THE LATEST AMENDMENT TO THE BRITISH NORTH AMERICA ACT

With the sanction by His Majesty the King of the Act, 10 George VI, c. 63, of the Imperial Parliament on July 26th, 1946, Canada's new system of Parliamentary representation became the law of the land, to take effect on the occasion of the next general election in Canada. This Act amends section 51 of the British North America Act, 1867, by replacing entirely the old text.

The amendment came before the Parliament of the United Kingdom as a result of a Resolution passed by the Canadian Parliament, which authorized the Dominion Government to seek an amendment to the British North America Act altering the basis of representation in Parliament. Bitter controversy was aroused both in and out of Parliament, and it became so much of a legal as well as a political issue that it might be of some interest to summarize here the arguments advanced on both sides, without attempting to participate in the controversies involved.

This Resolution provided for an amendment to the B.N.A. Act, which would give Parliament a membership of 255 instead of the present 245. Under the present system, as laid down in section 51 of the Act and amendments, the Province of Quebec has 65 members, while each of the other provinces is intended to have a number which bears the same proportion to its population as the number 65 bears to the population of Quebec. By section 51A of the Act, passed in 1915, a Province is entitled to a membership in the Commons at least equal to its representation in the Senate; hence Prince Edward Island sends 4 members to the Federal House. The Yukon Territory, in addition, is represented by one member in the House. An important qualification provides that on any redistribution, following a taking of the decennial census, the representation of a Province shall not be diminished unless the proportion its population bears to the whole of Canada has been reduced by not less than one-twentieth since the last readjustment of its representation in the House of Commons. In the case of the *Attorney-General for the Province of Prince Edward Island* v. *Attorney-General for the Dominion of Canada*[1] the Privy Council held that when, as a result of a census, the representation of the provinces is reconsidered, and the necessary changes, if any, made to bring it into harmony with the results of the

[1] [1905] A.C. 37.

census, that is a readjustment within the meaning of the Act, whether or not a change has been made in the case of any particular province. Hence readjustments for each province take place every ten years and, consequently, reductions in the representation of any given province can only be made if the proportion of the population of that province to the population of the Dominion between two censuses drops by five per cent or more. As a result representation by population has not worked out under the original Act, for while the proportion of some provinces, notably Ontario, has dropped by over five per cent, the drop has not amounted to five per cent within any one decade.

Under the new system the membership of the House of Commons is to consist of 255. One seat is to be set aside for the Yukon and 4 for Prince Edward Island. The figure 250 is divided into the population of the eight remaining provinces and a quotient is obtained, which happens at present to be 45,578. Each province then receives one member for as many times as 45,578 goes into its population. When this operation has been accomplished for each of the eight provinces, if 250 members have not been allotted, the remaining members are allotted to the provinces having the largest remainders.

The result is that Quebec will have 73 members instead of 65; Ontario 83 instead of 82; Nova Scotia 13 instead of 12; Manitoba 17 instead of 16; Saskatchewan 20 instead of 21; and British Columbia 18 instead of 16; while the number of members for New Brunswick and Alberta remains unchanged.

The Resolution above referred to provided for a joint address to His Majesty the King from the two Houses of the Parliament of Canada, praying for the desired amendment to Canada's written constitution, the B.N.A. Act. In accordance with established tradition and practice this request was placed before the Imperial Parliament in the form of an amendment to the B.N.A. Act, and was passed without question. While the Statute of Westminster of 1931 declared the United Kingdom and the Dominions to be equal in status, in no way subordinate one to another, Canada's formal constitution and its mode of amendment were left untouched, the reference to the Imperial Parliament being retained as a formal process only.

In this instance the joint address was forwarded to London without any previous consultation with the governments of the interested provinces, an omission that aroused spirited opposition in both Houses of Parliament and a strong, formal denunciation from the Quebec Government.

Members of all political parties agreed that some measure of redistribution was necessary in order to remedy present injustices and restore representation by population. Some members, both from the Government and the Opposition, counselled waiting until after the 1951 census, since the first revision under the proposed amendment would be based upon the census of 1941, when there was considerable dislocation of population on account of the war.

With regard to the method of achieving redistribution, there was no such unanimity. During the course of the debates the Progressive-Conservative Party, supported by the Social Credit members and some Independent Liberals, contended that the Provincial Governments should have been consulted before any representations were made to Westminster. The Liberal and C.C.F. parties argued that consultation with the Provinces was not required on the matter of redistribution. On the final vote only the Progressive-Conservative Opposition voted against the Resolution.

