

# JUDICIAL REVIEW IN CANADA: PROCEDURAL ASPECTS

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## *Introduction*

Although the power of the Governor General to disallow provincial statutes is still a subsisting one,<sup>1</sup> and may be used to prevent a province from invading the proper legislative sphere of the Dominion, primary responsibility for policing the division of powers between the Dominion and provincial governments and for enforcing the other limitations of the British North America Acts, 1867 to 1960, rests with the courts. In keeping with the standard pattern of the Americas this means the ordinary courts of law, not a special "constitutional court" as in some European countries. However, Canada has supplemented the normal procedures of the common law with provisions intended to speed up the solution of constitutional issues, while at the same time guaranteeing a more adequate consideration of the rights of all concerned. The result may well be the best thought out system of judicial control to be found anywhere in the world today.

The scope of judicial review is narrower in Canada than in the United States, Mexico, and many other federal systems because the British North America Act contains no list of individual guarantees. However, the adoption of statutory bills of rights by Saskatchewan in 1947<sup>2</sup> and by the Dominion in 1960<sup>3</sup> has given

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<sup>1</sup> Alberta contended to the contrary when three of its statutes were disallowed in August, 1937, but the Supreme Court, on reference, sustained the central government. *Re Power of Governor General in Council to Disallow Provincial Legislation*, [1938] S.C.R. 71. The Acts were disallowed because Alberta declined to postpone their effective dates pending rulings by the court as to their validity.

<sup>2</sup> S.S., 1947, c. 35, now R.S.S., 1953, c. 345. The earlier Alberta Bill of Rights Act, S.A., 1946, c. 11, essentially a "social credit" document, never went into effect since in the reference provided for in the Act itself both the Alberta Appellate Division and the Judicial Committee held it unconstitutional as an effort to control banking, a subject delegated exclusively to the Dominion. *Re Alberta Bill of Rights Act*, [1947] 1 D.L.R. 337, [1946] 3 W.W.R. 772, aff'd *sub nom. A.-G. Alta. v. A.-G. Can.*, [1947] A. C. 503.

For footnote 3, see next page.

the courts additional duties in controlling the acts of local governments and administrative officers. Of course the purely statutory status of these guarantees means that they are not binding even upon the legislatures concerned. However, since the Dominion Act provides, "Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognized and declared", it may in time serve as a basis for developing a system of judicial review to protect individual rights at the Dominion level even as against statutes.

### I. *The Court System.*

For a nation organized on a federal basis, the Canadian court system is a relatively simple one. The principal trial courts, alike for matters governed by Dominion, provincial, or foreign law, are those created by the provinces. The Governor General, however, appoints the judges of the "superior, district, and county courts", except those of probate in New Brunswick and Nova Scotia;<sup>4</sup> and their salaries are also set and paid by the Dominion.<sup>5</sup> The minor judiciary are appointed and paid by the provinces. The Dominion regulates the procedure that all such courts shall follow in trying Dominion crimes;<sup>6</sup> and although each province is free to determine its own procedure for the trial of provincial offenses,<sup>7</sup> they normally follow that set out by the Dominion. It has long been settled that the Dominion may also regulate the procedure of provincial courts when applying Dominion laws in civil matters,<sup>8</sup> but the Federal Parliament has largely accepted the civil procedure of the provinces save for bankruptcy and insolvency, fields over which the Dominion has exclusive jurisdiction.

<sup>3</sup> S.C., 1960, c. 44. Of course this Act does not apply to the provincial governments. *Re Williams and Williams*, [1961] O.R. 657, at p. 660, 29 D.L.R. (2d) 107, at p. 110 (C.A.).

<sup>4</sup> B.N.A. Act, 1867, 30 Vict., c. 3, s. 96. Efforts so to construe this clause to make it impossible for the provinces to vest judicial functions of a nature once exercised by such courts in provincially appointed boards or inferior courts have largely failed. See *Re Authority to Perform Functions Vested by the Adoption Act, etc.*, [1938] S.C.R. 398; *A.-G. Ont. v. Scott*, [1956] S.C.R. 137. For an excellent discussion of the problems involved see two articles by John Willis, Section 96 of the B.N.A. Act (1940), 18 Can. Bar Rev. 517, and Administrative Law in Canada (1961), 39 Can. Bar Rev. 251.

<sup>5</sup> B.N.A. Act, *supra*, footnote 4, s. 100.

<sup>6</sup> *Ibid.*, s. 91 (27).

<sup>7</sup> Efforts to establish the contrary rule have been rejected by the courts. A good example is *Rex v. McIlree*, [1950] 1 W.W.R. 894, 97 C.C.C. 89, 9 C.R. 447 (B.C. C.A.).

<sup>8</sup> *Valin v. Langlois* (1879), 3 S.C.R. 1, *aff'd* (1879), 5 App. Cas. 115; *Cushing v. Dupuy* (1880), 5 App. Cas. 409.

Although under section 101 of the British North America Act, 1867, the Dominion may provide "for the establishment of any additional courts for the better administration of the laws of Canada", it has seen fit to create only the Exchequer Court, the jurisdiction of which is limited largely to admiralty, suits involving patents, copyrights, or trade marks, Dominion tax matters, and suits against the Crown. Of course certain judicial or quasi-judicial powers have been granted to various Dominion officers and boards, such as the Board of Transport Commissioners.

Parliament has exercised the authority given to it by section 101 of the British North America Act, 1867, to "provide for the constitution, maintenance, and organization of a general court of appeal for Canada" by making the Supreme Court of Canada a court of appeal for all questions of law, provincial as well as Dominion or foreign. No province may curb this jurisdiction.<sup>9</sup> This has tremendously simplified the problem of securing uniformity of interpretation of identical provincial enactments, or of common-law principles applicable in the absence of statutes, without interfering with the right of the provinces to alter either, by statute, as they see fit.<sup>10</sup>

Of course appeals to the Judicial Committee were abolished by the Act of 1949,<sup>11</sup> which vests "exclusive ultimate appellate civil and criminal jurisdiction within and for Canada" in the Supreme Court.

## II. *Judicial Review.*

The basic Canadian system of judicial control is identical to that of the United States. The validity of any law, by-law, decree, or regulation, whether of the Dominion or of a province, including its local units of government, may be questioned by a party in any case in any court in which an effort is made to apply such legal norm to him. The court will refuse to apply it if it considers it to be in conflict with a higher legal norm. Thus a by-law or admin-

<sup>9</sup> *Clarkson v. Ryan* (1890), 17 S.C.R. 251.

<sup>10</sup> Compare J. A. C. Grant, *The Search for Uniformity of Law* (1938), 32 Am. Pol. Sci. Rev. 1082, discussing the problems the United States has had in this regard, with John Willis, *Securing Uniformity of Law in a Federal System — Canada* (1944), 5 U. T. L.J. 352.

<sup>11</sup> S.C., 1949, 2nd sess., c. 37, s. 3, now R.S.C., 1952, c. 259, s. 54. The bill was introduced in 1939, but was shelved until the Judicial Committee ruled that it would be valid in *A.-G. Ont. v. A.-G. Can.*, [1947] A.C. 127. Since the Act of 1949, s. 7, now s. 107 of R.S.C., 1952, c. 259, provided that it should not affect appeals from judgments in proceedings commenced prior to December 23rd, 1949, the last appeal was not disposed of until October 7th, 1959, when the ruling in *Wakefield Co. v. Oil City Petroleum et al.*, [1958] S.C.R. 361 was affirmed.

istrative regulation may be held void because it conflicts with a valid statute,<sup>12</sup> a provincial law may be held inapplicable because it conflicts with a Dominion Act in a field where the jurisdictions of the two governments overlap,<sup>13</sup> or a statute, either Dominion or provincial, may be held *ultra vires* the government concerned because it invades a field of legislation reserved by the British North America Act to the other level of government.<sup>14</sup> If the case involves enough money or meets other tests of appellate jurisdiction, the correctness of its ruling may be appealed of right to a higher court and ultimately to the Supreme Court of Canada. The Supreme Court may, and normally will, consider any case involving a meritorious constitutional issue regardless of the money value of the matter in controversy.

The law reports are replete with illustrations of the great variety of cases in which such defenses have been made. For example, some defendants have questioned the legal existence of the tribunal in which they have been prosecuted or sued,<sup>15</sup> or its jurisdiction over the field involved;<sup>16</sup> others have only questioned the validity of the particular statute they have been prosecuted for violating or under which property or damages have been sought from them.<sup>17</sup> In other cases the defendant has pleaded a particular statute as his defense, and the plaintiff has then challenged its validity.<sup>18</sup>

Most Latin American and European writers like to distinguish

<sup>12</sup> *Rex v. Naish*, [1950] 1 W.W.R. 987, 97 C.C.C. 19, 10 C.R. 65, in which a police court held an anti-litter by-law as applied to a Jehovah's Witness to conflict with the religious freedom guarantee of the Saskatchewan Bill of Rights Act.

<sup>13</sup> *Re Regina v. Dickie*, [1955] 2 D.L.R. 757, 13 W.W.R. 545, 110 C.C.C. 168 (Alta. S.C.), quashing a conviction under the provincial Vehicles and Highway Traffic Act because the field had been occupied by the Dominion Criminal Code; *Kennedy v. Rowell*, [1954] 4 D.L.R. 44, 11 W.W.R. 177 (Man. Q.B.), holding that the Criminal Code also suspends the operation of certain civil statutes of the provinces; *In re Bozanich*, [1942] S.C.R. 130, holding that provisions of the Dominion laws on bankruptcy supersede provincial statutes as to preference between creditors. See Bora Laskin, *Occupying the Field: Paramouncy in Penal Legislation* (1963), 41 Can. Bar Rev. 234.

<sup>14</sup> This is the most frequent argument. The "New Deal" cases, discussed *infra* in the text accompanying footnotes 64 through 67, are typical examples, although these cases reached the courts on reference by the executive. *Hammerstein v. B.C. Coast Vegetable Marketing Board et al.* (1962), 37 D.L.R. (2d) 153 (B.C. C.A.) raised the same type of issue in an application for an injunction.

<sup>15</sup> *The Picton* (1879), 4 S.C.R. 648.

<sup>16</sup> *Valin v. Langlois*, *supra*, footnote 8; *Ex parte Dansereau* (1875), 19 L.C.J. 210 (Que. Q.B. *in banc*).

<sup>17</sup> *A.-G. Que. v. A.-G. Can.*, [1945] S.C.R. 600; *City of Fredericton v. The Queen* (1880), 3 S.C.R. 505.

