Supreme Court of Canada

*In re* Representation of P. E. I. in the House of Commons (1903) 33 SCR 594

Date: 1903-06-08

In the Matter of The Representation of Prince Edward Island in the House of Commons upon the last Decennial Census.

1903: June 2; 1903: June 8.

Present:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Constitutional law—B. N. A. Act, 1867—Representation of P. E. L in House of Commons.

The representation of the Province of Prince Edward Island in the House of Commons of Canada is liable to be reduced below the original number of six under s. 51, s.s. 4, B. N. A. Act, 1867, after a decennial census.

Special Case referred by the Governor General in Council to the Supreme Court of Canada for hearing and consideration.

The case so referred was in the following terms: "Extract from a report of a Committee of the Honourable the Privy Council approved by His Excellency on the 16th May, 1903.

"On a memorandum dated 12th May, 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 Prince Edward Island contends that its representation in the House of Commons is not liable to be reduced below six, although the application of the provisions of section 51 of the British North America Act, 1867, would, in view of the census returns result in a reduction.

"The Minister states that he does not agree with the view advocated by the Government of Prince

[Page 595]

Edward Island and the province has 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 Prince Edward Island, be referred to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of the Supreme and Exchequer Courts Act as amended by the Act 54 & 55 Vic. ch. 25, intituled 'An Act to amend Chapter 135 of the Revised Statutes intituled An Act respecting the Supreme and Exchequer Courts,' viz:

"Although the population of Prince Edward Island, as ascertained in the census of 1901, if divided by the unit of representation ascertained 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 Committee submit the same for approval.

"JOHN J. McGEE,

*"Clerk of the Privy Council."*

The following counsel appeared:

For the Province of Prince Edward Island: *A. B. Aylesworth, K.C.; The Honourable Arthur Peters, K.C.,* Attorney General of Prince Edward Island, and *Mr. E B. Williams.*

For the Dominion of Canada: *E. L. Newcombe, K.C.,* Deputy Minister of Justice for the Dominion of Canada.

[Page 596]

*Aylesworth K.C.:* If your Lordships please, Mr. Attorney General Peters and Mr. Williams, of Charlottetown, are also of counsel for the province in the case, and unless it is contrary entirely to your Lordships' traditions to hear more than two counsel, I have no doubt that each would be very pleased if your Lordships would allow him to address the court.

The Chief Justice: Of course, this is not a usual case. We do not even give a judgment; nothing but an opinion. It binds nobody, and we did hear a good many counsel on the reference the other day but of course they were representing the different provinces. You are asking now that three be heard on one side; is that it?

*Mr. Aylesworth:* Yes, my Lord.

The Chief Justice: I do not think there would be any objection to it under the circumstances of the case. We will hear the learned gentlemen.

*Mr. Aylesworth:* We shall endeavour to present the considerations which it appears to us affect the matter, as briefly as may be. Of course everything depends, for disposal of this question, upon the provisions of our constitution, the Act or instrument of Government, the British North America Act. Under the British North America Act, as your Lordships will be aware, there was provision made by section 146 for the subsequent admission into the union of Prince Edward Island as well as of British Columbia, Newfoundland and such portions of the territories from time to time as it might be desirable to take in. As to Prince Edward Island, the provision of the British North America Act was that upon addresses from both Houses of the Parliament of Canada and both Houses of the Provincial Legislature, the Queen might, by order-in-council, upon such terms and conditions as are expressed in the addresses, subject

[Page 597]

to the conditions of the Act, admit the province into the union. Addresses were passed by the respective legislatures and the terms and conditions of union agreed upon and incorporated in an order-incouncil, by which on the 26th of June, 1873, it was provided that Prince Edward Island should be admitted into confederation

Our position is that, under the terms of that compact and agreement, Prince Edward Island was given six members in the House of Commons and that that representation was then fixed for the island; not as a matter of right, not as a matter of giving representation by population in accordance with the provisions of the British North America Act itself, but because of the peculiarly isolated position of the province, and because, unless there had been an arrangement of that sort it would, as the delegates to the conference from the Island stated, have been quite impossible to have carried in the Island the terms of union.

We have it then in the first place: That by agreement, by compact between the Dominion then an established Government on the one part and the provincial legislature of the Island on the other part, it was a term of the union that the representation of the island should be six members at least, and it was never contemplated that that number should at a future time be reduced.

The Chief Justice: Prince Edward Island came in, in 1873?

*Mr. Aylesworth:* Yes my Lord. At that time the population of the Island would not according to the unit of representation have entitled it to more than five members, but from the first it had been the position taken by those representing the island in the various conferences, that with regard to confederation five members would not satisfy and that unless a larger

[Page 598]

representation than five members could be secured it was idle to propose terms of union which it could be expected would be acceptable to the people of the Island. Your Lordships will find in the Quebec resolutions, that at that time it was proposed that Newfoundland and Prince Edward Island should join the union, and that the House of Commons should consist of 194 members of whom five should represent Prince Edward Island. Now, the debates on the resolutions in the conference at Quebec, and especially the attitude taken by the delegates of Prince Edward Island at that time, demonstrated that it was just because of that small representation which the resolutions proposed to allot to Prince Edward Island, that the Island refused at that time to enter confederation. The Island and Newfoundland not joining in confederation, the statute provided by section 37 that the House of Commons should consist of 181 members. The resolutions had contemplated 13 more or 193 members altogether; five for Prince Edward Island and eight for Newfoundland, but as those colonies were not joining in the pact of confederation the number was reduced to 181 when the Act itself came to be passed. The position taken by the representatives of the Island at that time as detailed in the debates, leading to the passage of the Quebec resolutions, demonstrates that the feature of union amongst others, that one at all events particularly, was one in regard to which the delegates felt strongly and by reason of which among other things the Island at that time was unwilling to enter confederation. It is put in that way in the most distinct manner by the different representatives of Prince Edward Island. Mr. Palmer speaking at the conference puts it this way:

*"*(*a.*)When a colony surrenders the right to self-government she should have something commensurate

[Page 509]

in the federation. Why give up so great certainties where we have only a feeble voice."

Mr. Whalen says:

"Our people would not be contented to give up their present benefits for the representation of five members. It may be said that confederation will go on without Prince Edward Island and that we shall eventually be forced in. Better however than that we should willingly go into confederation with that representation."

Colonel Grey says:

"The provision of five members is unsatisfactory, Prince Edward Island is divided longitudinally into three counties. We cannot divide three counties into five members."

Mr. Galt had proposed six members and Mr. Coles said:

"I approve that rather than Mr. Brown's motion because it allows us to give to our counties two members each."

And finally on this subject Mr. Pope said:

"The circumstances of Prince Edward Island are such that I hope the Conference will agree to give us such a number as we can divide amongst our three constituencies. Nature as well as the original settlement of the Island has made three counties and it would give rise to much difficulty if we had to adjust five members to the three counties. I cannot ask it as a matter of right, but as one of expediency, as one without which it is impossible for us to carry the measure in Prince Edward Island."

That being put distinctly before the members of the conference at Quebec none the less the resolutions were passed, and by the seventeenth resolution the proposal was, that Prince Edward Island should have but five members if it entered confederation. Prince

[Page 600]

Edward Island declined to do so and confederation became accordingly an accomplished fact under the statute, with the representation of the other of the four combining provinces fixed by section 37 of the Act at the figures which the conference proposed. Then the authorities both in this country and in the old country continued to urge that whether Newfoundland came in or not, Prince Edward Island should at all events be admitted upon some terms. We have a notable letter from Lord Granville to the Governor General on the 4th of September 1869 (which will be found in the Journals of the Prince Edward Island House of Assembly, 1870 page 15Y in which Lord Granville urges upon the Governor-in-Council that in settling the basis of arrangement between the provincial and Dominion governments, the Dominion Government should deal with the Island;

"I trust that in settling the claims proposed as the basis of this arrangement the Government of the Dominion will deal liberally as well as justly with the Island."

At this stage, when it was a matter of negotiation between a great commonwealth such as the union of these provinces extending from the Gulf of St. Lawrence to the Pacific Ocean had made, there was on the one hand the large contracting party, the Dominion, which could afford to be generous in the matter of representation with its small sister who was considering the advisability of entering into the federal pact.

There had been, as your Lordships may see from the attitude taken at the Quebec Conference, just that line of division, just that very circumstance, that the representation of so few as five members out of a house of 194 was felt to be entirely inadequate; would have given to the island as a constituency so feeble a voice in

[Page 601]

the councils of the nation that there was no return offered for the manifest advantages of self that the Island would by entering confederation be giving up. The House had now by lapse of time and by the admission into confederation of the new provinces of Manitoba and of British Columbia, come to have a representation of 200 members by the statute of 1872; and there being a slightly larger representation in the whole House of Commons than there had been at the origin of confederation in 1867; there being this emergency; it was suggested from the Colonial Office that the Dominion could afford to deal generously and to deal liberally with the Island in the matter of representation. It came to be a matter of agreement between the Dominion on the one part and the Island on the other, and it was settled that there should be six representatives, and upon that footing and basis these addresses were passed by the provincial houses at Charlottetown and by the Dominion Legislature here and incorporated in the Queen's order-in-council admitting the province.

Now according to representation by population there was no such right. If one had divided the population of Prince Edward Island as it stood in 1873 by the unit fixed in section 51 of the statute in reference to the population of Quebec, the Island would not have been entitled to six members at all; it would have been entitled to barely five; and that circumstance coupled with the fact that the province had been, from the time of the original proposal for confederation, standing for better terms, so to say, standing out for larger representation; now that the terms of union were being arranged it was stipulated on their part and agreed to by the Dominion that they should have a representation larger than their population entitled them to. That seems to us one of the very strongest

[Page 602]

circumstances as then demonstrating that the intention of both sides at the time was that Prince Edward Island should never have less than the number of six representatives.

Mr. Justice Davies: Do I understand you to say that when the Island was admitted in 1873, the population at the previous decennial census, with the addition allowed for the years between 1871 and 1873, would not have entitled them to six.

*Mr. Aylesworth:* Not according to the Quebec unit. As a matter of fact I think they would have scarcely five, but it would have been so near to five that if Prince Edward Island did come in upon the strict basis of representation of population they would have been awarded five only. It is recited in the resolutions clause 12:

"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 population in 1861 had been 80,857. and in 1871 it had come up to over 95,000, the actual increase being that 15,000 as recited in the resolution. The population of Quebec in 1871 being 1,191,516 the unit of representation as fixed by that population for the decade of the seventies was 18,331, and your Lordships will see that that would not entitle Prince Edward Island with a population of even 95,000 to the representation of 6 members.

Mr. Justice Davies: The point I want to take is this—making a proportionate allowance for the two years from 1871 to 1873 which of course must be estimated, would that give them the six members.

*Mr. Aylesworth:* I think it manifestly would not, but of course under the statute we are dealing with the decennial census and at that time in 1873 the returns of the census of 1871 were probably not finally received.

[Page 603]

If under these circumstances we find, as we do, that the resolutions called for a representation of six members in a house of 200, it seems to us that we find the strongest grounds for the confidence that it was a matter of compact and arrangement, and that it was intended to be a fixed minimum below which the representation of that province was never to fall. Your Lordships of course see the alternative. We have now as a result of nearly thirty years of confederation an increase in our population over the number when we entered the union of nearly 10,000. But, by reason of there being a much larger increase in population in the province of Quebec, although our people now number nearly 104,000, we are not according to the present unit of representation entitled to more than four members. Quebec has grown from 1,190,000 in 1871 to 1,650,000. and the unit of representation has accordingly advanced from 18,000 to 25,000. Cur 104,000 people are now entitled to a member for each 25,000 souls and that would give us four members. And as Quebec increases its population in the decades to come, Prince Edward Island, limited in area, even though it advanced at the same rate per cent that it has advanced in the past, must gradually be over taken, and it is a mere matter of arithmetic to compute how long it will be until Prince Edward Island can have no member at all, and until its population would fall below the unit of representation. The unit of representation is growing, and each decade there is an advance of 2,000 or 3,000; it was. 18,111 in 1871; it was 21,000 in 1881; it was 23,000 in 1891, and it is 25,000 now. It advances by 2,000 or more each decade, because the population in Quebec increasing as it does and its representation being fixed at 65, we have a greater number of individuals each decade to be represented by the one member. At that rate of advance,

[Page 604]

even granting to Prince Edward Island its increase in population upon the same percentage basis as in the past, with 2,000 square miles of area circumscribed as it is, by natural conditions, it is bound to be overtaken and unless there is an actual decline in the population of Quebec, in the course of three or four decades more Prince Edward Island will have been reduced to one member and finally to none at all, because their whole population will not entitle them to one member.

