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## BACKGROUND PAPER



# Parliament and Supreme Court of Canada Reference Cases

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*Parliament and Supreme Court of Canada Reference Cases*  
(Background Paper)

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# PARLIAMENT AND SUPREME COURT OF CANADA REFERENCE CASES

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## 1 INTRODUCTION

When Parliament created the Supreme Court of Canada (“the Court”) in 1875, it conferred upon the Court the ability to hear references – that is, questions of law not arising from traditional legal disputes between parties.<sup>1</sup> Since then, the Court has examined many important legal and constitutional issues in such reference cases, and its opinions in these matters are considered to be among the Court’s most important and influential.<sup>2</sup>

This backgrounder presents the different types of reference cases, the evolution of the reference provisions in the *Supreme Court Act*, and parliamentary engagement with Supreme Court reference cases.

## 2 TYPES OF REFERENCES

The *Supreme Court Act* contains two provisions authorizing reference cases that can be initiated at the Court. The first, section 53(1), permits Cabinet (“the Governor in Council”<sup>3</sup>) to submit questions of law or fact, as follows:

The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning:

- (a) the interpretation of the *Constitution Acts*;
- (b) the constitutionality or interpretation of any federal or provincial legislation;
- (c) the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or
- (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.<sup>4</sup>

In addition to these enumerated grounds, the *Supreme Court Act* also permits the Governor in Council to refer other matters as it sees fit to the Supreme Court.<sup>5</sup>

The second reference provision allows the Senate or the House of Commons to submit references related to private bills or petitions for private bills to the Supreme Court.<sup>6</sup> Private bills are rare in modern practice and deal with specific individuals or entities.<sup>7</sup> The provision to enable references in relation to such bills has rarely been used.<sup>8</sup>

In addition to the *Supreme Court Act*, other statutory provisions enacted by Parliament may authorize a reference in specific circumstances.<sup>9</sup>

As well as these references, a reference case initiated under provincial law may be appealed to the Court for consideration.<sup>10</sup>

### 3 BACKGROUND AND HISTORICAL EVOLUTION

The *Supreme and Exchequer Courts Act* of 1875 authorized the Governor in Council to “refer to the Supreme Court for hearing or consideration, any matters whatsoever as he may think fit.”<sup>11</sup> The provision required the judges to certify their opinions – affirming or dissenting – to the Governor in Council.<sup>12</sup>

With regard to references by the Senate and House of Commons, the 1875 provision allowed for the Court – or any two judges thereof – to “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.”<sup>13</sup>

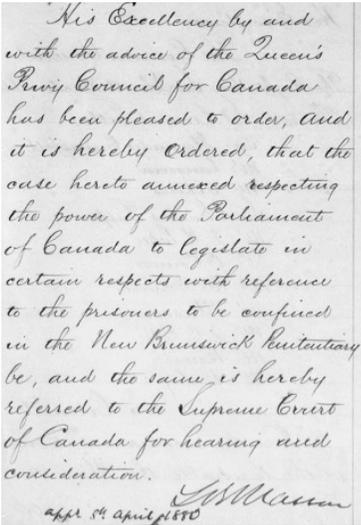
#### 3.1 THE FIRST REFERENCES (1876–1890)

The first known reference of any kind occurred in 1876, when the Senate referred a private bill: *An Act to incorporate the Brothers of the Christian Schools in Canada*.<sup>14</sup> The Senate asked the Court to determine whether the subject matter of the bill fell within federal or provincial authority under the provisions of the *British North America Act* (now the *Constitution Act, 1867*).<sup>15</sup>

Within several days of the Senate referring the matter by way of a motion, the Court reported back that the subject matter of the bill was within provincial jurisdiction.<sup>16</sup> No reasons were given for this conclusion, and the Court did not hear legal arguments from counsel on the matter.

The Governor in Council referred its first case<sup>17</sup> in 1880 when the Government of Canada and the Province of New Brunswick agreed to submit a case to the Court with specific questions regarding certain New Brunswick prisoners. The Court heard from counsel representing both the Attorney General of Canada and the Province of New Brunswick before issuing its six-paragraph ruling several weeks after the Order in Council to refer the case was adopted.<sup>18</sup>

