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Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction

James L. Huffman,* MardiLyn Saathoff**

Unlike United States courts,1 Canadian courts have the power to render advisory opinions.2 The Canadian experience over the last century suggests that advisory opinions can prove beneficial. Indeed, on fundamental questions of constitutional organization and governmental power, the abstract character of advisory proceedings offers advantages over the concrete setting of traditional adversary proceedings.3

Pursuant to its reference jurisdiction,4 the Supreme Court of Canada issues advisory opinions on a wide range of legal

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* Professor of Law, Lewis & Clark Law School.
** Student, Lewis & Clark Law School.

1. The case or controversy provision of Article III of the United States Constitution precludes federal courts from deciding "abstract, hypothetical or contingent questions." Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945). Federal courts will not "give opinions in the nature of advice concerning legislative [or executive] action." Muskrat v. United States, 219 U.S. 346, 362 (1911). Since the Supreme Court refused in 1792 to advise Congress and the Secretary of War on certain pension applications, Hayburn's Case, 2 U.S. (2 Dall.) 409, 409-10 (1792), and in 1793 to advise President Washington on questions relating to United States neutrality in the European War of 1793, see H. Johnston, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 486-89 (1891), federal courts have not rendered advisory opinions. A few states allow their courts to render advisory opinions. See infra note 9 (listing states). In those states, however, judges "often maintain the notion that, in so doing, they are performing an extrajudicial function, and that such opinions should consequently have dramatically limited stare decisis effect." L. Tribe, AMERICAN CONSTITUTIONAL LAW 73 n.4 (1988). See generally Note, Advisory Opinions on the Constitutionality of Statutes, 69 HARV. L. REV. 1302 (1956).

2. See infra notes 25-56 and accompanying text.
3. See infra notes 136-72 and accompanying text.
4. The name derives from the procedure by which the Governor General in Council refers questions to the Supreme Court. References also may reach the Supreme Court on appeal from provincial high courts that have rendered opinions on questions referred by the Lieutenant Governor in Council for the province. See infra notes 25-56 and accompanying text (detailing statutory basis of the Supreme Court's reference jurisdiction).
questions. Recent disagreements over proper procedures for amending the Canadian Constitution illustrate that the Supreme Court's advisory opinions often involve questions of the greatest national concern, and predominantly involve the issue of federalism. Canadians have accepted this role for


6. See, e.g., Reference re Objection to a Resolution to Amend the Constitution, [1982] 52 S.C.R. 793. At issue was the Province of Quebec's assertion that the Canadian Parliament needed consent from all the provinces to adopt an amendment to the Constitution of Canada that would affect the legislative competence of the provinces and the status of the provinces in the Canadian federation. Id. at 798. The Supreme Court rejected the contention of Quebec and the new Canadian Constitution took effect on April 17, 1982. Id. at 806. This opinion, along with an earlier reference opinion on essentially the same issue, Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, was of central importance to the enactment of a fundamental change in the constitutional definition of the Canadian federation. Reference cases have involved similarly important issues throughout Canada's national history. See B. STRAYER, THE CANADIAN CONSTITUTION AND THE COURTS 271 (1983) (stating that more than 25% of leading decisions were made in reference proceedings). For a complete listing of all reference opinions and their subject matter, see Appendix.


In the Canadian system, a clear line theoretically demarcates federal and provincial jurisdictions and one should not invade the other. A challenge to a statute as ultra vires requires a two-step analysis. A threshold inquiry addresses whether the legislation is expressly and exclusively within one section or the other. This inquiry often depends on previous case law defining the enumerated subjects' scope and substance. See, e.g., Reference re The Natural Prods. Mktg. Act, 1936 S.C.R. 398, 408-09, aff'd, 1937 App.Cas. 377. If the legislation is expressly within § 91, it is not within § 92. Reference re Alberta Statutes, 1935 S.C.R. 100, 114-15, aff'd, 1939 App.Cas. 117. The reverse is not always true, however; legislation expressly within § 92 may be preempted by the Dominion if necessary to exercise its own exclusive jurisdiction, Reference re The Debt Adjustment Act, 1942 S.C.R. 31, 41-44 (Crocket, J., dissenting), aff'd, 1943 App.Cas. 356., or if special circumstances warrant invoking § 91 general jurisdiction for the peace, welfare, and good government of Canada. See Reference re Natural Prods. Mktg. Act, supra; Reference re Radio Communication Act, 1931 S.C.R. 541, 546-47; Reference re Validity of the Combines Investigative Act, 1939 S.C.R. 409, 419.

If the legislation is not exclusively within one section, the Court next reviews the subject matter to determine whether it is in "pith and substance" within either section, and only incidentally infringes upon the other's jurisdiction. See Reference re § 498A of the Criminal Code, 1936 S.C.R. 363, 367-68,
their highest court only after lengthy debate over the appropriateness of courts rendering advisory opinions.\(^8\)

The important role of advisory opinions in Canadian constitutional history may surprise American lawyers imbued in the teachings of the United States Supreme Court. Although some state courts render advisory opinions,\(^9\) United States courts have held since 1793 that the United States Constitution does and should deny such jurisdiction to federal courts.\(^10\)

Early in their law school careers, American lawyers learn of the problems associated with advisory opinions. The most important of these problems, as Chief Justice Jay wrote to President Washington in 1793, is that judicial rendering of advisory opinions offends the separation of powers as enshrined in the U.S. Constitution.\(^11\) The constitutional limitation of federal court jurisdiction to cases or controversies helps to ensure this separation of powers.\(^12\)

Another problem is the hypothetical nature of advisory opinions. Because advisory opinions do not bind affected parties, they may erode judicial authority.\(^13\) Advisory opinions prevent the adversary system from ensuring that both sides of a question are well and fully argued, and increase the prospect of collusive litigation.\(^14\) Advisory jurisdiction, some argue, requires courts to interpret the Constitution in the context of hypothetical and abstract disputes, which may fail to illuminate the true complexity of issues.\(^15\) When limited to resolving ac-

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\(^8\) See B. STRAYER, supra note 6, at 278 (concluding that from early in Canadian constitutional history, "at both the federal and the provincial level," the reference procedure "was looked upon as an integral part of the functioning of the constitution" and "[t]here was [by 1891] a general assumption that this was an important device for ensuring that neither Parliament nor the Legislatures exceeded their constitutional powers").

\(^9\) Colorado, Florida, Massachusetts, Maine, New Hampshire, Rhode Island and South Dakota all authorize judicial advisory opinions. See L. TRIBE, supra note 1, at 73 n.4.

\(^10\) See supra note 1.

\(^11\) "[T]he lines of separation [are] drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges in a court of the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions [posed]." 3 H. JOHNSTON, supra note 1, at 488.

\(^12\) U.S. CONST., art. III, § 2, cl. 1.


\(^14\) Id.

\(^15\) See infra notes 114-35 and accompanying text.
tual controversies, courts might be able to avoid needlessly addressing these constitutional issues.16

Although Canadians continue to debate the extent and scope of reference jurisdiction,17 the Canadian Supreme Court rarely has examined its appropriateness since a 1910 opinion in which the Court discussed extensively the constitutionality of reference jurisdiction.18 Canadians not only accept the Supreme Court's advisory role, but they rely on the reference procedure to resolve important constitutional questions. In just over a century, the Canadian Supreme Court has rendered 115 reference opinions.19

These opinions particularly should interest American lawyers and courts because they represent extensive experience with the advisory functions of courts in a federal, constitutional system. Studying these cases will allow Americans to assess the nature and impact of judicial advice in Canada to determine whether American concerns about advisory opinions are justified, and to decide whether the Canadian experience should

16. Id.

17. See supra note 6 (discussing 1982 constitutional amendment reference).

18. Reference re References, 43 S.C.R. 536 (1910), aff'd, App.Cas. 571 (1912). This case is discussed in depth infra text accompanying notes 76-97.

19. See Appendix. This total is subject to debate. Although most references are titled as such, some are not. Determining whether this number includes every reference opinion is thus impossible without reading every Supreme Court case, and even then it is not always clear. The problem is illustrated by a 1940 opinion titled Home Oil Distributors, Limited (Plaintiffs) and Attorney-General of British Columbia, the Coal Petroleum Board (Defendants) 1940 S.C.R. 444. The question came on appeal from the Court of Appeals for British Columbia, where it had been raised under the Constitutional Questions Determination Act, 54 B.C.R. 48 (1939), which authorized the provincial high court to entertain references. Except for the jurisdictional basis of the provincial opinion and use of "and" rather than "v" in the title, nothing in the Supreme Court opinion indicates it is rendered pursuant to the Court's reference authority. In identifying the references discussed in this Article we have relied on the case title and on citations to reference opinions in the Supreme Court's opinions and in secondary sources. Thus, although we are confident that we have identified almost every reference opinion, and certainly the most important ones, we cannot be certain that we have catalogued every single one.

The task also is complicated by the fact that reference opinions do not always deal with purely abstract questions. Often the questions posed involve specific situations and particular parties, making it difficult to distinguish references on the basis of their substantive content. The implications of this non-abstract nature of many references is addressed infra text accompanying notes 366-68.
spur Americans to consider the addition of an advisory function to federal court jurisdiction.

The bulk of this Article analyzes the 115 Canadian Supreme Court reference opinions. Part I reviews the history of reference jurisdiction and describes its statutory basis. Part II examines the theoretical and political arguments favoring and opposing reference jurisdiction. Part III describes reference jurisdiction in practice. Part IV analyzes the role of references in defining the Canadian federation. Part V evaluates the judicial advisory opinion in the context of the Canadian experience. Part VI discusses the possible relevance of the Canadian experience to American federal courts. The Article concludes that the success of the Canadian reference system should lead American jurists and lawyers to re-think the long-standing American rule against federal court advisory opinions.

I. HISTORICAL ROOTS AND STATUTORY BASIS OF REFERENCE JURISDICTION

In 1910 Justice Duff observed that "[t]he . . . asking [of] the extra judicial advice of the judges upon questions of law is an ancient practice."\(^{21}\) Until at least 1760, the English House of Lords had exercised an entitlement requiring common law judges to answer legal questions regardless of whether the questions arose from pending litigation.\(^{22}\) The judges presumably responded with advice they felt duty-bound to render, based on convention rather than statute.\(^{23}\) This practice bridges, or obscures, the separation of the judicial, legislative, and executive functions in the English system.\(^{24}\)

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\(^{20}\) This study analyzes only the reference jurisdiction of the Canadian Supreme Court. The high court of every province performs the same function. Until 1949, the English Judicial Committee of the Privy Council in London also gave advisory opinions on questions of Canadian law. See Lederman, The Extension of Governmental Institutions and Legal Systems to British North America in the Colonial Period, in CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS 63, 79 (1981). This Article considers Provincial and Privy Council references only to the extent that they involve appeals to or from Supreme Court references.


\(^{22}\) Id.

\(^{23}\) The convention was rooted in the peculiar nature of the English House of Lords with its Privy Council and Judicial Committee. Justice Duff states that "the last recorded instance in England in which without statutory authority such advice was sought by the Crown occurred in 1760, when a question . . . was submitted . . . and answered." Id.

\(^{24}\) The Canadian Constitution makes no express reference to the separation of powers nor to the parliamentary form of government. Parliamentary
Although the Supreme Court of Canada was not modeled after the English Privy Council, defenders of reference jurisdiction nevertheless found the Privy Council precedent persuasive, perhaps because the Supreme Court functioned initially as a channel for importing English jurisprudence to Canada. Several phases mark Canada's incorporation of reference jurisdiction: 1) statutory establishment and acceptance (1875-1906); 2) constitutionalization (1906-1922); and 3) adaptation and adjustment (1922-present).

A. STATUTORY ESTABLISHMENT AND ACCEPTANCE (1875-1906)

Section 4 of the British statute constituting the Judicial Committee of the Privy Council (Privy Council) provided the statutory model for the Canadian legislation that created reference jurisdiction. Section 4 gave the Crown power to submit references to the Privy Council. English common law also allowed the Crown and courts to refer questions, but the scope of these questions was "confined to the strict construction of existing laws." Given the Supreme Court's channeling func-

government exists at both the national and provincial levels and obscures any separation of legislative and executive powers. Strayer states "that there is no constitutional separation of powers at either the provincial or the federal level in Canada." B. STRAYER, supra note 6, at 125. Hogg agrees that the Constitution "does not separate the legislative, executive and judicial functions and insist[s] that each branch of government exercise only 'its own' function." P. HOGG, CONSTITUTIONAL LAW OF CANADA 150 (1985). Hogg points out that Canadian law differs from American law "in Canada's retention of the British system of responsible government." Id. at 287. Notwithstanding this widely accepted interpretation of the Canadian Constitution, separation of powers proved to be a concern when the Court first addressed the validity of its reference jurisdiction. See infra text accompanying notes 106-08.


26. Justice Idington suggested this connection between the English and Canadian statutes in Reference re Abstention From Sunday Labour, 35 S.C.R. 581, 597 (1905) as did Chief Justice Fitzpatrick in Reference re References, 43 S.C.R. 536, 555 (1910), aff'd, App.Cas. 571 (1912). The English statute provided: "It shall be lawful for His Majesty to refer to the said Judicial Committee . . . , for hearing and consideration and such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid." Judicial Committee Act, 1833, 3 & 4 Wm. IV, ch. 41, § 4. Strayer confirms this lineage and notes that the Judicial Committee Act of 1833 had earlier precedents in the English common law. B. STRAYER, supra note 6, at 182.

27. B. STRAYER, supra note 6, at 271-72 (stating also that § 4 "inspired the introduction of [reference jurisdiction] into Canada").

28. M'Naghten's Case, 8 Eng.Rep. 718 (1843); Reference re London and Westminster Bank, 6 Eng.Rep. 1127 (1834). In both cases the Court deter-
Parliament understandably included reference jurisdiction when establishing the Canadian Court in 1875. Section 52 of the Canadian Supreme and Exchequer Courts Act authorized "the Governor in Council to refer to the Supreme Court for hearing or consideration any matter whatsoever . . . [and provided that] the Court shall thereupon hear and consider the same." An additional provision also allowed either the Senate or House of Commons to submit pending bills for referral to the Court. Despite the several avenues of referral, the Canadian Supreme Court heard only seven references between 1875 and 1891.

The Senate submitted most of these early references, which usually questioned Parliament's incorporation powers. These references reveal that the Court interpreted its reference obligation narrowly, following English precedent. For example, in Reference re New Brunswick Penitentiary, the Court cautioned against extra-judicial answers. It carefully restricted its opinion, which concerned Parliament's power to exclude certain types of prisoners from a federally-funded penitentiary, to an express interpretation of the relevant statute. This narrow holding did not precisely address the question posed at hearing by New Brunswick's Attorney-General; the Court believed the province's position was too broad to be addressed. In narrow-minded that the House of Lords could require the judges to answer abstract questions of existing law.

29. Russell, supra note 25, at 583.
30. The Supreme and Exchequer Courts Act, 1875 CAN. STAT. ch. 11, § 52.
31. Id. § 53.
32. Reference re The Quebec Timber Company, Cout. Cas. 43 (1882); Reference re Canada Provident Association, Cout. Cas. 48 (1882); Reference re New Brunswick Penitentiary, Cout. Cas. 24 (1880); Reference re The Bros. of the Christian Schools in Canada, Cout. Cas., Apr. 4 (1874); Reference re The Thresher Case, B.C.R. 153 (1882); Reference re The McCarthy Act, Session Papers No. 85a (1885); Reference re The Jesuits' Estates Act, 1889 LEGAL NEWS 283.
33. The Court heard four Senate references before 1891: Reference re The Quebec Timber Co., Cout. Cas. 43 (1882); Reference re The Canada Provident Assosci., Cout. Cas. 48 (1882); Reference re The Bros. of the Christian Schools in Canada, Cout. Cas., Apr. 4 (1874); Reference re The McCarthy Act, Session Papers No. 85a (1885) (although the Senate debated this reference, it apparently was not reported in the Supreme Court Reporter or in Coutlee; perhaps it was not actually submitted).
34. Cout. Cas. 24 (1880).
35. Id. at 24-25.
36. Id. at 28-29; see Reference re The Quebec Timber Co., Cout. Cas. 43 (1882), in which the Court refused to answer certain questions because they might have affected private rights.
ing the question and its answer, this opinion helped establish the framework for judicial opinions within a reference.

Apparently no one seriously contested the extent of the judicial role during this period. One case did raise the question, however, of the purpose of a reference and the parties entitled to submit one. In 1889, a private party petitioned the Governor General, requesting the referral of questions related to the validity of several acts that had incorporated and settled the estates of a religious order. The province and the Dominion questioned the party’s standing. Canada’s Minister of Justice emphatically rejected the petition, stating that the interest of a private citizen and taxpayer was insufficient to confer standing. He also concluded that reference jurisdiction was “intended to enable the Governor-General to obtain an opinion from the Supreme Court of Canada in relation to some order which his government might be called on to make.” The Minister reasoned that use of references by private parties easily could deprive provincial courts of their functions, create due process problems, and change reference power into a summary procedure, rather than the advice it was meant to be. The controversy over reference jurisdiction during this period reflects these concerns.

From 1867 to 1896, the Dominion vigorously asserted federal jurisdiction. The provinces perceived the standing problem and the reference’s potential significance as threats to their sovereignty. In 1887, five of the seven provinces conferred in an interprovincial conference, passing several resolutions that called for constitutional change. One suggested change involved the reference power. It proposed “equal facilities to the Federal and Provincial Governments for promptly obtaining a judicial determination respecting the validity of Statutes of both the Federal Parliament and Provincial Legislatures.” This proposal notably merged two continuing controversies. First, provincial concern over equal access to judicial review of

37. Reference re the Jesuits’ Estates Act, 1889 LEGAL NEWS 283.
38. Id. at 284-85.
39. Id. at 286 (concluding also that use of reference jurisdiction to adjudicate private disputes would pervert it “into an arbitrary and inquisitorial power”).
40. Id. at 286-87.
41. B. Strayer, supra note 6, at 274.
42. Id. at 274-75.
43. Id. at 275.
44. Id. (quoting OFFICIAL PROCEEDINGS OF THE INTER-PROVINCIAL CONFERENCE, 1887, 28 (1887).
both federal and provincial laws underscored their claims of sovereignty. This controversy was not resolved until 1922. Second, the provinces’ threatened exclusion from the federal system underscored their fear of the potential power of a reference opinion.

Although the conference proposal was never enacted, it did result in provincial statutory reference systems. Within ten years of the conference, five provinces enacted reference statutes, and by 1953 all the provinces had reference jurisdiction. These statutes accomplished the conference proposal’s goals: they created access to the province’s highest court for judicial review of federal and provincial laws, and they deemed the provincial court’s decision a final judgment, which created a direct appeal to the Supreme Court and a potential appeal to the English Privy Council.

