# REFUSING TO ANSWER: THE SUPREME COURT AND THE REFERENCE POWER REVISITED

John P. McEvoy**

In *Reference re Same-Sex Marriage*[1], the Supreme Court of Canada exercised a claimed discretion not to answer the fourth question referred by the Governor General in Court. That question specifically asked whether the traditional opposite-sex definition of marriage[2] is consistent with the *Canadian Charter of Rights and Freedoms*; it followed logically from the first three questions *viz.* whether a draft Bill to define civil marriage as the "lawful union of two persons" is within the legislative competence of Parliament, whether the draft Bill is consistent with the *Charter*, and whether the *Charter* right to freedom of religion protects dissentient religious officials who refuse to solemnize same-sex marriages. That the Court declined to answer the fourth question is significant; not for the fact that it declined to answer, because the Court has previously declined to answer a question on a reference, nor for the reasons given by the Court to justify its refusal, but for what that refusal implicitly declares about the status of the Court in the Canadian legal order.

To understand the significance of *Reference re Same-Sex Marriage*, it is necessary to first consider the Court's reasons for not answering the fourth question. Then, those reasons must be placed in the context of the reference power enjoyed by the Governor General in Council and by the Lieutenants Governor in Council. With an appreciation of this context, the true message of the Supreme Court can be discerned.

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* *Faculty of Law, University of New Brunswick.* *I appreciate the helpful comments of my colleagues Edward Veitch and Carissima Mathen and of two anonymous reviewers on an earlier version of this essay.*

1 [2004] 3 S.C.CR. 698 79 (9 December 2004). Coram: McLachlin C.J.C. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

2 As expressed in the common law case of *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 at 133 and in the *Federal Law - Civil Law Harmonization Act*, No. 1, S.C. 2001, c. 4, s. 5.

## The Supreme Court's Refusal to Answer

In its *per curiam* opinion, the Supreme Court reasserts a discretion to decline to answer a reference question, a discretion the exercise of which "cannot be predicated on a presumed outcome",[3] and stated "...the Court may decline to answer reference questions where to do so would be inappropriate, either because the question lacks legal content... or because attempting to answer would for other reasons be problematic."[4] Citing the authority of the *Secession Reference*,[5] the Court identified two categories of reference questions which it has declined to answer: (i) "the question is too ambiguous or imprecise to allow an accurate answer" and (ii) "where the parties have not provided the Court with sufficient information to provide a complete answer".[6] However, the Court relied on neither of these justifications for its refusal to answer in *Reference re Same-Sex Marriage*. Instead, it identified "a unique set of circumstances"[7] which together render inappropriate any answer to question four.

The Court identified four circumstances. First, regardless of the answer to question four, the government had indicated its intention to proceed with the draft Bill. In so doing, the government accepted the correctness of the declarations of constitutional invalidity issued by various provincial courts that the traditional definition of marriage is inconsistent with the *Charter*[8] and, noted the Court, in each of those cases the Attorney General of Canada had conceded this constitutional issue. Second, private parties had acted in reliance on the declarations of invalidity issued in those cases. If the Court were to answer the fourth question contrary to the conclusions of the provincial courts i.e. if the Court gave the opinion that the traditional definition of marriage is not inconsistent with the Charter, persons who had relied on the declarations of invalidity would find their marriages considered contrary to valid

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[3] *Supra*, note 1 at para. 61.

[4] *Ibid.*, at para. 62.

[5] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 30.

[6] *Supra*, note 1 at para. 63. In several instances judges have relied upon an interpretation of the questions to focus on the "true" matter in issue e.g. *Reference re Prov. Electoral Boundaries* (Sask), [1991] 2 S.C.R. 158 at 178 per McLachlin J.; *Reference re Canada Assistance Plan* (1990), 71 D.L.R. (4th) 99 at 104-05 (B.C.C.A.) per Lambert J.A., though the majority answered the question without comment and the Supreme Court, on appeal, found sufficient legal content to warrant an answer to each question: *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

[7] *Ibid.*, at para. 64.

