NOVA SCOTIA COURT OF APPEAL

Citation: *Reference re Bill 148, An Act Respecting the Sustainability of Public Services*, 2022 NSCA 39

Date: 20220511
Docket: CA 467145
Registry: Halifax

Between:

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 ss.7-23 of the *Public Services 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 Chief Justice Michael J. Wood
Appeal Heard:	March 9 and 10, 2022, in Halifax, Nova Scotia
Subject:	*Constitutional Questions Act* – Discretion to not answer
Summary:	The Governor in Council referred two questions to the Court pursuant to the *Constitutional Questions Act* ("*Act*") concerning whether the *Public Services Sustainability (2015) Act* ("*PSSA*") violated the provisions of the *Canadian Charter of Rights and Freedoms*. The evidentiary record was limited to materials provided by the Attorney General. The Intervenor unions were not permitted to file any additional evidence. The parties disagreed about whether the Court had a sufficient evidentiary basis to answer the questions. The *PSSA* imposed time limited wage restraint on unionized public sector employees. The unions argued this violated the freedom of association found in s. 2(d) of the *Charter*. The Attorney General said the *PSSA* was not in violation of s. 2(d) but if it was, the legislation could be justified under s. 1 of the

Charter. At the time of the hearing all affected bargaining units had been exempted from the legislation by regulation and the time period for the wage restraint was set to expire.

Issue: Should the Court exercise its discretion and decline to answer the reference questions?

Result: The Court reviewed the jurisprudence concerning time limited wage restraint legislation and whether it violated the freedom of association protected by s. 2(d) of the *Charter*. It concluded the test to be applied required consideration of the factual context for the legislation. None of the cases relied on by the Attorney General were references. Each came through an evidentiary hearing before a trial court. The materials provided to the Court were not adequate to permit resolution of the necessary factual issues.

In light of the limitations of a reference under the *Act* and the lack of affected employees at the time of the hearing, the Court exercised its discretion and declined to answer the questions.

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 24 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: *Reference re Bill 148, An Act Respecting the Sustainability of Public Services*, 2022 NSCA 39

Date: 20220511
Docket: CA 467145
Registry: Halifax

Between:

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 ss.7-23 of the *Public Services 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

Judges: Wood, C.J.N.S.; Farrar and Beaton, JJ.A.

Appeal Heard: March 9 and 10, 2022, in Halifax, Nova Scotia

Held: Reference questions not answered, per reasons of Wood, C.J.N.S., Farrar and Beaton, JJ.A., concurring.

Counsel: Kevin Kindred, Q.C., for the Attorney General of Nova Scotia
Jillian Houlihan and June Mills, for the Intervenor Unions

Reasons for judgment:

[1] A refusal by a court to answer constitutional questions referred by the Governor in Council is not a decision which ought to be made lightly. The availability of advisory opinions in appropriate circumstances is an important mechanism which can provide timely guidance to the executive branch of government. This matter illustrates a circumstance where a court should exercise its discretion and decline to provide the requested advice.

[2] On December 18, 2015, the government of Nova Scotia enacted the *Public Services Sustainability (2015) Act*, S.N.S. 2015, c. 34 ("the *PSSA*"). The relevant provisions of the *PSSA* were proclaimed in force on August 22, 2017. On that same date, the Attorney General of Nova Scotia filed a reference with this Court pursuant to s. 3 of the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89 (the "*Act*"). That section provides:

> Reference to Court
>
> 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. R.S., c. 89, s. 3.

[3] On October 13, 2017, the Attorney General filed an amended Notice of Reference, which asked this Court to consider the following questions:

> (1) Do Sections 7 to 23 of the *Public Services Sustainability (2015) Act*, 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*?

[4] In January 2018, by consent order, eight trade unions (the "Unions") and the Attorney General of Manitoba were added as intervenors. The Attorney General of Manitoba eventually withdrew as an intervenor, prior to the hearing of the reference.

[5] On December 14, 2018, the Attorney General filed 16 volumes of materials which it referred to as the "Record of Attorney General of Nova Scotia" (the "Record"). It consists of 9,921 printed pages and a number of electronic files. The Record materials include:

- Bond rating reports for various governments, including Nova Scotia.
- Public accounts for the years 2008-2017.
- Various articles and reports on the Nova Scotia economy.
- Slideshows, news releases, briefing notes and other government documents concerning Nova Scotia budgets, employment costs and projections.
- Materials related to public sector bargaining including collective agreements, arbitration awards, and interviews with economic consultants and union representatives.
- Correspondence and emails between government and unions with respect to the "Public Services Sustainability Mandate".
- Speaking notes and slide presentations for ministers and other government officials in relation to discussions with union representatives.
- Extracts from Hansard.
- Media reports.
- Actuarial reports quantifying potential costs of retirement allowances for public sector employees.
- Collective bargaining proposals made during negotiations with the Canadian Union of Public Employees, the Nova Scotia Government and General Employees Union and the Nova Scotia Teachers Union.
- Auditor General reports for the years 1996 through 2018.

[6] On September 20, 2019, the Unions filed a Notice of Motion seeking two orders which were described as follows:

1. An order authorizing the Unions to rely on certain affidavits and expert reports; and
2. An order that the Attorney General add certain cabinet documents relevant to the *PSSA* to the Record.

