminish from time to time the limits of the Province of Manitoba, or of any other provinces of the Dominion, with the consent of the Government and Legislature of such provinces.”

These are the things he asked for and they were all granted by the amending Act of 1871, the Imperial Act:

“ Providing that the terms of the suggested Act be applicable to the Province of British Columbia whenever it may form part of the Dominion.”

That was not granted in reference to British Columbia, and why? The reason is that it is perfectly obvious that it is provided under section 146 that British Columbia is to come in on an address and may be dealt with absolutely in the same way as Prince Edward Island or Manitoba, but there might have been doubt with respect to the territories.

I draw attention to this, I do not attach importance to it, that by implication the Imperial authorities did not consider it necessary to do what your Lordship suggested might possibly be done.

Now, my Lords, my theory is that as a result of the issuing of the proclamation in 1867, and under section 3 of the order-in-council to which I have referred made pursuant to section 146 of The British North America Act, that all these provinces and territories came in and formed part of the Dominion, and that at the decennial census that took place after they came in, that is to say the decennial census of 1881, the Parliament of Canada then was the Parliament of Canada having legislative jurisdiction over all these several territories and provinces, and the words “four provinces” ought to read “seven provinces.”

If that be not the law, if that be not the rule of construction to be applied to section 51, where do you get, where does the Parliament of Canada get, the authority to deal in so far as representation is concerned with the readjustment of the representation of any province? The provinces came in with a certain number of representatives, but where do we get authority to deal with the readjustment of that representation, and where do you find authority for this especially, that they should come in under the terms

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of the addresses and be subject to all the provisions of The British North America Act and, in the terms of the order-in-council, as if they had formed part of the Dominion of Canada from its inception and yet they are not to be subject to the control of section 51.

I am not dealing with subsection 4 but with the first paragraph of section 51. How do they come in? Are they to be dealt with under section 51 or are they to be exempt from it? I submit they are to be dealt with under section 51, because they come in subject to the provisions of the Act, and the stipulation is made on their behalf that they are to be considered as if they had formed part of the Dominion from its inception. If that be the case I say the Parliament of Canada means the Parliament of Canada having jurisdiction over all these provinces and if they do not come in under section 51 how is their representation to be readjusted, where does the Parliament of Canada get authority to deal with them?

It is important in a statement of this sort to see how you are going to give effect to these provisions. What does this provide. This section provides for a readjustment of the representation of the provinces after each decennial census. Not only is the readjustment of the representation of the provinces provided for on the occasion of each decennial census, but the mode of readjustment is provided for also. The statute provides how the readjustment is to take place, it makes provision as to when and as to how, for the time and the method.

How is it to be done my Lords? Here is the first rule of all:

“Quebec shall have the fixed number of 65 members.”

That is the starting point. The principle is representation by population, that is the principle laid down

here, and it is to be ascertained by the aid of the pivotal province, Quebec. As the number 65 is to the population of Quebec, so is the number of representatives of any other province to  $x$ , the result, or rather to put the proportion properly the population of Quebec is to the population of any one of the other provinces, as the number 65 is to  $x$ .

The time when readjustment is to take place is fixed as a sequel to each decennial census, and the mode of operation is by Quebec having a fixed number of 65.

You then find section 2 of section 51 which says :

“There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).”

That is the provision of the Act in relation to the provinces outside of Quebec, and you must remember, when it is proposed to depart from this principle, it is proposed to be done against the Province of Quebec ; in favour of the other three of the original provinces, but against Quebec.

Now, my Lords, the rules laid down by section 51 for the readjustment of the representation is to take Quebec with the fixed number of 65 members. Then you assign to each of the other provinces such a number of members as will bear the same proportion to its population as the number 65 bears to the population of Quebec.

Let me put it to you in this way. Assuming the population of Quebec to be 1,600,000 and the number of representatives 65, then if you divide 65 into 1,600,000 the result is 25,000 and that would be the unit of representation. Then take that unit of representation and apply it to each of the provinces,

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that is to say assuming the unit of representation with respect to Quebec, the pivotal province, to be 25,000, then you take the population of any province, no matter what its population may be, and divide it by 25,000, and that quotient is the number of representatives to which it is entitled, an exceedingly simple method of finding out how the principle of representation can be worked out. You will see it is the most simple method by which this principle can be worked out. If your Lordships do that, and that is what the Act provides for, you will find that the result is that the population of Canada, taking the unit of population as we get it from Quebec, would entitle the people of Canada to be represented by 211.07 members.

On the other hand, if you take the principle contended for by my honourable friends, and apply it in the way I have done for Quebec, you get this result, First you get a unit of representation that varies according to each province. You get 25,367 for Quebec, 23,000 for Ontario, 22,000 as the unit for Nova Scotia, and 23,000 as the unit for New Brunswick. You got a unit of representation that varies for each of the provinces, and it would be unjust to Quebec that it should require to have a unit of 25,000 while Nova Scotia has a unit of 22,000.

More than that you have section 52 which you have to consider.

“The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces, prescribed by this Act, is not thereby disturbed.”

The number of members may be increased by the Parliament of Canada from time to time. That is what they are doing. The Maritime Provinces would



increase the number by their construction and in addition to that violate the proviso of sec. 52 which provides that the proportion of representation shall not be disturbed. They would increase the number of representatives and disturb the proportion of representation. That is what their construction leads to. Now let me see how far it is possible to put that construction on subsection 4 of section 51.

Now, in the result my Lords, if my construction is correct, section 8, to which I would ask your Lordships' attention now, has a most important hearing upon the question at issue. In sec. 8 the words "population of Canada" mean the population of the old provinces and also the population of the new provinces and the territories.

That is the basis of it. Let that be granted and we have the basis of the whole question. Let us take up section 51 and you will find in section 51 that it is provided that the re-adjustment of the representation of the provinces is to take place after each decennial census which decennial census is provided for by section 8.

Now, with respect to the question in hand, your Lordships will see that a re-adjustment is to take place on the completion of the census, and is to be carried out by the Parliament of Canada subject to the rules that are laid down in section 51. If your Lordships admit that the word "census" means the census of the population of Canada, as we have it at the time of each re-adjustment; that the "Parliament of Canada" is the Parliament which has legislative jurisdiction over that territory inhabited by the population as taken in the census; it seems to me that we have the case in so far as section 51 is concerned.

Let us go on to deal with the other provisions of section 51.

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The first subsection, of course, there is no doubt about. Quebec is to have under that subsection 65 members. There is no discussion about that. But then let me ask your Lordships to look at subsection 2 of section 51 which provides :

“There shall be assigned to each of the other provinces.”

That is to say, each of the provinces reading it at the time at which the British North America Act came into effect when the proclamation was first issued.

“Such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number 65 bears to the number of the population of Quebec (so ascertained).”

So that your Lordships will see that section 8 is the basis of the operation of section 51. It is “the population of the provinces ascertained at such census.” Now my Lords, if the new provinces are not affected by section 8 ; if they are not part of the population of Canada within the meaning of section 8 ; how is their population to be ascertained ? If they do not come within the operation of section 8 ; if they are not part of the population of Canada, their census cannot be ascertained and as a result, my Lords, they can get no representation at the time of the readjustment. Do your Lordships follow me ?

MR. JUSTICE SEDGEWICK: I do not follow that.

Mr. Fitzpatrick: Well, my lord, let me put my argument in another way. Each province is entitled to have after each decennial census a readjustment of its representation ; that readjustment to be made upon the following basis: Quebec to have 65 members, and the population of Quebec divided by 65 gives the unit of representation. That unit of representation divided into the population of each of the

other provinces gives as a result the number of representatives to which each province is entitled. Now, my Lords, how is the population of each province into which the unit of representation is to be divided to be ascertained? Is it not the population of each province as ascertained by the census under section 8? Does your Lordship follow me in that?

MR. JUSTICE SEDGEWICK: Yes.

*Mr. Fitzpatrick*: If it is the population ascertained by the census by what census is that population to be ascertained except it is by the census which is required to be made by section 8. There is no other census. Section 8 provides that the census shall be of the population of Canada, and therefore if the inhabitants of the new provinces are not part of the population of Canada within the meaning of that section then the basis on which the readjustment is to be made fails. If it is conceded that the words "population of Canada" for the purposes of the census include all the provinces and territories, then I submit that these words must have the same meaning in subsection 4 of section 51. The argument of my learned friends on the other side is that "the population of Canada" in subsection 4 of section 51 means the population of the four original provinces. It seems to me that it is impossible that you should give to the same words in different parts of the same statute a different meaning, but that is the position into which my learned friends are necessarily driven. I submit my Lords that to determine the representation in the Dominion Parliament to which all the provinces are entitled you must take the population of Canada as ascertained by the general census and then you have a definite meaning given to the words "population of Canada"; and that meaning is as I have so often repeated that "population of Canada" includes

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all the provinces and all the territories. My learned friends suggest that when the four original provinces constituted Canada under the Act by virtue of the proclamation, section 51 provided that they should have a representation proportionate to their population and that they then had in this respect acquired vested rights which could not be affected by the subsequent admission into the union of other parts of British North America.

