The Reference Procedure: The Government's Ability to Ask the Court's Opinion

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INTRODUCTION

What is the “reference procedure”?

The “reference procedure” is the ability of the government in Canada to ask a direct question (a “reference question”) to the court for its opinion.

Reference questions can be asked by either level of government (federal or provincial), and can be asked even without a concrete dispute or court case.[1] Although the questions can theoretically be about any legal topic, the majority of questions asked are constitutional in nature. Many of Canada's leading constitutional decisions are the result of a reference question.[2]

The history of the reference procedure

The reference procedure was inherited in Canada from old English common law.[3] For as long as the Supreme Court of Canada has been in existence, it has had the power to consider reference questions. This power was granted to the Supreme Court when it was created,[4] and was inspired by a similar provision in the British *Judicial Committee Act*.[5]

The first reference opinion rendered by the Supreme Court was delivered in 1874. The case concluded that the Dominion Parliament had exceeded its legislative authority when it incorporated a teachers' society.[6]

Early legislation dealing with the reference process was skeletal and contained many shortcomings. For example, the reference procedure did not involve argument presented to the court, and the court did not have to give reasons for its decision – it could choose to answer only "yes" or "no" to questions presented.

So, the reference procedure was amended in 1891.[7] At this time, a new section expanded the scope of the reference power to include, among other matters, the power to consider questions of law or fact concerning the constitutionality of any provincial or federal law.[8] In addition, the new legislation required the court to give reasons for its decision, just as in any other case, and provisions were included to allow the court to hear representations from different affected parties. Reference opinions rendered by the Supreme Court could be appealed to the Judicial Committee of the Privy Council in England. Around this same time, provinces began to enact provincial reference statutes, giving their provincial governments the power to ask a question to their provincial Court of Appeal.[9]

While some small changes were made in 1906, these provisions today remain essentially unchanged with one exception – appeals to the Privy Council were abolished in 1949 (as with all other appeals to the Privy Council). At this time, the Supreme Court of Canada became the highest court authority in the country.[10]

THE SCOPE OF THE REFERENCE POWER: THE MODERN STATUTORY SCHEME

When the reference power was initially implemented in Canada, it was reserved for questions launched by the federal government for consideration by the Supreme Court of Canada. Not long after, however, provincial governments granted their provincial courts of appeal a similar power to consider questions from the provincial government. Today, a reference procedure exists in every jurisdiction in Canada.

The modern reference question process is nearly indistinguishable from the normal appeal process. Issues are discussed in both written and oral arguments put forth by lawyers on

both sides, and the court gives reasons for its decision.[11]

The Supreme Court Act and provincial equivalents

Today, the reference process for questions submitted to the Supreme Court of Canada is outlined in the federal *Supreme Court Act*.[12] Section 53 of the *Supreme Court Act* states: "the Governor in Council may refer to the Court for hearing and consideration important questions of law or fact." When a question is referred in this manner, "it is the duty of the Court to hear and consider it and to answer each question so referred." In other words, the *Supreme Court Act* enables the federal Governor in Council (the federal cabinet) to refer a question to the Supreme Court for consideration.

Similar legislation exists in each of the provinces, giving each the power to ask their respective provincial Court of Appeal a reference question. In addition, the Federal Court has the power to consider questions arising out of the proceedings of any federal board, commission, or tribunal.[13] The reference power is outlined in separate legislation for each jurisdiction:

· Federal Court: *Federal Courts Act****[14]***

· British Columbia: *Constitutional Questions Act****[15]***

· Alberta: *Judicature Act****[16]***

· Saskatchewan: *Constitutional Questions Act, 2012****[17]***

· Manitoba: *Constitutional Questions Act****[18]***

· Ontario: *Courts of Justice Act****[19]***

· Quebec: *Court of Appeal Reference Act****[20]***

· New Brunswick: *Judicature Act****[21]***

· Nova Scotia: *Constitutional Questions Act****[22]***

· Newfoundland and Labrador: *Judicature Act****[23]***

· Prince Edward Island: *Judicature Act****[24]***

In most provinces, reference questions are considered by the provincial Court of Appeal. However, both the British Columbia and Federal Court legislation permit questions to be referred to a lower court. For example, the British Columbia *Constitutional Questions Act* allows the Lieutenant Governor in Council (the provincial cabinet) to refer any matter to either the Court of Appeal or to the Supreme Court of British Columbia for consideration.[25]

Who can ask a reference question?