[7] The affidavits which the Unions sought to rely on were from ten union officials and three independent expert witnesses. The affidavits of the union

officials were intended to provide evidence of interference with the right to bargain collectively including:

1. The number of employees and collective agreements affected by the *PSSA*;
2. The history of negotiations and agreements with respect to service awards and retirement allowances including the current status of negotiations with the province of Nova Scotia on these issues;
3. The conduct of the province of Nova Scotia during collective bargaining;
4. The effect of the *PSSA* on the ability of the Unions to negotiate collective agreements and the impact of wages having been "taken off the table" by the *PSSA*;
5. Statements by the premier and cabinet members regarding the *PSSA*; and
6. The history and importance of interest arbitration for settling collective bargaining disputes in Nova Scotia and the effect of the *PSSA* on such proceedings.

[8] The proposed expert evidence included opinions on international legal developments concerning the freedom of association and how these relate to the *PSSA*. In addition, the proposed experts reviewed the nature of collective bargaining and interest arbitration in Nova Scotia and opined on how it would be impacted by the *PSSA*. They also outlined the finances of Nova Scotia and whether there were alternatives which could have been pursued by the province to achieve its financial objectives other than those found in the *PSSA*.

[9] The cabinet documents, which the Unions sought to have included in the Record, related to the strategy and options considered by the government in the lead up to the enactment of the *PSSA*.

[10] The Attorney General opposed the Unions' motion on the basis the additional evidence was not appropriate for a reference. The Attorney General said the Unions' evidence related to government conduct which was not within the scope of the questions referred to the Court.

[11] The Unions' motion was heard by the Court on September 25, 2020 and dismissed by written decision dated January 15, 2021 (2021 NSCA 9).

[12] In dismissing the motion, the Court agreed with the position of the Attorney General concerning the nature of constitutional references. It described why it concluded the Unions' request was not consistent with the purpose of a reference:

> [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.

[13] This matter highlights a significant limitation with respect to constitutional references. They are not a forum which easily lends itself to evidentiary disagreements nor making factual findings. As a result, there are circumstances in which a court cannot, and should not, attempt to answer the questions referred to it. This is one of those cases and, for the reasons I will explain in more detail below, I would exercise my discretion and decline to answer the questions posed by the Attorney General.

[14] In my analysis, I will first discuss the nature of a constitutional reference followed by an outline of the principles applicable when the constitutionality of legislation is tested in relation to s. 2(d) of the *Charter*. I will then explain why the constitutional principles at play in relation to the *PSSA* are not appropriate for resolution through this reference.

Nature of a Constitutional Reference

[15] The *Act* sets out a process whereby the Governor in Council can request an advisory opinion from this Court. Similar legislation is found in all provinces. For the federal government, references are made to the Supreme Court of Canada.

[16] References are different than other court processes. They are not accompanied by the evidentiary tools used by trial courts such as production of documents, discovery examinations or witness testimony. There is no adverse party and no burden of proof. They originate at the appellate level. There is no lower court decision nor standard of review to be applied. The Court is being asked to answer a question on the basis of information provided by the party seeking the opinion as opposed to evidence developed in the context of a litigated dispute.

[17] The unique nature of a reference was described by this Court in the decision on the Unions' motions:

[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)

[18] Although s. 3 of the *Act* says the court "shall" hear and consider the question, it is crucial there be a discretion to refuse to answer so that judicial independence is maintained. This was emphasized by Carissima Mathen in *Courts Without Cases; The Law and Politics of Advisory Opinions* (London: Hart Publishing, 2019) at pages 62-63:

> As noted in Chapter 3, Canadian courts have rejected that sort of argument. They largely accept that they may perform functions other than deciding disputes that present as 'cases'. That has had numerous implications for the role of the courts.

> An entity that is expected to perform at the command of another could be perceived as being subordinate to it. To be sure, it is common in any system of governance for branches of the state to have to respond to each other as a matter of practical or constitutional reality. In a presidential system, the executive must respond to a Bill passed by the legislature, indicating his or her consent (or veto). Such relationships do not necessarily imply subordination. The particular concern here is whether the fact that the court is expected to modify its actions, priorities and tasks because of an executive demand may indicate, in a non-trivial sense, diminished independence. When references are initiated, the courts are expected to respond. The Supreme Court of Canada, for example, must modify its schedule to accommodate the necessary hearings. It must devote both administrative and judicial resources to dealing with the myriad requests that accompany them. And it must allocate time to sifting through the arguments, both written and oral; discussing the issue in conference; and, finally, delivering a written opinion.
>
> Canadian courts do retain a significant degree of control over the process. Under the Supreme Court Act, for example, the Court retains full say over such things as: appointing *amicus curiae*, directing process, deciding on additional participants, assigning the judges who will review and hear the argument, deciding on the content of the opinion and determining the timing of its release.
>
> Such control may help mitigate the perception that Canadian courts, and the Supreme Court in particular, are captive to another branch. Yet, the fundamental character of the reference seems largely unaffected. It is important, then, to consider other responses, by the judiciary itself, that seem intended to resist the limiting effect of a reference on its institutional autonomy. The most important of those is resisting or refusing to provide an answer.
>
> On numerous occasions, the Supreme Court simply has refused to engage with the question posed to it by the executive. At times, the Court has seen fit to *modify* the question in some way; at others, it has declined to respond altogether.