Admitting that originally the union was limited to the four provinces, you cannot cut out of the statute section 146 which provides that on addresses from the Parliament of Canada, and from the Legislatures of the provinces in that section mentioned, those provinces may be admitted into the union upon such terms and conditions as are in the addresses expressed. Let us deal with the case of Manitoba in the first instance. The last lines of section 2, of 33 Vic., ch. 3 read "the provisions of the B.N.A. Act shall apply to Manitoba in the same way and to the like extent as they apply to the several other provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act"; and the proviso of section 4 of the same Act is to this effect—"provided that on the completion of the census in the year 1881 and of each decennial census afterwards the representation of the said province shall be re-adjusted according to the provisions of section 51 of the B.N.A. Act 1867." Are we to assume that these words are not wide enough to include subsection 4 of section 51 and that Manitoba is not to have the benefit of that section to the same extent and in the same way as the four original provinces? Then what becomes of the argument as to vested or acquired rights. If they had such rights, were they not at liberty to waive them when they adopted this Act? Further if we remember that

33 Vic. ch. 3 has, as I have already pointed out, the effect of an imperial statute and must be read with the Act of 1867, is the consequence not that the first Act is amended by the second, and that Manitoba must be dealt with in all respects as if it had been one of the provinces originally united by the B.N.A. Act. ?

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What I have said of Manitoba applies with equal force to British Columbia and Prince Edward Island. In the terms and conditions in each case provision is made that the representation is to be re-adjusted under the provisions of the B.N.A. Act and that each province is to be dealt with as if it had been one of the provinces originally united by the B.N.A. Act. Therefore, impliedly, these other provinces when they came in were made subject to section 51.

But, my Lords, there is more than that. I will ask your Lordships to follow me while I read subsection 4 which provides :

“ On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of population of the province bore to the number of the aggregate population of Canada at the then preceding re-adjustment of the number of members for the province is ascertained at the then latest census to be diminished by one-twentieth part or upwards.”

You always get back to the census. Here you find that it is the aggregate population of Canada ascertained at the then latest census that is to determine the decrease, or the maintenance of the *status quo*. By which census is the “ population of Canada ” referred to there to be ascertained? It is the population of Canada referred to in section 8 my Lords. Therefore, as you always get back to the meaning of the words “ population of Canada ” in section 8, the construction I have contended for, that is to say, the population of

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Canada in its entirety, the matter is concluded, because it is that population of Canada ascertained by that census under that section that determines the meaning to be put upon subsection 4.

MR. JUSTICE SEDGEWICK: It is a great protection to the representation of the decreasing provinces, because there must be a decrease of more than one-twentieth during the ten years. It may be a little smaller decrease than the one-twentieth for the ten years, and the result may be that not a single one may be left in the province after a time, and still they would be entitled to their full representation.

*Mr. Fitzpatrick*: I have no desire to put forward a provincial view of this matter at all; on the contrary, so far as the Dominion Parliament is concerned, our desire and our duty is to see that the Act operates automatically without respect to consequences. One of the important features of this scheme of re-distribution is the consideration to be paid to the intention of those who formed part of confederation at its inception. If your Lordships will consider it, you will see that Canada was originally formed of the four provinces, Quebec being one. The construction which my learned friends put upon this subsection 4 is a construction which is applicable to three provinces and not to four because it cannot affect Quebec.

Whether the population of Quebec be decreased by one-twentieth or not, her representation remains the same. It is only with respect to three provinces, and not to the four provinces that it is of importance. But my Lords Quebec consented to have 65 members with the understanding that these 65 members in proportion to the population of Quebec should determine the representation of the other provinces, so that a man in Quebec should have by reason of his vote, the same political influence in Canada as a man in any other part

of the Dominion. If this Act is construed properly, then every man in the Dominion of Canada will have the same amount of political influence as the result of his vote.

MR. JUSTICE SEDGEWICK: That is emphasized by section 52.

*Mr. Fitzpatrick:* Yes my Lord. If you divide 65 into the population of Quebec, you find that the unit of representation is twenty-five thousand, three hundred and sixty-seven. You take that unit of representation and divide it into the population of the other provinces as ascertained by the last census, and you get a result which operates equitably between all the provinces and which gives a number of representatives to each province in proportion to the number of representatives which Quebec has in respect to its population and its number of 65.

And if my learned friends' construction of the statute should apply, the result would be that you will have 92 members for the province of Ontario; that you will have twenty members for the province of Nova Scotia; that you will have fourteen members for the province of New Brunswick, with this consequence that you would have one unit of representation for Quebec representing 25,367; that you would have another unit of representation for Ontario representing 23,727; that you would have another unit of representation for Nova Scotia representing 22,978, and another unit for New Brunswick representing 23,651. Now my Lords, what is the further result? It is that we would have for Canada 219 members of Parliament; whereas based upon the population, and upon the principle that Quebec is the pivotal province and that that province furnishes the unit of representation, there should be only 211 members.

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I shall conclude with this statement to your Lordships: That in order to give effect to the argument of my learned friends, it is necessary for you to give the same words in the same section different meanings; you will be obliged to give to these words different meanings throughout the Act; you will have to construe each clause of that Act by giving a different meaning to the same words, in different sub-sections even, and give to those words in subsection 4 of sec. 51, with respect to the census of Canada, a meaning entirely distinct and entirely different from the meaning which you give to the same words in section 8 which provides for the taking of the census. My learned friend is driven to that conclusion, and I say it is an impossible conclusion; it is a conclusion that your Lordships cannot adopt. It is a conclusion contrary to every principle of the construction of statutes.

*Newcombe K.C.*, Deputy Minister of Justice, follows—My Lords, I have little to add to the very able and exhaustive argument of the Attorney General, and perhaps it would not be necessary for me to occupy your Lordships' time at all but that there are one or two considerations which it seems to me demonstrate the futility of the argument advanced by my learned friends on the other side and which show its fallacy so clearly, that perhaps I may be justified in adding a few remarks.

Now, my Lords, referring to section 4 which has often been quoted, that section does not say what my learned friends have submitted it does say, or what they appear to think. It says:

“ Unless it is otherwise expressed or implied the name Canada shall be taken to mean Canada as constituted under this Act.”

The whole basis of the argument of my learned friends proceeds upon the assumption that the union



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of the British American provinces was consummated and brought into effect by the immediate operation of the British North America Act; and assuming the false premise to start with, they argue as if the words in section 4 were not as they appear in the statute, but that the name "Canada" should be taken to mean Canada as constituted *by* this Act. Now, my Lords, if it were as my learned friends contend, I submit they would not have much of a case, although they might have something to argue upon. The question might be arguable if the effect of the statute and the words of the statute were as assumed all along for the purpose of their argument; but when you consider what the words of the statute are, and how it was that this union came into effect, I submit that it is perfectly apparent that they have not a vestige of a case on which to base an argument here.

My Lords, you have to refer, as has been said, to section 146 in connection with section 4. I have not heard my learned friends contend, and I presume they would not venture to contend, that the terms of union, the terms of the addresses under which British Columbia, Manitoba, Prince Edward Island and the Territories were brought in, have altered the construction which is to be put upon section 51. They say that paragraph 4 of section 51, in using the expression "aggregate population of Canada" refers to Canada as comprising only the four original provinces, and that this is an inelastic clause which cannot be extended. Will your Lordships refer to section 146 with me for a moment. Let me read it in this way, because we are entitled to read it in this way for the purpose of arguing this point.

"It shall be lawful for the Queen to admit the provinces of Newfoundland, Prince Edward Island and British Columbia or any of them into the union and

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to admit Rupert's Land and the Northwestern Territory or any of them into the union, subject to the provisions of this Act."

And referring to clause 3 :

"It shall be lawful for the Queen to declare by proclamation that on and after a day therein appointed, not being more than six months after the passing of this Act, the provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada."