The Dominion and Parliament rarely submitted references during this early period, possibly because the provinces believed that the reference procedure threatened their sovereignty. More likely, the Dominion and Parliament rarely used references because they perceived deficiencies in the reference procedure. In 1891, Parliament amended the Supreme and Exchequer Courts Act to remedy these shortcomings. These changes extended the reference scope to disallowance, education, and questions of law or fact. They also obliged the Court to certify its reasons and give notice and opportunity for hear-

45. See text accompanying infra note 66.
46. This provincial assessment seems obvious and prophetic given that the majority of references in the next 100 years concerned federalism issues. See infra note 214.
47. B. STRAYER, supra note 6, at 275.
48. Manitoba (1890), Nova Scotia (1890), British Columbia (1891), Ontario (1891), Quebec (1898). Id. at 275 n.17.
49. Northwest Territories (1901) (later applied to Alberta and Saskatchewan), New Brunswick (1928), Prince Edward Island (1941), Newfoundland (1953). Id. at 275 n.18.
50. Id. at 277-78.
51. See supra note 32.
52. An Act to amend Chapter one hundred and thirty five of the Revised Statutes entitled, “An Act respecting the Supreme and Exchequer courts,” CAN. STAT. ch. 25, § 4 (1891) [hereinafter “1891 Amendment”].
53. Id. As a result, § 90 of the BNA Act provides that provincial legislation is subject to the federal government’s powers of reservation and disallowance. BNA Act, supra note 7, § 90. Disallowance allows the government to invalidate a provincial statute. Although the Dominion often used this power early in Confederation history, Hogg states that the “modern development of judicial review and democratic responsibility has left no room for [its] exercise” and it has not been used since 1943. P. HOGG, supra note 24, at 90.
ing to the Attorney General of any province whose interests were involved in a reference proceeding. Finally, the amendments provided that a reference would be a final judgment for purposes of appeal to the English Privy Council.

These amendments, together with provincial statutes enacted between 1875 and 1906, solidified reference jurisdiction in Canada. This period embodied a struggle between federal and provincial sovereignty, resulting in the development of independent provincial reference systems. During this time, no

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54. 1891 Amendment, supra note 52.
55. Id. The 1891 Amendment stated in part:

Important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor in Council by "The British North America Act, 1867, or by any other Act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power, may be referred, by the Governor in Council, to the Supreme Court for hearing or consideration; and the court shall thereupon hear and consider the same:

2. The court shall certify to the Governor in Council, for his information, its opinion on questions so referred, with the reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said court; and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion and his reasons:

3. In case any such question relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the Legislature of any Province, or of any provision in any such Act, or in case, for any reason, the Government of any Province has any special interest in any such question, the Attorney General of such Province, or, in the case of the North-West Territories, the Lieutenant Governor thereof, shall be notified of the hearing, in order that he may be heard if he thinks fit:

4. The court shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon:

5. The court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance and Receiver General out of any moneys appropriated by Parliament for expenses of litigation:

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:

7. General rules and orders with respect to matters coming within the jurisdiction of the court under this section may be made in the same manner and to the same extent as is provided by this Act, with respect to other matters within its jurisdiction, and, in particular, such rules and orders as to the judges making them seem best for the investigation of questions of fact involved in any reference thereunder.

1891 Amendment, supra note 52.
one seriously challenged the federal procedure, and by 1891 courts had accepted the technical validity of reference jurisdiction. 58

B. CONSTITUTIONALIZATION OF REFERENCE JURISDICTION (1906-1922)

Because the Canadian Supreme Court generally refused to accept the provinces’ references on appeal, 57 the provinces challenged the constitutionality of reference jurisdiction. In Attorney Gen. (Ont.) v. Attorney Gen. (Can.), 58 the Privy Council affirmed a Supreme Court opinion that firmly established the constitutionality of reference jurisdiction and the Court’s duty to answer referred questions. 59 The Privy Council concluded that the British North America Act (BNA Act) would be subverted if Parliament lacked a power incidental to its self-government. 60 Parliament thus necessarily had the authority to confer reference jurisdiction on the Supreme Court. 61 Two factors were critical to the Privy Council decision. Because the BNA Act did not clearly separate powers, it allowed courts to perform traditionally non-judicial functions, such as rendering advisory opinions. 62 The Privy Council noted further that most of the provinces had enacted statutory reference systems. 63 That factor seriously undermined the provinces’ position on the constitutionality of references. 64 Failing to prove reference jurisdiction was ultra vires the Court, the provinces resumed

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56. B. STRAYER, supra note 6, at 274. A later amendment, An Act to amend the “Supreme and Exchequer Courts Act,” CAN. STAT. ch. 50, § 2 (1906), only clarified the earlier revisions and did not extend or limit the statute’s scope.

57. In Union Colliery Co. v. Attorney Gen. for B.C., 27 S.C.R. 637 (1897), British Columbia attempted to appeal a reference opinion from its Supreme Court. Id. at 639. Typical of the provincial statutes, B.C.’s reference statute “deemed” the Court’s opinion a “judgment.” Id. The Supreme Court of Canada, however, found it had no jurisdiction to hear the appeal. Id. The opinion seems contradictory, given its own amended statute. See supra note 52. The Court reasoned that the phrase “deemed a final judgment” inherently reveals that a reference opinion is not really a final judgment because “there is no action, no parties, [and] no controversy.” 27 S.C.R. at 639. The Court thus could not review the reference opinion.


60. Id. at 581.

61. Id. at 582.

62. Id. at 588.

63. Id.

64. Id.
pressing for appellate access to the Court.65

C. ADAPTATION AND ADJUSTMENT (1922-PRESENT)

A 1922 statutory amendment granted the provinces access to the Supreme Court.66 The amendment modified sections of the Supreme Court Act, enabling a province to appeal a reference to the Supreme Court if there were a sufficient statutory basis. Since 1922, Parliament has enacted minor alterations to the basic reference provisions,67 but the general purpose and scope remain the same.68 Reference use, however, has changed.


66. An Act to amend the Supreme Court Act, CAN. STAT. 1922, ch. 48, § 1.
68. The modern Supreme Court Act, CAN. REV. STAT. ch. S-26, § 53 (1985) provides in pertinent part:

(1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
(a) the interpretation of the Constitution Acts;
(b) the constitutionality or interpretation of any federal or provincial legislation;
(c) the appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or
(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.

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court ejusdem generis with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

(4) Where a reference is made to the Court under subsection (1) or (2), 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 on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

(5) Where the question relates to the constitutional validity of any Act passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney
Parliament abolished appeals to the English Privy Council in 1949. Less apparent has been the trend toward judicial resolution of inherent weaknesses in references. Admission of evidence, use of factums, and loosening of standing requirements all reveal adjustments intended to respond to the traditional arguments against advisory opinions.

The evolution of reference jurisdiction established its procedural and constitutional validity, while adjusting its use to federal-provincial tensions and fear of its potential influence. Although reference jurisdiction differs by nature from most judicial functions, the lack of procedural controversy attests to its acceptance within Canada as an integral part of judicial review.

II. REFERENCE JURISDICTION IN THEORY

Reference proceedings are an established part of Supreme Court practice in Canada. This modern acceptance, however,
follows strenuous past debate in cases and scholarly journals. A review of this debate is important in assessing whether the theoretical advantages and/or disadvantages of reference proceedings are manifested in practice. Because the arguments in favor of the Court's reference function usually arise in response to the arguments against the function, it is most fruitful to examine the latter first.

A. ARGUMENTS FOR LIMITING REFERENCE JURISDICTION

Three overlapping categories divide the arguments for limiting Supreme Court reference jurisdiction. Constitutional arguments primarily involve interpretation of the BNA Act as it relates to federalism and separation of powers. Other arguments focus on interpretation of the Supreme Court's jurisdictional statutes. Finally, commentators advance a host of policy arguments favoring judicial self-restraint, if not formal limitations on reference jurisdiction.

1. Constitutional Arguments

a. Federalism

Federalism has been the center of debate over reference jurisdiction and the dominant issue of Canadian constitutional law throughout the nation's history. The most important reference case in the Supreme Court's history, References re References, involved federalism. At issue was whether the Court had jurisdiction to consider previously referred questions of provincial versus Dominion legislative power. The Supreme Court decided Reference re References on the motion of several provinces that objected to the Court's exercise of reference jurisdiction. The provinces objected to the Court's consideration

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73. Until 1982 the British North America Act, an enactment of the British Parliament, served as the principal document of the Constitution of Canada. In 1982 that law and several amendments to it were "patriated" under the Constitution Act, 1982, ch. 11 (U.K.). For the first time in Canadian history, amending the Constitution became the exclusive domain of Canadians.
74. See infra notes 109-13 and accompanying text.
75. See infra notes 114-35 and accompanying text.
77. 43 S.C.R. 536 (1910), aff'd, App.Cas. 571 (1912).
of various questions relating to provincial powers to incorporate companies and to regulate or limit the activities of companies incorporated by the Dominion or other provinces. The provinces also objected to the Court's consideration of questions relating to provincial regulation of coastal fishing. The provinces argued that the Court's reference jurisdiction under Section 60 of the Supreme Court Act depended on that provision's validity under Sections 101 and 92(14) of the BNA Act.

Section 101 of the BNA Act authorized the Dominion Parliament to "provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada and for the Establishment of any additional Courts for the Better Administration of the Laws of Canada." In Section 60 of the Supreme Court Act, the Dominion Parliament granted the Supreme Court reference jurisdiction over "questions of law or fact touching . . . the constitutionality or interpretation of any . . . provincial legislation." The provinces argued that Section 101 did not authorize this grant, because the reference jurisdiction involved neither an appellate function nor the administration of Canadian laws.

Justice Idington had suggested this argument earlier in Reference re Criminal Code, but in dissent in Reference re References he acknowledged that although Section 101 alone did not clearly authorize reference jurisdiction, the section together with Section 92(14) and Section 67 of the Supreme Court Act was sufficient for the creation of reference jurisdiction. The limit Section 67 imposed, requiring provincial consent, was central to Justice Idington's dissent, as was the requirement that cases involving provincial law be an exercise of appellate jurisdiction after local courts had answered the question.

Justice Girouard put the argument slightly differently, reading Section 101 to authorize creation of a "general court of

78. Id. at 537-39.
79. Id. at 540. The Court later answered these questions in Reference re B.C. Fisheries, 47 S.C.R. 493 (1913), aff'd, 1914 App.Cas. 153.
80. Quebec and British Columbia consented to the references concerning "Fisheries," and the "Insurance Act." Reference re References, 43 S.C.R. at 545. Ontario, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Alberta objected to the reference. Id. at 537.
81. BNA § 101.
82. Supreme Court Act, 3 R.S.C. ch. 139, § 60 (1906).
83. 43 S.C.R. at 543.
84. 43 S.C.R. 434, 441 (1910).
85. 43 S.C.R. at 567 (Idington, J., dissenting).
86. See id.
appeal for Canada” and separate courts “for the better administration of the laws of Canada.” In Justice Girouard’s opinion the Supreme Court was the general court of appeal and therefore could not sit also as an “additional court for the administration of the laws of Canada.”

Justice Idington agreed that “[t]he question of separation . . . or of consolidation [of one or more judicial powers is] entirely [a] matter of convenience and expediency.” Justice Idington insisted, however, that absent provincial consent and proper appellate procedural posture, Section 101 limited the Supreme Court’s jurisdiction to administering the laws of Canada.

The Supreme Court rejected this argument under Section 101 on the ground that “the language of . . . section [101] is quite broad and ample enough to confer the required and assumed power.” The Court reasoned, moreover, that the existence of previously unchallenged Supreme Court jurisdiction over other reference questions supported the validity of Section 60 of the Supreme Court Act.

The provinces, having failed in their argument under Section 101 of the BNA Act, urged that Section 92(14) of that Act rendered application of reference jurisdiction to provincial laws unconstitutional. Even if Section 101 authorized Section 60, the provinces argued, the subject matter of the law still must be within Dominion, as opposed to provincial, powers. Section 91 of the BNA Act enumerates the Dominion Parliament’s powers, including the general power to “make Laws for the Peace, order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects . . . assigned exclusively to the Legislatures of the Provinces.” Provincial powers under section 92 of the BNA Act encompass “[t]he Administration of Justice in the Province, including the Constitu-

87. Id. at 557 (Girouard, J.). The Chief Justice rejected this argument, quoting an earlier opinion to the effect that “[t]he distinction between creating a new court and conferring a new jurisdiction upon an existing court is but a verbal and non-substantial distinction.” Id. at 553 (quoting Valin v. Langlois, 5 App.Cas. 115 (1879)).
88. Id. at 569. (Idington, J., dissenting).
89. Id. at 575 (noting that “administering the laws of the provinces is a thing beyond the literal meaning of the [statute]”).
90. Id. at 562 (Davies, J.).
91. In particular, questions referred under the Railway Act. Id. at 557 (Fitzpatrick, C.J.).
92. Id. at 564.
93. Id. at 541.
94. BNA § 91.
tion, Maintenance, and Organization of Provincial Courts."

The provinces argued that provincial courts established under Section 92(14) have exclusive authority to issue opinions on the constitutionality of provincial laws.

The Court rejected this constitutional argument as contrary to the established interpretation of Section 92 of the BNA Act.

b. Due Process

A second constitutional objection to the reference focused on individual rather than provincial rights. Counsel in Reference re Abstention from Sunday Labour urged that references on pending provincial legislation would violate the rights "not only of provincial legislatures, but of the individual citizens in the province." The reference opinion would directly affect individual rights without the affected individuals having notice of the reference proceedings or an opportunity to participate.

Criminal trials in particular implicate the due process objection to references. Courts might violate the rights of criminal defendants by following reference opinions when faced with an actual controversy in the criminal case.

95. BNA § 92.
96. 43 S.C.R. at 541-42.
97. Id. at 552.
98. Others have characterized the concerns for private rights and judicial administration as ethical objections to the reference system. See, e.g., Rubin, The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law, 6 McGill L.J. 168, 175 n.24 (1960).
100. Id. at 588-89.
101. Under the American view, this is "due process," a concept rooted for some in natural law and for others in the Constitution. See L. Tribe, American Constitutional Law 666-67 (2d ed. 1988). In the Canadian Constitution, the parallel concept seems to be "fundamental justice," but the term, like American due process, encompasses more than the British natural justice. See P. Hogg, supra note 24, at 746-47.
102. Justice Manle stated in his celebrated opinion in McNaghten’s Case: "[A]s these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice, when they are cited in criminal trials." 10 Cl. & F. 200, 294 (1843). McNaghten’s Case concerned an accused’s criminal actions, committed under the influence of insane delusion. The Court addressed several questions of law concerning mental illness and culpability. Although the Court cautioned against "minute applications of [broad] principles," it nevertheless held that the House of Lords has a right to require judges to answer abstract questions of existing law.
103. Counsel in Reference re References reiterated Justice Manle’s concern
Beginning in 1929, the Court declined to answer some questions if answering would violate due process.\textsuperscript{104} For example, in a 1958 reference concerning title to mines and minerals within railway land grants, the Court abstained from answering one referred question because answering "would be contrary to the fundamental conception of due process."\textsuperscript{105}

c. Separation of Powers

The federalism argument applies only to issues of provincial authority and the due process argument applies only to cases affecting private rights. The separation of powers argument potentially carries greater impact, because it holds that extra-judicial advice is simply not a proper part of the judicial role.

One example of the separation of powers argument is Justice Idington's dissent in \textit{Reference re Abstention from Sunday Labour},\textsuperscript{106} in which the Court decided that the Ontario legis-

\textsuperscript{104} In the 1929 \textit{Reference re Waters and Water-Powers}, Justice Duff, writing for the Court, noted "the impracticability of giving \ldots answers to some of the questions submitted. \ldots [T]he limit of practicability seems to be reached, when the principles to which reference must be made for the determination of particular cases have been indicated." 1929 S.C.R. 200, 226-27.


\textsuperscript{106} 35 S.C.R. 581 (1905).
ture had no authority to adopt a proposed law. Justice Idington criticized the decision as "a departure from the recognized principle of severing and keeping as distinct as possible the respective powers and duties of the legislative, executive and judicial functions of Government."  

2. Statutory Jurisdiction Arguments

Another argument in favor of limiting reference jurisdiction is based on the Supreme Court's jurisdictional statutes. In 1905 the Supreme Court decided it lacked jurisdiction to answer references concerning the constitutionality of legislation a province might enact in the future, but found it had jurisdiction to assess the constitutionality of actual provincial legislation. In so concluding, the Court applied the interpretive rule *ejusdem generis* to the "touching any other matter" language of Section 37 of the Supreme Court Act. The Court reasoned that the meaning of the general words "touching any other matter" was limited by the preceding language of Section 3 of the Supreme Court Act, which described the Court as "[a] court

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107. Id. at 592. A draft of the law had been submitted to the Court. Id. at 583-87.

108. Id. at 603 (Idington, J., dissenting). Judicial consideration of "future possible legislation before the matter has passed through the beneficent [sic] ordeal of public discussion, parliamentary investigation, and solemn determination in... Parliament or Legislative Assembly is," said Justice Idington, "an innovation" fraught with such far reaching consequences that it should be rejected by the Court. Id. Justice Idington renewed his separation of powers argument five years later in Reference re References, 43 S.C.R. 536 (1910), aff'd, App.Cas. 571 (1912). The provinces, objecting to Supreme Court reference jurisdiction, argued that Parliament had no power to compel the Supreme Court to give advice. Id. at 543. Justice Idington agreed, contending that reference jurisdiction made the Court "an advisory adjunct of the Department of Justice," a function "subaltern law officers of the Crown" usually performed. Id. at 567 (Idington, J., dissenting). Justice Idington insisted that imposing advisory duties on the Court would "degrade this Court" and "destroy a fundamental principle of our government." Id. at 582. "The production of a thesis" on abstract legal questions "might be a profitable mental exercise," but it was "beyond the scope and purview of anything permitted by the 'British North America Act' as part of any judicial duty." Id.


110. Id. *Ejusdem generis*, as stated by Lord Campbell, requires that "where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." Id. at 600-01 (quoting Lord Campbell).

111. Id. at 591. The version of the relevant Act before the Court was the Supreme and Exchequer Courts Act, 2 R.S.C. ch. 135, § 37 (1866).
of common law and equity."\textsuperscript{112} Such a court, it had been argued, had jurisdiction only in actual cases.\textsuperscript{113}

3. Policy Arguments

The usually speculative nature of the Court's task in a reference case bottoms the most repeated policy argument against reference jurisdiction. This argument applies to all references, regardless of their subject matter and without relation to the federal structure of the Canadian Dominion. The argument holds that courts require the specific facts of an actual controversy to illuminate the complexities of legal issues, and courts therefore should not and cannot resolve abstract legal questions.

