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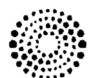

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rendered an opinion on a reference (as opposed to an actual case), there is an appeal as of right to the Supreme Court of Canada.[84] This right to appeal without leave means in effect that the provincial governments enjoy the same privilege as the federal government in being able to secure a ruling from the Supreme Court of Canada on a controverted point.

(c) Constitutional basis

The rendering of advisory opinions to government is not traditionally a judicial function for two reasons. First, it lacks the adversarial and concrete character of a genuine controversy; and, secondly, it is a function normally undertaken by the executive branch of government, specifically, the Attorney General. In Australia, the High Court of Australia has refused to render advisory opinions, on the ground that it is a non-judicial function.[85] And the Supreme Court of the United States has informally indicated a similar constitutional objection to the function.[86]

It would not have been surprising if the Canadian courts had held that the rendering of advisory opinions by the Supreme Court of Canada was precluded by the Constitution Act's description of the Court in s. 101 as "a general court of appeal for Canada". When the point was litigated up to the Privy Council in the *Reference Appeal* (1912),[87] the reference statute was upheld. Their lordships acknowledged that the function was not a judicial one, and emphasized that "the answers are only advisory and will have no more effect than the opinions of the law officers", but their lordships held nevertheless that the function could be conferred by statute on the Court.[88] This decision is often taken as authority for the proposition that no separation-of-powers doctrine is to be read into the Constitution of Canada.[89] The provincial reference statutes seem never to have been squarely challenged, but have always been accepted as valid, apparently as laws in relation to the administration of justice in the province.[90]

A different kind of constitutional objection to federal (but not provincial) references would be based on the fact that they are an exercise of original rather than appellate jurisdiction by the Court. Section 101 of the Constitution Act, 1867 authorizes the establishment of "a general court of appeal for Canada". It will be

84 Supreme Court Act, s. 36, requiring no leave to appeal.

85 *Re Judiciary and Navigation Act* (1921) 29 C.L.R. 257.

86 The refusal to render an advisory opinion is contained in correspondence in 1793 between the President and Secretary of State, on the one hand, and the judges of the Court, on the other. The refusal is undoubtedly consistent with the requirement of a "case" or "controversy" in the definition of the "judicial power of the United States", which limits the jurisdiction of the Supreme Court of the United States, as well as the lower federal courts. Several states authorize advisory opinions, however. See generally Note, "Advisory Opinions on the Constitutionality of Statutes" (1956) 69 Harv. L. Rev. 1302; Tribe, *American Constitutional* Law (2nd ed., 1988), 73-77.

87 *A.-G. Ont. v. A.-G. Can.* (Reference Appeal) [1912] A.C. 571.

88 This holding was reaffirmed in *Re Secession of Quebec* [1998] 2 S.C.R. 217, para. 15.

89 See ch. 7, Courts, under heading 7.3(a), "Separation of powers", above.

90 Strayer, note 77, above, 139; see the rest of Strayer's ch. 5 on the constitutionality of references.

recalled that in the United States it was the attempt to confer original jurisdiction on the Supreme Court of the United States that led to the celebrated case of *Marbury v. Madison* (1803), in which a federal statute was held unconstitutional for the very first time.[91] Oddly, this objection was never taken to the reference jurisdiction of the Supreme Court of Canada until the *Secession Reference* (1998)[92] In that case, the Court decided that "an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction".[93] The federal Parliament therefore had the power to confer some original jurisdiction on a court whose functions were primarily appellate.[94] The reference jurisdiction was valid for that reason.

(d) Advisory character

In the *Reference Appeal* (1912),[95] as quoted above, the Privy Council held that the Court's answer to a question posed on a reference was "advisory" only and of "no more effect than the opinions of the law officers". It follows that the Court's answer is not binding even on the parties to the reference, and is not of the same precedential weight as an opinion in an actual case. This is certainly the black-letter law. But there do not seem to be any recorded instances where a reference opinion was disregarded by the parties, or where it was not followed by a subsequent court on the ground of its advisory character. In practice, reference opinions are treated in the same way as other judicial opinions.[96]

The Supreme Court Act and the provincial reference statutes impose on the Court a duty to answer reference questions. However, the Court has often asserted and occasionally exercised a discretion not to answer a question posed on a reference.[97] It may exercise that discretion where the question is not yet ripe,[98] or has become moot,[99] or is not a legal question,[100] or is too vague to admit of a

91 *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137 is discussed in ch. 5, Federalism, under heading 5.5(a), "Development of judicial review", above. (The Supreme Court of the United States has some original jurisdiction, but only what is expressly authorized by the Constitution.)

92 *Re Secession of Quebec* [1998] 2 S.C.R. 217.

93 *Id.*, para. 9.

