INVITING JUDICIAL REVIEW:
A COMPREHENSIVE ANALYSIS OF CANADIAN APPELLATE COURT REFERENCE CASES

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TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION ................................................................. 1
  Research Puzzle and Central Argument in Brief ........................................ 3
  Case Selection ......................................................................................... 5
  Chapter Overview and Summary of Findings ............................................ 7

CHAPTER TWO: REVIEW OF LITERATURE AND THEORETICAL FRAMEWORK ...... 14
  Legal Parameters of the Reference Power ................................................ 15
  Review of Extant Literature on Canadian Reference Cases ...................... 19
  Constitutional Courts and Comparative Abstract Review .......................... 27

THEORETICAL QUESTIONS ..................................................................... 33
  The Separation of Powers, and Judicial Independence ............................... 34
  Delegation to the Courts and Strategic Litigation ..................................... 43

CONCLUSION .......................................................................................... 57

CHAPTER THREE: CANADIAN REFERENCE CASES 1875 TO 2014, A BIMODAL
  DISTRIBUTION .................................................................................... 61
  THE CREATION OF THE REFERENCE POWER ....................................... 62
  DATA COLLECTION AND METHODOLOGY ......................................... 67
  ANALYTICAL DESCRIPTION OF CANADIAN REFERENCE CASES .............. 70
    Reference Case High Point I: 1930s .................................................... 77
    Reference Case High Point II: 1980s .................................................... 89
    1930s and 1980s Compared: References Become a Tool of the Provinces ... 100

CONCLUSION .......................................................................................... 103

CHAPTER FOUR: CANADIAN REFERENCE CASES POST-1949, ROUTINE POLITICS AND
  NON-ROUTINE LITIGATION .................................................................. 106
  OVERVIEW OF REFERENCE CASES POST-1949 ................................... 109
  COURTS ................................................................................................... 112
    Case Dispositions .................................................................................. 113
    Unanimity Rate and Authorship ............................................................ 114
  TYPE OF JUDICIAL REVIEW .................................................................. 117
    Concrete Review Reference Cases ....................................................... 119
    Abstract Review Reference Cases ........................................................ 121
  REFUSING TO ANSWER ....................................................................... 124
    Refusals of Practicality ......................................................................... 127
    Lack of Information ............................................................................... 128
    Appropriateness and Political Refusals .................................................. 130
  PARTIES IN REFERENCE CASES 1949 TO 2014 ........................................... 133
    Governments ......................................................................................... 134
    Third-Party Interveners ......................................................................... 137
  CONCLUSION: CONTEXTUALIZATION OF REFERENCE CASES .................. 141

CHAPTER FIVE: WHY GOVERNMENTS USE THE REFERENCE POWER ............. 147
  WHY DO GOVERNMENTS ASK REFERENCE QUESTIONS? ......................... 150
    Politics, Controversy, and Hot Potatoes ................................................. 153
    Federalism ............................................................................................ 158
    Institutional Authority and Protection of the Courts ............................... 161
    Time and Resource: Pausing the Debate ................................................. 167
    Abstract Review and the Structure of the Reference Power .................... 171
    On the Reference Power in General ....................................................... 174
LIST OF FIGURES
Figure 1 – Reference Cases Final Court 1875 to 2014. .................................................. 70
Figure 2 – Government Initiating Case ............................................................................ 71
Figure 3 – Federal and Provincial Use of References ...................................................... 72
Figure 4 – Canadian Reference Cases Across Time .......................................................... 76
Figure 5 – Reference Cases Post-1949 .............................................................................. 109
Figure 6 – Rate of Participation of Government and Non-Government Interveners .......... 140
Figure 7 – Comparison of European Constitutional Courts and Canada ....................... 225

LIST OF TABLES
Table 1 – Government Initiating Reference and Statue/Action Referred ......................... 74
Table 2 – Issues of Reference cases in the 1930s ............................................................... 79
Table 3 – Issues of Reference Cases in the 1980s ............................................................... 93
Table 4 – Case Type 1949 to 2014 .................................................................................. 110
Table 5 – Case Type 1982 to 2014 .................................................................................. 112
Table 6 – Disposition of Reference Cases ....................................................................... 113
Table 7 – Category of Judicial Review by Question Type ............................................... 118
Table 8 – Reasons for Refusing to Answer ...................................................................... 127
Table 9 – Most Reference Initiating Governments (four or more cases) ......................... 135
Table 10 – Cases with the Highest Number of Third Party Interveners ........................... 139
Canadian reference questions allow the executive (both federal and provincial) to obtain an advisory judicial opinion from a provincial appellate court or the Supreme Court of Canada on the constitutionality of government legislation, either proposed or enacted, in the absence of a live legal dispute. The reference procedure allows governments to insert the courts and the judiciary into often highly contentious and normative partisan debates. The process of reference questions in Canada raises several heretofore unexplored questions, such as: Why would political actors delegate a portion of their decision making power to the courts in these episodes? Is government participation in reference cases evidence of strategic litigation?

This project is driven by the central question: why do governments ask reference questions? In answering this research question, this study argues that the use of Canadian reference power cases demonstrates a delegation of decision-making that offers governments several unique advantages: initiating a reference provides governments a means to deal with political controversies, references can help governments deal with issues associated with federalism, references provide the ability to overcome time/resource limitations associated with routine litigation, references provide the opportunity to benefit from the institutional authority of the courts, and references allow governments to take advantage of the opportunity to initiate abstract review. This analysis demonstrates that the actual outcome of a reference case – win or lose – is almost secondary to the political benefits that can be attained from simply involving the courts through the reference power. This dissertation makes a significant contribution to the field through a novel analysis of all Canadian appellate court reference cases from 1875 to 2014, which is complemented with interview data and archival research.

Au Canada, les renvois relatifs permettent l’exécutif (fédéral ou provincial) d’obtenir, en absence d’un litige réel, un avis juridique consultatif sur la constitutionnalité d’une législation gouvernementale, soit proposée ou adoptée, d’une cour d’appel provinciale ou la Cour suprême du Canada. Le processus de renvoi relatifs permet aux gouvernements d’impliquer les tribunaux et le système judiciaire dans des débats partisans, qui sont souvent très controversées et normatives. Ce processus suscite plusieurs questions jusqu’ici inexplorées : Pourquoi les acteurs politiques délégueraient-ils une partie de leur pouvoir décisionnel aux tribunaux ? La participation gouvernementale dans les renvois relatifs est-elle preuve du litige stratégique ?

Ce projet est axé sur une question principale: pourquoi les gouvernements soumettent-ils des renvois relatifs ? Cette étude démontre que le pouvoir de demander un renvoi relatif est en effet une délégation du pouvoir décisionnel qui confère aux gouvernements des avantages uniques. Cette délégation fournit aux gouvernements un moyen d’éviter des controverses politiques, aide ceux-ci à résoudre les questions liées au fédéralisme, les permet de surmonter les limitations du temps ou des ressources associées aux litiges courants, offre la possibilité de bénéficier de l’autorité institutionnelle des tribunaux et permet aux gouvernements de profiter de l’occasion pour lancer un contrôle abstrait. Cette analyse démontre que le résultat d’un renvoi relatif – soit gagné ou perdu - est secondaire aux avantages politiques atteints par la participation des tribunaux. Cette thèse apporte une contribution importante à l’étude de la question grâce à une analyse innovatrice de tous les renvois relatifs aux Cours d’appel du Canada de 1875 à 2014 et est complétée par des données d’entrevue et les données d’archives.
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CHAPTER ONE: INTRODUCTION

In Reference re Secession of Quebec, a unanimous Supreme Court of Canada stated: “This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government…[this case] combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity” ([1998] 2 S.C.R. 217, at paragraph 1, Secession Reference). The Secession Reference could be considered one of the most controversial and polarizing decisions in Canadian jurisprudence, as the Supreme Court was asked to consider if a province could legally unilaterally secede from the federation. However, the Secession Reference is not the first nor the last time a Canadian appellate court was referred questions that were both highly controversial and abstract. As Peter Russell (2011) argues, one would be hard-pressed to find another constitutional democracy that has relied on its courts as frequently as Canada to answer controversial issues related to the core of its survival. Indeed, reference cases have concerned crucial topics such as the constitutionality of same-sex marriage, the legality of the unilateral patriation of the 1982 Constitution, and, more recently, the reform of the Canadian Senate.