In the \textit{Reference re Abstention from Sunday Labour},\textsuperscript{114} the Supreme Court was asked to determine the constitutionality of proposed provincial legislation.\textsuperscript{115} Counsel for the Canadian Copper Company objected, arguing that the Court's reference jurisdiction extended only to "Act[s] actually passed by a provincial legislature" and not to "speculative or academical questions as to the powers possessed by such legislature."\textsuperscript{116} The Court agreed in principle, but proceeded to answer the questions because "the practice of this Court heretofore has been to answer questions similar to those now submitted."\textsuperscript{117}

In \textit{Reference re Criminal Code}\textsuperscript{118} Justice Duff explained

\begin{itemize}
  \item \textsuperscript{112} Id. at 588, 591. \textit{See} Supreme and Exchequer Courts Act, 2 R.S.C. ch. 135, § 3 (1886).
  \item \textsuperscript{113} 35 S.C.R. at 592-94. Justice Sedgwick dissented, finding no difference between considering the constitutionality of proposed or actual provincial legislation. Justice Idington concurred with the majority, however, while maintaining that provincial sovereignty prohibited the Governor General from submitting actual or hypothetical questions of provincial law. In every prior reference concerning provincial law, argued Justice Idington, the province consented to the submission. He discussed several such references, concluding that he "would prefer to attribute the Court's action in these cases to ... [provincial and Dominion] consent." \textit{Id.} at 600.
  \item \textsuperscript{114} 35 S.C.R. 581 (1905).
  \item \textsuperscript{115} Id. at 581.
  \item \textsuperscript{116} Id. at 588.
  \item \textsuperscript{117} Id. at 592. Justice Idington agreed that the Court lacked jurisdiction, but disagreed with the decision to proceed because of past practice. \textit{Id.} at 602 (Idington, J., dissenting). He acknowledged that the Court answered similar questions in the past, but objected "that not in a single case had the right or power been challenged by any of the parties, and hence never argued, till this reference." \textit{Id.} Furthermore, said Justice Idington, "[n]one of the cases have gone so far, ... as would be required here, to answer speculative questions." \textit{Id.} at 603.
  \item \textsuperscript{118} 43 S.C.R. 434 (1910).
\end{itemize}
one of the principle reasons for objecting to references in hypothetical cases. He stated that the Court should refuse "to answer questions the replies to which might properly be influenced by the circumstances in which the questions should arise for actual judicial decision." Justice Duff’s concern was in part that such decisions would "tend to embarrass the administration of justice," but also that a court cannot articulate useful legal principles based on speculation about actual application of those principles. Justice Duff reiterated the argument in detail nineteen years later in Reference re Waters and Water-Power, noting "the difficulty, indeed the impracticability, of giving precise and categorical answers to some of the questions submitted." He cited Attorney Gen. for British Columbia v. Attorney Gen. for Canada in which the English Privy Council found it “practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts,” and John Deere Plow Co. v. Wharton in which the Privy Council predicted that opinions based on hypothetical circumstance “must almost certainly miscarry.”

Although by 1950 no one questioned the Court’s jurisdiction to render advisory opinions, the Court remained concerned about the difficulties involved. Chief Justice Rinfret explored the question in Reference re Wartime Leasehold Regulations. After noting that the Court was “limited to the statements of fact contained in the Order of Reference” and those other facts “of which it could ordinarily take judicial notice,” Chief Justice Rinfret asserted that questions about “the constitutionality of legislation disputed on the ground of colourability should really be brought before the courts not on a Reference, but in an ordinary case.” As recently as 1981, the Supreme Court ex-

119. Id. at 453.
120. Id. (quotation omitted).
121. Id.
122. 1929 S.C.R. 200.
123. Id. at 226.
124. 1914 App.Cas. 153 (P.C.) (Can.).
125. Id. at 162.
126. 1915 App.Cas. 330 (P.C.) (Can.).
127. Id. at 339. Justice Smith concurred in Justice Duff’s opinion, elaborating on facts generally known, but not before the Court, to illustrate “the difficulty of giving general answers to . . . questions applicable to every possible variation of facts and circumstances.” 1929 S.C.R. at 233 (Smith, J., concurring).
129. Id. at 126.
130. Id. at 128. “The ‘colourability’ doctrine is invoked when a statute bears
pressed concern about the “particular difficulty in a constitutional reference when only the bare bones of the statute arrive for consideration.”

A problem associated with the speculative nature of many references is that interested parties often are not represented. This lack of representation may raise due process concerns, particularly when a reference opinion affects unrepresented parties who may be involved in subsequent litigation on the same issue.

Finally, some argue that the Supreme Court should decline, on a policy basis, to answer references involving political questions or moot issues. The Court rejected both arguments in the 1982 Reference re the Constitution of Canada. It rejected the political question argument, reasoning that even if political questions were raised, constitutional issues also would be present. On the mootness claim, raised because Parliament proclaimed the Constitution Act of 1982 before the Court had addressed the Act’s constitutionality, the Court concluded that “the importance of the constitutional issue” justified giving an answer on appeal. In fact, the Court could have rejected the mootness argument on the simple basis that references are not actual cases in the first place and thus cannot become moot.

In sum, opponents of reference jurisdiction have argued that it is unconstitutional under the BNA, contrary to provincial rights, violates separation of powers and due process, does not come within the Supreme Court Act’s jurisdictional grant,

the formal trappings of a matter within jurisdiction but in reality is addressed to a matter outside jurisdiction.” P. HOGG, supra note 24, at 322. For example, in Reference re Upper Churchill Water Rights, the Supreme Court found that a Newfoundland statute purporting to be an exercise of the provincial expropriation power was actually a nullification of a hydropower contract and thus outside the provincial jurisdiction. [1984] 1 S.C.R. 297, 335. Hogg notes that “there is a very fine line between adjudication on policy and adjudication on validity.” P. HOGG, supra note 24, at 322. He cautions that courts should avoid voicing disapproval on policy grounds in the interest of judicial neutrality. Id.

“The colourability doctrine can and should be stated without impugning the legislative branch; it simply means that ‘form is not controlling in the determination of essential character.’” Id. (quoting Abel, The Neglected Logic of 91 and 92, 19 U. TORONTO L.J. 487, 494 (1969)).

132. See, e.g., Reference re the Constitution of Canada, [1982] 2 S.C.R. 793, 805 (stating that the respondent had argued that the Supreme Court should not answer the referred question because it was “purely political” and “had become academic”).
133. Id.
134. Id. at 805.
135. Id. at 806.
and undermines fair judicial decision making. The Supreme Court usually has rejected these arguments or has articulated countervailing reasons why it should proceed. The debate accompanying Canadian acceptance of the reference process, however, has had some impact on modern use of the reference proceeding.

B. ARGUMENTS FAVORING REFERENCE JURISDICTION

Although the Supreme Court has offered justifications for its reference jurisdiction, much of the argument favoring references has been defensive. This is true not because there are no positive arguments to be made, but because the reference system was an inheritance that required justification only after it was questioned. The burden was on challengers to justify change, rather than on defenders to justify the status quo.

1. Constitutional Arguments

Proponents of the reference responded to detractors who argued that the BNA Act did not authorize Parliament to provide for Supreme Court reference jurisdiction. Observing that Section 101 of the BNA Act permitted Parliament to create a court that could render advisory opinions, Chief Justice Fitzpatrick reasoned that Parliament also could confer reference jurisdiction on an already-existing court.

Proponents of reference jurisdiction also found authority in Section 91 of the BNA Act, which authorized legislation for the

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136. "[I]t will not be suggested," argued Chief Justice Fitzpatrick, "that the Imperial Parliament could not constitutionally confer upon the Canadian Legislature the power to establish a court competent to deal with such references." Reference re References, 43 S.C.R. 536, 552 (1910), aff'd, App.Cas. 571 (1912). In his view the language of Section 101 authorizing legislation for "the better administration of the laws of Canada" "convey[ed] the widest discretion of legislation." Id.

137. Id. at 552-53.

138. Id. at 553. Fitzpatrick quoted the Privy Council in support: "The distinction between creating a new court and conferring a new jurisdiction upon an existing court is but a verbal and non-substantial distinction." Valin v. Langlois, [1879] 5 App.Cas. 115, 121 (P.C.). Justice Davies supported the Chief Justice's position, noting that § 101 granted power to the Canadian Legislature "notwithstanding anything in this Act." 43 S.C.R. at 562. "It would seem only right and proper," said Justice Davies, "that there should have been ... some means authorized by which opinions of some independent tribunal might be obtained on such questions as related to the proper interpretation of the constitutional Act itself." Id. He concluded that "such an apparently desirable objective was accomplished by the language of the 101st section." Id. at 562-63.
"Peace, Order and good Government" of Canada.\footnote{139} Because Section 91 empowered the Canadian legislature to grant reference jurisdiction,\footnote{140} Chief Justice Fitzpatrick did "not think it could seriously be argued for a moment . . . that power has not been vested in the executive" to refer questions to the Court.\footnote{141}

This argument assumes that answering references involving provincial legislation does not infringe provincial rights. At other times, the Court explicitly addressed the federalism issue.

\footnote{139}{British North America Act, 1867, 30 & 31 Vict., ch. 3, § 91 (U.K.).}
\footnote{140}{"If any doubt remains as to the legislative jurisdiction of Parliament [to grant reference jurisdiction to the Supreme Court] . . ., a reference to section 91 . . . should dispel that doubt." 43 S.C.R. at 562-63.}
\footnote{141}{\textit{Id.} at 553-54. The Supreme and Exchequer Courts Act, 1875, 38 Vict., ch. 11, § 52, allowed the Governor in Council to refer anything "as he may think fit" to the Court. It required the judges to certify both majority and minority opinions. The Supreme and Exchequer Courts Act, 1886, 2 R.S.C. ch. 135, § 37, is essentially the same provision with some minor revisions. The first important changes occurred in 1891. See The Supreme and Exchequer Courts Act, 1891, 54-55 Vict. ch. 25, § 4 (amending § 37). Parliament in 1906 repealed subsections 1 and 2 of § 37. Act to amend the Supreme and Exchequer Courts Act, 1906, ch. 50, § 2. These changes primarily were structural, clarifying the type of matters the Governor in Council could refer. For example, appellate jurisdiction over educational matters encompassed provisions of \textit{any law or Act}, as well as the BNA Act (emphasis identifies the changes). \textit{Id.}

This amendment did broaden reference power, however, by allowing reference jurisdiction over questions concerning the powers of Parliament, province Legislatures, or their governments "whether or not the particular power in question has been or is proposed to be executed." \textit{Id.} Furthermore, § 60(e) decisively altered the phrase "touching any other matter," to read "any other matter, whether or not in the opinion of the Court ejusdem generis with the foregoing enumerations." \textit{Id.}

The revisions of 1906 also subtly changed the judicial role. While the 1891 provisions stated that the Governor could refer questions to the Supreme Court "for hearing or consideration," and that the Court "shall" certify its opinion, the 1906 provisions seemed to respond to the issue of judicial discretion. The statute states, "it shall be the duty of the court to hear and consider" any reference made to it. Supreme Court Act, CAN. REV. STAT. ch. 139, § 60(2) (1906).

In 1927, Parliament again clarified the language. Supreme Court Act, CAN. REV. STAT. ch. 35, § 55 (1927). In 1956, Parliament repealed § 55(6) of the 1927 Act, which stated that reference opinions were advisory only and appealable as a final judgment. Act to Amend the Supreme Court Act and the Criminal Code, 1956 CAN. STAT. 321, 323 (§ 7). Repeal of the latter provision is understandable, because Parliament abolished appeals to the Privy Council in 1949. Act Amending the Supreme Court Act, ch. 37, 1949 (2d Sess.), CAN. STAT. 247, 249-50 (§ 3). Repeal of the former provision is curious, because the legislature may have intended reference opinions to assume a greater role than advice. The present codification is substantively the same statute as the 1952 provision as amended in 1956, and remains the authority for reference jurisdiction. See Supreme Court Act, CAN. REV. STAT. ch. S-26, § 53 (1985).}
In *Reference re References*, the Chief Justice analogized Supreme Court references on provincial laws to Privy Council references on Canadian laws. He suggested that just as the "Home Government" could refer questions to the Privy Council "[b]efore exercising . . . [the] prerogative of rejection," so could the Dominion government refer questions to the Supreme Court "in connection with the power of supervision over provincial legislation entrusted to the Dominion Government."

The Court refuted the oft-raised separation of powers complaint on two grounds. Justice Duff rejected the assertion that separation of powers was relevant under the Canadian Constitution. He argued that "the first paragraph of the preamble of the [BNA Act] discloses the intention that the Constitution of Canada shall be similar in principle to that of the United Kingdom." The United Kingdom Constitution, he argued, embodied no separation of powers principle.

Justice Anglin maintained, moreover, that separation of powers required the Court to exercise reference powers. He argued that Parliament clearly had the authority to seek legal counsel and to create a body of law officers for that purpose. He could find "nothing to prevent its requiring the discharge of such duties by lawyers who happen to be members of . . . [the Supreme Court]," and suggested that it was for Parliament, not the Court, to determine "[t]he wisdom of such legislation as a matter of policy."

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143. *Id.* at 557.
144. *Id.* In the same case Justice Davies argued that reference power must extend to provincial laws because Dominion and provincial legislative powers "are so interlaced that one can hardly be considered apart from the other." *Id.* at 563.
145. *Id.* at 588. "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion . . . , with a Constitution similar in principle to that of the United Kingdom." BNA Act, Preamble. See supra note 7.
146. "There is nothing . . . in the fact that this court is a court which according to traditional British notions is necessarily inconsistent with the exercise of [the reference jurisdiction]" 43 S.C.R. at 589.
147. *Id.* at 593-94.
148. *Id.* at 594.
149. *Id.* at 594. Justice Idington rejected this argument. He agreed that Parliament could create an advisory body, but disagreed that it therefore could choose to have the Supreme Court perform the function. *Id.* at 594 (Idington, J., dissenting) He noted Parliament had powers to create bodies for other non-judicial purposes and asked: "Can Parliament constitute this court a tariff commission, a civil service commission, a conservation commission, a department for the management of any of the affairs of state . . . ?" *Id.* at 591. "It is,"
2. Tradition

The Court often has justified reference jurisdiction on the basis that English and Canadian courts traditionally have exercised such jurisdiction. The Court offers this argument sometimes as evidence of the Constitution's meaning, and sometimes as a claim about the inherent nature of the reference function. In fact, members of the Court occasionally have asserted that reference power would exist even without the BNA Act provisions or the Supreme Court Act.

By the time the Supreme Court first directly faced the jurisdictional issue in 1905, it already had answered numerous references. In the Reference re Abstention from Sunday Labour, the majority, after explaining why the Court should not answer the questions posed, proceeded nevertheless to answer them because "the practice of this Court heretofore has been to answer questions similar to those now submitted." Five years later, the Chief Justice said he was bound by earlier cases that "established a rule of conduct which now has for me
the force of law."157 In the same case Justice Davies noted that "many of Canada's most distinguished jurists" have been involved in past references and none ever had raised the jurisdictional challenge.158

Probably no one raised the jurisdictional issue because British law long recognized a reference proceeding.159 In Reference re References,160 Chief Justice Fitzpatrick insisted the reference proceeding would exist even if no statute codified it, because "the members of this court are the official advisers of the executive in the same way as the judges in England are the counsel or advisers of the King in matters of law."161 The Chief Justice analogized British governmental powers to Dominion governmental powers to explain how the British practice was relevant precedent.162 The Court found British precedent persuasive, although Justice Idington argued that British reference precedent was inapplicable because the practice originated in "times when the separation of the legislative, executive and judicial functions were not supposed to be as necessary, . . . a principle of modern constitutional government as modern thought has held."163 Justice Idington earlier had suggested that the Court look instead to United States Supreme Court decisions for relevant precedent.164

3. Nonbinding Nature

In defending reference jurisdiction the Court frequently argues that because answers to the questions are merely advi-

158. Id. at 564.
159. Reference re Criminal Code, 43 S.C.R. 434, 451 (1910). "It has long been settled," wrote Justice Duff, "that the House of Lords is entitled to require the answers of the common law judges upon questions as to the existing state of the law whether arising out of litigation pending before the House or not." Id.
161. Id. at 547.
162. Id. at 557. Justice Duff suggested the same analogy. Id. at 588.
163. Id. at 575 (Idington, J., dissenting).
164. He cited J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 388 (1833), and T. COOLEY, CONSTITUTIONAL LIMITATIONS 192 (5th ed. 1883), and said "[t]here is much that is instructive . . . in the constitutional history of the United States." Reference re Abstention from Sunday Labour, 35 S.C.R. 581, 604 (1905). Five years later, he again urged the relevance of United States law, arguing that long American experience with the separation of powers issue should make the Canadian court recognize "the wisdom of making haste slowly." Reference re References, 43 S.C.R. 536, 580 (1910) (Idington, J., dissenting), aff'd, App.Cas. 571 (1912).
sory, some criticisms are irrelevant. Justice Girouard made this argument in *Reference re Criminal Code*,165 in response to the provincial claim that, because the reference was in reality an appeal of a criminal case, the Supreme Court had no jurisdiction.166 After expressing sympathy with the provincial concern, Justice Girouard concluded that “as our advice has no legal effect, does not affect the rights of parties, nor the provincial decisions, and is not even binding upon us,” he had no objection to answering the reference.167 Justice Davies made the same point in explicit response to the provinces’ federalism objections in *Reference re References*: “Being advisory only and not binding upon the body to whom they are given [the Governor General in Council] or upon the judges who give them they cannot be said to be in any way binding upon the judges of any of the provincial courts.”168 This particular defense of the reference proceeding has not persuaded most critics.169

4. Policy Arguments

Proponents also have defended the reference on the general policy ground that executive and legislative officials should have the benefit of legal advice before they act. In *Reference re References*, Chief Justice Fitzpatrick quoted Lord Campbell, who had advised his colleagues in the House of Lords that “[you] may be called on, in your legislative capacity, to change the law and before doing so it is proper that you should be satisfied beyond a doubt what the law really is.”170

165. 43 S.C.R. 434 (1910).
166. Id. at 435.
167. Id. at 436.
168. 43 S.C.R. 536, 561 (1910), aff’d, App.Cas. 571 (1912). The provinces maintained that Supreme Court exercise of reference jurisdiction in cases involving provincial laws interfered with provincial administration of justice under § 92 of the British North America Act. Id. at 541-42. Said Justice Duff: “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.” Id. at 590.
169. See infra text accompanying notes 194-99.
170. 43 S.C.R. at 549 (quotation omitted). Justice Davies suggested that such authority was surely granted, particularly for the purpose of interpreting the Constitution Act. Id. at 582. Justice Duff argued that it might be “absolutely essential that Parliament be in a position to inform itself as thoroughly as possible in advance of legislation ... [to be advised] not only how far its own powers extend ... [but] what authority may be lawfully exercised by the provinces in relation to it.” Id. at 587. “In all such cases,” said Justice Duff, “the advantage of trustworthy legal advice respecting the constitutional authority of the Dominion and the provinces respectively must be evident.” Id.
Reference proponents also have argued that the reference facilitates the purposes of the Constitution, particularly those related to the federal structure. In the 1981 Reference re Residential Tenancies Act,\(^\text{171}\) the Court stated: "A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution."\(^\text{172}\)

C. REFERENCE JURISDICTION AND PROVINCIAL SOVEREIGNTY

Because many references involve questions of provincial versus Dominion legislative authority, the provinces often claim that the Supreme Court violates their sovereignty by deciding references to which the provinces have not consented. This argument develops in any dispute about division of legislative authority under the BNA Act because reference jurisdiction allows the Supreme Court of the Dominion to resolve a dispute between the Dominion and a province.\(^\text{173}\) If the provinces truly are sovereign, the argument contends, they need not accept the Supreme Court’s opinion on the extent of their authority.