<sup>18</sup> *North American Life Assurance Co. v. McLean*, [1941] 1 W.W.R. 430 (Alta. S.C.); *L'Union St.-Jacques de Montréal v. Bélisle* (1874), L.R. 6 P.C. 31.

between judicial review by way of an *exception*, as in the above examples, and by way of an *action* brought for the express purpose of settling the constitutionality of a law or setting aside the application that has been made of it in a given instance. Although the distinction is often a somewhat artificial one, it may be said that such *actions* also are quite in keeping with common-law procedures as used in Canada. Habeas corpus is a classic example of an action brought to nullify steps taken in violation of law, including the constitution,<sup>19</sup> as is a petition of right to recover taxes paid under protest.<sup>20</sup> One may test the constitutionality of a statute creating an office by quo warranto,<sup>21</sup> or the validity of a statute granting jurisdiction by prohibition;<sup>22</sup> and of course injunction proceedings may be used by either side, that is, by those who wish to proceed or to force others to do so in spite of a statutory provision to the contrary,<sup>23</sup> or to prevent action contrary to a statute the petitioner feels to be valid.<sup>24</sup> The same is true of the declaratory judgment.<sup>25</sup>

Constitutional issues may also be raised by a person who takes no side, leaving it up to other interested parties to join in the action to protect their interests. This may be the case, for example, in bankruptcy proceedings or probate matters, when the receiver or administrator asks for "instructions" from the court.<sup>26</sup>

<sup>19</sup> This was one of the earliest remedies used to raise constitutional issues. See *Ex parte Dixon* (1872), 2 Rev. Crit. 231 (Que. C.A.); *Ex parte Dansereau*, *supra*, footnote 16.

<sup>20</sup> *Burland v. The King*, [1922] 1 A.C. 215, reversing an unreported Quebec ruling.

<sup>21</sup> *The King ex rel. Township of Stamford v. McKeown et al.*, [1934] O.R. 662, [1934] 4 D.L.R. 664 (H.C.), aff'd [1935] O.R. 109, [1935] 2 D.L.R. 157, 43 C.R.C. 264 (C.A.).

<sup>22</sup> *Re Williams and Williams*, *supra*, footnote 3, affirming *Re Williams and Ont. Securities Com'n*, [1961] O.R. 350, 27 D.L.R. (2d) 390 (H.C.); *A.-G. Ont. v. Scott*, *supra*, footnote 4, reversing *Re Scott*, [1954] O.R. 676, [1954] 4 D.L.R. 546 (C.A.) and reinstating [1954] O.R. 246, [1954] 2 D.L.R. 465 (H.C.).

<sup>23</sup> *Hammerstein v. B.C. Coast Vegetable Marketing Board et al.*, *supra*, footnote 14. Mandamus may be the proper remedy, as in *City of Fredericton v. The Queen* (1879), 3 S.C.R. 505; or a party may seek to quash a local rate he feels to be unconstitutional, as in *City of Winnipeg v. Barrett*, [1892] A.C. 445.

<sup>24</sup> *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, a shareholder's suit to enjoin a corporation organized under the Companies Act of Canada from operating in British Columbia without a provincial license. Of course both the Dominion and the province intervened.

<sup>25</sup> *Oil, Chemical and Atomic Workers Int'l Union, Local No. 16-601 v. Imperial Oil Ltd.* (1961), 30 D.L.R. (2d) 657, 36 W.W.R. 385 (B.C. S.C.) aff'd (1962), 33 D.L.R. (2d) 732, 38 W.W.R. 533 (C.A.); *Currie v. Harris Lithographing Co.* (1917), 40 O.L.R. 290 (H.C.), modified (1917), 41 O.L.R. 475, 41 D.L.R. 227 (App. Div.), reversed *sub. nom. Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91.

<sup>26</sup> *A.-G. Can. v. A.-G. Alta.*, [1928] A.C. 475, affirming [1927] S.C.R. 136, which modified *Re Western Trust Co. and Trusts and Guarantee Co.* (1926), 22 Alta. L.R. 186, [1926] 1 W.W.R. 337 (S.C. App. Div.) (probate);

Everything said so far will seem quite familiar to any lawyer practicing in the United States or anyone acquainted with its institutions. But the Canadian system has many additional features, and it is these that I wish to discuss in some detail.

### III. *Special Procedures To Litigate Constitutional Issues.*

#### 1) *Regular suits.*

A. *Suspend and refer.* A law suit, especially if it entails one or more appeals and even a retrial, may be a time consuming and expensive process; and it is especially frustrating when in the end it proves abortive because the statute on which it was based is held unconstitutional, or an action brought to test the validity of a statute is decided on some other ground or even dismissed because the case has become moot. In six of the ten provinces of Canada it is possible to shorten the time necessary to secure the Supreme Court's definitive ruling on a constitutional issue even in suits between private individuals. The Dominion Supreme Court Act authorizes the provincial legislatures to provide that any suit in which the parties by their pleadings have raised the question of the validity of a Dominion or a provincial statute, and in the opinion of the trial judge the question is material, may be transferred to the Supreme Court. The court will then hear argument and rule on this constitutional question only, remanding the case to the trial court for completion in the light of its ruling.<sup>27</sup> British Columbia,<sup>28</sup> Manitoba,<sup>29</sup> New Brunswick,<sup>30</sup> Newfoundland,<sup>31</sup> Ontario,<sup>32</sup> and Prince Edward Island<sup>33</sup> have passed statutes requiring this procedure to be followed when the parties to the case request it, and permitting the trial court to order it even over the objection of a party who might benefit from delay.

Several countries of Latin America have copied this technique.<sup>34</sup>

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*Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A. C. 437, affirming (1889), 20 S.C.R. 695 which affirmed (1888), 27 N.B.R. 379 (S.C. *in banc*) (bankruptcy).

<sup>27</sup> S.C., 1875, c. 11, ss. 54 and 56, now R.S.C., 1952, c. 259, s. 62. The original Act provided that such reference should be mandatory once the trial judge had ruled the issue "material"; but S.C., 1876, c. 26, s. 17, passed just three months after the Supreme Court was organized and had held its first session, substituted the present language: "shall, at the request of the parties, and may without such request if he thinks fit, order the case to be removed."

<sup>28</sup> S.B.C., 1881, c. 6, s. 1, now R.S.B.C., 1960, c. 141, s. 2.

<sup>29</sup> S.M., 1917, c. 18, s. 2, now R.S.M., 1954, c. 51, s. 2 (c).

<sup>30</sup> S.N.B., 1888, c. 9, s. 1, now R.S.N.B., 1952, c. 83, s. 1 (c).

<sup>31</sup> S.N., 1954, No. 13, s. 2 (c).

<sup>32</sup> S.O., 1877, c. 5, s. 1, now R.S.O., 1960, c. 112, s. 1 (c).

<sup>33</sup> S.P.E.I., 1941, c. 16, s. 11, now R.S.P.E.I., 1951, c. 79, s. 40 (1) (c).

<sup>34</sup> The constitutional and statutory provisions are collected in Ch. 3

Canada, in turn, seems to have borrowed it from earlier practices in the United States, where, however, it was not restricted to constitutional questions. The 1802 amendment to the federal Judiciary Act provided: "Whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point . . . shall, upon the request of either party . . . be certified to the Supreme Court . . . and shall, by the said court, be finally decided." It added that the circuit court might continue the trial "if, in the opinion of the court, further proceedings can be had without prejudice to the merits".<sup>35</sup> These "certificates of division of opinion" came to an end when the multi-judge circuit courts were abolished in 1912, no provision for such references having been made for the new three-judge district courts created in 1910; but questions may still be certified to the Supreme Court from the federal courts of appeals.<sup>36</sup>

The value of this procedure was demonstrated in *Tennessee v. Davis*.<sup>37</sup> The State of Tennessee indicted a federal officer for murder, and he petitioned to have the case removed to the federal circuit court for trial because his defense was that he was acting legally in the enforcement of a federal law. The circuit court was not sure that the statute permitting this was constitutional, nor did it know whether, assuming it could try the case, it should follow the ordinary federal criminal procedure or the procedure set out by state law for the state courts. Rather than risk guessing incorrectly, it certified these questions to the Supreme Court, which replied 1) that it did have jurisdiction; 2) that it should apply the substantive law of murder of the state, but 3) should follow federal criminal procedure. This was certainly preferable to trying the case under state procedure, being reversed on appeal, and then starting all over again, not to mention the other errors that could easily have been made.

Canada has given similar authority to the Board of Railway Commissioners and its successor, the Board of Transport Com-

of my Control Jurisdiccional de la Constitucionalidad de las Leyes: una Contribución de las Américas a la Ciencia Política (Mexico, 1963).

<sup>35</sup> (1802), 2 U.S. Stat. 159, c. 31, s. 6. Its scope was restricted to criminal trials by (1872), 17 U.S. Stat. 196, c. 255, s. 1, the view of the presiding judge prevailing in civil cases.

<sup>36</sup> For example, on April 9th, 1963 the Court of Appeals for the Fifth Circuit certified the question whether the Governor and Lieutenant-Governor of Mississippi are entitled to trial by jury on charges of criminal contempt growing out of their alleged violation of a temporary restraining order issued in connection with the application of James H. Meredith, a Negro, for admission to the University of Mississippi. *United States v. Barnett and Johnson*, docket No. 1011, October term 1962.

<sup>37</sup> (1897), 100 U.S. 257.

missioners, which on its own motion or upon the application of any party may "state a case, in writing, for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is a question of law or of the jurisdiction of the Board." The court shall then "hear and determine such questions, and remit the matter to the Board with the opinion of the Court thereon".<sup>38</sup> The Board of Commerce, which existed from 1919 to 1923, was given similar authority.<sup>39</sup> Although most questions submitted under these Acts have turned on statutory construction,<sup>40</sup> it was in such a reference that the Combines and Fair Prices Act of 1919 was held *ultra vires* the Dominion.<sup>41</sup>

B. *Attorney General v. Attorney General*. Every Canadian province, with the possible exception of Quebec,<sup>42</sup> provides for declaratory judgments, generally in the language of the English rule of 1883: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether any consequential relief is or could be claimed or not." Such proceedings have proved to be especially well adapted to litigate many constitutional issues, whether the suit be one between private parties<sup>43</sup> or between a private party and the appropriate attorney general.<sup>44</sup> Since the attorneys general for the provinces and of the Dominion are free to intervene, the suit may end up pitting

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<sup>38</sup> Railway Act, S.C., 1888, c. 29, ss. 19 and 20, now as am. R.S.C., 1952, c. 234, s. 44.