[8] *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (BCCA); *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161; *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506; *Dunbar v. Yukon*, [2004] Y.J. No. 61 (QL); *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (QL); *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (QL); *N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669 (QL).

provincial law which limits marriage to the traditional definition.[9] Third, and related to the second circumstance, to answer the fourth question would place the Court in the position of reviewing the correctness of the decisions of the provincial courts in the absence of an actual appeal by the parties concerned. Distinguishing past instances when the reference power had been invoked in situations because no appeal lay to the Court or when the Court itself had previously dismissed an application for leave to appeal,[10] the Court stated:

> The only instance that we are aware of where a reference was pursued in lieu of appeal is *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86. That reference is also distinguishable: unlike the instant reference, it was not a direct response to the findings of a lower appellate court and the parties involved in the prior proceedings had consented to the use of the reference procedure.[11]

Fourth, as a reference opinion and not a judgment in an actual appeal, an answer to the fourth question which confirmed the consistency of the traditional definition of marriage with the *Charter* would create legal confusion in provinces where a court had declared the invalidity of the traditional definition and would undermine the federal government's goal of a uniform concept of marriage through its draft Bill. At its narrowest, the concern identified may be that though Parliament, in the exercise of its legislative jurisdiction in relation to "marriage", i.e. in terms of the capacity to marry, might extend marriage to include same-sex couples, one or more provinces might, in the exercise of exclusive provincial legislative jurisdiction in relation to the solemnization of marriage or the formal validity of marriage, limit civil marriage for provincial purposes to the traditional opposite-sex definition.[12] The concern raises obvious issues of equality rights. Thus, the Court declined to answer the fourth reference question, a question it acknowledged to present a justiciable issue.

Several points can be made with respect to the "unique circumstances" identi-

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[9] It would seem that the Court may be alluding to provincial marriage legislation as interpreted by prior jurisprudence to reflect the opposite sex definition of marriage. The New Brunswick *Marriage Act*, R.S.N.B. c. M-3, s. 2(1) refers to "persons who are lawfully entitled to contract that marriage". That Act does, however, express the opposite sex concept of marriage declaring the validity of marriages solemnized in good faith by a person not authorized to do so "where the parties so married have cohabited together as man and wife", *ibid.* s. 28. In Ontario, the *Marriage Act*, R.S.O. 1990, c. M.3, s. 24 expresses the opposite sex concept by providing that the officiant "do hereby pronounce you AB and CD to be husband and wife".

[10] *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; *Reference re Regina v. Coffin*, [1956] S.C.R. 191; *Reference re Truscott*, [1967] S.C.R. 309; and *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866.

[11] *Supra*, note 1 at para. 68.

[12] *Constitution Act, 1867*, s. 91(26) and s. 92 (12), respectively.

fied by the Court. First, the Court's view that the determination whether to exercise its discretion to decline to answer a reference question should be assessed *in limine* – that is, regardless of its opinion, positive or negative – is belied by the four circumstances it identifies, all of which are premised on a positive answer i.e. that the traditional definition of marriage is consistent with the *Charter*. Second, that the government intended to proceed with the draft Bill regardless of the answer does not mean that the opinion of the Court to question four would have been a *brutum fulmen*. If the Court's opinion is that the traditional definition of marriage is consistent with the *Charter*, the government would be presenting Parliament with the social policy question of whether to approve an extension of the institution of marriage to same-sex couples; if the opinion is that the traditional definition is inconsistent with the *Charter*, the draft Bill would address a constitutional violation. The Court's opinion would, therefore, assist members of Parliament in forming their political stance on the draft Bill when presented for enactment.[13]