[19] Professor Mathen notes (at page 67) the Supreme Court of Canada has refused to answer reference questions because of mootness, lack of specificity, vagueness and the risk of creating legal uncertainty. She goes on to point out how the Supreme Court's approach to mootness enhances the constitutional separation of the judiciary from the executive (page 68):

> For at least two reasons, this second point is significant. First, it finds a counterpart in the Court's approach in ordinary cases. Especially since 1982, the Court has entertained cases that strictly speaking, were moot, because it determined that the hearing would serve some additional interest. In so doing, the Court acknowledges limits to its jurisdiction while retaining the authority to determine what those limits are. To be sure, this is common to many types of judicial craft. **In the context of references, though, which strain the ordinary understanding of what a court does, it is noteworthy that the Supreme Court**

> **does not consider itself bound to observe what *another* branch wants it to do. In other words, while the refusal seems on the surface an acknowledgment of the *limits* of judicial power, in practice it may serve to *enhance* it, by both entrenching a certain type of interpretative role and highlighting the court's independence**.
>
> [emphasis added]

[20] In *Reference Re Same-Sex Marriage*, 2004 SCC 79 the Supreme Court of Canada set out the preferred approach when an issue arises as to whether a court should decline to answer a reference question:

> 61 The first issue is whether this Court should answer the fourth question, in the unique circumstances of this reference. This issue must be approached on the basis that the answer to Question 4 may be positive or negative; the preliminary analysis of the discretion not to answer a reference question cannot be predicated on a presumed outcome. The reference jurisdiction vested in this Court by s. 53 of the *Supreme Court Act* is broad and has been interpreted liberally: see, e.g., *Secession Reference*, *supra*. The Court has rarely exercised its discretion not to answer a reference question reflecting its perception of the seriousness of its advisory role.
>
> 62 Despite this, the Court may decline to answer reference questions where to do so would be inappropriate, either because the question lacks sufficient legal content (which is not the case here) or because attempting to answer it would for other reasons be problematic.
>
> 63 In the *Secession Reference*, *supra*, at para. 30, we noted that instances where the Court has refused to answer reference questions on grounds other than lack of legal content tend to fall into two broad categories: (1) where the question is too ambiguous or imprecise to allow an accurate answer: see, e.g., *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, at p. 485; and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 256; and (2) where the parties have not provided the Court with sufficient information to provide a complete answer: see, e.g., *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at pp. 75-77; and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 257. These categories highlight two important considerations, but are not exhaustive.

[21] There are two important principles which flow from this passage. The first is that the decision whether to provide an answer should be made on a preliminary basis and does not depend on what answer the court is likely to give. The second is that the discretion is extremely broad and is not limited to categories such as mootness, ambiguity or sufficiency of the record.

Constitutionality of Legislation Under Section 2(d) of the *Charter*

[22] Section 2(d) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of association. It came into effect in 1982; but it was not until 2007 that the Supreme Court of Canada acknowledged this provision extended protection to collective bargaining rights in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*Health Services*").

[23] *Health Services* involved legislation passed by the government of British Columbia in response to challenges facing the healthcare system. The goal of the legislation was to reduce costs and facilitate management of the workforce in the healthcare sector. It addressed transfers in multi-worksite assignment rights, contracting out, the status of employees under contracting out arrangements, job security programs, layoffs and bumping rights. Various unions challenged the legislation as being unconstitutional because it infringed s. 2(d), s. 7 and s. 15 of the *Charter*. The most significant aspect of the decision relates to the s. 2(d) analysis.

[24] The Supreme Court concluded that s. 2(d) of the *Charter* guaranteed employees the right to participate in collective bargaining. However, this did not extend to ensuring a particular outcome for that process. It was only substantial interference with the right to bargain collectively that was protected by s. 2(d). The Court said the inquiry to be undertaken required examination of the particular context:

> 92 To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as 'union breaking' clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. **The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted**.
>
> [emphasis added]

[25] The Court went on to describe the two-step process to be followed:

> 93 Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> 94 Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation.

[26] The decision emphasized the importance of assessing the circumstances surrounding the legislation and the bargaining relationship between the parties in determining whether there was a violation of the employees' s. 2(d) rights:

> 107 In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, **regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines**. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. Nevertheless, there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.
>
> 108 Even where a s. 2(*d*) violation is established, that is not the end of the matter; limitations of s. 2(*d*) may be justified under s. 1 of the Charter, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.
>
> 109 In summary, s. 2(*d*) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. **Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished.** Important changes effected through a process of good faith negotiation may not violate s. 2(*d*). Conversely, less central matters may be changed more summarily, without violating s. 2(*d*). Only where the matter is both

> important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(*d*) be breached.
>
> [emphasis added]

[27] Legislation which purports to restrict the ability of unions to collectively bargain does not arise out of thin air. There is inevitably a context involving economic and management circumstances which is described as a "crisis". There will be a history of government and union interaction including collective bargaining, consultation and discussions concerning the legislation. In assessing whether legislation arising out of this milieu substantially interferes with the process of collective bargaining, the circumstances need to be considered. The Supreme Court of Canada in *Health Services* described it this way:

> 129 To amount to a breach of the s. 2(*d*) freedom of association, the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(*d*). Two inquiries are relevant here. First, substantial interference is more likely to be found in measures impacting matters central to the freedom of association of workers, and to the capacity of their associations (the unions) to achieve common goals by working in concert. This suggests **an inquiry into the nature of the affected right.** Second, the manner in which the right is curtailed may affect its impact on the process of collective bargaining and ultimately freedom of association. To this end, **we must inquire into the process by which the changes were made and how they impact on the voluntary good faith underpinning of collective bargaining.** Even where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to collective bargaining. Both inquiries, as discussed earlier, are essential.
>
> [emphasis added]

[28] The Court concluded the BC legislation substantially interfered with s. 2(d) rights and the government was unable to meet its burden to establish justification under s. 1 of the *Charter*. The legislation was struck down as unconstitutional.