It becomes apparent, my Lords, that it was an executive Act which constituted the Dominion of Canada and not a legislative Act. Her Majesty acted under a delegated power in bringing about the confederation of the provinces. The constitution was framed, adopted and sanctioned by Parliament and it was a hard and fast constitution which could not be altered by the executive; but there was a power delegated to the executive to bring in the members of that confederation by an executive Act, namely, by a proclamation so far as the three original provinces were concerned, and by orders-in-council so far as the others were concerned. Therefore when you speak of "Canada" as constituted *under* this Act, you must necessarily have regard to Canada as existing by virtue of the Acts of the Crown, authorised by the statute, and it makes no difference in the reading of section 146 that there are certain preliminary requirements to the passing of the orders-in-council. If the statute stood as I read section 146 to your Lordships a few moments ago, then it would have been quite competent for all these executive Acts to have come into effect at the same time; the proclamation might have issued, the orders-in-council might have issued and the seven provinces would have been united at the same time. I say, my Lords, if you leave out for the purpose of this

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argument that which is quite immaterial in section 146, viz. the reference to the addresses of the Parliament of Canada and of the Legislature—leave them out for a moment (because I say that these addresses cannot and it is not contended by my learned friends that they do alter the construction of section 51) leaving these out, it is an Act of the Crown that brings in the original provinces; it is a similar Act of the Crown that brings in the other provinces. If these had been left out, I say that the seven provinces could all have come into the union at the same time, and if so, does any one pretend to say that under section 51 you would limit the aggregate population of Canada to four of the provinces rather than to the whole and if to four, then to what four do you limit it under these circumstances? There is no reason why you should limit it to Ontario, Quebec, Nova Scotia and New-Brunswick rather than to British Columbia, Manitoba, Prince Edward Island and one other of the four. My learned friends' case is like this, and their whole contention proceeds upon a basis to which this condition of things, which I mention for the sake of illustration, would be a parallel. If an Act were passed now providing that the West Indies should form part of Canada, and should come into the union on certain terms laid down by the Imperial Parliament, unless that Act expressly amended the British North America Act so as to make, for the purposes of section 51, the West Indies a part of Canada, they would have to be excluded in computing population because the West Indies under those circumstances would not be included in Canada as constituted under this Act. They would come in under another Act. But here, it is not *by* this Act as my learned friend said in his argument (whether he misread the statute or not I do not know; probably he thought the statute meant that but there

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is a most important distinction); it is not "by" this Act but "under" this Act that Canada is constituted. Canada is constituted under this Act, as to the provinces later brought in, in the same way precisely as it is constituted in respect to the earlier provinces.

That name "Canada" is used in at least 48 different sections of this Act and it would lead to the most absurd and impossible results if it should be construed for the general purposes of the Act as referring merely to the four provinces. It would no doubt be very confusing also if separate and distinct considerations have to be applied to each of these 48 sections for the purpose of determining whether "Canada" as therein used refers only to the four provinces, or to the whole Dominion, or to a portion of the Dominion.

Therefore, my Lords, I submit that there is no ground, according to the letter of the statute, for applying any restricted meaning to the word "Canada" as used in section 51, par. 4, and according to principle "Canada" for the purposes of that section must include the whole, or otherwise there is produced an absence of uniformity and equality.

There is no doubt, my Lords, that it was intended that these provinces should be represented upon equal terms. I would like to know what would be the result if the view of my learned friends was adopted with regard to par. 4 of sec. 51. You have got to deal with the expression "aggregate population of Canada" and that clause undoubtedly applies to all the provinces that have been brought in since 1867. Now with regard to Manitoba if you consider whether Manitoba's representation should be decreased, is Manitoba's representation to be compared with the aggregate population of the four provinces, or is it to be compared with the population of the five provinces of

which Manitoba is one? And so with regard to British Columbia?

MR. JUSTICE DAVIES: There are three possible contentions which have been submitted to us.

*Mr. Newcombe:* But I am showing my Lord that there are six possible contentions. I am showing that there are a great many more possible contentions than my learned friends have mentioned. You have the words "the aggregate population of Canada" and my learned friends say that means the aggregate population of the four original provinces of Canada. Now suppose you have to read just Manitoba under that and to ascertain whether the population of Manitoba has diminished more than one-twentieth, having regard to the aggregate population of Canada, are you going to compare the population of Manitoba with the population of the four provinces for that purpose, or are you going to compare it with the five provinces including Manitoba? Or having regard to the present condition of things are you going to take in British Columbia, and are you going to take in the Territories, and are you going to take in Prince Edward Island? My learned friend, Mr. Pugsley, felt that there was a difficulty about it when he said that there were three different constructions and no doubt he was anxious to limit the number of the constructions as much as possible, but when you come to look into it there are at least six different constructions, every one of which is quite as hopeful as the one my learned friend Mr. Pugsley put forth.

MR. JUSTICE GIROUARD: There is one for each province.

*Mr. Newcombe:* Nearly one for each province, my lord. Manitoba certainly could advance precisely the same argument when her population came to be readjusted, in regard to the aggregate population of

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Canada as constituted the moment that she came in. That would give us five provinces instead of four, and when British Columbia came in we will have six provinces instead of four, and when P.E.I. came in we would have seven provinces instead of four. The result of that would be, and the result of my learned friends' argument inevitably must be, that under the conditions which may arise, Manitoba, British Columbia or Prince Edward Island, say one or more of them, might lose a member on account of a decrease which would not justify the taking away of a member from New Brunswick, and therefore the result would be inequality and want of uniformity and all kinds of diversity under the provisions of the Act.

I submit, my Lords, that if it had been desired or intended to bring in provinces or territories upon such terms as my learned friends contend for, it would have been impossible to do so under the provisions of section 146. It is manifest, I submit, that the terms and conditions affecting the constitution of the union or Dominion are expected where it speaks of the terms and conditions mentioned in the addresses under which these provinces may be brought in. The terms and conditions are terms and conditions of union in one Dominion, subject to the provisions of this Act.

As to the territories, there is nothing in section 51, par. 4 with regard to the aggregate population of Canada, which makes that expression dependent upon those parts of Canada which have representation. It merely says that the population of each province shall be compared with the aggregate population of Canada for the purpose of ascertaining whether there is to be decrease, regardless of whether any of these portions have representation or not. Your Lordships must admit that there might be, as originally contemplated by the Act, parts of Canada which would not be repre-

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sented, because according to the concensus of opinion, when this Act was passed and before any amendments, there was no authority to provide for representation of the unorganised territories of Rupert's Land or the North West. They had to get an amending Act for that purpose; and when they passed the British North America Act of 1867, they used the words "aggregate population of Canada" having regard to Canada as to be composed of provinces which must be represented, and as to be composed of territories which under the Act as it then stood (accepting the common view) could not have been represented.

MR. JUSTICE SEDGEWICK: Might or might not.

*Mr. Newcombe*: Could not, my Lord, if you assume that it was necessary for that purpose to amend the Act. On what principle then are you going to exclude the unrepresented portions of Canada when you have regard to the words "aggregate population of Canada" in section 51 par. 4? It seems to me, my Lords, that as my learned friend, the Attorney General said, Canada is a geographical term—Canada as bounded by so and so.

MR. JUSTICE GIROUARD: Whether represented or not.

*Mr. Newcombe*: Certainly, my lord, whether represented or not. It means the whole Dominion of Canada. I want to point out further that in the Rupert's Land and North West order-in-council, under which that territory became part of the Dominion of Canada, it says expressly:

"It is hereby ordered and declared by Her Majesty that from and after the fifteenth day of July 1870, the said North Western Territories shall be admitted into and become part of the Dominion of Canada."

Is that expression *intra vires* of the Queen in Council? It says in terms that the North West Terri-

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tories shall become part of Canada. If that was a declaration founded on statutory power, then it has the same effect as the statute, and the North West Territories are a part of Canada; but it does not stop there because it is expressly reiterated and affirmed by the British North America Act of 1886. You go to the British North America Act 1886 to get representation, and if it depends on representation, as Mr. Justice Armour suggests, then they have got representation.

The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons or either of them of any territories which for the time being formed part of the Dominion of Canada but are not included in any province thereof.

Mark the words "formed part". Now Rupert's Land and the North West Territories had been annexed to Canada when that Act was passed. They are the only territories which the Act contemplates or which could be by any possibility referred to in the words I have read, and they form part of the Dominion of Canada.

"And this Act and the British North America Act, 1867, and the British North America Act 1871 shall be construed together and may be cited together as the British North America Act 1867 to 1886."

*Mr. Allen*: Would you re-adjust their representation under section 51?

*Mr. Newcombe*: There is a special provision with regard to their representation, that it is regulated by the Parliament of Canada. Whether it should be re-adjusted or not, is quite aside from the point. The question at present is: Whether the territories form part of the Dominion of Canada geographically speaking, and you invoke there again section 4 which says



that unless it is otherwise expressed or implied Canada shall mean Canada as constituted under this Act. Canada as constituted under this Act included the territories; the territories are expressly referred to by the British North America Act of 1886 as a part of Canada. Then we get the expression "aggregate population of Canada" and how are you to import into that the exclusion of the territories. It says, unless it is otherwise expressed or implied, and there is not a single section in the whole Act that expresses or implies, with regard to the term "Canada", a meaning as including less than the whole, or shows the purpose of the qualification, except section 22 which refers to Canada in relation to the constitution of the Senate and provides that it shall be divided into three divisions. It is probably implied there that the word "Canada" is used in that section as relating only to the original provinces because three divisions could not be said to embrace the western provinces, but this is an exception which proves the rule.

