

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of (1) The Attorney-General for the Province of Prince Edward Island v. The Attorney-General for the Dominion of Canada; and (2) The Attorney-General for the Province of New Brunswick v. The Attorney-General for the Dominion of Canada; delivered the 4th November 1904.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

These Appeals have been brought against two decisions of the Supreme Court of Canada upon two questions referred to that Court for its opinion by Order in Council under the Canadian Act 54 & 55 Vict. c. 25. The two questions have arisen out of the same occurrences, though different considerations apply to them, and the two Appeals were argued together. They may conveniently be disposed of in one Judgment.

The British North America Act 1867, sect. 3, empowered Her late Majesty in Council to declare by Proclamation that, on and after a day therein appointed, not being more than six months after the passing of the Act, the Provinces of Canada, Nova Scotia, and New Brunswick should form and be one Dominion under the name of Canada; and on and after that day those three Provinces were to form and be one Dominion under that name accordingly.

Section 4 said : "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."

Section 5 said : " Canada shall be divided into  
 " four Provinces, named Ontario, Quebec, Nova  
 " Scotia, and New Brunswick."

Section 8 said : " 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."

Section 37 said : " The House of Commons shall,  
 " subject to the provisions of this Act, consist of  
 " one hundred and eighty-one members, of whom  
 " eighty-two shall be elected for Ontario, sixty-  
 " five for Quebec, nineteen for Nova Scotia, and  
 " fifteen for New Brunswick."

Section 51 is as follows :—

" 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  
 " re-adjusted 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 :—

" (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 popula-  
 “ tion of Quebec (so ascertained).

“ (3.) In the computation of the number of  
 “ members for a Province a fractional  
 “ part not exceeding one-half of the  
 “ whole number requisite for entitling  
 “ the Province to a member shall be  
 “ disregarded; but a fractional part  
 “ exceeding one-half of that number  
 “ shall be equivalent to the whole  
 “ number.

“ (4.) On any such re-adjustment the number  
 “ of members for a Province shall  
 “ not be reduced unless the propor-  
 “ tion 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 Pro-  
 “ vince is ascertained at the then  
 “ latest census to be diminished by  
 “ one twentieth part or upwards.

“ (5.) Such re-adjustment shall not take effect  
 “ until the termination of the then  
 “ existing Parliament.”

By Section 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 the Act is not thereby disturbed.

Section 146 is as follows:—

“ 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 Terri-  
 “ tory, 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.”

Canada in the widest sense of the term now comprises, in addition to the four original Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, three other Provinces which have entered the Dominion at various dates subsequent to its first formation, Manitoba, British Columbia, and Prince Edward Island. It also comprises certain territories which have not received the organisation of provinces.

It will be convenient here to notice briefly certain of the circumstances connected with the admission of each of the new Provinces into the Dominion, for some argument was based upon them. Manitoba was the first of the new Provinces, and it was carved out of Rupert’s Land and the North-Western Territory referred to in Section 146 of the British North America Act, 1867. An Order in Council, based upon an address as contemplated by that Section, was issued on the 24th June 1870, by which Rupert’s Land and the North-Western Territory were made part of the Dominion of Canada. In preparation for this Order in Council, at a time when it was expected but had not actually issued, the Canadian Act 33 Vict. c. 3 was passed. It enacted that from the time when the

expected Order in Council should incorporate Rupert's Land and the North-Western Territory, there should be carved out of them the Province of Manitoba.

It was added by Section 2 that :—

“ 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 applic-  
 “ able 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; ”  
 and by Section 4 that :—

“ 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 re-adjusted  
 “ according to the provisions of the fifty-first  
 “ section of the British North America Act,  
 “ 1867.”

This Canadian Act was affirmed and full validity given to it by the Imperial British North America Act, 1871, 34 & 35 Vict. c. 28.

British Columbia was admitted into the Dominion by an Order in Council bearing date the 16th May 1871, which was based upon addresses as contemplated by Section 146 of the

Act of 1867 and embodied their terms. It is only necessary to refer to the following :—

Section 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.”