**Figure 1 – First Governor in Council Reference (1880)**

 <p>His Excellency by and with the advice of the Queen's Privy Council for Canada has been pleased to order, and it is hereby Ordered, that the case hereto annexed respecting the power of the Parliament of Canada to legislate in certain respects with reference to the prisoners to be confined in the New Brunswick Penitentiary be, and the same is hereby referred to the Supreme Court of Canada for hearing and consideration.</p> <p>L. M. Masson Apr 8 1880</p>	<p>“His Excellency by and with the advice of the Queen's Privy Council for Canada has been pleased to order, and it is hereby Ordered, that the case hereto annexed respecting the power of the Parliament of Canada to legislate in certain respects with reference to the prisoners to be confined in the New Brunswick Penitentiary be, and the same is hereby referred to the Supreme Court of Canada for hearing and consideration.”</p> <p>(Signed) Louis François Rodrigue Masson (President of the Privy Council) 8 April 1880</p> <p>Order in Council 1880-0668. <i>Image:</i> Library and Archives Canada.</p> <p>Series A-1-d, Volume 2762. (Transcription by author).</p>
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Early references were primarily concerned with whether a particular power was under federal or provincial jurisdiction. Although the Court was quick to respond in these cases, judges would often provide only their conclusion as to whether Parliament, or the provinces, had legislative authority over a particular matter.<sup>19</sup> Without the reasons for these decisions, Parliament could not easily further its understanding of its legislative authority. Moreover, judges occasionally expressed their desire to hear arguments from counsel so as to inform their opinion in particular cases.<sup>20</sup>

To address these concerns, Parliament amended the statute authorizing references.

### **3.2 CHANGES TO THE GOVERNOR IN COUNCIL REFERENCE POWER (1891–1912)**

In 1891, Parliament amended the Governor in Council reference provision in the *Supreme and Exchequer Courts Act* to require reasons from judges for their opinions.<sup>21</sup> In addition, the Court was now permitted to give notice to interested parties and provinces, allowing them to be heard in arguments on the matter. As well, Parliament granted the Court the ability to request that counsel argue a case.

In 1906, Parliament made further amendments to the reference provisions.<sup>22</sup> In particular, an enumeration of “important questions of law or fact” that could be referred was included; this is similar to what appears in the current *Supreme Court Act*, cited above. Moreover, the Court was specifically given the duty to “answer each question so referred” as well as to provide “its opinion on each such question, with the reasons for each such answer.” In the early days, not all referred questions were answered.<sup>23</sup>

At various points in the early history of the reference process, doubts were expressed as to its legality. This question was ultimately resolved by the British Judicial Committee of the Privy Council (JCPC), to which appeals from the Court

could then be referred. In its 1912 judgment in *Ontario (Attorney General) v. Canada (Attorney General)* – also known as the *Reference re References* – the JCPC confirmed that the reference jurisdiction granted to the Court was constitutional.<sup>24</sup>

### **3.3 THE REFERENCE PROVISIONS AFTER 1912**

The Governor in Council reference power has remained largely unchanged and unchallenged since 1912.<sup>25</sup> Some amendments of note have been made to the statute, such as the removal of appeals to the JCPC in 1949.<sup>26</sup> Further, the enumerated grounds for a reference have been expanded to reflect the changing nature of Canada’s Constitution.<sup>27</sup>

The provision authorizing the Senate or House of Commons to submit a reference regarding a private bill or petition for a private bill has remained essentially unchanged since its first enactment in 1875.

### **3.4 PROPOSED PARLIAMENTARY REFORMS OF THE REFERENCE POWER**

On occasion, legislation has been introduced in Parliament that would affect the reference power. For example, two Senate bills introduced in the 38<sup>th</sup> Parliament, 1<sup>st</sup> Session would have abolished Governor in Council references entirely.<sup>28</sup> In the House of Commons, legislation was introduced during the 29<sup>th</sup> Parliament, 2<sup>nd</sup> Session that would have allowed references to be initiated by private citizens.<sup>29</sup> None of these bills were passed.

## **4 PARLIAMENT AND REFERENCES BY THE GOVERNOR IN COUNCIL**

References originating from the Governor in Council begin with the minister of Justice proposing a reference to Cabinet for approval by the Governor in Council. Although Parliament has no formal role in the drafting or approval of questions submitted to the Supreme Court through this process, both the Senate and House of Commons engage with Governor in Council references in important ways.

### **4.1 REFERENCES REGARDING LEGISLATION**

The Governor in Council may refer proposed or enacted legislation to the Supreme Court for consideration. Typically, such references seek clarification on the authority of Parliament to pass the legislation and to confirm that its provisions are consistent with the Constitution, including the *Canadian Charter of Rights and Freedoms*.

