

THE NATURE, USE AND EFFECT OF REFERENCE CASES IN CANADIAN CONSTITUTIONAL LAW

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THE NATURE OF REFERENCE CASES

An analysis of the nature of "reference cases" requires a working definition of that term and a term which is synonymous with it; "advisory opinions." An "advisory opinion" has been defined as follows.¹

A formal opinion by judge or judges or a court of law or a law officer upon a question of law submitted by a legislative body or a governmental official, but not actually presented in a concrete case at law.

It is the concluding words of this definition which point most clearly to the outstanding characteristics of a reference case. A "concrete case at law" is characterized by at least two features: rival litigants, and a specific actual fact situation out of which their dispute arose. It is the peculiar mark of the reference case that it has neither of these features.

The absence of the first feature is one of the key factors distinguishing the reference or advisory opinion from the declaratory judgment, while the absence of the second feature is the basic distinction between the reference and the stated case.

It has been stressed that the advisory opinion differs "fundamentally" from the declaratory judgment and that the function of rendering advisory opinions belongs properly to the law officers or the attorney-general. The power has been exercised by the courts simply because there has been no constitutional bar and the courts have been unable to decline.

The advisory opinion binds no one, not even the judges, is not rendered between parties, is given to the asking official or department and is often rendered without hearing argument. In all these respects it differs from the declaratory judgment. Even if argument is heard by parties with opposing interests . . . it lacks one of the essential elements of a judgment in that it is rendered not on demand of and to an aggrieved or complaining party, but on demand of and to an administrative body.²

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¹*Black's Law Dictionary*, 4th ed. (1951), p. 75. The definition continues: "Merely opinion of judges or court which adjudicates nothing and is binding on no one, in exercise of wholly non or extra-judicial function. The expression ordinarily connotes the practice which existed in England from very early times of extra-judicial consultation of the judges by the Crown and the House of Lords."

²Borchard, E. M., *Declaratory Judgments*, 1st ed., (1934), pp. 51-52, cited by J. F. Davison in "The Constitutionality and Utility of Advisory Opinions", (1937-38), 2 *University of Toronto L.J.* 259, n. 24. See also the second edition of Borchard's work, 1941, at pp. 71-73. *Osborn's Concise Law Dictionary*, 4th ed. (1954), defines a declaratory judgment as follows: "A judgment which conclusively declares the

The distinction between the stated case and the reference must also be borne in mind. "It is absolutely settled law," writes an Australian judge,³ "in both England and Australia that the expression 'state a case' involves stating facts, that is, the ultimate facts, requiring only the certainty of some point of law applied to those facts to determine either the whole case or some particular stage of it." It is just this factual basis which is lacking in the reference case.⁴

The distinctions we have attempted to make are not matters of purely academic interest. In *Re Board of Commerce*⁵ the Supreme Court of Canada rebuffed an attempt to submit to it what was in reality a reference under the guise of a stated case. S. 32 of The Board of Commerce Act of 1919 empowered the Board of Commerce to state a case in writing for the opinion of the Supreme Court upon any question which, in the opinion of the Board, was a question of law or jurisdiction. Acting, or claiming to act, under this section, the Board of Commerce drew up a list of six questions.

Three of the questions were concerned with the constitutional validity of certain provisions of the Combines and Fair Prices Act of 1919, the others with the construction of certain sections of the same statute. When the matter came to be considered by the Court, it found that the questions presented did not constitute a "stated case" within the meaning of the Board of Commerce Act. The Board then inserted a typewritten memorandum into the record stating that the questions had arisen as a result of certain matters actually pending before the Board, but this too was rejected because, in the words of Anglin J., "it did not contain any statement out of which the questions formulated arose." The Court based itself upon an English decision, *Re Cardigan County Council*,⁶ where it was held that in stating a case for the High Court under s. 29 of The Local Government Act of 1888, "the facts which have actually arisen" and the decision thereon, must be set forth, and that the High Court would not answer questions as to the construction of

pre-existing rights of the litigants without the appendage of any coercive decree. See also *Wharton's Law Lexicon*, 14th ed., (1938), p. 307; *Black's Law Dictionary*, 4th ed., p. 497. The Judicature Act, R.S.O. 1950, c. 190, s. 20. For cases under declaratory judgment legislation in Canada see *Attorney-General for Canada v. Attorney-General for Ontario*, (1891-92), 19 O.A.R. 51, *Attorney-General for Ontario v. Attorney-General for Canada*, [1931] 2 D.L.R. 297; *Motor Car Supply Co. v. Attorney-General for Alberta*, [1939] 3 D.L.R. 660.

³*Australian Commonwealth Shipping Board v. Federated Seamen's Union of Australasia*, (1925), 36 C.L.R. 442, *per* Isaacs J., at p. 450, cited in *Words and Phrases Judicially Defined*, (1945), Vol. V, p. 152.

⁴See Borchard, *op. cit.*, 2nd ed. pp. 221-23 for a discussion of the special case — "an agreed statement of facts for the determination of a disputed issue of law" — and its variation in the special case stated — "used by certain special courts and administrative tribunals to test the validity of their orders." At p. 223, n. 65, Borchard cautions against confusing the special case stated with the advisory opinion.

⁵(1920), 60 S.C.R. 456.

⁶(1890), 54 J.P. 792.

the statute "unless arising out of acts which have actually occurred." The justices of the Supreme Court looked upon the questions submitted by the Board, again in the words of Anglin J., as an unintentional assumption, under the guise of a stated case, of the power conferred on the Governor-General in Council by the Supreme Court Act for hearing and considering the constitutionality of any federal or provincial legislation.⁷

For purposes of this paper, reference cases may be defined as matters referred to the courts under the provisions of the Supreme Court Act, R.S.C., 1952, c. 259, ss. 55,56,37 and corresponding provincial legislation.⁸

Thus, the term "reference case", as we intend to use it, is at once wider and narrower than the definition we cited at the beginning of this paper. It is wider in the sense that matters of law *and* fact can be submitted under the federal or provincial reference legislation, narrower in that references to the law officers of the Crown are not included in it.

THE USE OF REFERENCE CASES

i. *Constitutional references — general.*

Generally speaking, the strongest moving force for use of the reference power is a desire by both the federal and provincial executives for a speedy judicial determination of legal problems arising out of the interpretation of the provisions of the British North America Act and especially the provisions allotting legislative jurisdiction. The question as to which legislative authority has the power to implement treaty obligations, one involving ss. 91, 92, and 132, is an excellent example. The answer to this question has been, almost in its entirety, furnished by the Supreme Court and the Judicial Committee in answer to references submitted to them.⁹

In terms of the actual content of the British North America Act references, there is no very significant difference between the use of the federal reference power and the use of the provincial reference power. But in terms of motivation, beyond the common federal and provincial interest in obtaining information as to the working of that Act, there are special factors peculiar to the use of the federal reference power which will now be considered.

⁷The difficulty was finally overcome when the Board made a third submission to the Court containing the required statement of facts. For the account of the Board's difficulties in obtaining a hearing, see the remarks of Anglin J., (1920), 60 S.C.R. 456 at pp. 457-59 and those of Idington J. at pp. 475-80.

⁸R.S.N.S., 1954, c. 50; R.S.P.E.I., 1951, c. 79; R.S.N.B., c. 120, s. 24A; Statutes of Newfoundland, 1953, No. 3; R.S.Q., 1941, c. 8; R.S. Man., 1954, c. 44; R.S. Sask., 1953, c. 18; R.S. Alta., 1955, c. 55; R.S.B.C., 1948, c. 66.