[29] Following the economic crisis of 2008, a number of governments enacted legislation which temporarily limited pay increases in the public sector. This led to constitutional challenges by unions resulting in a series of court decisions which the Attorney General refers to as the "wage restraint cases". Most of these involved challenges to the federal *Expenditure Restraint Act*, S.C. 2009, c. 2 ("*ERA*"). It is worth noting none of these were references, and all were constitutional challenges initiated by unions in the applicable trial court.

[30] The first *ERA* case to reach the Supreme Court of Canada was *Meredith v. Canada (Attorney General)*, 2015 SCC 2 ("*Meredith*"), involving the application of the legislation to the RCMP. After concluding RCMP members had s. 2(d) rights to be protected, the Court considered whether the *ERA* substantially interfered with the process used to negotiate compensation issues. The Court found the *ERA* did not substantially interfere with the bargaining process for members' compensation. One factor in reaching this conclusion was that compensation agreements reached with other bargaining agents were consistent with the wage limits set out in the *ERA*:

> [28] The facts of *Health Services* should not be understood as a minimum threshold for finding a breach of s. 2(*d*). Nonetheless, the comparison between the impugned legislation in that case and the *ERA* is instructive. The *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, Part 2, introduced radical changes to significant terms covered by collective agreements previously concluded. **By contrast, the level at which the *ERA* capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes**. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the *ERA* did not preclude consultation on other compensation-related issues, either in the past or the future.
>
> [emphasis added]

[31] Another reason why there was no substantial interference was the *ERA* provision permitting the RCMP to be exempt from the legislation for "new allowances". This led the Court to consider evidence related to the outcome of negotiations on these issues:

> [29] Furthermore, the *ERA* did not prevent the consultation process from moving forward. Most significantly in the case of RCMP members, s. 62 permitted the negotiation of additional allowances as part of 'transformation[al] initiatives' within the RCMP. The record indicates that RCMP members were able to obtain significant benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Service pay was increased from 1% to 1.5% for every five years of service — representing a 50% increase — and extended for the first time to certain civilian members. A new and more generous policy for stand-by pay was also approved. Actual outcomes are not determinative of a s. 2(*d*) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the *ERA* had a minor impact on the appellants' associational activity.

[32] As the Supreme Court of Canada indicates in *Meredith*, an examination of the impact of the legislation and whether it rises to the level of a s. 2(d) violation, may necessitate looking at evidence of the collective bargaining outcomes for other employees in order to determine a "going rate". In addition, the process of consultation with the particular bargaining units covered by the legislation should be considered.

[33] The challenge to the *ERA* was dismissed by the Supreme Court due to the failure to establish a substantial interference with the process of collective bargaining.

[34] The *ERA* was also alleged to infringe s. 2(d) of the *Charter* in *Canada (Procureur généneral) c. Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163 ("*Syndicat canadien*"). The focus of the challenge was the legislated roll back of wage increases and the imposition of time limited wage caps. The Supreme Court of Canada dismissed the challenge after concluding the union had not shown substantial interference with their s. 2(d) rights. The approach used in the analysis included consideration of the ability to bargain on non-wage issues as well as evidence of negotiation of comparable "going rate" wage increases:

> [51] ... The respondents were not consulted (by either the government or their employer) before the *ERA* was passed – a question we will revisit – but the cap on wage increases under the *Act* were in fact comparable to those that many of the employees had ultimately negotiated in discussions led by their unions. This element should be considered when assessing the seriousness of the violation.

[35] Another union challenge to the constitutionality of *ERA* arose in *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 ("*Gordon*"). After reviewing the jurisprudence including the decisions in *Health Services* and *Meredith*, the Ontario Court of Appeal summarized the applicable test:

> [56] In conclusion, in applying the substantial interference test, which involves a contextual, fact-specific inquiry, the court must consider both the significance of the matter in issue to the collective bargaining process and the degree of interference with the collective bargaining process. While bargaining outcomes are not determinative, they may be indicative of whether there has been substantial interference with the collective bargaining process.

[36] As was the case in *Meredith*, the court looked at evidence with respect to results obtained through collective bargaining for other employees in order to

determine the effect of the *ERA* on the process of collective bargaining. Based upon the evidence before it, the court concluded the legislation had little impact:

> [122] Bargaining over wages is ordinarily a significant matter in free collective bargaining. Here, the evidence amply substantiates the appellants' argument that salary increases were a significant issue for most of the bargaining units, as the application judge's reasons actually show. Accordingly, I would not accept the application judge's finding that 'wages were not central to the process'. They were. But this does not resolve the issue.
>
> [123] **Here, the evidence indicates that the legislated caps on wage increases were consistent with what the bargaining units would have achieved even without the caps.**
>
> …
>
> [127] The *ERA*'s imposition of the wage increase caps therefore was consistent with the results of free collective bargaining that were the most favourable to the unions, having been negotiated by the largest union.
>
> [128] From a process perspective, it is difficult to imagine that continuation of an unfettered bargaining process for the remaining minority of units would have produced significantly different outcomes, given that the settlement with the majority of the public service drove the determination of the wage increase caps.
>
> [emphasis added]