The reference question procedure allows the executive (of both federal and provincial) to obtain an advisory judicial opinion from a provincial appellate court or the Supreme Court of Canada on the constitutionality of government legislation, either proposed or enacted, in the absence of a live legal dispute or in the context of concrete litigation. When focused on an abstract question (as the majority of references concern this form of abstract review), reference cases stray from the traditional adversarial nature of Canadian courts, as there is no concrete legal problem for the court to resolve. Through section 53 of the Supreme Court Act (RSC 1985, c S-26) or various provisions created by provincial legislatures,¹ the executive branch can pose questions directly to the Supreme

¹ See Appendix A.
Court or provincial courts of appeal. In the federal case, this power was created by a simple act of Parliament via the amendment of the *Supreme Court Act* in 1875.

The reference power provides governments with the ability to sidestep the normal litigation route to the Supreme Court or provincial courts of appeal, giving the executive (provincial and federal) privileged and more timely access to the courts that is denied to citizens, interest groups, or opposing political parties. Furthermore, political actors involved in these contentious political episodes abide by the decisions made by the courts, making reference decisions more binding than advisory in nature (Rubin 1960; Hogg 2012). The reference procedure allows governments to insert the courts and the judiciary into often highly contentious and normative partisan debates. This provides evidence of judicialized politics in Canada and a political role for the judiciary that is independent of *Charter* politics.

In the Canadian context, many scholars point to the entrenchment of the 1982 *Constitution Act*, which included the *Canadian Charter of Rights and Freedoms* (*The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, *Charter*), as the demarcation point for an enhanced role of the judiciary in Canadian politics and government. This emphasis on the *Charter* has generated a dizzying array of political science, law, and sociological literature that assesses the impact of the *Charter* on the Canadian public, rights discourse, governance, and judicialization of politics.\(^2\) However, many of these scholars overlook a striking example of courts engaging in a political role that predates the *Charter*: the Canadian reference power.

The process of the Canadian reference power is largely analogous to the practice of abstract review and advisory opinions practiced by many civil law constitutional courts in Europe. Indeed, most European constitutional courts allow either the executive or the legislature (and in some cases the opposition in the legislature) to pose questions

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regarding the constitutionality of proposed or enacted legislation before the country’s constitutional court. As a result, many scholars of European civil law courts have analyzed the political nature of advisory opinions by various constitutional courts and the impact of these decisions on larger political and institutional dynamics. Comparatively little is known about the Canadian case and its parallels with European constitutional courts.

Research Puzzle and Central Argument in Brief

The process of reference questions in Canada raises several heretofore unexplored questions: Why would political actors delegate a portion of their decision making power to the courts in these episodes? Is government participation in reference cases evidence of strategic litigation? Why would these actors seek an advisory opinion from the courts and choose to be bound by it, rather than adopt a more flexible approach that could be achieved via inter-institutional or inter-governmental bargaining? What does the phenomena of reference questions mean for the separation of powers in Canada? What can the Canadian case learn from the institutional dynamics of European civil law constitutional courts where this process is much more commonplace? All of these questions have yet to be addressed in the existing scholarship with a comprehensive political analysis.

This project is driven by the central question: why do governments ask reference questions? In addressing this central question, a second and equally important question emerges: what are the effects of the reference power on the separation of powers between the judiciary and the executive? This thesis argues that Canadian governments ask reference questions to strategically benefit from the unique characteristics of reference

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4 While it should be noted that reference cases might not be considered litigation in the specific conception involving the settlement of a live legal dispute (as in a lawsuit), they are however considered litigation in a more general sense that they involve the making of claims in the form of a legal action in a court. See: Martin, E. A, and Jonathan Law. Oxford Dictionary of Law. 7th ed. New York: Oxford University Press, 2012, “litigation.”
cases. Furthermore, this project finds that there are five answers as to why governments ask reference questions. First, this project argues that governments will ask reference questions for reasons related to political strategy and to avoid political controversy. Second, this analysis finds that references are useful for governments to understand the limits of constitutional jurisdiction and other matters related to federalism, such as negotiating with other governments. Third, a reference case can allow a government to benefit from the institutional authority and protection by the courts. Fourth, because the reference process is relatively speedy compared to routine review, governments can rely on the reference power to address pressing issues in a timely manner. Finally, governments will use the reference power for reasons related to structural advantages of abstract review. This project concludes with a consideration of the central implications of this analysis and provides some suggestions to protect the courts from undue influence from the executive.

In addressing these questions, this project makes two substantial contributions. First, this project provides the inaugural comprehensive analysis of Canadian reference cases and the reference power. Second, this project analyzes government litigation strategy in reference cases and assesses why delegating decision-making to the courts is a viable political strategy, providing insight into this most common, yet largely understudied litigant. This project examines all reference cases from provincial appellate courts and the Supreme Court of Canada from the creation of the federal reference power in 1875 to 2014, a total of 207 cases. This study provides the first analysis of the central features of all Canadian reference cases, documenting important descriptive characteristics and trends over time. Addressing the use of references over time, this project demonstrates the interaction between the use of reference cases and other major events in Canadian political history, demonstrating that the use of reference cases mirrors times of great political and social contestation. This project also makes important contributions in understanding how reference cases compare to routine litigation across several dimensions, such as type of review (abstract or concrete), number of interveners, unanimity rates, authorship styles, and case dispositions. This analysis also addresses important theoretical questions that concern the ability of courts to refuse to answer

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5 Current to cases decided before September 1, 2014. For a list of cases, see Appendix B.
reference questions and the implications question refusal for the separation of powers and judicial independence.

This project also makes a substantial contribution to understanding government litigation decision-making and strategy. Building on the analytical description of reference cases, this study examines why reference cases are a viable political strategy for governments. It addresses the benefits and potential pitfalls for governments that flow from the unique nature of the reference power. This dimension of the research is evaluated through in-depth interviews with individuals involved in past reference cases, such as former attorneys general, constitutional experts/government counsel, and a former first minister. This interview data is grounded in secondary scholarship and analysis of historical/archival documents. While demonstrating the benefits of the reference power, this study also analyzes potential drawbacks to references through an analysis of two cases in which governments considered a reference but ultimately abandoned this option. This analysis is completed through the lens of delegation theory—a theoretical perspective that seeks to explain and understand why principal decision-makers will empower independent agents, such as the courts with control and management over some issues (Graber 1993; Salzberger 1993; Whittington 2007). Delegation theory links the Canadian case to a larger literature that has been underexplored in previous Canadian scholarship. In pursuing this delegation-based explanation, the study applies this theoretical framework in a novel manner to understand the relationship between courts and the executive as it relates to the reference power. This analysis demonstrates that the actual outcome of a reference case—win or lose—is almost secondary to the political benefits that can be attained from simply involving the courts through the reference power.

