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REFERENCE RE REGINA v. COFFIN

MOTION DECLINING THE COURT'S JURISDICTION

Jurisdiction—Power of this Court to hear Reference by Governor General in Council—Criminal case—Supreme Court Act, R.S.C. 1952, c. 259, s. 55.

In a preliminary objection to the jurisdiction of this Court to hear the Reference made by the Governor General in Council in *Regina* v. *Coffin* (1956 S.C.R. 191), it was contended by the Attorney General of Quebec that the Order-in-Council went beyond the terms of s. 55 of the *Supreme Court Act* (R.S.C. 1952, c. 259), in that a judicial opinion was asked on a matter as to which there was *res judicata;* that it was an interference with the administration of justice in a province and that under s. 596 of the *Criminal Code* there was no power to refer the matter to this Court.

Held: The motion should be dismissed.

Per Kerwin C.J., Taschereau, Locke, Cartwright and Fauteux JJ.: By the terms of s. 55(6) of the *Supreme Court Act,* the opinion of the Court is a final judgment only for the purposes of appeal to Her Majesty in Council. While the opinion will be followed as a general rule, there is no *lis* between the parties. S. 55 and particularly s-s. (1)(*e*) is wide enough to cover this case and there is precedent for such a reference. Furthermore, whether the Governor General in Council desired the opinion in order to come to a conclusion on the question of clemency or in order to assist the Minister of Justice in deciding what action he should take under s. 596 of the *Criminal Code,* the reference was authorized by s. 55.

Per Rand and Kellock JJ.: The reference falls under s. 55(1)(*d*) and (*e*) of the *Supreme Court Act.*

Objection raised by the Attorney General of Quebec to the jurisdiction of this Court to hear the Reference in *Regina* v. *Coffin.*

N. Dorion, Q.C. and *P. Miquelon, Q.C.* for the motion.

G. Favreau, Q.C. and *A. J. MacLeod, Q.C.* contra.

A. E. M. Maloney, Q.C. and *F. de B. Gravel* for the accused.

The judgment of Kerwin C.J., Taschereau, Locke, Cartwright and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—The Attorney General of Quebec raised a preliminary objection to the jurisdiction of this Court to hear this Reference and it is, therefore, advisable

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

to set out the relevant parts of s. 55 of *The Supreme Court Act*, R.S.C. 1952, c. 259, under the authority of which the Order of Reference was made:—

> 55 (1) Important questions of law or fact touching
> (*a*) the interpretation of the British North America Acts;
> (*b*) the constitutionality or interpretation of any Dominion or provincial legislation;
> (*c*) the appellate jurisdiction as to educational matters, by the British North America Act 1867, or by any other Act or law vested in the Governor in Council;
> (*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised; or
> (*e*) any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;
>
> may be referred by the Governor in Council to the Supreme Court or hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.
>
> (2) Where a reference is made to the Court under sub-section (1) it is the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.
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> * * *
>
> (6) The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to Her Majesty in Council, be treated as a final judgment of the said Court between parties.

Mr. Dorion did not argue that this section was *ultra vires* Parliament, but he did contend that the Order-in-Council went beyond the terms of the section and submitted that what was asked was a judicial opinion, as to which the doctrine of *res judicata* would apply. Sub-section (6) was relied upon as indicating that the opinion was a final judgment but, as the sub-section itself states, this was only for the purposes of appeal to Her Majesty in Council. In any event, while undoubtedly the opinions expressed by the Members of the Court on a Reference will be followed as a general rule, there is no *lis* between parties. In view of the wide terms of the provisions of the section, and particularly of s-s. (1) (*e*), this contention cannot be sustained.

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Mr. Dorion next contended that it was an interference with the administration of justice within a province which matter, by Head 14 of s. 92 of *The British North America Act*, was committed exclusively to the Provincial Legislature. In that connection he pointed to the following language used by Chief Justice Fitzpatrick in *In re References by Governor General in Council* (1):

> If in the course of the argument or subsequently it becomes apparent that to answer any particular question might interfere with the proper administration of justice, it will then be time to ask the executive, for that reason, not to insist upon answers being given; and this might very properly be done notwithstanding that such answers would not in any circumstances have the binding force of adjudications, like decisions given in regular course of judicial proceedings.

and to Chief Justice Fitzpatrick's conclusion at p. 558:

> For all these reasons I hold:
>
> 1. That the Governor in Council has the power under the constitution to make this reference;
>
> 2. That it is the duty of the members of this court to hear the argument of counsel and to answer the questions, subject to our right to make all proper representations if it appears to us during the course of the argument, or thereafter, that to answer such questions might in any way embarrass the administration of justice.