[37] The court in *Gordon* was faced with an argument that *Meredith* should be distinguished because of the legislative exemption for RCMP officers. However, the court rejected this on the basis the most important finding in *Meredith* was the existence of equivalent, freely negotiated, salary caps:

> [161] In my view, the *ERA's* s. 62 exception for the RCMP did not drive the result in *Meredith*. Rather, the key to the Supreme Court's decision was its finding, at para. 28, that the level of capped wage increases imposed by the *ERA* reflected the results of free collective bargaining, which, as discussed above, is also true here.

[38] In the result, the court concluded that the unions had not met the burden of establishing a breach of their s. 2(d) *Charter* rights.

[39] The British Columbia Court of Appeal also considered a union challenge to the constitutionality of the *ERA* in *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156 ("*Dockyard Trades*"). The issue was the constitutionality of the *ERA* provision which rolled

back a binding arbitration award setting dockyard worker wages. The court outlined its analytic process as follows:

> [83] In my view, the authorities indicate that the appropriate inquiry is a holistic, contextual, or blended one. The question of substantial interference should be approached contextually, taking into account the nature of the matter subject to the interference, the effect of the interference, and the context or exigent circumstances in which the interference occurred. If, on an assessment of all of those factors, it can be said that the interference was 'substantial', then s. 2(d) is infringed. I do not understand the jurisprudence to stipulate any particular form of pre-legislative consultation; rather, it is a contextual examination driven by the circumstances driving the enactment of the legislation (see also this Court's reasons in *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184 at paras. 57, 58, 72, 79 ("*BCTF*")).

[40] The court deferred to the trial judge's factual findings which showed the parties were able to engage in collective bargaining on a wide range of issues. This demonstrated the *ERA* did not substantially interfere with the right to an effective process of collective bargaining. The context which led to the conclusion there was no s. 2(d) violation was described this way:

> [92] In my view, the length and depth of the negotiations and consultations prior to the *ERA's* enactment was adequate, given the looming fiscal crisis. The summary judge examined the circumstances surrounding the negotiations, the arbitration, and the exigencies that led the government to enact the *ERA*. He concluded that, in the circumstances, the government's conduct did not rise to the level of interference necessary to establish a breach of s. 2(d). In reaching that conclusion he made the following findings:
>
> > a) The notice to the Council about the impending legislation was considerable compared to the 20 minute warning in *Health Services* (at para. 233). He described this as close to the 'maximum' possible notice given the financial crisis facing government (at para. 234).
> >
> > b) The government adopted an approach to controlling public sector wages that respected past collective bargaining and avoided extinguishing existing terms and conditions.
> >
> > c) The government chose to limit wage increases for a temporary, limited defined period and only limited future wage increases if they had not been settled before December 8, 2008. Unlike *Health Services*, the legislation did not limit future bargaining on any term in the collective agreement other than in respect to the wage increase for 2006 (at para. 262).
> >
> > d) The government chose a 'negotiate first, legislate second' approach, informing the negotiators of the looming deadline (at paras. 240-241).

> e) The government used its best efforts to consult in good faith with all parties including the Council (at para. 248).
>
> f) The government negotiators made five different attempts to restart negotiations in the days before the deadline (at para. 249).
>
> g) The Council and its members were well aware that they risked the legislation overriding an arbitration award if they pressed ahead with the arbitration (at para. 259).
>
> [93] These findings are critical. Fiscal and economic context cannot be ignored. The government met its constitutional obligations through its attempts to negotiate until the last moment, and to signal the potential effects of the impending legislation. Its response was proportional to the looming fiscal emergency. Moreover, I do not think it can be said, as contended by the appellants, that this legislation compromised the essential integrity of the collective bargaining process. It is not my view that this legislation can be said to significantly impair or thwart the associational goals of the Dockworkers. The legislation simply does not have that reach.

[41] Between August 2016 and February 2017 the Supreme Court of Canada dismissed applications for leave to appeal in *Syndicat canadien*, *Gordon* and *Dockyard Trades*. In November 2016 it allowed an appeal from the British Columbia Court of Appeal in *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49 ("*British Columbia Teachers' Federation*") substantially for the reasons of the dissenting judge, Justice Donald (2015 BCCA 184).

[42] In *British Columbia Teachers' Federation*, the union alleged provincial legislation impacted teachers' working conditions and invalidated certain provisions of existing collective agreements and was, therefore, unconstitutional as infringing s. 2(d) of the *Charter*. Justice Donald agreed and would have upheld the challenge. The appeal arose from a 29 day evidentiary hearing in the British Columbia Supreme Court and Justice Donald relied on much of that evidence in concluding the legislation was not constitutional. As part of his analysis, he explained why the context of the legislation had to be considered:

> [287] If the act of associating in order to collectively negotiate to achieve workplace goals is not substantially interfered with, the government has not breached s. 2(d). The mere act of passing the terms of employment through legislation rather than a traditional collective agreement makes no difference to whether the employees were given the opportunity to associate and <u>effectively</u> pursue workplace goals. If the government, prior to unilaterally changing terms of employment, gives a union the opportunity to <u>meaningfully</u> influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless

> and the employees' attempts at associating to pursue workplace goals were not pointless or futile: see *SFL* at para. 55. Thus, the employees' freedom of association would likely not therefore be breached.
>
> [288] In this context, a *Charter* breach cannot always be seen within the four corners of legislation, but must sometimes be found to occur *prior* to the passage of the legislation, when the government failed to consult a union in good faith or give it an opportunity to bargain collectively. If the breach *is* the lack of consultation, then surely this Court must consider such a lack of consultation when determining whether a breach occurred.