Now, can such result ever have been contemplated by those who framed this statute on the terms of union between the Island and the Dominion. We think not. We think it is not a question of representation by population in that sense. There are other circumstances that are to be taken into account. The principle of representation by population is just enough as between the larger provinces; as between the different sections of the different provinces. That principle could very well be employed in such a case, but when you have a community isolated as Prince Edward Island is, you have it circumscribed and limited so that it cannot expand and grow. Its voice in the Parliament of the country will be feeble indeed unless you adopt some other principle than the strict one of representation by population in fixing its representation in the House.

The next step in the argument is, on our part: That there is no provision in the British North America Act for any reduction in representation unless it is in the case where there has first been an increase. Our position is that the British North America Act never contemplated Quebec, of course, having less than 65; equally it never contemplated Ontario being reduced below 82.

Mr. Justice Sedgewick: Why not?

*Mr Aylesworth:* Because section 37 of the Act provides for a Parliament of 181 members for the four

[Page 605]

provinces that were then in the union and for no less; and it would be no Parliament at all if it had, we would say, 175 members. There is no provision in the British North America Act for a reduction below 181. That never was contemplated, and no matter what the population might be, no matter what the readjustments might be, there were never to be, our submission is, less than 82 for Ontario; less than the number fixed by section 37 for New Brunswick and Nova Scotia respectively.

Before discussing in a little more fullness the position under this clause of the union, let me point out or emphasize the further considerations that I have already alluded to. We were, as of course any province is that enters into confederation, surrendering something of our independence of government. We were of course entering confederation necessarily subject to the provisions of this Act, as section 146 declares, and we could no I have validly stipulated—even if we had so desired—that after that we should have control over any of the matters mentioned in section 91 of the Act. The Island Legislature was necessarily giving up its control over these subjects of legislation. What was it getting in return? What else but a right to a voice in the passing of such laws by means of at least six representatives from the province.

Then we have the circumstance that is adverted to and made the ground for, as it were, pressing the claim. At all events the insistence on six members by the Prince Edward Island delegates in respect to the natural and geographical subdivision of the island into three sections, is a circumstance of some importance in that connection. The British North America Act fully recognised the subdivision of the country into counties, and the representation of different sections in the Parliament of the Dominion by counties.

[Page 606]

That is the scheme of representation provided by section 40 of the statute, and the schedule to the Act annexed. We hear of three counties on the island, and these three counties were set beyond and separate, each from the other, by deep indentations into the coast line, and sea gulfs separating one of the three subdivisions from each of its fellows. It was marked out for the representation of some multiple of three.

I cannot pretend to say that that was by any means to be a governing consideration, but that was certainly in the minds of those who were framing these resolutions as demonstrated by their remarks upon that occasion and that consideration certainly influenced the matter at the time. It is just as impossible to day as it was forty years ago to distribute proportionately five members or four members among three counties. That consideration was advanced and urged by the delegates of the island at the Quebec conference. It has been relied upon in their subsequent negotiations in regard to these matters, and it is a circumstance of importance, as it seems to us, in the consideration of the matter still.

As I say, there are these circumstances in the discussion of the Quebec resolutions and of the terms of union in 1873, which demonstrated the views of those who debated the terms under which the island should join the Dominion. But aside altogether from any such question, upon the nature of the terms and conditions themselves it can be readily seen that the idea of those who framed, and the idea on the part of the provincial representatives, was that for which we contend when they introduced the language of clause 12.

"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

[Page 607]

representation to be readjusted from time to time under provisions of the British North America Act, 1867."

I do not know what the fact may be as to whether the census returns of 1871 had been completed at the time of the framing of this resolution; the reference to the approximate increase that the population had been increased by 15,000 or upwards, seems to indicate lack of absolute certainty as to the figure. But the reference to the figures of 1861 seems important. Why word the resolution in that way? Why preface it by that consideration? We interpret that as simply meaning this: The population of the Island is increasing, and inasmuch as it had increased by 15,000 in the last decade, inasmuch as it is an increasing thing, we will give a representation of six subject to re-adjustment.

Now, our population at that time as I have said would have given us but five and one-eighth or barely over five members. We are then given six members because of the fact that we are of an increasing population. Then I refer further to the provisions of clause 14 of the resolution;

"The provisions of the British North America Act 1867 shall, except those parts that are referable to one province only-"

which does not apply here—

"and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island."

That is possibly in view of the provisions of section 146 which authorised the Queen in council to define or to approve the terms of union expressed in the resolutions "subject to the provisions of this Act." That perhaps is a provision to which if it in any way conflicted with the expressed terms of the statute no effect could be given, but treating it as a provision which is not opposed, as we hope to convince your Lordships it

[Page 608]

is not, to anything contained in the statute, it seems an additional guarantee to Prince Edward Island in this minimum representation.

The provisions of the British North America Act 1867, except so far as the same may be varied by these resolutions, shall 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.

Your Lordships will remember the wording of section 51 of the British North America Act in its terms applies to only four provinces. The language is:

"The representation of the four provinces shall be re-adjusted."

I do not overlook the circumstance—of course I may not do so—that the other day, in assigning reasons for the disposal made of the questions submitted as to the interpretation of section 51, Mr. Justice Mills, at all events, of your Lordships' bench, expressed the view that the word "four" ought to be read as if it were "seven" and that section 51 would in that view be applicable to all the provinces of the Dominion however few or many they might be from time to time.

The point I was seeking to make—if it is open to me at all—on section 51 was as I have indicated, that it does not profess to apply to any but the four provinces that were then united. That at all events is the language, and if that be a correct view of its scope, then reading it with this 14th resolution you have nothing in conflict, but you have as one of the terms of the compact of union with Prince Edward Island the stipulation that the provisions of the British North America Act, except to the extent that they are varied by this resolution, shall be applicable to Prince Edward Island. Now, one of the variations—the principal one so far as

[Page 609]

one can see in the whole series of resolutions—is this on the matter of representation, and that representation haying been fixed by resolution 12 we think it immediately followed as one of the articles of the treaty, that the British North America Act, except so far as it might be varied by these resolutions, was to be applicable.

Mr. Justice Girouard: The opinion of the court is that section 51 should be construed as meaning the whole population of Canada including the provinces which had been admitted into confederation subsequent to the passing of the British North America Act. Now yon are asking us to decide the very reverse.

*Mr. Aylesworth:* No my Lord; let me point out. The court has undoubtedly declared that under subsection 4 of section 51, the phrase "the population of Canada" means the population of seven or of eight or of all the provinces. But that is quite a different thing my Lord from the question I am submitting; whether the representation of any province except the original four is to determined by that rule of proportion based upon the aggregate population of the whole Dominion. Your Lordships were not asked anything in the other case by the reference, as to whether section 51 was applicable to the provinces that have joined Confederation since 1867. The court was asked merely with reference to the words "the aggregate population of Canada", and the court answering what was meant by "the aggregate population of Canada**"**, declared that it meant the whole population of the whole Dominion, seven or eight provinces. Now, that might well be the basis of representation in each one of the four original confederating provinces and not be the basis in a specially admitted province such as Prince Edward Island.

Mr. Justice Sedgewick: But the Queen's orderin-council admitting Prince Edward Island into the

[Page 610]

union provided expressly that after 1873 the subsequent representation of the province should be readjusted according to section 51.

*Mr. Aylesworth:* No my Lord. The only thing we have in that regard is in resolution 12 which I have referred to; that the population having been increased by 15,000 since 1861 the Island should 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.

Mr. Justice Nesbitt: The opinion of this court on the former reference says that these four provinces are in the same position as others coming in afterwards.

*Mr. Aylesworth:* No; all that this judgment says—at least the only answer that goes formally from the court is that as far as re-adjustment is necessary under 51 you must take the population of the whole Dominion as the basis.

Mr. Justice Nesbitt: Is it not the same thing?

*Mr. Aylesworth:* I do not think so. If your Lordship had the clause before you, you would see what I am contending for. By section 51 it is provided that after each decennial census the representation of the four provinces shall be re-adjusted. These four provinces were of course the two Canadas, New Brunswick and Nova Scotia. The representation of these four is to be re-adjusted in the following manner: Quebec shall have a fixed number of 65. There shall be assigned to each of the others—I read that, each of the other three—such a number of members as will bear the same proportion to the number of its population as the number 65 bears to the population of Quebec. That will provide a house of say 185 members. Then there is no change as to the remainder of the House. Of course that is unfair representation to Quebec I grant. It is equally unfair representation to Ontario, and New Brunswick

[Page 611]

and Nova Scotia, but while it is so it is comparatively a little thing; it is over-representation at most to the extent of two or three or four members, a trifle in the whole; a large thing to the small province, but a thing of small consequence to the other members of confederation.

Upon the terms of our union there is just a further reference I wish to make. By clause 6 your Lordships will find the provision for paying annual subsidies to the island:

"In consideration of the transfer to the Parliament of Canada of the powers of taxation, the following sums shall be paid yearly by Canada to Prince Edward Island for the support of its Government and Legislature; that is to say: $30,000 and an annual grant equal to 80 cents per head of its population as shown by the census returns of 1871, namely, 94,021; both, by half yearly payments in advance. Such grant of 80 cts. per head to be augmented in proportion to the increase in population of the Island as may be shown by each subsequent decennial census until the population mounts to 400,000, at which rate the grant shall hereafter remain, it being understood that the next census shall be taken in the year 1881."

That recites that the population is now 94,021 and provides that 80 cts per head of that population shall be paid it annually, and then that that grant of 80 cts. per head shall be augmented in proportion to the increase of the population of the Island as may be shown by each decennial census. Now, it happened that the population of the Island increased from 94,000 in 1871 to 108,000 in 1881; increased again to 109,000 in 1891 and fell off in 1901. That is to say, it was larger in 1891 than in any other period since the Island entered into the union. Does this grant of 80 cts per head fall off? No. The provision is that this grant

[Page 612]

of 80 cts. per head shall be augmented in proportion to the increase of the population of the Island, and having once gone up to 80 cts. on 109,000 it never comes down no matter how much the population of the island falls off decade after decade.

Mr. Justice Nesbitt: Is not that against you on the rules of construction?

*Mr. Aylesworth:* Because it is expressed in the one clause and not in the other? I do not think so, I am not going to argue that there is anything in the British North America Act itself inconsistent with the contention that we are putting forth, but rather the reverse. There is on the face of these resolutions what constitutes the terms of our union with the Dominion, a clear expression in clause 6 which I read, that decrease in the population was not to affect our rights in that regard. As a matter of fact the authorities of the Dominion acquiesced in this interpretation of that clause.

Mr. Justice Sedgewick: There is nothing in the British North America Act to prevent the original four provinces from giving any amount of subsidy to British Columbia or Newfoundland or Prince Edward Island.

*Mr. Aylesworth:* Certainly, and clearly there is nothing in the British North America Act to prevent them from giving undue representation to any of the outlying district—I mean representation greater than the population would warrant.