Section 10. “The provisions of the British North  
 “ America Act, 1867, shall (except those parts  
 “ thereof which are in terms made, or by reason-  
 “ able 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.”

Prince Edward Island was made part of the Dominion of Canada by Order in Council, dated 26th June 1873, which like its predecessor was based upon, and embodied the terms of, the addresses contemplated by the statute. It is only necessary to notice one clause (12) :—

“That the population of Prince Edward Island  
 “ having been increased by fifteen thousand 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 re-adjusted from time to time under the  
 “ provisions of the British North America Act,  
 “ 1867.”

With regard to the territories not included in provinces it is sufficient to say that the Imperial British North America Act, 1886, 49 and 50 Vict. c. 35, gave full power to the Canadian Legislature to provide for the Parliamentary

representation of territories, and Acts of the Canadian Legislature have from time to time conferred upon the inhabitants of the territories rights of representation in the Dominion Parliament, on a more liberal scale, it was stated, than would result from a strict application of the usual rule of proportion.

In 1871, and in each tenth year from that time, a census of the Dominion has been taken in accordance with Section 8 of the British North America Act, 1867. And each such census has been followed by an Act of the Dominion Parliament to re-adjust the representation of the Provinces, in conformity with the results disclosed by the census, according to the principles embodied in Section 51.

Such a census was taken in 1901, and in 1903 followed the Act readjusting representation. That Act as passed reduced the number of representatives in the House of Commons of certain of the Provinces of the Dominion, of which it is only necessary to mention New Brunswick, whose members were reduced in number from 14 to 13, and Prince Edward Island whose members fell from 5 to 4.

Each of these Provinces objected to the principles upon which the re-adjustment had been carried out, and with respect to each of these Provinces a question was submitted by Order of the Governor-General in Council for the opinion of the Supreme Court.

New Brunswick was one of the four original Provinces of the Dominion, and in her case there could be no doubt of the applicability of Section 51 of the Act of 1867, the only doubt suggested was as to its construction. The question submitted was this:—

“ In determining the number of representatives in the House of Commons to which . . .  
 “ New Brunswick . . . is 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 ? ”

Prince Edward Island was not one of the four original Provinces ; but was incorporated in the Dominion in 1873 on terms which have been sufficiently noticed. On her behalf considerations were raised of a somewhat different character from those in the case of New Brunswick. The question submitted to the Supreme Court in the case of Prince Edward Island was this :—

“ Although the population of Prince Edward  
 “ Island, as ascertained at the census of 1901, if  
 “ divided by the unit of representation ascer-  
 “ tained by dividing the number of 65 into the  
 “ population of Quebec is not sufficient to give  
 “ six members in the House of Commons of  
 “ Canada to that Province, is the representation  
 “ of Prince Edward Island in the House  
 “ of Commons of Canada liable under the  
 “ British North America Act, 1867, and  
 “ amendments thereto, and the Terms of Union  
 “ of 1873 under which that Province entered  
 “ Confederation, to be reduced below six, the  
 “ number granted to that Province by the said  
 “ Terms of Union of 1873 ? ”

The case relating to New Brunswick was the first to come before the Supreme Court, and in that case the learned Judges answered the question laid before them to the effect that “ the  
 “ words ‘ aggregate population of Canada’ in  
 “ Sub-section 4 of Section 51 of the British



“ North America Act, 1867, should be construed  
“ as meaning the whole population of Canada,  
“ including that of the Provinces which have  
“ been admitted to the Confederation subsequent  
“ to the passage of the British North America  
“ Act.” And they gave full reasons for their  
conclusion.

The case of Prince Edward Island afterwards came before the Court, and in that case the learned Judges after argument, and for reasons fully stated by them, answered the question submitted to them in the affirmative.