<sup>39</sup> Board of Commerce Act, S.C., 1919, c. 37, s. 32.

<sup>40</sup> See, for example, *Reference by the Board of Transport Comm'rs*, [1943] S.C.R. 333; *Re Angliers Railway Crossing*, [1937] S.C.R. 451; *Re "The Grade Crossing Fund"*, [1933] S.C.R. 81; *Re Branch Lines C.P.R.* (1905), 36 S.C.R. 42.

<sup>41</sup> *Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191. The Supreme Court (1920), 60 S.C.R. 456, had divided evenly on this issue. Counsel were instructed by the Attorney General of Canada, various provincial attorneys general, and interested manufacturers.

It was this ruling that led to the abolition of the Board of Commerce by S.C., 1923, c. 9, s. 36, as it had been created primarily to administer the Combines and Fair Prices Act.

<sup>42</sup> See *Saumur and Jehovah's Witnesses v. A.-G. Que. et al.*, [1963] Que. Q.B. 116, 37 D.L.R. (2d) 703 (*in banc*), which attempts to explain away the earlier cases.

<sup>43</sup> *Currie v. Harris Lithographing Co.*, *supra*, footnote 25. Both the provincial and the Dominion attorneys general intervened and participated actively at all stages of the case.

<sup>44</sup> *A.-G. Ont. v. Harris Lithographing Co.*, tried and reviewed together with the case cited in the preceding footnote. The Attorney General of Canada intervened on behalf of the defendant. In *A.-G. Que. v. Saumur and Jehovah's Witnesses*, [1945] Que. Q.B. 565, 5 D.L.R. (2d) 190 (*in banc*), affirming [1956] Que. P.R. 331 (S.C.) the attorney general was originally the defendant rather than the plaintiff.



one against the other as the most active participants.<sup>45</sup>

Alberta,<sup>46</sup> British Columbia,<sup>47</sup> Manitoba,<sup>48</sup> New Brunswick,<sup>49</sup> and Ontario<sup>50</sup> have specifically provided that when it is suspected that a provincial statute exceeds the jurisdiction of the provincial legislature and invades that of the Dominion Parliament, the Attorney General of Canada may bring a suit in a provincial court against the attorney general for the province to secure a declaratory judgment as to its validity. In the alternative, the suit may be brought by the attorney general for the province against the Dominion Attorney General. The Ontario Act is equally applicable to Dominion statutes. These statutes make it unnecessary to wait to settle the issue until a dispute arises between private individuals or corporations, or between the government and a private person or corporation.

Many interesting and important questions of constitutional law have been settled in such suits. For example, Ontario successfully defended the right of the lieutenant-governor of a province to pardon those convicted of provincial offenses.<sup>51</sup> British Columbia, even with the help of Ontario, failed to establish its right to import liquor to be sold in its provincially-owned liquor stores without paying Dominion import duties.<sup>52</sup> Ontario succeeded in having several sections of a Dominion insurance act held void, although other sections were sustained as valid.<sup>53</sup>

## 2) *Reference cases.*

From the very first the Supreme Court Act has provided for advisory opinions at the request of the Governor in Council. Although the original language authorized him "to refer to the Supreme Court, for hearing and consideration, any matters whatsoever as he may think fit",<sup>54</sup> its principal use has been to refer questions as to the constitutional validity of Dominion or provincial statutes or bills under discussion. This approach is reflected

<sup>45</sup> See the two preceding footnotes, and the case discussed *infra* in the text accompanying footnote 133.

<sup>46</sup> S.A., 1907, c. 5, s. 7, now R.S.A., 1955, c. 164, s. 32 (1) and (m).

<sup>47</sup> S.B.C., 1903-04, c. 15, s. 18, now R.S.B.C., 1960, c. 72, s. 11.

<sup>48</sup> S.M., 1895, c. 6, s. 38(2), now R.S.M., 1954, c. 52, s. 61.

<sup>49</sup> S.N.B., 1909, c. 5, s. 16, now R.S.N.B., 1952, c. 120, s. 24.

<sup>50</sup> S.O., 1886, c. 16, s. 38 (a), now R.S.O., 1960, c. 197, s. 20.

<sup>51</sup> *A.-G. Can. v. A.-G. Ont.* (1890), 20 O.R. 222 (H.C.), *aff'd* (1892), 19 O.A.R. 31, *aff'd* (1894), 23 S.C.R. 458.

<sup>52</sup> *A.-G.B.C. v. A.-G. Can.* (1922), 21 Ex. C.R. 281, *aff'd* (1922), 64 S.C.R. 377.

<sup>53</sup> *A.-G. Ont. v. A.-G. Can.*, [1931] O.R. 5, [1931] 2 D.L.R. 297, 55 C.C.C. 346 (S.C.).

<sup>54</sup> S.C., 1875, c. 11, s. 52.

in the language in which the provision now appears in Chapter 259 of the 1952 Revised Statutes of Canada.

55. (1) Important questions of law or fact touching
- (a) the interpretation of the *British North America Acts*;
  - (b) the constitutionality or interpretation of any Dominion or provincial legislation;
  - (c) the appellate jurisdiction as to educational matters, by the *British North America Act* 1867, or by any other Act or law vested in the Governor in Council;
  - (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised; or
  - (e) any other matter, whether or not in the opinion of the Court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;

May be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.

2. Where a reference is made to the Court under subsection (1) it is the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.

Each of the provinces has copied this Dominion procedure, authorizing its lieutenant-governor to submit "any matter he thinks fit" to the provincial court of appeals, with an appeal to the Supreme Court of Canada. Some allow the option of submitting questions to a single judge, with an appeal to the court of appeals and then to the Supreme Court; but this is almost never done. Again the principal use of such references has been to settle questions as to the constitutionality of statutes.<sup>55</sup> Indeed, such provincial Acts are commonly entitled "An Act for expediting the decision of constitutional questions" or just "Constitutional Questions Act".

In 1897 the Supreme Court declined to hear an appeal from such a reference, stating: "We clearly have no jurisdiction to entertain the appeal. There is no judgment to be appealed from. The British

<sup>55</sup> The lieutenant-governor may even submit questions as to the validity of a Dominion law, *A.-G. Ont. v. Canada Temperance Federation*, [1946] A.C. 193. Of course the central government, if it wishes to shorten the process, may render the provincial reference moot by submitting the same questions directly to the Supreme Court, as in *Re Regulation and Control of Radio Communication*, [1931] S.C.R. 541, aff'd [1932] A.C. 304

Columbia statute itself says 'shall be deemed a judgment.' That is saying that it is not a judgment. There is no action, no parties, no controversy perhaps, and the British Columbia legislature, did it intend to do so, cannot extend our jurisdiction, and create a right to appeal to this court."<sup>56</sup> Had this decision stood, it would have destroyed the value of these provincial reference Acts. But the Judicial Committee had entertained an appeal from such a reference opinion three years earlier,<sup>57</sup> and continued to do so;<sup>58</sup> and in 1922 the Supreme Court Act was amended specifically to bring these rulings within the jurisdiction of the Supreme Court.<sup>59</sup>

Generally, of course, the initiative for a reference comes from the cabinet acting on pressures from the law officers of the Crown. But the Dominion may act at the request of a province, as in *Re Power of the Governor General in Council to Disallow Provincial Legislation*,<sup>60</sup> where two additional questions were added at the specific request of Alberta. In *Re Meaning of Word "Persons" in Section 24 of the B.N.A. Act*<sup>61</sup> the reference was the direct result of a petition filed with the government by five ladies "interested in the admission of women to the Senate of Canada". The petitioners then instructed two counsel to present their views to the Supreme Court.

Not only may the opinion of the court be sought before a bill is enacted into law,<sup>62</sup> but the same result may be accomplished

<sup>56</sup> *Union Colliery Co. v. A.-G. B. C.* (1897), 27 S.C.R. 637, at p. 639.

<sup>57</sup> *A.-G. Ont. v. A.-G. Can.*, [1894] A.C. 189, reversing *Re Assignment and Preferences Act* (1893), 20 O.A.R. 489.

<sup>58</sup> *A.-G. Can. v. A.-G. Ont.*, [1898] A.C. 247, affirming *Re Queen's Counsel* (1896), 23 O.A.R. 792; *A.-G. Man. v. Manitoba Licence Holders' Association*, [1902] A.C. 73, reversing *Re Liquor Act* (1901), 13 Man. R. 239 (K.B. *in banc*); *A.-G. Ont. v. Hamilton Street Ry.*, [1903] A.C. 524, reversing *Re Lord's Day Act of Ontario* (1902), 1 O.W.R. 312 (C.A.); *Brothers of Christian Schools v. Minister of Education*, [1907] A.C. 69, affirming *Re Qualifications of Teachers in Roman Catholic Separate Schools* (1906), 7 O.W.R. 141 (C.A.); *Re Initiative and Referendum Act*, [1919] A.C. 935, affirming (1917), 27 Man. L.R. 1, 32 D.L.R. 148, [1917] 1 W.W.R. 1012 (C.A.).

<sup>59</sup> S.C., 1922, c. 48, now R.S.C., 1952, c. 259, s. 37.

<sup>60</sup> [1938] S.C.R. 71. And see the case cited *supra*, footnote 55, where Quebec forced the Dominion's hand by referring questions to the provincial court.

<sup>61</sup> [1928] S.C.R. 276.

<sup>62</sup> The court held to the contrary, at least so far as provincial bills are concerned, in *Re Jurisdiction of a Province to Legislate Respecting Abstinence from Labour on Sunday* (1905), 35 S.C.R. 581, stating, at p. 590, that it did not believe the Supreme Court Act gave it jurisdiction to pass on "supposed or hypothetical legislation which the legislature of a province might enact in the future". Parliament immediately amended the Act to make it clear that it does. S.C., 1906, c. 50, s. 2, now R.S.C., 1952, s. 55(1) (d). The case cited *supra*, footnote 11, illustrates such a reference, as do *Re Marriage Laws* (1912), 46 S.C.R. 132, discussed *infra* in the text accompanying footnotes 81 to 88; *Re Section 17 of the Alberta Act*, [1927]

through providing that a statute will not go into effect unless and until its validity is sustained by the court.<sup>63</sup> This can be accomplished in various ways, as may be illustrated by three of the "New Deal" statutes<sup>64</sup> referred to the court in November, 1935, and ruled upon the following June. The Employment and Social Insurance Act, 1935, provided that no insurance contributions under the Act would be due before a date to be set by the commission that was to administer it. As the statute was held *ultra vires* the Dominion Parliament,<sup>65</sup> no such date was ever announced. Portions of the Farmers' Creditors Arrangement Act, 1934, and its 1935 amendments were to take effect upon dates to be set by the Governor in Council, and such proclamations were not issued until the Act was sustained.<sup>66</sup> The Minimum Wages Act, 1935,

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S.C.R. 364, and *Re Bill 136 . . . Delegation of Legislative Jurisdiction*, [1948] 4 D.L.R. 1, 22 M.P.R. 83 (N.S.S.C. *in banc*), *aff'd sub nom. A.-G. N.S. v. A.-G. Can.*, [1951] S.C.R. 31.

