NOVA SCOTIA COURT OF APPEAL

Citation: *Reference re Public Services Sustainability (2015) Act*, 2021 NSCA 9

Date: 20210115
Docket: CA 467145
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 an Amended Reference by the Governor in Council concerning the constitutionality of the ss. 7-23 of the *Public Service Sustainability (2015) Act*, Chapter 34 of the Acts of Nova Scotia 2015, as set out in Order in Council 2017-254 dated October 4, 2017

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	September 25, 2020, in Halifax, Nova Scotia
Subject:	Reference cases; Sufficiency of Record filed by the Attorney General
Summary:	The Attorney General of Nova Scotia filed a Reference to this Court, pursuant to Section 3 of the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, on August 22, 2017. The Reference was amended on October 13, 2017. The Amended Reference asks this Court to consider whether the *Public Services Sustainability (2015) Act*, S.N.S. 2015, c. 34 (Bill 148) violated the *Canadian Charter of Rights and Freedoms.* The Unions and the Attorney General of Manitoba were added as intervenors. The Attorney General filed a Record consisting of 16 volumes of materials. The Unions moved to add an additional 20 volumes of materials of their own evidence and to have the Attorney General produce certain Cabinet documents.

The Unions' principal argument was that the documents were necessary to determine the questions that arose on the Reference.

Issues: (1) Should the Unions be allowed to submit their own evidence on the Amended Reference?
(2) Should we order that the Attorney General add certain Cabinet documents to the Record?

Result: Motion dismissed.

The Unions have not established that it was necessary for the evidence they wish to submit or the Cabinet documents to be added to the Record for this Court to determine the questions on the Amended Reference.

Further, the addition of the additional documentation would essentially turn the Amended Reference into an action, which is contrary to the purpose and intent of a reference.

The motion is dismissed with costs to the Attorney General in the amount of $2,000.00, inclusive of disbursements.

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Judges:	Wood, C.J.N.S., Farrar and Beaton, JJ.A.
Appeal Heard:	September 25, 2020, in Halifax, Nova Scotia
Held:	Motion dismissed, with costs payable to the Attorney General in the amount of $2,000.00, inclusive of disbursements, payable forthwith, per reasons for judgment of Farrar, J.A.; Wood, C.J.N.S. and Beaton, J.A. concurring
Counsel:	Jeff Waugh and Kevin Kindred, for the Attorney General of Nova Scotia Heather Leonoff, for the Attorney General of Manitoba (not participating) Gail Gatchalian, Q.C. and Jillian Houlihan, for the Intervenor Unions

Reasons for judgment:

Background

[1] On August 22, 2017, the Attorney General of Nova Scotia filed a Reference to this Court pursuant to Section 3 of the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89. On October 13, 2017, it filed an Amended Notice of Reference. The Amended Reference asked this Court to consider the following questions:

> (1) Do Sections 7 to 23 of the *Public Services Sustainability (2015) Act*,[1] S.N.S. 2015, Chapter 34, violate the *Canadian Charter of Rights and Freedoms*?
>
> (2) If the answer to question 1 is "yes", are sections 7 to 23 saved by operation of section 1 of the *Canadian Charter of Rights and Freedoms*?

[2] In January 2018, by consent order, eight unions (the Unions) and the Attorney General of Manitoba were added as intervenors on the Amended Reference.

[3] To assist the Court in answering the questions on the Amended Reference, the Attorney General of Nova Scotia filed an Evidentiary Record consisting of 16 volumes of materials. The Unions wish to have additional documents added to the Record filed by the Attorney General. They also seek to introduce their own evidence. On September 20, 2019, the Unions filed a Notice of Motion seeking two orders:

> (1) An order authorizing the Unions to rely on certain affidavits and expert reports; and
>
> (2) An order that the Attorney General of Nova Scotia (the "Attorney General") add certain Cabinet documents relevant to Bill 148 (the "Cabinet Documents") to the Record[2].