At the Supreme Court, the only body that can refer a question for the Supreme Court's consideration is the Governor in Council (the federal cabinet).[26] In the provinces, questions may be referred by the Lieutenant Governor in Council (the provincial cabinet).

The provinces are not able to refer questions directly to the Supreme Court for consideration. Instead, provincial reference legislation in each province permits questions to be referred to provincial courts.[27]When a provincial court has rendered its reference opinion, either side has an automatic right to appeal the decision to the Supreme Court.[28] In this way, the Supreme Court can hear reference questions from the provinces.

As a result, there are three different ways that reference cases can be heard at the Supreme Court.

1. The Governor in Council (the federal cabinet) may refer an "important question of law or fact" to the Court for consideration;[29]

2. The Senate or House of Commons may submit a private bill to the Court for examination and report (a private bill deals with the affairs of an individual or group of individuals, and can be contrasted to a public bill which deals with public policy);[30] or

3. The Supreme Court may consider an appeal of a reference decision rendered by one of the provincial Courts of Appeal or the Federal Court.[31]

A private body is not able to ask the court a reference question. This means that private individuals do not have equal access to the reference procedure because they cannot ask a reference question. However, the courts have attempted to compensate for this inequality by developing relaxed "standing" rules. These rules give private individuals the ability to launch challenges to the constitutional validity of federal or provincial laws in some circumstances, using the normal court process, even if those individuals have not been affected by the law.[32]

What kinds of questions can be asked?

In each jurisdiction, the legislation permits a broad range of questions to be submitted for the court's consideration. Most commonly, reference questions ask for an opinion on the constitutionality of a federal or provincial law, or the constitutionality of a draft law that has been proposed but not yet enacted.[33] For example, in the *Reference re Securities Act*, the federal government submitted draft federal securities legislation to the Supreme Court for its opinion on whether the legislation was within the jurisdiction of the federal government, or whether it intruded into provincial jurisdiction.

Federal references submitted to the Supreme Court are not limited to questions about federal legislation – the questions may also involve provincial legislation.[34] For example, the opinion in *Reference re Alberta Statutes* involved a question submitted to the Supreme Court by the federal Government about the constitutionality of several laws passed by the Alberta Social Credit government in the 1930s. Likewise, provincial references can deal with legislation from either level of government – a province can ask a question about the

constitutional validity of a federal law.

The wording of the legislation in each province differs slightly with respect to the type of questions that can be asked. For example, the legislation in New Brunswick states that the question must be about "important questions of law or fact" on constitutional or other matters.[35] By contrast, the Ontario legislation is even more broad – permitting "any question" for the Court's consideration.[36]

BENEFITS AND CRITICISMS: THE LEGITIMACY AND EFFECTIVENESS OF THE REFERENCE PROCEDURE

Is the reference procedure constitutional?

In the early years of the Supreme Court's existence in Canada, the Court expressed doubt about the constitutionality of the reference procedure. The question arose because rendering an advisory opinion is not traditionally considered to be part of the role of the judiciary. As one commentator noted, this is for two reasons:

1. The reference process is not grounded in a real, concrete dispute or controversy between actual parties, making it somewhat hypothetical and theoretical; and

2. Giving advice to Parliament is generally considered part of the function of the executive branch of government.[37]

However, the question of constitutionality was resolved by the Judicial Committee of the Privy Council in*Reference re References* (1912).[38]

In that decision, the Judicial Committee of the Privy Council concluded that it was constitutional for the government to grant a reference power to the Supreme Court by statute. The case resulted from ten complex questions referred to the Supreme Court by the federal Governor in Council in May and June 1910. The questions raised issues about provincial jurisdiction over a number of areas. Six provinces argued that the Court should not hear the case as the reference jurisdiction itself was unconstitutional.