S.C., 1875, c. 11, s. 53, also provided: "The Court, or any two judges thereof, shall examine and report upon any private bill or petition for a private bill presented to the Senate or House of Commons, and referred to the Court under any rules or orders made by the Senate or House of Commons." This was used on a few occasions to secure the court's opinion as to the validity of such a bill if enacted. See L. W. Coutlée, *A Collection of Notes of Unreported Cases in the Supreme Court of Canada, from 1875 to 1907* (1907), pp. 1, 43, and 48. Although this provision is still in effect, R.S.C., 1952, c. 259, s. 56, it has fallen into disuse, reference by the executive having become the preferred procedure.

<sup>63</sup> The earliest such statute I have found is the Liquor License (Amendment) Act, S.C., 1884, c. 32, s. 26: "Whereas doubts have arisen as to the power of Parliament to pass 'The Liquor License Act, 1883,' and the amendments thereof contained in this Act, it is therefore enacted, that until the question of the competence of the Parliament of Canada to pass the said Act, and this Act, be determined as hereinafter provided, no prosecution for the infringement or violation of the said Liquor License Acts shall be instituted against any holder of a license for selling liquor granted to him under the authority of any Statute in any of the Provinces, so long as such license under such authority is in force. (2) And for the purpose of having the said question determined as soon as possible, the Governor in Council may refer to the Supreme Court of Canada, for hearing and determination, the said question as to the competence of Parliament to pass said acts, in whole or in part. . . . [A]ny of the Provinces may . . . become a party to the said case; and . . . be entitled to be heard by counsel on the argument thereof. . . ." In the subsequent reference the Supreme Court held the license Act largely *ultra vires* the Dominion, and the Privy Council held it entirely so. *Re Liquor License Act*, unreported (1885), summarized in R. Cassels, *Digest of Cases Determined in the Supreme Court of Canada, 1875-1893* (1893), p. 509, and in L. W. Coutlée, *Digest . . . 1875-1903* (1904), col. 797. See, also, *Re Railway Act Amendment, 1904* (1905), 36 S.C.R. 136, *aff'd sub nom. Grand Trunk Ry. v. A.-G. Can.*, [1907] A. C. 65, where again the statute expressly provided for the reference.

<sup>64</sup> So called because they were patterned after the New Deal legislation of the Roosevelt Administration in the United States.

<sup>65</sup> *Re Employment and Social Insurance Act*, [1936] S.C.R. 427, *aff'd sub nom. A.-G. Can. v. A.-G. Ont.*, [1937] A.C. 355.

<sup>66</sup> *Re Farmers' Creditors Arrangement Act*, [1936] S.C.R. 384, *aff'd sub nom. A.-G. B.C. v. A.-G. Can.*, [1937] A.C. 391.

which was held *ultra vires* the Dominion,<sup>67</sup> never went into effect, as the Governor General never issued the required proclamation.

The provinces have followed similar procedures. The Alberta Bill of Rights Act of 1946, constituting a renewed effort to establish a "social credit" system, was never proclaimed because both the appellate division of the provincial supreme court and the Judicial Committee held it *ultra vires* the provincial legislature.<sup>68</sup> Twelve years later the same province passed an Act to lighten the burdens of debtors, the validity of which was doubtful because exclusive legislative jurisdiction over bankruptcy and insolvency is delegated to the Dominion. Section 22 provided, "This Act comes into force on a date to be fixed by proclamation". The question of its validity was referred to the appellate division, which advised that it was *ultra vires* the provincial legislature<sup>69</sup>; and Alberta, joined by the Provinces of Ontario and Saskatchewan, appealed. As the Supreme Court affirmed the provincial court's ruling,<sup>70</sup> the statute was abandoned without ever having been proclaimed to be in effect.

This last case is an excellent illustration of the way in which Canada has attempted to guard against rulings on constitutional issues without an adequate presentation of all facets of the problems involved, a matter that I will discuss later. When the appellate division docketed the reference at the request of the provincial attorney general, it directed that the following be notified and invited to appear at the hearing: Canadian Bankers Association; Credit Granter's Association of Edmonton; Retail Merchants Association of Canada (Alberta) Inc., Canadian Credit Men's Trust Association Ltd., Canadian Consumer Loan Association (Canada); Attorney General of Canada. Although it might seem safe to assume that one or more of the associations named would gladly appear, the court at the same time appointed a leading member of the bar, George H. Steer, Q.C., to argue the case on behalf of "creditors and others who may be opposed to the Act". When the case came on for argument, the two representatives of the provincial attorney general were aided by counsel sent by three credit

<sup>67</sup> The Supreme Court was evenly divided in *Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act, and Limitations of Hours of Work Act*, [1936] S.C.R. 461, but the Judicial Committee, *sub nom. A.-G. Can. v. A.-G. Ont.*, [1937] A.C. 326, held all three acts *ultra vires* the Dominion.

<sup>68</sup> See *supra*, footnote 2.

<sup>69</sup> *Re Orderly Payment of Debts Act, 1959 (Alta.)*, (1959), 20 D.L.R. (2d) 503, 29 W.W.R. 435 (Alta.).

<sup>70</sup> *Validity of the Orderly Payment of Debts Act, 1959 (Alta.)*, [1960] S.C.R. 571.

associations who favored the Act. Mr. Steer and his assistants, in opposition, carried the day.

When this ruling was appealed to the Supreme Court, the latter notified the Attorney General of Canada and all provincial attorneys general. The former did not participate, but Ontario and Saskatchewan intervened on behalf of Alberta and sent counsel to argue in favor of the Act's validity. Mr. Steer, whose appointment was continued by the province, appeared in opposition and again carried the day.

A. *Validity and scope.* The Supreme Court accepted reference cases at least as early as 1883, 1884 and 1885,<sup>71</sup> apparently without objection. The majority gave their opinions again in 1892, but Justice Taschereau stated: "I do not take part in this consultation. I have some doubts . . . on the power of Parliament to make this court an advisory board to the executive power or its officers, or, as it seems to me to have done in some instances by that statute, a court of original jurisdiction."<sup>72</sup> Two years later he stated; "I doubt our jurisdiction on this reference or consultation. . . . By which section of the B.N.A. Act is Parliament empowered to confer on this statutory court any other jurisdiction than that of a court of appeal . . . ?"<sup>73</sup> But he yielded to the precedents and joined his colleagues in answering the questions asked, salving his conscience with the remark that "our answers . . . will bind no one, not even those who put them; nay, not even those who give them".<sup>74</sup>

Although Taschereau J. served until 1906, the last four years as Chief Justice, he did not again object. However, during his period on the court it declined to hear an appeal from a provincial reference<sup>75</sup> or to pass on a bill not yet passed by the provincial legislature,<sup>76</sup> necessitating amendments to the Supreme Court Act to make jurisdiction in such cases explicit. He also contended, without success, that the reference provisions do not apply to statutes passed prior to Confederation.<sup>77</sup>

<sup>71</sup> *Sewell v. British Columbia Towing Co. (The Thrasher Case)*, unreported (1883), summarized in Cassels, *op. cit.*, footnote 63, pp. 480-481 and in Coutlée, *op. cit.*, footnote 63, vol. 1, cols. 273-274; *Re Canada Temperance Act, 1878, and County Perth*, (1884), 20 C.L.J. 375; *Re Canada Temperance Act, 1878, and County of Kent*, unreported (1884), summarized in Cassels, *ibid.*, pp. 106-107 and in Coutlée, *ibid.*, cols. 223-224, and the case cited *supra*, footnote 63.

<sup>72</sup> *Re County Courts of British Columbia* (1892), 21 S.C.R. 446, at pp. 454-455.

<sup>73</sup> *Re Certain Statutes of the Province of Manitoba* (1894), 22 S.C.R. 577, at p. 677. The Judicial Committee accepted an appeal and reversed the advice given *sub nom. Brophy v. A.-G. Man.*, [1895] A.C. 202.

<sup>74</sup> *Ibid.*, at 678.

<sup>75</sup> See the text accompanying footnote 56, *supra*.

<sup>76</sup> See *supra*, footnote 62.

<sup>77</sup> *Re Jurisdiction over Provincial Fisheries* (1896), 26 S.C.R. 444, at p. 540, modified *sub nom. A.-G. Can. v. A.-G. Ont.*, [1898] A.C. 700.

In 1910 Justice Idington revived and expanded the original arguments of Taschereau J. Counsel contended that the Dominion lacks authority to refer questions of provincial law to the Supreme Court, a position that was rejected by the majority both on its merits and on precedent.<sup>78</sup> Idington J. not only dissented, but went further, stating: "The legislative, executive and judicial functions of government must be kept separate if we are to maintain the principles of government we enjoy, and which it was intended we should enjoy. If we degrade this court by imposing upon it duties that cannot be held judicial but merely advisory . . . we destroy a fundamental principle of our government. . . . Is there not involved, in the very essence of what is attempted, the taking away of men's rights or liberties without due process of law? Was the doing of that not the fundamental reason that led to the remonstrances that brought about the granting of the great charter that such things should not henceforth be done?"<sup>79</sup>

One suspects that Justice Idington had been reading United States histories and decisions rather than those of England and Canada. His colleagues' opinions made it adequately clear that such references are entirely within the normal scope of activity of English and Canadian courts. The success of the provisions for intervention by any interested party, and even for court appointed counsel, to be discussed later, brought an end to such objections.

In 1898 the Privy Council declined to answer one of the questions submitted in a Dominion reference, stating: ". . . as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors."<sup>80</sup> This led to a full debate in the Supreme Court in 1912 on the propriety of passing upon private rights in a reference case.