[4] The parties disagreed about whether this Court had the authority to order production and asked that the question be answered on a preliminary basis, prior to hearing argument on the Unions' motion. The preliminary motion was heard on

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[1] Often referred to as Bill 148.

[2] The Notice of Motion was amended on November 20, 2019, and again on July 24, 2020. The amendments are not material to the issues in this decision.

February 10, 2020, and by decision dated August 7, 2020 (reported 2020 NSCA 53), this Court found that it had jurisdiction and discretion to order production of documents. However, no determination was made of what, if any, documents would be ordered to be disclosed or what, if any, documents would be allowed to be submitted by the Unions.

[5] Of significance on August 30, 2020, the Nova Scotia Government and General Employees Union, one of the intervenors in this Reference, filed a Notice of Intended Action in the Supreme Court of Nova Scotia against the Attorney General. In the Notice of Intended Action it seeks a declaration that Bill 148 violates s. 2(d) (freedom of association) and s. 2(b) (freedom of expression) of the *Charter of Rights and Freedoms* and that the violations cannot be justified under s. 1 of the *Charter*.

[6] On September 25, 2020, the panel heard further submissions from the parties on whether the affidavits and the Cabinet documents should be required to form part of the record on the Amended Reference.

[7] For the reasons that follow, I would dismiss the motion. I would not permit the Unions to submit affidavit evidence or expert reports, nor would I order the Attorney General to add the Cabinet documents to the Record.

Issues

(1) Should the Unions be allowed to submit their own evidence on the Amended Reference?

(2) Should we order that the Attorney General add certain Cabinet documents to the Record?

[8] I will address both issues together.

Standard of Review

[9] As this Court is considering the issues in the first instance there is no standard of review. The question is simply whether this Court should exercise its discretion to allow additional documents to be added to the Record for the purposes of deciding the Amended Reference.

Analysis

[10] Section 3 of the *Constitutional Questions Act* provides that:

> 3. The Governor in Council may refer to the Court for hearing or consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same.
>
> 4. The Court shall certify to the Governor in Council its opinion on the matter referred, with the reasons therefor, which are to be given in like manner as in the case of a judgment in an ordinary action, and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion, with his reasons therefor, to the Governor in Council.

[11] For the purposes of this motion, it is important to distinguish references from actions and applications (for ease of reference, I will refer to both actions and applications as actions). An action allows parties to file all relevant non-privileged evidence – it results in a binding decision from the court. A reference is, in essence, a request by Government for a legal opinion. At the provincial level, references are brought to and considered by the Court of Appeal pursuant to the provisions which I have set out above.

[12] Peter Hogg in *Constitutional Law of Canada*, 5th ed. Supplemented, loose-leaf (Toronto: Thomson Reuters Canada, 2007), notes at p. 8-20:

> In the *Reference Appeal* [1912] A.C. 571, as quoted above, the Privy Council held that the Court's answer to a question posed on a reference was "advisory" only and of "no more effect than the opinions of the law officers". It follows that the Court's answer is not binding even on the parties to the reference, and is not of the same precedential weight as an opinion in an actual case. This is certainly the black-letter law. But there do not seem to be any recorded instances where a reference opinion was disregarded by the parties, or where it was not followed by a subsequent court on the ground of its advisory character. In practice, reference opinions are treated in the same way as other judicial opinions. [emphasis added]

[13] Although in practice a reference opinion may be treated the same way as other judicial opinions, this does not change its distinguishing characteristics from actions. References arise in a totally different manner, are advisory in nature and are heard in the first instance at the appellate level.