For example, in 2010 the Governor in Council submitted proposed legislation to the Supreme Court, asking “Is the annexed Proposed *Canadian Securities Act* within the legislative authority of the Parliament of Canada?”<sup>30</sup> The resulting decision in *Reference re Securities Act* concluded that the legislation as drafted overstepped Parliament’s constitutional authority and legislated on matters reserved for the provinces.<sup>31</sup>

Similarly, in 2003 the Governor in Council referred proposed legislation regarding same-sex marriage to the Supreme Court, asking whether Parliament had the authority to enact it.<sup>32</sup> In addition to referring the draft legislation for review, the Governor in Council posed specific legal questions, such as “Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?”

The Court’s decision in *Reference re Same-Sex Marriage* concluded that some portions of the proposed legislation were within Parliament’s legislative authority but other provisions were only within the powers of the provinces to enact.<sup>33</sup> As well, the Court addressed the questions referred to it.

While many references ask the Court to examine the authority of Parliament relative to proposed legislation before Parliament considers the matter further, in certain cases the Governor in Council refers for consideration a statute already enacted.<sup>34</sup> Further, it is possible for the Governor in Council to submit a reference regarding legislation at the same time as its introduction in Parliament, and to enact it before the Court issues its decision.<sup>35</sup> Put simply, a reference may be initiated at any time.

## 4.2 REFERENCES REGARDING THE CONSTITUTION AND OTHER MATTERS

Unlike Governor in Council references regarding Parliament’s authority relative to proposed or enacted legislation, certain references seek answers to other legal questions, most often concerning the interpretation of Canada’s Constitution.

In the 1929 *Reference re meaning of the word “Persons” in s. 24 of British North America Act*, the Supreme Court was asked whether women were included in the meaning of “persons” such that women could serve in the Senate of Canada.<sup>36</sup> Similarly, in *Reference whether “Indians” includes “Eskimo”* (known today as Inuit), the Governor in Council asked the Court to clarify whether the term “Indians” in the *British North America Act* included the Inuit of the Province of Quebec.<sup>37</sup>

Beyond clarifying the interpretation of Canada’s Constitution, references may inspire future legislation. For example, the Governor in Council submitted constitutional and international law questions to the Supreme Court in the *Reference re Secession of Quebec*.<sup>38</sup> Subsequently, Parliament enacted *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, known as the *Clarity Act*.<sup>39</sup> This legislation directly addressed elements of the Court’s reference decision.

Although, as in the *Clarity Act* example, some references may lead to statutory changes that Parliament can enact alone, other reference decisions may indicate that amendments to the Constitution are required. For example, in *Reference re Senate Reform*, the Supreme Court clarified, among other things, the scope of changes to the Senate of Canada that could be accomplished by Parliament acting alone, and what modifications would require constitutional amendment with the consent of some or all of the provinces.<sup>40</sup>

Beyond constitutional questions, some references seek clarity on other legal matters. For example, in *Reference as to Powers to Levy Rates on Foreign Legations*, the Governor in Council asked the Supreme Court to determine whether the City of Ottawa could charge property tax on certain properties of foreign governments, such as the Office and Residence of the High Commissioner for the United Kingdom.<sup>41</sup> In concluding that the City did not have this power, the Court interpreted and applied various principles of international law.

#### **4.3 LIEUTENANT GOVERNOR IN COUNCIL REFERENCES ON APPEAL**

Provincial legislation grants the Lieutenant Governor in Council of each province the authority to initiate a reference at each province's highest court. These cases may be appealed to the Supreme Court of Canada and may touch directly on Parliament's authority.

For example, after the federal *Firearms Act* was enacted, Alberta commenced a provincial reference case questioning its validity. This was subsequently appealed to the Supreme Court, resulting in *Reference re Firearms Act (Can.)*, which confirmed the validity of the federal legislation.<sup>42</sup>

Similarly, when the Government of Canada announced its plan to patriate the Constitution in 1980, references were commenced in several provinces regarding the constitutionality of the resolution before Parliament. These were appealed to the Supreme Court in the resulting *Patriation Reference*.<sup>43</sup>

### **5 REFERENCES BY THE SENATE AND HOUSE OF COMMONS**

Section 54 of the *Supreme Court Act* allows the Senate or House of Commons to submit a reference to the Court regarding a private bill.<sup>44</sup> It should be recalled that private bills are rare in modern practice and do not include matters that fall under private members' business. As Audrey O'Brien and Marc Bosc note in *House of Commons Procedure and Practice*, "a private bill ... seeks something which cannot be obtained by means of the general law and is founded on a petition from an individual or group of individuals."<sup>45</sup>

The *Supreme Court Act* and its forerunner, the *Supreme and Exchequer Courts Act*, allow private bill references to be examined by "[t]he Court, or any two of the judges."