This reference grew out of Catholic opposition in Quebec to either mixed marriages, or the marriage of two Catholics, by other than a Catholic priest; and the immediate cause seems to have been the institution of a suit in a Quebec court involving such a marriage. Both the petitioner and the respondent had been baptised as Roman Catholics. They were married at Montreal in 1908

<sup>78</sup> *Re References by the Governor-General in Council* (1910), 43 S.C.R. 536, aff'd *sub nom. A.-G. Ont. v. A.-G. Can.*, [1912] A.C. 571.

<sup>79</sup> *Ibid.*, at pp. 582 and 583 (S.C.R.).

<sup>80</sup> *Supra*, footnote 77, at p. 717 (A.C.).

by a Methodist minister. After the birth of a child, the Archbishop of Montreal, on petition of the husband, declared the marriage void; and his petition to the court asked that this church ruling be "ratified and confirmed for all legal purposes". He was granted a default judgment, which subsequently was reopened at the request of the wife. The husband then desisted from his judgment and asked that the case be dismissed.<sup>81</sup> This ultimately was done,<sup>82</sup> but in the meantime the Governor in Council had referred to the Supreme Court the question of the validity of such marriages under the laws of Quebec and the power of the Dominion Parliament to enact that all such marriages heretofore or hereafter entered into are legally binding.

The case was argued on behalf of the proponents and opponents of the proposed Dominion law, the Attorney General of Canada, and the attorneys general for the provinces of Quebec and Ontario. Quebec asked the court not to answer the question as to the validity of such marriages under Quebec law, stating: "[T]here cannot be any question submitted which involves more complete private rights than this question. It involves a declaration which . . . would put the ban of absolute nullity upon scores of marriages of persons who are not represented at all before your Lordships. . . . [T]he individual whose rights as a married person or whose legitimacy is in question is entitled to be represented by his own counsel."<sup>83</sup> The proponents of Dominion action replied: "[I]t is just as important for Parliament to know what the law of the Province of Quebec is on that subject as it is for Parliament to know the extent of its own powers to legislate over the subject-matter. . . . [I]t is almost impossible to answer upon any reference at all without the possibility of your affecting private rights prejudicially or otherwise."<sup>84</sup> The deputy minister of justice, representing the Dominion, came straight to the heart of the matter, stating: "It is said that these questions may affect marriages, the status of parties who are not and cannot be represented in this court. The same is true, my Lords, of every case that is heard in this court, because other interests which are not represented and which cannot be represented under the practice of the court are affected, and are determined in every case which your Lordships decide. If the *Hébert* case comes to this court, the decision on it might affect hundreds of people, and yet they are equally without representation and without means

<sup>81</sup> *Hébert v. Clouâtre* (1912), 41 Que. S.C. 249, 6 D.L.R. 411.

<sup>82</sup> (1914), 45 Que. S.C. 239, 15 D.L.R. 498.

<sup>83</sup> *Re Marriage Laws*, *supra*, footnote 62, at p. 289.

<sup>84</sup> *Ibid.*, at pp. 157, 158.



of representation in that case as they are upon one of these references."<sup>85</sup>

The deputy minister's reasoning was similar to that of Justice Black, objecting to the United States Supreme Court's tightening of its rules concerning *amicus* briefs: "Most of the cases before this Court involve matters that affect more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rules."<sup>86</sup> The deputy minister's logic cannot be denied without denying the significance of the doctrine of *stare decisis*. It prevailed, even Justice Idington joining with all but one of his colleagues in answering all of the questions asked.<sup>87</sup> Chief Justice Fitzpatrick concluded that since the court was advising that the Dominion Parliament has no authority to legislate as to the solemnization of marriages, the question as to the validity of non-Catholic ceremonies in Quebec was no longer of interest to the central government. He gave, as an additional reason: "The question involves the determination of a point that is in issue in a case now actually pending before a competent Quebec tribunal, and I respectfully suggest that in such circumstances proper respect for judicial ethics requires us to abstain."<sup>88</sup>

The doctrine that matters of "private right" should not be passed upon in reference cases is to be distinguished from the very sound practice of the court to refrain from attempting categorical answers to questions that do not lend themselves to such delusive exactness. As early as 1903 the Judicial Committee, after deciding the basic issues involved in a reference, declined to go further, stating: "They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless. . . . When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it."<sup>89</sup> The Supreme Court has taken the same stand, as

<sup>85</sup> *Ibid.*, at p. 308.

<sup>86</sup> Order Adopting Revised Rules of the Supreme Court of the United States (1954), 346 U.S. 947.

<sup>87</sup> However, he took occasion to lament that his protest against "the vicious principle of interrogating judges" had not prevailed. *Supra*, footnote 83, at p. 395.

<sup>88</sup> *Ibid.*, at p. 336.

<sup>89</sup> *A.-G. Ont. v. Hamilton Street Ry.*, *supra*, footnote 58, at p. 529.

any intelligent court must, examples being the 1929 *Reference re Waters and Water-Powers*<sup>90</sup> and the recent one concerning the validity and interpretation of a section of the Railway Act,<sup>91</sup> in each of which it felt that no precise or useful answer was possible to some of the questions because the answers would depend upon a variety of facts not before the court. In such circumstances "it depends" is not an evasive answer, but the only honest answer possible.

B. *Nature of reference rulings.* Had the court been willing to answer such questions it could have been predicted that its rulings would "bind no one, not even those who put them; nay, not even those who give them".<sup>92</sup> The same would have been true had it been willing to give its answers after inadequate argument. Quite to the contrary, reference cases seem to be among the most completely argued of any that the court decides; and they are argued by counsel representing truly antagonistic positions.

Many reference cases are argued by the Dominion pitted against one or more provinces, which seems quite appropriate when the issue is as to which level of government has jurisdiction in the premises. But any province can join on either side, and occasionally one or more intervene on behalf of the Dominion.<sup>93</sup> If the issue involves Sunday closing we may expect the Lord's Day Alliance to be there, too, pitted against various public carriers<sup>94</sup> or an enter-

<sup>90</sup> [1929] S.C.R. 200.

<sup>91</sup> *A.-G. Can. v. C.P.R. and C.N.R.*, [1958] S.C.R. 285, modifying *Re Validity of Section 198 of the Railway Act* (1956), 2 D.L.R. (2d) 93, 17 W.W.R. 415, 73 Can. R.T.C. 254 (Man. C.A.). G. Rubin, *The Nature and Effect of Reference Cases in Canadian Constitutional Law* (1960), 6 McGill L. J. 168, at p. 187 treats this case as a revival of the "private rights" concept. I cannot agree. I believe that the key sentence in the paragraph from which he quotes is the first one, which he omits together with the opening words of the second: "The application of ss. 198 to 201 to the National company is thus seen to involve questions of the time of purchase, of special legislative enactments and of amalgamations of constituent companies, apart from the interpretation of the Canadian National Railways Act itself. In these circumstances, by answering questions 2, 3 and 4 we would be expressing an opinion that might seriously affect private rights in the absence of those claiming them, a step which would be contrary to the fundamental conception of due process, the application of which to opinions of this nature has long been recognized." At p. 294 (S.C.R.).

<sup>92</sup> Taschereau J., quoted *supra*, footnote 74.

<sup>93</sup> In *A.-G. Ont. v. A.-G. Can.*, [1947] A.C. 127, affirming *Re Privy Council Appeals*, [1940] S.C.R. 49, Manitoba and Saskatchewan joined the Dominion against Ontario, British Columbia, New Brunswick, and Quebec. Prince Edward Island and Nova Scotia (but not Saskatchewan) also participated at the Supreme Court level, but the reporter has not noted how the parties divided there. Ontario supported the Dominion in opposition to Quebec in the case cited *supra*, footnote 83.

<sup>94</sup> *Re Jurisdiction of a Province to Legislate Respecting Abstention from Labour on Sunday*, *supra*, footnote 62; *A.-G. Ont. v. Hamilton Street Ry.*,

tainment combine,<sup>95</sup> just as a reference as to the validity and scope of a Dominion labour disputes Act found the Brotherhood of Railway and Steamship Clerks and District 50 of the United Mine Workers opposing a powerful employer.<sup>96</sup>

The continuance of wartime rent controls was argued by organizations of tenants, property owners, the Canadian Legion, British Empire Service League, and Canadian Congress of Labour.<sup>97</sup> Banks and Mortgage associations have taken a lively part in references concerning moratoria and debt adjustment Acts,<sup>98</sup> and the Canadian Federation of Agriculture has sent counsel to argue on farm measures.<sup>99</sup> Dairy associations have argued against each other over milk control measures,<sup>100</sup> and if a case involves the mineral rights of railroads not only such roads but an interested oil company may be expected to appear.<sup>101</sup> On occasions the special interests involved have been so well represented that the attorney general has stepped aside and let them carry the entire defense of his government's position.<sup>102</sup>

*supra*, footnote 58, reversing *Re Lord's Day Act (Ont.)* (1902), 1 O.W.R. 312 (C.A.).

<sup>95</sup> *Lord's Day Alliance v. A.-G. B.C., City of Vancouver, and Vancouver Mounties Holdings Ltd.*, [1959] S.C.R. 497, affirming *Re Vancouver Charter* (1958), 15 D.L.R.(2d) 169 (B.C.C.A.).

<sup>96</sup> *Re validity of the Industrial Relations and Disputes Investigation Act (Can.)*, [1955] S.C.R. 529. Employees and employers also appeared on opposite sides in *Re Railway Act Amendment 1904*, *supra*, footnote 63.

<sup>97</sup> *Re Validity of Wartime Leasehold Regulations*, [1950] S.C.R. 124.

<sup>98</sup> *Re Debt Adjustment Act (Alta.)*, [1942] S.C.R. 31, aff'd *sub nom. A.-G. Alta v. A.-G. Can.*, [1943] A.C. 356; *Re Farm Security Act (Sask.)*, [1947] S.C.R. 394, aff'd *sub nom. A.-G. Sask. v. A.-G. Can.*, [1949] A.C. 110; *Canadian Bankers' Ass'n v. A.-G. Sask.*, [1956] S.C.R. 31, reversing *Re Saskatchewan Moratorium Legislation*, [1954] 4 D.L.R. 599, 13 W.W.R. 289 (Sask. C.A.).

<sup>99</sup> *Re Validity of Section 5 (A) of the Dairy Industry Act (Can.)*, [1949] S.C.R. 1, where the Canadian Association of Consumers was one of those appearing on the other side; *Re Farm Products Marketing Act (Ont.)*, [1957] S.C.R. 198.

<sup>100</sup> *Crawford, Hillside Farm Dairy Ltd., and Hay Bros. Farms Ltd. v. A.-G. B.C., City of Vancouver, and Fraser Valley Milk Producers Ass'n*, [1960] S.C.R. 346, modifying *Re Milk Industry Act (B.C.)* (1959), 17 D.L.R.(2d) 637 (B.C.C.A.).