Justice Idington rooted his objection to the reference proceeding almost entirely in a concern for provincial sovereignty. In the Reference re Abstention from Sunday Labour,\(^\text{174}\) he responded to the argument that numerous past references involving provincial legislative authority evidenced the legitimacy of the proceeding, by insisting that the provinces had consented to the earlier cases.\(^\text{175}\) Absent consent by the provinces, the Supreme Court would have had no jurisdiction for the reference.

\(^{172}\) Id. at 723. Counsel in the Reference re Abstention from Sunday Labour told the Court that the reference “was intended to cover the case of questions actually arising from the action of rival legislative authorities.” 35 S.C.R. 581, 588 (1905).

\(^{173}\) Id. at 723. Counsel in the Reference re Abstention from Sunday Labour told the Court that the reference “was intended to cover the case of questions actually arising from the action of rival legislative authorities.” 35 S.C.R. 581, 588 (1905).

\(^{174}\) See supra notes 76-97 and accompanying text.

\(^{175}\) Id. at 598-600. "[I]n most of the cases there was in fact but a mutual submission of points in dispute...[with]little regard had to the form, save as a means of executing this mutual purpose..." Id. at 602. In Reference re References, counsel for the provinces claimed that "with but one exception" the provinces had consented to all prior references. 43 S.C.R. at 542. In that case it was on the basis of provincial consent that Justice Idington thought the Court should proceed with the reference to which British Columbia had consented, but not with the reference to which seven provinces had not consented. Id. at 568 (Idington, J., dissenting).
Reference proponents commonly respond that the provinces consented to references at the time of confederation. For example, Justice Taschereau accepted the Court's jurisdiction to hear references involving provincial legislation, but did "not think that . . . [the Court was] called upon to determine what was the law in any of the provinces before confederation." The claim that the provinces consented at the time of confederation presumes the Supreme Court Act grants the Court such jurisdiction, a claim reference opponents also dispute.

The Supreme Court Act as amended in 1922 made clear that provincial references could be appealed to the Supreme Court. The Act, however, also strengthened the case for provincial consent as a prerequisite to Supreme Court consideration of references on questions of provincial law. Chief Justice Anglin noted that Section 42a of the Act "seems to contemplate the enactment of provincial legislation applicable generally to references made to the highest court of final resort in the province." Lacking enactment of such provincial legislation, Section 42a seems to preclude appeal of provincial references. Thus, provincial consent, in the form of a statute declaring provincial court reference opinions final judgments, is necessary for an appeal to the Supreme Court. This argument does not make the general case for provincial consent, however, because it applies only to appeals from provincial references. Issues of provincial law still can be referred directly to the Supreme

178. An Act to amend the Supreme Court Act, 1922, ch. 48, § 42a, 1922 CAN. STAT. 189. Under the Act appeal may be had from "an opinion pronounced by the highest court of final resort in any province on any matter referred to it . . . by the Lieutenant Governor . . . whenever it has been by the statutes of said province declared that such opinion is to be deemed a judgment of the said highest court of final resort."
180. In Reference re Education in Montreal, 1926 S.C.R. 246, 251, aff'd, 1928 App.Cas. 200, the appeal was based not on a general statute like Justice Anglin contemplated, but on special legislation declaring the provincial court's opinion in the particular case a final judgment. Id. at 250. Justice Anglin suggested that "[i]t would seem improbable that Parliament contemplated enabling a provincial legislature to single out a particular reference . . . [and] still less that a specific judgment already rendered and not appealable when given should . . . become the subject of such legislation." Id. at 25. Justice Anglin concluded, however, that the Court should hear the appeal because the provincial statute was "within the letter of s. 42a." Id.
Court without provincial consent. Thus, Section 42a exhibits more deference to provincial high courts than a recognition of the need for provincial consent.

D. REFERENCES AS ADVISORY OPINIONS

A common response to many criticisms of the reference proceeding is that reference opinions are purely advisory and therefore have no legal impact on the provinces or other parties to current or future legal disputes. "We determine nothing," said Justice Taschereau in Reference re Fisheries, "[w]e are mere advisers, and the answers we give bind no one, not even ourselves."182

The Court's insistence that a reference is non-binding presumes that reference decisions differ from judgments in actual cases. In distinguishing the two, the Court seldom has said more than that reference opinions are non-binding. In the 1895 Fisheries reference, however, Justice Taschereau stated that the Court's task was "to say what is the law as heretofore judicially expounded, not what is the law according to our opinion."183 This statement is puzzling, because saying what the law is in the Court's opinion seems similar to saying what the law is as "heretofore judicially expounded." Apparently, Justice Taschereau is suggesting that in an actual case the Court is free to make law, while in a reference it may only state what the law is.

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181. The Supreme Court Act, supra note 68, provides in § 1(b) for the referral by the Governor General of any federal or provincial legislation.

182. 26 S.C.R. at 539. Fifteen years later, Justice Davies wrote that "I do not think this court or its members would feel bound in any concrete case which might arise hereafter by any expression of opinion we may now give on these questions." Reference re Criminal Code, 43 S.C.R. 434, 437 (1910). In Reference re References, Justice Davies added that Supreme Court reference opinions were not "in any way binding upon the judges of any of the provincial courts." 43 S.C.R. at 561. In the same case the Chief Justice said that it should not "be supposed for one moment that the Supreme Court will consider [itself] bound by its reference opinions." Id. at 550. Justices Duff and Anglin added their voices to the chorus of agreement, the latter saying the Court was "free to disregard it." Id. at 588, 592. Justice Davies also rejected the argument that reference jurisdiction created a conflict between provincial power under § 92 and Dominion power under § 91 because it is not binding. Id. at 561. The Court admitted "the futility of the proceeding" and justified it because "their opinions bound no one." Id. at 570. In Reference re Criminal Code, Justice Girouard also dismissed the jurisdictional challenge as unimportant because of the advisory nature of the reference proceeding. 43 S.C.R. at 436.

Implementing Justice Taschereau's distinction becomes difficult because common law discourse merges the two tasks. With rare exception, courts justify opinions about what the law is by citing past judicial opinions. Courts explain changes in the law by distinguishing the case before the court from earlier cases. A realist may insist, however, that courts really change the law for policy reasons or because of judicial bias. For a court actually to proceed differently in a reference than in a case, it must rely exclusively on past decisions without regard to the facts underlying the reference. The common law process makes this extremely difficult, if not impossible. Common law courts work in increments of specific cases rather than in general statements of broad legal principles. Even if a court can state the law abstractly, it seldom will serve the needs of those who seek the court's opinion. Academic treatises may reflect an objective interest in the state of the law, but those seeking reference opinions have particular applications in mind. Perhaps a court can adopt the treatise writer's attitude when deciding references and still perform as a common law court when deciding actual cases. The absence of concrete facts in a reference would facilitate such chameleon-like behavior. The Supreme Court, however, often searches for facts or assumes them in references, suggesting that it has difficulty performing the dual function Justice Taschereau described.

The claim that references are different from actual cases may reflect the Court's recurrent insistence that the former are non-binding. Perhaps references are different because they are non-binding, rather than non-binding because they are different. If theoretical arguments like Justice Taschereau's fail to distinguish the reference opinion on the basis of its substance, only the nature of the reference process may explain why the reference is non-binding. Justice Anglin urged that "[i]t must be understood that as this opinion is given without the advantage of argument except on behalf of the provincial Attorney-General, it would not be proper that it should be deemed binding." Although Justice Idington objected to this justification of

184. See infra text accompanying notes 333-38.
185. See Rubin, supra note 98, at 175-76.
186. Reference re Criminal Code, 43 S.C.R. 434, 454 (1910). More often, however, the Court simply asserts that the reference process does not raise problems because it is non-binding, without explaining why it is non-binding. See supra note 182 and accompanying text (discussing Court statements that references are non-binding).
the reference based on its nonbinding nature, the argument seems to have persuaded most members of the Supreme Court. Theoretical justifications of the reference as non-binding, however, have not diminished its impact on Canadian law.

E. REFERENCES AS PRECEDENT

The concept of non-binding references implies that they have no precedential significance. The Court has made the point explicitly. In Reference re References, Justice Duff stated that “the opinions expressed do not constitute judicial precedents by which this court can be bound.” In the 1958 Reference re Water and Water-Powers, the Court stated that “the answers are only advisory and will have no more effect than the opinions of law officers.” Theoretically, therefore, reference opinions are no different in legal effect than opinions of executive officials who implement laws or the legislative officials who enact laws. Justice Duff asserted that the Supreme Court “should be ready ‘without difficulty to change’ their opinion” when an actual case later raised a question previously decided by reference.

It is one thing, however, to show that the House of Lords does not always abide by the judges’ opinion, and quite another to assert that references have no precedential effect on

187. “To say that our opinion may bind no one is, I respectfully submit, not a satisfactory disposition of the matter.” Reference re References, 43 S.C.R. 536, 570 (1910) (Idington, J., dissenting), aff’d, App.Cas. 571 (1912). Justice Idington went on to explain that Parliament has the power to make reference opinions binding by enacting the opinions as law. Id.

188. Rubin, supra note 98, at 180.

189. “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.’” Id. at 177.

190. 43 S.C.R. at 588.


192. Id. at 228.

193. Reference re Criminal Code, 43 S.C.R. 434, 451 (1910) (quotation omitted). Justice Duff said that “if the question should afterwards be brought before them judicially,” they should be prepared to change their opinion. Id.

194. The Privy Council most often treated reference opinions as binding. For example, in Attorney Gen. for Man. v. Manitoba License Holder’s Assoc., Lord MacNaghten repeatedly described the earlier Local Prohibition Reference, 1896 App.Cas. 348 (P.C.), opinion as a “decision” and as “the judgment of this Board.” 1902 App.Cas. 73, 77-78 (P.C.). The Reference re Representation in the House of Commons described Supreme Court reference opinions as “decisions.” 1905 App.Cas. 37, 43 (P.C.). See Rubin, supra note 98, at 177.
lower courts or lesser governmental officials. In *M’Naghten’s Case*, Justice Manle accepted that reference opinions will be "cited in criminal trials." Similarly, in *Reference re References*, counsel argued that "[a]n opinion by the judges of the Supreme Court of Canada is entirely different from an opinion given by any other individuals, even if equally qualified, inasmuch as all provincial courts, while not, perhaps, legally bound to give effect to that opinion, would feel themselves bound by that opinion."

The Supreme Court itself has often relied on earlier reference opinions as precedent. Although as recently as 1957, in *Canadian Pac. Ry. v. Town of Estevan*, the Court stated that reference opinions are not binding in future cases, the Court rarely rejects reference opinions as relevant precedent. Even in *Town of Estevan*, after stating that reference opinions were not binding, the Court agreed with the holding of a reference that had been urged as precedent. The stature of Supreme Court references, therefore, is difficult to ignore. The precedential method of the common law, moreover, increases the likelihood that courts will follow prior reference decisions. In response to an objection that a Supreme Court reference opinion on one province’s legislation might

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195. 10 Cl. & F. 200 (1843).
196. Id. at 204.
197. 43 S.C.R. at 544. Ample evidence suggests that Justice Idington was correct. See, e.g., Milk Board v. Hillside Farm Dairy Ltd., 40 D.L.R. 2d 731, 733 (B.C. 1963) (holding Reference re Farm Prods. Mktg. Act (Ont.), 1958 S.C.R. 31, binding); Legal Proceedings Suspension Act Reference, [1942] 3 D.L.R. 318 (Alta.) (quoting preamble to Act and stating that Reference re Debt Adjustment Act, 1935, 1942 S.C.R. 31, was binding); The King v. Brinkley, 14 O.L.R. 434, 436-37 (1907) (holding Reference re Criminal Code Sections Relating to Bigamy, 27 S.C.R. 461 (1897) binding). Justice Idington stated the argument less subtly: "What right have we to attempt to overawe them [the provincial courts] by dicta of ours, obtained by this method?" Reference re References, 43 S.C.R. at 572 (Idington, J., dissenting). In addition to believing provincial courts would hesitate to ignore the Supreme Court’s reference opinions, Justice Idington also feared the Court’s repeated insistence that such opinions were non-binding "would . . . encourage a contempt for the highest court in the Dominion.” Id. at 578.
199. In 1959 Gerald Rubin reported that "there is not one recorded instance since 1891, with the exception of the Kerley case, where opinions rendered on either federal or provincial references were repudiated in a subsequent reference or concrete case.” Rubin, supra note 98, at 180. In Kerley v. London & Lake Erie Transp. Co., [1912] 6 D.L.R. 189 (Ont.), a provincial court declined to follow the Reference re Abstention from Sunday Labour, 35 S.C.R. 581 (1905). Id. at 192, 194.
bind unrepresented provinces, Justice Idington agreed that “[s]uch must of necessity under our system of jurisprudence, resting upon precedent, be the result of any decision of any concrete case.” In Reference re Wartime Leasehold Regulations, Chief Justice Rinfret reasserted that reference opinions are non-binding, but then stated that “in a contested case where the same questions would arise, they would no doubt be followed.”

F. A MANDATORY OR DISCRETIONARY JUDICIAL FUNCTION

The conclusion that reference jurisdiction is constitutional and appropriate did not resolve questions relative to the Court’s exercise of the function. Many policy arguments made against the reference also could be urged as reasons for the Court to decline to render opinions in particular cases. Such an exercise of judicial discretion would depend, of course, on the Court’s authority to abstain.

The most persistent critic of the reference, Justice Idington, did not urge that the Court had such discretion. Indeed, he insisted that the Court is “bound to observe and discharge such judicial functions as are implied [in section 101].” Other members of the Court have seen some room for judicial maneuvering. Some have suggested a bit of judicial diplomacy, while others have argued for a degree of judicial discretion. For example, Justice Davies believed the Court could urge the executive to withdraw or reformulate reference questions. Other justices believed the Court appropriately could abstain from hearing certain references.

201. Reference re References, 43 S.C.R. at 568 (Idington, J., dissenting).
203. See supra text accompanying notes 114-35.
204. Reference re References, 43 S.C.R. at 569-70 (Idington, J., dissenting).
205. Reference re Criminal Code, 43 S.C.R. 434 (1910). Justice Davies reluctantly rendered an opinion “in obedience to the imperative provisions of the statute,” but argued “that the better course would be for this court to refer the questions back to His Excellency in Council,” pointing out the problems inherent in a judicial opinion under the circumstances. Id. at 437. Justice Anglin made the same point after stating that “the court answers the questions now submitted with reluctance and diffidence, solely in obedience to the imperative provisions of the statute.” Id. at 454; see also Attorney Gen. for Ont. v. Attorney Gen. for Can., 1912 App.Cas. 571, 589 (P.C.) (Can.) (stating that the Court could point out in its answer its reservations, or could “make the necessary representation to the Governor-General in Council” if it thought such treatment of the question was appropriate.”
206. 43 S.C.R. at 453-54. The Court had precedent for such a conclusion. In the 1882 Reference re the Quebec Timber Co., Cout. Cas. 43 (1882), the Court
In at least one case the Supreme Court declined to answer several questions because the relevant facts were not before the Court. Justice Duff insisted that when the "interrogatory is general in form" and the "facts affecting [specific interests] are capable of ascertainment," it is inappropriate to answer.207

Proponents and opponents of reference procedure have articulated plausible theories for their positions, based on constitutional and statutory law, common law conceptions about the role of courts, policy concerns about the impact of judicial advice, and conceptions of the Canadian federal system. The next section examines the history of Supreme Court references, where practice has tested the competing theories.

deployed to answer some questions because of an expected effect on private rights. In Reference re References, decided the same year as Reference re Criminal Code, Chief Justice Fitzpatrick, admitted "it is our duty to consider the questions submitted," 43 S.C.R. at 547, but stated:

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 . . . not to insist upon answers being given, . . . notwithstanding that such answers would not in any circumstances have the binding force of adjudication, like decisions given in regular course of judicial proceedings.

Id. at 547.

Perhaps the Chief Justice's concern for the proper administration of justice reflected a recognition that reference opinions were in fact more than merely advisory.

Chief Justice Fitzpatrick's argument may mean that, when exercising its reference jurisdiction, the Court, like any legal advisor, should be free to urge its advisee to pursue a different course of action than the one contemplated. Under this view, the executive and the Court would consult about the appropriateness of a reference opinion in particular cases. In support of his position the Chief Justice quoted Hargrave:

However numerous and strong the precedents may be in favour of the King's extra-judicially consulting the judges on questions in which the Crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve lest the rigid impartiality so essential to their judicial capacity, should be violated.

Id. at 551 (quotation omitted).

207. Reference re Water and Water-Powers, 1929 S.C.R. 200, 224. In support Justice Duff cited a Privy Council decision effectively holding that the Supreme Court had gone too far in answering particular reference questions. "[T]he task imposed was . . . an impossible one, owing to the abstract character of the questions put." Id. at 228 (citing John Deere Plow Co. v. Wharton, 1915 App.Cas. 330, 339 (P.C.) (Can.).
III. REFERENCE JURISDICTION IN PRACTICE

A. THE OPINIONS

The Supreme Court of Canada has answered approximately 115 references. The first reference opinion, rendered in 1874, concluded that the Dominion Parliament exceeded its legislative authority in incorporating a teachers' society. The most recent reference opinion, rendered in 1989, upheld a Newfoundland workers' compensation law in the face of a challenge under the Canadian Charter of Rights and Freedoms. Other reference opinions have dealt with similar questions related to Dominion and provincial legislative authority. Although the Supreme Court has rendered mixed results in terms of relative Dominion and provincial powers, neither side has been reluctant to turn to the Supreme Court for answers to the most basic questions of Canadian constitutional government.

Anyone familiar with the rapidly expanding caseload of American courts might expect the reference caseload of the Canadian Supreme Court to have grown steadily over the last century. It has not. As Figure I illustrates, the number of references has fluctuated. The number of references increased significantly during the 1920s to a peak in the 1930s. It then declined steadily through the 1970s before rising sharply in the 1980s. The most logical explanation for this pattern, particularly in light of the predominance of federalism issues in references, is that the provinces were especially concerned about the threat of expanding Dominion power in the 1930s and 1980s. In the 1930s the Dominion expanded economic regulations to counter the effects of the Great Depression. In the 1980s

208. See Appendix.

209. Reference re The Bros. of the Christian Schools in Canada, Cout. Cas., Apr. 4 (1874) (concluding that Parliament did not have jurisdiction to incorporate a teachers' society because the power was solely within provincial jurisdiction).