#### **5.1 CURRENT CONTEXT**

The power to send private bill references to the Court is codified in Senate Rule 11-18:

At any time before the adoption of a private bill, the Senate may order that it be referred to the Supreme Court of Canada for examination and an opinion on any point identified in the order of reference to the court.<sup>46</sup>

The Senate considers private bills from time to time. Most recently, a private bill introduced in the Senate during the 41<sup>st</sup> Parliament, 2<sup>nd</sup> Session received Royal Assent.<sup>47</sup> It was not referred to the Supreme Court.

No private bill has been introduced in the House of Commons since the 3<sup>rd</sup> Session of the 30<sup>th</sup> Parliament, and the House of Commons Standing Orders contain no provisions regarding referral of such bills to the Court. However, the power of the House to submit such a referral remains in the *Supreme Court Act*.

## 5.2 HISTORICAL USE

In 1876, shortly after the creation of the Supreme Court, the Senate referred *An Act to incorporate the Brothers of the Christian Schools in Canada* to the Supreme Court by way of a motion “[t]hat the question be not now put, but the Bill be referred to the Judges of the Supreme Court” to determine whether the bill’s provisions were matters of federal or provincial legislative authority.<sup>48</sup>

The resulting Supreme Court opinion, *In re The Brothers of the Christian Schools in Canada*, was two paragraphs in length and concluded that the bill legislated on matters reserved for the provinces.<sup>49</sup> The bill was not proceeded with by the Senate.<sup>50</sup>

In 1882, the Senate referred two private bills to the Supreme Court. The first, legislation to incorporate the Quebec Timber Company, raised a number of issues, including whether the matter was within federal or provincial jurisdiction. A particularly complex legal question arose because the company was incorporated in Scotland by an Act of the Imperial Parliament, and might thus have had some corporate status in Canada already. As such, would incorporating it confer a second corporate identity on the same entity?

When these issues were raised at second reading, the matter was referred to the Committee on Standing Orders and Private Bills. Three days later the committee reported back to the Senate as follows:

[T]he doubts which have arisen as to the jurisdiction of Parliament to legislate, as is in the said Bill proposed, are sufficiently serious to make it expedient to obtain, before proceeding further with the Bill, the report of the Supreme Court, or two Judges thereof, under the 33<sup>rd</sup> Section of “The Supreme and Exchequer Court Act.”<sup>51</sup>

The report included the recommendation that “the Senate, under its 55<sup>th</sup> Rule, do refer the Bill to the Supreme Court to examine and report thereupon” and provided specific questions.<sup>52</sup> The Senate adopted the report on 24 March 1882, referring the matter.<sup>53</sup>

The Court responded days later. In *Re Quebec Timber Company*, it concluded that the matter was within the jurisdiction of Parliament, but declined to answer the question regarding the operation of the Imperial Act. In the Court’s words: “The court pray to be excused from answering this question, on the ground that the question

affects private rights which may come before it judicially, and which ought not to be passed upon without a trial.”<sup>54</sup>

The Senate continued with its consideration of the legislation, referring it to a second committee for subsequent consideration and amendment.<sup>55</sup> It was passed and received Royal Assent upon concurrence by the House in the Senate amendments.<sup>56</sup>

The final private bill referred in 1882 concerned the incorporation of the Canada Provident Association. Because the parliamentary session was nearing its end, senators expressed their hope that an opinion in the matter would be issued quickly.<sup>57</sup> The matter was referred on 4 May by motion, and on 8 May the Court reported that the bill did not fall within provincial jurisdiction.<sup>58</sup> The Senate subsequently passed the legislation.<sup>59</sup>

### 5.3 PRIVATE BILLS AND CURRENT REVIEW PRACTICES

Although private bills are rare, the need to refer such items to the Court may in part be mitigated through other changes in parliamentary and private bill practice that have occurred since the 19<sup>th</sup> century. For example, as noted in *Senate Procedure in Practice*, the Office of the Law Clerk and Parliamentary Counsel may, upon request, “advise the sponsor on the constitutional and legislative acceptability of a private bill.”<sup>60</sup> Similarly, as O’Brien and Bosc note with respect to private bills in the House of Commons, “The legislative counsel can also advise the committee examining the private bill of any of its provisions which are at variance with the general law and of any unusual provisions deserving special attention.”<sup>61</sup> It may be that such processes mitigate the need for the Senate or House of Commons to proceed with a reference in these matters.

