

Court of Appeal undecided about hearing case on dual busing Panel of justices said lawyers haven't persuaded them to consider constitutional question on dual busing

Description

The New Brunswick Court of Appeal still isn't convinced it should be hearing a politically charged constitutional case about dual busing.

Last year the Gallant government asked the province's top court to rule on whether English and French school bus systems are required by the Charter of Rights and Freedoms.

But in a ruling on Thursday, the panel of three justices said government lawyers still haven't persuaded them that it should consider the question at all.

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Instead, they say they want to hear more arguments on that issue and have scheduled a hearing for Feb.15 and 16, 2017. That means the main arguments in the case won't happen before next spring at the earliest.

The ruling isn't a surprise: in June, Chief Justice Ernest Drapeau told lawyers that he and Justices Margaret Larlee and Kathleen Quigg weren't sure "if this is a proper case to go forward" at the appeal court.

"We have serious preoccupations about using the vehicle of a reference case to determine this issue," said Drapeau at the time.



In June, Chief Justice Ernest Drapeau said he wasn't sure "if this is a proper case to go forward" at the appeal court. (CBC)

Before they can hear substantive arguments on whether dual busing is constitutionally required, the justices must decide who is allowed to intervene and make legal arguments in the case.

The June hearing was devoted to that question.

The People's Alliance of New Brunswick political party, retired school teacher Jane Sherrard, three francophone school districts and a francophone parents' group applied to intervene.

Thursday's ruling dismisses the applications from Sherrard and the People's Alliance to take part as friends of the court.

It puts the other applications on hold, including one by the People's Alliance to intervene as a party, until the court can decide whether to hear the reference at all.

The ruling said the Office of the Attorney General must file arguments by Nov. 18 on the question of whether the court is "at liberty to decline" to answer the constitutional question, and if it is, whether it should.



Government lawyer André Richard has argued that the court should hear the reference. (Jacques Poitras/CBC)

In earlier hearings in the case, Drapeau said he was concerned the law on reference cases forces the court to hear anything the government sends it, a possible interference with judicial independence.

He also said he was worried that the calling of expert witnesses in the case, which is rarely done at the appeal court level, would turn the court into a trial court or commission of inquiry.

Government lawyer André Richard has already argued that the court should hear the reference, but Thursday's decision suggests his written submission last May "does not respond appropriately" to whether the court's independence is jeopardized.

The ruling on Thursday appoints Fredericton lawyer Richard Scott as a "friend of the court" to argue the "no" side of whether the court should hear the case. It orders the province to pay Scott's legal bills.

Scott is a lawyer with the regional law firm McInnes Cooper and is a former president of the New Brunswick Law Society.

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Date Created

2016-10-14

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