Reference was also made to the statement of Mr. Justice Duff, as he then was, in the same case, at pp. 589-590:

> The objection to some extent is also rested upon section 92, subsection (14), of the Act. I quite agree that if section 60 on its true construction required this court to do any act directly affecting the action of the courts of any of the provinces in respect of such a question either by way of declaring a rule which those courts should be bound to follow or creating a judicial precedent binding upon them, or upon this court in its capacity as a court entertaining appeals from the provincial courts under section 101 or *imposing on this court any duty incompatible with the due exercise of its jurisdiction in respect of such appeals*—such for example as pronouncing, *ex parte*, at the behest of the executive upon a question raised, *inter partes*, in such an appeal—I quite agree, I say, that if that were the effect of section 60 then the validity of that section might be open to objection as Dominion legislation professing to deal with subject of the administration of justice in the provinces after a manner not justified by the "British North America Act". But I do not think the submission (for advice) of questions relating to the legislative jurisdiction of the provinces or the giving of such advice necessarily constitute such an interference with the administration of justice.

Mr. Dorion relied on the following extract from the argument of Counsel for Canada at p. 579 of the report of the appeal from the decision of this Court when it was before

(1) (1910) 43 Can. S.C.R. 536 at 547.

the Judicial Committee, *Attorney General for Ontario* v. *Attorney General for Canada* (1): "The Court, if it considered that its answers to the questions put might prejudicially affect the administration of justice in future cases, might refuse to answer the questions, stating their reasons for so doing."

It is true that in that case the point raised was that the then s. 60 authorizing References was *ultra vires,* but at pp. 575-6 of the Report in the Judicial Committee Counsel argued that the exercise of the power given would be highly prejudicial to the administration of justice and, notwithstanding this argument, the Judicial Committee upheld the conclusions of the majority of this Court in determining that the section was operative. It is permissible, I think, as their Lordships did in that case, to point to the fact that many References have been made to this Court upon different matters and particularly the question submitted in the *Reference as to the Minimum Wage Act of Saskatchewan* (2):

> Was the Saskatchewan Court of Appeal right in holding in its decision in *Williams* v. *Graham* that The Minimum Wage Act, Chapter 310 of the Revised Statutes of Saskatchewan, 1940, was applicable to the employment of Leo Fleming in the Post Office at Maple Creek, Saskatchewan?

The Order of Reference there before the Court recited that an appeal did not lie from the decision of the Court of Appeal in the Williams case. It is significant that no question was raised that the Reference was not authorized by the terms of s. 55 of *The Supreme Court Act.*

Closely allied to the point under discussion is another which may be treated either as a branch or under a separate heading. This is to the effect that while by s. 596 of the *Criminal Code,* c. 51 of the Statutes of Canada 1953-4, the Minister of Justice may direct a new trial for a person who has been convicted in proceedings by indictment, or may refer the matter or any question to the provincial Court of Appeal, these very terms indicate that there was no power to refer the Coffin matter to this Court. Mr. Favreau called our attention to para. XII of the Letters Patent con-

(1) [1912] A.C. 571. (2) [1948] S.C.R. 248.

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stituting the office of Governor General of Canada, effective February 1, 1947, which is to be found at p. 6432 of Vol. VI, R.S.C. 1952:—

> XII. And We do further authorize and empower Our Governor General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of Canada has been committed for which the offender may be tried thereunder, to grant a pardon to any accomplice, in such crime or offence, who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further to grant to any offender convicted of any such crime or offence in any court, or before any Judge, Justice or Magistrate, administering the laws of Canada, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our Governor General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. And We do hereby direct and enjoin that Our Governor General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of Our Privy Council for Canada and, in other cases, the advice of one, at least, of his Ministers.

The Order-in-Council directing the present Reference recites:—

* * *

> THAT in an application for the mercy of the Crown Wilbert Coffin has requested that the Minister of Justice, pursuant to section 596 of the Criminal Code, direct a new trial and in support thereof represents that there are, in this case, questions of law that relate to the issue whether he received a fair trial.

* * *

> THAT, in the opinion of the Minister, it is in the public interest that the Minister should have the benefit of the views of the Supreme Court of Canada on the question of what disposition of the appeal would, after argument of the said appeal, have been made by the Court if the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any or all of the grounds alleged on the said application.

Upon these and other recitals His Excellency the Governor General-in-Council referred the question to this Court for hearing and consideration. In whichever aspect the matter is looked at I have no doubt the Order of Reference was authorized by s. 55 of *The Supreme Court Act,* whether the Governor General-in-Council desired to have the opinions of the Members of the Court in coming to a conclusion as to whether clemency should be exercised, or whether he desired that those opinions should be available to the Minister of Justice in coming to a conclusion as to what action, if any, the latter would take under s. 596 of the *Criminal Code.* It may also be pointed out that by Head 27

of s. 91 of *The British North America Act* the exclusive legislative authority of Parliament extends to all matters coming within:—

> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

The objection to the jurisdiction of the Court to hear the Reference fails on all grounds.

The judgment of Rand and Kellock JJ. was delivered by:—

RAND J.:—I agree that the reference here comes within the jurisdiction of this Court under s. 55 of *The Supreme Court Act* as a question "of law or fact touching" . . . (*d*) "the powers . . . of the respective governments" and (*e*) "any other matter . . . with reference to which the Governor in Council sees fit to submit any such question". The preliminary objection is not well founded and the motion must be dismissed.

Motion dismissed.

Solicitors for the A.G. of Quebec: *N. Dorion & P. Miquelon.*

Solicitor for the A.G. of Canada: *F. P. Varcoe.*

Solicitor for the accused: *F. de B. Gravel.*