Therefore, my Lords, I submit that the only meaning which you can give to this paragraph 4 consistently with the letter of the Act and consistently with the principle promoted by the Act, is that the aggregate population of Canada refers in all circumstances to the territorial area of Canada defined as school boys learn in their geographies.

*Cannon K.C.*, for the Province of Quebec: May it please your Lordships. On behalf of the Province of Quebec which I represent on this reference, I beg to say that Quebec concurs entirely in the opinion of the Dominion of Canada as expressed by the learned Attorney General and the Deputy Minister who have preceded me. We concur with them as to the interpretation of the words "aggregate population of Canada." It will therefore be unnecessary for me

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to repeat any of the arguments which have been so forcibly placed before your Lordships by the Minister of Justice and his deputy. I would merely wish to refer to section 51 of the British North America Act, if your Lordships would allow me, and briefly to point out in what way I consider the interpretation to be put upon sub-clause 4 of section 51 by my learned friends from New Brunswick and Nova Scotia is illegal, and would operate injuriously to the Province of Quebec, and destroy that proportion of representation which was prescribed by the B.N.A. Act. It has been admitted on all sides by the counsel who have preceded me, that the system of representation which was given to Canada by the British North America Act was representation by population. Upon that point there is no question. Now, representation by population being the accepted principle in the B.N.A. Act section 51 goes on to state how this representation by population will be readjusted. This readjustment is to take place under section 51 every ten years, after each decennial census, and subsections 1 and 2 fix the unit of representation under which the redistribution shall take place. Subsection 1 says:

“Quebec shall have the fixed number of sixty five members.”

And subsection 2 says:

“There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty five bears to the number of the population in Quebec (so ascertained).”

As to these two subsections, may it please your Lordships, there is no difficulty whatever. The learned counsel who preceded me on both sides interpreted these two subsections in the same manner, namely, that the unit of representation is one 65th of the population

of Quebec at a given census, and that the proportion of one .65th of the population of Quebec to the population of the other provinces, gives these provinces the right of representation in the Parliament of Canada. There is, I say, perfect accord as to the interpretation of the clauses which fixes the manner in which the representation may be increased after a given census. Subsection 3 deals with fractions of the unit of representation that is fixed by section 2 and states that fractions of such a unit will give the right to an additional member. Then we come to subsection 4 upon certain words of which the present reference has been made by His Excellency the Governor General in Council, as to how the words "the aggregate population of Canada" are to be interpreted. Two interpretations of this subsection 4 are given, one by my learned friends representing New Brunswick and Nova Scotia, and the other by the learned Attorney General of Canada and Deputy Minister with whom I concur on this point. It struck me, in listening to the argument of my learned friends from Nova Scotia and New Brunswick, that they seem to give a double interpretation, if I may so express myself, to the words "aggregate population of Canada," in this subsection 4. If I understood their argument rightly I think that in so far as the new provinces and the territories are concerned, they admit that the aggregate population of Canada means all Canada including all the provinces and the Territories. But when it comes to the three old provinces of Ontario, New Brunswick and Nova Scotia—and this seems to me a very singular legal pretension—then they say that the same words in the same subsection of the Act shall be given another interpretation, and they say that these words "aggregate population of Canada" which for the new provinces and the territories means the population of

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all Canada as geographically constituted at a given time has another meaning for the three old provinces, and only means then Canada as constituted at the time of the passing of the B. N. A. Act, and applies only to the four old provinces of Canada. As I say, at first sight, this pretension seems to me rather singular from a legal standpoint, since in order to put it before the court they are obliged to interpret the words in one sense for a certain number of the provinces and the territories, and in another sense for the four old provinces.

We contend that these words "aggregate population of Canada" apply to all Canada as constituted at the time that the re-adjustment takes place. Now, may it please your Lordships, I think that is the natural interpretation conformable to the wording of the British North America Act. As I have said, this Act gave Canada representation by population and section 51 fixes the unit of representation and made the Province of Quebec the pivotal province as to the unit of representation. As to the increase, we all agree that the increase at a given census to any province whatever is the increase which is equivalent to one 65th of the population of Quebec at that same census over and above the number of members which it already has; this increase will give it the right to an additional representative in the House of Commons of Canada. Of course the decrease or reduction in the number of members is not treated in the same proportion as the increase. The B. N. A. Act has provided, and very wisely I think, that once a given province has obtained additional representation, it will not lose that representation by the mere loss of the same number of population which gave it the representation, but it must sustain a heavier loss in its population to be

deprived of the additional member which was given to it by the preceding census.

When it comes to making a province lose one of its additional representatives which it had a right to by the preceding census, then the B. N. A. Act requires a larger decrease in the population than the increase that was required to give it an additional representative. But still I claim may it please your Lordships, and that is the point I wish to put before your Lordships as forcibly as I can; I claim that this proportionate decrease required by subsection 4 in order that the province should lose a representative must be on the proportion of the same population which is taken into consideration in order to give an increase to the representation of the province. Although the proportion is not the same amount still I say the proportion is based upon the same population for the decrease as for the increase, and that must necessarily be so in order not to interfere with the system of representation by population which is established by the British North America Act.

On the other hand, it is argued that although Quebec is bound to accept the increased representatives in the western provinces under section 51 on account of increase in population still the other provinces who have a decrease in population would not lose representation in proportion to the decrease of their population, the proportion being taken upon the same provinces. I must submit that if that were held it would be an unjust and illegal consequence under section 51. Quebec is obliged to accept the increased representation which the increase of population gives to the western provinces, but on the other hand the older provinces. if they have undergone a decrease of population which causes them to lose, taking into consideration the proportion of the whole population of Canada at the last

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preceding census, the old provinces I say must submit to that decrease if we wish that proportionate representation which is enacted by section 51 to remain in existence.

I think my Lords that if the interpretation put upon subsection 4 by my learned friends from New Brunswick and Nova Scotia were accepted, then this interpretation would be absolutely against the provisions of section 52 of the B. N. A. Act, and that proportionate representation of the provinces which is absolutely and peremptorily ordered by section 52 would be destroyed. It seems to me that we cannot come to any other conclusion on that point. Now, my Lords, I would merely wish to mention that it seems to me very clear that in this subsection 4 of section 51 the word "Canada" should be read and understood to mean Canada as it exists to-day. My learned friend the Attorney General of Canada cited the section of the Interpretation Act (Revised Statutes of Canada ch. 1, sec. 7 subsec.3) which if the court will allow me, I will read:

"The law shall be considered as always speaking and whenever any manner or thing is expressed——

THE CHIEF JUSTICE: That does not apply to the B. N. A. Act.

*Mr. Cannon*: I do not pretend that it applies to the B. N. A. Act which is an Imperial statute. But I submit that this is a rule of the English common law. It is a rule which applies in England also and it is a rule which will be found in Elbert as cited by the Attorney General of Canada. I think that rule is very concisely put in that subsection of the Interpretation Act. Now, my Lords, I would merely wish to say in conclusion that the British North America Act 1867 appears to me to be a kind of treaty or articles of partnership between certain possible partners who are

mentioned therein, and that the different clauses and articles of this treaty or deal of partnership must be applied equally to all the parties who have since that date come under this treaty or deed of partnership. I think that in the interpretation which the Government of the Dominion is giving to these words "aggregate population of Canada" it is acting within the true letter and spirit of the British North America Act and I hope that this opinion will be upheld by your Lordships. With these remarks may it please your lordships. I leave the matter in your hands.

*Pugsley K. C.*, in reply—It seems to me, my Lords, that the argument which the learned Attorney General for Canada addressed to your Lordships, having reference to the result of yielding to our contention, was an argument that might rather have been applied some thirty odd years ago when the British North America Act was being framed, than to-day; because that saving clause was inserted in the British North America Act in order to bring about the very result which he says would be brought about if our contention prevails. The object was, that even though a province might fall slightly below its proportion relatively to the province of Quebec, yet it should not lose a representative if, taking the aggregate population of the four provinces, its proportion had not fallen below the one-twentieth. One can readily understand that the smaller provinces might have refused to have entered into confederation unless that safeguard was provided. And if your Lordships should have the curiosity to read Pope's Confederation Documents you will see how strongly that was dwelt upon as a safeguard which was held out to the Lower Provinces. It was said by reason of that saving clause contained in subsec. 4: You need never fear that there will be a decrease in your representation.

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Now, my learned friends representing the Province of Quebec complain that we, representing the other provinces, insist as strongly as we can upon this provision of the constitution being recognised. We do not ask that there should be any violation of the terms of the compact of union. All we ask is that these terms shall be carried out and what we say is that when by the British North America Act it is provided that the representation of the four provinces shall be readjusted in the mode which is thereby described, that the statute means what it says and that is all we ask your Lordships to determine.

*Mr. Fitzpatrick*: Without regard to any amendment.