211. Strayer, even in the 1983 edition of his book, predicts a continuing decline in reliance on references. "The second century of Confederation has so far seen a sharply reduced rate of references in comparison to the volume of ordinary constitutional litigation, and this trend is likely to continue." B. STRAYER, supra note 6, at 295.

control over natural resources and amendment of the Constitution were the cause of provincial concern.\textsuperscript{213}


On the general question of the provincial role in constitutional amendment, see Hogg & Lederman, \textit{Commentaries: Amendment and Patriotism}, 19 ALBERTA L. REV. 369 (1981); Lederman, \textit{The Process of Constitutional Amend-
**Figure II**

**SUBJECT MATTER OF SUPREME COURT REFERENCES**

*1874-1989*

<table>
<thead>
<tr>
<th>Subject</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dominion Legislative Power</td>
<td>42</td>
</tr>
<tr>
<td>Provincial Legislative Power</td>
<td>30</td>
</tr>
<tr>
<td>Reference Jurisdiction</td>
<td>18</td>
</tr>
<tr>
<td>Dominion Versus Provincial Title to Land</td>
<td>9</td>
</tr>
<tr>
<td>Criminal Procedure</td>
<td>6</td>
</tr>
<tr>
<td>Individual and Charter Rights</td>
<td>5</td>
</tr>
<tr>
<td>Interpretation of Dominion Law</td>
<td>4</td>
</tr>
<tr>
<td>Railroads</td>
<td>3</td>
</tr>
<tr>
<td>Delegation by Parliament</td>
<td>3</td>
</tr>
<tr>
<td>Constitutional Amendment</td>
<td>3</td>
</tr>
</tbody>
</table>

Note -- In addition to the topics included above, the following subjects were considered in one or two references as indicated: provincial constitutional interpretation (2), interprovincial disputes (2), international law (2), provincial versus Dominion liability for costs (2), delegation by province (1), disallowance (1), interpretation of provincial law (1), payment of fines (1), and the Chief Justice of Alberta (1). Because some references have considered multiple issues, the total of subjects considered exceeds the total number of references.

*Note: All figures based on data in Appendix.*
As illustrated in Figure II, the vast majority of references concern the distribution of power in the Canadian federal system.\textsuperscript{214} Forty-two opinions have answered express questions about the extent of Dominion legislative jurisdiction. Thirty references have involved express questions about provincial legislative authority. Nine references have concerned provincial versus Dominion title to lands. Three references in the 1980s have resolved fundamental questions about the role of provinces in amendment of the Canadian Constitution. In addition, eighteen references have addressed questions about the nature and extent of Supreme Court reference jurisdiction, questions often reflecting provincial concern about Supreme Court authority to determine the scope of provincial powers.

No other subject-matter category accounts for a significant number of references, although a few opinions have addressed important questions. Six references have involved criminal procedure.\textsuperscript{215} Others have interpreted Dominion and provincial laws,\textsuperscript{216} determined the rights and responsibilities of rail-

\textsuperscript{214} Eighty-nine of the 115 reference opinions deal with questions relevant to the division of powers between the provincial and Dominion governments. An asterisk indicates these cases in the Appendix. This predominance of federalism issues — 76% — would be even greater if all cases involving the definition of Dominion or provincial power were included. Included in the total of 89 are those in which a provincial government expressly disagreed with the Dominion government or in which the definition of the power of one government would directly affect the power of the other government. At least ten other references have indirectly affected the distribution of governmental powers, in the sense that the denial or recognition of power in one government may indicate whether that the other government has such power. For example, three references dealt with the extent to which Parliament delegated power to executive officials of the Dominion government. Reference re Persons of Japanese Race, 1946 S.C.R. 248, aff'd, 1947 App.Cas. 87; Reference re Regulations Under the War Measures Act, 1943 S.C.R. 1; Reference re Tariff Board of Commerce, 1934 S.C.R. 538. Unless the power in question is exclusive with the Dominion government, or because it is exclusive with the provincial governments, the reference opinion will affect the distribution of powers between the provincial and Dominion governments. Thus, the percentage of references dealing with federalism is arguably as high as 84%.

\textsuperscript{215} Reference re Criminal Code, 43 S.C.R. 424 (1910); Reference re Depor- 

roads, interpreted provincial constitutional provisions, and interpreted international law. Only three references have involved express questions of individual rights, but that number should increase with the recent adoption of the Charter of Rights.

B. Who Refers Questions to the Supreme Court?

1. The Governor General

Pursuant to the Supreme Court's statutory reference jurisdiction, the Governor General has submitted most reference questions. The Governor General, however, seldom requests a reference independently, but acts at the government's behest. The submission by the Governor General is one of form, not substance. The government is not always the true party in interest when the Governor General refers a question to the Supreme Court. The government must approve every reference, but it may do so at the request of other parties.

Because of the often informal and extra-constitutional nature of Dominion-provincial relations, many references result from agreement between the Dominion and one or several provinces to refer a particular issue to the Supreme Court. For


221. The only body which can direct a reference to the Court is the "Governor General in Council." This phrase means Canada's Governor General and Privy Council, which stand at the formal apex of Canada's federal government; in practice, these bodies are only ceremonial; executive power is wielded by the Prime Minister and his cabinet — the government of the day.

example, questions relative to the Dominion's authority over aerial navigation were referred after agreement among participants at a Dominion-provincial conference. The 1931 Reference re Natural Resources involved questions in connection with negotiations between the Government of Canada and the Province of Saskatchewan. The Governor General submits numerous references on behalf of provinces, although presumably the government will not be happy with an opinion that Dominion legislation is ultra vires the BNA Act. These submissions likely reflect Dominion political strategy: rather than allowing the provinces to resist Dominion legislation, the Dominion prefers to have its court resolve the issue.

The Governor General submits some references on behalf of private parties. The Order in Council referring questions in Reference re Persons of the Japanese Race stated that "the Acting Minister of Justice reports that representations have been made to him, by and on behalf of a number of Canadian organizations and societies . . . requesting a reference to the Supreme Court of Canada." In Reference re Tariff Board of Commerce, the Governor General submitted questions in part as a response to "an appeal . . . by a Canadian manufacturer." Foreign governments also have influenced the Governor General to seek reference opinions.

225. 1931 S.C.R. 263.
226. Id. at 264.
227. For example, five references submitted in 1936 questioned the validity of the Dominion government's legislative response to the Great Depression. See supra note 212. The Governor General submitted all five, but not because the government doubted the validity of the various acts. The provinces cannot refer questions to the Supreme Court, see supra notes 27-31, so they must ask the Governor General to act on their behalf, or must seek a provincial court opinion and then appeal to the Supreme Court if they dispute the result.
229. Id. at 253.
231. Id. at 540. Justice Rinfret reported that "[t]he Governor in Council considered these matters were of great public importance and thought, pending any decision of the matter, the opinion of the Supreme Court of Canada should be obtained." Id.
232. In one reference, for example, the Governor General submitted a reference at the request of the Minister of Justice after receiving a letter from the Consul General of Japan urging "exercise [of] the power of disallowance with regard to a statute of British Columbia." Reference re Employment of Aliens, [1921] 63 S.C.R. 293, 294, aff'd, 20 Oct. 1923.
2. Appeals from Provincial High Courts

The second most common source of reference questions is appeals from provincial high courts. Twenty-three references have been appeals from provincial reference opinions.233 The Governor General submitted twelve other references in response to provincial court decisions.234 Although appeals from provincial references represent less than a quarter of all refer-


This total does not include an unusual case reported only in the British Columbia Law Reports, Sewell v. British Columbia Towing Co., 1 B.C.R. 153 (1882) (The Thrasher Case). Apparently, the issue in the case was submitted to the Canadian Supreme Court as a reference. Id. at 243 (note). The Supreme Court's opinion is included as a note at the end of the provincial court's opinion and is treated as authority for that opinion. Id. at 243-44 (note).

ence proceedings, they have increased markedly since 1940. Nearly half of the references since 1940, and more than half since 1970, have come by appeal from provincial courts. This trend is partly attributable to the 1922 amendment of the Supreme Court Act allowing appeals from provincial courts, but continued growth in the proportion of such appeals suggests other factors are at work. Although theoretically some questions can be raised in a Supreme Court reference only on appeal, the subject matter of the references does not correlate with whether the Court hears the reference on the Governor General’s submission or on appeal from a provincial

235. Twenty-three of 115 references have come by appeal from provincial references. Since 1940, 22 of 51 references have been by appeal from a provincial reference. Since 1970, 12 of 21 references have been appeals. See Appendix.

236. An Act to amend the Supreme Court Act, 1922, ch. 48, 1922 CAN. STAT. 189.

237. The Supreme Court Act enumerates the subject matter of references, CAN. REV. STAT. ch. 5-25, § 53(1) (1985), but paragraph (2) opens the flood gates to Governor General discretion. Id. § 53(2) (stating that the Governor in Council may refer to the Court any important question as the Governor sees fit).
Whatever the reasons, many questions the Governor General could submit are now first raised in provincial high courts. The provinces probably prefer this situation because they have more control in framing the issues, they limit Dominion and Supreme Court discretion by coming to the Court on appeal, and they may be more likely to get a favorable decision in the provincial court. Figure III illustrates the growth in appeals as a percentage of the total number of references.

3. Statutory Appeals

Occasionally references result from statutorily authorized appeals from decisions of other governmental entities or processes. In Reference re Manitoba Education Statutes, the Catholic minority appealed to the Governor General under Section 22(2) of the Manitoba Act, questioning the provincial legislature’s curtailment of a tax immunity for Roman Catholics who send their children to church schools. Although the Supreme Court refused to hear the appeal on the facts submitted, the Court made clear that in some cases Section 22(2) would authorize appeal. Two other references were appeals from arbiters’ decisions in Dominion-provincial disputes in which the statute authorizing the arbitration expressly provided for such appeal to the Governor General.

238. Since 1980, appeals from provincial references have involved questions of provincial legislative authority, Dominion legislative authority, provincial versus Dominion title to land, provincial rights in constitutional amendment, intervention in reference proceedings, and judicial authorization of wiretaps. See Appendix.
239. Although the Supreme Court is free to overturn the provincial court opinion, comity seems to work in favor of affirmance.
240. 22 S.C.R. 577 (1894).
242. 22 S.C.R. at 652.
243. The Supreme Court stated that “[t]he proper answers to be given to the questions propounded depend principally on the meaning to be attached to the words 'any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education' in subsection 2 of section 22 of the Manitoba Act.” Id. at 652. The Court concluded that the relevant rights and privileges were those existing at the time of confederation. Id. at 661.
244. Reference re Common School Fund and Lands, 31 S.C.R. 516 (1901), rev’d, 1903 App.Cas. 39; Reference re Common School Fund and Lands, 28 S.C.R. 609 (1898). Both references involved questions of the rights of Ontario and Quebec versus the Dominion with respect to school trust lands. The appeals were pursuant to similar legislation the Dominion Parliament and the two provinces had adopted. The Dominion version provided that “[a]ny award made under this Act shall be . . . subject to appeal to the Supreme Court of Canada.” Act of July 10, 1891, ch. 6, 1891 CAN. STAT. 82, 83. See Act of May 4,
C. Appeals to the Privy Council

References also were appealed to the English Privy Council before the abolition of all such appeals in 1949. Of this number, one was withdrawn, three were denied, five were reversed, and the remainder were affirmed. The Privy Council apparently was chary of interfering in Canadian federal politics, but nevertheless reversed the Supreme Court in some important cases. In two cases the Privy Council overruled the Supreme Court on questions of Dominion versus provincial legislative competence.

The Privy Council also reversed the Supreme Court's decision that women were ineligible for membership in the Canadian Senate. The Privy Council's affirmance of Supreme Court reference opinions has been important, particularly its agreement with the constitutionality of the reference process itself.

1891, ch. 2, 1891 Ont. Stat. 6, 7; Act of Dec. 30, 1890, ch. 4, 1890 Que. Stat. 31, 32.

245. See supra note 69.

246. See Appendix.


250. See Appendix.


IV. THE ROLE OF REFERENCES IN DEFINING THE CANADIAN FEDERATION

Given the predominance of federalism issues in reference cases, the reference procedure has played an important role in the constitutional definition of the Canadian federal system. The provinces were concerned from the beginning that the Supreme Court's reference jurisdiction would threaten their sovereignty. Assurances that reference opinions would not be binding did not quell provincial concerns. After failing to persuade the Court that the reference proceeding violated their constitutionally guaranteed sovereignty, the provinces tried to circumvent the Court by establishing their own reference procedures and bypassing the Supreme Court with direct appeals to the Privy Council.

Although some argue that the reference may limit Dominion power, the general assumption has been that the Supreme Court favors the Dominion over the provinces. The Dominion executive appoints members of the Court and “the provinces have no role in the selection of judges, and are not in practice consulted before an appointment is made.” Although a statute requires that three of the Court's nine members be from Quebec, and by custom the Dominion executive appoints three members of the Court from Ontario, two from the four western provinces, and one from the four Atlantic provinces, that tradition was broken in 1978. Even with mandatory and customary provincial representation, however, the Court nonetheless is a part of the Dominion government and thus a possible threat to the provinces.

The following three sections evaluate the impact of

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254. See supra notes 76-97 and accompanying text.
255. Id.
256. As indicated supra note 69, all appeals to the Privy Council were abolished in 1949.
259. Hogg, supra note 223, at 40.
260. Supreme Court Act, CAN. REV. STAT. ch. S-26, § 16 (1985). Hogg asserts the purpose of this provision is to ensure that at least three members of the Court are versed in the civil law. Hogg, supra note 223, at 39. Although this is a justifiable rationale for Quebec's special treatment, political power certainly made the provision possible.
261. In 1978, Judge Spence from Ontario retired and was replaced by Judge McIntyre from British Columbia. See Hogg, supra note 223, at 39.
Supreme Court reference opinions on provincial sovereignty and the distribution of power in the Canadian federation. The Article considers three categories of references: those interpreting Dominion power under Section 91 of the BNA Act, those interpreting provincial power under Section 92 of the BNA Act, and those involving questions of control over land and natural resources. Although the raw numbers suggest the provinces have lost more than their share, it is not clear whether the Supreme Court has sided with the Dominion in its political struggle with the provinces.

A. DOMINION POWER UNDER SECTION 91 OF THE BNA ACT

Forty-two references have raised questions of the Dominion’s legislative jurisdiction under Section 91 of the BNA Act. In twenty-seven of these references the Supreme Court concluded that existing or proposed legislation was intra vires. In eight the Court found the legislation ultra vires.

262. See Appendix.

and in five the Court concluded the legislation was both intra and ultra vires. The Court refused to answer the question posed in one reference. Sixteen of these opinions were appealed to the English Privy Council. The Privy Council, showing no Dominion or provincial bias, affirmed the Supreme Court opinion in twelve cases, reversed in one, reversed in part in another, and refused to hear one appeal. The two reversals were of Supreme Court opinions that found Dominion legislation both intra and ultra vires.

Until 1958, the Dominion government submitted all references that raised questions about the validity of Dominion legislation. Although provincial references may address


266. Reference re Can. Temperance Act, Cout. Cas. 204 (1907).


271. The Board of Commerce submitted one of these cases, Reference re Bd. of Commerce, 60 S.C.R. 456 (1920), aff'd, [1922] 1 App.Cas. 191, pursuant to The Board of Commerce Act, ch. 11, § 32, 1919 CAN. STAT. 231, 238. The Senate submitted three under the provisions of The Supreme and Exchequer Courts Act, ch. 11, § 32, 1919 CAN. STAT. 231, 238. (Reference re The Bros. of the Christian Schools in Can., Cout. Cas. Apr. 4 (1874); Reference re Que. Timber Co., Cout. Cas. 43 (1882); Reference re Can. Provident Ass'n, Cout. Cas. 48 (1882)). The Governor General submitted the remainder pursuant to The Supreme Court Act, R.S.C. ch. 35 (1927).
questions of Dominion law,272 and provincial reference opinions have been appealable to the Supreme Court since 1922,273 not until 1958 did an appeal from a provincial reference question the validity of Dominion legislation.274 Since 1958, four of the five references addressing Parliament’s Section 91 powers have come to the Court on appeal from provincial references.275

Although the number of cases is small, the twenty-year period during which appeals from provincial reference opinions have been the dominant avenue of challenge to Dominion legislation may suggest a shift from the traditional approach of persuading the Dominion government to have the Governor General submit such questions. The provinces have good reasons to prefer initial submission of questions under Section 91 to their own courts. They can forego the politics inherent in getting the Governor General to submit, give their court first opportunity to address the question, and guarantee a Supreme Court hearing should they be dissatisfied with the provincial court’s opinion.276

The reference opinions on Dominion legislative authority have played an important, but not a distinctive, role in the definition of Canadian federalism. Of the eight cases finding Dominion legislation ultra vires, three concerned control of

272. “Each provincial law is broadly framed, allowing the constitutionality of federal laws as well as provincial laws to be referred, as well as nonconstitutional questions.” Hogg, supra note 223, at 51.
273. An Act to amend the Supreme Court Act, ch. 48, 1922 CAN. STAT. 189.
274. Reference re The Real Property Act, 1958 S.C.R. 285. Three pre-1958 references, although not appeals from provincial references, were motivated by non-reference, provincial decisions: In one decision the Supreme Court found intra vires a Dominion statute that the Ontario high court had held ultra vires. Reference re Criminal Code — Bigamy, 27 S.C.R. 461, 482 (1897) rev’d, Regina v. Flowman, 25 O.R. 656 (1895). In Reference re Fisheries Act, 1914, 1928 S.C.R. 457, the Supreme Court found ultra vires a Dominion statute that a British Columbia Magistrate also had found ultra vires. Id. (citation omitted). In Reference re § 110 of the Dominion Companies Act, 1934 S.C.R. 653, the Supreme Court found intra vires a Dominion statute the Ontario Court of Appeals had found ultra vires in Meyer Malt & Grain Co. v. Combs, 1933 O.R. 259. Although the Ontario decision was settled after an appeal to the Supreme Court, the Dominion chose to raise the question on a reference. 1934 S.C.R. at 654.
276. Hogg adds, “[The] right to appeal without leave means in effect that the provincial governments enjoy the same privilege as the federal government in being able to secure a ruling from the Supreme Court of Canada on a controverted point.” Hogg, supra note 223, at 51.
natural resources,\textsuperscript{277} two concerned insurance industry regulation,\textsuperscript{278} and the others related to marriage,\textsuperscript{279} trade and competition,\textsuperscript{280} social security,\textsuperscript{281} and the power of incorporation.\textsuperscript{282} Nothing suggests the reference procedure was peculiarly appropriate to these subjects, nor that use of the reference particularly influenced the outcome. Discussions of Dominion power under Section 91 treat reference opinions as part of the interpretive case law, but not as a part having either greater or lesser importance than non-reference opinions.\textsuperscript{283}

The only basis for claiming that references have peculiarly influenced the evolution of Canadian federalism is that seventy-five percent of the Supreme Court decisions on the validity of Dominion legislation have favored the Dominion.\textsuperscript{284} It is impossible to determine whether this Dominion advantage results from the Supreme Court viewing itself as the Dominion's court, and this study has not developed the data necessary to determine if the advantage to the Dominion is similar in non-reference opinions on the same subject.\textsuperscript{285} Significantly, however, provinces continue to bring federalism issues to the Court, and, as noted above, the Court has decided against the Dominion on occasion. The references in which the Supreme Court has invalidated Dominion legislation have spanned the history of the Court's reference jurisdiction, and in the period of great-


\textsuperscript{278} Reference re Ins. Act, 1910, 48 S.C.R. 260 (1912); Reference re § 16 of the Special War Revenue Act, 1932, 1942 S.C.R. 429.

\textsuperscript{279} Reference re Marriage Act, 46 S.C.R. 132 (1912), aff'd, 1912 App.Cas. 880.