Mr. Justice Davies: There is nothing to prevent you granting it when the province comes in, but is there not everything to prevent excepting that province from the readjustment which applies to the whole?

*Mr. Aylesworth:* Of course that is the point I am arguing. Let me ask your Lordships to permit a brief reference to Gray's Book on the History of

[Page 613]

Confederation page 58., upon this very question of whether representation by population was the governing principle of the statute. He says:

"Thus at the first inception on entering into the union, population was not intended to be held as the only rule for representation. Though taken as a guide the apportionment must be more or less arbitrary. Existing arrangements, territorial and other considerations must be taken into account, and modifications to suit circumstances necessarily made; but, after entering the union, future changes of the entire representation were to be governed by that principle. Such seemed to be the views on this subject. The principle itself was affirmed simply and explicitly in the 17th resolution in the conference at Quebec; but in the constitution as subsequently settled at Westminster and enacted by the British North America Act, 1867, while the re-adjustment made by the Quebec resolution is adhered to, the principle explicitly laid down 'that the basis of representation in the House of Commons shall be by population,' is not re-declared. So marked a distinction, it must be presumed, was intentional to remove any doubt that the confederation of the four provinces then formed should have free scope for terms that might be necessary thereafter to bring in other portions of British North America."

That is exactly the principle upon which we submit the Dominion, under the invitation or at the suggestion of the Home authorities, acted in regard to the admission of Prince Edward Island. They were invited to be generous and to deal liberally with their small sister. They did so and it would be a most illusory thing if granting that in the terms of the original compact, they are entitled to take it away at the expiration, it might be, of a couple of years.

[Page 614]

Mr. Justice Davies: Where would be the distinction from the illusory standpoint in Prince Edward Island losing a member under the terms it came in on and New Brunswick losing a member under the terms it came on.

*Mr. Aylesworth:* I have to say—unless I am precluded from saying it by your Lordships' view as expressed the other day—that my admission of the true construction of section 37 is that Nova Scotia could never have less than 19.

Mr. Justice Nesbitt: What do you make out of the words "subject to the provisions of this Act" in section 51?

*Mr. Aylesworth:* My interpretation of section 51 is this: Wherever you increase above the original representation as fixed by section 37, you may re-adjust that increase by wiping it out altogether, but there is no provision in the statute from start to finish for a house of less than 181 members. Would it be any Parliament at all with 160 members under the British North America Act? By section 52 there is a careful provision that the number may be increased. There is no provision that it may be decreased and surely one may say that a provision for decrease would be more necessary than one for increase. No matter how much you increase you still have at least 181 members and one would have thought no express provision for increase would be necessary. But in abundance of caution, by section 52 it is provided that you may increase. Surely the inference is the strongest that you should not cut down; you may not make a house smaller than the minimum fixed by the Act itself in section 37. If then you have a minimum house of 181 for the four original provinces, upon the basis of proportion you cannot cut any one of these four provinces below the numbers fixed by the statute.

[Page 615]

Mr. Justice Nesbitt: Suppose one of the provinces by constant influx of population or the growth of manufacture should become very populous. Take Nova Scotia; it cannot go below 19 but it can go to 70.

*Mr. Aylesworth:* Yes, and so increasing in population that increase beyond 19 might be re-adjusted and according to the terms of the statute might to up and down. It may be that the position was not contemplated of a province ever falling below the figures fixed by the original compact, by the statute. It may be that was not thought of, but however that may be there is certainly no provision for it here and the absence of such a provision is very marked, in the presence of such a very careful provision for increase.

Mr. Justice Davies: There is no provision if we give to the word "re-adjustment" the limited meaning you suggest. But giving it the ordinary meaning which it bears in the English language there is a provision for reduction. I do not quite catch the meaning of your argument or the full force of it on section 37. The statute does not say arbitrarily there shall be 181 members of Parliament, but "subject to the provisions of the Act" evidently contemplating the possibility of less.

*Mr. Aylesworth:* But what are the provisions of the Act in that regard? Section 52 provides for increase not decrease. Does section 51 provide for any decrease of the aggregate? Not that I am able to see.

Mr. Justice Davies: It provides for the operation of the rule, the result of which may be a decrease.

*Mr. Aylesworth:* To re-adjust; not to decrease.

Mr. Justice Sedgewick: If you re-adjust an account between two merchants that means that you have to add to one and subtract from another. Re-adjustment must be capable of only one meaning.

[Page 616]

*Mr. Aylesworth:* Let me ask your Lordships to look at at it as I have just been putting it. We have three sections defining the number of members in the House of Commons of Canada; sections 37, 51 and 52. Section 37 gives us a certain number to start with, namely 181 members, and the House of Commons shall consist of that number subject to the provisions of the Act. That must mean subject to these other two clauses; subject to 51 and 52. Now 52 says that the number of 181 may be increased. Then under sections 37 and 52 together, the number shall be 181 or more, and that number is to be readjusted by section 51.

Let me take it piece by piece. If we have a given number of 181 you could readjust 181 by subsection 4 in any different way you please from the particular way stated in section 37. You have the fixed number of 181, and you could readjust that among the four constituents which make up the 181. Similarly you could re-adjust 194 or you could re-adjust 213 or any number you like. Now there is not a hint anywhere in the statute as to reducing the aggregate membership of the House of Commons.

Mr. Justice Nesbitt: "Subject to the provisions of this Act."

*Mr. Aylesworth:* Which is not a reduction of the whole.

Mr. Justice Nesbitt: Why not?

*Mr. Aylesworth:* Because by section 51 subsection 4 it is a re-adjustment not a reduction; it is a re-adjustment by reducing one province and increasing another province. You have a fixed number.

Mr. Justice Sedgewick: Section 52 will allow the Dominion Parliament giving Quebec 100 members, so that instead of dividing the population of Quebec by 65 you will divide it by 100 and then re-adjust the representation of the other provinces accordingly.

[Page 617]

*Mr. Aylesworth:* That may be what is contemplated by section 52, though I would not have thought so, and I have considered that possibility. I thought that section 52 meant simply this: That from time to time as re-adjustment demanded an increase above 181, which section 37 had fixed as the minimum, that increase could be given to the whole membership of the House of Commons, but that increased membership must proceed according to the provisions of section 51. Now if there had been in clause 52 any provisions for decreasing, if it had said the number may from time to time be increased or diminished preserving the proportion, the argument I am now presenting would have no place; but when you have by section 37 such a careful provision for 181 members distributed among the provinces there mentioned, it seems to me that the intention of the framers of the statute was a minimum House of Commons of 181, increasing as section 51 calls for increase from time to time, but never going below these figures.

Mr. Justice Nesbitt: That would be if it were not subject to the provisions of this Act

*Mr. Aylesworth:* This much is certain, that unless that construction is the true one, our province is liable to be deprived absolutely of its representation and that never could have been contemplated.

Mr. Justice Nesbitt: The word **"**re-adjust" seems to be wide enough as we find it in the dictionary.

*Mr. Aylesworth:* No doubt, but I read "readjust" in section 51 in the light of 37 and 52. Your Lordships will observe in section 51 that while there is the provision by subsection 2 of assigning to each of the other provinces a number proportionate to the representation of Quebec,—that is the phrase,—there is in subsection 3 the provision that one-half of the unit is to count as a whole, and that less than one-half is to be ignored, and

[Page 618]

by subsection 4 there is a provision preventing reduction of any province unless the falling off in the population is one twentieth of the whole. But that is the whole scope of that section. There is nothing in clause 2, which is the only section that deals with the aggregate membership, indicating a reduction in the whole number. There is re-adjustment by assigning to each of the other provinces a proportionate number of the whole whatever that whole may be. Where then do you find any idea of reducing? You can reduce a province but it does not follow that you will reduce the whole below the original number."

I have just one or two considerations to urge looking at the matter from the standpoint of the opposite party to the compact or arrangement under which we came in. Certainly the view of the representatives of the island is abundantly manifested by the course they have taken and by the language they have used. Is it not equally clear that the same view obtained on the other side? We have in the first place the circumstance that nine years after the admission of the island into the union the re-adjustment of 1.882 took place, and at that time upon the unit of population or the representation as it then stood, the Island would have been entitled to only five and one-fifth members; slightly greater than it had been entitled to at the time of its entrance into the union which was barely five and one-eighth, it being five and one-fifth in 1882. There was no reduction from six to five in 1882.

Mr. Justice Nesbitt: That could not be. A decennial census must occur twice before you could make a reduction.

*Mr. Aylesworth:* That is of course if subsection 4 has application. But if that clause had application, as certainly its words state, to the four provinces, it would have to, and did not, touch the

[Page 619]

representation of Prince Edward Island in 1882. At all events, the figures of the census in 1882 show as I said that Prince Edward Island was then entitled only to one-fifth over the five members. Its representation remained unaltered. We point to that circumstance as one of significance, and it seems to have peculiar significance in this that at that time the first Minister of Canada, Sir John A. Macdonald, was the very statesman who had presided in the conference in 1873 under which the terms of the admission of the island had been settled. He must have been distinctly aware of what the intention was under which these resolutions had been framed, and if we find no alteration made in the representation of Prince Edward Island although the falling off in population or the variation of population would have called for it—if we find no variation made in the representation of the island until after Sir John A. Macdonald's death, it certainly seems a circumstance indicating the understanding of the terms upon which the Island was admitted into confederation.

Mr. Justice Nesbitt: Did not a reduction take place in 1891?

*Mr. Aylesworth:* Not until after the death of Sir John A. Macdonald. He died in June, 1891, and the redistribution was by statute 55 & 56 Vic. in 1892.

Mr. Justice Davies: The census returns could not have been in to enable the re-adjustment to be made before Sir John A. Macdonald died.

*Mr. Aylesworth:* Certainly not, but in the re-adjustment of 1882 the Island is certainly untouched. There is a still further consideration upon the statute that I present in the same regard. By section 147 of the statute the representation of Prince Edward Island, in case it is admitted, in the Senate of Canada shall be four members. Prince Edward Island when admitted

[Page 620]

shall be deemed to be comprised in the third of the three divisions into which Canada is divided in relation to the constitution of the Senate provided by this Act, and accordingly after the admission of Prince Edward Island (whether Newfoundland is admitted or not) the representation of Nova Scotia and New Brunswick in the Senate shall if vacancies occur be reduced from 12 to 10 members respectively, and the representation of each of these provinces shall not be increased at any time beyond ten except under the provisions of this Act for the appointment of six additional senators under the direction of the Queen. It is quite evident that there is going to be no reduction in the Senate representation. We have the statute saying so and saying so plainly. The constitution of the House of Commons was fully as important as the constitution of the Senate. We have an express enactment as to the circumstances under which the representation of the Senate may be diminished as well as may be increased. We have provision for increase in the House of Commons under section 52; none for decrease. But with regard to Prince Edward Island, my point is this. You find four senators defined as the representation of the Island in the Senate. That is a fixed number. Now then from first to last the scheme of the British North America Act is that the representation of each and every province in the Commons shall be somewhat in excess of its representation in the Senate. That is so as to Quebec, so as to Ontario, so as to each and every province. Would it not be a most anomalous thing; could it ever have been in the contemplation of the framers of this Act that the day should come when Prince Edward Island should have four senators and only one member in the House of Commons.

*Mr. Peters:* Or none at all.

[Page 621]

*Mr. Aylesworth:* Or none at all. We must not forget that the day is within sight when Prince Edward Island may only have one member or no member unless our contention prevails or the British North America Act is amended.