*Mr. Pugsley*: Without regard absolutely to any amendment made for another purpose and which only professes to relate to the new provinces and which does not profess to take away or to alter or to interfere with the rights of the old provinces. We say that this compact, this treaty which we entered into, ought not to be altered by any agreement to which the legislatures of the provinces were not parties; to which the people of the provinces were not parties.

My learned friends it seems to me, are seeking to have the British North America Act interpreted as if instead of the words "the four provinces," in section 51, the words were "the representation of each province." They are seeking to have it interpreted just as if the British North America Act had remained as it was in some of the drafts of the bill which your Lordships will find, if you desire to look at them, in Pope's work to which I have referred. I find in the Confederation Documents by Joseph Pope on page 164 that the third draft of the bill provides as follows:

"There shall be a general census of the people of the Dominion of Canada taken in the year one thousand eight hundred and seventy-one, and decennially



afterwards; and immediately after the said census, and immediately after every decennial census thereafter, the representation from each province in the House of Commons shall be readjusted by such authority, in such manner, and from such time as any Act of the Parliament of Canada from time to time directs."

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That expression is contained in two of the drafts but when we come to the final draft however the words "each province" are omitted, and so that there can be no doubt as to what is meant the words "the four provinces" are inserted instead.

In *St. Catherines Milling and Lumber Company v. The Queen* (1) Mr. Justice Strong used this passage:

"In construing this enactment (the British North America Act) we are not only entitled, but bound, to apply that well established rule which requires us, in placing a meaning upon descriptive terms and definitions contained in statutes, to have recourse to external aids derived from the surrounding circumstances and the history of the subject matter dealt with, and to construe the enactment by the light derived from such source, and so to put ourselves as far as possible in the position of the legislature whose language we have to expound. If this rule were rejected and the language of the statute were considered without such assistance from extrinsic facts, it is manifest that the task of interpretation would degenerate into mere speculation and guess work."

In the case just referred to, Mr. Mowat, who was counsel in the case said: "In various cases it has been decided, I am not quite sure whether in this court or in other courts, reference has been made to the resolutions upon which the British North America Act was founded. What degree of importance should

(1) 13 Can. S. C. R. 577 at p. 606.

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be attached to them has not been stated but at all events it is reasonable for judges to look at them, and if they do find that they throw any light on the subject they should avail themselves of that light." I have the impression that in the Supreme Court of New Brunswick, the late Mr. Justice Fisher thought it was quite proper to look at the proceedings of the Quebec Conference, and he claimed it was his duty to do so in order to get such light as they would throw upon the matter with a view of enabling him the better to construe the statute.

In Pope, page 126, the words are "the representation from each province shall be readjusted." As I have said my Lords, you will find these words changed back and forth. In the first draft it is the "four provinces." I do not know what it was in the second draft, but in the third draft it was "each province," and I think it was in the fourth draft also; but when you come to the final draft and to the Act as it was passed by the Imperial Parliament the words are "the four provinces."

MR. JUSTICE GIROUARD: You attach much importance to the difference of the wording.

*Mr. Pugsley*: I do my Lord, because if those who were drafting the bill were looking forward to future provinces coming in under that section no better words could have been used than "each province," but as they were introducing a safeguard, and as they were providing for provinces which were comparatively old, they thought it better not to use any words which would be open to doubt and therefore they inserted the words "the four provinces," so that it would clearly appear that in respect to representation it was with those four provinces and with those four provinces alone they were dealing, leaving the question

of representation in the other provinces to be considered in the future.

MR. JUSTICE GIROUARD: Do you mean to say that the words "four provinces" excluded the new provinces?

*Mr. Pugsley*: They do so as far as section 51 is concerned, and I say you have to look to the orders-in-council in reference to other provinces to see what their rights are and they cannot in any way alter the rights which were given to the old provinces under this section.

MR. JUSTICE MILLS: By sections 91 and 92 you have the terms and conditions as to the division of power. Would the order-in-council override that?

*Mr. Pugsley*: No my Lord and for this reason; that the order-in-council and the Imperial Act both provide that the various sections of the statute that are not particularly applicable to the provinces shall apply to the new provinces. It is quite consistent for me to admit that, and yet argue that the right in respect to representation has not been affected so far as the old provinces are concerned, because representation in respect to new provinces is not dealt with at all.

MR. JUSTICE MILLS: Your contention would go this far: That the terms and conditions of union would embrace the distribution of powers and that it would be from the terms and conditions you would have to ascertain what the powers of the new provinces were in the union.

*Mr. Pugsley*: I would say my Lord, that by necessary implication these words would extend to the new provinces, but it does not at all follow that the provision with regard to representation in respect to which no provision is made so far as a new province is concerned is not entirely different.

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Your Lordships can see that in order to provide a proper safeguard you might have to have, and you would have to have, a very different proportion if you were considering new provinces and new territories in respect to which the increase of population would necessarily be much more rapid than in the old provinces. You can very well see that the framers of confederation would recognise, that if the population of new provinces and territories had to be considered it would be no safeguard at all to put it at one-twentieth, and it would be utterly useless to have it there. It seems to me that my learned friends upon the other side must be entirely wrong in their statement that provision could be made under section 146 by order-in-council in respect to the representation if it were at all at variance with the provisions of section 51, and their whole argument seems to be based on that. I submit my Lords that if you read section 146 you will, I think, agree with me that any order-in-council which they chose to pass providing any terms of union that they pleased to agree to, the moment that was assented to by the Queen in council it had all the force and effect of an Imperial statute.

MR. JUSTICE DAVIES: You do not consider at all the words "subject to the provisions of this Act."

Mr. Pugsley: No my Lord because it would not be necessary to put them in. Let me read section 146. Surely it will not be denied that the Imperial Parliament can make any provision it likes. Section 146 reads:

"It shall be lawful for the Queen by and with the advice of Her Majesty's Most Honourable Privy Council on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island and British Columbia, to admit

those Colonies or any of them into the Union on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve subject to the provisions of this Act; and the provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

MR. JUSTICE ARMOUR: That is all controlled by "subject to the provisions of this Act."

Mr. Pugsley: A complete answer is, that the Act makes no provision with respect to these new provinces.

Now my Lords, just consider how unreasonable it would be to construe the British North America Act or section 51 in the way in which my learned friends think it should be construed. The Dominion originally consisted of four provinces. The idea of the safeguard in subsection 4 is that a reduction of representation shall depend upon the proportionate increase in these four provinces. Now if the contention of my learned friends is correct, the moment you brought in British Columbia you would have introduced an element which was not taken into consideration and could not have been taken into consideration upon the previous readjustment because it was no part of Canada, and therefore so far as the older provinces are concerned you would have to be placing their increase merely against the whole population of the new province which is brought in. And therefore, even although the increase of New Brunswick might have been greater than the increase of the five provinces including British Columbia, yet we would still lose our representative because you could not take into account the increase, but you would have to take into account the whole population of British Columbia as it did not form part of Canada previously.

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I have one reference to make and I shall not trouble your Lordships further, because the case has been exhaustively argued and there is nothing I can say further to aid your Lordships. The report which the learned Attorney General for Canada mentioned yesterday, the report which was made by the then Minister of Justice, Sir John Macdonald, on the 28th day of September 1870, under which the Imperial legislation is enacted absolutely confirms, it seems to me, the position which we take. I find in Hodgins Dominion and Provincial Legislation page 10, that Sir John Macdonald reported:

“The general purview of the British North America Act 1867 seems to be confined to the three provinces of Canada, Nova Scotia and New Brunswick, originally forming the Dominion.”

That is our view, my Lords.

MR. JUSTICE MILLS: That was due to the way in which that territory was brought into Canada. There were no conditions stated.

Mr. Pugsley. But the view of the Minister of Justice was that the British North America Act makes no provision whatever in regard to and does not have in view representation from the territories, and that was why Sir John Macdonald thought it necessary to have additional legislation on the subject. Now my Lords, the Deputy Minister of Justice when he referred to section 22, held that “Canada” must not always receive the same interpretation so far as the British North America Act is concerned. He admits that Canada in section 22 only means a part of Canada. He admits that “Canada” there does not mean the whole of Canada because it says:

“In relation to the constitution of the Senate, Canada shall be deemed to consist of three provinces, namely Ontario, Quebec and the Maritime provinces of Nova Scotia and New Brunswick.”

MR. JUSTICE GIROUARD. That is an exception made by the statute but whenever there is no exception you must take the other view and give a large interpretation to the word "Canada."

Mr. Pugsley: I think your Lordship does not quite understand. What I understood to be admitted, and what I would say as to that is, that in interpreting that section your Lordships must hold that "Canada" only means there Ontario, Quebec and the Maritime Provinces.

MR. JUSTICE GIROUARD: The statute says so.