Third, the Court apparently equates the Attorney General with the Governor in Council. They are, in law, formally distinct. It is the Governor General in Council who referred the questions for the opinion of the Court, not the Attorney General acting alone. Fourth, that some persons entered into same-sex marriages in reliance upon a lower court decision would not seem a particularly weighty factor. At issue is the constitutional validity of the traditional definition of marriage. The draft Bill attached with the reference questions does not retroactively validate same-sex marriages already performed; so, if invalid before the reference opinion, such marriages would remain invalid. The Court's exercise of discretion leaves these parties, if not in a legal limbo, then with a measure of doubt as to the validity of their legal relationships and this residual spark of uncertainty exists notwithstanding the authority of the trial and appellate court decisions upon which they rely. The Court's opinion on question four would have ended any uncertainty. Fifth, many of the parties who successfully challenged the traditional definition in the provincial courts were in fact

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[13] *The Supreme Court Act*, R.S.C. 1985, c. S- 26, s. 54 provides that "[t]he Court, or any two of the judges, shall examine and report on 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." The Senate invoked this procedure three times: in *Re Brother of the Christian Schools in Canada* (1876), Coutlee 1; in *Re Quebec Timber Co.* (1882), Coutlee 43; and in *Re Canada Provident Ass'n.* (1882), Coutlee 48. The Senate submitted a fourth reference through the Governor General in Council: *Reference as to Validity of s. 5(a) of the Dairy Industry Act (Margarine Reference)*, [1949] S.C.R. 1. This procedure would not apply to the draft Bill considered in *Reference re Same-Sex Marriage* because it is not a private Bill. Presented by the Minister of Justice, Hon. Irwin Cotler, the House of Commons gave first reading on 1 February 2005 to Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes.*

interveners on the reference and were represented by counsel.[14] It is somewhat remarkable that the Court's solicitousness for such persons extends to the petitioners in *N.W. v. Canada*[15] who would have relied on a decision of the Saskatchewan Court of Queen's Bench, Family Division dated 5 November 2004, a full month after the hearing of the reference in the Supreme Court (heard 6-7 October 2004). Sixth, the Court distinguishes *Reference re Newfoundland Continental Shelf* because the reference by the Governor General in Council in that matter did not directly respond to the related Newfoundland Court of Appeal opinion[16] on a similar provincial reference and because the parties had consented to the use of the reference procedure. This situation presented competing federal and provincial exercises of the reference power. The Lieutenant Governor in Council of Newfoundland and Labrador referred specific questions to the provincial Court of Appeal on 18 February 1982 and the Governor General in Council responded with its own reference to the Supreme Court on 19 May 1982. The Court of Appeal released its opinion on 17 February 1983, just five days before the Supreme Court hearing which commenced on 22 February 1983. In its opinion on the federal reference, the Court gave the following summary of the state of proceedings:

> The Attorney General of Newfoundland has filed a Notice of Appeal in respect of the continental shelf and the Attorney General of Canada has filed a Notice of Appeal in respect of the territorial sea. Nothing further has been done to bring these appeals before this Court.
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> Accordingly, the Newfoundland Court of Appeal's decision is not actually before this Court in the present reference. The Court of Appeal's decision, however, was rendered on February 17, 1983, the week before this Court's hearing on the present federal reference. Much of the oral argument in the present case was directed toward the reasons of the Newfoundland Court of Appeal since, in respect of the continental shelf, the identical issue is raised. We therefore think it proper in these reasons to comment on the reasons of the Court of Appeal insofar as they relate to the continental shelf.[17]

The *Supreme Court Act*, s. 36 provides an automatic right of appeal to the Supreme Court from the opinion of a court of appeal on a provincial reference. Notice of

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[14] The sixteen petitioners in *EGALE Canada Inc., supra*, note 8, the two petitioners in *Halpern, supra*, note 8 and the two petitioners in *Hendricks, supra*, note 8 were all represented as interveners and were identified by the Court as the EGALE couples, the B.C. couples, the Ontario couples and the Quebec couple, respectively.