We have a limited area and we cannot increase as the other provinces. Then we submit that upon the construction of the British North America Act which I have endeavoured to argue, that section 51 in terms applies only to the four provinces so far as the readjustment is concerned. That, as I have pointed out, does not conflict with the decision of this court the other day, and full effect may be given to all the answers made by the court to the questions submitted by the Government by giving to the words in subsection 4 the meaning which the court assigned to them without in the least militating against the argument I present that section 51 applies only to the four provinces so far as representation is concerned, and that we in Prince Edward Island are not governed by section 51 at all, but on the other hand are governed by the stipulation of the terms on which we entered into the union. But if I am wrong in that, even though section 51 applies to Prince Edward Island as well as to the other provinces, full effect can be given to this provision as to readjustment by reading that in the way I have submitted, that it is applicable to any increase that may ever be awarded to any particular province. We submit that as a true interpretation of section 51. We read it in the light of sections 52 and 37. One other consideration, and I have presented all that I am able to. I call your lordships' attention to the statute 61 Vic, ch. 3 with respect to the boundaries of the province of Quebec, in which it is declared that the northern and north western and north eastern boundaries are thereby

[Page 622]

declared to be the following, and there is a description of these boundaries. While that statute takes the place of a declaratory enactment its preamble recites the power to pass it under the British North America Act of 1871; under that statute power was conferred upon the Parliament of Canada from time to time with the consent of any legislature of any province to increase, diminish or otherwise alter the limits of such province. Now then, there being power under the British North America Act, 1871, to increase, diminish or otherwise alter these limits, there certainly was no diminution of the territorial area of Quebec under this statute. It must have been and it necessarily was as we submit an increase. It was not any mere definition of boundaries but it was the fixing of the territorial area of the province within the ['limits prescribed by that statute, and its effect was to increase the territorial area of Quebec which had been in 1864 at the time of the Quebec resolutions, understood to be an area of some 118,000 square miles of territory. There is in that area room for a most enormous extension of population within the provincial limits of Quebec. What is the effect upon the small members of the confederation if you fix as the British North America Act does the Parliamentary representation of Quebec at 65, and double, treble, quadruple or multiply its present population. At once the unit of representation goes up correspondingly, and at once the representation of the province consisting of perhaps 100,000 population goes down. Is not that a variation in the condition of things existing at the time we entered into confederation in 1873; a variation of such character as to emphasize the argument we present; that the minimum representation was intended to be fixed on our request, naming six as the number of members from the Island. Unless you have such a fixed minimum representation

[Page 623]

for the smaller provinces, they are necessarily face to face with the situation I have described. Ontario has its fertile belt known to exist and about to be penetrated by a railway in contemplation to connect the city of Quebec with the Pacific. Look at the influx of population that is all but certain to follow the building of another transcontinental road through these fertile lands. If there were room for all the other provinces to extend the case would not be so bad, but there is no room for Prince Edward Island, and if the Province of Quebec is going to grow and quadruple its population, the unit of representation would be enlarged and you would destroy at a stroke the representation of the small province. Unless the construction of the statute which I am contending for obtained and unless you hold that there is by section 37 implied, in the absence of any provision for decrease, a fixed minimum for the provinces that entered confederation originally, or that have come in on some compact of union since, you have to face the difficulty which we present, and which in the case of Prince Edward Island has come to be a very real grievance, for there is a very imminent prospect of that province losing altogether her representation in the House of Commons.

*Peters K.C.,* Prime Minister and Attorney General of Prince Edward Island:—May it please your Lordships. The very able argument made by my colleague) Mr. Aylesworth, leaves very little for me to say; but still there are one or two points that strike me as being of some importance in connection with the case and to which I shall refer briefly. Your Lordships will doubtless recognize the vital importance of this question to the Province of Prince Edward Island. As Mr. Aylesworth has well put it: If the Province of Quebec increases, as it is likely to increase, the day may come and the day may not be far distant, when

[Page 624]

we shall have no representation at all from Prince Edward Island in the Canadian House of Commons. That is a condition of things we have to guard against. At the very outset I submit most humbly to your Lordships, that so far as your Lordships' judgment of the other day is concerned, as to whether "Canada" meant the whole of Canada or only "old Canada", with that judgment I entirely agree. I have not a word to say against that judgment. I do not think that that judgment touches at all the question that your Lordships have now before you. The question which we have taken some trouble to get before your Lordships, and which your Lordships have to decide here, is whether or not at the time we entered confederation we entered on terms which entitled us to a representation of not less than six members in the House of Commons. I ask your Lordships to carefully consider the correspondence and the entries in the Journals of the House bearing on this subject. I submit most strongly that old Canada—that is Ontario, Quebec, Nova Scotia and New Brunswick, went into confederation under the British North America Act alone; they walked in under that Act in a body. The Province of Prince Edward Island refused to come under that Act. We refused time and again to be bound by that Act. Our delegates went to Quebec and they repeatedly refused to agree to confederation on the terms of this Act, and finally they had to make an alteration in the resolutions before we did come in. Take the resolutions that Mr. Aylesworth has so ably placed before you, and I submit that Prince Edward Island entered confederation not on the same basis as Ontario, Quebec, Nova Scotia and New Brunswick. We entered on terms that are actually provided for and which are special to ourselves and I say that if these terms have a reasonable construction given to them as a matter of contract, then

[Page 625]

the contention of Prince Edward Island before this court will be sustained by your Lordships.

Mr. Justice Davies: The difficulty is section 146 which provides for the island entering into confederation on terms and it explicitly says that such terms must be "subject to the provisions of this Act."

*Mr. Peters:* And what do these words mean in that section. That section only applies to new provinces, and I say that when your construe "subject to the provisions of this Act" in that section it means subject to the provisions of the Act with regard to the matter they are talking about. It does not mean with regard to four senators, which section 117, the section immediately succeeding, expressly provides for. If your Lordship will look at the authorities on the construction of statutes you will find that "subject to the provisions of this Act," when found in a section like that, mean subject to the matter you are talking about.

Mr. Justice Davies: Would your contention go to the extent of saying that you could have made terms of union inconsistent with the general provisions of the British North America Act?

*Mr. Peters:* No my Lord, I will not go to that extent, but I say we have the right and we exercise that right when it is not inconsistent with the British North America Act. The provisions of the different sections of the British North America Act can be reconciled with what we did. For instance British Columbia came in under express terms and she had so many members given to her for all time to come. Why should not we do the same thing? I am not going to weary the court by repeating the argument of Mr. Aylesworth. The whole point is that the terms of the contract or the agreement or whatever you like to call it show that we went into confederation on specific terms. If your Lordships should hold that this was

[Page 626]

*ultra vires,* then I ask your Lordships; Of what was it *ultra vires?*

Mr. Justice Davies: Which is the section which you say expressly gives you this right because it would appear from the terms that you came in and expressly assented to the re-adjustment under the Act. So it goes back to the question Mr. Aylesworth argued; what is the meaning of the clause which provides for re-adjustment.

*Mr. Peters:* What is the meaning of the word "re-adjustment"? I am glad your Lordship called my attention to that. I say that when these four provinces were formed into a confederation, Canada framed a constitution, just as the Chief Justice said the United States framed a constitution. Canada framed a constitution and section 37 of that constitution says that the House of Commons shall contain 181 members and when the constitution said that they were talking about the four provinces only. Then they had to make some arrangement for getting in the other provinces if these provinces wanted to come in, and so they sat down and very wisely, or unwisely, they said: We will arrange this: We will give Ontario 82 members, we will give Quebec so many, we will give Nova Scotia so many, and we will give New Brunswick so many. That was the original formation of the constitution if you like to call it that. They afterwards said they would give Prince Edward Island six members. I say my Lords that if you are going to upset that constitution; if you give a decision by which the 181 members which formed the original constitution of Canada can be decreased; then it is striking very hard at the constitution of Canada.

Then the framers of the constitution said: Now we have these four provinces agreeing to come in under these terms but Prince Edward Island and the others

[Page 627]

will not come in under these terms but if they do want to come in we will make a regulation by which they can come in; we will give them a certain representation. We will divide the population of Quebec by 65 so that we will get a unit of representation and fix the representation of these provinces. But Prince Edward Island refused to accept that and we said: We want you to give us a fixed representation just as you have given British Columbia. After fighting the matter out for a number of years, the Government of Canada as it then was thought fit to give us a fixed number of members as they had power to do and they made that contract with us and we entered confederation on the understanding that we would have six members and no less.

Now my Lords, I have read your Lordships' judgment very carefully. As I said I have nothing to find fault with in that judgment except for one statement made by Mr. Justice Armour who said that it might happen that the population of our province would disappear altogether.

*Mr. Justice Girouard:* Mr. Justice Armour did not write the judgment.

*Mr. Peters:* It was a statement made in the course of the argument. Mr. Justice Armour said: "Suppose the population of the province should disappear altogether and nobody was left there; would you contend that Prince Edward Island should still have its full representation?" And Mr. Pugsley said: "Certainly my lord." And you can put the converse of that supposition. Quebec has increased its territory by 118,000 miles and suppose the population of that province should increase to a large extent then it might turn out that the unit of representation would be such that Prince Edward Island should have no representation at all. We might have in Prince Edward Island

[Page 628]

a population of 200,000 in one of the most fertile provinces of the whole Dominion, but the population of Quebec might so increase that we would have no representation at all from Prince Edward Island in the House of Commons. That is what might come about if the contention of the Attorney General for Canada is upheld. I want your Lordships to take that into consideration. We entered confederation on the term that we should have six members and no less. Is it not fair that that understanding should be maintained. We are an island completely surrounded by water; we cannot increase as the other provinces of Canada can increase. That was all taken into consideration at the time we entered confederation. The framers of the constitution said: We are dealing with a province that cannot increase its population; cannot grow larger, and so we will give it special terms.

Now my Lords before I close, I would like to very strongly impress upon your Lordships what we deem to be the true intent of the arrangement that was made between the province of Prince Edward Island and Canada. I have no doubt at all that if your Lordships will take the trouble to read the Journals of the House of Commons and the debates in our own Local House you will find that we absolutely refused to come in to confederation at all unless we had a fair representation in the House of Commons.

Mr. Justice Girouard: Did not you change your mind.

*Mr. Peters:* We changed our mind because we got six members as we wanted.

Mr. Justice Nesbitt: Subject to re-adjustment.

*Mr. Peters:* Yes, if we ever got to having ten members we might be re-adjusted down; but we were never to have less than six. That is our contention.

[Page 629]

Mr. Justice Nesbitt: Suppose your population ran up to 400,000.

*Mr. Peters:* Will you show me one provision in; the British North America Act or in our terms of confederation by which we were to be subject to a decrease below six members.

Mr. Justice Nesbitt: Section 37 read in connection with the other clauses looks very like it.

*Mr. Peters:* No my Lord, section 37 does not hold that.

Mr. Justice Nesbitt: It depends on what you mean by "subject to the provisions of this Act," and what provisions of the Act govern.

*Mr. Peters:* But have you not to take that with the other provisions that went before when they formed this compact and got us to come into confederation and said: We will give you so many members, and then they said "subject to the provisions of this Act." Subject to what provisions? Is it subject to the next section which provides for four senators?

Mr. Justice Nesbitt: If you look at section 22 the same argument would apply to that. Section 22 provides for a fixed number of senators in Nova Scotia, and yet Nova Scotia may under subsections 2 and 4 of section 51 be reduced below the fixed number of members.

*Mr. Aylesworth:* We think not below the number mentioned in section 37.

*Mr. Peters:* We believe we cannot go below the number of six.

Mr. Justice Girouard: Your argument is that you cannot get the aggregate under 181, but you admit you could get one province below.

Mr. Justice Nesbitt: Probably they never contemplated a reduction below six.

*Mr. Peters:* We certainly never did.