⁹*Reference re Employment of Aliens*, (1922), 63 S.C.R. 293; *Reference re Waters and Water Powers*, [1929] S.C.R. 200; *Reference re Hours of Labour*, [1925] S.C.R. 505; *Reference re Regulation and Control of Aeronautics*, [1930] S.C.R. 663; *Reference re Regulation of Radio Communication*, [1931] S.C.R. 541. *The Labour Conventions Reference*, [1936] S.C.R. 461.

ii. Constitutional references — disallowance.

Reference has long been considered as a useful aid to the federal executive in the exercise of its disallowance power. This was one of the principle reasons behind the introduction in the House of Commons, of the Hon. Edward Blake's resolution of 1890 on references which in turn led to the amendment in 1891 of the reference provisions of the Supreme Court Act. In supporting his resolution in the Commons, Blake outlined his view of the relationship between the reference power he desired and disallowance.¹⁰

Now, Sir, in the exercise of this power of disallowance by the Government, political questions may . . . arise. Questions of policy may present themselves, that is, questions of expediency, of convenience, of the public interest, of the spirit of the constitution or of the form of legislation. All these are clearly, exclusively for the executive and legislative, that is, for the political departments of the Government. But it is equally clear that when, in order to determine your course you must find whether a particular act is *ultra* or *intra vires*, you are discharging a legal and judicial function . . . Now, I aver that in the decision of all legal questions, it is important that the political executive should not, more than can be avoided, arrogate to itself judicial powers; and that when in the discharge of its political duties, it is called upon to deal with legal questions, it ought to have the power, in cases of solemnity and importance where it may be thought expedient so to do, to call in aid the judicial department in order to arrive at a correct solution.

The decision that an act was *ultra vires*, he continued, and its consequent disallowance by the federal executive were incidents peculiar to Canada. It was a most delicate function and its exercise involved grave ulterior consequences. The question whether the act disallowed was or was not valid was removed from judicial cognizance forever. Thus, by repeated exercises of the power of disallowance, in respect to repeated provincial legislation, a province might practically be deprived of that which might be a right justly claimed. One of two limited governments might practically decide the extent of the limits of what was, in a sense, its rival government. A decision under such circumstances would necessarily be suspect. It would, in a sense, be the decision of a party in its own cause. The concurrence of a neutral and respected court was necessary to strengthen the decision of the executive.

My own opinion is that whenever, in opposition to the continued view of a Provincial Executive and Legislature, it is contemplated by the Dominion Executive to disallow a provincial Act because it is *ultra vires*, there ought to be a reference; and also that there ought to be a reference in certain cases where the condition of public opinion renders expedient a solution of legal problems, dissociated from those elements of passion and expediency which are rightly or wrongly too often attributed to the action of political bodies.¹¹

The relationship between references and disallowance was also discussed by the Federal Minister of Justice, Sir John Thompson, during the debate on the amendment of 1891. The disallowance power, explained Sir John, was exercised in two classes of cases: first, where an act of a provincial legislature

¹⁰For the speeches on the resolution by Blake and Sir John Macdonald see Debates, House of Commons, Canada, 1890, Vol. II, 4084-94.

¹¹*Ibid.*

was in conflict with Dominion policy, Dominion rights, or Dominion property; and secondly, where it was felt by the Dominion executive that the legislature, in passing the act in question, had exceeded its powers. It was with regard to the second class of cases that Sir John felt the reference power, as provided for in the amendment, would be of assistance. As matters presently stood, he said, when it was felt that the operation of an unconstitutional act would create public inconvenience, its disallowance was recommended, but the basis for this was merely the opinion of the Minister of Justice. Henceforth, he declared, he took it for granted that in nearly every case of that kind, reference would be had with a view to understanding what were the constitutional rights of the legislature. If the Court held the act to be *intra vires*, since the opinions would be only advisory, the bare power of disallowance for constitutional reasons would remain. However, he acknowledged¹²

. . . it would be more absurd and practically impossible for the Minister of Justice to advise that it should be disallowed, after the highest tribunal had decided that the Act was within the powers of the Provincial Legislature.

It will be at once perceived that Blake and Thompson had advanced definite criteria which were to guide the federal executive in using the reference in disallowance cases. "Constitutional" cases involving questions of *ultra vires* were to be referred to the Court, while cases involving "policy" were, as Blake said, "clearly, exclusively for the executive and legislative, that is for the political departments of the Government." However, there is often no clear cut line between "constitutional" cases and "policy" cases. "Constitutional" cases often involve strong elements of "policy" and vice versa. There is thus a danger that the federal executive, where a case involves *both* the constitutional issue and highly controversial questions of policy will shirk its disallowance responsibility and pass political "hot potatoes" to the Supreme Court under the guise of following the rule that cases involving the constitutionality of a statute should not be decided by the executive but by the courts. It has been suggested that this was indeed the policy of the Federal Cabinet during the great storm that arose in the thirties over Alberta legislation. When the first group of Alberta statutes was enacted, the first move of Prime Minister King was to suggest a reference. It was only when this tactic, and others, had failed that the Federal Cabinet, "smoked out", as it were, resorted to disallowance.¹³

¹²Debates, House of Commons, Canada, 1891, Vol. II, 3586-87.

¹³Mallory, J. R., Disallowance and the National Interest, 1948, Canadian Journal of Economics and Political Science, p. 357. Eugene Forsey writes: "Authentic copies (of the Alberta Acts) reached the Governor General August 10th (1937). On the same day the Minister of Justice wrote a long and elaborate report recommending disallowance. On August 11th the Prime Minister telegraphed Mr. Aberhart, Premier of Alberta, that the Minister of Justice 'is considering' disallowance and offered to refer the Acts to the Supreme Court if Mr. Aberhart would suspend their operation.

Sir John Macdonald was aware that a danger existed but felt that the terms of Blake's resolution, the substantial basis for s. 55 of the Supreme Court Act as it is enacted today, would enable it to be avoided. He told the Commons, in accepting Blake's resolution, that it had at first seemed to him to be a step toward the American system which transferred the responsibility of the Ministry of the day to a judicial tribunal, but he saw now that Blake had been careful not to propose in his resolution that the opinions would bind the executive. It was, he noted, explicitly declared that the decision was only for the information of the government. The executive was not released from all responsibility by the Court's reply. It was possible that the government would not approve of this decision, and it would be its *duty* not to approve if it did not accept the conclusion of the Court.¹⁴

While it is to be hoped that federal cabinets will show the fortitude expected of them by Sir John Macdonald, the danger of abuse of the reference power remains.

iii. *Constitutional references — education.*

Similar problems arise with regard to the appellate jurisdiction of the federal executive in educational matters under s. 93 of the British North America Act, for, in view of the impending storm in Manitoba, it was also Blake's aim in submitting his resolution of 1890 to have the reference power employed in such matters. The arguments he employed were similar to those he used in discussing disallowance. What was the procedure to be followed, he asked, when an educational appeal came before the federal executive? First, it was necessary to determine whether any class of persons had, in virtue of the law or practice at the Union, any right or privilege pertaining to denominational schools, and if so, what was the right. Secondly, it was necessary to determine if a right or privilege had been affected and how by the provincial legislation complained of, and, finally, to determine what legislative action was necessary to repair any harm done. The first two questions, Blake stressed, were legal and not political.¹⁵

The objection to the executive alone deciding the questions that arose in the case of disallowance was also applicable here. The following passage certainly applied to both:

Mr. Aberhart refused. Six days later, August 17th, the Acts were formally disallowed." "Canada and Alberta: The Revival of Dominion Control over the Provinces," p. 104. Reprinted from *Politica*, June, 1939, Vol. IV, No. 16.

