Reference Question

A reference question is a submission by either the federal or provincial government that asks the courts for advice on a major legal issue. A court does not rule on a reference question. Rather, the question results in an "advisory opinion" that guides the government in determining a law's meaning or the constitutionality[1] of a proposed course of action. A court's answer to a reference question is not binding.

The Supreme Court of Canada (SCC) hears reference questions from the federal government. Until 1949 the SCC's opinion could be appealed to the Judicial Committee of the Privy Council in Britain. After that, the SCC became the highest court in Canada.[2] Since that time, its decisions are the final word on the reference questions put before it.

In contrast, reference questions from provincial and territorial governments are heard by courts in their own jurisdictions. Each province has rules about how questions may be brought to the courts, which are in legislation such as *Judicature Acts* or *Constitutional Questions Acts*.[3] In most provinces the provincial Court of Appeal considers reference questions. British Columbia is the exception because its *Constitutional Questions Act*[4] allows questions to be referred to either the Court of Appeal or to the Supreme Court of British Columbia.[5] Once a provincial court has given its reference opinion, the government has an automatic right to appeal the decision to the SCC.[6]

Only governments can initiate reference questions. They cannot be initiated by private individuals or groups, but a court's advice often impacts these stakeholder groups.[7] Once a court receives a reference question request from the government, it first decides whether it will hear it. For example, a court may decide to hear questions involving unresolved legal issues of interest to Canadians, but it may refuse to hear questions that can be heard as a case in lower courts or questions that are no longer relevant.[8] The guidelines for federal government reference question submissions are stated in section 53 of the *Supreme Court Act*, which discusses the processes for referring certain questions for judicial opinion.[9] The guidelines for provincial or territorial submissions occur within that jurisdiction's own legislation.

Reference questions are an effective tool in Canadian law. They can influence political and societal norms. The first reference question put to the Supreme Court, in 1876, dealt with an important issue at that time: in *Reference re The Brothers of the Christian Schools in Canada*, the SCC was asked if Parliament had exceeded its legislative authority when it incorporated a teachers' society.[10] Since then, the SCC has considered questions which influenced topics such as the definition of marriage in the *Civil Marriage Act* to Quebec separatism when it was asked to consider if and how a province can separate from Canada.[11]

Reference questions also provide timely, authoritative and cost-effective advice on the constitutionality of proposed legislation. Obtaining a court's opinion by reference procedure is far less costly than a future constitutional challenge once a law has been passed.[12] And

although courts' reference opinions are not legally binding, to date no government has ignored them.[13]

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[1] Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law," in William R Lederman ed, *The Courts and the Canadian Constitution* (McClelland & Stewart, 1964) at 169.

[2] 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 1260.

[3] Rubin, *supra* note 1 at 172.

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

[5] Leah McDaniel, "The Reference Procedure: The Government's Ability to Ask the Court's Opinion" (June 26, 2013), online: Centre for Constitutional Studies < https://www.constitutionalstudies.ca/ccs/index.php/constitutional-issues/democratic-governance/2-the-reference-procedure-the-government-s-ability-to-ask-the-court-s-opinion#_edn6>.

[6] *Supreme Court Act*, *supra* note 3, s 36.

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

[8] Hogg, *supra* note 2.

[9] RSC 1985, c S-26 .

[10] Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Toronto: McGill-Queen's University Press, 1992) at 75.

[11] Rubin, *supra* note 1 at 174.

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

[13] McDaniel, *supra* note 8.