[Page 630]

*Mr. E. Bayfield Williams* follows: My Lords, there are just a few observations I have to make with reference to some matters that seem to me to have been but slightly touched upon by my learned friends Mr. Aylesworth and the Attorney General, and which when touched upon did not seem to impress your Lordships in the way we think they might. These matters may be looked at, to my mind, in at least a little different way or at all events in a way that would make them more clear. Before starting into these matters of fact I would like to call your Lordships' attention to what we are really here for. We are here to-day construing the constitution of the Province of Prince Edward Island for all time to come as part of the confederation, and in construing the constitution of the Province of Prince Edward Island under the British North America Act and the terms of union we are really construing the constitution of the whole Confederation with reference to certain points. It is laid down by Lefroy and in all books on Constitutional Law:

"That the constitution above all things is to be construed in a liberal manner and in such a manner as will give perfect harmony to all sections at the time the question arose."

I submit my Lords that as a matter of fact your Lordships might have given a construction to the constitution in 1867, and if it were possible to admit of two constructions you might in justice construe it differently to day. It is laid down as Lefroy put it:

"That special restrictions which at present might seem salutary might in the end prove the overthrow of the system itself."

We are coming to the time when the restrictions, if such there were—and I claim there were none in the British North America Act—if applied to our

[Page 631]

province would, in the words I quote, prove the overthrow of the system itself. We have now after 20 years experience of confederation arrived at such a state as to make it possible that in a comparatively short time, although we are recognized as a distinct province of the confederation; given the machinery of a province with all the responsibilities of section 92 of the British North America Act upon us and with other responsibilities given by our own terms in addition to section 92; we have now arrived at a stage when it can be foreseen that we will have no representation in the popular chamber of the House of Commons. To my mind that would be an absurdity that could never have been intended when we entered confederation. When the constitution of Canada was framed it was not framed for a day. Mr. Justice Sedgewick said: "Sufficient to the day is the evil thereof" I submit my Lords that that evil day has come so far as the Province of Prince Edward Island is concerned. In dealing with the constitution I claim above all things that the constitution, whether it be a statute or whether it be in the nature of the English constitution, must be dealt with so as to give it a construction that will last for all time to come and such as would have been intended when it was made to last for all time to come. The construction that your Lordships seem to suggest with reference to the constitution of Canada will not last for all time to come because if what are now normal conditions should prevail for the next 50 years, then Prince Edward Island will have no representation in the House of Commons at all, and that my Lords cannot last. I submit also to your lordships that in Clements, Canadian Constitution, and every other constitutional authority you will find the construction advocated which I am contending for. I want to impress upon your Lordships that the constitution must

[Page 632]

be construed so that there will be no absurdity in it and I submit that the construction we are putting upon the different sections of the Act is the only construction that will not lead to absurdity.

Lefroy page 469; numbers 38 and following:

"The constitution is entitled to a construction as nearly as may be in accordance with the intent of its makers."

The Chief Justice: That is different from our British North America Act, which is a statute.

*Mr. Williams:* But at the same time it is a constitution.

The Chief Justice: You cannot read it as you would the constitution of the United States.

*Mr. Williams:* That is true my Lord but to a certain extent we combined the benefits of it with the benefits of the British constitution.

The Chief Justice: The Privy Council has alluded to that.

*Mr. Williams:* The Privy Council did allude to it, I think even in *The Fisheries Case[[1]](#footnote-2)*.

I claim that although the British North America Act is a statute and an imperial statute it is also a treaty with us Notwithstanding that the British North America Act is a statute, it is at the same time a constitution and should not be construed according to Maxwell on Statutes, but with regard to the construction of constitutions in a broad and liberal view which will last for ever.

The Chief Justice: It seems to me the question is plain. Section 146 says that you must read this Resolution 12 as if the British Parliament had passed an Act and had said in so many words: Prince Edward Island shall have six members subject to readjustment according to the British North America Act. If the

[Page 633]

British Parliament had passed an Act of that kind how should we interpret it.

*Mr. Williams:* We should interpret that as a constitutional Act.

The Chief Justice: As if it were a new Act passed by the Imperial Parliament in 1873, saying among other things: Prince Edward Island shall come in but they shall have six members subject to re-adjustment as provided for in the other provinces by the British North America Act.

*Mr. Williams*: That is perfectly correct and I am leaving that point to ask what does readjusted mean in the light of what I have said.

The Chief Justice: It might be that it was the impression of Prince Edward Island at the time, in the minds of the public men when they consented to this, that they did not expect a decrease, but that is not a consideration in the interpretation of a clear Act of Parliament.

*Mr. Williams:* It is not entirely an impression. If we can give you the express wording of the Act to show what was the meaning of it in the minds of the Conference.

The Chief Justice: The framers of the Act may have intended a different meaning from the mind of the British Parliament.

*Mr. Williams:* The framers of the Act might have a different mind from the wording of the law?

The Chief Justice: We must take the Act as it reads. The history that preceded the confederation Act may be more or less enquired into for the interpretation of the constitution. That I believe has been decided in the Privy Council. Mr. Justice Mills did it the other day in giving the opinion of the court in the last reference.

*Mr. Williams:* He did.

[Page 634]

The Chief Justice: Rather more extensively than I would have done it myself; however it seems to have been admitted. Though you cannot refer to debates in Parliament it seems to have been admitted that you can refer to the history of the times not only for the interpretation of the constitution but for the interpretation of any Act.

*Mr. Williams:* And more so for the interpretation of the constitution.

The Chief Justice: The same thing—study of the state of the law as it was before and all that kind of thing.

*Mr. Williams:* Yes my Lord. I would like to mention a word in connection with the observation made by Mr. Justice Davies as to why we were reduced in 1882. Mr. Justice Davies supposed that in 1882 we could not have been re-adjusted because we had had no previous decennial census.

The Chief Justice: Of the Dominion. *Mr. Williams:* Yes my Lord. If that is a construction that must carry with reference to 1882 then section 51 says that there shall be a re-adjustment in 1871 and that re-adjustment would not be possible because there was no previous census on which to make that re-adjustment.

Mr. Justice Davies: The standard to enable you to make a re-adjustment did not exist; it could not exist until there was a decennial census.

*Mr. Williams:* In 1871 there was not a decennial census, but still they did re-adjust.

Mr. Justice Davies: They re-adjusted of course so far as it was possible to re-adjust.

*Mr. Williams:* Subsection 4 is the only section in the whole Act relating to reduction either in positive or negative terms but it could not apply in 1871 because there had been no last preceding

[Page 635]

re-adjustment of the number of members and consequently that must be read out of section 51.

The Chief Justice: I do not see how it affects the question at all.

*Mr. Williams:* I will show in one moment. That section relating to reduction not having applied to any province in 1871, it was not part of section 51 in 1871, but in 1871 there had to be readjustment. I am confining that argument to a great extent to what Mr. Aylesworth spoke of namely that the aggregate House of Commons shall be 181 members and I am giving a meaning to the word "re-adjusted" in the light of the fact that in 1871 the reduction clause did not apply. In 1871, the reduction clause not having applied there must be a re-adjustment and there could not possibly be a re-adjustment of the number of members in the way of reduction without reducing the number below 181. Therefore if our contention is correct that the number of 181 cannot be reduced then the word "re-adjusted" did not mean reduction in 1871. It meant re-adjustment upon the number given in section 37 and if it meant that in 1871 it must mean the same thing now. Now, section 37 "subject to the provisions of this Act" refers to the House of Commons, that is the aggregate House of Commons. The only other section that refers to the House of Commons is section 52 and as my learned friend says the constitution of Canada is 181 members plus or otherwise there is no meaning to that section. Why is it so? They could be increased by subsection 2, according to the contention that your Lordships seem to put forward, and they could be increased by section 146. But the wisdom of the framers of the constitution seemed to point to the fact that they wanted a specific clause saying that you could be increased—they were just as much in need of a clause

[Page 636]

saying they should be decreased because subsection 2 refers to increase and decrease.

Mr. Justice Nesbitt: Do you find anything throwing light on your argument in the introduction by the Imperial Parliament of section 37?

*Mr. Williams:* I have little to assist me in that as to the meaning of "subject to the provisions of this Act."

Mr. Justice Nesbitt: I mean as to the fixing of the number of members.

*Mr. Williams:* I have nothing except the opinion given by members of the bar.

Mr. Justice Nesbitt: But as to the introduction of the British North America Act in the Imperial Parliament.

*Mr. Williams:* There is absolutely nothing. I went over that and there is nothing except one speech of Lord Carnarvon and that did not go to the merits or demerits of the Act at all but only the great possibilities that would result from it.

Mr. Justice Davies: It is explained by Lord Carnarvon that the Imperial Parliament should not make any material alteration—not even to the dotting of an "i" or the crossing of a "t".

*Mr. Williams:* I would draw attention to the fact, which Mr. Justice Davies' remark has brought out, and it is that the Quebec resolutions are materially changed by the British North America Act in this very matter. The Chief Justice: Certainly.

*Mr. Williams:* And as against the conclusion of representation by population.

Mr. Justice Sedgewick: If you read the Memoirs of one Mr. Vansittart you will find what an important thing representation by population was before you were born.

[Page 637]

*Mr. Williams:* Well my Lord I will read Vansittart for your Lordship. I have his Memoirs open before me and here is what he says:

"On the 19th, Mr. Brown at length had the proud satisfaction of moving a resolution which carried into effect the principle of representation by population which he had been fighting for in Upper Canada for fifteen years or more. The resolution provided, that the basis of representation in the House of Commons shall be population, as determined by the official census every ten years, and that the number of members at first shall be two hundred, distributed as follows: Upper Canada, eighty nine; Lower Canada, sixty five; Nova Scotia, nineteen"; New Brunswick, fifteen; Newfoundland, seven; Prince Edward Island, five; and that for the purpose of re-adjustments Lower Canada shall be the unit of population, with sixty five members. This resolution was vigorously opposed by the Prince Edward Island delegates, who said their province would not go into confederation if this motion was concurred in as it would have no status whatever. Other members pointed out that it had been well understood at Charlottetown that the principle of representation in the popular chamber should be representation by population, and it was idle to raise the question now. The resolution carried, all concurring except Prince Edward Island. Next day the subject was again informally discussed, but the view of the Prince Edward Island delegates was that this clause would preclude their province from joining the union."

That is Vansittart my lord. I want to refer particularly to what Mr. Justice Nesbitt said with reference to "subject to the provisions of this Act I claim that when you say in any Act subject to the provisions of this Act, you mean subject to such provisions of the Act as relate to the very same

[Page 638]

subject matter. The reference in section 37 is to the House of Commons as an aggregate and to nothing else. That is in the first part. There is only one other clause in the whole Act referring to the House of Commons as an aggregate when we are considering the question of representation, and that is section 52. Therefore section 37 can read perfectly clearly; The House of Commons shall under the provisions of section 52 of this Act consist of 181 members because section 51 is only a re-adjusting clause; with the representation in the House of Commons. The representation in the House of Commons is provided for by section 37 plus section 52. The future readjustment does not relate to the representation of the House of Commons and consequently subject to the provisions of the Act are subject to such provisions as relate to the House of Commons and its representation.

Mr. Justice Nesbitt: They are not quite the same subject matter. "The number of members of the House of Commons:" Is that not in section 52?

*Mr. Williams:* Let me point your Lordship's attention to another matter in connection with that supporting my contention and I will quote a case to your Lordship. If it meant that the 82 for Ontario, the 65 for Quebec, the 19 for Nova Scotia and the 15 for New Brunswick, were at any time to be reduced below the original number given, which I claim is the constitution of Canada, and cannot be disturbed, as section 52 says; if it meant that it would read: The House of Commons shall subject to the provisions of this Act consist of 181 members of which 82 shall be elected for Ontario subject to the provisions of the Act; 65 for Quebec, subject to the provisions of the Act, and so on. But they do not do that. They put subject to the provisions of the Act with regard to the House of Commons as a House of Commons and as to the

[Page 639]

original House of Commons. I hope Mr. Justice Nesbitt follows me.

Mr. Justice Nesbitt: I follow your argument.