The case was considered first by the Supreme Court of Canada. In a 4-2 ruling, the Supreme Court concluded that the reference procedure was constitutional, based mainly on the constitutionality of the process in England, which had been imported into Canada with the *Constitution Act, 1867*.[39] In coming to this conclusion, the majority stressed the advisory nature of reference opinions, emphasizing that the opinions are non-binding.[40]

The Supreme Court's decision was appealed to the Judicial Committee of the Privy Council, where it was upheld.[41] The Court concluded that because the *Constitution Act, 1867* (then titled the *British North America Act*) did not clearly separate powers, the court could perform an advisory function, even if this was traditionally not the role of a court.[42] One of the determinative factors for the Privy Council was the strong history of reference cases in Canada, without any concern from the "great lawyers who heard those cases."[43] In addition, the advisory power was constitutional because the answers that the Court provides

"are only advisory and will have no more effect than the opinions of the law officers."[44]

The Supreme Court was asked to revisit this conclusion more recently in *Reference re Secession of Quebec,* where the constitutionality of the reference procedure was again challenged.[45] A summary of the opinion rendered by the Court in that case can be found **here**. The Supreme Court again upheld the constitutionality of the reference procedure.[46] The Court concluded that there is no constitutional barrier to the reference procedure:

Even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role.[47]

Accordingly, it is clear that the reference procedure is here to stay, and will continue to play a vital role in Canadian law.

Is the court required to answer the question posed?

As noted above, the reference procedure is governed by multiple pieces of federal and provincial legislation. Most of this legislation uses wording that implies that the court *must* answer each question asked, and does not appear to leave room for a discretion to refuse to answer a question. For example, the *Supreme Court Act* uses the phrase "it is the duty of the Court to hear and consider" each of the referred questions.[48] Similarly, the Alberta *Judicature Act* states that the Alberta Court of Appeal "*shall*" consider any referred question.[49]

However, the Supreme Court of Canada has, from time to time, discussed and utilized a purported discretion to decline to answer a reference question. The Court has referenced a number of different principles to justify this refusal, but they fall primarily into one of two broad categories:

1. Where the question does not raise a "justiciable" issue or answering the question is not within the proper function of a court;

2. Where a complete answer is impossible because the question is too ambiguous or imprecise or there is an insufficient factual context provided in order to permit a legal response.[50]

Refusal to answer: The "justiciability" concern

If a court deems that a question is not "justiciable", it means that the question is not proper for judicial consideration. In other words, a non-justiciable question is one that would take the court outside its normal and proper role *as a court* in the Canadian constitutional system.

The justiciability concern has many facets. It may be argued that a question is not justiciable

if it is too theoretical or speculative, too political in nature, not a legal question, or simply not yet "ripe" for the court's consideration.[51] A question is considered not yet "ripe" if it would involve examining a future possibility – such that answering the question would be hypothetical and premature.

The rationale behind answering only questions that raise legal issues is that courts should not be expected to answer questions that are outside of their expertise - i.e. questions that are not legal ones. As Justice Meredith of the Ontario Court of Appeal famously stated in 1906: courts should not be expected to answer questions such as "whether the moon is made of green cheese."[52]

The argument that answering some questions is not within the proper role of a court's function sometimes has its roots in a "separation of powers" argument. This argument holds that in some situations, a court oversteps its role in answering a reference question if it takes on a role which really should be within the scope of the executive branch of government.[53] The issue concerns the proper balance between the role of the judiciary and the other branches of government, and the argument is that providing advice is "simply not a proper part of the judicial role."[54]