<sup>101</sup> *A.-G. Can. v. C.P.R. and C.N.R.*, *supra*, footnote 91. Imperial Oil Ltd. intervened on behalf of the Dominion.

<sup>102</sup> See *Re Qualification of Teachers in Roman Catholic Separate Schools*, *supra*, footnote 58, where the Catholics argued their own case; *Re Race Tracks and Betting* (1921), 49 O.L.R. 339, 61 D.L.R. 504, 36 C.C.C. 357 (S.C. App. Div.) where the case against provincial jurisdiction was successfully presented by the Kenilworth and Ontario jockey clubs and the Canadian, Western and Thorncliffe racing associations; *Hirsch v. Protestant Board of School Comm'rs* (1925), 31 Rev. de J. 440 (Que., K.B. *in banc*), aff'd [1926] S.C.R. 246, aff'd [1928] A.C. 200, where the argument was carried largely by representatives of various Jewish, Protestant, and Catholic groups, although the provincial attorney general also participated; *Re C.P.R. Taxation*, [1949] 2 D.L.R. 240, [1949] 1 W.W.R. 353 (Sask. C.A.), modified *sub nom. C.P.R. v. A.-G. Sask.*, [1951] S.C.R. 190, and

It is not surprising, then, to find that perhaps a third of all important rulings of the Supreme Court on constitutional issues have been rendered in reference cases. Answers to questions concerning the division of legislative authority to implement treaty obligations have been almost entirely furnished through such cases.<sup>103</sup> Nor is it surprising to find that only lip service is paid to the thesis that such rulings are "advisory only", and even this with decreasing frequency. Mr. Gerald Rubin, in the most detailed study of the problem yet published, concludes that the courts have fallen into "the habit of regarding opinions rendered on references as true judgments";<sup>104</sup> and when a trial judge attempted to rule otherwise, he was severely rebuked on appeal.<sup>105</sup>

#### IV. *Parties To Constitutional Issues.*

##### 1) *Regular suits.*

Canada long ago awakened to the fact that private parties cannot be relied upon adequately to represent the interests of the public, either in their Dominion or their provincial aspects. Through statute and custom it has become a cardinal rule of Canadian constitutional law that no court can pass upon the validity of a statute, Dominion or provincial, without first notifying at least the government whose act is involved and giving it an opportunity to intervene. If the case involves the division of powers between the Dominion and the provinces, both will be notified.

*A. The United States: a contrast.* The value of the Canadian aff'd as modified, [1953] A.C. 594. The C.P.R. carried the burden at all levels.

I have found only one reference that seems to have been answered without adequate argument. In *Re Criminal Code Sections Relating to Bigamy* (1897), 27 S.C.R. 461, no one opposed the jurisdiction of the Dominion to punish a British subject resident in Canada for leaving the country to contract a bigamous marriage. The court apparently was so certain of the Dominion's right to do so that it did not appoint counsel when no one appeared in opposition.

<sup>103</sup> *Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act, and Limitation of Hours of Work Act*, supra, footnote 67, a tie vote being settled *sub nom.* *A.-G. Can. v. A.-G. Ont.*, *ibid.*; *Re Regulation and Control of Radio Communications*, supra, footnote 55; *Re Regulation and Control of Aeronautics*, [1930] S.C.R. 663, modified [1932] A.C. 54; *Re Waters and Water-Powers*, supra, footnote 90; *Re Legislative Jurisdiction Over Hours of Labour*, [1925] S.C.R. 505; *Re Employment of Aliens* (1922), 63 S.C.R. 293.

Many other important questions involving relations with other countries have been handled on references. See *Re Validity of Orders in Council . . . in Relation to Persons of the Japanese Race*, [1946] S.C.R. 248; *Re Members of the Military Forces of the United States*, [1943] S.C.R. 483; *Re Power to Levy Rates on Foreign Legations*, [1943] S.C.R. 208.

<sup>104</sup> *Op. cit.*, footnote 91, at p. 170.

<sup>105</sup> *Lowe Chong Co. v. B.C. Coast Vegetable Marketing Board*, [1937] 3 W.W.R. 406, at pp. 411, 413 (B.C.C.A.).

procedure is best illustrated by some of the difficulties encountered in the United States because of the absence, until quite recently, of even a limited application of such a rule. Not only have United States courts insisted that constitutional issues can only be ruled upon in cases between parties claiming adverse interests,<sup>106</sup> but they have placed too much confidence in the ability of such parties adequately to represent all of the interests involved. At times they even have failed to look behind the façade of allegations to the real interests of the parties, which may not be adverse at all.

In *Fletcher v. Peck*<sup>107</sup> the plaintiff was as anxious as the defendant to have the Georgia statute on which his action hinged declared unconstitutional. This situation enabled a critic of the decision to state on the floor of Congress, "I never did hear of one who wished to lose his suit, but what he was . . . accommodated. I never did see a Judge who had talents and ingenuity enough to overrule and defeat both parties and their attorneys, and award judgment to the plaintiff, contrary to their united efforts."<sup>108</sup> Stockholders' suits have placed the defense of a tax<sup>109</sup> or a regulatory Act<sup>110</sup> upon a corporation subject to the tax or regulations.

<sup>106</sup> The amount at stake may be quite nominal, making it evident that the real interest of the plaintiff is not the sum for which he sues, but the legal principle he seeks to establish. The validity of the Roosevelt legislation devaluing the dollar, which of course involved billions, was settled in a suit for \$15.60, the difference between the \$22.50 face value of an interest coupon and the \$38.10 the plaintiff demanded because of the changed gold content of the dollar. *Norman v. Baltimore & Ohio R.* (1935), 294 U.S. 240. In *Grove v. Townsend* (1935), 295 U.S. 45, the validity of a Texas voting law was settled in a suit against a county clerk for \$10.00 damages for his refusal to permit the plaintiff, a Negro, to vote in a Democratic Party primary. He could as easily have sued for \$10,000.00; but that would have delayed a final ruling, since he would have had to sue in the principal trial court and appeal to the higher Texas courts before going to the United States Supreme Court. By suing only for \$10.00 he was able to file his action in an inferior court that tried it at once, and then appeal directly to the Supreme Court. And see *Breedlove v. Suttles* (1937), 302 U.S. 277, where the validity of certain Georgia laws was settled in a suit to restrain the collection of a tax of \$1.00, and *Lathrop v. Donohue* (1961), 367 U.S. 820, sustaining a Wisconsin statute governing the legal profession in a suit to recover \$15.00 paid as dues to the State Bar Association.

<sup>107</sup> (1810), 6 Cranch (10 U.S.) 87.

<sup>108</sup> Representative Farrow of South Carolina, March 23rd, 1814, quoted in Charles Warren, *The Supreme Court in United States History* (1922), 1: 395 n.

<sup>109</sup> *Pollock v. Farmers' Loan and Trust Co.* (1895), 157 U.S. 429 and (1895), 158 U.S. 601. Cf. *John Deere Plow Co. v. Wharton*, *supra*, footnote 24, where both the Dominion and the province intervened in a shareholder's suit brought to enjoin a corporation organized under the Companies Act of Canada from operating in British Columbia without a provincial license.

<sup>110</sup> *Carter v. Carter Coal Co.* (1936), 298 U.S. 238. The president sued the company, including his father, who was vice president, to enjoin compliance with the act. Fortunately it was combined for trial with other more realistic suits.

But *Buchanan v. Warley*<sup>111</sup> was more startling still.

That case involved an ordinance of the City of Louisville, Kentucky, forbidding Negroes to move into white districts, and *vice versa*. Warley, a Negro, agreed to purchase a house in a white area from Buchanan, but only if it was lawful for his family to occupy it as a residence; in other words, only if the ordinance was unconstitutional. Warley then refused to pay for the house, and Buchanan sued to compel him to do so. Warley's only defence was the ordinance, which Buchanan alleged to be invalid. Thus the only arguments in favor of segregation were presented by counsel for the Negro defendant, who obviously wished to live in this house. Although I fully agree with the opinion of the court holding this segregation ordinance unconstitutional, I must agree with the segregationists when they point out that the ruling was made without giving them any chance to present whatever arguments they might have had for a contrary ruling.

In 1937 Congress provided, "Whenever the constitutionality of any act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States . . . is not a party, the court . . . shall certify such fact to the Attorney General [and] permit the United States to intervene" with all of the rights of a party, including the right to appeal.<sup>112</sup> The value of this provision was soon demonstrated in *United States v. Johnson*.<sup>113</sup>

A party signing his name as "Roach" had sued Johnson, alleging that the latter had been charging him more rent than the maximum allowed by the Price Administrator under the Emergency Price Control Act of 1942. Johnson moved to dismiss the suit on the ground that the Emergency Price Control Act was unconstitutional, and the district court granted his motion. "Roach" appealed, but failed to file certain required papers on time. The government, however, was able to show that "Roach" had filed his suit under a fictitious name, had never met the attorney who represented him, and had paid none of the expenses of the suit. Instead, his attorney had been hired by Johnson's attorney, who also paid the filing fee and all other charges. The failure of

<sup>111</sup> (1917), 245 U.S. 60.

<sup>112</sup> (1937), 50 U.S. Stat. 751, s. 1, now (1958), 28 U.S.C. s. 2403. Note that the statute is permissive rather than compulsory. This is wise, and in keeping not only with the Canadian practice but with the 1950 amendment to the Mexican Ley de Amparo, art. 5. Formerly the Mexican law required the minister of justice to participate in all cases, but he may now decline if he concludes that the case lacks sufficient public interest.

<sup>113</sup> (1943), 319 U.S. 302.

"Roach's" attorney to perfect the appeal was a part of the scheme, as the reports would then show that the district court had held the statute unconstitutional and that the Supreme Court had dismissed the appeal. This, it was hoped, would influence other courts to hold the statute unconstitutional and in the meantime would cause tenants to pay higher rents. Instead, the Supreme Court accepted the appeal and then ordered the case dismissed as collusive.

Although the 1937 Act works a decided advance, it does not go far enough. Congress, doubting its authority to order a state court to permit the nation to intervene in state court proceedings, limited its scope to the federal courts. But it did not even provide for state intervention in the federal courts. The United States needs such a statute,<sup>114</sup> as well as state laws providing for intervention by either government when statutes are under attack in state courts.<sup>115</sup>

In short, it is submitted that the United States would do well to copy the full sweep of the Canadian practice, to which I turn.