## 6 REFERENCES BY STATUTE

Generally, reference cases are submitted to the Court pursuant to the *Supreme Court Act*. However, Parliament may direct that a reference be sought through statute or authorize a reference pursuant to a specific statutory provision. For example, *An Act to amend the Special War Revenue Act* stated that:

Sections three and four of this Act shall not come into effect until proclamation by the Governor in Council, and such proclamation shall not be issued until section four of this Act shall have been submitted to the Supreme Court of Canada for the purpose of having the judgment of the said Court on the constitutionality of said section four, and said judgment has been given.<sup>62</sup>

The Court found that the legislation was unconstitutional.<sup>63</sup>

Similarly, *An Act to amend “The Liquor License Act, 1883”* contained a provision noting that “doubts have arisen as to the power of Parliament to pass” the legislation.<sup>64</sup> It therefore stated that individuals would not be prosecuted for certain offences under the legislation until the validity of the Act had been ascertained. For this purpose, the statute authorized the Governor in Council to refer the matter to the Supreme Court, specifically allowed the provinces to become parties to the case, and required the

Court to certify to the Governor in Council which parts of the Act were validly enacted by Parliament.<sup>65</sup>

The Supreme Court found that the legislation exceeded Parliament’s constitutional authority.<sup>66</sup> Parliament then amended the legislation to suspend its effect until the Judicial Committee of the Privy Council (JCPC) – then Canada’s highest court of appeal – could decide the question, and included the text of the Supreme Court’s decision as a schedule to the Act.<sup>67</sup> On appeal, the JCPC upheld the Supreme Court’s decision.<sup>68</sup> The original legislation and its amendments were subsequently repealed.<sup>69</sup>

Another example of a reference being initiated outside the *Supreme Court Act* can be found in *The Railway Act*.<sup>70</sup> Provisions of this legislation created a Railway Committee within the Privy Council and authorized it to “state a case in writing for the opinion of the Supreme Court of Canada on any question which in the opinion of the Committee is a question of law.”<sup>71</sup> The Act further required the Supreme Court “to hear and determine the question or questions of law arising thereon and remit the matter to the Railway Committee, with the opinion of the court thereon.”<sup>72</sup> This provision appears to have been used once.<sup>73</sup>

Though it rarely occurs, Parliament may also authorize specific matters to be referred to judges of the Supreme Court pursuant to statute. For example, *An Act to amend the Customs Tariff* authorized the Governor in Council to “commission or empower any judge of the Supreme Court [...] to hold an inquiry in a summary way” into matters related to certain anti-consumer behaviours by manufacturers.<sup>74</sup> A similar provision was enacted with respect to proposed fee changes under *An Act to incorporate the Northwest Telephone and Telegraph Company*.<sup>75</sup>

## 7 PARLIAMENTARY ENGAGEMENT WITH REFERENCES

Private bill references from the Senate or House of Commons involve direct parliamentary engagement with the reference process. Specifically, Parliament drafts, debates, and adopts the motion to refer, which is recorded in the Journals, and historically the opinion of the Court would be included there as well when received.

In contrast, Parliament has no formal role in drafting, approving, or submitting the text of a Governor in Council reference. As such, parliamentary engagement with these references is indirect.

### 7.1 PARLIAMENT AND GOVERNOR IN COUNCIL REFERENCES: DISCUSSION AND DEBATE

Although the *sub judice* convention – that parliamentarians not discuss matters before the courts – may apply in relation to reference cases,<sup>76</sup> such matters have been the subject of questions in question period<sup>77</sup> and have been mentioned in debate.<sup>78</sup>

Further, members have at various times, such as during question period, called for a matter to be referred to the Supreme Court.<sup>79</sup> In addition, motions have been made for the government to refer a matter, including as a hoist amendment:<sup>80</sup> “that this Bill be not now read the second time, but that it be resolved by the Senate that, in its opinion, the subject-matter thereof should be referred by the Governor in Council to the Supreme Court of Canada.”<sup>81</sup> As well, motions maintaining that a matter should have been referred to the Supreme Court have been debated.<sup>82</sup>

Although Parliament cannot order a Governor in Council reference, on one occasion the Senate did adopt a motion “[t]hat, in the opinion of this House, the Government should, immediately after prorogation of the present session of Parliament, refer to the Supreme Court of Canada for the opinion of that Court the question of the constitutional validity of that part of the Dairy Industry Act.”<sup>83</sup> The Governor in Council subsequently submitted a reference that included the text of the Senate motion.<sup>84</sup>

## **7.2 PARLIAMENT AND GOVERNOR IN COUNCIL REFERENCES: LEGISLATIVE CONSEQUENCES**

When proposed legislation is referred to the Supreme Court, Parliament may continue with its enactment. In such cases, a ruling may confirm or invalidate a statutory provision, in which case Parliament may choose to repeal it.