Accordingly, the Court acknowledged that it must be careful in answering a reference question to maintain its proper role within the constitutional democracy that makes up Canada. As the Court stated in *Reference re Canada Assistance Plan*:

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.[55]

In other words, the key consideration is whether a question has sufficient legal content to warrant a court's opinion. If a question has both legal and non-legal components, the Court may choose to answer only the legal components of the question, or may decline to answer it at all.[56]

One striking example where there was a broad suggestion that answering the question would be outside the proper role of a court was in the *Reference re Same-Sex Marriage*. In short, four questions were referred to the Supreme Court for its opinion:

1. Is proposed same-sex marriage legislation within the authority of Parliament?

2. Is same-sex marriage consistent with the *Charter of Rights and Freedoms?*

3. Are religious officials protected from being compelled to perform same-sex marriages by the freedom of religion guarantee in the *Charter*?

4. Is the traditional, opposite-sex definition of marriage consistent with the *Charter?*

The Supreme Court refused to answer the fourth question. It did this on the basis that to do so would serve "no legal purpose",[57] asserting that the parliamentary process should "run

its course" on what was clearly a sensitive political issue before court intervention was warranted. As one commentator noted, "it was not the court's function to assist the government in overcoming well-known difficulties with its back bench."[58] In addition, the Court wished to avoid introducing legal confusion by rendering an opinion that conflicted with lower court decisions that had not been appealed.[59]

The Court considered these to be "a unique set of circumstances" which rendered an answer to the fourth question inappropriate.[60]

In deciding whether a question is justiciable, the Court has looked to the unique nature of the reference procedure as compared to regular, adversarial litigation. As the Supreme Court noted in the *Reference re Secession of Quebec*: "No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights."[61] This means that the Court may entertain questions in a reference that it otherwise might not.

The Court also has referenced its discretion to refuse to answer a question that has become moot. A question is said to be "moot" if the answer to it would no longer have any practical value and the question is purely theoretical or academic. For example, in the *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, the Supreme Court considered an objection by Quebec to a proposed amendment to the Constitution of Canada.[62] By the time the Supreme Court heard the case, the Canadian Constitution had already been amended, so the opinion would have no legal effect. The Supreme Court noted that it could refuse to answer the reference question on the basis that it had become moot because the *Constitution Act, 1982* had come into force. However, the Court noted that it also had a discretion to hear a moot argument in certain circumstances, and so concluded that "it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered."[63]

Refusal to answer: the ambiguity or precision concern

In addition, the Supreme Court may decline to answer a reference question if the question is too imprecise or ambiguous. An example can be found in *Reference re Court of Unified Criminal Jurisdiction,* where the Court ruled that it is "entitled to exercise its judgment on whether it should answer referred questions if it concludes that they do not exhibit sufficient precision to permit cogent answers."[64] However, the Court may also choose instead to interpret the question or qualify the answer in order to avoid a risk of misunderstanding or misleading.[65]

The Supreme Court has also declined to answer a reference question on the basis that there has not been a sufficient factual context put forward to enable the Court to formulate a legal response. For example, in *Reference re Authority of Parliament in Relation to the Upper House*, the Supreme Court declined to answer several of the questions, noting: "we do not feel that we have a factual context in which to formulate a satisfactory answer."[66] A full summary of that case can be found **here**.

Refusal to answer: the controversy

The question of whether (and in what circumstances) a court can refuse to answer a reference question is one of the most controversial aspects of the reference procedure.