[43] Justice Donald explains why consideration of pre-legislation consultation is relevant to the constitutional analysis, particularly where the statute has the effect of deleting terms of existing collective agreements:

> [291] Pre-legislative consultation, then, can be seen as a replacement for the traditional collective bargaining process, but only if it truly is a meaningful substitution. To be meaningful, the bargaining parties must consult from an assumed position of 'approximate equality'. I note here that in *SFL*, Abella J., writing for the majority of the Court, found that a right to strike was essential in order to maintain 'approximate equality' between employees and employers in the collective bargaining process: at para. 55, quoting Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History" (2009-2010), 15 C.L.E.L.J. 333 at 333.
>
> …
>
> [293] In my view, an obligation to consult in this context does not unduly restrict the Legislature any more than all the other rights and freedoms enumerated in the *Charter* restrict the Legislature. As I will discuss in greater detail below, if the government negotiates or consults with an association in good faith and nevertheless comes to an impasse, it will likely have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process. If the government does not have time to consult or negotiate with a collective bargaining unit because of exigent circumstances or emergency, it may then be found to have breached s. 2(d), but such a breach may be saved under s. 1.
>
> …
>
> [298] Of great concern is the notion that government can unilaterally delete provisions in a collective agreement, or temporarily prohibit collective bargaining, and 'cure' such unconstitutional behaviour through the notion of 'consultation'. This is precisely why courts must inquire into the existence of good faith on the part of government. As I will explain in greater detail in these reasons, if the government were permitted to hold out all of its positions as 'final offers' and 'skip' rounds of bargaining at its own whim through temporary prohibitions on collective bargaining, this would have the effect of making the act

> of associating essentially futile. But a sufficiently probing analysis of a government's good faith while engaged in consultation would ameliorate this threat to a large degree.
>
> [299] It must be acknowledged that Bill 22 as passed does not contain a permanent negation of collective bargaining rights. Thus, in my opinion, the legislation should be seen as primarily a unilateral deletion of employment terms. While the existence of a temporary prohibition on collective bargaining complicates this analysis, I believe that, in the specific facts of this case, the 'temporary prohibition' in Bill 22 was collateral to the bill's primary purpose of enshrining the deletion of the Working Conditions. Therefore, the bill is best understood as one of unilateral deletion or alteration of a collective agreement. For the reasons I have discussed, pre-legislative consultation was therefore relevant for this constitutional analysis.

[44] In *British Columbia Teachers' Federation* the labour relationship between the union and the provincial government was acrimonious, with a history of contested litigation and frustrated collective bargaining. In order to assess the constitutionality of the legislation enacted by the province, the court was compelled to look at the entire relationship. This is undoubtedly why the trial involved an evidentiary hearing of 29 days. Justice Donald described the importance of the trial judge's evidentiary findings this way:

> [324] According to the Supreme Court of Canada, when assessing the constitutionality of government legislation or actions with respect to a union's freedom of association, '[t]he inquiry in every case is contextual and fact-specific': *Health Services* at para. 92. In a case like this, we are not dealing with abstract questions of rights and freedoms. Rather, a case like this deals entirely with discrete actions of government and the relationship between actual, identifiable, and knowable parties – albeit parties representing the interests of large groups of people. The actions of the Province, its motivations, and the consequent effects on teachers and the BCTF are facts that are best determined by a trial judge with the necessary fact-finding tools, such as *viva voce* testimony.

[45] According to Justice Donald, the trial judge's findings with respect to the conduct of the province through the consultation process were determinative on the issue of the constitutionality of the legislation:

> [376] In summary, I agree with the trial judge that the Province did not consult in good faith. Since the Province did not consult in good faith, it did not retain a meaningful process that protected the BCTF's s. 2(d) right to collectively bargain toward important workplace goals. The unilateral deletion of the Working Conditions, which were of significant importance to the teachers, was therefore a substantial interference with BCTF's associational activity and a breach of s. 2(d).

[46] After concluding the legislation was unconstitutional, Justice Donald went on to find the province had not met its burden under s. 1 of the *Charter*.

[47] The Manitoba Court of Appeal recently considered the "wage restraint cases" in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85 ("*Manitoba Federation*"). The legislation under challenge imposed time limited caps on provincial sector wages. It is similar to the *PSSA* which is the subject of this reference. The court did not conduct a contextual and fact specific analysis of the legislation and the circumstances leading to it. It considered whether the Supreme Court of Canada in *Meredith* had decided, as a matter of precedent, that temporary wage restraint legislation was constitutional. The court identified the focus of its analysis this way:

> [53] The critical issue in the present appeal is whether *Meredith* stands for the legal proposition that broad-based, time-limited wage restraint legislation does not violate the freedom of association as guaranteed under section 2(d) of the *Charter* and is, therefore, constitutional.