In cases where Parliament waits for the Court’s decision to act, it may choose to enact the legislation as is, enact a modified version, or abandon it on the basis of the Court’s judgment.<sup>85</sup> If the Supreme Court confirms the validity of a proposed enactment, it is not enacted without the legislative process first being completed; however, Parliament is under no obligation to enact the legislation. A Supreme Court decision, in this sense, has no bearing on the legislative process or on Parliament’s ultimate ability to pass legislation if it so chooses.

## **7.3 PARLIAMENT AND GOVERNOR IN COUNCIL REFERENCES: PROCESS CONSIDERATIONS**

No requirement exists for Parliament to be informed when the Governor in Council submits a reference question or when the Court has ruled. On occasion, governments have indicated that a question has been submitted<sup>86</sup> or have tabled the relevant Order in Council.<sup>87</sup>

At various times, information regarding references has been tabled in Parliament. For example, in 1882, the Senate adopted a motion that the case agreed upon between New Brunswick and the Government of Canada regarding the New Brunswick Penitentiary be tabled along with the Supreme Court’s judgment in the reference.<sup>88</sup> Similarly, sessional papers provided correspondence between the Government and the provinces in relation to a reference case.<sup>89</sup>

More recently, through questions on the *Order Paper*, members have sought and received information related to references, including the cost of litigating certain

questions,<sup>90</sup> and how the government might respond to a particular reference decision.<sup>91</sup>

## 8 CONCLUSION

Reference cases allow for the determination of important legal questions, including those concerning the scope of Parliament’s legislative authority and the constitutionality of proposed legislation, absent a traditional legal dispute. Parliament has conferred upon the Governor in Council the ability to submit references to the Supreme Court, as well as allowing the Senate and House of Commons to submit references regarding private bills and petitions for private bills. Together, these mechanisms and the resulting decisions of the Court have clarified the interpretation of the Constitution as well as the legislative authority of the Parliament of Canada.

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## NOTES

1. *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, 38 Vict., c. 11 [*Supreme and Exchequer Courts Act*].
2. See, for example, Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government*, Toronto, McGraw-Hill Ryerson Ltd., 1987, pp. 91–92; and Barry L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3<sup>rd</sup> ed., Toronto, Butterworths, 1988, pp. 311–334.
3. Governor in Council here refers to Cabinet when acting in a legal capacity.
4. [Supreme Court Act](#), R.S.C. 1985, c. S-26, s. 53(1). [*Supreme Court Act*].
5. *Ibid.*, s. 53(2).
6. See, in this paper, “References from the Senate and House of Commons.”
7. For example, [Bill S-1001, An Act respecting Queen’s University at Kingston](#), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament.
8. Only three such references are known to have occurred, all during the 19<sup>th</sup> century.
9. See, in this paper, “References by Statute.”
10. *Supreme Court Act*, s. 36.
11. *Supreme Court and Exchequer Act*, s. 52.
12. *Ibid.*
13. *Ibid.*, s. 51.
14. *In re The Brothers of the Christian Schools in Canada* (1876) Cout. Dig. 1.
15. Senate, *Journals*, 3<sup>rd</sup> Session, 3<sup>rd</sup> Parliament, 4 April 1876, p. 155.
16. Senate, *Journals*, 3<sup>rd</sup> Session, 3<sup>rd</sup> Parliament, 11 April 1876, pp. 206–207.
17. Although some early Supreme Court cases are unreported, a list of Governor in Council references was provided to the House of Commons by the then minister of Justice in response to a question in 1906; this list indicated that *In re New Brunswick Penitentiary* was the first Governor in Council reference. See House of Commons, *Journals*, 18 April 1906, p. 1678.