One commentator, Peter Hogg, has argued that a court clearly has discretion to refuse to answer, but has not utilized its discretion as frequently as it should have. He argues that the court should be ready to refuse to answer reference questions when they are too abstract and without an adequate setting – because "the lack of a concrete controversy can lead the Court to miss the point."[67]

Similarly, Barry Strayer argues that when courts do not exercise restraint and use their discretion to refuse to answer certain questions, the court may be thrust into the political arena – an issue that may reduce the effectiveness of reference opinions in the long run.[68]

On the other hand, another commentator, John McEvoy, argues that for the court to exercise a purported discretion and refuse to answer referred questions "would be tantamount to a judicial rebellion… [where] the only available recourse open to the executive would appear to be impeachment of the obstinate judges."[69]

But if there is discretion to refuse to answer a reference question, where does this discretion come from? The answer to this question is unclear.[70] The statutes that grant the reference power appear to deny any discretion. The Supreme Court has frequently referenced this discretion while not providing any details on its source. It is possible that the discretion finds itself in the principle of judicial independence and the Court's role as the guardian of the Constitution in Canada.[71] Regardless, the Court is clearly willing to utilize this discretion and refuse to answer a question where it deems it appropriate. For this reason, the Court has been referred to as a "fickle friend" of the Government on a reference – it will sometimes decline to answer questions asked, while at other times answering more than it was asked.[72]

The advisory nature of the reference power

One of the most common responses to concerns about the appropriateness of the reference procedure is that reference opinions are intended to be merely advisory in nature. In other words, reference opinions are not technically binding on courts or parties, and future courts and legislators are free to come to a different conclusion.[73]

The advisory-only nature of reference opinions was established very early in the Supreme Court's history. As early as 1896 in *Reference re Fisheries*, Justice Taschereau wrote: "[w]e determine nothing. We are mere advisers , and the answers we give bind no one, not even ourselves."[74]

Though this draws a distinction between reference cases and cases based on actual disputes, reference opinions have proven to be highly persuasive. For example, in *Reference re Remuneration of Judges of the Provincial Court,* the Court stated that while references are "only advisory", they will be "of highly persuasive weight" for a lower court.[75]

In fact, reference opinions have been so persuasive that, to date, there are no recorded instances where courts or parties have disregarded a reference opinion or declined to follow it.[76] Accordingly, as a practical matter, reference decisions appear to carry the same weight as court decisions in normal cases, and their influence is difficult to ignore.

Problems of proof in the reference procedure

One of the challenges in the reference procedure is related to proving facts and accessing evidence. Under the reference procedure, questions are posed directly to the court for consideration. There is no "trial" in the traditional sense. Because of this, proving facts can be particularly difficult – without a trial, there is no forum for presenting evidence in the traditional manner.

At one point in history, it was thought that since a reference case results in an opinion only, it should be based not on facts, but only on the materials presented to the court as part of the reference question. But, the modern view is that a factual context is important so that a court can properly assess the impact of an opinion on future disputes.[77]

To address this concern, an agreed "statement of facts" is sometimes included along with the question to provide the court with some context, or the court will give directions to the parties that allow them to file written evidence for the court's consideration.

Today, a wide variety of factual materials are used in references, including information on history, development of international law, statistics, and even election results.[78]

CONCLUSION: THE CONTINUED RELEVANCE OF THE REFERENCE PROCEDURE

References are a flexible and timely means for governments to question the constitutionality of an existing or proposed law by bringing cases before the court that would not otherwise get there, or by speeding up the litigation process.[79]

One of the key benefits of the reference procedure is the timely and authoritative advice on the constitutionality of proposed legislation. Although it is true that the Government can look to their own lawyers for this type of advice, a court opinion comes with a certain level of authoritativeness.[80] This can make the process of passing legislation more cost effective as well – a government is able to get an early opinion on whether proposed legislation is constitutional before going through the process of passing the legislation. Obtaining the court's opinion on the constitutionality of legislation through the reference procedure is likely far less costly than constitutional interpretation resulting from an actual dispute between affected parties after a law has been passed.[81] The reference procedure is an expeditious way for a government to ask the court's opinion, and in doing so, save time and money.

However, there remain disadvantages to the reference procedure. Because the court renders its opinion without a full factual context, opinions may be somewhat abstract and hypothetical. This reduces their applicability to future disputes.