¹⁴Debates, House of Commons, Canada, 1890, Vol. II, 4093-94.

¹⁵While Blake considered these questions "legal" as opposed to "political" he saw that these legal questions were actually mixed questions of law and fact. It was for this reason that the words "or fact" were inserted into the resolution. Blake discussed the educational aspect in the speech in which he considered the disallowance question. Debates, House of Commons, Canada, 1890, Vol. II, 4084-93.

Ours is a popular government; and when burning questions arise, inflaming the public mind, when agitation is rife as to the political action of the Executive or the Legislature — when action is to be based on legal questions, obviously beyond the grasp of the people at large; when the people are on such questions divided by cries of creed and race; then I maintain that a great public good is attainable by the submission of such legal questions to legal tribunals with all the customary securities for a sound judgment; and whose decisions — passionless and dignified, accepted by each of us as binding in our own affairs involving fortune, freedom, honour, life itself — are more likely to be accepted by us all in questions of public concern.

The reference power *was* employed by the Federal Cabinet in the *Manitoba Education Reference*, in 1894,¹⁶ but Blake's hopes that this would significantly reduce controversy were not realized.¹⁷

iv. Other references.

Other special motives for the use of the federal reference power are to be found in the desire of the federal executive for information regarding treaties and other questions touching Canada's relations with foreign powers too important to wait until they come up in a concrete case,¹⁸ and also in the great need for swift judicial clarification of issues at the highest level in the midst of a war emergency.¹⁹

References have also been used by both the federal and provincial executives simply for assistance in the administration of the federal or provincial laws. This practice is found more often in provincial references,²⁰ but there is no apparent reason why this should be so. Perhaps it is because provincial boards and agencies are not often empowered to "state a case" for the courts in the manner of the Federal Board of Transport Commissioners. Federal references are also used to aid in settling disputes arising from Dominion-Provincial agreements and arrangements.²¹

¹⁶(1894), 22 S.C.R. 577.

¹⁷For cases in which the disallowance power was involved see: *Reference re Employment of Aliens*, (1922), 63 S.C.R. 293; *Reference re The Manitoba Act*, [1924] S.C.R. 317; *Reference re Disallowance*, [1938] S.C.R. 71; *Reference re Alberta Securities*, [1938] S.C.R. 100; *Reference re Alberta Railway Act*, (1913), 48 S.C.R. 9.

¹⁸*Supra*, footnote 9. Also, *Reference re U.S. Forces*, [1943] S.C.R. 483.

¹⁹*Reference re Validity of the Chemical Regulations*, [1943] S.C.R. 1.

²⁰Provincial references: *Reference re Ontario Medical Act*, (1907), 13 O.L.R. 501; *Reference re Bread Sales Act*, (1911), 23 O.L.R. 238; *Reference re Liquor Licence Act*, (1913-14), 29 O.L.R. 475; *Reference re Sessional Allowances*, [1945] 2 D.L.R. 631 (Ont.); *Reference re Power of Municipal Council*, (1957), 7 D.L.R. (2nd) 222 (Ont.); *Re Trades Union Act*, [1945] 2 D.L.R. 163 (N.S.); *Re Labour Act*, [1948] 2 D.L.R. 428 (Alta.); *Reference re Jury Act*, [1946] 3 D.L.R. 457 (Alta.); *Reference re Relief Liability Act*, [1938] 4 D.L.R. 646 (Alta.); *Reference re Charter of City of Vancouver*, [1946] 1 D.L.R. 638; Federal references: *Reference re Validity and Applicability of Industrial Relations and Disputes Investigation Act (Can)*, [1955] S.C.R. 529; *Reference re Adoption Act (Ont.) et al.*; [1938] S.C.R. 398; *Reference re Jurisdiction of Tariff Board of Canada*, [1934] S.C.R. 538.

²¹*Reference re Saskatchewan Natural Resources*, [1931] S.C.R. 263; *Reference re Troops in Cape Breton*, [1930] S.C.R. 554.

THE EFFECT OF REFERENCES

i. *Binding?*

Do opinions given on a reference bind the judges rendering them, the executive asking them, or anyone else? The proper legal answer must be that they do not. But what happens in practice is, as we shall see, quite a different matter.

The original federal reference provision, s. 52 of the Supreme Court Act, 1875, did not expressly state that the opinions rendered were to be advisory only, but the Federal Minister of Justice, in introducing the Act to the Commons in 1875 stated that the decision rendered by the Court would not have the character of a judgment but would merely have its moral weight in assisting the government to arrive at a determination.²² This was entirely in accord with English precedent.

Over a decade later, in 1889, another Minister of Justice, Sir John Thompson, wrote:

Indeed, there seems much reason to doubt . . . that the decision of the Supreme Court on a reference would be binding on any parties or on any interests involved. It would simply advise (the Governor in Council) as to the opinions entertained by the members of the Court. The precedents in Canada are like those in Great Britain.²³

The 1891 amendment to the Supreme Court Act expressly declared that the opinions were to be "advisory only" and this view was reiterated by Sir John Thompson in the Commons.²⁴

The matter was first taken up judicially in the *Manitoba Education Reference*²⁵ when Taschereau J. declared emphatically that

. . . our answers to the questions submitted will bind no one, not even those who put them, nay, not even those who give them, no court of justice, not even this court. We give no judgment, we determine nothing, we end no controversy, and whatever our answers may be, should it be deemed expedient at any time by [an interested party] to impugn the constitutionality of any measure that might hereinafter be taken by the federal authorities . . . whether such measure is in accordance with or in opposition to, the answers to this consultation, the recourse in the usual way, to the courts of the country remains open to them.²⁵

²²Debates, House of Commons, Canada, 1875, Vol. I, 286.

²³(1889), 12 L.N. 284. Of course this was the strict legal view. Sir John was aware of other possibilities.

²⁴Debates, House of Commons, Canada, (1891), 3587. The words "advisory only" remained in the reference provisions of the Supreme Court Act until 1956 when the subsection containing them was repealed by 4-5 Eliz. II c. 48, s. 7. The repeal has no effect upon the character of the opinions rendered. The words "advisory only" were inserted in the first place, as a precaution only, to underline that although the opinions were to be regarded as a *final* judgment for *purposes of appeal* to the Privy Council, they were *only advisory for purposes of not binding* the executive or the Supreme Court in future cases. As far as the words "advisory only" were concerned, s. 55 ss. 6 was simply declaratory. The original s. 52 did not contain the words "advisory only" yet the opinions rendered under it were, as we have seen, so regarded.

²⁵(1894), 22 S.C.R. 577 at p. 678.

Provincial references were regarded in the same manner. The words "although advisory only" were not to be found in the Ontario reference statute, observed Moss C.J.O. in *Re Ontario Medical Act*,²⁶ but their insertion was scarcely necessary as all the other provisions of the statute went to show that the opinion given was only for the information of the Lieutenant Governor in Council.²⁷

These views continued to be emphasized up to 1912. In *Re Criminal Code*,²⁸ nearly every judge stressed the non-binding, advisory nature of the opinions. As Girouard J. put it:

. . . our advice has no legal effect, does not affect the rights of parties nor the provincial decisions, and is not even binding upon us.²⁹

Shortly afterwards, in *Re References by the Governor in Council*,³⁰ Fitzpatrick C.J. expressed his adherence to the "advisory only" view and the other justices reiterated their views. Anglin J. was especially emphatic. The words "advisory only" in the Supreme Court Act, he declared, denuded a reference opinion of all the marks of a judgment of the Court leaving the Court itself and every other court throughout Canada — inferior as well as superior — free to disregard it.