The Government of the Province of Quebec first made formal objection to the procedure adopted by Ottawa in a letter written by Premier Duplessis to the Rt. Hon. L. S. St. Laurent, Minister of Justice. The Premier declared that on a matter of such fundamental importance to the Province of Quebec the previous consent of the Province should have been obtained. He stressed the danger that, if the Dominion Parliament could increase the number of seats in the House of Commons by a simple majority vote of its members, it could with equal ease reduce that number and even modify the representative proportion. This he felt was an invasion of the autonomy of the provinces.

The Quebec Government went on to pass an Order in Council, again protesting the Dominion Government's decision, and charging that the latter was attempting to do away with essential provincial rights. The Order stated that the Dominion Government will be advised:

> That the Government of the Province of Quebec energetically claims the integral respect of the Canadian federative pact; that it affirms its irrevocable desire to safeguard integrally the constitutional prerogatives belonging to it and to keep intact the intangible and inalienable rights of the French language.
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> . . . . that it is the desire of Quebec that all the provinces, especially Quebec, obtain, through proceedings in conformity with the spirit and letter of the Canadian constitution, a fair and reasonable federal representation.

In the House of Commons and the Senate the official Opposition contended that all changes and amendments in the constitution of Canada, under which the rights, privileges and responsibilities of the provinces are affected, or under which minorities may be affected, should be first of all the subject of consultation with the provinces. It was pointed out that this has been the view of many students of the constitution, notably Borden, Meighen and Lapointe, regardless of whether they regarded the B.N.A. Act as a contract, a statute, a treaty or a pact.

The Opposition pointed out particularly that in view of Canada's present equal status with Great Britain within the Commonwealth, there is now no superior check upon the authority and actions of the Federal Government, that the amendments to the B.N.A. Act proposed by it are not subject to the approval of the Government of the United Kingdom and that the division of authority between the Dominion and the provinces, and the rights of minorities, are now in jeopardy, enjoying no reasonable safeguard whatever. In accordance with the Government's contention, the constitution could be amended by a majority of one in the House, which is a dangerous suggestion, in that a majority in the House does not necessarily mean a majority in the country; in fact the present Government was elected by a minority. Thus Canada's constitution, unlike those of most other countries, which can only be altered by a special mode of procedure, could be amended by unilateral action on the part of a majority in the House, representing a minority in the country. The rights of provinces and of minorities would enjoy no safeguards and, as was pointed out by Mr. Arthur Smith, member for Calgary West, there was now nothing to prevent an "angry majority", perhaps a majority of one, from amending section 133 providing for the official use of the French language in the courts and in Parliament.

The Government's considered opinion was given to the House by Minister of Justice St. Laurent. He said that the Dominion enjoyed the right to request, on its own initiative, amendments to the B.N.A. Act regarding all matters with the exception of the allocation of legislative jurisdiction. He held that the Federal House has no right to deal with matters allocated to provincial legislatures and that, if any change is proposed which would affect the legislative competence of the provinces, the consent of the Provincial Governments would have to be obtained before an amendment to the B.N.A. Act

could be secured. Representation in the House of Commons, however, is readjusted from time to time by Parliament, composed of representatives of all the Provinces, and as it is obviously within the sole legislative competence of the Dominion to deal with representation in the House, so it is also correct to say that the Provincial Governments need not be consulted on any proposed amendment to the B.N.A. Act dealing with Federal representation. As to the suggestion that the official use of the French language could be abolished, he replied that such an amendment was "legally" possible, but that a better guarantee than section 133 was to be found in the principles of British freedom and British fair play, which animated the public conscience.

With regard to the present amendment, Mr. St. Laurent said: "The central point does not derive its existence and its authority from the provinces, and it does not need to go back to the provinces to say what Canada shall be in the future." He declared that to submit the proposed redistribution amendment to the provincial legislatures would have the effect of "destroying the Canadian nation and making the national Parliament the mere creature or delegate of sovereign provincial states, who would exercise their superintendence over its attempts to keep in step with the progress of Canada as a national entity".

On August 20th, 1946, in the Senate of Canada, Senator McGeer pointed out that Canada's constitution could not be more easily amended than at the present time. Not even an act of Parliament was required, simply a Resolution of the Commons, endorsed by the Senate, and automatically and without question embodied in statute form by the Imperial Parliament. He felt that henceforth all guarantees of the rights of the provinces and of minorities and of the integrity of the nation were gone. A constitution should be flexible, but not so flexible as to be amended readily. Therefore he suggested that Canada should be able to amend its own written constitution in accordance with the practice of the other Dominions. As a means of ascertaining the best method by which the B.N.A. Act may be amended or changed, while preserving the rights of the Provinces and giving power to the Dominion and Provincial Governments to deal effectively with urgent current problems, he moved a resolution proposing the formation of a Committee of the Senate to study the question and report. As the Session was then drawing to a close, however, any further action on this suggestion was postponed until the next Session of Parliament.