NOVA SCOTIA COURT OF APPEAL

Citation: *Reference re Public Services Sustainability (2015) Act*, 2020 NSCA 53

Date: 20200807
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 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
Motion Heard:	February 10, 2020, in Halifax, Nova Scotia
Subject:	*Constitutional Questions Act* - Procedure – Authority to Order Production
Summary:	In this Reference under the *Constitutional Questions Act* certain intervenors made a motion to compel the AGNS to add documents to the record. Parties treated the motion as one for the production of documents. As a preliminary question the parties sought a ruling on whether the court had the authority to order production.
Issues:	Does the Court of Appeal have the authority to order production of documents on a constitutional reference?
Result:	The Court's authority to manage its own process includes the power to order production in appropriate circumstances. Whether it would do so in this matter will be determined after a further hearing.

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 5 pages.

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

Motion Heard: February 10, 2020, in Halifax, Nova Scotia

Held: Motion allowed per reasons of Wood, C.J.N.S., concurred in by Farrar, J.A. and Beaton J.A.

Counsel: Edward Gores, QC and Andrew Taillon, for the Attorney General of Nova Scotia
Gail L. Gatchalian, QC and Jillian Houlihan, for the Intervenor Unions
Heather Leonoff, QC, for the Attorney General of Manitoba (not participating)

Reasons for judgment:

[1] On August 22, 2017, the Attorney General of Nova Scotia ("AGNS") filed a Reference in this Court pursuant to s. 3 of the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89. An amended Notice of Reference was filed on October 13, 2017. The Reference, as amended, asked the Court to answer 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*?

[2] The purpose the *Public Services Sustainability (2015) Act* ("PSSA") is found in s. 2:

> 2 The purpose of this Act is
>
> (a) to create a framework for compensation plans for public-sector employees that
>
> > (i) is consistent with the duty of the Government of the Province to pursue its policy objectives in accordance with the principles of responsible fiscal management prescribed under the *Finance Act*, and
> >
> > (ii) protects the sustainability of public services,
>
> by placing fiscal limits on increases to the compensation rates and compensation ranges payable by public-sector employers that are in conformity with the consolidated fiscal plan for the Province;
>
> (b) to authorize a portion of cost savings identified through collective bargaining to fund increases in compensation rates, compensation ranges or other employee benefits established by a collective agreement;
>
> (c) to limit the scope of arbitral awards to comply with the principles of responsible fiscal management prescribed under the *Finance Act*; and
>
> (d) to enable and encourage meaningful collective bargaining processes. 2015, c. 34, s. 2.

[3] The AGNS in its submissions to the Court describes the PSSA as placing limits on the size of wage increases that could be awarded in interest arbitration and also removing long services awards or their equivalent from various collective agreements applicable to government employees.

[4] In January 2018, eight unions were added, on consent, as intervenors in this matter. The unions represent employees of the Government of Nova Scotia and are parties to collective agreements which would be impacted by the PSSA.

[5] In support of the Reference, the AGNS filed an evidentiary record consisting of 16 volumes of material. The intervenors wish to have additional documents added to the record filed by the AGNS. They also seek to introduce their own evidence. They have filed a motion seeking leave to address these two issues. The documents which the intervenors seek to have the AGNS add to the record consist of materials described as minutes of Executive Council meetings and correspondence between the Executive Council and certain Ministers. These materials are globally described as “cabinet documents”. The parties agree this second aspect of the intervenors’ motion essentially seeks an order for production of these materials from the AGNS.

[6] The parties disagree about whether this Court has the authority to order production and have requested this question be answered on a preliminary basis, prior to argument on the intervenors’ pending motion. For the reasons that follow, I have concluded that this Court does have jurisdiction to order production of documents. Whether the panel will ultimately make such an order will be determined after further submissions from the parties as part of the intervenors’ motion.

Positions of the Parties

Union Intervenors

[7] The intervenors point to two potential sources of the Court’s authority to compel production of documents in this Reference. The first is s. 3 of the *Constitutional Questions Act* which says:

> 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.

[8] In the intervenors’ submissions, the requirement that the Court “hear and consider” the Reference carries with it the power to order production.

[9] The second source of authority is said to be the *Civil Procedure Rules*, including *Rule* 90.23 which states that, on a Reference, a judge may make such orders as they consider just. In addition, the intervenors rely on *Rule* 90.02(1)

which provides that *Rules* not inconsistent with *Rule* 90 apply to proceedings in the Court of Appeal with necessary modification. They say this incorporates the authority to order production under *Rule* 14.12(1).

AGNS

[10] The AGNS says that because References are advisory in nature, they are not like other proceedings and there are no adjudicative facts to be litigated. As a result, neither the *Constitutional Questions Act* nor the *Civil Procedure Rules* give authority to order production.