This period also saw the approval of the "advisory only" doctrine by the Judicial Committee of the Privy Council in *Attorney-General for Ontario v. Attorney-General for Canada*³¹ and one of the very rare applications of this doctrine in practice in *Kerley v. London and Lake Erie Transportation Co.*³² In the former, Lord Loreburn agreed that the answers given by the Supreme Court were "only advisory" and would have "no more effect than the opinions of law officers."³³ In the latter, an Ontario "concrete case", the judge referred to one of the answers given by the Supreme Court in the 1905 *Sunday Labour Reference* which seemed to be relevant to the point before him. "With all proper deference to the Judges of the Supreme Court," he said, "I cannot regard the opinion expressed on this head as a judgment binding on me, nor can I accept it as the law."³⁴

²⁶(1907), 13 O.L.R. 501 at p. 507. The words were subsequently inserted.

²⁷A few years earlier, Osler J. A. reserved the right to arrive at a different opinion upon all or any of the questions he had answered. *Reference re Lords Day Act of Ontario*, (1902), 1 O.W.R. 312 at p. 315.

²⁸(1910), 43 S.C.R. 434.

²⁹*Ibid.*, at p. 436. See also Davies J. at p. 437; Duff J. at pp. 451, 453; Anglin J. at p. 454. Indington J. did not mention the matter but certainly shared their view.

³⁰(1910), 43 S.C.R. 536 at p. 592. See also *Reference re Provincial Fisheries*, (1896-97), 26 S.C.R. 444 at p. 539.

³¹[1912] A.C. 571.

³²(1912), 6 D.L.R. 189, (Ont.).

³³[1912] A.C. 571 at p. 589.

³⁴(1912), 6 D.L.R. 189 at p. 197. The *Sunday Labour Reference* is at (1905), 35 S.C.R. 581. See also *Reference re Bread Sales Act*, (1911), 23 O.L.R. 238 at p. 241.

After 1912 virtually nothing more is heard of the "advisory only" approach³⁵ and *in practice* the opinions rendered were regarded as binding. Even before 1912 there were phrases uttered judicially and action taken judicially which indicated that judicial practice was going to be quite different than that suggested by the words "advisory only."

In *The King v. Brinkley*,³⁶ Maclaren J.A. was confronted with the argument that the opinions of the judges of the Supreme Court in an earlier federal reference³⁷ touching substantially the same question as was now before him was not binding upon him. Maclaren J.A. proceeded to cite the remarks of Taschereau J. in the *Manitoba Education*^{37a} and *Provincial Fisheries*^{37b} references to which we have earlier referred. He noted that the opinions and answers in the *Fisheries Reference* were subsequently cited as authorities in an opinion, concurred in by a majority of the judges in a subsequent reference.³⁸ Moreover, he continued, in *Attorney-General for Manitoba v. Manitoba License Holders' Association*,³⁹ Lord MacNaghten, delivering the judgment of the Board, referred several times to the opinion of the Board in the *Local Prohibition Reference*⁴⁰ as a "decision" and as "the judgment of this Board", and as having settled and removed objections that were raised to the legislation in the case in question. In the *Representation in the House of Commons Reference*,⁴¹ the opinions of the Supreme Court were also referred to as "decisions" in the Privy Council's opinion.

The question of the binding effect of references was never raised by counsel during their arguments on constitutional questions during the nineteen-twenties and it was natural for the courts to sink deeper into the habit, pointed out in *The King v. Brinkley*, of regarding opinions earlier rendered as binding. An illustration of this habit is found in the *Aeronautics Reference*⁴² when it came before the Privy Council. Delivering the judgment of the Board, Lord Sankey recognized that there had grown up around the British North America Act "a body of precedents of high authority and value as guides to its interpretation and application." He pointed to four cases where the "essential task of taking stock of this body of authority and reviewing it in relation to its original text" had been performed. Three of the four cases to which Lord

³⁵See, however, *Reference re Bills of Sale Act et al.*, [1927] 2 D.L.R. 50 at p. 56.

³⁶(1907), 14 O.L.R. 434.

³⁷*Reference re Criminal Code Sections Relating to Bigamy*, (1897), 27 S.C.R. 461.

^{37a}*Supra*, footnote 16.

^{37b}*Supra*, footnote 30.

³⁸*Reference re International and Interprovincial Ferries*, (1905), 36 S.C.R. 206 at pp. 217-18.

³⁹[1902] A.C. 73.

⁴⁰[1896] A.C. 348.

⁴¹[1905] A.C. 37, at p. 43.

⁴²[1932] A.C. 54.

Sankey attached such importance were references.⁴³ Finally, his Lordship pointed to still another reference, *Attorney-General for Canada v. Attorney-General for British Columbia*⁴⁴ as having "laid down" four propositions relative to the legislative competence of Canada and the provinces respectively as "established" by the "decisions" of the Judicial Committee. Two of the four cases cited by the Board in establishing the propositions are references.⁴⁵

Further illustrations are to be found in the *Natural Products Marketing Act Reference*,⁴⁶ where Duff C.J. cited a group of cases including a reference as "binding" upon the Supreme Court, and the *Labour Conventions Reference*,⁴⁷ where Rinfret J. referred to the *Hours of Labour Reference*^{47a} of 1925 and declared that "the opinion then given may be regarded as binding upon this Court."

How far the habit of regarding opinions rendered on references as true judgments had gone by 1942 is strikingly illustrated by the *Legal Proceedings Suspension Act Reference*,⁴⁸ an Alberta reference. The circumstances surrounding the reference are worth going into in some detail. The Alberta Debt Adjustment Act of 1937 enacted, generally speaking, that no action should be commenced or continued in the Province of Alberta in respect of any debt or liquidated demand unless a permit to do so had first been procured from the Debt Adjustment Board. The Supreme Court of Canada, on a reference by the Governor in Council, declared the Debt Adjustment Act *ultra vires*, whereupon the Alberta Legislature enacted the Legal Proceedings Suspension Act of 1942, providing that all actions then or thereafter commenced which involved the applicability of the Debt Adjustment Act (excepting those in which no permit was required under the Debt Adjustment Act, or in which a permit was granted) should be stayed until sixty days after the determination of an application for leave to appeal to the Privy Council from the opinion of the Supreme Court of Canada, or, if leave was granted, from the determination of the appeal.⁴⁹ The Legal Proceedings Suspension Act was then referred by

⁴³*Attorney-General for Ontario v. Attorney-General for Canada*, [1896] A.C. 348; *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia*, [1898] A.C. 700; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571.

⁴⁴[1930] A.C. 111 at p. 118.

⁴⁵*Attorney-General for Ontario v. Attorney-General for Canada*, [1894] A.C. 189; *Attorney-General for Ontario v. Attorney General for Canada*, [1896] A.C. 348.

⁴⁶The reference was *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588. See [1936] S.C.R. 398 at pp. 404-05.

⁴⁷[1936] S.C.R. 461 at p. 507.

^{47a}*Supra*, footnote 9.

⁴⁸[1942] 3 D.L.R. 318.