Mr. Pugsley: That is true, and so in section 51 it says the "four provinces," and where can be the difference. Here it gives in detail what the four provinces are, namely, Ontario, Quebec, New Brunswick and Nova Scotia, and in the other case it says the four provinces which are the provinces which are being constituted into a confederacy. It seems to me my Lord that if my learned friends here have to contend as they have that in construing subsection 4 you are to take the population of the territories as well as the new provinces, they are driven into a very great difficulty because the result of their contention is that in applying this saving clause you will have to bring in a portion of Canada which is not represented in the House of Commons at all. You would bring in the Peace River country, you would bring in the district of Ungava; you would bring in all the unorganised territories which contain a population of 75,000, the organised territories containing a population of 150,000. The unorganised territories form a part of the Dominion of Canada. You would therefore not only be obliged to bring in a portion of the territories in respect to which there is a representation but which is not to be readjusted at all under section 51, but you would also bring in a large population of the unorgan-

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ised territories which has no representation in Parliament which contains about 75,000 people, and in respect to which there will be a very rapid increase of population in the near future; because judging by the way that western country is filling up population is not going to be confined to the organised territories.

GIROUARD J.—This Order of Reference involves the interpretation of clauses 51 and 146 of the B. N. A. Act which, it seems to me, are capable of only one construction. As I read them, they mean the aggregate population, as ascertained at the latest census, of all the provinces and territories then constituting Canada. Sec. 51 lays down the principle to be applied to the readjustment of the representation of the four original provinces, and sec. 146 and the Imperial statutes relating to the territories; 34 & 35 Vict. ch. 28, and 49 & 50 Vict. ch. 35, provide for the admission of other provinces into the union, and that these new provinces, whether formerly independent of Canada, like Prince Edward Island and British Columbia, or created out of the territories, like Manitoba, shall be subject to the provisions of the B. N. A. Act. They and the territories—not only the four original provinces—constitute Canada and the Dominion of Canada, and are governed by the same constitution, in so far as it may not be inconsistent with the terms of their union respectively.

I am therefore of opinion that subsection 4 of section 51 of the B. N. A. Act means the whole population of Canada; that is not only the aggregate population of the four original provinces, as ascertained at the latest census, but also the territories, whether represented in Parliament or not, and all the provinces which have been created or admitted into the union subsequent to the passage of the B. N. A. Act, 1867.

DAVIES J.—This reference is made for the purpose of obtaining the opinion of this court as to whether in determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled, after each decennial census, the words aggregate population of Canada, in subsection 4 of section 51 of the British North America Act of 1867, should be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada including that of the new provinces which have been admitted to the Confederation subsequent to the passing of the British North America Act.

The question we are asked to answer involves the proper construction to be given to sec. 51 of the B. N. A. Act. It is contended on behalf of the Provinces of Ontario, Nova Scotia and New Brunswick, that the section in question applies in terms only to the four provinces which were declared to comprise the Dominion when the B. N. A. Act came into operation and that it was only intended to have such limited application excepting in so far as subsequent orders-in-council, under the 146th sec. of the Act admitting other provinces into the union, might extend to these new provinces the principles and benefits of the section. It was strenuously contended, however, that the extension of the operation of the section in question to new provinces could not take away from any of the four first provinces comprising the Dominion rights which the section gave and was intended to give them.

There is no doubt a good deal to be said for the argument thus presented arising from the use in the section under review of the language “the representation of the four provinces shall be re-adjusted” by

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Parliament after each decennial census in manner therein provided. I have, however, after careful consideration of the whole Act and its amendments, reached the conclusion that the argument of the Attorney General for Canada must prevail and that the expression "four provinces" means, and must be read as "several provinces" comprising the Dominion. Any other construction gives rise to incongruities and difficulties which would render the operation of the section different in different provinces of the Dominion and would defeat what appears by the 51st and 52nd sections of the Act to be the basic principle intended to govern the representation of the people in the House of Commons, viz., "the proportionate representation of the provinces." The B. N. A. Act is an instrument of government and must be read and construed in the light of its declared objects. Its preamble, while declaring the desire of the three provinces of Canada, Nova Scotia and New Brunswick to be federally united into one Dominion under the Crown, further declared the expediency of providing for "the eventual admission into the union of other parts of British North America" and its enacting part made provision for carrying out these objects. These two main objects of the Act must at all times be borne in mind while construing any of its sections. The union was not consummated by the act itself, but by an executive Act of the Crown authorised by the 3rd section of the statute, and in like manner the extension of the Dominion by the admission of other parts of British North America whether provinces or territories from time to time took place by similar executive acts (sec. 146).

The 4th section provides that in construing the provisions of the Act unless otherwise expressed or implied "the name Canada shall be taken to

mean Canada as constituted under this Act." I think the contention submitted on behalf of the Dominion is correct, and that this means Canada as constituted *from time to time* under the Act. And so applying this principle to the 8th section requiring a decennial "census of the population of Canada" to be taken, I think it obviously meant Canada as it was constituted at the time appointed by the statute for the taking of each decennial census. Any other construction involving a partial census only would seem absurd and calculated to defeat the object Parliament must have had in view. It is true the same section requires the respective populations of the four provinces into which Canada was first divided to be distinguished, but again I adopt the reading of the Attorney General that this means, and by virtue of subsequent amendments of the Act must necessarily mean, the several provinces comprising the Dominion from time to time, and whose subsequent admission was either expressly contemplated originally or subsequently authorised by Imperial legislation. The scheme for the decennial readjustment of the representation of the people in the House of Commons of Canada contained in secs. 51 and 52 is, as I have said, expressly declared to be the "proportionate representation of the provinces," and is based upon the well known principle of representation by population. It is to work automatically. Quebec is selected as the pivotal province and has an arbitrary number of 65 members assigned to it. The division of that number into its population after each decennial census gives the unit of representation on which the readjustment for the whole Dominion is to be based, and subsec. 2 accordingly applies it to "each of the other provinces." Subsec. 3 directs fractional parts of the unit less than a half to be disregarded, and subsec. 4

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around which the main argument revolved and which in the argument at bar was called the "saving clause" provided against a province losing any of its representation unless the proportion which the number of its population bore "to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province as ascertained at the then latest census should be found to be diminished by ¹ or upwards."

I am of opinion that this section is a general provision applicable and intended to be applicable to all the provinces forming part of the Dominion from time to time. It is obvious that no reduction in the representation accorded to any one of the newly admitted provinces could be made under this subsection, until that province had been made part of the Dominion for two decennial periods because the standards or proportions fixed by the subsection and by virtue of the existence of which alone the reduction could be made could not be found till after that. But apart from that limited and special period the provision was intended to cover the cases of all the provinces for which the previous section had provided there should be a decennial census and the general words "the number of the aggregate population of Canada" are to be given their proper and plain meaning, and read so as to include the population of the provinces and territory added from time to time as well as that of the four original provinces into which Canada was first divided. These words are not to be limited, even when working out the application of the section to the other provinces, to the population of Canada as it existed territorially when confederation was first formed. The Attorney General for New Brunswick admitted that with respect to Prince Edward Island and British Columbia, each of which joined the union

some years after it was originally constituted, and also with respect to Manitoba which was created as a province by subsequent legislation, a larger construction than the one contended for by him with respect to Ontario, Nova Scotia and New Brunswick must necessarily be given to the words in question. The result would follow that two or more different constructions must be given the same phraseology in the same subsection and instead of the same section working automatically after each decennial census as between the population of a province and the aggregate population of Canada, as I think was intended, it would have to be worked out on the basis that there were three or four different "aggregate populations of Canada" dependent upon the several times when the different provinces whose union with the Dominion was contemplated actually became part of it. This certainly is a conclusion and a result which only the clearest and strongest language would justify us in reaching, and so far from the language of this section being clear and strong enough to justify a construction so opposed to ordinary rules I am of opinion it is perfectly consistent with the larger and better construction which, excepting in the special cases where a meaning territorially limited is expressly given or is necessarily to be implied, requires the general sections of this instrument of government, the British North America Act and its amendments, to be construed as embracing as well the territory and people subsequently admitted to the union as those originally constituting it.

Subsequent Imperial legislation in 1871 confirming the Dominion legislation constituting a part of Ruperts Land and the North-West Territory a province of the Dominion under the name of Manitoba, and afterwards in 1886 empowering the Dominion to provide for the

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representation in the Senate and Commons of Canada of any territory which for the time being formed part of Canada but was not included in any province thereof, declared that the original Act and its amendments should be construed together. This legislation of 1871 as confirmed by the Imperial Parliament provides that the provisions of the British North America Act, 1867,

except those parts thereof which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more of the provinces now composing the Dominion shall be applicable to the new province of Manitoba, in the same way and to the same extent as they apply to the other provinces of the Dominion and as if the Province of Manitoba had been one of the provinces originally united by the said Act.