[15] *Supra*, note 8.

[16] *Reference Re Mineral and Other Natural Resources of the Continental Shelf Appurtenant to the Province of Newfoundland* (1983), 41 Nfld. & P.E.I.R. 271 (NFCA).

[17] [1984] 1 S.C.R. 86, at 87.

appeal of the opinion of the Newfoundland Court had been filed so the matter was coming to the Court but it was not yet ripe for hearing as an appeal. Had it been so inclined, the Court could have respected its own jurisdiction on the federal reference along with the future appeal of the provincial reference. It could have instructed counsel not to include the Court of Appeal opinion in their respective arguments; a rather unreal and impractical instruction. The Court could also have delayed hearing of the federal reference pending perfection of the appeal.[18] But it did neither. In its opinion, the Court merely states "we think it proper to... comment on the reasons of the Court of Appeal"; it does not refer to the consent of the parties to this course of action. Seventh, the Court's solicitude for the federal government's goal of achieving uniformity in the concept of marriage through its draft Bill is as striking as its solicitude for those who married in reliance on lower court decisions. In this instance, however, the Court appears to have entered an area of policy rather than principle; and it is political policy at that. Lord Mansfield may have provided the best judicial comment to the "unique circumstance" identified by the Court: *"Fiat justitia, ruat coelum"*.[19]

By exercising a claimed discretion to refuse to answer a reference question, the Court arguably failed in its duty to the Governor General in Council. By focussing attention on negative circumstances which in effect cast doubt on the appropriateness of the prior decisions of the provincial courts, actually undermined the goal attributed to the government of achieving legal uniformity in the concept of marriage as including same-sex unions. If, based on the opinions expressed in response to the first three reference questions, Parliament proceeds to enact a Bill to affect a permissive expansion of the concept of marriage to include same-sex unions, it does not necessarily follow that provinces would automatically accept the expanded federal concept of the capacity to marry. A rogue province might take the position that federal legislative jurisdiction to define capacity to marry does not mean that such persons may enter into lawful marriages consistent with provincial legislative jurisdiction to regulate the formal validity of marriage i.e. the province might decline to

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[18] The Ontario Court of Appeal followed this course of action in *Reference re Constitution Act, 1867, s. 92(10)(a)* (also cited as *Reference re Legislative Authority to Bypass Pipelines*) (1988), 26 O.A.C. 395, 49 D.L.R. (4th) 566 when the reference questions mirrored the issues on appeal to the Federal Court of Appeal in *Reference re National Energy Board Act* (1987), 81 N.R. 241, 48 D.L.R. (4th) 596.

[19] *Rex v. Wilkes* (1770), 4 Burr. 2527 at 2561, 98 E.R. 327 (Let justice be done though the heavens fall). See *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (2004) in which, by a five to two majority, the Supreme Court of California invalidated as contrary to state law and, therefore void, 3,955 same-sex marriages performed in San Francisco. The state Attorney General commenced the action in response to a decision by Mayor Gavin Newsom to permit such marriages in that city. The marriages were performed between 12 February and 11 March 2004 after the mayor ordered city officials to issue marriage licences to same-sex couples in the belief that the legal definition of marriage violated the right to equal protection under the state constitution notwithstanding that no court had issued a declaration of invalidity.

accept registration of such marriages for the purposes of its vital statistic legislation. Arguably, federal paramountcy would not be triggered because the provincial law would not be in "conflict" with the federal law; the province would respect the capacity of same-sex couples to marry, it would just not provide formal sanction to such marriages. This result would simply result in more private litigation to challenge the provincial law as inoperative, because the federal law states that same-sex couples can marry and the provincial law says they cannot, or, more directly, as a *Charter* equality rights challenge to address the very issue raised in question four – consistency with the *Charter* of an under-inclusiveness definition of marriage for provincial purposes.