⁴⁹This statement of the background is taken virtually verbatim from the report on the *Legal Proceedings Suspension Act Reference* [1942] 3 D.L.R. 318. For the report of the Supreme Court decision declaring the Debt Adjustment Act *ultra vires* see [1942] S.C.R. 31.

the Lieutenant Governor in Council of Alberta to the Alberta Supreme Court where it was held to be *ultra vires*.

Harvey C.J.A. observed that the stay granted by the Act and the barring of actions for debts, was not for a definite but for an indefinite period which, if there were no attempt to appeal to the Privy Council, would never end. He continued:

For the period of the stay this is a complete setting at nought of the *judgment* of the Supreme Court of Canada and it is not without significance that the period of the stay is not limited to the time involved in obtaining the decision of the Judicial Committee, but is for a further period of sixty day . . .⁵⁰

The whole affair shows how seriously a reference "opinion" was regarded. The Alberta Legislature seemed to take it for granted that the opinion of the Supreme Court of Canada was much more than "advisory only" and that unless it was overruled by the Privy Council, the Debt Adjustment Act and the debtors' protection under it were at an end. Thus, new legislation was necessary to assist debtors. The Alberta Supreme Court took the "opinion" with equal seriousness. Like the Legislature, it assumed that the pre-Debt Adjustment Act situation between creditors and debtors had been re-established by the Canadian Supreme Court opinion and felt it necessary to strike down the Legal Proceedings Suspension Act to protect the post-opinion position of the creditors.

It was no longer possible to speak of "unconscious habit" after the bold pronouncement of Rinfret J. in 1945 in *Attorney-General of Canada v. Higbie et al. and the Attorney-General for British Columbia*.^{50a} One of the points at issue was the interpretation to be given to the opinion of Newcombe J. in the earlier *Saskatchewan Natural Resources Reference*.⁵¹

Rinfret J. had no doubts:

It is needless to mention here that, although this was not a judgment in the true sense of the word, but merely what is sometimes referred to as an opinion made in Reference to this Court by the Governor General in Council as provided for by section 55 of the Supreme Court Act and the special jurisdiction therein given to this Court, we should regard an opinion of that kind as binding upon this Court . . .⁵²

All the more startling, then, after these words, was the course taken by the Supreme Court in 1957 in *C.P.R. v. Town of Estevan et al.*^{52a} Here the Court was faced, among other problems, with the question of what effect to give to opinions rendered by it and the Judicial Committee upon an earlier reference under the Saskatchewan Constitutional Questions Act⁵³ which had

⁵⁰[1942] 3 D.L.R. 318 at p. 320. Author's italics.

^{50a}[1945] S.C.R. 385.

⁵¹[1931] S.C.R. 263.

⁵²[1945] S.C.R. 385 at p. 403.

^{52a}[1957] S.C.R. 365.

⁵³R.S.S. 1953, c. 78.

come before them on appeal.⁵⁴ Locke J., speaking for the other judges on this point, held that the Supreme Court and Judicial Committee were not binding as between the parties to this present case, insofar as a particular point was concerned. The matter, he declared,

. . . was not rendered *res judicata* as between the parties to this litigation by the decision of this Court upon the [earlier] reference, or by the judgment of the Judicial Committee. . . . upon . . . questions involved in that reference. In so far as the defendant municipalities are concerned, they were not parties to and were not heard upon the reference and, in so far as the present appellant is concerned, even though it was represented [at all stages] . . . I think it is not bound either by the opinions expressed by the Judicial Committee or by this Court. In this respect, matters referred to the Court of Appeal for Saskatchewan under The Constitutional Questions Act of that Province . . . do not differ from references to this Court under what is now s. 55 of the Supreme Court Act, R.S.C. 1952, c. 259.⁵⁵

What is one to make of all this? Theoretically, in law, reference opinions are "advisory only" — no doubt about that. But in practice they are treated with the respect due to judgments. One is reminded of the words of Lord Simon in *Attorney-General for Ontario v. Canada Temperance Federation*⁵⁶ where, speaking in a somewhat different connection, he said:

Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board. . . . But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on by governments and subjects.⁵⁶

This seems to sum up the position of the courts on the binding effect of reference. The forceful pronouncements of earlier days that references were only advisory and the holding in *C.P.R. v. Town of Estevan et al.* must be taken together with the facts that the pronouncements were all made in cases where there was no need or opportunity to put them into actual effect and that there is not one recorded instance since 1891, with the exception of the *Kerley case*,^{56a} where opinions rendered on either federal or provincial references were repudiated in a subsequent reference or concrete case. It is interesting that even in *C.P.R. v. Town of Estevan et al.* Locke J., having uttered the words quoted above, went on, nevertheless, to declare his agreement with the opinions rendered on the earlier reference, and so the necessity for actual repudiation did not arise.

ii. Useful?

The usefulness of reference cases has long been in issue in the courts. We have seen in the remarks of Maule J. in *M'Naghten's case*^{56b} the difficulties

⁵⁴Reference re Taxation of C.P.R. [1949] 2 D.L.R. 240; *C.P.R. v. Attorney-General for Saskatchewan*, [1951] S.C.R. 190; *Attorney-General for Saskatchewan v. C.P.R.*, [1953] A.C. 594.

⁵⁵[1957] S.C.R. 365 at pp. 368-69; Duff J's remarks in *Reference re Criminal Code*, (1910), 43 S.C.R. 434 at p. 451 and in *Re References by the Governor General in Council*, (1910), 43 S.C.R. 536 at p. 588 were cited for support.

⁵⁶[1946] A.C. 193 at p. 206.

^{56a}*Supra*, footnote 32.

^{56b}10 Cl. & F. 200.

experienced by English judges in preparing a satisfactory reply. The remarks of Lord Chief Justice Tindal in the same case, put the point with even greater effect. The judges, he declared, had

. . . foreborne entering into any particular discussion upon these questions from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon; they deem it at once impractical and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions.⁵⁷

Similar sentiments have frequently been voiced in Canadian courts and in the Privy Council with regard to Canadian references.^{57a} In the *Local Prohibition Reference*, Lord Watson criticized the six general questions as "academic" rather than "judicial" and as "better fitted for the consideration of the officers of the Crown than of a court of law." The replies to them must necessarily, he said, depend upon the circumstances in which they might arise for decision and the circumstances were, in this case, left to speculation.⁵⁸ A much harsher criticism of questions submitted was voiced by the Board in *Attorney-General for Ontario v. Hamilton Street Railway*,⁵⁹ again directed against the general questions in a mixed submission. They were questions, the Board declared, proper to be considered in concrete cases only and opinions expressed upon them would be worthless "as being speculative opinions on hypothetical questions." Similar remarks had earlier been made in the Ontario Court of Appeal when the same questions were being considered there,⁶⁰ while in 1905 the Supreme Court of Canada declined to answer a question dealing with *specific* pieces of legislation on the grounds that useful or satisfactory answers could only be given to them when they arose in concrete cases.⁶¹

⁵⁷*Ibid.*, at p. 208.

^{57a}*Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A.C. 153 at p. 162; *Reference re Alberta Railway Act*, (1914), 48 S.C.R. 9 at p. 25; *Attorney-General for Ontario v. Attorney-General for Canada*, [1916] 1 A.C. 598; *Hirsch v. Protestant Board of School Commissioners*, [1928] A.C. 200 at p. 215; *Re Waters and Water Powers*, [1929] S.C.R. 200 at pp. 226, 227; *Re Bills of Sale Act et al*, [1927] 2 D.L.R. 50 at p. 52; *Reference re Alberta Debt Adjustment Act*, [1942] S.C.R. 31 at p. 52; *Aeronautics Reference*, [1932] A.C. 54 at p. 66; *Companies Reference*, (1914), 48 S.C.R. 331 at p. 359.