[14] In contrast to an action, this Court has discretion to not answer any question posed on a reference. As Hogg notes:

> However, the Court has often asserted and occasionally exercised a discretion not to answer a question posed on a reference. It may exercise that discretion where

> the question is not yet ripe, or has become moot, or is not a legal question, or is too vague to admit of a satisfactory answer, or is not accompanied by enough information to provide a complete answer. (p. 8-20)

[15] Finally, contrary to an action, there is no formal procedure for adducing evidence. Hogg also refers to the difficulty of proving facts on a reference:

> Proof of facts in a reference is peculiarly difficult, because a reference originates in a court that is normally an appellate court: there is no trial, and no other procedure enabling evidence to be adduced. (8-23)

[16] The Unions are asserting two separate arguments regarding the constitutionality of Bill 148. This can be seen in their brief:

> 13. The Unions take the position that ss. 7 to 23 of Bill 148 substantially interfere with collective bargaining in violation of section 2(d) because those sections:
>
> (a) restricted collective bargaining on wages by imposing wage freezes for the first two years and wage caps for the next two years of renewed collective agreements;
>
> (b) significantly reduced, in the case of existing employees, or eliminated, in the case of new employees, Service Award and Retirement Allowance provisions in collective agreements;
>
> ...
>
> (d) prohibited interest arbitration boards from making any award inconsistent with the terms of Bill 148.

[17] These questions are appropriate for a reference to this Court. They are legal questions. The facts necessary to decide those questions are apparent from the wording of the legislation and its consequences. However, the Unions want to go further to argue the Province, in passing the bill, acted in bad faith. Again citing their brief:

> 14. The Unions take the position that the Province did not respect a process of meaningful and good faith consultation or negotiation because:
>
> (a) in most cases, no consultation or negotiation had taken place with the Unions before the passage of Bill 148; and
>
> (b) the Province had its mind made up on wage restraint and ending the accrual of the Service Award and Retirement Allowance, and had a strategy in place in 2015 to achieve that outcome.

[18] These are two different lines of argument. One goes to the constitutionality of legislation, the other goes to the constitutionality of government conduct. The former falls within the scope of the Reference; in my view, the latter does not.

[19] The conduct of the Government is not at issue in this Reference; what is at issue is the constitutionality of the provisions of Bill 148.

[20] The Unions' second line of argument is more appropriate for an Application in Court. An application is already before the Nova Scotia Supreme Court, having been brought by the Nova Scotia Government and General Employees Union by its Notice of Intended Action on August 30, 2020. In that proceeding, the Court can review all relevant evidence and make findings of fact and determinations on the conduct of the Province in enacting Bill 148.

[21] In seeking to expand the Record, the Unions are attempting to turn a reference into an action. Counsel for the Unions confirmed in argument that the evidence sought to be introduced on this motion is the same evidence that will be produced on the application currently before the Supreme Court.

[22] I will now turn to the Unions' arguments on why they consider it necessary for this Court to receive the additional evidence.

Inadequacy of the Record

[23] The Unions argue the inadequacy of the factual record is fatal to deciding the Amended Reference question and it is necessary to have their evidence and the Cabinet documents before this Court.

[24] In support of their position, the Unions rely on a number of cases starting with *Mackay v. Manitoba*, [1989] 2 S.C.R. 357.

[25] In *Mackay* the Court found that the lack of a factual basis for determining *Charter* issues was not a mere technicality but a fatal flaw to the determination of the action brought to challenge the constitutional validity of the legislation. It found there must be an adequate factual foundation to decide *Charter* issues (page 366). However, in *Mackay* there was a complete lack of a factual foundation to assess the deleterious effect of the legislation (page 360). I also observe *Mackay* was commenced as an action and not as a reference.

[26] The Attorney General has filed a Record comprised of 16 volumes of documents. The Record is extensive. Unlike *Mackay*, there is not a complete lack of an evidentiary foundation for the determination of the questions in the Reference.

[27] The Unions' position, simply put, is that they wish to have their evidence before the Court without regard to whether the Record as filed by the Attorney General is sufficient. There was no argument or suggestion that the Record is insufficient to decide the questions posed on the reference. It may be necessary to have the Unions' evidence and Cabinet documents to decide the Unions' issues on the conduct of Government. As I have indicated previously, those issues are not appropriate for a reference.