[48] It described its conclusion on this question as follows:

> [118] *Meredith* and the three appellate court decisions held that imposing broad-based and time-limited wage restraint legislation met both inquiries of the *Health Services* test. They determined that the *ERA* did not preclude a robust bargaining process on the other issues. It was concluded that this type of legislation did not substantially interfere with the collective right to good faith negotiation and consultation. ***Meredith* is binding on this Court and the three appellate court decisions are highly persuasive.**
>
> …
>
> [124] As I indicated at the beginning of these reasons, the key question is whether it is unconstitutional for legislation to prevent collective bargaining on wages for a limited period of time. There can be no doubt that the intention of the *ERA* and the *PSSA* legislation was to remove the issue of wages from discussion at the bargaining table. In the end, the Supreme Court of Canada in *Meredith* and the three appellate courts concluded that removing the issue of wages from the bargaining process for a limited period of time did not substantially interfere with a meaningful collective bargaining process and, thus, the *ERA* complied with section 2(d).
>
> [125] **I have not been persuaded that there is any sound legal basis to distinguish *Meredith*.** It is my view that *Meredith* stands for the proposition that it is not unconstitutional for a government to remove by statute the topic of wages from the bargaining table so long as:
>
> a) the wage restraint legislation is broad-based and time-limited; and

> b) it does not preclude a meaningful collective bargaining process from occurring on other important workplace matters.
>
> [emphasis added]

[49] In my view, *Manitoba Federation* does not add any new principles to the jurisprudence with respect to s. 2(d) of the *Charter*. The Attorney General relies heavily on this decision because of the similarities between the legislation under consideration and the *PSSA*. He argues it stands for the proposition time limited wage restraint legislation is always constitutional. If the suggestion is this conclusion can be reached without the need to consider the surrounding context, this runs contrary to the clear advice of the Supreme Court of Canada in *Health Services*, *Meredith* and *British Columbia Teachers' Federation*. I would not adopt such an interpretation of *Manitoba Federation*.

[50] Before concluding my discussion of the constitutional principles arising from s. 2(d) of the *Charter*, I must comment on the evidentiary and persuasive burdens which arise on a constitutional challenge to wage restraint legislation.

[51] Legislation is presumed to be constitutional and a party who alleges otherwise bears the onus of establishing this. The Manitoba Court of Appeal in *Manitoba Federation* described it this way:

> [25] The party claiming that the government has substantially interfered with its section 2(d) associational right has the onus of satisfying the judge on a balance of probabilities that the test has been met. If met, the onus shifts to the state to justify the violation under section 1 of the *Charter* (see *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 47 (*Fraser*)).

[52] As the court indicates, once a violation is established the burden shifts to the government to establish a justification for the violation of rights under s. 1 of the *Charter*. They must do so on a balance of probabilities (see para. 148 of *Health Services*).

[53] A s. 1 justification will inevitably require evidence on the part of the government. In cases where s. 2(d) is engaged this will involve establishing the range of options which were available to the government. Justice Donald, in *British Columbia Teachers' Federation*, described it this way:

> [386] Permanence or transience of the prohibition on collective bargaining aside, it is important to stress that the minimal impairment stage of the s. 1 analysis does not look at whether the Province has taken a less damaging approach to the legislation compared to some even more egregious alternative, but whether the

> Province took a *least* damaging approach within a range of reasonable alternatives. In my opinion, despite attempts made to reduce the impairment of the legislation, it cannot be said to be minimally impairing within a range of reasonable alternatives.

Should the Court decline to answer the reference questions?

[54] As the previous discussion indicates, references are not designed to be fact finding exercises. The usual evidentiary tools used by trial judges are not available. Appellate courts typically do not engage in multi-day evidentiary hearings.

[55] When proceedings involve factual disputes, trial courts have the benefit of an adversarial system where parties assemble the available evidence, determine what is relevant and present it through witness testimony or affidavit. In addition, parties are able to challenge evidence adduced by adverse parties through cross examination or presentation of contrary evidence. None of this is possible on a reference. There are no adverse parties nor is there any ability for a party, other than the Attorney General, to provide evidence without prior permission of the court. In this case, the Unions sought to do this but their motion was dismissed.

[56] The first question in the reference is whether the *PSSA* violates the *Charter*. As the jurisprudence indicates, there is no burden on the Attorney General to establish constitutionality. Despite having no evidentiary burden, the Attorney General has filed the Record representing the only evidence which can be considered. The Unions, who would bear the burden of proof in a constitutional challenge, were not permitted to contest the contents of the Record by adducing additional evidence.

[57] The Record contains materials which have not been proven by any witness and are rife with hearsay and opinion. Some of the opinions are obviously matters for which expertise would be required; however, the authors have not been qualified to give expert opinion.

[58] At the hearing, the Court asked counsel for the Attorney General about these evidentiary concerns. He suggested that the Court could answer the question of the legislation's constitutionality by considering the *PSSA* "on its face". He said the Court could consider the non-controversial portions of the Record in order to assess the factual context for the *PSSA*. Counsel for the Unions disagreed strenuously and said we should not consider any of the Record documents as proof of the facts they contain; nor should we draw any factual inferences as suggested by the Attorney General. The dispute between the parties about the Record is

illustrated by their positions on whether there is any evidence of a "going rate" of collectively negotiated wages which accords with the wage caps found in the *PSSA*.