Regardless of any controversy, the reference procedure has nonetheless proved to be a valuable one for securing the timely resolution of constitutional questions. There is general agreement that the value of this legal procedure is "immeasurable."[82]

FURTHER READING

Centre for Constitutional Studies: Summaries of Selected Supreme Court Reference Cases

· ***Reference re Securities Act (2011)***

· ***Reference re Same-Sex Marriage* (2004)**

· *Reference re Secession of Quebec* (1998)

· *Reference re Remuneration of Judges of the Provincial Court (PEI)* (1997)

· ***Reference re Firearms Act* (1995)**

· ***Reference re Provincial Electoral Boundaries* (1991)**

· ***Reference re Manitoba Language Rights* (1985)**

· ***Reference re Authority of Parliament in Relation to the Upper House* (1980)**

Centre for Constitution Studies: Summaries of Selected Alberta Reference Cases

· *Reference re Alberta Election Act* (1921)

· *Reference re Constitutional Questions Act* (1978)

· *Reference re Electoral Boundaries Commission Act* (1991)

· *Reference re Electoral Divisions Statutes Amendment Act* (1994)

· *Reference re Firearms Act* (1996)

· *Reference re Goods and Services Tax* (1991)

· *Reference re Jury Act* (1946)

· *Reference re Labour Act* (1948)

· *Reference re Legal Proceedings and Suspension Act* (1942)

· *Reference re Orderly Payment of Debts Act* (1959)

· *Reference re Proposed Federal Tax on Natural Gas* (1981)

· *Reference re Public Service Employee Relations Act* (1984)

· *Reference re Alberta Marketing Choice Program* (1998)

· *Reference re Alberta (Natural Gas Utilities Board)* (1945)

· *Reference re Alberta Bill of Rights Act* (1946)

[1]Andrew K Lokan & Christopher M Dassios, *Constitutional Litigation in Canada* (Toronto: Thomson Reuters Canada Limited, 2006) at 5-42.

[2]*Ibid* at 5-42.

[3]Barry L Strayer, *The Canadian Constitution and The Courts: The Function and Scope of Judicial Review,*3d ed (Toronto: Butterworths, 1988) at 311.

[4]*Supreme and Exchequer Court Act,* SC 1875, c 11. See Strayer, *ibid* at 311.

[5]1833, 3 & 4 Wm IV, ch 41, s 4. See James L Huffman and MardiLyn Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction" (1989) 74 Minn L Rev 1251 at 1256. The British statute stated: "It shall be lawful for His Majesty to refer to the said Judicial Committee… for hearing and consideration and such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in the manner aforesaid."

[6]*Reference re The Brothers of the Christian Schools in Canada,* Cout Cas Apr 4 (1874).

[7]Strayer, *supra* note 3 at 313.

[8]*Ibid*.

[9]Huffman & Saathoff, *supra* note 5 at 1260.

[10]*An Act to Amend the Supreme Court Act*, 1949 Can Stat, ch 37, s 3.

[11]Strayer, *supra* note 3 at 318.

[12]RSC 1985, c S-26 .

[13]*Federal Courts Act*, RSC 1985, c F-7, s 18.3. The question may be raised by any federal board, commission, or tribunal. In addition, the Attorney General of Canada may raise a question regarding the constitutionality of any federal law during the proceedings of any federal board, commission, or tribunal.

[14]RSC 1985, c F-7.

[15]RSBC 1996, c 68 [BC *Constitutional Questions Act*].

[16]RSA 2000, c J-2 [Alta *Judicature Act*].

[17]SS 2012, c C-29.01.

[18]CCSM c C180.

[19]RSO 1990, c C.43 .

[20]RSQ, c R-23.

[21]RSNB 1973, c J-2 .

[22]RSNS 1989, c 89.

[23]RSNL 1990, c J-4.

[24]RSPEI 1988, c J-2.1.

[25]BC *Constitutional Questions Act*, *supra* note 15, s 1.

[26]Peter W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters Canada, 2009) at 8.6(a)).

[27]*Ibid* at 8.6(b)).

[28]*Supreme Court Act*, *supra* note 12, s 36.