*Mr. Williams:* I quote in support of that the case of *Ormerod* v. *Tod Morden[[2]](#footnote-3)* which is the only case I can find which puts a construction on these express words "subject to the provisions of this Act."

Mr. Justice Sedgewick: What are you citing from?

*Mr. Williams:* From the Weekly Reporter, vol. 30, page 808. The judgment of Lord Justice Brett. The decision of Lord Justice Brett there defines the meaning of these words as being confined to the subject matter spoken of in the section in which the words occur. And putting that construction on it you should confine "subject to the provisions of the Act" to the House of Commons in section 37 and consequently it means section 52. I may say also my Lords that the view that 181 could never be reduced was mentioned by Mr. Dalton McCarthy as a legal opinion, and also by the late Hon. A. R. Dickie, at one time Minister of Justice. They gave that opinion in the House of Commons if your Lordships will permit me to give you the official debates

The Chief Justice: You cannot cite such things as authorities.

*Mr. Williams:* But as your Lordships are only giving an opinion and not a judgment it might be allowed.

The Chief Justice: I cannot see why your own opinion is not as good.

*Mr. Williams:* That may be my Lord and I thank you, but I would lil:e to point your Lordships to the opinion of these 3minent lawyers. Mr. Dalton McCarthy's opinion iscontained in the House of Commons Debates, 1892, page 3412, and Mr. Dickie's opinion is to be found onpage 3419, at the top. I may

[Page 640]

say, as Mr. Justice Davies knows, that it is almost impossible for Prince Edward Island to increase rapidly in population because our province is composed of farming lands; we have no manufactures and we cannot extend very much.

*Newcombe K.C.* for the Dominion of Canada: May it please your Lordships; what I would have had to say in reply to my learned friends has been so far anticipated by the observations which have fallen from your Lordships, that I shall necessarily be very brief. In the first place I suppose we may eliminate from the discussion those things which have been decided by this court in the opinion recently delivered upon the New Brunswick reference. The decision of Mr. Justice Mills which was concurred in by the Chief Justice, by Mr. Justice Sedgewick and by Mr. Justice Armour, seems to set at rest a number of points to which my learned friends have referred. The late Mr. Justice Mills in his opinion said:[[3]](#footnote-4)

"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 names such as sections 5, 37, 51, 102, 129 and others of the like character \* \* It is too plain to call for discussion that the three provinces now included into the Dominion 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 as if they had been in the union from the beginning. They are entitled to be enumerated along with the four provinces whenever 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."

[Page 641]

Mr. Justice Girouard: What are you quoting from?

*Mr. Newcombe:* From the judgment of the court as pronounced by Mr. Justice Mills.

The Chief Justice: You could hardly call it a judgment.

*Mr. Newcombe:* No; but it represents the reasons for the answers given by the majority of the court.

Mr. Justice Girouard: The whole court.

*Mr. Newcombe:* I presume so, but Mr. Justice Davies and your Lordship gave separate reasons.

Mr. Justice Girouard: We came to the same conclusion, but I would not say that the reasons are different.

*Mr. Newcombe:* Not necessarily different reasons, but you gave reasons, whereas three of their Lordships concurred in the opinion of Mr. Justice Mills which I am reading:[[4]](#footnote-5)

"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 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 section 146 makes it possible to carry this avowed intention into effect, on lines consistent with the provisions of the Act."

[Page 642]

Therefore, it is manifest that in the construction of section 51 of the British North America Act, under present conditions, you are to substitute the word "seven" for the word "four" and to read it as saying:

"The representation of the seven provinces shall be re-adjusted by such authority, in such manner and from such time as the Parliament of Canada novices, subject and according to the following rules."

That disposes of the contention that there is any difference, so far as Prince Edward Island is concerned, between her situation and the position which she would have occupied had she come in with the original four provinces. My Lords, I do not propose to refer at all to the debates or the Journals, or the Quebec Conference, or any of these documents which my learned friends have invoked to show the intention of this Act, as they contend. The letter of the Act itself is very plain and very clear, as I conceive. And that being so I deny the right of my learned friend to refer to or to read any of these papers, and I submit that your Lordships cannot refer to them for the purpose of construing the Act. I need not quote authorities to your Lordships on that because you are familiar with them. It has been laid down time and again by the highest courts, by the Judicial Committee in Appeal which is directly binding upon this court, that documents of that sort cannot be invoked to modify, affect or throw light upon the construction of an Act of Parliament. Therefore, it is that in approaching this question we have to be governed by the letter of the Act and only by the letter of the Act so far as it is possible in construing the words to give a reasonable interpretation to them.

It would be a very singular thing if the question which my learned friends have propounded could be answered in their favour consistently with the result

[Page 643]

in the New Brunswick case recently referred to your lordships. The Province of New Brunswick, supported by the Provinces of Ontario and Nova Scotia, framed a question which was before your Lordships a few days ago, with the view of having a determination upon the point as to whether they were liable to have their representation decreased. It was supposed by the advisers of these Governments that that depended upon the construction which is to be given to the words "aggregate population of Canada" as used in paragraph 4 of section 51. That question was answered by your lordships favourably to the contention that it included the population of all Canada, and the result as accepted by the governments concerned is that so far as the opinion of this court so delivered could govern, they are liable to have their representation diminished as is proposed by the Redistribution Bill now before the House of Commons.

Supposing that judgment to stand, my learned friends say, or it is involved in their argument and I presume they will say it in terms: That it is neither here nor there so far as the point is concerned which they are now presenting to the court It would be rather a curious result if New Brunswick and Ontario and Nova Scotia have so far mistaken the point upon which the whole thing depends as to submit a question which is really irrelevant to the inquiry. However that may be the question has been answered by your lordships and I do not propose to re-open anything that was decided upon that question.

My learned friends have referred to section 37 which provides:

"That the House of Commons shall, subject to the provisions of this Act, consist of 181 members; of whom 82 shall be elected for Ontario, 65 for Quebec, 19 for Nova Scotia and 15 for New Brunswick."

[Page 644]

In 1873 come the terms of union with Prince Edward Island and one of these terms is:

"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 by six members; the representation to be re-adjusted from time to time under the provisions of the British North America Act 1861"

I take it in view of what I have said, and particularly with reference to the opinion already given by the court, that we must now, for the purpose of considering the present question, add to section 37 the words: "Six for Prince Edward Island."

And my learned friends' case cannot stand upon any higher ground than that. Then you will have it read:

"Six for Prince Edward Island subject to the provisions of this Act."

You have to go to section 51 to find provisions of this Act subject to which Prince Edward Island is to have six members, and subject to which the House of Commons is to consist of 181 members.

"51. On the completion of the census in the year 1871 and of each subsequent decennial census the representation of the seven provinces shall be re-adjusted subject to the following rules: Quebec shall have a fixed number of 65 members. There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to its number of population ascertained at such census as the number 65 bears to the population of Quebec so ascertained."

It necessarily follows from the reading of these two sections together, that you may have an increase or you may have a diminution of the members forming either the aggregate of the House of Commons or the aggregate of any province. I think that follows, my Lords. But it is not necessary in the present circumstances to

[Page 645]

determine whether or not the aggregate membership of the House of Commons may be reduced or not. That question is not before the court and is not involved in this inquiry, because it may very well happen that the representation of a province may be reduced and the representation of another province may be correspondingly increased, and the total representation in the House of Commons remain the same. I submit that section 52 has no office whatever so far as the present inquiry is concerned; section 52 has never yet been invoked by Parliament. The power given under that section has never been executed, but it may be executed and only in one way—that is, by increasing the number fixed for the Province of Quebec. If Parliament were to provide that Quebec shall have 75 members and that the representation of the other provinces shall be increased accordingly, that would be an enactment quite within the authority of the Dominion Parliament and referable solely to the authority conferred by section 52.

Mr. Justice Davies: Is not the increase of members in the North West referable solely to this also?

*Mr. Newcombe:* We have a special Act with regard to the North West Territories.

Mr. Justice Davies: You have a special Act, but it is under this section that your power to make an Act giving increased representation surely lies. I may be entirely mistaken, but that was always my assumption. The number of members in the House of Commons can only be increased by a statute. That statute can only be passed pursuant to the power contained in the 52nd section, and when additional members were admitted from the North West and the number of members in the House of Commons was increased to 215, surely it was by virtue of the power in section 52 they did that.

[Page 646]

*Mr. Newcombe:* In 49 & 50 Vic. ch. 35 we have:

"The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or 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."

Mr. Justice Davies: That was an additional Act to remove the doubts that existed.

*Mr. Newcombe:* That was passed in 1886.

Mr. Justice Davies: It is not necessary for your argument I suppose, but I assume that there were doubts expressed and these doubts were properly removed by an Imperial Act. I assumed that the Parliament of Canada have the power under section 52 to increase the number of members from the North West.

*Mr. Newcombe:* I had supposed, my Lord, that that power came under the amending Act. However, so far as are concerned the provinces that are constituted as forming the Dominion, that section is quite unnecessary to authorize the increase which may come about in case every province had increased relatively to Quebec, so as to require a representation in the House of Commons of say 200 members instead of 181. You have all that provided for in section 51. My learned friend's argument is no doubt very ingenious and his whole point comes to this: That under section 51 and under the terms of the union with Prince Edward Island, the representation of the province may be re-adjusted, but he says that the word "re-adjusted" excluded any idea of diminution or increase so far as the whole is concerned. He would perhaps say that it is like a puzzle which we may make by cutting up a sheet of card paper into various figures and mixing them up together. These may be re-adjusted as often as you like for the purpose of making one re-constituted

[Page 647]

whole, but you cannot take away one of these pieces and you cannot add one to these pieces because that is not re-adjustment. It is diminution or increase. But that very argument, it seems to me, works against my learned friends. We are not here on the question as to whether the House of Commons can consist of less than 181 members, but as to whether one of these provinces mentioned in section 37 may upon any readjustment have less than the number there assigned to it. I have shown that Prince Edward Island does not stand upon any higher ground than Ontario, and I ask your Lordships whether it does not follow plainly and obviously that upon the first re-adjustment, when the provisions of section 51 might be invoked after the Confederation, it may not be necessary to take away two members from Ontario and add these two members to Nova Scotia. If that may be done then the representation of Prince Edward Island which is now five members must on the present occasion be reduced to four; and you decide that, without touching the question at all as to whether under any circumstance the House of Commons may decrease below 181 members. My submission would be—if the court held that that inquiry were material—that the House of Commons could be reduced below 181 members. Either that, or you have a very important case entirely unprovided for by the Act; because it might happen that Nova Scotia, New Brunswick and Ontario had each decreased, so that the application of the unit of Quebec after any decennial census to their population would have given them much less than the number of members stipulated by the British North America Act. Then, Quebec must remain at 65, Ontario might have 50, Nova Scotia 10 and New Brunswick 10, and there you have a total of 135 members. That would be the result if no other province had come in and if

[Page 648]

that condition of population had resulted after any decennial census you would have a House composed of 135 members, unless it be that this provision about readjustment has not gone far enough and has left that case entirely unprovided for. I understand my Lords that that question has not arisen and probably can never arise, so that I do not invite your Lordships to consider it, but rather that we should leave it as many other things are left to be determined in case it ever becomes necessary to determine it.

Mr. Justice Davies: Has it not arisen in the case of Nova Scotia? The totality of members of Parliament and the totality for the province specified in section 37 will remain on the same basis as if they are not controlled by the words "subject to the provisions of this Act," and the opinion of this court being that they were, then Nova Scotia would be properly reduced.

*Mr. Aylesworth:* Not Nova Scotia but New Brunswick; Nova Scotia is still at the original 19 members.

Mr. Justice Davies: One or other of these provinces would be reduced below the number.

Mr. Justice Sedgewick: Nova Scotia loses two members now.

*Mr. Aylesworth:* But still they have the original 19.