⁵⁸[1896] A.C. 348 at p. 370.

⁵⁹[1903] A.C. 524 at p. 529.

⁶⁰[1902] O.W.R. 312 at pp. 314, 315, 316.

⁶¹*Reference re Legislation Respecting Abstention from Labour on Sunday*, (1905), 35 S.C.R. 581 at p. 591. See also *Reference re Ontario Medical Act*, (1907), 13 O.L.R. 501 at pp. 507-9 and *Reference re Bread Sales Act*, (1911), 23 O.L.R. 238 at p. 240.

In *John Deere Plow Co. Ltd. v. Wharton*^{61a} Lord Haldane referred to the attempts made by the Supreme Court in the *Companies Reference*, to carry out the task imposed upon them by the submission. In Lord Haldane's view, the task had been an impossible one, owing, he said, to the abstract character of the questions put. Earlier in the judgment he delivered a caution on the use of reference cases in constitutional matters:

The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise . . . to attempt exhaustive definitions of the meaning and scope of these expressions . . . It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided . . . it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand . . . It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases, the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality.⁶²

These words, taken together with the fact that the reference power has been very frequently employed by federal and provincial executives to determine the division of legislative jurisdiction, raise the further question as to what effect this use of references has had on the interpretation of those sections. In particular, have references contributed noticeably to the marked judicial diminution of the scope of federal legislative jurisdiction from that envisaged by the Fathers of Confederation and the text of the British North America Act?

Some writers maintain that they have. Jennings⁶³ hints at such a connection. Others are more explicit. Clokie⁶⁴ states, "Judicial nullification of Dominion legislation began in the field of advisory opinions" and sees significance in the fact that they were favoured by Blake, "a 'provincial rights' man." Macdonald⁶⁵ considers it "not without point" to observe that the Privy Council's contribution to the elucidation of the Canadian Constitution has been made in reference cases where the realities of Canadian life and problems were not presented in the way that they might have been in concrete cases. Other

^{61a}[1915] A.C. 330.

⁶²*Ibid.*, at pp. 338-39.

⁶³Jennings, W. Ivor, *Constitutional Interpretation: The Experience of Canada*, (1937), 51 *Harvard L. R.* 1, at p. 12.

⁶⁴Clokie, H. McD., *Judicial Review, Federalism and the Canadian Constitution*, (1942), 8 *Canadian Journal of Economics and Political Science* 537, at p. 543. Parenthetically, it seems grossly unfair to speak of "judicial pretensions" in the matter of advisory opinions, as Clokie does, considering the long history of judicial resistance to the use of the reference power on grounds that references were of limited value, unethical and unconstitutional.

⁶⁵Macdonald, Vincent C., *The Privy Council and the Canadian Constitution*, (1951), 29 *Can. Bar Rev.* 1021, at p. 1028.

writers⁶⁶ have, in effect, come to the same conclusion. Echoing many of the judicial objections to references, they stress the absence of a factual, "real-life" background in the questions submitted and the consequent unreality of many of the opinions rendered.

Davison,⁶⁷ examining the Bennett New Deal references finds the factual background "necessarily meagre." In economic terms he notes the *Employment and Social Insurance Act Reference* where counsel for Canada presented statistics relating to unemployment and unemployment expenditures for the period 1930-35 which were analyzed in the arguments of provincial counsel before the Judicial Committee, but not, be it noted, in the opinion itself.⁶⁸ He is especially critical of the key *Natural Products Marketing Act Reference* where neither the arguments nor opinion scrutinize factual material.⁶⁹ The upholding of virtually the entire *Dominion Trade and Industry Commission Act*⁷⁰ he regards as miraculous.

LaBrie⁷¹ stresses that many important considerations relevant to a determination of pith and substance can only be determined from the form of the legislation considered along with the circumstances which surround its enactment and operation and that even where fully drafted legislation is referred to a court, it would be difficult to prove the implications that might arise from its enactment. Labrie is also critical of confining the courts to facts set out in the order of reference. But the examples he cites, while interesting, are inconclusive in terms of our present discussion, namely, the federal-provincial conflict over legislative jurisdiction.⁷²

The critics are surely right in suggesting that there is some relationship between the use of references and the trend of judicial interpretation, but the extent of that relationship is not easy to determine. The very lack of concrete cases with which the references might be compared makes the task of measuring their influence itself rather abstract and hypothetical. Those concrete cases

⁶⁶Freund, Paul A., *A Supreme Court in a Federation: Some Lessons from Legal History*, (1953), 53 *Columbia L. R.* 597, at p. 613.

⁶⁷Davison, J. F., *The Constitutionality and Utility of Advisory Opinions*, (1937-38), 2 *University of Toronto L. J.* 254, at pp. 275-76.

⁶⁸[1937] A.C. 355 at p. 359 for the statistics. See [1936] S.C.R. 427 at p. 451 where the "emergency" question is touched on. The arguments of counsel before the Supreme Court were not reported.

⁶⁹[1936] S.C.R. 398; [1937] A.C. 377.

⁷⁰[1936] S.C.R. 379; [1937] A.C. 405.

⁷¹LaBrie, F. E., *Constitutional Interpretation and Legislative Review*, (1950), 8 *University of Toronto L. J.* 298, at p. 347.

⁷²*The Alberta Statutes Reference* [1939] A.C. 117; went against the province. *The Margarine Reference* [1951] A.C. 179; went against the Dominion. *The Canada Temperance Act Reference*, [1939] O.R. 570, and the *Leasehold Regulations Reference*, [1950] S.C.R. 124 saw the confinement to the terms of reference work in favour of the Dominion with regard to the continuance of an emergency. But it is easy to conceive of situations where the reverse could be true.

that did arise seem inconclusive. There is a *Russell's case*⁷⁴ but there is a *Snider's case*.⁷⁵ The companies cases⁷⁶ may be significant, but afford no firm basis for conclusions. A statement which purported to reduce "The Regulation of Trade and Commerce" to the same degree of weakness as the federal residuary power⁷⁷ was made in a concrete case.⁷⁸ The "emergency" doctrine was expounded in still another concrete case.⁷⁹ Conversely, a number of important references have gone in favour of the Dominion.⁸⁰

The *Aeronautics Reference* and the *Canada Temperance Act Reference* suggest that what may be equally important is the approach of the judges. If they are prepared, as Lord Sankey urged, to treat the British North America Act as a "living tree, capable of growth",⁸¹ to eschew narrow canons of interpretation⁸² and slavish adherence to *stare decisis*,⁸³ the form in which the case comes before them will not be an insuperable obstacle to a decision based upon the text of the Act and the realities of Canadian life.

⁷⁴(1882), 7 A.C. 829.

⁷⁵[1925] A.C. 396.

⁷⁶*John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91. Lord Haldane was driven in these cases to "peace, order and good government" for the incorporation of companies with Dominion objects.

⁷⁷*Attorney-General for Ontario v. Attorney-General for Canada*, [1896] A.C. 348.

⁷⁸*City of Montreal v. Montreal Street Railway*, [1912] A.C. 333 at p. 344.

⁷⁹*Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.*, [1923] A.C. 695.