\textsuperscript{282} Reference re The Bros. of the Christian Schools in Can., Cout. Cas., Apr. 4 (1874).

\textsuperscript{283} That references generally receive the same consideration as other Supreme Court decisions is discussed supra text accompanying notes 194-99.

\textsuperscript{284} This figure is based on the 36 references in which the Court concluded that Dominion legislation was either ultra or intra vires. See supra notes 263-64. In five references the Court found Dominion legislation to be both ultra and intra vires. See supra note 265.

\textsuperscript{285} Strayer's statistics on the frequency with which the Supreme Court finds both Dominion and provincial legislation invalid indicate no significant difference between references and ordinary cases. B. STRAYER, supra note 6, at 284.
est Dominion ambition, the mid-1930s, the Supreme Court objected to as much Dominion legislation as it found acceptable.286

B. PROVINCIAL POWER UNDER SECTION 92 OF THE BNA ACT

The Dominion has enjoyed less advantage in references challenging the validity of provincial legislation under Section 92 of the BNA Act. The Court has found provincial legislation ultra vires fourteen times287 and intra vires twelve times.288 In three references the Court found provincial law both ultra and intra vires.289 References on provincial laws span the Court's

286. Judicial treatment of economic legislation of the 1930s, like United States Supreme Court reaction to the early New Deal legislation, led some to fear that the reference system disadvantaged the Dominion. See Davison, The Constitutionality and Utility of Advisory Opinions, 2 U. TORONTO L.J. 254, 270-75 (1937-38). Davison's objectivity is suspect, however, given his clear belief in the wisdom of the "new deal" program in both the United States and Canada. Id. Of Justice Cardozo's role in the American law, he writes: "Mr. Justice Cardozo, coming from a fine liberal tradition . . ., associated himself with the liberal group of the supreme court of the United States, happily enough in results, although in some opinions it is not clear that he understood the full economic significance of many modern problems." Id. at 274-75.


289. Reference re Incorporation of Companies, 48 S.C.R. 331, 332 (1913);
history with a seemingly random distribution of ultra vires and intra vires holdings.\(^{290}\) Again the significance of the numbers is probably that the Supreme Court does uphold provincial laws, even though consequently curtailing the scope of Dominion legislative authority.\(^{291}\) If the Supreme Court were inappropriately loyal to the Dominion government or somehow obliged to that government, it likely would not defer to provincial claims with such regularity.

Before abolition of English Privy Council appeals, approximately sixty percent of Supreme Court references on provincial legislation were appealed.\(^{292}\) As with appeals of references on Dominion legislation,\(^{293}\) the Privy Council almost always deferred to the Supreme Court opinion. In only one of twelve appeals did the Privy Council reverse the Supreme Court. In the 1894 Reference re Prohibitory Liquor Laws,\(^{294}\) the Supreme Court found Ontario's Act to Improve the Liquor License Acts ultra vires,\(^{295}\) and the Privy Council disagreed.\(^{296}\) Because this reference was the first concerning provincial legislation to be appealed, the provinces may have believed the Privy Council would be their salvation from Supreme Court invalidations of provincial laws. Every ultra vires ruling on provincial legisla-

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\(^{290}\) The earliest reference questioning the validity of a provincial law was Reference re The Thrasher Case, B.C.R. 153 (1882). The most recent were the two 1987 references under the Charter, Reference re Public Service Employee Relations Act, Alberta, 1980, [1987] 1 S.C.R. 313, and Reference re An Act to Amend the Education Act, (Ont.), 1987 S.C.R. 1148. The distribution of ultra vires and intra vires holdings in the intervening years appears to be random. See Appendix.

\(^{291}\) This conclusion derives from the principle of exclusiveness on which interpretation of BNA § 91-92 is based.

Each list of classes of subjects in s. 91 or s. 92 of the Constitution Act, 1867 is exclusive to the Parliament or Legislature to which it is assigned. This means that a particular "matter" will come within a class of subjects in only one list . . . . However, the exclusiveness of the two lists does not mean that similar or even identical laws may not be enacted by both levels of government. Some laws are available to both levels, but that is because such laws have a double aspect, . . . not because the classes of subjects duplicate or overlap each other; they do not.

P. Hogg, supra note 24, at 332-33.

\(^{292}\) See Appendix.

\(^{293}\) See supra note 284 and accompanying text.

\(^{294}\) 24 S.C.R. 170 (1894).

\(^{295}\) Id.

tion from that reference until 1948 was appealed to the Privy Council.²⁹⁷ None of those cases gave any hope of special Privy Council support for provincial autonomy. The Privy Council also affirmed in every appeal of an intra vires ruling,²⁹⁸ however, so apparently it had no tendency to favor either the provinces or the Dominion.

The tendency to seek provincial references followed by an appeal to the Supreme Court developed earlier with respect to questions concerning provincial law than it did regarding questions of Dominion law.²⁹⁹ A 1940 reference upholding the validity of British Columbia petroleum and coal regulations affirmed a reference opinion of the British Columbia high court.³⁰⁰ A second appeal of a provincial reference was submitted to the Supreme Court in 1948,³⁰¹ and from that date forward all but two Supreme Court references on provincial legislation have come by appeal from provincial reference opinions.³⁰² The Court found the provincial legislation ultra vires


²⁹⁸. Home Oil Distributors Ltd v. Attorney-Gen for B.C., 54 B.C.R. 48 (1939), aff’d 1940 S.C.R. 444. Reference re The Thrasher Case, B.C. 153 (1882) was by all appearances an appeal, although no statutory basis existed for such appeal and the Supreme Court opinion is not reported except as a note to the British Columbia court’s opinion. See supra note 233 and accompanying text (discussing Thrasher).


³⁰⁰. The two exceptions are Reference re Farm Prods. Mktg. Act, 1950,
in five of these references\textsuperscript{303} and intra vires in six.\textsuperscript{304} The Court affirmed the provincial court opinion in nine of these appeals. In the two reversals the provincial court found the provincial legislation intra vires.\textsuperscript{305} One might argue that these two reversals indicate a Dominion bias, but the evidence more likely demonstrates the Supreme Court's deferential attitude toward provincial courts.

C. PROVINCIAL VERSUS DOMINION CONTROL OF LAND AND RESOURCES

Fifteen references have addressed provincial versus Dominion control over land and natural resources. Most of these references have involved control over waters, submerged lands, and the minerals in those submerged lands. The Supreme Court has recognized a divided control over these resources consistent with the language of Sections 91 and 92 and relevant common law property doctrines. The Court has held that title to submerged lands depends on the nature of the waterway — the Dominion has title to the beds of tidal and navigable waterways and the province or riparian landowner has title to beds of nonnavigable waterways.\textsuperscript{306} The Court has held that the owner of the bed owns the fishery, except in tidal and navigable waters where fish are considered \textit{ferae naturae}.\textsuperscript{307} The power to regulate the fishery is divided between the Dominion


and the provinces. Ownership of minerals in submerged lands was found to depend on title in the case of territorial waters, and on international law in the case of nonterritorial waters.

References have addressed other natural resource questions, including ownership of precious metals, public rights in navigable waters, control over water power, control of public lands, natural products marketing, control of private water rights, regulation of navigation, and provincial authority relative to school and railway lands. Taken together, these references on the subject of natural resources have favored neither the provinces nor the Dominion. In the fifteen references, the Dominion prevailed six times and the provinces five times. Four opinions gave


311. Reference re Precious Metals, 1927 S.C.R. 458 (affirming, in a dispute between the Dominion and a private company, that the Crown owns precious metals, even under private lands), aff’d, 1929 App.Cas. 285. In terms of the relative rights of the provinces and the Dominion, Crown rights depend on ownership of the surface, absent a contrary reservation. See P. Hogg, supra note 24, at 569-70.

312. Reference re Waters and Water-Power, 1929 S.C.R. 200, 201-03.

313. I.d.

314. Reference re Sask. Natural Resources, 1931 S.C.R. 263, 266 (resolving a dispute between the Dominion and Saskatchewan over lands contained in the N.W. Territory and Rupert’s Land before the creation of the province).


no clear advantage to either side. Except on the subject of offshore minerals, reference opinions have not played a dominant part in resolving the allocation of natural resources. The two offshore mineral references, Reference re Offshore Mineral Rights, and Reference re Seabed and Subsoil of the Continental Shelf Offshore Newfoundland, are the leading opinions on the subject and they reflect a division of control over natural resources consistent with historic common law and international law principles.

This review of the Supreme Court's reference opinions addressing the allocation of power in the Canadian federation suggests that the reference has not been a tool for expansion of Dominion power at the expense of the provinces. Although before the abolition of Privy Council appeals many of the same issues were appealed to that body either directly from provincial references or from Supreme Court references, nothing suggests the prospect of appeal to higher authority restrained the Supreme Court. In subject areas other than federalism, Supreme Court bias was never a reason to question the reference process. In those areas, the sole concern was that the reference process would yield poorly informed and inadequately considered opinions. The next section examines the reference cases in light of these concerns.


322. Reference re Fisheries, 26 S.C.R. 444 (1895) (province prevailed on issues relating to control of fisheries and submerged lands while the Dominion prevailed on the issue of authority to regulate navigation, aff'd 1895 App.Cas. 700); Reference re §189 of the Railway Act, 1926 S.C.R. 163 (dispute about railway authority to take provincial lands pursuant to Dominion legislation, aff'd, 1926 App.Cas. 715); Reference re Precious Metals, 1927 S.C.R. 458 (dispute between the Dominion and a private claimant); Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 (concerning provincial control over vested private water rights).

323. 1967 S.C.R. 792.

324. [1984] 1 S.C.R. 86.

325. See P. Hogg, supra note 24, at 586-88.

326. Id.

327. Privy Council appeals were abolished in 1949. See supra note 69; Appendix.

328. As is indicated supra text accompanying notes 245-52, the Privy Council rarely overruled the Supreme Court.
V. EVALUATING THE CONCERNS ABOUT ADVISORY OPINIONS

The Supreme Court of Canada's resolution of important constitutional issues in an advisory proceeding is not the danger some early Canadian jurists perceived it to be. The process has been widely accepted, and the reference opinions have withstood the test of time as well as any of the thousands of decisions Canadian courts have rendered. The following sections examine the impact of the reference proceeding in light of early arguments against its use.

A. CONSTITUTIONAL CONCERNS ARE UNWARRANTED

1. Separation of Powers

Constitutional objections to the Canadian Supreme Court's reference jurisdiction were rooted in federalism, separation of powers, and due process. Of these, the least persuasive from the outset of the Canadian federation was the separation of powers concern. Although the concept of a Supreme Court was a break with English tradition, and thus invited analogy to the American experience, the Canadian national government was not one of separated powers in the sense understood by Americans. The model was Westminster, not Washington, meaning the judiciary could advise the executive and parliament without sacrificing its independence.

Although the theory of separation of powers presented no serious obstacle, the Canadian Supreme Court did encounter problems of institutional competence in implementing its advisory function. Courts are designed to resolve disputes between adversaries. Their processes are fashioned with this task in mind. When asked to function as legal advisors, a role most judges have performed earlier in their careers, courts can try to adapt their institutional processes to those of the solicitor, or they can adapt references to the processes of adjudication. The Canadian Supreme Court has tended to the latter approach, as references have come to look more and more like ordinary cases.  

329. See supra notes 73-108 and accompanying text.
331. See supra notes 106-08 and accompanying text.
332. As Strayer points out, the Court has been encouraged in this "judicializing" of the reference by "both Parliament and the Legislatures [which have] intended that the procedure in reference cases should be as similar as possible
As early as 1889, the Court addressed the question of standing in a reference proceeding. Rather than conclude that the Court's attorney-client relationship is only with the government, a logical and legitimate basis for refusing advice to third parties, the Court spoke the language of adjudication in arguing that a private party has no standing to initiate a reference. The reference proceeding has taken on other characteristics of adjudication. The Court has addressed questions of evidence in several reference proceedings. For example, in Reference re Wartime Leasehold Regulations, Chief Justice Rinfret concluded that the Court should review only material appearing in the order of reference, unless the material is of common knowledge. Reference re Upper Churchill Water Rights Reversion Act liberalized this evidentiary standard, but the continuing concern about the admissibility of evidence testifies to the Court's effort to adapt the advisory function to the processes of adjudication. These efforts began in 1891 with amendments that provided for notice to parties concerned about the specific question submitted. This change was reflected in the 1905 Reference re Abstention from Sunday Labour, in which counsel represented both a railway company and a copper company.
2. Due Process

The Court's concern for traditional judicial processes in performing its advisory function reflects its concern for the due process implications of reference procedure. If reference opinions are purely advisory, due process concerns are misplaced because no party is bound and thus no rights are violated. Individuals unrepresented in a reference proceeding will have their day in court when the law actually is implemented and affects their interests. In no other situation is the legal advisor expected to consult with parties other than the client who have an interest in the client's actions. This is true even when the client, like the government, acts on behalf of others. If an agent fails to represent the interests of his principal, one of the principal's alternatives is to get a new agent. By analogy, the political process, not the courts, is the proper forum for dissatisfied citizens.

The due process concern persists nonetheless and for good reason. Reference opinions are more than advice to clients. Despite the Supreme Court's recurrent protestations, its reference opinions are not purely advisory. Lower courts treat them as binding precedent. Public officials and citizens alike probably do not distinguish them from any other decisions Canadian courts render. For several decades, the Supreme Court's reference opinions were appealable to the Privy Council and provincial references remain appealable to the Supreme Court. True advice cannot be appealed nor overruled. Reference opinions are routinely appealed and sometimes overruled because they are judicial statements of the law, not non-binding advice as the Court has consistently insisted. Because of this reality, due process concerns are real and the Court's efforts to ensure that private interests are not injured are appropriate and necessary.

3. Federalism

The most persistent constitutional challenge to reference jurisdiction has been rooted in federalism. As recently as the

341. Id.
342. Strayer argues that concern about affected private rights "appears specious for the same may be said of almost any decision." B. STRAYER, supra note 6, at 292. The point made by comparison is valid, but it does not lead to the conclusion that due process concerns are not present in reference proceedings.
constitutional amendment references of 1981 and 1982,\textsuperscript{343} the provinces have claimed that the Supreme Court compromises their sovereignty by rendering advisory opinions on matters of provincial law and provincial power.\textsuperscript{344} Depending on the extent to which the Canadian federal system is designed to maintain a wall of separation between provincial and Dominion governments, including the courts, the provinces may have had a good argument. From the Supreme Court’s point of view, however, the federalism question, like the separation of powers question, simply is a matter of constitutional interpretation. The Court proceeds as a court having jurisdiction to interpret the law of the Constitution, not as a branch of the Dominion government. From this perspective, deciding federalism questions in a reference poses no greater threat to provincial sovereignty than resolving them in ordinary litigation.

The Constitution of Canada, as a matter of positive constitutional law, could provide expressly for judicial rendering of advisory opinions. What can be done expressly can surely be done by implication. Thus, the question whether Supreme Court reference jurisdiction infringes on Canadian federalism has been treated correctly as a straightforward problem of constitutional interpretation. When room exists for disagreement about the Constitution’s meaning, room exists for judicial discretion on the basis of policy considerations. Thus the important question, assuming agreement on constitutional objectives of a federal system, is whether the reference process has affected the achievement of those objectives.

In the United States, for two centuries states have suffered a steady decline in power.\textsuperscript{345} One versed in American federalism therefore would expect that provinces have suffered as a consequence of Supreme Court reference jurisdiction. The actual results in reference proceedings, however, seem to belie that expectation.\textsuperscript{346} Although the provinces have lost more often than they have won in contests with the Dominion gov-


\textsuperscript{344} See supra notes 173-81 and accompanying text.

\textsuperscript{345} See The Third Death of Federalism, 3 CON. COMM. 293 (1986).

\textsuperscript{346} In addressing the somewhat different concern that the abstract nature of references favors findings of invalidity, Strayer reports that in 42 references involving provincial legislative competence, the provincial legislation was upheld 22 times and found lacking 20 times. B. STRAYER, supra note 6, at 284. These figures reflect Privy Council and Supreme Court references and appeals.
overnment over legislative power, their victories have been important. The Supreme Court has not proven to be a tool of the Dominion government, and had it been inclined to adopt that role, the least significant source of power would have been the reference jurisdiction that the Court always has insisted binds no one.

Indeed the reference process may have strengthened the provinces within the Canadian federation by providing a highly visible forum for pressing provincial sovereignty claims. To the extent provincial power depends on politics, the provinces stand to benefit from a legal process primarily engaged in the ongoing definition of the distribution of power between the provinces and the Dominion. The provinces also would seem to benefit from having federalism issues addressed in the abstract manner of a reference, a process requiring the Court to “attempt to determine and give effect to the broad purpose of the Constitution.” The repeated asking and answering of questions about the theory of Canadian federalism may have created a theoretical rigidity that translates into legal and political reality. In contrast, the case law approach is confined to specific factual controversies, litigants, and remedies; it may not provide a sufficient frame of reference to prevent erosion of a federation’s jurisdictional spheres. Case-by-case analysis allows a court to blur the jurisdictional boundaries that abstract theory clarifies. Ironically, the reference process the provinces fought may have provided important protection for provincial sovereignty. At the same time, the Dominion has not suffered, as some had feared, at the hands of Supreme Court reference jurisdiction. A workable and politically acceptable balance seems to have been achieved.

B. POLICY ARGUMENTS AGAINST ADVISORY OPINIONS ARE INACCURATE OR INCONCLUSIVE

1. Speculative Nature

The Canadian experience suggests two different conclusions about the speculative and hypothetical nature of the reference process. To the extent referred questions are narrowly

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348. Justice Idington commented that reference jurisdiction may be implied as a means to “protect and so far as possible delimit [the provinces’ and Dominions’] respective spheres of jurisdiction.” Reference re References, 43 S.C.R. at 568 (1910) (Idington, J., dissenting), aff’d, App.Cas. 571 (1912).
349. See supra note 257.
drawn on specific questions of law affecting private interests, the Supreme Court has recognized that speculation is problematic.\textsuperscript{350} It also has recognized that truly interested parties may be excluded from such abstract proceedings, leading to briefing and argument by parties not fully aware of the interests they purport to represent.\textsuperscript{351} The solution to both problems has been to modify the reference proceeding so that it is less speculative and more concrete. Modifications have included evidentiary adaptations and procedures to ensure representation of interested parties.\textsuperscript{352}

To the extent that reference questions are broadly framed, some commentators believe that inadequate factual basis "hinder[s] sound characterization of laws."\textsuperscript{353} Hogg concludes that "[e]ven when the questions are specific and the factual setting is adequately presented, the lack of a concrete controversy can lead the Court to miss the point of an important question."\textsuperscript{354} Strayer discusses several cases that he says "illustrate[] their potential for creating abstract jurisprudence," but concludes that "[t]here are ... several mitigating factors which should be recognized in assessing the merits of the reference system in this respect."\textsuperscript{355} Among these factors is the reality that conceptual rather than functional decisions are inherent to constitutional interpretation whether in a reference or in ordinary litigation.