**Case Selection**

The Canadian reference power is a critical case for analysis. In comparison to many common law countries, the Canadian case is an anomaly. Advisory opinions and abstract review are prohibited in the United States, New Zealand, and Australia. Indeed, the American Constitution explicitly bans abstract review and advisory opinions at the United States Supreme Court by limiting the Supreme Court’s jurisdiction through the
‘cases and controversies’ clause in the Constitution. The Australian High Court has refused to receive reference cases in *Re Judiciary and Navigation Act*. In this case, the High Court found that parliament does not have the ability to “confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved,” ([1921] 29 C.R.L. 257, at 267; See: Zines 2010). In both Australia and the United States, the judiciary cannot serve as a legal advisor to the executive and judicial review can only be invoked through routine and concrete litigation (Russell 1987). In New Zealand, when the Supreme Court was created in 2004, the government explicitly rejected the proposal of creating a reference option, citing the Canadian model (Office of the Attorney General, Report of the Advisory Group 2002).

Compared to the common law countries mentioned above, the reference power in Canada is unique. However, abstract review, similar in principle to the Canadian reference power, is a routine feature in constitutional courts of many civil law countries. Despite this similarity, the Canadian case is distinguishable due to the executive-centered nature of the Canadian system and reference question process. For example, abstract review in European constitutional courts is more accessible and often available to groups outside the governing party. In Canada, the power to initiate abstract review (in the form of a reference question) is the sole prerogative of the executive through the Governor-in-Council (or Lieutenant Governor-in-Council). Moreover, there are few parameters on the reference power in Canada, which results in a concentration of power not found in civil law countries, like France and Germany. As a case of study, Canada combines advisory judicial opinions and abstract review often only found in civil law jurisdictions with the executive centered Westminster parliamentary system. This combination creates a set of institutional and actor variables that provide interesting and unique circumstances for analysis.

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6 Found in Article III, section 2, clause 1. However, it should be noted that although prohibited by the United States Supreme Court, several state supreme courts do accept reference questions from state legislatures, and/or the governor. The state constitutions of Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island and South Dakota authorize advisory opinions. Alabama and Delaware provide the advisory power through statute. North Carolina allows for advisory opinions based on judicial initiative, see: Rogers and Vanberg (2002).
Chapter Overview and Summary of Findings
This dissertation consists of six chapters. Chapter Two gives an overview of the existing literature on Canadian reference cases and situates the present study within this field of scholarship. This chapter addresses previous scholarship that has concentrated individual reference case episodes. Additionally, Chapter Two briefly reviews literature on European civil law constitutional courts, as the reference power places Canadian appellate courts in a role that is similar to these European courts. This literature is helpful because its highlights some of the institutional and theoretical problems that can arise when courts engage in abstract review or provide advisory opinions. Chapter Two also provides an overview of the theoretical framework of this dissertation. This chapter considers the unique problems that reference cases pose for a separation of powers in the Canadian constitutional framework, focusing on judicial independence. Additionally the chapter reviews the origins of delegation theory, tracing its roots from the analysis of administrative bodies in the United States, to assessment of the empowerment of the judiciary by political actors. This review will extend the application of this theoretical framework to the Canadian reference power through an examination of the decision-making process of political actors.

Chapter Three provides a description of the use and operation of the reference power in both federal and provincial jurisdictions. This chapter provides an explanation of this project’s data collection and coding. Second, this chapter provides an analytical description of Canadian reference cases from 1875 to 2014, a total of 207 cases. Third, through the analysis of the reference case dataset, Chapter Three investigates the trends related to reference cases and compares these trends across time, a within-case comparison. The analysis of data in Chapter Three demonstrates that although the federal government first created the reference power, provincial governments have made greater use of the reference power compared to federal governments over time. Chapter Three finds that although governments can use the reference power to challenge the legislation

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7 As explained in Chapter Three, this dataset includes only references to provincial courts of appeal, the Supreme Court of Canada and the Judicial Committee of the Privy Council. As a result, it does not include the instances of reference cases from lower provincial courts, as some provinces (for example B.C. and Manitoba) have an ability to reference to lower courts (section 96 trial courts). These cases are excluded as a means to ensure consistency across provinces and a focus exclusively on appellate courts.
of other governments, this has become less common practice, especially by federal
governments who have not referred provincial legislation since 1994.

Additionally, Chapter Three provides in an analysis of reference cases over time. The data analyzed in this chapter shows that the number of reference cases corresponds to fluctuations in periods of great political contestation in Canada, such as the Great Depression (1930s) and the era of mega constitutional politics (1980s). Taking a closer look at these two decades, this chapter documents the central issues that governments attempted to address during these periods and how they resulted in an increase in reference cases use. The 1930s are characterized by the federal government attempting to deal with the financial disaster of the Great Depression within the confines of Canadian federalism and the constitutional division of powers. This period demonstrates the difficulty of applying the division of powers to the contemporaneous problems of governance such as the expansion of social reform and the making of international treaties. The second period examined in detail, the 1980s, depicts a period in Canadian politics where governments were concerned with big constitutional projects such as the adoption of a new constitutional amending formula and the role of the provinces in seeking a new constitution. This period is also characterized by several disputes between the provinces and federal government and the expansion of executive federalism, in which the reference power serves as an extension. The reference cases of this period mirror many of the events of mega constitutional politics, such as the patriation of the constitution and the jurisdictional disputes between governments over various issues such as natural resources. The chapter concludes by a comparative analysis of the 1930s and the 1980s, demonstrating how the use of the reference power has changed from a power of the federal government to a power that is used by both levels of government to protect and promote constitutional jurisdiction.

Chapter Four continues the in-case comparison and analysis, but specifically addresses reference cases from 1949 to 2014. 1949 is selected as a starting date as it marks the end of appeals to the Judicial Committee of the Privy Council (JCPC), which resulted in a profound change in role for the Canadian Supreme Court. The central contribution of this chapter is an analysis of the behaviour of courts and parties in reference cases and a comparison with existing scholarship. This chapter details how
governments have used reference cases, how interest groups have participated in references, and how courts have responded. This chapter also makes a theoretical contribution in assessing the ability of the courts to refuse to answer reference questions. Chapter Four documents for the first time the number of instances in which courts have refused to answer all questions submitted in reference cases and the various reasons provided for this refusal. Building on this analysis, the chapter argues that in order to preserve the separation of powers in Canada and judicial independence, courts must hold the power to refuse to answer reference questions that are deemed inappropriate through the tests of justiciability.

Chapter Four uncovers that the reference power has been used to deal with both concrete (live disputes) and abstract issues, a finding that is neglected by previous reference case scholarship. Furthermore, it finds that reference cases attract a much higher rate of third-party intervener participation compared to routine litigation. As the chapter demonstrates, the high rate of intervener participation is linked to the abstract nature of many reference cases and the unique opportunity that references can provide groups to influence the policymaking process. Additionally, this analysis finds that courts do not view their power to invalidate government legislation or policy to be any different in reference cases compared to routine litigation, regardless of the fact that most references do not arise out of a concrete dispute with a genuine controversy. Furthermore this chapter documents that the unanimity rate in reference cases is actually lower than the unanimity rate of the Supreme Court in general, with a high number of concurring opinions issued in reference cases. Finally, in terms of government behaviour in reference cases, this chapter demonstrates that both liberal and conservative governments are willing to use the reference power and that governments are most likely to initiate a reference with a majority in the legislature.