18. *In re New Brunswick Penitentiary*, 1880 CarswellNat 2.
19. For a discussion, see James L. Huffman and MardiLyn Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction," *Minnesota Law Review*, Vol. 74, June 1990, p. 1251.
20. For example, see *In re Canada Provident Association* (1882) CarswellNat 6, paras. 3–4.
21. An Act to amend Chapter one hundred and thirty-five of the Revised Statutes, entitled "An Act respecting the Supreme and Exchequer Courts," 54–55 Vict. c. 25, s. 4.
22. *An Act to amend The Supreme and Exchequer Courts Act*, 6 Edw. VII, c. 50.
23. For a discussion, see John McEvoy, "Separation of Powers and the Reference Power: Is there a Right to Refuse?," *Supreme Court Law Review*, Vol. 10, 1988.
24. *Ontario (Attorney General) v. Canada (Attorney General)*, [1912] A.C. 571.
25. For discussion see Carissima Mathen, "[The question calls for an answer, and I propose to answer it: The Patriation Reference as Constitutional Method](#)," *Supreme Court Law Review*, Vol. 54 (2d), 2011, pp. 143–166.
26. *An Act to Amend the Supreme Court Act*, 13 Geo. VI, c. 37.
27. In particular, enumerated ground (a) now concerns "the interpretation of the *Constitution Acts*." When first enacted in 1906, this clause was "the interpretation of *The British North America Acts*, 1867 to 1886."
28. [Bill S-34, An Act to amend the Department of Justice Act and the Supreme Court Act to remove certain doubts with respect to the constitutional role of the Attorney General of Canada and to clarify the constitutional relationship between the Attorney General of Canada and Parliament](#), 1<sup>st</sup> Session, 38<sup>th</sup> Parliament; and [Bill S-7, An Act to amend the Supreme Court Act \(references by Governor in Council\)](#), 1<sup>st</sup> Session, 38<sup>th</sup> Parliament.
29. Bill C-230, *An Act to amend the Supreme Court Act (private citizen's reference)*, 2<sup>nd</sup> Session, 29<sup>th</sup> Parliament.
30. Order in Council P.C. 2010-0667, 26 May 2010.
31. [Reference re Securities Act](#), [2011] 3 S.C.R. 837.
32. Order in Council P.C. 2003-1055, 16 July 2003.
33. [Reference re Same-Sex Marriage](#), [2004] 3 S.C.R. 698.
34. For example, *Reference re legislative jurisdiction of Parliament of Canada to enact the Minimum Wages Act (1935, c. 44)*, [1936] S.C.R. 461 and *Reference re legislative jurisdiction of Parliament of Canada to enact the Employment and Social Insurance Act (1935, c. 48)*, [1936] S.C.R. 427.
35. See [Reference re Supreme Court Act, ss. 5 and 6](#), [2014] 1 S.C.R. 433, para. 11.
36. *Reference re meaning of the word "Persons" in s. 24 of British North America Act*, [1928] S.C.R. 276.
37. *Reference whether "Indians" includes "Eskimo"*, [1939] S.C.R. 104.
38. [Reference re Secession of Quebec](#), [1998] 2 S.C.R. 217.
39. [An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference](#), S.C. 2000, c. 26.
40. [Reference re Senate Reform](#), [2014] 1 S.C.R. 704.
41. [Reference as to Powers to Levy Rates on Foreign Legations](#), [1943] S.C.R. 208.
42. [Reference re Firearms Act \(Can.\)](#), [2000] 1 S.C.R. 783.

43. [Re: Resolution to amend the Constitution](#), [1981] 1 S.C.R. 753.
44. *Supreme Court Act*, s. 54.
45. See Audrey O'Brien and Marc Bosc, eds., "[Private Bill Practice](#)," in *House of Commons Procedure and Practice*, 2<sup>nd</sup> ed., 2009.
46. *Rules of the Senate of Canada*, [Rule 11-18](#).
47. [Bill S-1001, An Act to amend the Eastern Synod of the Evangelical Lutheran Church in Canada Act](#), 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament.
48. Senate, *Journals*, 3<sup>rd</sup> Session, 3<sup>rd</sup> Parliament, 4 April 1876 p. 155.
49. *In re The Brothers of the Christian Schools in Canada* (1876) Cout. Dig. 1.
50. Senate, *Journals*, 3<sup>rd</sup> Session, 3<sup>rd</sup> Parliament, Index, p. vi.
51. Senate, *Journals*, 4<sup>th</sup> Session, 4<sup>th</sup> Parliament, 24 March 1882 p. 143.
52. Ibid.
53. Ibid.
54. *Re Quebec Timber Co.* (1882), Coutlee 43.
55. Senate, *Journals*, 4<sup>th</sup> Session, 4<sup>th</sup> Parliament, 4 April 1882, p. 178.
56. Senate, *Journals*, 4<sup>th</sup> Session, 4<sup>th</sup> Parliament, 20 April 1882, p. 219; and Senate, *Journals*, 4<sup>th</sup> Session, 4<sup>th</sup> Parliament, 17 May 1882 p. 343.
57. Senate, *Debates*, 4<sup>th</sup> Session, 4<sup>th</sup> Parliament, 4 May 1882, p. 580.
58. Senate, *Journals*, 4<sup>th</sup> Session, 4<sup>th</sup> Parliament, 10 May 1882, p. 301.
59. Senate, *Journals*, 4<sup>th</sup> Session, 4<sup>th</sup> Parliament, 12 May 1882, p. 316.
60. [Senate Procedure in Practice](#), 1<sup>st</sup> ed., June 2015, p. 170.
61. O'Brien and Bosc (2009), "[Form of a private bill](#)."
62. *An Act to amend the Special War Revenue Act*, S.C. 1941, c. 27, s. 29.
63. *Reference as to Validity of Section 16 of The Special War Revenue Act, as amended*, [1942] S.C.R. 429.
64. *An Act to amend the Liquor License Act, 1883*, 47 Vic., c. 32.
65. Ibid., s. 26.
66. *Liquor License Act, 1883*, Cass. Dig. 1 ed. 279.
67. *An Act respecting "The Liquor License Act, 1883"*, S.C. 1885, c. 74.
68. *Reference re Dominion Liquor License Acts, 1883-84*. C.R. [14] A.C. 286.
69. *An Act respecting the Revised Statutes of Canada*, S.C. 1886, c. 4.
70. *An Act respecting Railways*, 51 Vict., c. 29, s. 19.
71. Ibid.
72. Ibid., s. 20.
73. *Reference by Railway Committee of the Privy Council for Canada*, Cass. Dig. 2 ed. 487.
74. *An Act to amend the Customs Tariff*, 21–22 Geo V., c. 30, s. 15.
75. *An Act to incorporate the Northwest Telephone and Telegraph Company*, 4–5 Ed. VII, c. 136, s. 3.