2. Collusive Nature

The danger of collusion has not been important in Supreme Court thinking about the reference proceeding. To the extent that collusion may lead to poorly addressed questions and unrepresented points of view, the procedural adjust-

\textsuperscript{350} See supra text accompanying notes 114-27.
\textsuperscript{351} See supra text accompanying notes 101-05.
\textsuperscript{352} E.g., The Supreme Court Act, CAN. REV. STAT. ch. S-26, § 53(5) (1986).
\textsuperscript{353} B. STRAYER, supra note 6, at 283.
\textsuperscript{354} P. HOGG, supra note 24, at 181. Hogg cites Reference re Agricultural Prods. Mktg. Act, [1978] 2 S.C.R. 1198, as an example of an opinion that fails to resolve "one of the main points in dispute." \textit{Id.} at 181.
\textsuperscript{355} B. STRAYER, supra note 6, at 288. "First it should be recognized that while such decisions were conceptual rather than functional, this was also true of contemporary decisions in normal litigation." \textit{Id.} at 288-89. "Secondly, there are situations where there is no need for a factual study of legislative effect or administrative action." \textit{Id.} at 289. "Thirdly the remedy for abstract reference decisions should not be total abandonment of this sometimes useful device, but rather a more selective use of it accompanied by adequate fact-introduction." \textit{Id.} at 290.
ments just mentioned are helpful. Collusion does not appear to have been viewed as a problem, however, at least with respect to the issues generally addressed in reference proceedings. In fact, most references appear to result from collusion in the sense that opposing parties agree to submit an issue to the Court. Such "collusion" is necessary to any provincial challenge to Dominion action in the Supreme Court, because only the Dominion can compel the Governor General to refer a question to the Court.\textsuperscript{356} When abstract questions of constitutional design are in issue, collusion is not a danger.

3. Erosion of Authority

The Canadian experience over a century and a quarter evidences that rendering non-binding, advisory opinions has not eroded the Supreme Court's authority. Although the Supreme Court's influence has been questioned by some,\textsuperscript{357} there is no basis for concluding that the court's authority has been eroded by issuance of non-binding opinions. Lower courts often treat the Supreme Court's reference opinions as binding precedent.\textsuperscript{358} If the Dominion or a provincial government rejected the Supreme Court's advice, or if a lower court or the Supreme Court itself actually ignored a reference opinion, the Court's authority might erode. As practiced in Canada, however, the reference proceeding has not put this concern for judicial authority to a test.

4. Addressing Constitutional Questions

The Canadian experience neither proves nor disproves the claim that an advisory opinion process will encourage courts to address constitutional questions. Most reference cases have involved constitutional issues, but those issues also have been raised with regularity through ordinary judicial proceedings. It is impossible to know whether the Court would have addressed fewer constitutional questions without the reference process.

The more important issue, however, is whether the objective of avoiding constitutional questions is desirable, particularly when courts can address those questions in the sometimes contemplative setting of a reference. Nothing suggests the con-

\textsuperscript{356} See supra text accompanying notes 222-32.

\textsuperscript{357} "Canadian political scientists do not consider the Supreme Court to have been a major factor in shaping federal-provincial relations since 1949." Russell, supra note 25, at 590.

\textsuperscript{358} See supra notes 190-202 and accompanying text.
Institutional questions the Supreme Court has addressed in references have been less well answered than those it has addressed in ordinary cases. Nor is there reason to conclude that Canadian constitutional law would be better off if the Court had left these constitutional questions unanswered. To the contrary, the nature and intensity of constitutional conflict in Canada over the last two decades required the resolution of constitutional questions. Ordinary adjudication might have resolved those questions satisfactorily, but the reference system expedited the answers.359

5. Political Questions and Mootness

Canada’s reference history demonstrates that concerns about political questions and mootness are misplaced. As the United States Supreme Court’s experience with the political question doctrine evidences, the boundary between constitutional questions and political questions is blurred at best.360 Constitutional questions are by nature political, particularly those relating to the allocation of legislative power in a federal system. Such political questions often are addressed best in the abstract setting of an advisory proceeding, where particular interests may be submerged.361 The claim that the reference proceeding will permit or encourage the answering of moot questions is illogical in light of the often tandem objection that these proceedings are hypothetical and therefore too speculative. A hypothetical proceeding cannot become moot because by definition it never was a dispute in the first place.

359. “A balanced assessment of the reference procedure must acknowledge its utility as a means of securing an answer to a constitutional question . . . . The reference procedure enables an early resolution of the constitutional doubt.” P. Hogg, supra note 24, at 181.

360. As early as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall suggested that some questions may be political and thus not within judicial authority. A political question doctrine evolved through several cases, but recent caselaw greatly limits the doctrine’s scope. The Court has settled on a “textually demonstrable constitutional commitment” test to determine when the political nature of questions limits judicial authority. See L. Tribe, supra note 101, at 96-107.

361. According to Strayer,

[the principal danger to be avoided . . . is the reference of essentially a political issue to the courts: where there are few, if any, genuinely legal criteria to which courts can resort for a rationale for their decision, they may be perceived as making a political judgment which may impair their long-term credibility.]

B. Strayer, supra note 6, at 295.
C. POLICY ARGUMENTS FAVORING ADVISORY OPINIONS ARE PERSUASIVE

Reference opponents have carried the burden of challenging a status quo deeply rooted in Anglo-Canadian jurisprudence. Defenders of the reference have relied, however, on more than tradition. More than a century of experience suggests that the arguments favoring an advisory role for Canadian courts were well conceived.

The most obvious justification for judicial advice to the legislative and executive branches of government has been the need for timely and authoritative opinions on the validity of contemplated governmental action. References commonly question the legality of proposed legislative or administrative actions. One option is to take action, leaving the regular course of judicial proceedings to resolve doubts about validity. If the judiciary ultimately concludes the action is invalid, the government returns to ground zero and must delay resolution of some problem or implementation of some program. It is far more efficient to simply ask the courts in advance about the validity of proposed actions.

Although the Attorney General or retained counsel can offer timely advice, courts also offer authoritativeness. Because the legal advisor must prognosticate future judicial action, courts are the best advisors, even if the reference opinion is truly only advisory. On questions of constitutionality, there can be no better legal advisor than the court ultimately responsible for interpreting the Constitution.

Reliable advice offers numerous obvious benefits. Those benefits are even greater when the advice is treated as binding precedent, as it is in Canada. The legislature and executive can act with assurance that a court will not subsequently invalidate their actions. Time and resources invested in governmental actions are risked only on the adequacy and wisdom of the action, not on the uncertainties of future legal proceedings. Subsequent challenges based on facts arguably different from those contemplated in a reference are not precluded, but they are discouraged by abstract judicial opinions that often readily apply to a host of fact situations. Furthermore, the total direct costs of constitutional interpretation by reference are likely significantly less than the costs of interpretation by ordinary adjudication. Incentives to engage in legal proceedings may decrease

362. See supra note 262 and accompanying text.
as the questions posed become increasingly abstract. It is impossible to know how much ordinary constitutional litigation Canada would have had without the reference system, but it seems intuitive that without the system, the Canadian Supreme Court's constitutional caseload would have been greater.

At the heart of debate about the reference system is not the government's need for and right to legal advice, but its need for and right to judicial advice. Judicial advice has a special quality, perhaps because the best lawyers are presumed to be judges, and surely because courts often will have the final say in interpreting the law. The central issue is whether courts should render legal opinions in the generally hypothetical circumstances of advisory proceedings. The Canadian experience suggests that the benefits are considerable and the dangers far fewer than American lawyers and judges generally assume.

VI. REFERENCES AS A POSITIVE FORCE IN CANADIAN CONSTITUTIONALISM

Canadian lawyers may say that the conclusion that references have been a positive force in Canadian constitutional interpretation was obvious from the outset. Many of them probably would view an American lawyer's fascination with the issue as conclusive evidence of American provincialism. Canadian lawyers may find this comprehensive survey of their Supreme Court references a useful catalogue, if not particularly insightful. Perhaps Canadian judges will be reminded of the transparency of insisting that reference opinions are advisory only. Some Canadian lawyers and judges even may gain a new appreciation for the reference system as an integral part of their constitutional system, rather than just another inheritance from British law.

The principal audience for this study, however, surely must be American lawyers and judges. The American presumption against advisory opinions is as ingrained as the Canadian presumption in favor of the reference system. The presumptive

363. An early version of this Article was presented to the Biennial Conference of The Association for Canadian Studies in the United States in Montreal on Oct. 8, 1987. The few Canadian lawyers in attendance seemed to find my interest in the subject quaint, if not misdirected. More recently we encountered great puzzlement when we attempted to determine through the Supreme Court Clerk's Office what references are pending. Although modern references seem to be consistently identified by their case name as references, the people in the clerk's office were not accustomed to distinguishing them from other cases pending before the court.
acceptance of what works is fortuity; the presumptive rejection of what might work is ignorance. The reference system has functioned well in Canada and the Canadian experience should give reason for a second look at the settled American position. History demonstrates that legal system imports and exports often yield unexpected results. Law and legal institutions inescapably intertwine with culture, but the shared common law history and neighborly development as New World federations make the United States and Canada good candidates for legal transplants without cultural rejection. The Canadian experience therefore offers several lessons that should interest American jurists.

The assumption that advisory proceedings are qualitatively distinct from adjudicative proceedings is incorrect. The distinction is one of degree. The traditional adjudicative proceeding can not always avoid hypothesis. The advisory proceeding is seldom entirely devoid of concreteness. More importantly, the advisory proceeding can be modified to overcome many of the shortcomings inherent in abstract proceedings. Not surprisingly, appropriate procedures can ensure due process and accommodate the judicial institution to the rendering of advice. A middle ground thus exists between abstract and concrete judicial proceedings.

The abstract proceeding, moreover, is sometimes appropriate for the questions courts must resolve, particularly when those questions require constitutional interpretation. Constitutional provisions often differ from statutory provisions in their degrees of abstractness. The statement of general concepts, rather than specific conceptions, permits a constitution to function over extended periods of time. Just as drafting and adoption of such abstract statements of principle may require people

364. “Although history records many examples of import and export of legal rules and institutions, it also evidences a rule or institution in its new setting is never what it was in its original setting. Except in those cases of complete political, social, and economic take-over which occurred during the era of colonialism, imported legal systems have invariably been forced to adapt, often in drastic ways, to their new cultural setting. Even in countries with a long history of foreign domination, established colonial legal systems have been forced to adjust to the realities of the new political, social and economic order of independence.” J. Huffman, GOVERNMENT LIABILITY AND DISASTER MITIGATION: A COMPARATIVE STUDY 10 (1986).


366. See supra notes 66-71 and accompanying text.
to divorce themselves from their personal circumstances, so interpretation may depend on insulation from the appeals of those with vested interests. Because protection of at least some vested interests is a common principle in western constitutionalism, balancing the abstract and the concrete is easy. The hypothetical nature of the advisory proceeding, particularly as modified in the Canadian reference system, seems to facilitate rather than inhibit wise constitutional interpretation.

We cannot know whether the substance of American constitutional law would be different if Chief Justice Jay had answered the questions President Washington submitted, but to the extent it would be, United States Supreme Court doctrine might better reflect the underlying principles and values of American constitutionalism. Some say facts are the missing ingredient in advisory proceedings, but facts can be known in various ways and in any event may obscure questions of principle. Philosophy, not the nature of the proceeding, most often has governed Canadian Supreme Court reference opinions. It is better to ask and answer the fundamental, philosophical questions of constitutional law in the daylight a reference provides than in the obscurity of the adjudicatory process.

The visibility and distinctness of these proceedings may have played an important role in maintaining certain aspects of Canadian constitutional government. The provincial governments persistently have used the reference forum to remind the Dominion government and the population generally of their claims to sovereignty and political power. In most of the world's federal systems, the constituent states gradually have relinquished power through the seemingly inevitable, centripetal forces of politics. The Canadian provinces, however, have maintained a consistently important role in government. To contend that the reference system is a total explanation of this situation would be naive. The Court, however, has rendered decisions favorable to the provinces on many basic

368. See supra notes 254-327 and accompanying text.
369. See, e.g., W. BERNETr, AMERICAN THEORIES OF FEDERALISM 198 (1964).
370. "It is widely believed that American federalism is characterized by weak states and Canadian federalism by strong provinces." Feldman, Federal Systems are Not All Alike (But that May be Changing), in J. MAGNEL, CONSTITUTIONAL LAW OF CANADA 8, 9 (1985).
federalism issues, in a forum the provinces once feared as a threat to their sovereignty. The reference system therefore likely has contributed to provincial standing in the Canadian federal system. The Canadian Supreme Court has recognized repeatedly that the provinces have a determinable sovereignty that, unlike most of the power of the American states, is not subject to curtailment under one balancing test or another. The Supreme Court thus has been a regular defender of provincial sovereignty through the reference procedure.

Although separation of powers was never accepted as a basis for limiting the Canadian Supreme Court's reference jurisdiction, the United States nevertheless can derive important lessons about separation of powers from the Canadian experience. The traditional argument, widely accepted in the United States, has been that separation of powers prevents courts from rendering advice to the legislative and executive branches of government. If the reference opinions actually were treated as advice, rather than binding judicial holdings, the blending of judicial with executive or legislative functions might overwhelm Americans. When the reference opinions are treated like any other decision for precedential purposes, however, the separation of powers concern is largely avoided. The federal court would function as a court and the legislative and executive officials would view its opinions as those of a court. The Canadian system demonstrates that a court can render a reasoned and workable decision in a hypothetical setting without insisting on the strictly adversary context of traditional adjudicative proceedings.

This conclusion is likely to be tested in coming years as more questions are referred to the Canadian Supreme Court on the subject of individual rights. Because the theory of separa-

371. See supra notes 283-86 and accompanying text.

372. Although the Canadian law of federalism may have been the same if resolved entirely through ordinary adjudication, it seems unlikely. The United States law of federalism has evolved in a long series of lawsuits often brought by private interests seeking to avoid federal government regulation. These litigants primarily are interested in avoiding regulation, not asserting the regulatory power of state governments. Because the issues are addressed piecemeal and narrowly in ordinary adjudication, courts can slowly and almost imperceptibly chip away at the state power. By addressing the federalism issues in the reference setting, even when that setting has been modified to resemble ordinary adjudication, the basic concept of divided powers is less likely to be submerged beneath the particular private or regulatory interests involved in a case.

373. See supra notes 106-08 and accompanying text.
tion of powers involves a concern for the protection of individual liberty, concern about breaching that separation should be greatest when questions about constitutional rights under the Charter of Rights are referred to the Court. Perhaps those questions cannot be addressed in a hypothetical proceeding without sacrificing individual rights to the pressures of growing governmental power. The experience of individuals, however, may be similar to the experience of the provinces. The reference procedure may prove an ideal forum in which to address fundamental questions of individual liberty.

Finally, to the extent that judicial resolution of hypothetical questions actually functions as an advisory proceeding, the Canadian experience indicates that discretion can protect those values that such proceedings may threaten. The discretion of comity has served provincial interests; the discretion of deference has protected the non-judicial functions of the Dominion government; and the discretion of abstention has ensured due process to individuals. It might be argued that a society should not rely on such discretion to protect these important values, but in reality judges have enormous discretion. The abstract nature of the reference proceeding, in which the pressures of vested interests are minimized, may be the safest context for courts to exercise such discretion.

CONCLUSION

The Canadian reference system has functioned well, evidencing few of the problems critics predicted. The reason is not that concerns about advisory proceedings were misplaced entirely; to some extent those concerns were well founded. Canadians have addressed those concerns, however, modifying their reference system into a valuable institution for constitutional interpretation.

American lawyers and jurists should take notice of the relative success of the Canadian reference system. The system has provided a workable and prompt means of addressing issues that arise in federal systems of government. To the extent that the Americans and Canadians share this type of system, per-

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374. See supra note 221.

375. Hogg believes "that the Court has not made sufficient use of its discretion not to answer a question posed on a reference," but concludes that "[a] balanced assessment of the reference must acknowledge its utility." P. HOGG, supra note 24, at 180-81.
haps the American system might benefit from the lessons the Canadian reference system provides.
## APPENDIX

REFERENCE OPINIONS OF THE SUPREME COURT OF CANADA

* Indicates those opinions relevant to federalism

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>* Re New Brunswick Penitentiary [1880] Cout. Cas. 24</td>
<td>Parliamentary Jurisdiction, Reference Jurisdiction, Criminal Law</td>
<td>Parliament may exclude class of prisoner who was housed prior to Confederation.</td>
<td></td>
</tr>
<tr>
<td>* Re The Thrasher Case 1882 B.C.R. 153</td>
<td>Provincial Jurisdiction, Judicial Procedure, Residence</td>
<td>Act concerning judicial procedure and residence is <em>ultra vires</em> the British Columbia Legislature.</td>
<td>Affirmed by Privy Council (same cite)</td>
</tr>
<tr>
<td>Re The Jesuits' Estates Act 12 LEGAL NEWS 283 (1889)</td>
<td>Standing to Bring Reference Before Supreme Court</td>
<td>Private party standing not allowed</td>
<td>Appeal Refused</td>
</tr>
<tr>
<td>* Re Administration of Justice [1892] 21 S.C.R. 446</td>
<td>Provincial Jurisdiction, Judicial Appointments</td>
<td>Provincial act on appointment of county judge is <em>intra vires</em>, but does not grant jurisdiction.</td>
<td></td>
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**Sender:**

**Recipient:**

**Date:**

**Subject:**

**File No.:**

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**Note:**

1. *ultra vires* means acts or actions outside the power or authority granted.
## APPENDIX (continued)

**REFERENCE OPINIONS OF THE SUPREME COURT OF CANADA**  
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<tr>
<td>* Re Prohibitory Liquor Laws [1894] 24 S.C.R. 170</td>
<td>Provincial Jurisdiction, Liquor Regulation</td>
<td>Regulation of trade in liquor comes within § 91(2) and is thus ultra vires the provincial legislature.</td>
<td>Reversed by Privy Council, 1896 App. Cas. 348</td>
</tr>
<tr>
<td>* Re Representation in House [1903] 33 S.C.R. 475</td>
<td>Apportionment of Provincial Representation in House of Commons</td>
<td></td>
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</tr>
</tbody>
</table>
* Re Representation of Prince Edward Island in House [1903] 33 S.C.R. 594

- Re Canadian Pacific Railway Act [1905] 36 S.C.R. 41
- Re Railway Act Amendment [1905] 36 S.C.R. 136
* Re International and Provincial Ferries [1905] 36 S.C.R. 206
* Re Canada Temperance Act [1907] 42 S.C.R. 505
- Re Grand Trunk Railway Bonds, Dominion Contractual Obligations [1909] 43 S.C.R. 505

* Re Reference Jurisdiction [1910] 43 S.C.R. 536
* Re Marriage Act [1912] 46 S.C.R. 132

Apportionment of Provincial Representation in House of Commons
Provincial Jurisdiction, Regulation of Sunday Labor, Reference Jurisdiction
The Railway Act, Rights of Railways to Construct Branch Lines
Parliamentary Jurisdiction, Railway Liability
Parliamentary Jurisdiction, Creation and Regulation of Ferries
Parliamentary Jurisdiction, Temperance Legislation
Railway Bonds, Dominion Contractual Obligations
Criminal Procedure, Authority of Deputy Attorney General
Parliamentary Jurisdiction, Reference Jurisdiction
Parliamentary Jurisdiction, Regulation of Marriage and Divorce

Prince Edward Island's representation in House may be reduced pursuant to § 51 of British North America Act.
Provincial legislation is ultra vires. Because it is draft bill, reference may be ultra vires the Supreme Court.
Railway has right to construct branch lines pursuant to its charter and The Railway Act.
Parliamentary prohibition of railway liability relief through exemption agreements is intra vires.
Parliamentary act creating ferry between provinces is intra vires.
Hearing postponed and no answer given.
Dominion contractual obligations are limited to a definite amount of proceeds, but not any deficiency.
Deputy Attorney General must have written consent of judge or Attorney General to prefer a charge.
Parliament has authority to require Supreme Court to answer questions relative to legislation not yet adopted.
Parliamentary legislation on validity of marriage and rights and duties of married persons is ultra vires.

