

NOVA SCOTIA COURT OF APPEAL

Citation: *Reference re the Final Report of the Electoral Boundaries Commission*,
2017 NSCA 10

Date: 20170124
Docket: CA 432219
Registry: Halifax

IN THE MATTER OF Section 3 of the
Constitutional Questions Act, R.S.N.S. 1989, c. 89;

AND IN THE MATTER OF a Reference by the Governor in Council concerning
the September 24, 2012 Final Report of the Electoral Boundaries Commission and
Section 1 of the *House of Assembly Act*, Chapter 61 of the *Acts of Nova Scotia*,
2012, as set out in Order in Council 2014-414, dated October 1, 2014

-
- Judges:** The Honourable Justices Fichaud, Saunders, Oland, Bryson and Bourgeois
- Reference Heard:** September 20 and 21, 2016, in Halifax, Nova Scotia
- Subject:** Section 3 of *Canadian Charter of Rights and Freedoms* – electoral boundaries – effective representation – justification under s. 1 of *Charter*
- Summary:** Nova Scotia’s *House of Assembly Act*, R.S.N.S. 1989, c. 61, s. 5, says that, every 10 years, an Independent Electoral Boundaries Commission is to inquire and recommend provincial electoral boundaries. Under s. 5: (1) the Commission is to conduct hearings, prepare an interim report, hold further hearings on the contents of the interim report, then prepare a final report; (2) the Government is to introduce the recommendations from the final report as a bill in the Legislature. The leading decision of the Supreme Court of Canada has said that: (1) to comply with s. 3 of the *Canadian Charter of Rights and Freedoms*, the electoral boundaries should accomplish “effective representation”; and (2) effective representation involves a balance of voter parity with other criteria that may include minority representation and

cultural identity.

In 1992 and 2002, the Commission recommended, and the Legislature enacted, electoral boundaries for the significantly Acadian ridings of Clare, Argyle and Richmond that had notably less than the average population ratio for Nova Scotia's ridings generally. The reason was to encourage the participation in the Legislature by individuals belonging to the Acadian minority.

In 2012, the Terms of Reference to the Commission, prepared by a Select Committee of the House of Assembly, excluded the option of maintaining these three ridings. The Terms of Reference said that all electoral districts must come within a maximum variance of population ratio. It was clear from the outset that Clare, Argyle and Richmond did not comply with that maximum. The Commission's Interim Report nonetheless recommended that the three ridings continue. The Commission's reason was that the constitutional criteria of effective representation, in the Commission's view, justified the continuation of Clare, Argyle and Richmond to promote the representation of individuals belonging to the Acadian minority.

The Attorney General, by letter to the Commission's chair, stated that the Commission's Interim Report was "null and void" for non-compliance with the Terms of Reference, and directed the Commission to prepare another Interim Report.

The Commission then wrote a new Interim Report, followed by a Final Report, that recommended the elimination of the electoral districts of Clare, Argyle and Richmond. By S.N.S. 2012, c. 61, s. 1, the Legislature enacted the electoral boundaries that were recommended in the Final Report.

Issues:

In 2014, by Order in Council under the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, the Governor in Council referred two questions for the opinion of the Court of Appeal:

1. Does Section 1 of Chapter 61 of the Acts of Nova Scotia 2012 (a copy of which is attached as Schedule ‘A’), by which provisions the recommendations tendered by the Electoral Boundaries Commission by its Final Report (a copy of which is attached as Schedule ‘B’) to the House of Assembly were enacted, violate Section 3 of the *Canadian Charter of Rights and Freedoms* by abolishment of the electoral districts of Clare, Argyle and Richmond?
2. If the answer to question 1 is ‘yes’, is the impugned legislation saved by operation of section 1 of the *Charter of Rights and Freedoms*?

Result:

The Court of Appeal answered Yes to Question #1, and No to Question #2.

Question #1: Section 3 of the *Charter* requires that electoral boundaries reflect effective representation. The Supreme Court of Canada has explained that effective representation involves a balance of voter parity, as the primary factor, with countervailing criteria that may include minority representation and cultural identity.

There is no constitutional requirement that there be an independent boundaries commission. But whatever body is authorized by law to fashion the boundaries must be allowed to perform the balance of criteria, that is contemplated by s. 3 of the *Charter* as interpreted by the Supreme Court of Canada, to assess effective representation. Section 5 of the *House of Assembly Act* prescribes that, in Nova Scotia, the body which recommends boundaries is the Independent Electoral Boundaries Commission, not the Attorney General, Government or Select Committee.

The Attorney General’s intervention prevented the Commission from performing the balancing exercise required by s. 3 of the *Charter* to assess effective representation for the electors in Clare, Argyle and Richmond. The Attorney

General's intervention led to a Final Report by the Commission that did not represent the authentic view of the Commission on the effective representation of those electors, and to the enactment of those recommendations from that Final Report. Consequently, the enactment of those boundaries violated s. 3 of the *Charter*.

Question #2: The legislative objective was to implement the constitutional principles of effective representation with the assistance of an Independent Electoral Boundaries Commission as contemplated by s. 5 of the *House of Assembly Act*. The Attorney General's intervention was not rationally connected to the legislative objective. Neither did the consequences of the Attorney General's intervention minimally impair the *Charter* right.

Nothing in the *House of Assembly Act* contemplates that the Attorney General may derail the statutory process by declaring the Interim Report null and void. The objective of s. 5, enacted in 1992, was to replace the former system, whereby the Government could dictate the principles of effective representation, with a nonpartisan system of independent recommendations. The proposition that the Attorney General or the Select Committee, which is controlled by the Government, may dictate binding rulings on core issues of effective representation is not rationally connected with the legislative objective.

Section 5 prescribed that the Commission's Interim Report should proceed to further public hearings, to be followed by a Final Report, and that the recommendations in the Final Report be introduced in as a Government Bill in the House of Assembly. Section 5 contemplates that, after the Bill's introduction in the House, the Government may amend the Bill. Notwithstanding any recommendations in the Commission's Final Report, by following the process in s. 5, the Government could have amended the Bill to abolish the electoral districts of Clare, Argyle and Richmond. That was the process, rationally connected to the legislative objective, which would minimally impair the *Charter* right.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 63 pages.