[59] The Attorney General relies on tentative agreements negotiated with two of the intervenors. In both cases, the agreements were rejected by vote of the union membership. The Unions argue these do not reflect agreements reached through free bargaining and would be of no comparative value once the full context of the negotiations is examined. They argue this is explained in the affidavits which they had sought to file but were not permitted to do so. The Attorney General says we should infer the agreements were reached through fair bargaining and there is no need to look at the circumstances of the negotiation.

[60] The debate about the extent to which a factual basis is needed to answer the constitutional questions is clear from the parties' briefs. The Unions provide their perspective in this passage following their discussion of the Court's motion decision:

> 138. Given this ruling, it is surprising that the Attorney General has sought to defend Bill 148 with claims that the Province negotiated in good faith and consulted with the Unions - the two matters on which the Union sought to introduce evidence and which the Court said it would not consider.
>
> 139. Under the heading, 'Consultations respecting the Public Sector Sustainability Mandate', the Attorney General describes meetings with Unions and seeks to characterize the meetings as 'open and transparent' and that the 'purpose was both to encourage engagement for meaningful negotiations but also to consult on the legislative framework for collective bargaining in Nova Scotia.' This interpretation of events is disputed by the Unions and in any event is outside the bounds of the Reference.
>
> 140. The Attorney General goes on to invite the Court to find that the Province not only engaged in good faith bargaining, but that Bill 148 reflects the outcomes of such bargaining. These are matters directly in dispute between the parties, on which the Unions have not had the opportunity to lead evidence, and which the Court has already decided it would not consider.

[61] The Attorney General's reply brief responded to this submission as follows:

> 28. This Court, however, did not rule that the constitutionality of Bill 148 had to be considered in a complete void of any evidence referencing the conduct of government; it ruled that the *constitutionality* of such conduct would require an action, and not a Reference, to determine.

> 29. The Attorney General, in citing evidence clearly on the record, avoided making any argument as to the whether the government conduct in question was constitutional or not; that question can be determined in the appropriate forum. However, the evidence in the record is very clear. It is factually true that consultations took place with unions before Bill 148 was introduced. It is factually true that the wage patterns seen in Bill 148 were negotiated in tentative agreements with both the NSGEU and the NSTU before Bill 148 was passed. The Attorney General referred to those negotiations as 'good faith,' citing the legal principal that the existence of a tentative agreement is evidence that the negotiations were in good faith. The case law indicates that these facts are relevant to the assessment of the constitutionality of Bill 148 itself. If there are separate arguments as to the constitutionality of government conduct, those can be raised in the appropriate forum.
>
> 30. Thus, the Attorney General submits that there is nothing inappropriate about the Court reviewing the evidence in the Record as to consultation and bargaining, for the purposes of determining the constitutionality of the legislation.

[62] Counsel has advised the Court there are proceedings underway, initiated by some of the Unions, in the Nova Scotia Supreme Court, challenging the constitutionality of the *PSSA* a violation of s. 2(d) of the *Charter*. That litigation is on hold pending an answer from this Court to the reference questions. The Attorney General argues if the reference questions raise any issues requiring factual findings those can be dealt with later in the Nova Scotia Supreme Court proceedings. For example, if the government's conduct in consultations prior to enactment is relevant to the *PSSA's* constitutionality, this could be decided in the Supreme Court. Similarly, any evidentiary hearing under s. 1 of the *Charter* could take place in that forum.

[63] What the Attorney General is essentially suggesting is that we should decide the question of the legislation's constitutionality "on its face" without regard to the surrounding circumstances and context, and leave any evidentiary matters to the outstanding Supreme Court proceeding.

[64] I am satisfied we should not be making any factual determinations based upon the Record given the absence of witness testimony, the lack of an adversarial process and the inability of the Unions to present evidence. In my view, it is clear from the jurisprudence that a constitutional challenge under s. 2(d) of the *Charter* requires consideration of the factual circumstances leading up to and following the enactment of the legislation. This is how the impact of the legislation on the process of collective bargaining must be assessed. A reference is not a proper forum for such a determination. The cases relied upon by the Attorney General are

all constitutional challenges by unions and, in most cases, arose from extensive evidentiary hearings with witness testimony and expert reports.

[65] In my view, it would not be appropriate to attempt to answer the reference question in the limited manner proposed by counsel for the Attorney General. At best, this would result in a qualified opinion on some of the arguments concerning the *PSSA's* constitutionality. There would need to be a further evidentiary hearing in the Nova Scotia Supreme Court before the constitutionality of the legislation could be conclusively determined.

[66] There are other reasons why I believe it would be inappropriate to answer the questions posed. We have been advised by counsel that all bargaining units affected by the *PSSA* have been exempted by regulation. This means there are no longer any public sector employees who are subject to its provisions. In addition, the time limit for the wage restraint has passed for almost all of the bargaining units and, for the rest, it will expire in the near future.

[67] It is not possible for the Court to give a comprehensive answer to the issue raised by the reference, which is whether the *PSSA* violates the *Charter*. Even if a partial answer could be given and the remaining issues left for determination in another proceeding before a different court, the utility of that exercise is questionable. When this is combined with the apparent mootness of the questions due to the lack of public sector employees impacted by the *PSSA*, I conclude that we should exercise our discretion and decline to answer the questions referred to the Court for consideration.

Wood, C.J.N.S.

Concurred in:

Farrar, J.A.

Beaton, J.A.