

APPEAL TO THE PRIVY COUNCIL

In our Representation Case—Premier Peters Details the Steps Leading to Appeal and Shows the Causes of Delay—The Case Going On

DEAR SIR:—I have noticed quite a lot of editorials in the papers recently relative to the representation appeal to the Privy Council which, if not contradicted, might have the effect of misleading the public as to the actual state of facts. I am always loath to go into the press at all as I prefer to let these editorials or communications be published without comment so long as they do not affect the public mind improperly. I noticed especially a very fair editorial in your paper of this morning commenting on the state of the appeal and after reading it I think it my duty as Attorney General and as the person having the conduct of the appeal to state how the matter actually stands. The Guardian is quite correct in quoting a number of statements made by Members of the House of Commons when the discussion came up. Some of these statements were true in some respects but incorrect in others, and would therefore be very misleading if allowed to go uncontradicted.

This case was first set down for hearing before the Supreme Court of Canada on the authority of an Order of the Governor General in Council on the 12th of May 1903 on questions submitted to the Supreme Court by the authority of the Governor General in Council agreed to by myself and the Attorney General of Canada, which question raised the point at issue between the Province and the Dominion Government as to the representation. The case was to have come on in the May term of the Supreme Court at Ottawa, everything was prepared and Counsel retained, namely Mr. Aylesworth K. C. of Toronto, to argue the case with myself. We went to Ottawa. Unhappily, while on our way there or during the time we were there and before the case came on, Mr. Justice Mills, one of the Judges of the Supreme Court, died, leaving the Court with only four judges—not a quorum—one of whom was Mr. Justice Davies. We might perhaps by consent of the Attorney General of Canada and myself have proceeded to argue the case before these four judges; but, I certainly did not think I would be justified in arguing the case before a Court which was not properly constituted especially as one of the judges was Sir Louis Davies, who I thought held certain fixed views on this subject; and therefore I decided that it would be better to return and go back again when the Court was properly constituted. The case was therefore put off until June and on the 2nd of that month it was argued before the Bench consisting of the Chief Justice, Sir H. E. Taschereau, Sir Louis Davies, Mr. Justice Groulx, Sedgewick and Nesbitt. On the 8th of June following, the Court delivered judgment by the Chief Justice holding the case in the affirmative; that is, deciding that the Province was not entitled to retain its representation of six members and is liable to be reduced each decennial census. We had then either to abide by the decision of the Supreme Court, or to appeal it to the highest Court in the land, the Privy Council, and have the matter finally settled one way or the other. This was a step which no one would ask me or any one else to take without proper consultation, and without knowing whether the public and the Government which I led, would justify me in taking this course.

Before the case could be appealed to the Privy Council it was necessary that the Government be called together and an Order in Council passed authorizing the appeal to the Privy Council. I did not wish to do this without a full representation of the Government at the Council Board. On the 9th of June on my way to the Summerside Court I received a telegram on the train from my agents in Ottawa saying that judgment had been given by the Supreme Court against the Province. What the grounds of the judgment were I had no idea, and I immediately telegraphed for a full copy of the judgment to be sent me; and I could not of course call a meeting of Council until I had such full copy. At this term at Summerside

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there were several criminal trials, amongst others the Gillian case, and the Court lasted some days. On the 18th of June a meeting of the Government was held, for the purpose of deciding whether it would be advisable to appeal to the Privy Council. At this meeting it was ordered that I ascertain as soon as possible the probable cost of such an appeal to the Privy Council, in case the Government should decide at another meeting, after having ascertained the cost, to carry the case there so that there might be no delay in the matter. Mr. Aylesworth, the Counsel whom I proposed to retain in this appeal, and who has since been retained, left for England on the 17th of June, the day before this Order in Council was made, and therefore any communication that I would have with him would have to be forwarded to England, and I would have to wait for his answer. On the 17th of July, I called another meeting of Council, which of course as you well know, requires time in order to notify the members, some of whom might be off the Island, and in this particular case were off the Island. At this meeting an Order was made ordering that the Representation Case of Prince Edward Island be appealed to the Privy Council. I then took the necessary steps to get the case in train for that Court. One of the first steps to be taken was the sending of a certified copy of what is called the Record of the Judgment of the Supreme Court of Canada to England and filing it with the Privy Council. I then instructed my agent at Ottawa a well known firm of Solicitors, to procure a proper certified copy of the Record of the Judgment, which is a voluminous document containing as it does, affidavits of verification attached, with the question, and also the copy of the Judgment of the Court certified by the Registrar of the Court. On the 23rd of July I wrote our Solicitors in Ottawa requesting them to take the necessary steps at once to obtain a certified copy of the Record to be sent to England. On the 29th I received a letter in reply to mine of the 23rd saying that they were unable to obtain a copy of the Record as the Registrar of the Supreme Court who had to certify the Record was then absent from Ottawa, but would be back in a few days, and that they had telegraphed him advising him that a copy of the Record was required, and requesting him to let them know when he would return to Ottawa. On the 4th of August I received a letter from our Solicitors at Ottawa enclosing what they represented to be a certified copy of the Record of the Representation Case of Prince Edward Island, but on carefully perusing this document I happily discovered that by some extraordinary mistake they had annexed to the Record instead of the Representation Case of Prince Edward Island, the Representation Case of New Brunswick and Nova Scotia. This necessitated my sending the case back to them to have this error rectified, which took some days.