Mr. Justice Davies: It brings it down to 18 and it is 19 in the statute. Therefore, in the rule which is laid down in the opinion of this court the crisis has arisen. There must be a construction to maintain that opinion of the court in favour of the view we expressed that subject to the provisions of this Act it is not an arbitrary assignment of so many members for all times, but it is an arbitrary assignment of members for each province and the whole House of Commons, until the making of the re-adjustment provided for under section 51.

[Page 649]

*Mr. Newcombe:* Yes my Lord. The question as to whether you are reducing the aggregate representation below 181.

Mr. Justice Davies: Or the special representation of the provinces named in the same section, below the number assigned to each of them respectively. You see I am agreeing with you.

*Mr. Newcombe:* I thought that was not involved because there was no proposal to make any decrease in the aggregate representation of the House of Commons but only with regard to one particular province, and other provinces are getting the benefit of that; we decrease one province and we give an increase to another province. Under the present condition of affairs if you determine this question in my favour, the aggregate representation of Canada is not thereby decreased below 181, or the corresponding number whatever it is having regard to the introduction of the various other provinces. A member is coming off Prince Edward Island and he is going to Manitoba; a member is coming off Ontario and he is going to British Columbia and so on, so that the very thing is working out which, on the most limited construction, section 51 was intended to provide for. My learned friend says that you cannot decrease the number of 181. Granted for the purpose of this point that you cannot decrease the 181, but, you could take your 181 and 65 of them would go into the Quebec space entirely, and the balance might be shuffled back and forth as much as you like.

Mr. Justice Davies: That is not his argument. He says you cannot reduce Quebec below 65, Nova Scotia below 19 and New Brunswick below 15, and when you come to apply the section of clause 51 and reach that point, you must stay your hand.

[Page 650]

*Mr. Newcombe:* If he says that, admitting that 181 must have been a fixture and admitting that 65 for Quebec must remain a fixture, then he would say that you cannot take one out of Ontario's 82 and add it to Nova Scotia's 19?

Mr. Justice Davies: That is what he does say. *Mr. Newcombe:* If he says you cannot do that, then my Lord he is giving no effect whatever to the plainest words which could be used to confer authority to do that very thing. It is said that Lord Thing daughter this Act and I assume he was a very eminent draughtsman. If the draughtsman had had any instructions or had any intention of providing that the aggregate of 181 could not diminish; that Ontario's 82 could not be diminished, and that the members assigned to the other provinces could not be diminished; would he not in all conscience have added to 51 and stated "provided however that the total representation mentioned in section 37 for the Dominion and for each province is not in any case to be reduced."

The Chief Justice: What object would there be for the Imperial Parliament to take away from the Dominion Parliament the right either to increase or diminish at will so long as they went on the principle of representation by population.

*Mr. Newcombe:* No object my Lord.

Mr. Justice Davies: Excepting of course that it might be argued that the smaller provinces might have insisted that applying your rule of representation by population they would prefer to have an arbitrary number that they would be sure of in any event. I suppose that would be the argument. But the words "subject to the provisions of this Act" are very strong.

*Mr. Newcombe:* My learned friend says that the Dominion Government can afford to be generous to Prince Edward Island because it is a small province,

[Page 651]

because it is circumscribed by the sea, because it is an agricultural community and its population can never increase beyond a certain limit and because of its broken coast line and deep indentations and everything of that sort. But I submit with all deference to that view that the power of the Dominion to be generous is circumscribed and limited by the British North America Act.

The Chief Justice: You need not allude to that. We cannot force the Dominion Parliament to be generous or parsimonious.

*Mr. Newcombe:* Very well my Lord. If they did give Prince Edward Island a larger representation by her terms of union than she would have been entitled to if her population were taken at that time under the rules laid down in section 51 it was, as I understand it laid down here the other day, that when you bring a province in you have to start with an arbitrary number of representatives. It may be more or it may be less than the province is entitled to, but if the province comes in by agreement it is within the power of the contracting governments to fix that number and then that number will stand by force of the Queen's order until the period of the first readjustment comes around and down it goes or up it goes.

Mr. Justice Davies: The second re-adjustment.

*Mr. Newcombe:* Quite so my lord. I quite agree that there must be a second decennial census before you can get a standard from which to judge. It is plain that they supposed at that time that Prince Edward Island was increasing rapidly in population and there was the suggestion—and it is in effect nothing more than a suggestion—to the public as justifying the giving of six members to Prince Edward Island:

[Page 652]

"That the population of Prince Edward Island haying increased by 15,000 or upwards since the year 1861, the island shall be represented by six members."

The word "re-adjusted" in these terms of union with Prince Edward Island must be taken to have been advisedly substituted for the word "increased" which was used in the terms of union with British Columbia two years before, and it seems to be indicative of the intention that the representation should be subject to increase as well as diminution under the provisions of the British North America Act. The reason why Prince Edward Island was given more than its due proportion of members to start with (so far as appears from the terms of union themselves) was that its increase of population since 1861 had been rapid, having increased by 15,000 or upwards and it was no doubt supposed that the increase would continue to be rapid in the future, and so it was thought that it would be better not to tie the province down to five members until the next re-adjustment. But there is nothing in the language of the terms of the union suggesting any other reason for this provision, or pointing to the existence of an intention that the representation should not be reduced if the population should fall below that existing at the previous census.

Mr. Justice Davies: It is not contested that the Dominion and the island have a right to make an agreement, that when the island came in it should have six members irrespective of what their population was.

*Mr. Newcombe:* No my lord.

Mr. Justice Davies: Had the Dominion power to make a provision inconsistent with section 51?

*Mr. Newcombe:* Certainly not. I submit that this is clear under the provisions of section 146 which says:

[Page 653]

"On such terms and conditions in each case as are in the addresses expressed and as the colony thinks fit to approve subject to the provisions of this Act."

It is subject my Lords to the provisions of this Act, which is one constitution for one Dominion of Canada, providing equality, and to give to these terms and conditions either expressly or by necessary implication any such construction as my learned friends contend for, would produce inequality as between the provinces in their representation in the House of Commons.

I do not think that what I am about to say has anything to do with the case, but in view of what my learned friends have urged as to the possibility or probability of Prince Edward Island losing its representation altogether, I want to point out that there is a clause here which renders that contingency extremely remote and improbable if not entirely impossible. Subsection 4 of section 5 L says:

"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 bears 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."

Now if you consider a case happening at the end of each decade where the diminution is the twenty-first part or upwards of the one-twentieth part, you see that there is a check in the process every ten years, and the province starts over again, and you cannot go back to the beginning for the purpose of considering the proportion. Therefore it may be that a province will have a very much larger representation ultimately in the House of Commons than its population would entitle it to having regard to the unit of the population

[Page 654]

of the Province of Quebec, because if it can barely avoid during each ten years the proportionate reduction of a one-twentieth part, it gets a new proportion established, and therefore I think that is a very carefully thought out provision. I say that these rules under section 51 are prepared with great foresight and will result. I have no doubt, in doing justice to the small communities as well as in providing just representation to the larger ones.

My learned friend the Attorney General for Prince Edward Island asserts that Prince Edward Island entered the union upon a different basis from Ontario and New Brunswick and Nova Scotia. I submit that it did not enter upon a different basis, and that it could not enter upon a different basis. It could only enter subject to the provisions of this Act; subject to the application of section 51 and the other sections which apply to all the provinces and not exclusively to any one province in particular. I submit therefore my Lords, that there is very little open for consideration on the present question, if your Lordships are to be governed by the opinion already delivered, and that the answer to that question depends upon the construction of sections 37 and 51 of the statute, having regard to the terms of union with Prince Edward Island which so far as this point is concerned placed Prince Edward Island upon the same footing as one of the original provinces; and that upon the proper interpretation of these sections, the only answer to be given is in favour of the obligation to reduce under the circumstances which exist.

*Aylesworth K.C.,* in reply: Of course if the question which is here propounded is answered by any necessary implication in the opinion already expressed by the court on the previous reference, there is an end to the matter. We cannot ask your Lordships to change

[Page 655]

your views upon the questions that were then under consideration, but we do ask, and we think we are entitled to submit to the court, that it is only the question that was there put and the answer that was given to that very question, that is in the position of a decision of the court in the matter; and that so far as opinions are expressed which were not necessary to a decision of the question than before the court, we have simply an *orbiter dictum* which is not necessarily binding at all upon your lordships' court.

Now the Province of New Brunswick, which was there the actor, did not raise the question (which of course if its legal adviser had seen fit it might have raised) upon the construction of section 37, as to whether or not there was anything to prevent the reduction of its provincial representation below the initial number of fifteen. There had been a reduction below 15 in New Brunswick in 1891—there is to be, it is said, a further reduction in the bill now under consideration in the House of Commons. Those advising the province had that expectation or that possibility before them, and they did not see fit to ask that that question should be submitted to the court. They stated their contention upon an altogether different clause of the statute. They contended that there could be no reduction by reason of a certain specific construction which they sought to have put upon sub clause 4 of section 51. They found as a matter of arithmetic that if you segregated the population of the original four provinces into the number of Quebec, their province would not have diminished by one-twentieth as compared with the population of that portion of the Dominion, and so the question which was before your Lordships then was simply one entirely as to the true meaning of subsection 4 of section 51. It was not material at all, not necessary at all I should say, to a

[Page 656]

decision of that question that any opinion should have been pronounced upon the construction of the words "four provinces" in the principal part of section 51. These words "four provinces" may, without detracting in the least degree from the decision of this court in the previous question, have the meaning which I am submitting they should have, namely, the meaning that these words expressed. You can give full effect to every word of the decision which the court gave on the question submitted previously, and still construe the words "four provinces" as they read and not the "seven provinces." The answer to the question has just as much meaning and force, though the section itself has application as a means of re-adjustment for the four provinces and not for the seven provinces. And that we submit is the true intention of the framers of the Act. Why is it not so? They had four confederating provinces to deal with and they provided for the manner in which as among these four provinces representation should be from time to time readjusted. What need to provide for the manner of readjustment as to the new incoming provinces, or as to the new provinces to be created. That could be provided for in the terms of the union if it were one of the provinces already in existence that was coming in, or in the terms of creation if it were to be like Manitoba, some province carved out of the territories. There was no need whatever in 1867, that the Imperial Legislature should provide the means of re-adjustment as to new incoming provinces. They were not concerned I submit with that problem at all, but they were leaving that particular problem of re-adjustment to depend upon whatever contract the new Dominion that was then starting into existence might make with the incoming provinces.

[Page 657]

Mr. Justice Sedgewick: The difficulty of that argument is this: that section 91 or section 92 as well as section 51 would not apply to the incoming provinces of British Columbia or Prince Edward Island specially mentioned in the Act.

*Mr. Aylesworth:* Not so upon the language, because there is nothing in sections 91 or 92 about the four provinces. It does not use the words "four provinces" but it uses the word "Canada."

Is not that phraseology peculiar? In the previous argument, Mr. Pugsley drew special attention to the way in which the phrase had been changed from "each province" to "the four provinces" and back and forward in the different drafts of this section which are printed in Mr. Pope's book. That argument has no doubt some weight only if it is necessary to interpret the words "four provinces," and it was not in any way necessary for a decision of the previous question that these words should be interpreted.

Mr. Justice Davies: In reference to the new argument you invoke I would like you to answer this question. It seems to me your case is peculiarly weak for this reason: You say that section 37 provides arbitrarily the number of members which should constitute the House of Commons and that there were also arbitrary numbers assigned to New Brunswick, Nova Scotia and Ontario, and that the re-adjustment under section 51 when brought into force—and it was brought into force from decade to decade—it could operate but not so as to take away from any of these provinces or from the totality of the House of Commons the specific number assigned.

*Mr. Aylesworth:* Not so as to reduce.