Secs. 51 and 52 do not certainly come within the above exceptions and even if reasonable doubt did exist as to the true meaning of the sections under review this subsequent imperial legislation would seem to remove them.

Upon the whole, after careful consideration, I am of the opinion that after the admission of new provinces and territory into the union, the expressions "Canada" and "Province" throughout the Act of 1867, must unless specially restricted by the context be necessarily given an interpretation different from that which they respectively bore before these provinces or territory were admitted, and must be taken after such admission to apply to and include these subsequently admitted provinces; and the words "aggregate population of Canada" in the 51st sec. of the Act held to mean the population of Canada as it is constituted under the British North America Act at each decennial census.

MILLS J.—In my opinion the subsection referred to must be held to mean the whole population of Canada according to its last decennial census. It is important,

in considering this question, to ascertain whether the British North America Act, 1867, and the amendments made thereto, place the provinces which are now included within the Dominion, upon a footing of equality in respect to the representation of the people of those provinces in the House of Commons of Canada; whether each province is entitled, as nearly as may be, to representation in proportion to the population of all Canada, as it exists after the last census taken, under the authority of the Act, or whether the four provinces which constituted the Canadian confederation at the outset, are exceptionally dealt with and are entitled to have their representation under subsection 4 of section 51, remain undiminished, if the population of each province, compared with the population of the four taken together, is not diminished by one-twentieth part or upwards. In order that this question may be clearly understood, and the Act correctly construed, it is necessary to briefly refer to the constitutional discussions which took place in old Canada, now Ontario and Quebec, before the act of confederation was adopted, and out of which this provision of the British North America Act grew. When we look at the terms of the union agreed to at the conference of Quebec, between Canada and the Maritime Provinces, and which constituted the basis of the terms submitted to the Colonial Secretary and which are contained in the British North America Act, they will aid us in more clearly understanding what the framers of the Act sought to accomplish.

The Imperial Parliament, in the preamble of that statute, state that Canada, Nova Scotia and New Brunswick have expressed a desire to be federally united under a constitution similar in principle to that of the United Kingdom; so that, in passing the Act, they are meeting the views of the delegates of the provinces

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mentioned, and they also declare that such a union would conduce to the welfare of the provinces, and promote the interests of the Empire. In this statute, the Imperial Parliament is giving effect to the wishes of the provinces mentioned, but it is well known that it was not the ministers and other prominent men of the provinces named in the Act, alone, that met in the city of Quebec in 1864 to agree upon a plan of union, —to that plan prominent public men in Prince Edward Island and in Newfoundland were also parties. They discussed the terms upon which the union was to be brought about; they agreed that it should be a Federal union; they agreed upon the distribution of legislative jurisdiction to be made between the Provincial Legislatures that then existed, and the Parliament of Canada, which was yet to be created; they agreed that there should be a Senate and a House of Commons in which all the provinces were to be represented; they agreed that the Federal Government should be called into existence under a constitution similar in principle to that of the United Kingdom, that is, with ministers responsible to the House of Commons, and with a Parliament Supreme in the Government of the Dominion. In passing the Act, the Imperial Parliament were meeting the views of all the provinces that had taken part in settling the terms of union. In passing into law this plan of union, the Imperial Parliament sought to give effect to the wishes of the people whose representatives had taken a part in settling the terms of this instrument of Government. They agreed that the basis of representation in the House of Commons should be population, as ascertained by the official census to be taken every ten years. They agreed that the number of members for the House of Commons should be 194, distributed among the pro-

vinces whose delegates had settled the plan of union, as follows :

- Upper Canada, 82.
- Lower Canada, 65.
- Nova Scotia, 19.
- New Brunswick, 15.
- Newfoundland, 8.
- Prince Edward Island, 5.

This was to be the representation based on the population of each province, as nearly as it could be ascertained at the time. It was further provided, until the official census of 1871 could be made up, that there should be no change in the number of representatives to be returned from the several provinces. It was also provided that the communication of the Maritime Provinces should be promoted by the general government securing without delay the completion of the Intercolonial Railway from the Rivière du Loup, through New Brunswick, to Truro in Nova Scotia. This was thought a work essential to the union. The delegates looked to the extension of the Dominion to the westward, so as to include ultimately the whole of British North America, and to this end they further agreed that the communications with the Northwest Territories and the improvements necessary to that end, which were also required for the development of the trade of the great west with the sea-board, were subjects of the highest importance to the Federated Provinces, and should be prosecuted at the earliest period that the state of the finances would permit. The Quebec conference was largely made up of the advisers of the Crown in the five provinces of British North America, to the eastward of the territories, and which became six provinces by the dissolution of the incorporate union between Quebec and Ontario.

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All the provinces of British North America, except British Columbia, were represented in the Quebec conference, and they were all that it was thought possible to embrace at once in the union. They all assisted in framing the constitution, and they agreed, without dissent, that each province after entering the union, should be represented in the House of Commons according to its population.

Quebec was to have 65 members and the number of representatives to which each of the other provinces would be entitled could be ascertained by dividing the whole population of each by one sixty-fifth of the population of Quebec. It was agreed that the census should be taken every ten years, beginning with the year 1871, and the number of representatives mentioned, with which a province entered the union, was to continue to be the number by which it was entitled to be represented in the Commons of Canada until its population was ascertained by the taking of the census, after which a readjustment was to be effected, if this was found necessary. If the population of a province bore to the aggregate population of Canada a less proportion by one-twentieth than it did by the previous census its representation was to be diminished, but if the relative diminution was less than one-twentieth it was not thought desirable to necessitate the disturbance of its electoral districts by requiring readjustment. It was also provided that the number of members in the House of Commons might be, from time to time, increased by the Parliament of Canada provided that a proportionate representation of the provinces prescribed by this Act was not thereby disturbed.

This plan of union marked out by the Quebec Convention and ratified by the legislatures of the several provinces was further discussed by the delegates from

the various provinces that assembled in London, and since known as the London Conference, where an Act was finally prepared and introduced into the Imperial Parliament by Lord Carnarvon, the then Secretary of State for the Colonies.

Two of the provinces that were parties to the conference were not prepared, at once, to join the union and so the union of the remaining four provinces was proceeded with. The whole scheme was not allowed to stand over because two of the provinces that had taken part in settling the terms of the union hesitated afterwards to enter it.

When we examine the terms of the British North America Act with those facts before us, we shall be better able to understand its scope and bearing, and the provisions that were made with the view of bringing into the union those parts of British North America that were not, in 1867, included.

In the preamble of the Act it is stated that the Provinces of Canada, Nova Scotia and New Brunswick have expressed a desire to be federally united in one Dominion, under the Crown of the United Kingdom, with a constitution similar in principle to that of the United Kingdom,—similar in principle as respects the relations of the constitutional advisers of the Crown, to the Sovereign and to Parliament. The British North America Act is largely taken up with providing a plan of government for Canada. The system of government that prevailed in each of the four provinces was continued. The only change made was in the diminution of the legislative authority of each, and in supplementing what remained of the constitution of Ontario and Quebec, so as to give to each a separate provincial organisation. The executive authority being in the Sovereign of the United Kingdom, the executive government was declared; but there being no Fede-

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ral Parliament, the constitution of the legislative authority in the Dominion had to be provided for. The preamble of the Act declares that it is expedient that provision be made for the eventual admission into the union of other parts of British North America. So that, although but four provinces were embraced when the British North America Act, 1867, first came into operation, it was expressly declared in the preamble that it was expedient that provisions be made for the eventual admission into the union so proclaimed of other parts of British North America. It was the declared intention that all parts should be embraced and the Act was so framed that this intention might be carried out without further Imperial legislation; and we are called upon to so interpret and construe the Act that this intention may be accomplished.

I think, if we give full effect to the reason and spirit of the terms employed in the Act, it will not be found difficult to carry out the intentions of Parliament. In construing the British North America Act we must examine it in the light of the surrounding circumstances at the time it became law. It rests upon agreement. It is the result of compact. It is the outcome of a treaty between the provinces that were represented in the Quebec Conference in 1864, and in the London Conference at a later period. Lord Carnarvon assigned this origin as a reason, in addressing the House of Lords upon the bill, for not treating it as an ordinary bill, and for asking Parliament to accept its terms as it had come from the hands of the parties that had given it their sanction. They were representative men in self-governing provinces, that had agreed to surrender a portion of that authority which they had previously exercised to bring about a strong and durable union which was intended to embrace the whole of British North America. We must inter-

pret the Act as a public instrument of government, so as to secure its effective operation. The word Canada at the outset meant the four provinces that constituted the Dominion under the Act; since then, the intention stated in the preamble of the Act of admitting other parts of British North America into the union has been carried out, and the provisions for this purpose which the Act contains have been brought into operation. By section 22 Canada as it first existed, for the purpose of determining the representation in the Senate, consisted of three divisions, Ontario, Quebec and the Maritime Provinces of Nova Scotia and New Brunswick. This was the extent of its territorial limits; but section 147 provides that in case of the admission of Newfoundland and Prince Edward Island, "each of them shall be represented by four Senators in the Senate of Canada." Prince Edward Island when admitted is to be deemed to be comprised in the division of the Maritime Provinces, but Newfoundland is not embraced in that division.