B. *Government intervention in Canada.* As early as 1882, Quebec provided: "No question as to the constitutionality of any Act of the Province or of the Federal Parliament, shall be raised before the courts of original jurisdiction, or of appeal, unless the party raising the same, shows to the court that he has, at least eight days before the day fixed for the hearing, given notice to the Attorney-General of the question which he intends to raise, with sufficient information to enable him to understand the nature of his pretensions; upon such notice, the Attorney-General may intervene . . . and take issue . . . as if [he] were a party to the suit."<sup>116</sup>

<sup>114</sup> (1911), 36 U.S. Stat. 1162, s. 266, now (1958), 28 U.S.C., s. 2284 (2), provides for state intervention when a federal court is asked to enjoin enforcement of a state law.

<sup>115</sup> Most declaratory judgments Acts provide for such intervention. And see N.Y. Laws 1913, c. 442, now N.Y. Executive Law, s. 71, for a more general Act.

<sup>116</sup> S.Q., 1882, c. 4. Somewhat rewritten, the Act now appears as s. 114 of the Code of Civil Procedure, supplemented by special provisions concerning writs of prohibition and certiorari in ss. 1003 (a) and 1295 (a).

It seems strange, today, that the Dominion Minister of Justice should have objected to the inclusion in a provincial Act of provision for intervention when the validity of a Dominion statute is at stake, unless he feared that the act would be construed to permit intervention only by the provincial attorney general. See W. E. Hodgins, ed., *Dominion and Provincial Legislation: Correspondence, Reports of the Minister of Justice and Orders in Council upon the Subject* (1896), p. 306, report dated June 5th, 1883. In *A.-G. Que. v. Bérubé*, [1945] Que. K.B. 77 (*in banc*), *aff'd sub nom. A.-G. Que. v. A.-G. Can.*, [1945] S.C.R. 600, for example, the Dominion Attorney General, when notified pursuant to this act, not only intervened but was the only one to appear in defense of the Dominion law when the case was appealed to the Supreme Court. Since only \$36.20 was at stake, the private party could scarcely have afforded to defend the appeal.

Explaining the reason for passing this statute, its preamble declared: "Since Confederation, there have arisen and still arise daily before the courts, in suits between private individuals, between corporations, or between corporations and private individuals, questions of legislative conflict . . . without there being any legal means of permitting the Government to intervene and defend the legislative prerogatives . . . , which is prejudicial to the public interest. . . ."

The following year Ontario adopted what has become the standard statute, making it clear that both the Dominion and the provincial attorneys general are to be notified, and that either or both may become parties to the case.<sup>117</sup> Similar Acts have been adopted by Alberta,<sup>118</sup> British Columbia,<sup>119</sup> Manitoba,<sup>120</sup> New Brunswick,<sup>121</sup> and Saskatchewan.<sup>122</sup>

The New Brunswick Act is the only one restricted to provincial laws, and the only one that fails specifically to deny the court jurisdiction to question the validity of a statute unless proof of such notice is given.<sup>123</sup> The original Saskatchewan provision was placed in the Queen's Bench Act,<sup>124</sup> and hence did not govern suits in the inferior courts. However, in reviewing such a case the court of appeal stated: "It is quite true that there is no similar provision . . . in The District Court Act, . . . but . . . it is highly undesirable that an important constitutional question should be decided in the District Court without notice to the Attorney General."<sup>125</sup> The legislature thereupon inserted a provision in the Constitutional Questions Act requiring all courts of the province to give such notice.<sup>126</sup>

Apparently three provinces, Newfoundland, Nova Scotia, and

<sup>117</sup> S.O., 1883, c. 6, s. 6, now R.S.O., 1960, c. 197, s. 33.

<sup>118</sup> S.A., 1919, c. 3, s. 34, now R.S.A., 1955, c. 164, s. 31.

<sup>119</sup> S.B.C., 1903-04, c. 15, s. 17, now R.S.B.C., 1960, c. 72, s. 10.

<sup>120</sup> S.M., 1895, c. 6, s. 41, now R.S.M., 1954, c. 52, s. 72.

<sup>121</sup> S.N.B., 1909, c. 5, s. 16, now R.S.N.B., 1952, c. 120, s. 24(3).

<sup>122</sup> S.S., 1936, c. 121, s. 1, now R.S.S., 1953, c. 78, s. 8. An earlier Act only applied to the superior courts. See *infra*.

<sup>123</sup> Arguments as to the validity of a statute have frequently been brushed aside because no such notice had been given. See *Re Canadian Food Products Ltd. and Picardy Ltd.*; *Re Gotlieb* (1945), 53 Man. R. 101, at p. 105, [1945] 3 D.L.R. 287, at p. 289 (C.A.); *Pelletier v. Imperial Oil Ltd.*, [1941] 2 W.W.R. 75, at p. 78 (Sask. D.C.), aff'd [1941] 3 W.W.R. 739 (C.A.); *Mohr v. North American Life Assurance Co.*, [1941] 1 W.W.R. 15, at p. 19 (Sask. C.A.); *McLeod v. Security Trust Co.*, [1940] 1 W.W.R. 423, at p. 432 (Alta. S.C.); *First Nat'l Inv. Co. v. Oddson* (1919), 48 D.L.R. 732, at p. 737 (Man. K.B.); *Hately v. Merchants Despatch Co.* (1883), 2 O.R. 385, at p. 392 (Q.B.).

<sup>124</sup> S.S., 1915, c. 10, s. 26; S.S., 1918-19, c. 27, s. 6; R.S.S., 1920, c. 39 s. 27; R.S.S., 1930, c. 49, s. 28.

<sup>125</sup> *Maley v. Cadwell*, [1934] 1 W.W.R. 51, at p. 55.

<sup>126</sup> S.S., 1936, c. 21, s. 1, now R.S.S., 1953, c. 78, s. 8.



Prince Edward Island, have not passed such legislation. The unanimous opinion of the Saskatchewan Court of Appeal, just quoted, supports the view that such notice should be given anyway, and I am informed that at least in Nova Scotia "It is the usual practice for the courts to require notification to the Attorney General if a Provincial statute is questioned, and to permit [him] to intervene".<sup>127</sup>

Although there is no such Dominion statute, the Supreme Court amended its rules in 1905 to provide: "Where the validity of a statute of the Parliament of Canada is brought into question in an appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney General of Canada."<sup>128</sup> Its practice was much more liberal. *Canadian Pacific R. v. Ottawa Fire Ins. Co.* was argued in November, 1906, the court reserving judgment. On February 19th, 1907, it announced: "The argument in this case at bar raised some important questions as to the power of the provincial legislatures to incorporate companies and as to what, if any, limitations upon that power are contained in the words 'provincial objects' in subsection 11 of section 92 of the British North America Act. It also raises other questions of public importance as to the effect and meaning of the existing Dominion legislation. . . . As these questions involve the powers alike of the Dominion Parliament and provincial legislatures to legislate, we think the case upon these points should be re-argued and that the Attorney General of the Dominion and the Attorneys General of the several provinces should be notified so that such of them as desire might be heard upon the question of the powers of the respective Governments they represent. The questions to be specially argued are: . . ." <sup>129</sup> The Dominion and five provinces intervened, and participated in the June reargument.

Following this case, the court amended its rules specifically to provide for notice to the province whose statute is questioned.<sup>130</sup> The practice of notifying all provinces, however, has continued when the issue is of general importance.<sup>131</sup>

<sup>127</sup> Letter from John A. Y. MacDonald, Esq., Deputy Attorney General of Nova Scotia, dated Dec. 28th, 1962.

<sup>128</sup> Rule 15 (2), added by General Order 88 (1905), 36 S.C.R. ix; now rule 18.

<sup>129</sup> (1907), 39 S.C.R. 405, at p. 408.

<sup>130</sup> Rule 19 (3), effective Sept. 1st, 1907, 38 S.C.R. xvii; now rule 19. The actual practice of allowing such intervention is at least as old as *Citizens Ins. Co. v. Johnston*, unreported (1880), summarized in this respect in Cassels, *op. cit.*, footnote 63, p. 678 and Coutlée, *op. cit.*, footnote 63, col. 1106.

<sup>131</sup> See *Esso Standard (Inter-America) Inc. v. J. W. Enterprises Inc.*,

The courts have commented upon the value of this procedure. When the Canada Temperance Act was amended to forbid the importation of intoxicating liquor into any province adopting this section of the Act, and Alberta did so, a liquor importer sued an express company for damages for refusing to accept its business. The Alberta court explained: "It was . . . apparent . . . that the material interests of the parties are more allied than they are opposed and inasmuch as Dominion legislation and orders in council were attached the Court directed that before hearing argument, the Minister of Justice of Canada should receive notice. Notice was also required to be given to the Attorney General of this province."<sup>132</sup> As the interests of the two governments were identical, the Dominion permitted the provincial attorney general to carry the argument for both. He won.

In 1961 British Columbia amended its Labour Relations Act to forbid trade unions to contribute money to political parties or candidates out of union dues. The amendment also required a union to file a declaration that it would make no such contributions before an employer could withhold union dues from wages. When the Oil, Chemical and Atomic Workers International Union refused to file such a declaration, the Imperial Oil Ltd. declined to honor its check-off clause. The former then brought an action against the latter seeking a declaratory judgment that the amendment was *ultra vires* the provincial legislature.

Counsel for the defendant company "took very little part in the argument, simply stating that the defendant could not do otherwise than comply with [the 1961 amendment] and expressing his client's willingness to abide by the result of the action. The Attorney General, however, intervened, and . . . argued strongly the validity of the amendment".<sup>133</sup> It is obvious that without his

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[1963] S.C.R. 144, at p. 153, 37 D.L.R. (2d) 598, at p. 605, where none of the provinces chose to appear, although the Dominion intervened; *Duplain v. Cameron*, [1961] S.C.R. 693, at p. 696, where the Dominion and three provinces intervened; *O'Grady v. Sparling*, [1960] S.C.R. 804, where the Dominion and four provinces intervened; *Smith v. The Queen*, [1960] S.C.R. 776, where three provinces intervened; *Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619, where four additional provinces intervened; *A.-G. Ont. and Display Service Co. v. Victoria Medical Bldg. Ltd.*, [1960] S.C.R. 32, 34, where only the Dominion, in addition to Ontario, intervened.