To be sure, Chapters Three and Four do not rely on description alone. Instead, along with providing context and explanation for the trends relating to the use of the reference power, these chapters begin to provide initial pieces to the question of why governments ask reference questions. First, the analysis in these two chapters helps to explain that governments reliance on the reference power will increase when dealing with issues of great contestation, such as found in mega constitutional politics (outlined in
Chapter Three). Second, these two chapters demonstrate the unique structural features of the reference power, like the ability to engage in abstract review, and explains why these structural features can be advantageous for political actors. Third, by detailing the behaviour of governments in reference case use, these chapters demonstrate how reference cases can be an effective political strategy that helps governments to achieve particular goals. For example, finding that the reference power is used most often to deal with issues relating to the constitutional division of powers, speaks to the fact that the reference power is an effective mechanism of federalism and a means to deal with other governments. For instance, using references in this manner is documented in King governments references concerning the Social Credit government in Alberta,\(^8\) the Manitoba Government’s use of the reference power in the chicken and egg disputes with Ontario and Quebec,\(^9\) and the Alberta Government’s use of the reference power in dealing with the federally imposed gas tax.\(^10\)

Chapter Five builds on the findings of Chapter Three and Four and more directly addresses the central research puzzle – why do governments ask reference questions. Chapter Five seeks to answer this question in a more direct and theoretical manner than provided in the previous two chapters. The groundwork laid by the previous chapters demonstrates how governments have used the reference power, and offers initial insight into the reasons why governments would use the reference power. Chapter Five addresses this central question directly and explains why governments ask reference questions. The chapter also engages in theory building and analyzes why governments have initiated reference cases in the past and the possible benefits of the reference power through delegation. The chapter addresses the possible disadvantages of the reference power and examines two instances in which governments considered asking reference questions but ultimately abandoned the reference option, in the cases of the *Padlock Act* and the criminalization of blasphemy. Chapter Five presents the findings from in-depth interviews with individuals involved in past reference cases and archival research from government documents and the writings of former political leaders.


The analysis in Chapter Five produces five thematic explanations for the benefits of the reference power and why governments delegate to the courts: (1) references offer a means to deal with a political controversy; (2) references allow governments to respond to other governments and deal with issues of federalism and the division of powers; (3) the reference power allows governments to capitalize on the authority of the courts and use judicial decision-making as protection for legislative projects; (4) the structure of reference cases allow governments to overcome time and resource limitations; and (5) references provide governments with a unique opportunity to take advantage of abstract review. This analysis makes an important contribution to our understanding of reference cases, as it is the first study to move beyond simply viewing references as a political strategy and a means to ‘pass the buck.’ Instead this study recognizes that references allow governments to capitalize on the institutional authority and the role of the courts within the Canadian constitutional framework, beyond simply using courts to avoid difficult decisions. This analysis recognises important role that judicial independence plays in making the courts an attractive venue for the delegation by political actors, and the implications of this delegation for judicial independence. Furthermore, unlike previous scholarship, this study also emphasizes the various structural advantages made available to political actors through the reference power, most notably the unique benefits offered by abstract review.

The arguments presented in Chapter Five are grounded in delegation theory. The central tenets and contributions of this theoretical framework, as well as its application to Canadian reference cases, are explored. Delegation provides a useful framework for understanding the relationship between the courts and political actors, and why empowering the judiciary is a viable political strategy. This perspective is based in the understanding that the decisions made by elected officials reflect either a desire to maintain power or to secure re-election. With this motivation under consideration, political actors will make decisions to either engage in credit claiming or blame avoidance. The courts provide an effective forum for this behaviour and counter-intuitively, judicial review of political actions can be “friendly” and serve to benefit political actors. Aside from blame avoidance, delegation scholarship explains that judicial review can be an effective means to overcome legislative opposition or gridlock and to
provide position/policy legitimization. In sum, Chapter Five argues that many of the elements of delegation theory are present in the use of reference cases. The chapter also notes the paradox present in this understanding of the reference power – governments who use the reference power understand the advantage that can be gained from an authoritative constitutional interpretation in dealing with a political controversy, but at the same time, they do not recognize the threat that the reference power could pose for judicial independence. The chapter argues that for delegation to be effective, the independence of the judiciary and respect for that independence is essential – yet, the delegation of political controversies to the courts in references cases can pose a direct threat to judicial independence.

Chapter Six analyzes the implications of the findings and contributions of this study. The chapter addresses two central themes: references as confounding judicial independence and references as contributing to the centralization of power. In addressing the theme of judicial independence, Chapter Six revisits arguments surrounding the separation of powers in Canada and the ability of courts to refuse to answer reference questions. This discussion argues that the standards of justiciability, insofar as they relate to the determination of what matters are appropriate for a court to hear, should apply to reference cases. Unlike the majority of cases heard by appellate courts, references are essentially appeal by right and parties do not have to be granted leave for access to the court. As a result, courts also do not hold the power to reject leave to reference case applications, and thus are effectively forced to hear a reference case. As argued throughout this project, this raises several implications for judicial independence. Considering the unique position in which references place courts, this chapter argues that courts should, when appropriate, refuse to answer reference questions. The threshold for refusal should be quite high. Courts should only refuse to answer reference questions that they cannot provide a clear answer. Courts should also reject reference questions that are considered inappropriate and could negatively affect judicial independence.

Chapter Six also evaluates the great deal of autonomy and power that is available to political actors that have the ability to initiate a reference case. Not only is the reference power the sole prerogative of the executive – via the (Lieutenant) Governor General – there are little parameters on this power. When using the reference power a
political actor can obtain a judicial opinion that holds the same force as routine judicial
decision, on virtually any subject or issue it desires. This power provided to the executive
through references is at the expense of the legislature. Indeed, when a matter is placed
before the courts in a reference case, legislators no longer have the ability to influence the
decision-making nor do they have the ability to truly engage in position taking. The
centralization of power in references is indicative of the general centralization of power
that is present in the executive (both federal and provincial) in Canadian politics.
However, it is argued that advisory opinions/abstract review need not operate in such a
centralized manner. A brief comparison with four European constitutional courts that
routinely engage in abstract review demonstrates the various alternative institutional
arrangements that avoid the concentration of power found in the Canadian case. A
comparison to the structure, function, and selection mechanisms for the constitutional
courts in France, Germany, Italy, and Spain not only further demonstrates the executive-
centered nature of the Canadian system, is also demonstrates that this type of judicial
review need not function in such a centralized manner, providing potential possibilities
for reform of the reference power.

Chapter Six concludes with an overview of the central contributions of this study
to the fields of Canadian politics and law and politics. This review is followed by a brief
discussion of suggestions for future research, building off the analysis presented here.
The chapter concludes with a discussion of the central themes of this study.
CHAPTER TWO: REVIEW OF LITERATURE AND THEORETICAL FRAMEWORK

There is no comprehensive political analysis of Canadian reference questions to date. However, there are several exceptional case study examinations of single reference cases by political scientists, and equally important descriptions of the legal implications of reference cases by a handful of legal scholars. The following section will provide an analytical overview of this preexisting literature on Canadian reference cases, beginning with a brief discussion of the jurisprudential foundations of the power. This section will also engage with scholarship on abstract review in European constitutional courts. While there is not a great deal of literature on Canadian reference cases, the practice of abstract review and advisory opinions is well established in many civil law constitutional courts in Europe. As such, an understanding of this literature provides essential context for analysis of the Canadian case.