Section 146 provides for the admission of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the North-west Territories. These were to be brought in on such terms and conditions, in each case, as are in the addresses expressed, and as the Queen thinks fit to approve, "subject to the provisions of this Act." British Columbia and Prince Edward Island were so brought in after stating in the addresses various terms and conditions, some of which are necessary and some are surplusage, as the British North America Act assigned to the proper authority the matters referred to without any agreement.

Article 10 provides

that the provisions of the British North America Act, 1867, shall, (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only affect

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one and not the whole of the provinces now comprising the Dominion, and except so far as the same may be varied by this minute), be applicable to British Columbia in the same way and to like extent as they would apply to the other provinces of the Dominion and as if the Colony of British Columbia had been one of the provinces originally so united by the said Act. *The Attorney-General of British Columbia v. The Attorney-General of Canada* (1).

In the terms and conditions by which Prince Edward Island is admitted into the union, beside many other things, it is provided, article 14, that the provisions in the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only to affect one and not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island in the same way, and to the same extent, as they apply to the other provinces in the Dominion, and as if the Colony of Prince Edward Island had been one of the provinces originally united by the said Act.

In the case of these two provinces they were brought into the union under the power bestowed by section 146 of the British North America Act. And they are to exercise the legislative power bestowed under sections 92 and 93 of the Act, and to stand towards Canada in exactly the position they would have stood had they been originally united by the British North America Act. Can it then be said that they are not to be, after entering the union, enumerated in section 5, in section 8, in sec. 22, and in sec. 51 of the Act as if they had been included when the Act passed the Imperial Parliament? In the judgment of the Privy Council in *The Attorney General of British Columbia v. The Attorney General of Canada* (1), their Lordships say

(1) 14 App. Cas. 303, 304.

they do not think it admits of doubt, and it was not disputed at the bar, that sec. 109 of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration it enacts that all lands, mines, minerals and royalties, which belong to British Columbia at the time of the union, shall for the future belong to that province and not to the Dominion. In order to construe the exceptions in that enactment which is created by the eleventh article of the union, it is necessary to ascertain what is comprehended in each of the words of the enumeration, and particularly in the word "royalties."

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And on the previous page of the same judgment their Lordships say, in speaking of the eleventh article (1)—

It is part of the general statutory arrangement of which the leading enactment is that on its admission to the federal union, British Columbia shall retain all the rights and interest assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of the provincial property and revenues between the provinces and the Dominion, the 11th article being nothing more than an exception from these provisions.

So upon the authority of their Lordships the name of the Province of British Columbia should be inserted in those sections in which the provinces are named, such as sections 5, 37, 51, 102, 129 and others of like character.

In the case of Manitoba, a difficulty was created by the manner in which it was brought into the union. The mistake was pointed out in the discussion which took place in Parliament, and is referred to in a memorandum submitted to Council by Sir John Macdonald on the 2nd of January, 1871, as Minister of Justice. In the addresses for the admission of Rupert's Land and the North-West Territories into the Dominion of Canada, no provision was made for the future creation of provinces out of the territory under the authority bestowed by the British North America Act. The territory was acquired and placed under the jurisdiction of Canada,

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with no power for the creation of provinces out of it, without further imperial legislation. Manitoba received her constitution from Canada. Her powers of local self-government were professedly bestowed by an Act of the Canadian Parliament; so that it was a province whose powers might be enlarged, restricted or abolished by the Parliament of Canada. The relation existing between it and Canada was not federal, and so Imperial legislation was subsequently sought to validate what had been done and what might have been legally done under section 146 of the British North America Act, when the North-West Territories and Rupert's Land were being included within the Dominion of Canada. The Imperial Confederation Amendment Act of 1871 was passed to provide for the establishment of provinces out of the territories, and to secure their federal union with those already in Canada. This Act was necessary, because no provision had been made for the formation of provinces out of the territory acquired in its terms of admission.

It is too plain to call for discussion that the three provinces now included in the Dominion of Canada, but which were not in when the Dominion was proclaimed, stand towards Canada in exactly the same relation as the four provinces that were first embraced. They are in the union, under the authority of the imperial statute—as much so as if they had been in the union from the beginning. They are entitled to be enumerated along with the four provinces wherever that enumeration is employed to indicate the number of provinces embraced in the Dominion when the confederation Act was first enacted, and as if they had then been included. It is clear that a limited and specific power is bestowed under sec. 146 upon Her Majesty to legislate upon the receipt of addresses from the houses of the provincial legislature, and the two Houses of the

Parliament of Canada ; and the proper exercise of that power, amends the British North America Act wherever the number of provinces is mentioned, so as to make that number correspond with the number of provinces embraced in Canada at the time after the last admission to the union is made. At the outset there were but four provinces, and but four were in consequence mentioned in the Act, wherever it became necessary to refer to the number of provinces included in the union. At the present time there are seven, and seven should be now substituted in the British North America Act for four, wherever the word four is used, and when additional provinces are admitted into the confederation, the number of provinces in the union should be correctly stated in sections 5, 8, 51, and wherever the word four may be employed in the Act, as correctly stating the number of provinces within the Dominion. It follows from the provisions made for ultimately embracing the whole of British North America into the union, that the people of the different provinces were intended to stand, in respect to their representation in Parliament, upon a footing of perfect equality, and that the provisions of the 51st section of the British North America Act were intended to apply to the population of every province that might thereafter be admitted into the union, as well as to the population of each of the four provinces that were first included. I think this is reasonably clear from the provisions made for the admission of other provinces in North America, until the whole of British North America was included within the Dominion of Canada. A fair construction of sec. 146 makes it possible to carry this avowed intention into effect on lines consistent with the provisions of the Act. The policy of uniting all British North America under the constitutional Act of 1867 certainly contemplated a confed-

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eration that, when completed, would consist of many more provinces than those originally embraced. And sec. 146 makes provision for the admission of other provinces without the necessity of further legislation by the direct act of the Imperial Parliament. As these proceedings were to be taken under the authority of the Act, and without any interference with the terms and conditions already settled, and the distribution of power already made between the Dominion and the provinces, the legislature of the province to be admitted, and the two Houses of the Dominion Parliament, were entrusted with settling the terms and conditions of admission of such province in the Dominion in each case, which, when embraced in the imperial order-in-council, were to have the same effect after Her Majesty's approval, as if they had been enacted by the Parliament of the United Kingdom; so that the terms and conditions of that order-in-council are to be read as if they were a part of the British North America Act. This is not a strained, but an obvious construction of the Act alike called for by its letter and spirit. Were it necessary to do so, it would be our duty to make the words of the statute yield to its reason and expressed intention. In adopting this construction we are giving effect to the intention of Parliament, and following a rule necessary to carry into effect the provisions of our constitution. The courts of England have, on more than one occasion, preferred to follow the reason rather than the exact letter of the law; *Fowler v. Paget* (1); *Rex v. Banks* (2); *The Queen v. Tolson* (3); *Reg. v. Prince* (4); but in this case, in giving effect to the declared intention of Parliament, we are not required to give to the word any unnatural

(1) 7 T. R. 509, 514.

(2) 1 Esp. 144.

(3) 23 Q. B. D. 168.

(4) 2 C. C. R. 154.

construction, for we have in our judgment adhered to the letter and spirit of the Act of Confederation.

We concur in this opinion.

(Sd.) H. E. TASCHEREAU C.J.
R. SEDGEWICK J.
J. D. ARMOUR J.

1903
In re
REPRESENTATION IN
THE
HOUSE OF
COMMONS.
Mills J.

The formal report by the court to the Privy Council in answering the question submitted by the reference was as follows:—

In the matter of a reference to the Supreme Court of Canada by the Governor General in Council, under the provisions of the Act 54 & 55 Vict. ch. 25, sec. whereby the following question was submitted to the court for hearing and consideration :

In determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words "aggregate population of Canada" in subsection four of section fifty-one of the British North America Act, 1867, be construed as meaning the population of the four original Provinces of Canada, or as meaning the whole population of Canada including that of provinces which had been admitted to the confederation subsequent to the passage of the British North America Act ?

The court having heard counsel on behalf of the Dominion as well as on behalf of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, and having considered the question submitted as aforesaid certifies to the Governor in Council, that in its opinion the words "aggregate population of Canada" in subsection four of section 51 of the British North America Act, 1867, should, for the reasons contained in the documents hereunto annexed, be construed as meaning the whole population of Canada including that of provinces which have been admitted to the confederation subsequent to the passage of the British North America Act.