76. The convention is not a formal rule. See O'Brien and Bosc (2009), "[Rights and Immunities of Individual Members](#)."
77. See, for example, House of Commons, [Debates](#), 25 October 2013, p. 407.
78. See, for example, House of Commons, [Debates](#), 22 October 2013, pp. 218–219.
79. See, for example, House of Commons, [Debates](#), 17 June 2015, p. 15205.
80. As O'Brien and Bosc (2009) explain, a [hoist amendment](#) is a motion to postpone second reading of a bill for three or six months.
81. Senate, *Journals*, 2<sup>nd</sup> Session, 28<sup>th</sup> Parliament, 12 May 1970, p. 370.
82. Senate, *Journals*, 4<sup>th</sup> Session, 6<sup>th</sup> Parliament, 30 April–1 May 1890, p. 392. (Note: The *Journal* page covers both dates because the vote occurred after midnight.)
83. Senate, *Journals*, 4<sup>th</sup> Session, 20<sup>th</sup> Parliament, 10 June 1948, p. 393.
84. *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] S.C.R. 1.
85. As an example of continuing with proposed legislation, the legislation to incorporate the Canada Provident Association was enacted without amendment after a reference confirmed the legislation was within Parliament's authority. As an example of a reference resulting in amendment, after the *Reference re Same-Sex Marriage*, Parliament adopted the *Civil Marriage Act*, S.C. 2005, c. 33, which had different provisions from those the Court studied and mentioned the reference decision in its preamble. As an example of abandonment, no legislation regarding securities regulation has been introduced in Parliament after the decision in *Reference re Securities Act*.
86. For example, see House of Commons, [Debates](#), 22 October 2013, p. 254.
87. For example, see Senate, *Journals*, 4<sup>th</sup> Session, 30<sup>th</sup> Parliament, 5 December 1978, p. 181.
88. See Senate, [Debates](#), 4<sup>th</sup> Session, 4<sup>th</sup> Parliament, 9 March 1882, pp. 85–87.
89. For example, see Sessional Papers No. 85 (1885).
90. Sessional Paper No. 8555-412-1205.
91. Sessional Paper No. 8555-412-523.

## APPENDIX – NOTABLE SUPREME COURT OF CANADA REFERENCE CASES

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[\*Reference re Senate Reform\*](#), [2014] 1 S.C.R. 704

[\*Reference re Assisted Human Reproduction Act\*](#), [2010] 3 S.C.R. 457

[\*Reference re Same-Sex Marriage\*](#), [2004] 3 S.C.R. 698

[\*Reference re Secession of Quebec\*](#), [1998] 2 S.C.R. 217

[\*Reference re Goods and Services Tax\*](#), [1992] 2 S.C.R. 445

[\*Reference re Manitoba Language Rights\*](#), [1985] 1 S.C.R. 721

[\*Reference re Regulation and Control of Radio Communication\*](#), [1931] S.C.R. 541

[\*Reference re meaning of the word “Persons” in s. 24 of British North America Act\*](#), [1928] S.C.R. 276 (overturned by the Judicial Committee of the Privy Council [1929] UKPC 86, [1930] AC 124)