[28] Like *Mackay*, the other cases relied upon by the Unions were not reference cases, but rather were proceedings commenced in the superior courts. A review of some of those cases illustrates why a reference is not an appropriate forum to address the Government's conduct in passing legislation. The amount of evidence and the time required to decide such matters is not in keeping with a reference at the appellate court level.

[29] In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, the Supreme Court of Canada ultimately concluded that the right to strike is an essential part of a meaningful collective bargaining process. The hearing of that matter had taken place over 12 days before the Saskatchewan Queens Bench.

[30] *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, also dealt with the constitutionality of legislation. The hearing had taken place over 10 days before the British Columbia Supreme Court.

[31] *Manitoba Federation of Labour et al v. The Government of Manitoba*, 2020 MBQB 92, addressed the constitutionality of Manitoba's *Public Services Sustainability Act*; it required a 17-day hearing.

[32] These cases, none of them reference cases, challenged both the constitutionality of the legislation and the government's conduct. Evidence of government conduct during labour negotiations was admitted in order to assess alleged violations of s. 2(b) of the *Charter*.

[33] When questioned at the oral hearing on how long the Unions estimated the hearing in this matter would take, counsel gauged seven days. Counsel for the Attorney General was of the view significantly more time would be needed.

[34] If I were to allow the Unions' motion it would set off a process where:

(i) the Attorney General may want to, and would be entitled to, file rebuttal affidavits and expert reports;

(ii) there would have to be determinations of the qualifications of the experts whose reports are sought to be introduced, which could involve cross-examination on qualifications;

(iii) there would be cross-examination of some or all of the affiants;

(iv) there might be motions to strike portions of affidavits; and

(v) there would be protracted arguments on all of the issues listed above, before this Court could even consider addressing the reference questions.

[35] A lengthy hearing at the appellate level is contrary to the purpose and intent of a reference when considering the constitutionality of legislation. I refer again to Hogg, who discusses the purpose of the reference procedure:

> A balanced assessment of the reference procedure must acknowledge its utility as a means of securing an answer to a constitutional question. As noted earlier, the reference procedure has been used mainly in constitutional cases. This is because it enables a government to obtain an early and (for practical purposes) authoritative ruling on the constitutionality of a legislative programme. Sometimes questions of law are referred in advance of the drafting of legislation; sometimes draft legislation is referred before it is enacted; sometimes a statute is referred shortly after its enactment; often a statute is referred after several private proceedings challenging its constitutionality promise a prolonged period of uncertainty as the litigation slowly works its way up the provincial or federal court system. The reference procedure enables an early resolution of the constitutional doubt. (8-23) [emphasis added]

[36] The manner in which the Unions wish to proceed before this Court negates the benefits of a constitutional reference, which is intended to allow for an early resolution of constitutional doubt. The manner with which this case has proceeded defeats the very purpose of a reference. The Reference was filed in August 2017. Over three years later there continues to be a dispute about the evidentiary record.

[37] I am not suggesting this is the fault of the Unions. It is attributable to the parties, in good faith, trying to agree on what constitutes the record. Given the

subject matter and the divergent views on what should be addressed on the Amended Reference, it is not surprising an agreement has not been forthcoming.

[38] In future reference cases, I suggest it may be appropriate to wait until the record is filed before considering motions to permit interventions. At that time, the chambers judge could consider the appropriateness of adding intervenors, based on the record filed. Whether to add intervenors and the conditions of the intervention would be in the discretion of the chambers judge.

[39] In my view, the Unions have not established it is necessary to receive the additional documentation to decide the questions on the Amended Reference nor would its receipt be in keeping with the purpose and intent of a reference.

Affidavit Evidence and Expert Opinion is Routinely Admitted and Relied on in Reference Cases

[40] The Unions refer to a number of reference cases where they say courts have admitted affidavit evidence, oral evidence or expert reports. They say these cases support their position that this type of evidence is routinely filed by intervenors. I will review each of the cases cited to show they do not support the Unions' position.