This review will be followed by an examination of the larger theoretical themes and scholarly debates that this project necessarily engages. The reference power has theoretical implications for the separation of powers in Canada and the protection of judicial independence. This discussion considers the argument presented by previous scholars regarding the lack of discretion courts hold in answering reference questions. This chapter argues that when we consider the impact that the reference power can have on judicial independence, the discretion for courts to refuse to answer reference questions is essential. This section will also provide an introduction to delegation theory, which will be used to help to explain why political actors use the reference power and why the courts can be an attractive venue for dealing with some political controversies.
Legal Parameters of the Reference Power

The Supreme Court of Canada has had the ability to provide advisory opinions by answering reference questions since the creation of the Court in 1875. Shortly after the creation of the federal reference question process, provincial appellate courts were granted a similar power and currently all provincial jurisdictions have the power to render advisory opinions (more on the creation of the reference power in Chapter Three). Even though the Canadian reference power has operated for approximately 140 years, the Supreme Court has only ruled on the constitutionality/legality of the power twice.\(^\text{11}\) A review of the legal challenges to the reference power is essential for two central reasons. First, it details the constitutional and legal foundations for the reference power, as interpreted by the courts. This section details the two instances\(^\text{12}\) where the courts have directly assessed and commented on the constitutionality of reference cases, providing insight into how Canadian appellate courts understand the reference power. Second, a review of the two challenges to the reference power (the first of which is now over a century old), demonstrates that some of the concerns regarding the executive’s use of references from earlier periods in Canadian history are still relevant today. As detailed below, the first challenge to the reference power in 1910 concerned the extrajudicial nature of reference cases and proper role of the courts.

In Reference re: References [1910] 43 S.C.R. 536, a majority of the Supreme Court held that the federal government reference power was constitutional. This reference concerned several complex questions regarding provincial jurisdiction in regards to the incorporation of companies under section 92 of the British North America Act, 1867 (as it was then known). In the arguments presented in this case, six provinces\(^\text{13}\) argued that the Supreme Court should not hear this reference because the reference procedure was unconstitutional. The provinces argued that the reference power conferred original jurisdiction on the Supreme Court, which was outside the Court’s jurisdiction as a general appeal court for Canada under section 101 of the Constitution. In his decision, Chief

\(^{11}\) According to Hogg (2012), the provincial reference power has not been subject to challenge.


\(^{13}\) Provinces of Alberta, Manitoba, Ontario, Nova Scotia, New Brunswick and Prince Edward Island. It is interesting to note that when the re: References was heard in 1910, seven provinces had already enacted provincial reference power granting statutes, including several provinces party to this case (including Alberta, Manitoba, Ontario and Nova Scotia), see Appendix A.
Justice Fitzpatrick explained that by 1910 the reference procedure had become an established process within the Supreme Court’s jurisdiction and when presiding over a reference case, “the members of this court are the official advisors of the executive in the same way as the judges in England are the counsel or advisers of the King in matters of law” (page 7). The Supreme Court rejected the provinces’ arguments and found that, because the reference power was based on a similar procedure as in the United Kingdom, it was legitimately enacted in Canada.

The Supreme Court’s decision was upheld by the Judicial Committee of the Privy Council (JCPC)\(^\text{14}\) in *Reference Re References by the Governor in Council* [1912] A.C. 571. The JCPC was asked to consider if rendering reference opinions required that the Supreme Court engage in an extrajudicial function, outside of the constitutionally prescribed role of the Court. Furthermore, the provinces argued that the Supreme Court should not be able to hear references that concern provincial powers without obtaining the consent of provinces. Like the Supreme Court, the Privy Council was not sympathetic to the arguments of the provinces. It held that, although rendering an advisory opinion through a reference is an extrajudicial function, the federal government’s creation of this power was constitutionally and legally legitimate. The JCPC explained that because the opinions provided by the Supreme Court are not binding and the constitution does not provide for a strict separation of powers, the reference statute was constitutionally valid. That being said, the JCPC explained that the federal executive’s reference power was not unfettered and it warned against “indiscriminate and injudicious” use of the reference power (paragraph 16).

The reference power was not challenged again until *Reference re: Secession of Quebec* [1998] 2 S.C.R. 217 (*Secession Reference*). The amicus curiae appointed by the Supreme Court to represent the interests of Quebec in the *Secession Reference* made several arguments that questioned the legitimacy of the reference power in general and as it applied to the specific question of unilateral secession. The counsel argued that the
Government of Canada’s reference power was *ultra vires*\(^{15}\) and invalid in relation to section 101 of the Constitution. This argument rests on the argument that in creating the reference power for the Supreme Court, the Parliament of Canada granted the Court original jurisdiction. This original jurisdiction is incompatible with the Supreme Court’s appellate jurisdiction. The amicus curiae argued that when the Court participates in a reference case it engages in an advisory function that is outside the parameters of the constitutionally defined jurisdiction of the Court.

The arguments regarding section 101 centre on the contention that the reference power confers original jurisdiction on the Supreme Court and is outside the Court’s role as a “general court of appeal,” and was therefore unconstitutional/ *ultra vires*. In the *Secession* Reference, Supreme Court found that the definition of the Supreme Court as provided by section 101 should not be viewed as restrictive. Instead the Court finds that it is common practice for appellate courts to exercise original jurisdiction on an “exceptional basis,” as is permitted at the United States Supreme Court and the English Court of Appeal (paragraph 10). In making this argument regarding section 101, the amicus curiae\(^{16}\) also claimed that the reference power infringed on the provincial jurisdiction over the administration of justice as provided in section 92 (14), *Constitution Act, 1867*. However, the Court found that the federal power under section 101 (a plenary power) takes priority over the provincial power. The priority afforded to section 101 implies that if there is a conflict over the reference power and the original jurisdiction of provincial courts, the federal capacity to create the reference power takes precedence. Due to the fact that the Parliament of Canada holds the power to confer original jurisdiction on an appellate court, the reference power is *intra vires* and validly enacted by the Parliament of Canada.

The amicus curiae also challenged the reference power on the grounds that it was an extrajudicial function that required the Court to engage in a political role. The reference power can be understood as extrajudicial because in engaging in this advisory role, the Court is fulfilling the function of providing legal advice to the executive, a

\(^{15}\) Meaning beyond the legal power or authority. In the Canadian context, *ultra vires* refers to outside a constitutional jurisdiction. This can be contrasted with *intra vires*, meaning within legal power or authority.

\(^{16}\) The Court appointed counsel from Quebec law firm, Joli-Coeur Lacasse S.E.N.C.R.L. as amicus curiae to represent the interests of Quebec, as the Government of Quebec refused to officially participate in the reference case.
routine responsibility of the Attorney General. The Supreme Court held that although engaging in an advisory function is outside of the routine role of appellate courts (the adjudication of disputes), it is nonetheless a legal function, which is legitimately exercised by the Supreme Court. The Court explained, “There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties” (paragraph 14). Due to the fact that the opinions provided in a reference case are advisory only, and they do not bind the actions of the referring parties, the Court has no reservations about engaging in this advisory role. Furthermore, the Court explains that there is nothing that bars governments from rejecting the advice of the courts as provided in reference cases (paragraph 15). The Court supports this conclusion in the fact that reference cases in Canada are an established and accepted practice and that many other courts (some US state courts and many European constitutional courts) engage in a similar function. In the *Secession Reference*, a unanimous Supreme Court finds section 53 and the reference power of the *Supreme Court Act* constitutionally valid. The reference power is an enduring feature of the Canadian legal—political landscape; it is unlikely that the Supreme Court will invalidate the reference power in the future.