Analysis

[11] A court of appeal is a creature of statute. Its jurisdiction over a matter must be given to it by legislation. The Supreme Court of Canada described appellate jurisdiction as follows in *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53 at page 69:

> Rights of Appeal Generally
>
> Since the appellants' efforts were largely directed to finding a right of appeal in this case, I will first make some comments about the nature of rights of appeal generally.
>
> Appeals are solely creatures of statute; see *R. v. Meltzer*, 1989 CanLII68 (SCC), [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court. …

[12] In this case, by s. 3 of the *Constitutional Questions Act,* the legislature has given this Court jurisdiction to consider and decide the questions referred to it by the AGNS. What remains to be decided is a specific issue relating to the authority to compel production of documents.

[13] Once a matter is properly within the jurisdiction of a court of appeal, that court has a wide discretion to control its own process. This is sometimes described as inherent jurisdiction. For example, Saunders, JA in *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47 said:

> [178] Likewise, the Supreme Court of Canada has confirmed in *United States v. Shulman*, 2001 SCC 21 (S.C.C.), ¶33 and *United States v. Cobb*, 2001 SCC 19 (S.C.C.), ¶37 that a Court of Appeal "has, *like all courts*, an implied, if not inherent, jurisdiction to control its own process, including through the application of the common law doctrine of abuse of process" [underlining mine].

> In *Cunningham v. Lilles*, 2010 SCC 10 (S.C.C.), Justice Rothstein indicated at ¶18 that "[i]nherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner."

[14] Other courts have expressed this view. For example in *R. v. Buencamino*, 2012 BCCA 265 the court noted:

> [10] … The Court of Appeal is a statutory court, and has no inherent jurisdiction, unlike the Supreme Court. If the jurisdiction does not exist in a statute, then there is none. (**The exception is controlling the process of the Court,** which has no application here).
>
> [emphasis added]

[15] The Ontario Court of Appeal made a similar comment in *R. v. Fercan Developments Inc.*, 2016 ONCA 269 at para. 51:

> A statutory court also has the power to control its own process. That power is necessarily implied in a legislative grant of power to function as a court of law: *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 19.

[16] The Newfoundland and Labrador Court of Appeal provided some historical context for the principle in *McNally v. Bass*, 2003 NLCA 15 at para. 28:

> Even for those courts with no inherent jurisdiction, in the sense of original jurisdiction, there was a recognized power to control their own procedure. The Court of Appeal for New South Wales concluded in *Bogeta Pty. Ltd. v. Wales*, [1977] 1 N.S.W.L.R. 139 (New South Wales C.A.) at p. 149:
>
>> The general principle, where a court is properly seized with a matter, and there is no procedure laid down which enables it to deal with the particular problem facing it, that it should devise its own procedure is, in my opinion, applicable to all courts of Petty Sessions in this day and age. Historically, inferior courts have been allowed to devise their own procedures.
>
> The reasoning behind this view was expressed by Baron Alderson in *Cocker v. Tempest* (1841), 7 M. & W. 501, 151 E.R. 864 (Eng. Exch.):
>
>> The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.

[17] In my view, the authority of a court to regulate its process includes the power, when appropriate, to order production of documents. There are examples of superior courts ordering production as part of their jurisdiction to control their process (see *Brunette v. Bryce*, 2010 BCSC 1681 at para. 8; *Jewish Community Campus of Winnipeg Inc. v. Metaser*, 2013 MBQB 303 at para. 6).

[18] The scope of a court's power to control process is largely the same between statutory courts, such as courts of appeal, and superior courts. This was noted by the Ontario Court of Appeal in *R. v. Fercan Developments Inc.*, *supra*:

> [52] The Supreme Court of Canada has discussed the power of statutory courts to control their process in [*Cunningham v. Lilles*, 2016 SCC 10] and in *R. v. Imona-Russell*, 2013 SCC 43, [2013] 3 S.C.R. 3 (S.C.C.). Other than noting that this power cannot contravene explicit statutory provisions or constitutional principles like the separation of power, the court did not discuss the outer limits of a statutory court's ability to control its own process in either decision. However, in both cases, the court treated a statutory court's ability to control its own process as largely parallel to a superior court's ability to control its own process.

[19] Given the nature of a Reference and the legislature's explicit granting of authority to the Court of Appeal to hear and consider it, I am satisfied this Court has the ability to make a production order in some circumstances. There is no principled reason why the authority to order production as part of the power to regulate procedure should not be exercised by this Court in an appropriate case particularly where, as here, it is acting as a court of first instance. Whether such an order is issued in this Reference will be determined after a further hearing.

Wood, C.J.N.S.

Concurred in:

Farrar, J.A.

Beaton, J.A.