⁸⁰*The Aeronautics Reference*, [1932] A.C. 54; the *Radio Reference*, [1932] A.C. 304; the *Alberta Statutes Reference*, [1939] A.C. 117, the *Canada Temperance Act Reference*, [1946] A.C. 193. See also *Reference re Prohibitory Liquor Laws* (1895), 24 S.C.R. 170, where the Supreme Court held in favour of the Dominion, the same result, be it noted, that it reached with a somewhat differently composed court in the concrete case of *Huson v. Township of South Norwich* (1895), 24 S.C.R. 145. The Supreme Court was overruled in *Attorney-General for Ontario v. Attorney-General for Canada*, [1896] A.C. 348.

⁸¹The "living tree" metaphor was employed in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, a reference, but one not involving the question of legislative jurisdiction. It is possible to discern much of the same approach in Lord Sankey's opinion in the *Aeronautics Reference*, particularly in his "sixty colours" analogy and his statement that aeronautics had attained such dimensions as to affect the body politic of the Dominion. This is not, of course, to ignore the note played by s. 132 in the case.

⁸²Three canons that proved particularly disastrous to the scope of federal jurisdiction were, first, that the Act was to be interpreted like an ordinary statute, *Bank of Toronto v. Lambe*, (1887), 12 A.C. 575 (a concrete case), that the specific inclusion of Banking in s. 91 excluded other particular trades, *Citizen's Insurance Co. v. Parsons*, (1881), 7 A.C. 96 (a concrete case) and that regulation did not include prohibition, *Attorney-General for Ontario v. Attorney-General for Canada*, [1896] A.C. 348 (a reference). Also with regard to the attitude of the judges, see E. R. Richard, *Peace, Order and Good Government*, (1940), 18 Can. Bar Rev. 243 at pp. 256-58 where evidence is offered that the Act was deliberately twisted in favour of the provinces by Lord Watson for reasons of policy.

⁸³See Jennings, *op. cit.*, pp. 37-38.

There are, of course, other factors to be weighed in considering the usefulness of reference cases besides those we have touched upon. In particular, references have been forwarded as a technique for determining important legal questions speedily and without expense to private litigants. Blaké, during the discussion of his resolution of 1890⁸⁴ cited Bryce's exposition of the disadvantages which resulted from the absence of reference provisions in the United States. An immediate and final decision, wrote Bryce, of a contested point of constitutional law would often be of benefit both to the citizen individually and to the various organs of government. As things actually stood, no one knew with certainty when, if ever, a point of this type would be decided. No one liked incurring the cost and effort necessary to bring it before the courts and the case might be ended by a settlement or dropped entirely. If it did happen that, after many years, it came before the Supreme Court and was decided, it might be that the decision would differ from that which lawyers in general had foreseen, that it would modify what was thought to have been the law and that it would ruin private interests based on opinions that this decision now declared to be unfounded.⁸⁵

To these arguments might be added the special necessity for speedy determination of questions relating to war emergencies and Canada's relations with foreign powers.⁸⁶ On the other hand, as we have seen with regard to disallowance, there is the possibility that reference will be abused by the executive. This leads us to our next major area, the ethics of references.

iii. Ethical?

The judges have objected to the submission of references from an ethical viewpoint because, they argued, references affect private rights without affording parties affected an opportunity to be heard and because, though theoretically merely advisory, opinions rendered are bound to embarrass the administration of justice when the subject of an earlier reference is brought before the courts on a later occasion by genuine litigants.

In 1898, the Privy Council, in an important constitutional reference, made its position known on this question in a pronouncement that has often been judicially cited. Delivering the opinion of the Board, Lord Herschell declared:

Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors.⁸⁷

⁸⁴Debates, House of Commons, Canada, (1890), Vol. 2, 4084-93.

⁸⁵These views have been echoed but rarely in the courts, where there has been much hostility to the use of references. But see *Re References*, (1910), 43 S.C.R. 536 at p. 587 and *Reference Re Local Option Act*, (1890-91), 18 O.A.R. 572 at pp. 584-85.

⁸⁶*Reference re Chemical Regulations*, [1943] S.C.R. 1.

⁸⁷*Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia*, [1898] A.C. 700 at p. 717.

In *Re References*⁸⁸ Idington J. considered the question from its second aspect; embarrassment of the administration of justice. What would be the thought of a judge, he asked, who had expressed to a private litigant an opinion more or less deliberate upon questions the answers to which determined that litigant's rights and who had afterwards sat in that litigant's case and judged it? Was there not involved in the very essence of what was attempted the taking away of men's rights and liberties without due process of law?

But it was in the *Marriage Laws Reference*⁸⁹ that the private rights question received the fullest discussion. There, counsel for Quebec, citing the views of Lord Herschell as quoted above objected to the Supreme Court answering one of the questions on grounds that it was a question which affected private rights and private interests which were not represented before the Court. The question was whether the law of Quebec rendered null and void, unless contracted before a Roman Catholic priest, marriages between persons of certain religious faiths. In the view of counsel for Quebec a question could hardly be submitted which involved more private rights than this one. It involved a declaration which would not only cause disturbance, but would put the ban of absolute nullity upon scores of marriages of persons who were not represented before the Court. It was well and good to say that the opinion rendered would be only advisory, yet if the opinion favoured nullity, it would affect the name and fame and standing of every person married under the conditions set forth in the question as well as that of the children.

Counsel for Canada took up this argument in reply and pointed out that the same was true of *every* case that was heard in the Court. Interests which were not represented and could not be represented were affected and determined as much in ordinary cases as in any reference. Moreover, there was a public interest in having the answers which outweighed the private interest.⁹⁰

Fitzpatrick C.J., Idington and Anglin JJ. agreed with counsel for Quebec that the question was improper.⁹¹ Idington J. was very bitter:

As to the objections strongly pressed by counsel for Quebec that we should not answer the second question . . . in a recent reference I assumed that private rights might be touched and urged all I could in the same direction . . . The Judicial Committee's judgment indicates such objections were hardly worthy of notice . . . I admit this case involves . . . what I had conceived to be the vicious principle of interrogating judge.

It . . . imperils private rights in a way that seems to deprive those concerned of trial by the process of law.⁹²

⁸⁸(1910), 43 S.C.R. 536 at pp. 573, 583. It seems clear here that what Idington J. means by due process is simply an ordinary trial not the technical meaning of the American term.

⁸⁹[1912] 46 S.C.R. 132 at p. 289.

⁹⁰*Ibid.*, at pp. 308-09.

⁹¹*Ibid.*, at pp. 336, 421-22.

⁹²*Ibid.*, at p. 395.

A very recent echo of the private rights controversy was heard in *Attorney-General of Canada v. C.P.R. and C.N.R.*⁹³ where Rand J., delivering the judgment of Kerwin C.J. and Taschereau, Cartwright and Fauteux JJ., objected to answering three of the questions on grounds that

... we would be expressing an opinion that might seriously affect private rights in the absence of those claiming them, a step which would be contrary to the fundamental conception of due process, the application of which to opinions of this nature has long been recognized.⁹⁴

These remarks show that the private rights question is by no means closed. They also, when taken together with the other cases considered, suggest a criterion used in evaluating a "private rights" complaint, namely, that where the questions, although part of a larger constitutional reference directly touch private interests, as in *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia*⁹⁵ and *Attorney-General for Canada v. C.P.R. and C.N.R.*, the courts will decline to answer,⁹⁶ but where, as Anglin J. put it in the *Aeronautics Reference*, the interests are affected only obliquely because the questions are directed to the problem of legislative jurisdiction the courts will proceed.

iv. Constitutional ?