## The Reference Power

Elsewhere,[20] I reviewed the history of the reference power in some detail. This review includes the early years when individual judges cast doubt on the constitutional validity of the reference procedure; the favourable resolution of that issue in 1912 by the Judicial Committee of the Privy Council;[21] the period of relative quiet acceptance that followed, during which courts generally answered reference questions as best they could and individual judges periodically invoked not a discretion to refuse to answer but a representation to the Governor General in Council concerning the perceived difficulties in answering a referred question; and the re-emergence of an asserted judicial independence commencing in the 1980s culminating in a declared judicial discretion to refuse to answer a reference question. It is a history which confirms the validity of the reference power and provides a critical context to the Court's assertion of a discretion to refuse to respond to a reference question.

In the pre-1980s period, judges who were so inclined had no qualms about voicing a concern about the justiciability of reference questions. Meredith J.A. expressed this well in *Re Ontario Medical Act* (1906)[22] when he opined that a court should not be asked such fascinating questions as "whether the moon is made of green cheese". As such, justiciability has served as an implicit limitation on the types of "matters" about which questions could properly be referred to the Supreme Court or to a provincial Court of Appeal as falling within their expertise to answer. In other words, the nature of a the Supreme Court and of a provincial court of appeal necessarily requires the enabling legislation to be read down and thereby limit "matters" to matters presenting issues of legal analysis. The other concern, ambiguity, did not

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[20] J. McEvoy, "Separation of Powers and the Reference Power: Is there a Right to Refuse" (1988), 10 Sup. Ct. L. R. 429.

[21] *Attorney General for Ontario v. Attorney General for Canada*, [1912] A.C. 571 dismissing an appeal from *In re References by the Governor General in Council* (1910), 43 S.C.R. 536.

[22] (1906), 13 O.L.R. 501 at 516.

provide a reason for a court to decline to answer a reference question during the pre-1980's period but did provide a reason to limit or quality a response.

The passive position of a court on a reference changed dramatically in the 1980's with the heightened political character of the *Patriation* references. In the three provincial references on the *Amendment to the Constitution of Canada*,[23] counsel for the Attorney General of Canada repeatedly argued that the Courts of Appeal should not answer one or more of the questions because they were either not "legal" e.g. such as the constitutional convention question, or were premature. To varying degrees, judges responded favourably to this argument and proclaimed the existence of a discretion to refuse to answer in limited circumstances. On appeal,[24] the Supreme Court majority on the legality issue affirmed the existence of a discretion to refuse to answer non-justiciable questions[25] and the differently constituted majority on the convention issue addressed the problem of the "ambiguous" question. The convention majority declared that, faced with an ambiguous question, "the Court is either to interpret the question... or it may qualify both the question and the answer...."[26] In subsequent opinions, the Court has further developed its claimed discretion to refuse to answer leading, as we have seen, to its application in *Reference re Same-Sex Marriage*.

In more recent years, the Court addressed the reference procedure in the *Quebec Secession Reference*.[27] Responding to the position of the *amicus curiae* that the Court should not answer the reference questions, particularly a question characterized as presenting issues of "pure" international law, the Court reproduced what it described as the "relevant parts" of the *Supreme Court Act*, s. 53 (the section authorizing the Governor General to refer questions to the Court) and concluded that the questions raised matters appropriate for its opinion, within the meaning of section 53, as relating to "the interpretation of the *Constitution Act*... the powers of the Parliament of Canada, or the legislatures of the provinces... [and] important questions of law or fact concerning any matter." This analysis centred on an exercise in statutory interpretation to determine the limits of the reference power. Turning to the argument that, even if within the scope of section 53, the reference questions were

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[23] *Reference re Amendment of Constitution of Canada* (1981), 7 Man. R. (2d) 269 (C.A.); *Reference re Amendment of Constitution of Canada* (No. 2) (1981), 29 Nfld. & P.E.I.R. 503 (Nfld. C.A.); and *Reference re Amendment of Constitution of Canada* (No. 3) (1981), 120 D.L.R. (3d) 385 (Que. C.A.).