As mentioned above, the provincial reference power has not been subject to a constitutional challenge. Although the provincial reference legislation largely mirrors the *Supreme Court Act* provision (see Appendix A and Chapter Three), the creation of this power flows from the provincial power over the administration of justice, section 92(14), *Constitution Act 1867*. Since the provincial constitutional jurisdiction in relation to the reference power is different, the Supreme Court’s declaration regarding the constitutionality of the reference power in the *Secession Reference* would not preclude a legal challenge to the provincial power. That being said, mounting a challenge to the provincial power would certainly be difficult in light of the Supreme Court’s ruling in the *Secession Reference* and *Reference re: References*, as the Court made it clear that it is acceptable for a court to engage in the extrajudicial function of rendering advisory opinions. Furthermore, provinces have the constitutional jurisdiction to grant original jurisdiction to courts and would not be subject to challenge in this capacity, as the federal
government faced in regards to the reference power and section 101 of the Constitution (Hogg 2012).

**Review of Extant Literature on Canadian Reference Cases**

In their recent study of Canadian courts, political scientists Hausegger et al. (2015) note that no comprehensive analysis of Canadian reference cases exists. However, they estimate that since 1875 approximately 175 reference cases have reached the Supreme Court of Canada or the (JCPC) prior to 1949. Hausegger et al. are correct in the fact that no political scientist has comprehensively examined the phenomenon of reference cases in Canada; however, legal scholars Huffman and Saathoff (1990) examined 115 reference cases in their 1990 journal article. In this piece, the authors analyze what they refer to as ‘phases of incorporation’ for the reference procedure, which includes the establishment of the power to pose questions directly to the court, followed by ‘constitutionalization,’ which accounts for the JCPC’s acceptance of the jurisdiction for reference cases in the *British North America Act*. Constitutionalization is succeeded by ‘adaptation and adjustment’ in which the authors characterize all cases following 1922, which has solidified reference cases as statutorily and procedurally legitimate (Huffman and Saathoff 1990).

While the work by Huffman and Saathoff is impressive in its analysis of a large number of reference cases, this work is limited by its largely descriptive analysis and the lack of consideration of the political nature of reference questions. This work focuses on describing the various questions addressed by courts in reference case and some of the legal arguments made in reference cases that either support or undermine the reference power. Focusing largely on reference case jurisprudence, the authors do not address the other side of the reference relationship, the role of the political actor. As such, this study does not investigate why political actors have used the reference power, nor does it consider the potential problems posed by reference cases for the Canadian constitutional democracy.

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17 The authors explain that the Supreme Court ‘adapted’ and ‘adjusted’ the reference process during this period in several ways to overcome perceived weaknesses in the reference process. These reforms included the use of factums, the liberalization of standing requirements, and the admission of evidence. See Huffman and Saathoff (1990: 1263).
Additionally, in terms of methodology, placing all cases post 1922 in a single residual category of adaptation and adjustment could be viewed as conceptual stretching, as it does not allow for a precise account of the variety of reference case jurisprudence during that time period. This broad categorization of the cases may lead to a distortion or inaccurate depiction of the diversity and/or change in reference cases during that time period. Indeed, this category would encompass both the highly contentious *Reference re: a Resolution to Amend the Constitution* [1981] 1 S.C.R. 753 (the Patriation Reference), along with more mundane cases such as *Reference re: Powers to Levy Rates on Foreign Legations* [1943] S.C.R. 208, the power of the City of Ottawa to tax foreign legations and High Commissioners’ residences. Furthermore, the authors include some cases in their dataset that were not the product of a reference under the powers outlined in *Supreme Court Act*.

Finally, the work of Huffman and Saathoff is out of date, as the publication date of 1990 does not allow for the inclusion of more recent and significant cases such as the 1998 reference regarding the secession of Quebec or the 2014 *Senate Reform Reference* (*Reference re: Senate Reform* [2014] 1 S.C.R. 704).

Other legal scholars have provided valuable accounts of the legal foundations of the reference power in the Canadian context. In his 1988 text, Strayer provides the essential account of the creation of the reference power, tracing its roots to English common law and the political circumstances that drove legislators to adopt this power via statute. Strayer finds the impact of reference cases on the constitutional jurisprudence and federal division of powers in Canada to be immense: “in terms of impact on the political, social, and economic affairs of the country the decisions in these cases have had an effect far beyond their numerical proportion” (1988: 311). In his assessment of the role of references in the legal system, Strayer finds it beneficial that references allow politicians to gain judicial opinion and review when it might not be ordinarily accessible.

Additionally, Strayer explains that reference cases provide a low threshold for governments to challenge the constitutional validity of actions of other governments,

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19 For example, the authors include *Re Common School Fund and Lands* [1897] 28 S.C.R. 609, which is an arbitration appeal and *Re the Transport Act, 1938* [1943] S.C.R. 333 which proceeded under s.43 of the *Railway Act* and s.4 of the *Transport Act*, rather than under the reference power in the *Supreme Court Act*. 
allowing for a flexible approach to interjurisdictional relations. The threshold for access in a reference case is lower compared to routine litigation, as the restrictions relating to standing, mootness, and applications for leave do not apply to reference questions submitted by the government. Furthermore, as the questions can be posed in an abstract and hypothetical nature, the government submitting the question(s) does not need to prove that there has been a wrong committed by another government to challenge the legislation. However, Strayer finds that references are not without disadvantages, as they can force the courts to engage in abstract review that lacks the factual context of a concrete case, which may allow for the adjudication of matters that would not ordinarily be justiciable (1988: 321-323).

Legal work on reference cases, predating Strayer, is predominately critical. Scholars were concerned that the process could be problematic for the prestige of the courts in terms of perceptions of their impartiality and objectivity, when a reference embroils the court in a political controversy. Moreover, this early scholarship doubted the ability of political actors to achieve their legislative goals through reference cases, due to the fact that these judgments were often not the product of factual circumstances or a live legal dispute (Davison 1938). Grounding his opinion in the American Supreme Court’s reasoning for rejecting advisory opinions, Davison (1938) finds the opinions to be limited for two reasons: first, without tangible facts the abstract review may prove to be erroneous when applied to a concrete dispute. Second, he argues that involving the court in political decisions will serve to diminish the prestige of the court.

Despite this view of the limited political utility of reference questions, Rubin (1960) presents the opposite view, finding that reference cases have provided the federal government with a means to achieve the same ends provided by the disallowance power (such as finding a provincial law ultra vires), after the federal government’s ability to disallow provincial legislation was viewed as illegitimate. These early concerns also sparked some political commentary, as Smith (1983) discusses the political foundations of reference cases, describing them as a unique mixture of law and politics. Smith finds

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20 However, this work is limited in the fact that he does not address the utility of references for the provincial governments or how provinces have fared in Supreme Court reference cases.
that during the foundational period of the reference power, the process was a concern for many parliamentarians as expressed in parliamentary debate transcripts.

More recent critiques of reference cases focus on the possibility that political actors may rely on this power to avoid dealing with politically divisive issues. Hausegger et al. (2015) posit that political actors may use references to engage in ‘buck passing.’ In exercising the reference power politicians could ask courts to pronounce on controversial or divisive matters that could potentially alienate a portion of the electorate. Using a reference in this manner provides the opportunity for political actors to blame the courts when voters are unhappy with a court’s decision in a reference case. Furthermore, a reference case may allow political actors to posture themselves as ‘achieving results’ and ‘getting things done,’ while not having to take blame when things do not result in the way that voters would prefer. The reference power has the potential to allow an executive to yield a great deal of power, while other political actors are prevented from exercising its use. Commenting on the exclusivity of the reference power, Russell (1987) claims that it allows the executive privileged access to the courts that is beyond the reach of other litigants, such as citizen-backed interest groups, private citizens, and members of the opposition in the legislature.