94 In *Gulf Oil Corp. v. Gulf Canada* [1980] 2 S.C.R. 39, the Supreme Court of Canada, over objection, exercised an original jurisdiction to enforce letters rogatory (a request for documents from a foreign court) conferred by the Canada Evidence Act.

95 Note 87, above.

96 *Can. v. Bedford* [2013] 3 S.C.R. 1101, 2013 SCC 72, para. 40 ("While reference opinions may not be legally binding, in practice they have been followed."). However, the normal panoply of remedies is not available on a reference. In *Re Remuneration of Judges (No. 2)* [1998] 1 S.C.R. 4, the Court refused to issue a binding declaration on the ground (para. 9) that the case was a reference that could yield only "an advisory opinion and not a judgment". The Court distinguished *Re Manitoba Language Rights* [1985] 1 S.C.R. 721, where a binding declaration was issued on a reference, on the basis that in that case a remedy was necessary and no other remedy was available. The Court said (para. 10): "The rule of law gave this Court constitutional authority to provide a binding remedy in this unique situation." *Re Manitoba Language Rights* is discussed in ch. 58, Effect of Unconstitutional Law, under heading 58.8, "Wholesale invalidation of laws", below.

97 J. McEvoy, "Separation of Powers and the Reference Power: Is there a Right to Refuse?" (1988)

satisfactory answer,[101] or is not accompanied by enough information to provide a complete answer.[102]

In the *Same-Sex Marriage Reference* (2004),[103] the Court refused to answer a reference question where none of the usual objections applied. The Court was asked, as a fourth question, whether the opposite-sex requirement for marriage was consistent with the Charter of Rights. The Court answered the first three questions posed to it (which related to Parliament's authority to legalize same-sex marriage, and the impact of the Charter's guarantee of freedom of religion). But the Court refused to answer the fourth question on the ground that it would be "inappropriate".[104] The Court's explanation boiled down to two points. First, since the Government was planning to legalize same-sex marriage by legislative enactment anyway, an answer to the question "serves no legal purpose".[105] This was not quite true, because at the time of the Court's decision there was no guarantee that the proposed legislation (on which a free vote had been promised) would in fact pass. (It was later introduced and did pass.) Second, the Court said that, if it were to answer that the opposite-sex requirement was consistent with the Charter, that would be contrary to lower court decisions that had held the opposite, and upon the faith of which many same-sex marriages had been performed. What is odd about this reason is that it implies that there was no way for the Court to know how it was going to answer the question, despite the fact that the Court had received full written and oral argument on the point. Elsewhere in the opinion, it is strongly implied that the Court believed that the opposite-sex requirement was not consistent with the Charter, and, if the Court were to answer the question in that way, then the jeopardizing of existing marriages would not be

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10 Supreme Court L.R. 429 argues that there is no discretion to refuse to answer a reference question, but he acknowledges the abundant authority to the contrary.

98 *A.-G. Ont. v. A.-G. Can.* (Local Prohibition) [1896] A.C. 348, 370 (refusing to answer questions that "have not as yet given rise to any real and present controversy" and are therefore "academic rather than judicial"). Query the force of this reasoning given that references often pose questions that are hypothetical in the sense of not yet giving rise to a real dispute: *Re Secession of Quebec* [1998] 2 S.C.R. 217, para. 25.

99 *Re Objection by Que. to Resolution to Amend the Constitution* [1982] 2 S.C.R. 793, 806 (asserting discretion not to answer a question "where the issue has become moot", while deciding to answer the question nonetheless).

100 *Re Can. Assistance Plan* [1991] 2 S.C.R. 525, 545 (asserting discretion to refuse to answer a "purely political" question, although the question in the case did have "a sufficient legal component to warrant a decision by a court").

101 In *McEvoy v. A.-G. N.B.* [1983] 1 S.C.R. 704, 707-715 where the Court in the end decided to answer a question which it described as suffering from "excessive abstractness", the Court cited four cases in which questions were not answered for lack of specificity. A fifth could be added: *A.-G. B.C. v. A.-G. Can.* (Fishing Rights) [1914] A.C. 153, 162. A sixth case is *Re GST* [1992] 2 S.C.R. 445, 485-486 (refusing to answer question on grounds that it was "hypothetical" and "the answer given would not be precise or useful").

102 *Re Secession of Quebec* [1998] 2 S.C.R. 217, para. 30.

103 *Re Same-Sex Marriage* [2004] 3 S.C.R. 698. I disclose that I was counsel for the Attorney General of Canada, arguing that the question should be answered.

104 *Id.*, paras. 12, 62.

105 *Id.*, para. 65

a problem. Obviously, the Court did not want to answer the question, but surely not for the reasons provided. I speculate that the reason was a desire by the Court to make Parliament play a role in the legalization of same-sex marriage, so that it could not be claimed that such a controversial project was being entirely driven by judges.