[24] *Reference re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753.

[25] *Ibid.*, at 768 per Laskin C.J.C. and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

[26] *Ibid.*, at 875-76 per Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ.

[27] *Supra*, note 5.

essentially political and therefore not justiciable, the Court[28] in the *Secession Reference* emphasized its earlier statement in *Reference re Canada Assistance Plan (B.C.)*:[29]

> The Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government... In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.[30]

The Court identified a sufficient legal component to warrant its opinion and summarized its position on a reference with its two categories (quoted in *Reference re Same-Sex Marriage*, above) in which it enjoys a discretion to refuse to answer a reference question "that is otherwise justiciable". Remarkably, having clearly re-asserted its discretion to refuse to answer even a justiciable question, the Court completed this portion of its analysis by repeating the directive of the convention majority on dealing with ambiguous questions in the *Reference re Resolution to Amend the Constitution*, mentioned above,

> If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question . . . or it may qualify both the question and the answer. . . .[31]

The Court declared itself "duty bound" to answer the reference questions and did so.

The Court's analysis in *Reference re Quebec Secession* is significant for a serious and what can only be termed a deliberate omission. The Court reproduced and interpreted the first three subsections of section 53 of the *Supreme Court Act* which detail the authority of the Governor General in Council to refer questions to the Court; the Court did not reproduce the fourth subsection detailing the Court's duty on a reference:

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[28] *Ibid*, at para. 26.

[29] [1991] 2 S.C.R. 525.

[30] *Ibid.*, at 545 per Sopinka J. for the Court.

[31] *Supra*, note 5 at para. 31 quoting *Patriation Reference, supra*, note 22 at 875-76.

> 53 (4) Where a reference is made to the Court... *it is the duty of the Court to hear and consider it and to answer each question so referred*, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons. [emphasis added]

That the Court continually ignores this subsection is instructive. The will of Parliament is manifestly clear: "it is the duty of the Court to hear and consider it and to answer each question so referred". No margin of appreciation or discretion is conferred on the Court by its organic document, the *Supreme Court Act*, to refuse to answer a reference question.[32] What then is the source of this discretion to refuse to answer? The Court has never explained itself on this point.

## An Entrenched Court

The *Constitution Act, 1867* does not expressly create the Supreme Court as one of the institutions of government for Canada. Rather, it confers a permissive legislative jurisdiction upon Parliament, per s. 101, to "...from Time to Time, provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada...." Nor is the status of the Court much improved by the provisions relating to it in the *Constitution Act, 1982*. These provisions literally designate the appropriate procedure to be followed for constitutional amendments in relation to "the composition of the Supreme Court of Canada" (unanimous consent per s. 1(d))[33] and in relation to "the Supreme Court of Canada" (general procedure per s. 42(1)(d)); read literally, these provisions do not entrench the Court as an institution of Canadian governance. Entrenchment, and thus the source of a discretion to refuse to answer on a reference, must be found elsewhere in the *Constitution Act, 1867*.

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[32] In *Reference re Public Schools Act* (1990), 67 D.L.R. (4th) 488, O'Sullivan J.A. quoted similar mandatory language in the Manitoba *Constitutional Questions Act*, S.M. 1986-87, c. 3, s. 2 "[t]he Court of Appeal... shall certify... its opinion on the matter referred with reasons..." but concluded that the Court has "a duty to hear or consider any matter referred to us but we retain a discretion not to certify our opinion on matters referred" (at 532). In support of this position, O'Sullivan J.A. quoted the opinion of P. Hogg, *Constitutional Law of Canada* (2nd Ed.) at 180 where the learned author uncritically parrots the words of the Supreme Court asserting a discretion to refuse to answer a reference question. Toy, J.A., for the majority, made no comment on the sufficiency of the reference questions or on a residual judicial discretion. On appeal, *Reference re Public Schools Act* (1993), 100 D.L.R. (4th) 723 the Supreme Court, per Lamer C.J.C., answered all the reference questions.