The existing political and legal analysis of reference questions in Canada consists of in-depth examinations of single reference cases, with an overwhelming, but understandable, focus on high profile reference cases. This section will provide a brief overview of the scholarship on the reference cases that has received the most scholarly attention such as the Secession Reference, the Patriation Reference, and the Same Sex Marriage Reference (Reference re: Same Sex Marriage [2004] 3 S.C.R. 698). Much of this work comes from legal scholarship and most often does not look beyond a case study analysis of a single reference case. To be sure, the references discussed in detail below are not the only reference cases that have received academic analysis; instead the goal is to provide an overview of the general themes and arguments advanced in case study work on reference cases. This literature helps to support the understanding of why governments ask reference questions, as it provides a detailed focus on individual reference episodes

21 The work by Riddell and Morton (2004) on the lesser known Alberta Gas Tax Reference is a notable exception.
and highlights some of the factors that could drive a government towards asking a reference question.

Arguably, the most analyzed individual reference case is the *Secession Reference*, as the court was asked to consider if a province of Canada could legally unilaterally secede from the federation. The *Secession Reference* marks the first time such an issue was considered by a domestic court and as such, this case has garnered much attention both domestically and internationally. In general, the domestic scholarship on the *Secession Reference* focuses on the implications of the case for future negotiations regarding the secession of a Quebec, critically assessing the roadmap (or lack thereof) provided by the Court in this case (Cairns 1999; Leslie 1999) and the implications for the future amendments of the Canadian Constitution (Greschner 1999). Other scholars have engaged in a theoretical assessment of the language employed by the Supreme Court in this case and its implications for Canadian legal theory, secession, and constitutionalism (Choudhry and Howe 1999; Gaudreault-Desbiens 1999; McHugh 2000).

The *Secession Reference* has significant implications for the study of international law, in two central ways. First, the reference is useful to understand how international law can be interpreted in domestic courts. Second, the case provides an essential legal account of the definition and process of secession. Some scholars working within this framework have focused on the implications Court’s decision and its possible application to other countries faced with separatist movements (Van Ert 1998; Knop 2002; Aronovitch 2006). For example Walters (1999) looks at how the Court’s reasoning in the *Secession Reference* could be applied in the United Kingdom, in relation to the secession of Scotland. He finds this comparison fruitful as the Supreme Court’s decision in this case relied heavily on common law rather than the written constitution, making it more amendable to the case of the UK, as it lacks a written constitution. Charney and Prescott (2000) assess the implications of the *Secession Reference* in relation to the relationship between China and Taiwan. While, Oklopcic (2011) argues that the greatest impact of the *Secession Reference* outside of Canada has been in the context of the dissolution of the former Yugoslavia in the cases of Bosnia and Herzegovina, Montenegro, and Kosovo.
The *Secession Reference* has been considered by numerous domestic courts internationally and supranational courts such as the International Court of Justice.\(^{22}\)

Another case that has been the subject of much examination is the *Patriation Reference*. Scholarship analyzing this case is predominately critical, as in this case the court engaged in an analysis of (usually) non-justiciable political conventions, concerning the unilateral amendment of the constitution by the federal government, placing the Court directly in the middle of a political conflict between the provinces and Ottawa. The overt political nature of this case has caused some scholars to question why the Court accepted the reference questions regarding patriation in the first place (Mandel 1994). While Brandt (1982) argues that the *Patriation Reference* forced the Supreme Court to resolve a dispute that was “institutionally inappropriate,” as the dispute was void of substantive legal adjudication. Furthermore, scholars have speculated that the 1981 constitutional negotiations, which resulted in the 1982 *Constitution Act*, would not have continued had it not been for this reference case (Mandel 1994; Russell 2011). Other scholarship concerning the Patriation Reference has focused on the impact of the case on other aspects of the Canadian legal framework, such as the *Charter* (MacKay 1983) and Canadian constitutional law in general (Mathen 2011).

*Reference re Same Sex Marriage* has also garnered a great deal of legal and political analysis. The scholarly analysis of this reference focuses on two aspects – that the Government of Canada selected a reference instead of appealing lower court rulings that validated same sex marriage, and the Supreme Court’s refusal to answer the fourth reference question. \(^{23}\) Hennigar’s (2009) assessment of the case focuses on the government’s decision to select a reference rather than appealing a lower court ruling or simply legislating. Hennigar argues that in this case, the reference provided the government a means to avoid responsibility for dealing with what was at the time a divisive issue with the electorate and within the governing party’s caucus.

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\(^{22}\) For example the International Court of Justice dealt with the application of the Secession Reference to Kosovo. See: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403.

\(^{23}\) The fourth question, refused by the Supreme Court in the Same Sex Marriage Reference asked: “Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the Federal Law-Civil Law Harmonization Act, No. 1, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?” (*Reference re: Same-Sex Marriage* [2004] 3 S.C.R. 698, at paragraph 2).
more critical tone, Huscroft (2006; 2010) focuses on the Supreme Court and its refusal to answer one of the reference questions. Huscroft chides the actions of the Chretien/Martin governments in this episode arguing that their use of a reference case to deal with the issue of same sex marriage was “disingenuous,” as they could have simply legislated same sex marriage and did not need to seek the Supreme Court’s prior approval (2006: 39). In his analysis, Huscroft argues that the Supreme Court does not have the capacity to refuse to answer a reference question and the federal government could have simply resubmitted the unanswered question to the Court, to demand an answer. On the other hand, Hogg’s (2006) commentary on the case is much less critical. He notes that the government could not have ignored this issue and the Supreme Court’s decision and the government’s legislative response were inevitable considering the developments in Canadian constitutional law as it related to equality rights and the protection of sexual orientation.

While the Secession Reference, the Patriation Reference, and the Same Sex Marriage Reference have certainly garnered the greatest amount of scholarly attention, they are not the only references that academics have analyzed. Indeed, in response to the recent Senate Reform Reference, the McGill Law Journal dedicated an entire issue (2014, 60:4) with academic analysis focused on the implications of the Supreme Court’s decision to largely invalidate the Government of Canada’s proposed plans for Senate reform. In this edition of the McGill Law Journal, Emmett Macfarlane criticizes the Supreme Court’s approach in this reference. Focusing on the implications of the decision for the Part V constitutional amending formula, Macfarlane argues that the Court’s reasoning erodes the unilateral amending procedure, which will have a negative impact on future constitutional amendment. Similarly, constitutional scholar, Peter Hogg, criticizes the Court’s decision in the Senate Reform Reference with a particular focus on the Court’s interpretation of Part V. Hogg finds the Court’s interpretation of the amending provisions to be not interpretation at all, but rather “a radical reconstruction” (2015: 607). Hogg continues by arguing that this interpretation is both narrowing and expansive, and is simply incorrect, ultimately resulting in “constitutional paralysis,” making future amendment aimed at Senate reform improbable (2015: 607). Due to the high profile nature of this case and that it marks the first occasion in which the Supreme
Court explicitly deals with the amending formula in the *Constitution Act, 1982*, it is quite likely that that the *Senate Reform Reference* will be subject to more scholarly analysis in the future.