Mr. Justice Davies: Not so as to reduce. You say that is the effect of the imperial statute, but the trouble with Prince Edward Island is that there is no

[Page 658]

imperial statute assigning any arbitrary number to her. She comes in with the number assigned by mutual agreement between the Dominion and herself, but there is no arbitrary number assigned by imperial legislation to her. Because, don't you see the whole agreement made between Prince. Edward Island and the Dominion is expressed to be "subject to the provisions of this Act." Now, this 51st clause of your own concession purposes to increase as well as to reduce provided it does not interfere with section 37. Section 37 does not touch Prince Edward Island, and therefore there is not that limitation upon the application of the re-adjustment provided by section 51 so far as Prince Edward Island is concerned, even if there was that limitation with regard to Ontario and Nova Scotia. That point has occurred to me. Is there something in it?

*Mr. Aylesworth:* Oh yes, there is very much in it. There are a great many points in it. In the first place the effect of the order-in-council admitting Prince Edward Island into confederation has, under section 146, exactly the force of imperial legislation. By section 146 Her Majesty's Privy Council was empowered to legislate in this regard subject to the provisions of the Act, and accordingly that order-in-council was passed embodying and approving the addresses of the houses submitting the terms of union, and these terms at once received all the force of imperial legislation. It is the same as though it were introduced into section 37.

Mr. Justice Davies: If it does it answers the suggestion that the effect of the order-in-council read into section 37 was to amend section 37 by making it read, that the House of Commons shall consist of 187 members of which Ontario shall have 82, Quebec 65, Prince Edward Island 6, and so on.

[Page 659]

*Mr. Aylesworth:* Take the words "subject to the provisions of this Act" in section 146, and let me ask if that is not a fair meaning if you give full effect to that. That means that when Prince Edward Island, or Newfoundland, come into the union they come in subject to the provisions of this Act; they come in on the terms which may be settled by compact subject to the provisions of this Act. It would be *ultra vires* of the Act to provide that the judges of Prince Edward Island could hold office for ten years, should be elected, should be appointed by the provincial legislature. It would be contrary to the provisions of this Act to take away from the Dominion Parliament as to Prince Edward Island, any of the powers which section 91 confers. To use the illustration which Mr. Justice Mills put in the other argument, it would be contrary to the provisions of this Act if Prince Edward Island had sought to stipulate that its federal members should sit for seven years instead of five. That would be inconsistent with the provisions of the Act, and that is the force and as I would submit the full force of the words "subject to the provisions of this Act" as found in section 146.

My learned friend was discussing section 37 when he gave a reference to the authority he cited, but it would be equally applicable to section 146. There was nothing, it seems to be conceded on all hands, to have prevented the Dominion agreeing that Prince Edward Island should have eight hundred instead of six. The question is what effect is to be given to these words in the twelfth clause of our terms of union that we are to have six members, the representation to be re-adjusted from time to time under the provisions of the British North America Act. That reverts us to the re-adjusting section 51, and I say if that does have the effect of making section 51

[Page 660]

applicable to Prince Edward Island, it is a matter of compact and not because section 51 by force of its own language would have applied to Prince Edward Island, because by force of the language in 51 it applies only to the four provinces. But if it does apply to Prince Edward Island as a matter of compact should we not give full effect to the idea of readjustment, and to the word member, and that, notwithstanding this clause and notwithstanding the fact that the aggregate of population on the island increased in the decade. From 1881 to 1891 the population of the Island increased in fact, but still they lose a member. Why? Because they have not increased as fast as Quebec and because their diminution is in fact more than one-twentieth part of the whole. Therefore that protective clause did not protect us in 1891, and it does not protect us to-day in 1901. It will not protect us ten years hence, for although we do increase in population we do not increase proportionately. That is the trouble, and just as certain as we lost one member in 1891 and another in 1901, we shall lose another ten years hence and another twenty years hence.

Mr. Justice Girouard: How is it that in 1892 there was no protest in the House of Commons on the part of the members representing the Island?

*Mr. Aylesworth:* It was on that occasion that the opinion was expressed that Mr. Williams has referred to by Mr. Dickey and Mr. Dalton McCarthy; that as a matter of course you could not reduce the total representation of the House of Commons below 181.

Mr. Justice Davies: Seduced to a nut shell, your argument on that point is, that section 37 controls the operation of section 51, so as to prevent any reduction of members below the six then specified.

*Mr. Aylesworth:* That is putting it in a nut shell To give full effect to section 37 as well as to section 51

[Page 661]

you have to have a minimum, and that is not in conflict with the argument I addressed to your Lordships this morning as to the fixed number of senators, which it never was intended should be equal to nor greater than the representation in the popular assembly. Just a word upon this recital or preamble which is so significantly inserted here in clause 12 of our resolutions of union which says: "That the population of the Island having been increased by 15,000 or upwards." Why should that have been made a reason for giving six members or an apparent reason for it? There can be no other interpretation of it than the one I suggested, namely that it refers to the fact that the population was increasing, because 15,000 was not the unit of representation by any means. The unit was over 18,000 at that time, and the fact of there being in one year an increase of 15,000 or upwards was not a reason in itself for giving the extra member. Just let me say one other word with reference to what has been pointed out to me since I first addressed the court, and which has reference to what Mr. Justice Davies referred to, namely, the abnormal increase of population in the Island between 1871 and 1873. I am told by Mr. Williams that statistics show that the actual census for the Island for 1861 gave a population of 80,857, and the actual census returns of 1871, as stated in clause 6 of the resolution, show the population to be 94,021 or an actual increase between 1861 and 1871 of 13,164. The recital in clause 12 says, speaking in May 1873, the increase has now become 15,000 and upwards. It had only been 13,000 at the time of the taking of the census in 1871, and therefore they allowed that extra 2,000 or thereabouts as measuring the increase of population in the two years. And even allowing for that, they had not enough to give them an extra member at all, but taking the unit of representation as it stood in 1871

[Page 662]

they would have five members and a bare one-eighth (57/8) but still they gave as a matter of compact, or of generosity if you like, the sixth member.

Mr. Justice Nesbitt: It is a matter of terms.

*Mr. Aylesworth:* Certainly, and the generosity would be in this sense, that the Dominion was urged by the at home authorities to approach the negotiations in a spirit of liberality and not to stand upon the letter of their right as to representation by population. These are circumstances of course which we advance to the court, not with any suggestion that it is to be considered as a matter of policy, but as circumstances which ought to govern the interpretation of this statute, if it is in any way ambiguous; if it is open to the interpretation we are contending for. I point out that because the opinion of Mr. Justice Mills, that the words "four provinces" in section 51 ought now to be read "seven is not necessary for a decision of the question that is now before the court, and therefore not a binding view so far as the court is concerned now. There was not then before the court for consideration the interpretation of section 37 of the Act and the contention that the number of members shall never be reduced below the figures therein stated. So far as that contention is concerned, it is presented for the first time on behalf of the Island. I think that covers everything that I have to say to your Lordships by way of reply and explanation. I call your Lordships' attention to the language of the statute creating the Province of Manitoba, 33 Vic. ch. 3, passed on the 12th of May 1873, and therefore as much before all parties for consideration at the time of the framing of the terms of union with Prince Edward Island as were the terms of union with British Columbia or the British North America Act itself. By section 4 of that Manitoba Act, representation is provided for and these are the words:

[Page 663]

"The said province shall be represented in the first instance in the House of Commons of Canada by four members."

Is not the presence of the phrase "in the first instance" of great significance? It suggests at once a temporary measure of memberships. It was in fact more than the population of Manitoba at that time would have entitled it to according to the unit of representation, It was as it were, saying to Manitoba: Though we give you this number of members it is not to be a permanent thing. Now, the relations of the Dominion to Manitoba were very different from the relations of the province of Prince Edward Island to the Dominion. It was no question of compact or terms in the case of Manitoba but it was a question of granting a constitution to a new province and not a question of making terms with an old one. They were unfettered as to the representation they should grant; they might give and they might take away, but in the case of high contracting powers each on the footing of independence and dominion as the Island and the Dominion were at this time this contract was entered into, it would be an injustice to one of the contracting parties if now that party were to be told: You made your terms; you were only stipulating for six members for the time being. There is no hint of such a thing in anything that is said by the contracting parties, and we urge that your Lordships approach the consideration of the interpretation of this treaty under the view which will enable you to carry out the true meaning and intention of both parties to this treaty.

The opinion of the Court was delivered by

THE CHIEF JUSTICE:—Under the provisions of the Supreme Court Act as amended by the Act 54 & 55 Vict.

[Page 664]

ch. 25, the following question has been referred to the Court by the Governor-General-in-Council:

Although the population of Prince Edward Island, as ascertained at the census of 1901, if divided by the unit of representation ascertained 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 Province of Prince Edward Island contends that its representation in the House of Commons is not liable ever to be reduced below six members. That contention is based upon the 12th resolution under which the Province, in 1873, was admitted by an Imperial order in Council into the Union under the provisions of the one hundred and forty sixth section of the British North America Act. That resolution reads as follows:

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 by six members; the representation to be re-adjusted from time to time under the provisions of the British North America Act."

In my opinion the province's contention is unfounded. It may well be that the framers of the British North America Act have not foreseen or provided for every possible eventuality in the respective positions of the different provinces of the Dominion, as to population or other matters; it may be that some of the provinces would have refused to join the Union had they foreseen all the results that their adhesion to it is now ascertained to carry. But with such considerations we are not here concerned. On the statute and on the Order in Council of 1873 (which has to be construed as a statute), we must base our answer to the question

[Page 665]

submitted. The negotiations that preceded both or each of them are merged in the statute and the Order in Council. Now, it has to be taken as a settled proposition, as far as this court is concerned, by the opinion we lately delivered on the reference concerning New Brunswick and Nova Scotia (*ante* page 475,) that the representation in the federal House of Commons is, as the fundamental basis in that respect of the constitution, based upon population. I need not here do more than refer to the reasoning upon which we reached that conclusion. The Province of Prince Edward Island's contention, that it occupies an exceptional position in this regard within the union, and that it is entitled to a larger representation comparatively in the House of Commons than the other provinces thereof cannot prevail, it was provisionally that it was given six members, till its representation was re-adjusted with that of the other provinces, as provided for by section 51 of the B. N. A. Act. The resolution in question must be read as if the words "in the first instance" were inserted therein after the word "represented". Otherwise, the words that follow,

the representation to be re-adjusted from time to time under the provisions of the British North America Act,

would have no meaning whatever. The province would read them out of the resolution. And that cannot be done. They have to be read as if incorporated in a statute, and must be construed as meaning that the representation of the province shall be re-adjusted after every decennial census, as provided for by section 51 of the British North America Act, its representation, in the meantime, to be composed of six members. That section 51 must now be read as if the words "the four provinces" in the first paragraph thereof were replaced by the words "All the provinces". There is nothing that can have any bearing whatever

[Page 666]

on the solution of the question submitted in the assertion on the part of the province that it is only upon the understanding that its representation in the House of Commons should never be reduced below six members that it consented to come into the union. That cannot prevail as an argument. The rest of the Dominion are just as entitled to assert that they would not have admitted the province into the union had it insisted, as it now would do, upon more favourable terms than the other provinces in the matter of representation in the House of Commons.

I would answer the question in the affirmative; that is to say, I am of opinion that as by the Federal census of 1901, the population of Prince Edward Island divided by the unit of representation ascertained by dividing the number of 65 into the population of Quebec is not sufficient to give six members in the House of Commons to that province, the representation of that province must be re-adjusted and reduced proportionately to population as provided for by section 51 of the British North America Act.

1. 26 Can. S. C. R. 444. [↑](#footnote-ref-2)
2. 30 W. R. 808. [↑](#footnote-ref-3)
3. 33 Can. S. C. R. at pp. 539, 590. [↑](#footnote-ref-4)
4. 33 Can. 3. C. R. at p. 591. [↑](#footnote-ref-5)