<sup>132</sup> *Gold Seal Ltd. v. Dominion Express Co.* (1921), 16 Alta. L.R. 113, at p. 118, 58 D.L.R. 51, at p. 53, [1921] 1 W.W.R. 804, at p. 808, 34 C.C.C. 259, at p. 262 (S.C. App. Div.), aff'd *sub nom.* *Gold Seal Ltd. v. A.-G. Alta* (1921), 62 S.C.R. 424.

<sup>133</sup> *Oil, Chemical and Atomic Workers Int'l Union, Local 16-601 v. Imperial Oil Ltd.* (1961), 30 D.L.R. (2d) 657, at p. 659, 36 W.W.R. 385, at p. 388 (B.C.S.C.), aff'd, *supra*, footnote 25. The statute was sustained.

intervention one side of the argument would have gone unrepresented.

## 2) *Reference cases.*

A. *Government participation.* Although the original 1875 Act made no provision for argument when the Supreme Court is asked for an advisory opinion, the statute of 1884, directing that such an opinion be sought as to the validity of the Dominion Liquor License Act, permitted "any of the Provinces" to "become a party to the said case, and . . . be heard by counsel".<sup>134</sup> In 1891 this was made a permanent part of the Dominion reference Act,<sup>135</sup> and each of the provinces has made similar provision for Dominion intervention in provincial references.

Although it is the usual practice for one or more provinces to intervene in any Dominion reference that concerns the division of powers between the central and provincial governments, often the Dominion does not participate in a provincial reference until it reaches the Supreme Court. Failure of the Minister of Justice to send a representative to present the Dominion point of view on reciprocal insurance legislation led the Chief Justice of Ontario to protest: "It is to be regretted that where the validity of legislation of the Parliament of Canada is in question the practice of the Department of Justice is not to be represented in the provincial courts. It is a distinct disadvantage to the court . . . ; indeed I might go so far as to say that the practice pursued shows disrespect to the court."<sup>136</sup> The next time it failed to send a spokesman to the Ontario court, the latter appointed a leading member of the bar "to represent the Dominion" at provincial expense.<sup>137</sup>

If the Chief Justice meant to imply that this is the uniform practice of the Ministry of Justice, he went too far. The Dominion had been represented in two of the six previous Ontario references involving constitutional questions,<sup>138</sup> and it is represented on the average in about one case in four.<sup>139</sup>

<sup>134</sup> S.C., 1884, c. 32, s. 26 (3).

<sup>135</sup> S.C., 1891, c. 25, s. 4, now R.S.C., 1952, c. 259, s. 55 (3).

<sup>136</sup> *Re Reciprocal Ins. Legislation* (1922), 53 O.L.R. 195, at p. 211 (S.C. App. Div.). The portion of the opinion favoring Dominion jurisdiction was reversed on appeal, [1924] A.C. 328.

<sup>137</sup> *Re Insurance Contracts* (1926), 58 O.L.R. 404, [1926] 2 D.L.R. 204 (S.C. App. Div.).

<sup>138</sup> *Re Assignments and Preferences Act (Ont.)*, *supra*, footnote 57; *Re Queen's Counsel*, *supra*, footnote 58. The fact that both were argued at the provincial level only by representatives of the two governments may explain the reason for Dominion intervention.

<sup>139</sup> Since 1930 the Dominion has intervened at the provincial level in at least the following references involving constitutional issues: *Re Insurance*

B. *Private participation and court appointed counsel.* At the same time that the Dominion was providing for provincial representation before the Supreme Court it added two additional clauses:

4. The Court has 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 . . . 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. . . .<sup>140</sup>

All of the provincial Constitutional Questions Acts make similar provision for notice to interested persons, and all but British Columbia, New Brunswick, and Quebec have also copied the fifth paragraph.

The fourth paragraph is the crucial one. As has been pointed out above, intervention by interested persons or groups has become the general rule. The fifth paragraph, on the other hand, is largely superfluous. Although it has had some interesting applications,<sup>141</sup> it stands largely as a symbol of the spirit of fairness that permeates the Canadian law.

### V. Summary.

A majority of all constitutional issues that reach Canadian courts are settled in the normal course of contentious litigation between rival parties in ordinary law suits. Individuals seeking more rapid rulings, or wishing to litigate in advance of action, may be able

*Act and Special War Revenue Act* (1931), 49 Que. K.B. 236, [1931] 3 D.L.R. 31 (*in banc*), reversed [1932] A.C. 41; *Re Claim of Provincial Treasurer to Fines*, [1937] 1 D.L.R. 534, 67 C.C.C. 317, 11 M.P.R. 335 (N.S.S.C. *in banc*), *aff'd sub nom. A.-G. N.S. v. A.-G. Can.*, [1937] S.C.R. 403; *Re Canada Temperance Act*, [1939] O.R. 570, [1939] 4 D.L.R. 14, 72 C.C.C. 145 (C.A.); *Re Alberta Bill of Rights Act*, *supra*, footnote 2; *Re Bill 136 . . . Delegation of Legislative Jurisdiction*, *supra*, footnote 62; *Re Validity of Section 198 of the Railway Act (Dom.)*, *supra*, footnote 91; *Re Canada Temperance Act and Village of Grand Bend*, [1956] O.R. 615, 5 D.L.R. (2d) 92 (C.A.).

<sup>140</sup> S.C., 1891, c. 25, s. 4, now R.S.C., 1952, c. 259, s. 55 (4) and (5).

<sup>141</sup> I have found four cases in the Supreme Court in addition to the 1960 case discussed *supra* in the text accompanying footnote 70. These are *Re Certain Statutes of Manitoba Relating to Education* (1894), 22 S.C.R. 577; *Re Constitutional Validity of Section 17 of the Alberta Act*, *supra*, footnote 62; *Re Regulations (Chemicals) under War Measures Act*, [1943] S.C.R. 1, and *Re Farm Products Marketing Act (Ont.)*, *supra*, footnote 99. At least one of those appointed in each case was a Queen's Counsel.

J. W. Anderson, Esq., Solicitor in the Alberta Attorney General's Department, was so kind as to examine the files on the seven references handled by the Alberta court. He found that in *Re Agricultural Land Relief Act*, [1938] 4 D.L.R. 28, [1938] 3 W.W.R. 186, J. E. Brownlee, K.C. and

to avail themselves of declaratory judgment actions, injunction suits, and the like. In six provinces they also may agree to postpone action on the balance of the case while the constitutional issue is referred by a trial court to the Supreme Court for a definitive ruling.

Whatever procedure is followed, if the government is not already a party to the suit it may intervene. Frequently the law officers of the Dominion or of the province, or both, intervene at the trial court level and participate in the argument on the constitutional issue through all stages of the suit. In any case, when the issue reaches the Supreme Court both the Dominion and any interested province will be notified. If the issue involves the division of powers between the Dominion and the provinces, all provinces will be invited to participate. Since a province can intervene on either side, occasionally one or more line up with the Dominion in opposition to the views of other provincial governments.

Specific provision is made for declaratory judgment suits, on constitutional issues, by the Dominion against a province or the

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C. W. Clement, K.C. were appointed to argue on behalf of certain agricultural producers, and paid \$1,030.00. The files in *Re Legal Proceedings Suspension Act*, [1942] 3 D.L.R. 318, [1942] 2 W.W.R. 536, "indicate a payment of \$200.00 to one C. F. Newell for his efforts on someone's behalf", although the report fails to indicate that he took part in the argument. In 1959-60, G. H. Steer, Q.C. and G. A. C. Steer were paid "slightly in excess of \$1,800.00" for their successful attack on the Orderly Payment of Debts Act, first in the Alberta appellate division and then in the Supreme Court of Canada. See *supra*, text accompanying footnote 70.

Although I am advised by R. S. Cogar, Registrar, Manitoba Court of Appeal, that aside from *Re Liquor Act (Man.)* (1900-01), 13 Man. R. 239, 21 C.L.T. 212 (K.B. *in banc*), "Section 5 . . . has never been used so far as living memory can recollect", that case is an interesting one. H. M. Howell, Q.C. was appointed "to argue in the interest of the Hudson's Bay Co.", apparently because the arguments the court wished discussed were too unpopular to expect the company to put them forward. When the case reached the Judicial Committee, *sub nom. A.-G. Man. v. Manitoba License Holders' Ass'n*, [1902] A.C. 73, these issues were not discussed.

I have found only two other cases, both in Ontario; although there may be more. In *Re Judges Act* (1923), 52 O.R. 105, [1923] 2 D.L.R. 604 (S.C. App. Div.), D. L. McCarthy, K.C. was appointed to argue "in the interest of persons who would be affected" by a statute curbing additional payments to judges for special assignments. Apparently this meant the judges themselves. And in 1926, as mentioned *supra*, footnote 137, Sir Wm. Hearst, K.C. was appointed to represent the Dominion when that government failed to send counsel to argue a question of legislative jurisdiction over insurance.

In *Re Railway Act and Expropriation Act*, [1926] S.C.R. 239, the Minister of Justice sent King Counsel to argue each side of the question. In *Re Alberta Jury Act*, [1946] 3 D.L.R. 457, [1946] 2 W.W.R. 271, 86 C.C.C. 296, 2 C.R. 94 (Alta. S.C. App. Div.), *aff'd sub nom. Re Interpretation of the Jury Act of Alberta*, [1947] S.C.R. 213, the provincial attorney general paid counsel for each side in both courts. Neither case involved a constitutional question. The practice is not to be recommended, as it can give rise to the same doubts that accompany stockholders' suits.

reverse; and of course either may sue the other in a more standard type of action. If either does not wish to await the relatively slow workings of the normal processes of litigation, and the issue is one that can be reduced to a "stated case" without a trial of disputed facts, the Governor or Lieutenant-Governor may refer the question to the courts for an advisory opinion. Dominion references go directly to the Supreme Court; provincial references reach that court only after a ruling by the provincial court of appeals. In either case appropriate persons or groups will be notified and invited to intervene. If a particular interest is inadequately represented the judges may appoint counsel to argue the matter at government expense. In the few cases where this has been necessary, the persons so appointed have invariably been leading members of the bar.

Constitutional issues involved in a pending bill may be settled on reference prior to the bill's passage, or provision may be made for its promulgation only if it is sustained on reference. The Dominion may force this procedure upon a province through a threat of disallowance.

The Canadian system is outstanding in three ways: 1. Provision for relatively rapid settling of constitutional issues. 2. Adequate public representation in private suits. 3. Adequate private representation in public references. Since many other systems, including that of the United States, are handicapped by long-drawn out suits, inadequate representation of the rights of interested groups, and only limited opportunity for government intervention to defend its own statutes, the Canadian experience merits more serious study than it has received.

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