[33] Accordingly, the *Meech Lake Accord* failed because it did not attain the unanimous consent necessary to approve its provisions concerning the Supreme Court of Canada and for an amendment to the amending procedure, which also requires unanimity per the *Constitution Act, 1982*, s. 41(e).

The answer seemingly lies in the Court's view of its institutional evolution and present status in the Canadian constitutional context; what the Court, per *Reference re Canada Assistance Plan (B.C.),* considers "its proper role within the constitutional framework of our democratic form of government." In *Morguard Investments Ltd. v. De Savoye*,[34] the Court first declared the concept of "full faith and credit" to be implicit in a federal form of government – witness its express inclusion in the constitutions of the United States and Australia – and thus applicable within Canada to the recognition and enforcement of provincial judgments. Later, because *Morguard* was a common law rather than a constitutional case, the Court pronounced its declaration to be a constitutional imperative in *Hunt v. T. & N. plc*.[35] Another significant feature of federal forms of government, it must be noted, is a general court of appeal for the federation – witness again the constitutions of the United States, Australia, and many other federations, including the United Kingdom.[36] Significantly, for present purposes, the preamble to the *Constitution Act, 1867* states the Framers' intention that Canada have "a Constitution similar in Principle to that of the United Kingdom". Though essentially a unitary state in 1867, the Parliament of the United Kingdom enacted laws separately for England and Wales, for Scotland, and for Ireland (as it then was). Since that time it has evolved to a modern federal state with separate assemblies for Scotland, Wales, N. Ireland and the Isle of Man. In 1867, the House of Lords served, and today continues to serve, as the general court of appeal in civil matters for that country.

The Supreme Court considered the preamble to the *Constitution Act, 1867* as the source of constitutional protection of the independence of provincial court judges in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.[37] Lamer C.J.C., for the majority, recognized the preamble as an affirmation of fundamental principles of democratic constitutional governance which serve to inform and complete the general framework found throughout the constitutional document:

> I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts..... The existence of that principle... is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions

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[34] [1990] 3 S.C.R. 1077.

[35] [1993] 4 S.C.R. 289.

[36] The constitution or organic law creating the general court of appeal may limit the types of cases which may be brought to that court. For example, the United States Supreme Court cannot hear appeals on issues relating to state constitutions.

[37] [1997] 3 S.C.R.

> of the *Constitution Acts, 1867* to 1982, merely *"elaborate that principle in the institutional apparatus which they create or contemplate"*...[38]
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> ...[O]ur Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.[39]

The Court thus concluded that the express guarantees of security of tenure limited by section 99 of the *Constitution Act, 1867* to superior court judges and that persons charged with an offence will be tried by "an independent and impartial tribunal" per section 11(d) of the *Charter* are but particular applications of a principle of judicial independence applicable to the judiciary generally, and provincial court judges in particular. It takes no stretch of the imagination to envision the Court taking a similar approach to its own constitutional position. Thus, mention of "a General Court of Appeal" in section 101 serves to confirm the necessary role and function of the Supreme Court, once created by Parliament, in the Canadian federation – a role confirmed by the provisions in the *Constitution Act, 1982* concerning constitutional amendments in relation to the Court and always protected by the preamble to the *Constitution Act, 1867*. With the progressive evolution of Canadian constitutionalism, the Court is today an entrenched institution of Canadian governance. Once a child of Parliament, it has come of age and is asserting its independence.