[41] This matter is not akin to *Reference re the Final Report of the Electoral Boundaries Commission*, 2017 NSCA 10, cited by the Unions, where the Fédération Acadienne de la Nouvelle-Écosse (FANE) was an intervenor. In that case, FANE filed a Factum and evidence, including affidavits, and made oral presentations at the oral hearing. However, in that case, the evidence submitted by FANE was admitted by consent of the Attorney General.

[42] The Unions suggest that in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, the intervenors were given the right to submit affidavit evidence (¶ 94 of the Unions' brief). I have reviewed both the Supreme Court of Canada decision and the Court of Appeal decision (*Reference re Public Service Employee Relations Act (Alta.)*, [1984] 35 Alta. L.R. (2d) 124). I could not find in either of those decisions where the intervenors were permitted to submit evidence.

[43] In *Reference Re: Steven Murray Truscott*, [1967] S.C.R. 309, the Supreme Court of Canada was considering whether, if an appeal had been made to the Supreme Court of Canada by Mr. Truscott, it would have been successful. The question was worded as follows:

> Had an appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by Section 597A of the *Criminal Code of Canada*, what disposition would the Court have made of such an Appeal on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider? (p. 312) [emphasis added]

[44] The Supreme Court of Canada did, in that case, receive a large body of evidence, including medical reports and oral evidence from Mr. Truscott, as he had not testified at trial.

[45] The case is distinguishable in that the specific reference contemplated the receipt of evidence by the Court. However, there is no indication how that evidence came before the Court (whether by consent or otherwise). Finally, although a reference, it was not a constitutional reference dealing with legislation and arose under the provisions of the *Criminal Code*.

[46] The Unions refer to *Reference re Roman Catholic Separate High Schools Funding*, [1986] O.J. No. 2355, a decision of the Ontario Court of Appeal, for authority that the court can receive both oral and written evidence from intervenors. However, at the hearing before us they withdrew the reference to oral evidence but maintained that the Court received written evidence. Again, I have reviewed that case and I cannot see where evidence was introduced by any of the intervenors. The paragraph cited by the Unions actually refers to representations and not evidence:

> 2. In addition to the intervenants who made oral representations, written representations were received on behalf of the Canadian Unitarian Council and the Policy Analysis and Research Management both of whom opposed the constitutionality of Bill 30.

[47] *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866, is also referred to by the Unions. It was a criminal proceeding, and the evidence that was admitted came before the court as fresh evidence. The Supreme Court of Canada admitted the evidence as it could reasonably have affected a jury verdict:

> 9. In our view, this evidence, together with other evidence we have heard, constitutes credible evidence that could reasonably be expected to have affected the verdict of the jury considering the guilt or innocence of David Milgaard. …

[48] Again, it was a reference under the *Criminal Code* and, for the same reasons as *Truscott*, distinguishable.

[49] Concerning *Reference re Firearms Act (Can.)*, 1998 ABCA 305, the Unions suggest (para. 95 of their brief) that the court relied on "affidavit evidence from six affiants submitted by the intervener Alberta Council of Women's Shelters". In that case, the Government of Alberta objected to the affidavit evidence on the basis that it was anecdotal, non-empirical and based on hearsay (¶ 116). After reciting those concerns, the Court concluded that it did not have to address the issues raised by the province as there was ample other evidence to support the position put forward in the affidavits:

> [118] …In any event, I do not find it necessary to address this and other related issues. Assuming for the sake of argument that the challenged affidavit evidence is inadmissible or alternatively, should be given no weight, there is ample other unchallenged evidence to the same effect before this Court and, for that matter, in judicial precedent.

[50] In *Québec (Procureur general) c. Canada Procureur general*), 2008 QCCA 1167, the Quebec Court of Appeal dealt with the constitutional validity of the *Assisted Human Reproduction Act*, S.C. 2004 c. 2. The court referred to expert reports which were filed on behalf of the Attorney General of Canada and the Attorney General of Quebec, as well as the report of the Barrett Commission which made recommendations regulating activities relating to infertility research and treatment.