As before stated, Mr. Aylesworth had sailed for England on the 17th of June but before leaving he had given me his cable address in London so that I could communicate with him if I desired. On the 25th of July I cabled Mr. Aylesworth at his London address asking him whether he was willing to act with me in the Representation Case before the Privy Council and on the 27th, two days afterwards, I received a cable from him stating that he would act.

In order to appeal to the Privy Council it is first necessary to obtain leave from that Court to appeal. In ordinary cases between party and party and in ordinary decisions of the Supreme Court from the Provinces and Colonies this is generally a matter of argument, and the Privy Council sometimes refuses leave to appeal. But in cases where the question is a constitutional one leave is never refused. In order to obtain this leave a petition has to be presented to the Privy Council for that purpose setting out the facts. This petition was at once prepared by me and sent to England, but as the time had then gone on to the end of July and as August, (although some of the members at Ottawa do not seem to be aware of the fact) is one of the months of the long vacation in England, when no Courts sit, no application could be made until that long vacation was over, so that it was impossible even to make an application to the Court for leave to appeal. "The petition of appeal" which must be distinguished from the "petition for leave to appeal" has also been fully prepared and is now in England. The case, also which is somewhat similar to the factums prepared in the Supreme Court, Ottawa for appeals there, has been prepared by me, and is also in England. Everything is therefore ready for the appeal to come on and the only step to be taken now is the making of the application for leave to appeal. This application will be made on the first day of the term in November when the Privy Council first sits again; there being no Court from the time it rose until this date. There was a question whether it would have been advisable to have asked the Privy Council to hear the actual appeal in November the same term as they granted leave to appeal. But there were several objections to this, the first being that it was contrary to the rule of the Privy Council to hear appeals in the same term

as an application for leave to appeal is granted. The reason for this is very apparent. The docket of cases before the Privy Council is very large, and if they permitted an infringement of this rule, they would be swamped with cases coming on at the last moment. The second and strong reason to my mind was that Mr. Aylesworth who was retained, desired to return to Canada after the sitting on the Alaska Boundary Tribunal was ended in order to be present at the Supreme Court at Ottawa about the 1st of November, he having several important cases coming on and also the doubt existing whether the Privy Council would hear the case in that term at all. I therefore decided that as the matter was one in which a month would make very little difference, it would be better to have it settled positively when the case was to be heard.

As it now stands the application for leave to appeal will be made, all the papers being in, on the 1st day of November, and the case will be argued before the Privy Council by Mr. Aylesworth and myself or some other Counsel on behalf of this Province in the February term of that court. As to leave being granted to appeal this case, the matter is a foregone conclusion. The Privy Council always as I am informed by our Solicitors in London, Messrs Blake and Redden, grant leave to appeal where a constitutional case of this kind arises. I am also advised to the same effect by Mr. Aylesworth that he has no doubt at all that the Privy Council will as a matter of course grant leave to appeal. To put the matter beyond a doubt, I received yesterday a letter from the Deputy Minister of Justice, Mr. Newcomb, asked me for certain reasons of his own and as a matter of convenience to himself if I would not let the case stand over until next July, and stating that he could not actually consent to an appeal being granted by the Privy Council, and that he would not attend himself or oppose the application in London to appeal, but that Counsel would attend on behalf of the Government of Canada to formally oppose the application. But, he adds "while we would oppose this application, speaking without prejudice, I think it probable that as a constitutional matter involving the construction of the British North America Act, the Committee of the Privy Council would give you leave to appeal and perhaps you would not see any necessity of sending Counsel over to attend upon the application for leave." So, as to the matter of leave to appeal being granted, that question to my mind is settled. The public therefore may rest perfectly assured that so far as getting the case before the Privy Council is concerned it is practically there now, and everything is in readiness for the argument which will take place in February. I would have preferred that the argument might have taken place sooner, but as you will see from the facts stated by me in this letter, it was utterly impossible to have had the case any quicker than it will be. I do not think it is necessary for me to take up any of the statements made by the different members at Ottawa upon this question and referred to in your paper. One statement referred to by you is that of the Minister of Justice that no application for leave to appeal has yet been made. This to a certain extent is correct, but the Minister of Justice in making making it must have known, as his Deputy Minister does know (and I presume he is supposed to know what his Deputy knows) that the appeal was under way. Not only was it under way, but the Deputy Minister of Justice was asking me to postpone the time of hearing. The Attorney General Mr. Fitzpatrick is also quoted by The Examiner as saying that this appeal was made to the Supreme Court in May last, and there was nothing to prevent Prince Edward Island from petitioning His Majesty at either the sittings of the Privy Council in June, July or August. If this is correctly quoted, the Minister of Justice is most grossly incorrect. The case was not heard in May as the Minister of Justice ought to have known, as there was no quorum to hear it, and it was not heard until June, the following month; and as shown by me by the facts above, it was impossible to have had it before the Privy Council in June. The Attorney General of Canada also ought to know I should think that there is such a thing as a long vacation in England, and as a matter of fact the Privy Council does not sit during the months of August, September and October.

However, to put the matter shortly and to allay any unrest there may be in the public mind as to whether the appeal is going on or not, all I have to say is that the appeal is being perfected, as fast as possible, and it will be heard, barring unseen events which might happen between that time and this, in the February term of the sitting of the Privy Council. I have gone into this matter fully because it might be said if I simply contradicted the statements made in the different papers about this matter, that I was speaking without any grounds for what I said, I have given the facts, and I think any one can see, if he takes the trouble to read them, that the case is being prosecuted as fast as it possibly can be, and that it will be heard before the Privy Council in February, when I trust a decision in favor of the Province may be given.

ARTHUR PETERS.
Charlottetown, Oct 2nd 1903.

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