The refusal to answer the fourth question in the *Same-Sex Marriage Reference* is contrary to the Court's general approach to reference questions. As noted in the discussion of conventions in chapter 1,[106] in the reference litigation concerning the constitutional settlement of 1982, the Court was astonishingly liberal in the questions that it elected to answer. While acknowledging its power not to answer, the Court in the *Patriation Reference*[107] and the *Quebec Veto Reference*[108] answered questions about the existence and meaning of constitutional conventions — questions that raised no legal issue and had only political consequences.[109]

Generally speaking, it is my opinion that the Court has not made sufficient use of its discretion not to answer a question posed on a reference. The reference procedure has often presented the Court with a relatively abstract question divorced from the factual setting which would be present in a concrete case. It has been a common and justified complaint that some of the opinions rendered in references have propounded doctrine that was too general and abstract to provide a satisfactory rule. A number of the most important Canadian cases are open to criticism on this ground.[110]

Even 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. *Re Agricultural Products Marketing Act* (1978)[111] is an example. The case concerned the validity of a complex scheme for regulating the market in eggs which had been enacted by complementary federal and provincial legislation. A series of specific questions was asked on a reference by the Ontario government. Large quantities of factual information were placed before the Court. Oral argument occupied four days. The Court took six months to write two concurring opinions. But when the opinions are analyzed, they are found to be unclear as to whether or not the levies imposed on egg producers by the federal egg marketing agency were wholly valid. Since this was one of the main points in dispute, which had led the Ontario government to direct the reference in the first place, the opinions were seriously deficient.[112] An action by the federal agency to

106 Chapter 1, Sources, under heading 1.10, "Conventions", above.

107 *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753.

108 *Re Objection by Que. to Resolution to Amend the Constitution* [1982] 2 S.C.R. 793. In this case the only question posed was not only non-legal, it was also (as the Court acknowledged at pp. 805-806) "moot" even in a political sense.

109 Compare *Re Secession of Quebec* [1998] 2 S.C.R. 217, para. 22 (answering question of international law).

110 Strayer, *The Canadian Constitution and the Courts* (3rd ed., 1988), 323-328.

111 [1978] 2 S.C.R. 1198.

112 I should disclose that I was one of the counsel in the case, and admit the possibility that counsel were at fault in not sufficiently emphasizing the significance of this issue. On the other hand, the

collect unpaid levies, or a suit by a dissident producer to enjoin their collection, would have yielded a forthright outcome.

A balanced assessment of the reference procedure must acknowledge its utility as a means of securing an answer to a constitutional question. As noted earlier, the reference procedure has been used mainly in constitutional cases.[113] This is because it enables a government to obtain an early and (for practical purposes) authoritative ruling on the constitutionality of a legislative programme. Sometimes questions of law are referred in advance of the drafting of legislation; sometimes draft legislation is referred before it is enacted; sometimes a statute is referred shortly after its enactment; often a statute is referred after several private proceedings challenging its constitutionality promise a prolonged period of uncertainty as the litigation slowly works its way up the provincial or federal court system. The reference procedure enables an early resolution of the constitutional doubt.

(e) Proof of facts

Proof of facts in a reference is peculiarly difficult, because a reference originates in a court that is normally an appellate court: there is no trial, and no other procedure enabling evidence to be adduced. A statement of facts is sometimes included in the "order of reference", which is the document posing the questions that the government wishes the Court to answer. Sometimes, too, affidavits or Brandeis briefs or other material of a factual character are filed informally, or under the direction of the Court. The topic of evidence, including evidence in references, is taken up in chapter 60, Proof, below.[114]

8.7 Precedent

Canadian courts accept the doctrine of precedent (or stare decisis),[115] under which the decisions of a court are binding on courts lower in the judicial hierarchy.[116] Before the abolition of appeals to the Privy Council in 1949, the Supreme Court of Canada was lower in the judicial hierarchy and was accordingly bound by decisions[117] of the Privy Council.[118] During that period, the Supreme

majority opinion opened with the astonishing phrase (at p. 1289) "Being pressed for time...". Whoever was at fault, such an unsatisfactory outcome could only have been produced by the reference procedure.

113 Note 78, above.

114 Chapter 60, Proof, under heading 60.2, "Evidence", below.

115 Precedent or stare decisis is not to be confused with res judicata, under which the judgments of a court are permanently binding on the parties to the litigation.

116 See generally J.D. Murphy and R. Rueter, *Stare Decisis in Commonwealth Appellate Courts* (Butterworths, Toronto, 1981).

117 Decisions in reference cases, being advisory only, were not binding. However, as noted at note 96, above, in practice decisions in reference cases have been given the same weight as decisions in other cases.