[29]*Ibid*, s 53.

[30]*Ibid*, s 54. For more information on the difference between public and private bills, see Parliament of Canada, *House of Commons Procedure and Practice*, section 23.

[31]Lokan & Dassios, *supra* note 1 at 5-46.

[32]Hogg, *supra* note 26 at 8.6(a)).

[33]*Ibid*.

[34]*Supreme Court Act*, *supra* note 12, s 53(1).

[35]NB *Judicature Act*, *supra* note 21, s 23(1).

[36]*Courts of Justice Act*, *supra* note 19, s 8(1).

[37]Hogg, *supra* note 26 at 8.6(c)).

[38]*Reference re References by the Governor in Council,* [1912] AC 571 (JCPC) .

[39]*Reference re References by the Governor-General in Council* (1910), 43 SCR 536.

[40]*Ibid*.

[41]*Reference re References, JCPC, supra* note 38.

[42]Huffman & Saathoff, *supra* note 6 at 1261.

[43]*Reference re References, JCPC, supra* note 38 at para 13. The Judicial Committee of the Privy Council also placed great weight on the fact that the provinces had each passed provincial laws implementing a reference power in their own province, which made it difficult for the provinces to argue that the process was unconstitutional: see para 14.

[44]*Ibid* at para 14.

[45]*Reference re Secession of Quebec,* [1989] 2 SCR 217 at para 4 .

[46]*Ibid* at para 15.

[47]*Ibid* at para 15.

[48]*Supreme Court Act*, supra note 12, s 53(4).

[49]Alta *Judicature Act*, *supra* note 16, s 26(1).

[50]*Secession Reference, supra* note 45 at para 30.

[51]As was argued in the *Secession Reference*, *ibid* at para 24.

[52]*Re Ontario Medical Act*, (1906), 13 OLR 501 at 516.

[53]Lokan & Dassios, *supra* note 1 at 5-48.

[54]Huffman & Saathoff, *supra* note 5 at 1286.

[55]*Reference re Canada Assistance Plan,* [1991] 2 SCR 525 at 545.

[56]*Secession Reference, supra* note 45 at para 28.

[57]*Reference re Same-Sex Marriage,* 2004 SCC 79, [2004] 3 SCR 698 at para 65 .

[58]Lokan & Dassios, *supra* note 1 at 5-49.

[59]*Same-Sex Marriage Reference, supra* note 57 at paras 68-69.

[60]*Ibid* at para 64.

[61]*Secession Reference, supra* note 45 at para 25.

[62]*Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793.

[63]*Ibid* at 806.

[64]*Reference re Court of Unified Criminal Jurisdiction*, [1983] 1 SCR 704 at 708.

[65]*Reference re Resolution to Amend the Constitution,* [1981] 1 SCR 753 at 875-76.

[66]*Reference re Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54 at 77.

[67]Hogg, *supra* note 26.

[68]Strayer, *supra* note 3 at 330.

[69]John McEvoy, "Separation of Powers and the Reference Power: Is There A Right To Refuse?" (1988) 10 SCLR 429 at 468.

[70]*Ibid* at 458.

[71]John P McEvoy, "Refusing to Answer: the Supreme Court and the Reference Power Revisited" 54 UNBLJ 29 (2005) at 40.

[72]*Ibid* at 42.

[73]*Reference re References, JCPC, supra* note 38.

[74]*Reference re Fisheries* (1896), 26 SCR 444 at 539.

[75]*Reference re Remuneration of Judges of the Provincial Court*, [1998] 1 SCR 3 at para 10, as cited in Lokan & Dassios, *supra* note 1 at 5-46.

[76]Hogg, *supra* note 26 at 8.6(d)).

[77]Strayer, *supra* note 3 at 294.

[78]*Ibid* at 296.

[79]*Ibid* at 173.

[80]Huffman & Saathoff, *supra* note 5 at 1316.

[81]*Ibid* at 1316.

[82]McEvoy, *supra* note 69 at 466.