Affirmed by Privy Council.
Appeal refused by Privy Council.

( Ontario Court held ultra vires in separate case.)

Affirmed by Privy Council, 1912 App. Cas. 571.
Affirmed by Privy Council, 1912 App. Cas. 880.
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<tr>
<td>* Re Incorporation of Companies</td>
<td>[1912] 48 S.C.R. 331</td>
<td>Provincial law prohibiting federally incorporated companies from doing business in province is <em>ultra vires.</em></td>
<td></td>
</tr>
<tr>
<td>* Re Board of Commerce</td>
<td>[1920] 60 S.C.R. 456</td>
<td>Parliamentary delegation of power to Board of Commerce is <em>intra vires</em> and the Board's orders have the force of law.</td>
<td>Affirmed by Privy Council [1922] 1 App.Cas. 191.</td>
</tr>
<tr>
<td>Re Chief Justice of Alberta</td>
<td>[1922] 64 S.C.R. 135</td>
<td>Person appointed in 1910 is the Chief Justice of the Alberta Appellate Division.</td>
<td></td>
</tr>
<tr>
<td>* Re Manitoba Act 1924 S.C.R.</td>
<td>317</td>
<td>Manitoba Grain Futures Taxation Act imposes an indirect tax and is thus <em>ultra vires.</em></td>
<td>Affirmed by Privy Council, 26 March 1925.</td>
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<tr>
<td>Case Title</td>
<td>Details</td>
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<tr>
<td>* Re Hours of Labour 1925 S.C.R. 505</td>
<td>Parliamentary and Provincial Jurisdiction, Impact of Treaty</td>
<td></td>
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<tr>
<td>* Re Education in Montreal 1926 S.C.R. 246</td>
<td>Provincial Jurisdiction, Quebec Educational System, Religion</td>
<td></td>
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<tr>
<td>* Re § 189 Railway Act 1926 S.C.R. 163</td>
<td>Parliamentary Jurisdiction, Railway Location, Provincial Crown Lands</td>
<td></td>
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<tr>
<td>* Re Exchequer Court Jurisdiction 1926 S.C.R. 239</td>
<td>Exchequer Court Jurisdiction</td>
<td></td>
<td></td>
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<tr>
<td>* Re § 17 Alberta Act 1927 S.C.R. 364</td>
<td>Parliamentary Jurisdiction, Alberta Act</td>
<td></td>
<td></td>
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<tr>
<td>* Re Precious Metals 1927 S.C.R. 458</td>
<td>Title to Precious Metals</td>
<td></td>
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</tr>
<tr>
<td>Re Meaning of “Persons” 1928 S.C.R. 276</td>
<td>Senate, Eligibility of Women Under § 24 British North America Act</td>
<td></td>
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<tr>
<td>* Re Fisheries Act, 1928 S.C.R. 457</td>
<td>Parliamentary Jurisdiction, Fisheries Regulation</td>
<td></td>
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<tr>
<td>* Re Combines Investigation Act 1929 S.C.R. 409</td>
<td>Parliamentary Jurisdiction, Regulation of Combines, Criminal Law</td>
<td></td>
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</tr>
<tr>
<td>* Dominion’s obligation is to bring draft convention before competent authority. Province has jurisdiction over labour. Provincial legislation for Jewish representation on school board is ultra vires. Province may establish separate schools. Parliamentary legislation authorizing Governor General to locate railway on provincial crown lands is intra vires. Exchequer Court has jurisdiction to issue warrant of possession under Expropriation Act. Parliamentary legislation relative to school lands in Alberta Province is intra vires. Crown owns all precious metals contrary to claim of Hudson’s Bay Company under Dominion land grant. § 24 of British North America Act does not permit the election of women to the Senate. § 7A and § 18 of Fisheries Act, 1914 are ultra vires Parliament’s authority. Vested right of province is subordinate to public right. Dominion has jurisdiction over water power. Parliamentary legislation regulating combines and imposing criminal penalties is ultra vires.</td>
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<tr>
<td>* Re Militia Act, 1906 1930 S.C.R. 554</td>
<td>Provincial Liability for Militia Costs</td>
<td>Province is not liable for emergency militia costs because only the legislature can appropriate funds.</td>
<td>Reversed by Privy Council, 1932 App. Cas. 54.</td>
</tr>
<tr>
<td>* Re Natural Resources, Saskatchewan 1931 S.C.R. 263</td>
<td>Parliamentary Jurisdiction, Radio Communication</td>
<td>Parliamentary legislation providing for regulation of radio communication is intra vires.</td>
<td></td>
</tr>
<tr>
<td>* Re Radio Communication 1931 S.C.R. 541</td>
<td>Criminal Law, Immigration Act and Deportation</td>
<td>Governor General has discretion to reduce sentence of convict. Serving full sentence does not preclude deportation of alien.</td>
<td></td>
</tr>
<tr>
<td>* Re Refunds Under Timber Regulations 1933 S.C.R. 616</td>
<td>Parliamentary Jurisdiction, Regulation of Companies</td>
<td>Parliamentary legislation on liability of directors of company (§ 110 Companies Act) is intra vires.</td>
<td>(Ontario Court held ultra vires in separate case.)</td>
</tr>
<tr>
<td>* Re § 110 Dominion Act, 1927 1934 S.C.R. 653</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Re Companies Creditors
Arrangement Act, 1933 1934
S.C.R. 659

Re Tariff Board of Canada 1934
S.C.R. —

Re Canada Temperance Act,
1927 1935 S.C.R. 494

Re § 498A Criminal Code 1936
S.C.R. 363

Re Trade and Industry
Commission Act, 1935 1936 S.C.R.
379

Re Farmers’ Creditors
Arrangement Act, 1934 1936
S.C.R. 384

Re Natural Products Marketing
Act, 1934 1936 S.C.R. 398

Re Employment and Social
Insurance Act, 1935 1936 S.C.R.
427

Re Weekly Rest in Industrial
Undertakings Act 1936 S.C.R. 461

Parliamentary Jurisdiction,
Bankruptcy and Insolvency
Tariff Board Jurisdiction
Consistency of Provincial
Legislation with Canada
Temperance Act
Parliamentary Jurisdiction,
Trade and Commerce,
Criminal Law
Parliamentary Jurisdiction,
Trade and Industry,
Criminal Law
Parliamentary Jurisdiction,
Debtor Relief
Parliamentary Jurisdiction,
Natural Products
Marketing
Parliamentary Jurisdiction,
Labour and Employment
Conditions
Parliamentary Jurisdiction,
Working Conditions,
Minimum Wage
Parliamentary legislation providing for
arrangements with unsecured creditors is
intra vires.
Tariff Board does not have jurisdiction to
determine questions of law or annul dues.
Provincial legislation is not as restrictive as
Canada Temperance Act.
Parliamentary legislation imposing criminal
penalties for undesirable activities in trade
and commerce is intra vires.
Parliamentary legislation permitting
agreements to modify wasteful competition is
ultra vires.
Parliamentary legislation permitting time
extension for debtors is intra vires.
Parliamentary legislation to improve export
trade in natural products is ultra vires.
Parliamentary legislation providing for
Commission to organize unemployment
service and unemployment insurance is ultra
vires.
Parliamentary acts limiting hours of work
and providing for minimum wage are intra
vires.

(Contrary decision in New Brunswick
case.)
Cas. 388.
Cross Appeal to
Privy Council, 1937
App. Cas. 405.
Cas. 391.
Cas. 377.
Cas. 355.
Cas. 326.
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<tr>
<td>Re Provincial Treasurer of Nova Scotia 1937 S.C.R. 403</td>
<td>Payment of Fines to Province or Dominion</td>
<td>Fines are payable to Dominion, which instituted and bore the costs of the proceeding.</td>
<td>A**</td>
</tr>
<tr>
<td>* Re Disallowance Power of Governor General 1938 S.C.R. 71</td>
<td>Disallowance and Reservation Powers under § 90 British North America Act</td>
<td>Disallowance and reservation powers still exist and are not limited except disallowance must occur within one year.</td>
<td></td>
</tr>
<tr>
<td>* Re Jurisdiction of County and District Courts 1938 S.C.R. 398</td>
<td>Parliamentary Jurisdiction, Jurisdiction of Judges Appointed by Lt. Governor</td>
<td>Judges appointed by Lt. Governor pursuant to provincial legislation do have jurisdiction to decide specified cases.</td>
<td></td>
</tr>
</tbody>
</table>

**A** denotes Supreme Court affirmed province.
* Re Home Oil Distributors 1940 S.C.R. 444
  Provincial Jurisdiction, Provincial legislation regulating Price
  Regulation prices in oil industry is intra vires.

* Re Debt Adjustment Act, Alberta, 1937 1942 S.C.R. 31
  Provincial Jurisdiction, Debtor Relief
  Provincial legislation providing for debtor relief is ultra vires.

* Re § 16 Special War Revenue Act, 1932 1942 S.C.R. 429
  Parliamentary Jurisdiction, Tax on Unauthorized Foreign Investment
  Parliamentary legislation providing for tax on unauthorized investment in foreign company or exchange is ultra vires.

  Re Regulations Under the War Measures Act 1943 S.C.R. 1
  Authority of Governor General, War Measures Act, 1914
  Governor General's regulations of chemicals pursuant to War Measures Act are intra vires.

  Re Powers to Levy Rates on Foreign Legations 1943 S.C.R. 208
  City Taxing Jurisdiction, International Law
  City of Ottawa's levying of rates on foreign legations and High Commissioners' residences is ultra vires.

* Re § 31 Municipal District Act, Amendment Act, 1941 1943 S.C.R. 295
  Provincial Jurisdiction, Property Tax Lien
  Provincial legislation giving provincial tax lien priority over other liens is intra vires.

  Re The Transport Act, 1938 1943 S.C.R. 333
  Authority of Board of Transport
  Board of Transport may consider competing carriers in setting charge.

* Re United States Military or Naval Forces 1943 S.C.R. 483
  International Law, Criminal Jurisdiction
  Parliament may exempt United States forces from criminal process pursuant to § 91(7) and Governor General may exempt under Act.

  Re Persons of the Japanese Race 1946 S.C.R. 248
  Authority of Governor General, War Measures Act
  Parliament could have enacted regulations over Japanese so Governor General may pursuant to War Measures Act.

  Affirmed by Privy Council, 1945 App. Cas. 204.

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<td>Re The Jury Act of Alberta, 1922 1947 S.C.R. 213</td>
<td>Juror Qualifications</td>
<td>Persons under 25 and over 60 are not competent to serve as jurors under Alberta law.</td>
<td>A</td>
</tr>
<tr>
<td>* Re The Farm Security Act, 1944 1947 S.C.R. 394</td>
<td>Provincial Jurisdiction, Bankruptcy and Insolvency</td>
<td>Provincial debtor relief legislation is <em>ultra vires</em>.</td>
<td></td>
</tr>
<tr>
<td>* Re The Minimum Wage Act 1948 S.C.R. 248</td>
<td>Provincial Jurisdiction, Hours and Wages of Dominion Employees</td>
<td>Provincial legislation regulating hours and wages does not apply to post office employees</td>
<td>Affirmed by Privy Council, 1948 App. Cas. 110. (Provincial Court held province law applied.)</td>
</tr>
<tr>
<td>* Re Hours of Work Act, R.S.B.C., 1936, 1948 S.C.R. 373</td>
<td>Provincial Jurisdiction, Hours and Wages of Railway Employees.</td>
<td>Provincial regulations of hours and wages are binding on the Canadian Pacific Railway.</td>
<td>Affirm by Privy Council, 1950 App.Cas. 122 R**</td>
</tr>
<tr>
<td>* Re Esquimalt &amp; Nanaimo Railway Co. Land Grant 1948 S.C.R. 403</td>
<td>Provincial Jurisdiction, Timber Severance Taxation</td>
<td>Provincial taxation of timber on lands under contract for railway construction is <em>ultra vires</em>.</td>
<td></td>
</tr>
</tbody>
</table>

**R** Denotes Supreme Court reversed province.
<table>
<thead>
<tr>
<th>Case Title</th>
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</tr>
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<tbody>
<tr>
<td>Re Regina v. Snider 1954 S.C.R. 479</td>
<td>Judicial Authority</td>
<td></td>
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<tr>
<td>* Re Industrial Relations &amp; Disputes Investigations Act 1955 S.C.R. 529</td>
<td>Parliamentary Jurisdiction, Labour Regulations</td>
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<tr>
<td>Re Regina v. Coffin 1956 S.C.R. 186</td>
<td>Reference Jurisdiction, Criminal Law</td>
<td></td>
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<tr>
<td>Re Regina v. Coffin 1956 S.C.R. 191</td>
<td>Criminal Law, Evidence</td>
<td></td>
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<tr>
<td>* Re Farm Products Marketing Act, R.S.O., 1950-1957 S.C.R. 198</td>
<td>Provincial Jurisdiction, Trade and Commerce</td>
<td></td>
</tr>
<tr>
<td>* Re Vehicles Act, 1957 S.C.R. 608</td>
<td>Provincial Jurisdiction, Highway Safety, Criminal Law</td>
<td></td>
</tr>
<tr>
<td>Parliamentary legislation on rent control is * <strong>intra vires</strong> in national emergency.</td>
<td></td>
<td>A</td>
</tr>
<tr>
<td>Provincial tax exemptions granted prior to confederation are <strong>ultra vires</strong>.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court may order document production unless Minister clearly shows it contrary to public interest.</td>
<td></td>
<td>A</td>
</tr>
<tr>
<td>Parliamentary legislation regulating labour organizations is * <strong>intra vires</strong>.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>§ 55 Supreme Court Act permits reference of criminal matter that is * res judicata*.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If leave to appeal had been granted it would have been dismissed.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Provincial legislation regulating marketing of farm products within the province is * <strong>intra vires</strong>.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parliamentary legislation limiting acquisition of minerals by railways is <strong>intra vires</strong>.</td>
<td></td>
<td>R</td>
</tr>
<tr>
<td>Provincial legislation providing for suspension of licenses of drunk drivers is <strong>intra vires</strong>.</td>
<td></td>
<td>A</td>
</tr>
<tr>
<td>Parliamentary legislation exempting certain railway properties from tax is <strong>intra vires</strong>.</td>
<td></td>
<td>A</td>
</tr>
<tr>
<td>Provincial legislation providing for fixing of debt payments is <strong>ultra vires</strong>.</td>
<td></td>
<td>A</td>
</tr>
</tbody>
</table>
## APPENDIX (continued)

**REFERENCE OPINIONS OF THE SUPREME COURT OF CANADA**

* Indicates those opinions relevant to federalism

<table>
<thead>
<tr>
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<tr>
<td>* Re The Jurisdiction of the Magistrate's Court Act 1965 S.C.R. 772</td>
<td>Provincial Jurisdiction, Magistrate's Jurisdiction</td>
<td>Provincial legislation expanding the jurisdiction of the magistrate's courts is <em>intra vires.</em></td>
<td>R</td>
</tr>
<tr>
<td>Re Regina v. Truscott 1967 S.C.R. 309</td>
<td>Criminal Law, Evidence</td>
<td>If appeal had been allowed it would have been dismissed.</td>
<td></td>
</tr>
<tr>
<td>* Re Offshore Mineral Rights 1967 S.C.R. 792</td>
<td>Title to Natural Resources, Legislative Jurisdiction, Territorial Waters</td>
<td>Dominion has title to and regulatory authority over natural resources of seabed seaward from low water mark.</td>
<td></td>
</tr>
<tr>
<td>Re § 16 Criminal Law Amendment Act, 1968 1970 S.C.R. 777</td>
<td>Criminal Law, Proclamation Under Criminal Law Amendment Act</td>
<td>Court is divided over whether or not the provisions in question were validly brought into force.</td>
<td></td>
</tr>
<tr>
<td>* Re Senate [1980] 1 S.C.R. 54</td>
<td>Senate, Constitutional Amendment</td>
<td>Parliamentary legislation abolishing or changing Senate is <em>ultra vires.</em></td>
<td></td>
</tr>
<tr>
<td>Case</td>
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<td>Opinion</td>
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<tr>
<td>Re Amendment of the Constitution of Canada [1981] 1 S.C.R. 753</td>
<td>Constitutional Amendment, Provincial Consent</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>* Re Natural Gas and Gas Liquids Tax [1982] 1 S.C.R. 1004</td>
<td>Parliamentary Jurisdiction, Natural Gas Taxation</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Re Appeal on Application to Intervene [1982] 2 S.C.R. 791</td>
<td>Reference Jurisdiction, Intervention</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>* Re Constitution of Canada [1982] 2 S.C.R. 793</td>
<td>Constitutional Amendment, Provincial Consent, Quebec</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>* Re Seabed and Subsoil Offshore Newfoundland [1984] 1 S.C.R. 86</td>
<td>Title to Natural Resources, International Law, Legislative Jurisdiction</td>
<td>R</td>
<td></td>
</tr>
<tr>
<td>* Re Ownership of the Bed of the Strait of Georgia [1984] 1 S.C.R. 389</td>
<td>Title to Natural Resources, Territorial Waters</td>
<td>A</td>
<td></td>
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</table>

Substantial degree of provincial consent is conventionally required where federal-provincial relationship is affected.

Provincial legislation affecting jurisdiction of superior, county and district courts is *ultra vires* in part.

Parliamentary legislation imposing tax on natural gas is *ultra vires*.

Provincial Court denial of petition to intervene in reference is not appealable.

Quebec has no conventional power of veto over constitutional amendments affecting the provinces legislative competence or status. Only the Dominion has the right to explore, exploit and legislate over the natural resources of the continental shelf.

Provincial legislation having impact outside province is *ultra vires*.

Province has title to and regulatory authority over natural resources in waters in question.

Under Criminal Code judge has authority to authorize wiretaps.

Provincial legislation making English the official language is *ultra vires*, but laws are temporarily valid until reenacted.

Reference gives effect to Manitoba's commitment and establishes a period of temporary validity.
APPENDIX (continued)

REFERENCE OPINIONS OF THE SUPREME COURT OF CANADA

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<td>* Re An Act To Amend The Education Act, Ontario [1987] 1 S.C.R. 1148</td>
<td>Provincial Jurisdiction, Charter of Rights, Religious Freedom</td>
<td>Provincial legislation providing for funding of sectarian high schools is not contrary to Charter of Rights.</td>
<td>A</td>
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