The Appeals now before their Lordships are against these two decisions. The Appeal of Prince Edward Island was filed first, and the learned Counsel for that Province was the first to be heard before their Lordships. But it will be more convenient to deal with the cases in the order in which they came before the Supreme Court, and to consider that of New Brunswick first.

The scheme of Section 51 is clear and simple. In directing a re-adjustment of representation after each decennial census, it provides that Quebec is to have a fixed number of sixty-five representatives, and that each of the other Provinces is to have assigned to it a number of representatives bearing the same proportion to its population as 65 bears to that of Quebec. This is the enactment by virtue of which the number of representatives of any Province can be increased or diminished, and this is the enactment which furnishes the rule for such a change. Nor is there any dispute that upon the principle so laid down taken by itself the reduction in the number of representatives of New Brunswick was right.

The question arises upon Sub-section 4, a sub-section which introduces a restriction or qualification upon what has gone before, by saying that on

any 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 last preceding re-adjustment is ascertained to be diminished by one-twentieth part or upwards. And the point is as to the meaning of the words "the aggregate population of Canada." By Section 4 Canada is defined as meaning "unless it is otherwise expressed or implied . . . . "Canada as constituted under this Act." Under the Scheme of the Act the Dominion was not constituted by the immediate operation of the Act itself. The territory included in the four original Provinces was incorporated by Proclamation issued under the authority of Section 3. The territory included in the Provinces subsequently incorporated was admitted by Orders in Council issued under Section 146. In their Lordships' opinion all these Provinces equally form part of Canada as constituted under the Act.

The contentions raised on behalf of New Brunswick were these: First, it was said that in Sub-section 4 of Section 51 Canada means only the four original Provinces. This contention seems to their Lordships inconsistent with Section 4. It was next said that Canada in Sub-section 4 of Section 51 could at most only apply to such Provinces as were in the fullest sense themselves governed by that Section, and that by reason of the terms of incorporation already cited, this was not the case with regard to each of the three Provinces admitted since the original formation of the Dominion. Whatever be the case with regard to the latter part of this contention, it seems clear that the Provinces in question form part of Canada as constituted under the Act.

Lastly, it was contended that the territories should be excluded in estimating the aggregate population of Canada under Sub-section 4. It is doubtful, however, whether this point properly arises on the question submitted to the Supreme Court. It was not suggested that the exclusion of the territories from the calculation could have affected the result of the re-adjustment, and the Supreme Court has rightly not dealt with this matter.

For these reasons their Lordships agree with the learned Judges of the Supreme Court in the case of New Brunswick.

The case put forward on behalf of Prince Edward Island was somewhat wider in its scope. It was suggested that Section 51 applies only to the distribution of representatives between the four original Provinces. But the terms on which Prince Edward Island was incorporated expressly declared that its representation was "to be re-adjusted from time to time under the provisions of the British North America Act, 1867."

It was further argued that supposing Section 51 to apply to Prince Edward Island, still it was not liable to have the number of its representatives reduced in 1903 for the following reasons: that by the terms of Sub-section 4 there could be no reduction on any decennial adjustment unless there was a previous re-adjustment to afford a comparison, so that for any Province the first re-adjustment could not entail a reduction though it might permit of an increase, that there was no re-adjustment for any Province unless its representation was altered, and that therefore by the combined operation of Section 51 and of the terms on which Prince Edward Island entered the Confederation, its representation could not be reduced unless it had been previously increased.

This argument assumes that there has been no re-adjustment for any Province unless there has been alteration. Their Lordships think this is to give too narrow a meaning to the word. In their opinion, when as the result of a census the representation of the Provinces is re-considered and the necessary changes, if any, made to bring it into harmony with the results of the census, that is a re-adjustment within the meaning of Sub-section 4, whether there be or be not any change in the case of any particular Province. Their Lordships therefore think that the answer of the Supreme Court to the question submitted to it was correct.

Their Lordships will humbly advise His Majesty that each of these Appeals should be dismissed.

There will be no Order as to costs.

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