Can Parliament abolish the Supreme Court of Canada? If a future Parliament, controlled by critics of what is perceived as judicial activism, enacts an Act to abolish the Court and not replace it with any other "General Court of Appeal", would a challenge to the validity of that Act be successful? What opinion would the Court express if the Governor General in Council made such an Act the subject of a reference? Can it be doubted that the Court would declare the Act unconstitutional and would find support for this opinion in the preamble to the *Constitution Act, 1867*, section 101, and the progressive development of Canadian constitutionalism? Surely not.

Opposing clear and mandatory statutory language expressing its positive duty to respond, the Court's discretion to refuse to answer a reference question must find its source in the Court itself and its self-perceived role in the constitution of Canada. In other words, by imposing on the Court a positive duty to respond to each question referred on a reference, section 53(4) of the *Supreme Court Act* is unconstitutional as an improper constraint on the independence of the Court.

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[38] *Ibid.*, at para. 83.

[39] *Ibid.*, at para. 106.

## Conclusion

The Rule of Law and constitutionalism demands that all persons and constitutional actors conform to valid laws. That the judges of the Supreme Court of Canada refuse to conform to the clear duty imposed upon them by Parliament and have refused to answer each question referred by the Governor General in Council can only mean that the statute expressing such a duty is unconstitutional to the extent that it obliges the Court to answer. Indeed, such a conclusion is equally applicable to their provincial counterparts in the Courts of Appeal acting on references by the Lieutenants Governor in Council.

*Reference re Same-Sex Marriage* presented the Court with an opportunity to address the source of its discretion to refuse to answer a reference question. It did not take that opportunity. Instead, it merely repeated its bold assertion of a discretion. Without a clear lawful basis for such a discretion, it might be dismissed as a pretended discretion. Without a clear lawful basis for such discretion. The Court faces the risk of merely coupling the adage of United States Chief Justice John Marshall that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[40] with the Emperor's mistaken belief in his new clothes,[41] in the hope that mere repetition alone will foster acceptance of the legal reality of this discretion. In other words, if the Court says it long enough and often enough, it will become reality. As with the Emperor in the Hans Christian Andersen tale, a little child in a crowd may some day gasp "But they don't got anything on."

In *Reference re Same-Sex Marriage*, the Court exercised its negative discretion to refuse to answer a question referred and exercised a novel affirmative discretion to answer a question not asked by the Governor General in Council. The third reference question asked the Court's opinion whether the *Charter* right to freedom of religion protects religious officials if they decline to perform same-sex marriages; the question did not ask about the use of religious property or facilities for the purpose of celebrating or performing same-sex marriages. Yet, the Court had no compunction about expressing an opinion regarding concerns apparently raised by interveners:

> Concerns were raised about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages, suggests that the same would hold for these concerns.[42]

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[40] *Marbury v. Madison*, 1 Cranch 137 (1803).

[41] "The Emperor's New Clothes" by Hans Christian Andersen (Andersen (1805_75).

[42] *Supra*, note 1 at para. 59.

The Court is a fickle friend to the Governor General in Council on a reference. It declines to answer questions referred while answering questions not referred.[43] All within the exercise of its discretion.

Perhaps the Governor General in Council should test the limits of the Court's claimed discretion by once again referring the unanswered fourth question for hearing and answer. If answered, concerned private parties will be spared the financial and emotional costs of legal uncertainty about the validity of their marriages; if not answered a second time, all Canadians will undoubtedly benefit from a clarification of the constitutional role of the Court on a reference and its constitutional status in the Canadian legal order. Alternatively, the Governor General in Council may just accept the Court's refusal to answer and the issue of the Court's discretion will be left to another day. To address the uncertainty for private parties due to the Court's refusal to answer the fourth question, Parliament may want to make the Bill retroactive to the date of the first court decision on the issue. If not, the issue is sure to arise for determination either on an appeal from one of the existing provincial court decisions or in future litigation.

[43] The Court is not alone in answering questions not properly before it on a reference. See: *Re Yukon Election Residency Requirement* (1986), 27 D.L.R. (4th) 146 (Yukon C.A).