Are references constitutional? It has been decided on the highest authority that they are. The arguments advanced in favour of the contrary view are such as may involve us in some slight repetition of points covered earlier in this paper, for, as Lord Loreburn observed in 1912:⁹⁷

What in substance their Lordships are asked to do is to say that the Canadian Parliament ought not to pass laws like this because it may be embarrassing and onerous to a Court, and to declare this law invalid because it ought not to have been passed.

Protests from the bench that the federal reference legislation was unconstitutional were heard as far back as 1892 and 1894, shortly after the passage of the amendment to the Supreme Court Act in 1891. In 1894, in the *Manitoba Education Reference*,⁹⁸ Taschereau J. expressed his doubts as to whether the amendment was *intra vires* the Dominion. What section of the British North America Act, he asked, empowered Parliament to confer on the

⁹³[1958] S.C.R. 285.

⁹⁴*Ibid.*, at p. 294.

⁹⁵*Supra*, footnote 87.

⁹⁶The *Marriage Laws Reference* is somewhat unique. Since Question 2 directly affected private rights, Fitzpatrick C. J., Idington and Anglin JJ. protested it, yet it was answered by all the judges except Fitzpatrick C. J.

⁹⁷*Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571 at p. 589.

⁹⁸(1894), 22 S.C.R. 577 at p. 677. Taschereau J. had also expressed his doubts on this score in *Reference re County Courts of British Columbia*, (1892), 21 S.C.R. 446 at pp. 454-55.

Supreme Court, a statutory court, any other jurisdiction than that of a court of appeal under s.101 of that Act. In his view, the reference legislation had made the court a court of first instance, or rather an advisory board to the executive, performing neither the usual functions of a court of appeal or of any court of justice whatever.

It was only in 1910 however, that the constitutional issue was put squarely before the Court.⁹⁹ In that year the Governor-in-Council submitted a number of questions for the consideration of the Court dealing with a mixture of topics, including the limitations placed by the British North America Act, 1867, upon the provincial power to incorporate companies, the competency of British Columbia to grant certain fishing rights in certain waters, and the validity of some sections of the Insurance Act (Can.) of 1910. British Columbia consented to the reference on the fishing question and Quebec to the reference on both the fishing and insurance questions. However, all the other provinces, with the exception of Saskatchewan, moved that the Court should not consider the questions "as not being matters which can properly be considered by the court as a court or by the individual members thereof in the proper execution of their judicial duties." The motion of the provinces was dismissed by the Supreme Court, four to two.

On appeal,^{99a} counsel for the appellant provinces noted that the point involved in references might afterwards arise in the course of legal proceedings between private suitors or between the province and the Dominion. The contribution of counsel for Canada, on the other hand, is noteworthy too for pointing out that reference legislation had been enacted by most of the provinces. His remarks, together with those of provincial counsel, raised for the first time the constitutionality of provincial reference legislation. The Supreme Court had confined its attention entirely to references by the Governor-in-Council.

Earl Loreburn, delivering the judgment of the Board, proceeded to define the basic issues generally thus:

It is argued . . . that the Dominion Act authorizing questions to be asked of the Supreme Court is an invasion of provincial rights, but not because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less than this — that no Legislature in Canada has the right to pass an Act for asking such questions at all:¹⁰⁰

and with regard to the Supreme Court in particular, as follows:

The provinces . . . say that when a Court of Appeal from all the provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body according to the conception of judicial character obtaining in civilized countries and especially obtaining in Great Britain, to whose Constitution the Constitution of Canada is intended to be similar . . . And they say that to place the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the

⁹⁹References by the Governor-General in Council, (1910), 43 S.C.R. 536 at p. 537.

^{99a}Supra, footnote 97.

¹⁰⁰Ibid., at p. 581.

maintenance of such judicial character or of public confidence in it, or with the free access to an unbiased tribunal of appeal to which litigants in the provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court liable to be so treated ceases to be such a judiciary as the Constitution provides for . . . If, notwithstanding the liability to answer questions the Supreme Court is still a judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is *ultra vires*.¹⁰¹

His Lordship went on to reject the provincial contentions in general because to assume that any point of internal self-government had been withheld from Canada would be "subversive of the entire scheme and policy" of the British North America Act,¹⁰² and in particular, on three grounds: United Kingdom practice, the fact that reference had been answered before 1910 by the Supreme Court and Privy Council, and the fact that nearly all the provinces had enacted legislation similar to the federal legislation now being considered. Of these three, Earl Loreburn attached the greater weight to the last two, since, as he put it, "Canada must judge of Canadian requirements."¹⁰³

His Lordship noted that reference legislation had been on the federal statute books in one form or another since 1875 and that the Supreme Court had frequently answered questions submitted under it. More important, the Judicial Committee had heard several appeals from such answers without ever having questioned the validity of such proceedings. It was quite true, he admitted, that no interested party had ever raised the issue before 1910 and these bodies would be reluctant to raise it on their own, but surely this would not be the case where the practice involved the very foundations of justice. The only inference which could be drawn from the past silence of the Board in Canadian references was that it did not consider such submissions pre-judicial to the independence and character of courts of justice.¹⁰⁴ Moreover, there was the provincial reference legislation to consider. The proposition that this legislation could be valid while similar federal legislation was invalid was dismissed by his Lordship as "very strange." There only remained, then, the conclusion that the provincial legislation was also invalid "upon the general ground . . . that a court of justice ceased in effect to be a court of justice when such a duty is laid upon it." But this was unacceptable.

Certainly it is remarkable that for thirty-five years this point of view has apparently escaped notice in Canada, and a contrary view, now said to menace the very essence of justice has been tranquilly acted upon without question by the Legislatures of the Dominion and provinces, by the Courts in Canada, and by the Judicial Committee ever since the British North America Act established the present Constitution of Canada.¹⁰⁵

His Lordship then expressed his agreement with the proposition that federal references could not affect the administration of justice because they were

¹⁰¹*Ibid.*, at pp. 584-85.

¹⁰²*Ibid.*, at p. 581.

¹⁰³*Ibid.*, at p. 587.

¹⁰⁴*Ibid.*, at pp. 587-88.

¹⁰⁵*Ibid.*, at p. 588.

only advisory, issued a reminder that the Board was not concerned with whether references were good policy, and dismissed the appeal.

The judgment, by implication, upheld the provincial reference legislation as well as that of the Dominion. The holding declares that "it was *intra vires* of the *respective Legislatures*" to impose this duty upon the courts. Left more obscure is the question of basis in the sections of the British North America Act. Presumably, it is s.92 (14) for the provinces, but the source of federal jurisdiction is more uncertain. In *Re References Davies and Fitzpatrick JJ.* felt that s.101 would be adequate for this purpose, but that the necessary clause of s.91 would do equally well. Duff J. considered s.101 only, while Anglin J. did likewise with s.91. Perhaps since Anglin J. forcefully rejected s.101 while Duff J. did not consider s.91, the edge should go to the latter section. Macdonald¹⁰⁸ lists references among the few matters with which the Dominion may deal in normal times in virtue of the opening words of s.91. Since we have it on the authority of both the Supreme Court and the Privy Council that federal references involve no interference with any of the classes of subject assigned to the province in s.92, such a solution would be entirely proper.

¹⁰⁸Macdonald, *op. cit.*