[51] The issue in that case was whether the provisions of the act were *ultra vires* the Government of Canada. There is no indication in the case report that anyone objected to the admission of the evidence, nor was there any issue with respect to it being received by the court. The issue of admissibility was not adjudicated. The Quebec Court of Appeal found that the provisions were *ultra vires* the Government of Canada, however, that decision was overturned on appeal (2010 SCC 61).

[52] In *Reference re Securities Act*, 2011 SCC 66, the parties did present evidence; however, it is unclear how that evidence was admitted and in what form. The issue in that case was whether the proposed federal legislation was *ultra vires* the Government of Canada. The Court found it was. In reaching that conclusion, it commented on the nature of the task before the Court, noting that it was an advisory opinion and the evidence did little to assist in the task:

> 10 At this juncture, it is important to stress that this advisory opinion does not address the question of what constitutes the optimal model for regulating the securities market. While the parties presented evidence and arguments on the relative merits of federal and provincial regulation of securities, the policy question

> of whether a single national securities scheme is preferable to multiple provincial regimes is not one for the courts to decide. Accordingly, our answer to the reference question is dictated solely by the text of the Constitution, fundamental constitutional principles and the relevant case law. [emphasis added]

[53] In my view, the same considerations apply in this case. The answer to the Amended Reference questions will be dictated by the text of Bill 148, constitutional principles, case law and the Record filed by the Attorney General.

[54] In *Reference re Impact Assessment Act*, 2020 ABCA 202, and *Reference re Impact Assessment Act*, 2020 ABCA 224, a single judge of the Alberta Court of Appeal allowed evidence to be filed by the intervenors. However, in that case, the Attorney General for Alberta neither opposed nor consented to the admissibility of the relevant material, and reserved its rights to make arguments to the panel relating to its relevance or admissibility. Of particular significance was that evidence which was sought to be introduced was solely documentary and estimated to be 100 pages.

[55] Finally, in *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29, the Ontario Court of Appeal allowed intervenors to file a record. Again, that was a decision of a single judge of the court and the extent of the record sought to be introduced is unclear.

[56] In *Greenhouse Gas* the Attorney General of Ontario and the Attorney General of Canada were parties to the proceeding. There were interventions by the Attorney General of New Brunswick, the Attorney General of British Columbia and the Attorney General of Saskatchewan. The court granted leave to intervene to 12 other parties, of which seven sought to introduce a record. The court granted their request.

[57] The matter was scheduled to be heard over four days. The provincial intervenors and all 12 of the other intervenors were given one day to present their arguments. The remaining time scheduled for the appeal was granted to the Attorney General of Ontario and the Attorney General of Canada.

[58] From this schedule it does not appear the evidence to be introduced by the intervenors would have had a material impact on the length or conduct of the proceedings given that 15 intervenors were given one day to present argument which, presumably, would also include addressing the evidence submitted. It certainly did not result in the type of proceeding envisioned in this case by the Unions.

[59] A review of these cases, contrary to the submissions of the Unions, does not support its position that courts routinely allow intervenors to tender documentary evidence and expert reports.

[60] The 20 volumes of documents and the Cabinet documents sought to be admitted here, most of which go to the conduct of the Government in its negotiations with the Unions, are not appropriate for this reference proceeding.

[61] I was not referred to any case where an intervenor sought to file material as voluminous as the Unions' proposal in this Reference. The expert reports, Cabinet minutes and other documentation would require further evidence to be admitted by the Attorney General; cross-examination on affidavits; and decisions on all of the other matters referred to earlier. In none of the cases where evidence was received was a hearing of this nature contemplated.

[62] Further, as noted earlier, the Unions have not demonstrated why the present Record is inadequate to determine the questions on the Amended Reference or that the information that they seek to introduce is necessary to determine those questions.

[63] It is for these reasons that I would dismiss the motion.

Costs

[64] I would award costs to the Attorney General in the amount of $2,000.00, inclusive of disbursements, payable forthwith.

Farrar, J.A.

Concurred in:

Wood, C.J.N.S.

Beaton, J.A.