Other reference case scholarship addresses the implications of reference decisions for Canadian federalism and the constitutional division of powers. Scholars have focused on how the reference procedure has either helped or hindered relations between provincial and federal governments. For example, Taylor (1970) examines the offshore resource references and finds that the references likely exacerbated the tensions between Ottawa and provincial governments due to the formal nature of judicial review compared to more malleable negotiations between governments. Similarly, Robert Cairns (1992) explains that the federalism disputes over natural resources in the 1970s and 1980s is defined by a zero-sum style conflict between the provinces and the federal government, fostered in part by relying on the courts and the reference procedure. These reference cases had a discernable impact on federal—provincial relations, serving to perpetuate the decentralized control over natural resources in Canada (Cairns 1992). Both Taylor and Cairns demonstrate that in the resource based reference cases the involvement of the courts had a negative effect on relations between the governments. Looking at a different facet of federal relations in Canada and *Reference re: Anti-Inflation Act* [1976] 2 S.C.R. 373 (*Anti-Inflation Reference*), Russell (1977) argues that this reference demonstrates that judicial review has little impact on the politics of federalism. Instead, in this case, Russell argues that the Supreme Court’s decision did not serve to alter the balance of power within the federation. Instead the *Anti-Inflation Reference* merely reflected the current state of affairs between the federal and provincial governments. Interestingly, these scholars are writing about the same period in Canadian politics, but by focusing on different reference cases and policy areas, they reach much different conclusions regarding the impact of the courts on Canadian federalism through reference cases.

This body of scholarship provides valuable analysis of single case studies that helps to inform our current understanding of reference questions in Canada. However, due to the case specific nature of this work there are several questions regarding reference cases that remain unanswered. How has the use of reference questions by political actors changed over time? Does the pattern of references reflect other events in Canadian
politics? How have courts responded to reference questions? Are there any trends related to the subject of reference cases? More specifically, are references still primarily concerned with federalism and division of power related issues (the original intent behind the creation of the reference power)? Has the introduction of the Charter made a discernable impact on the subject of reference cases?

Finally, for the most part, previous reference case scholarship does not take into account the partisan nature of references and the use of references as political strategy by the executive branch. Moreover, the literature that does recognize the potential for political strategy largely focuses on how the reference power provides a means for political actors to engage in blame avoidance. In focusing on why political actors ask reference questions, this project will build upon the use of references as a tool of blame avoidance, but also will address other possible strategic benefits that can be gained through the reference power. Finally, a complete and politically oriented understanding of reference questions in Canada must take into account not only comprehensiveness, but also the greater theoretical problems posed by these cases for the institutional foundation of the Canadian polity, specifically the separation of powers and the phenomena of political actors turning to the courts to deal with divisive and contentious political questions and what this means for judicial independence.

**Constitutional Courts and Comparative Abstract Review**

Reference cases can require that courts engage in abstract review, as a reference is often the product of the referral of questions by a government to the courts, rather than a live dispute between two parties. This practice of abstract review by Canadian courts in references sets the Canadian case apart from other common law countries such as the United States and Australia, as the high courts in both countries are prohibited from engaging in abstract review. Abstract review does, however, serve to link the Canadian case to the work of civil law constitutional courts in Europe. However, there is a lack of scholarship on the existence and exercise of abstract review in Canada. As such, it is

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beneficial to look outwards at other cases in which abstract review is not only well established, but also has received a great deal of academic commentary, as in Europe. The following section reviews the origins of abstract review in European constitutional courts and provides a brief overview of the different institutional structures used to facilitate abstract review. This review will demonstrate the benefits and potential pitfalls of abstract review and provide a good foundation for understanding abstract review in the context of Canadian reference cases.

In the civil law tradition, judges were prohibited from constitutional interpretation, to preserve a notion of democracy that relied on the sovereignty of the people through the supremacy of parliament. However the maintenance of parliamentary supremacy became increasingly difficult with the spread of new written constitutions following World War II (Merryman and Pérez-Perdomo 2007; Stone Sweet 2003). Additionally, following the rise of a powerful court in the United States, the European aversion to judicial review was also an attempt to avoid the so-called American ‘government of judges.’ Indeed, in prewar Europe, most countries embraced legislative supremacy and relied upon constitutions that could be amended by a simple parliamentary majority. During this time, conflicts between laws and the constitution were read to no longer be in conflict by the judiciary or they were simply ignored (Stone Sweet 2000). However, following the many tragedies of the war in Europe, several countries adopted constitutions that placed an emphasis on human rights and created constitutional courts to interpret such rights and to ensure their protection. The Kelsen model named after Hans Kelsen, a legal scholar and the architect of the Austrian constitutional court, provided the framework for the new constitutional courts.

The Kelsenian constitutional court was first embodied in the Austrian second republic established in 1920 and was also adopted by the 1920 Czechoslovakian constitution. Following World War II, the Kelsenian court spread to the rest of Continental Europe, with this expansion culminating in its adoption, rather than American-style judicial review, by post-communist countries after 1989. This model rests

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25 Between 1945 and 1985, constitutional courts were created in Italy, the Federal Republic of Germany, France, Portugal, Spain, and Belgium. Following this first wave of courts, constitutional courts were introduced in the postcommunist world after 1989, beginning with Hungary, which was followed by Russia, Albania, Bulgaria and Romania, in 1991, a trend that was followed by all other postcommunist states, culminating with Bosnia in 1995 and Latvia in 1996.
on a separation of the constitutional court from the rest of the country’s judicial structure, as a means of protecting the separation of powers and “to ensure the normative superiority of the constitutional law” (Stone Sweet 2003: 2745). Unlike the American (and Canadian model), Kelsenian courts exercise centralized review, insofar that these courts are the sole interpreters of the constitution and lower courts cannot engage in constitutional review (Sadurski 2005).

While the courts exercise a monopoly over constitutional review, access to the courts for abstract review is much more democratic when compared to the Canadian system and other common law jurisdictions. All courts accept petitions for abstract review from the executive and/or head of state. Many states allow for the initiation of abstract review from groups of parliamentarians (a number that is often proportional to the size of the country’s legislature), a prosecutor general, ombudsman or other auditing bodies (Sadurski 2005). In many federal countries, like Germany, subnational units can engage abstract review from the constitutional court and in some instances, such as Slovenia and Ukraine representatives from local politics can also access the court through a petition of abstract review (Currie 1994). Interestingly, and most democratically, in Hungary, individual citizens can engage abstract constitutional review through *action popularis*, which is the most common way of initiating review in that country (Sadurski 2005). Additionally, these courts can receive petitions for concrete review from other courts within the legal system, when constitutional issues arise at trial.

The European constitutional court model rests on the ability to engage in abstract review and the detachment of the court from the judicial branch. Abstract review involves the judicial pronouncement of constitutionality *in abstracto*, without reference to the factual circumstances that may have brought the particular law or rule in front of the court. Abstract review also involves the consideration of laws that have been adopted by parliament, but not yet promulgated (as in France), or laws that have been promulgated but not yet enforced in the public sphere (as in Germany, Italy, and Spain) (Stone Sweet 2000). This pre-promulgation or pre-enforcement review serves to protect the “sovereign character of statute within the legal system afterwards,” as it significantly limits the number of statutes that will be found unconstitutional at a later date (Stone Sweet 2003). Pre-promulgation review greatly limits the number of statutes struck down and prevents
judges of the constitutional court from engaging in this form of judicial activism. Not only does abstract review serve to protect the sovereign character of legislation, it also fosters a level of stability within the system, as it prevents future statutory constitutional review. At the same time, the limitation of judicial activism curtails the ability of constitutional courts to engage in policymaking, serving to eliminate one of the long-standing fears of judicial review in Europe (Sadurski 2005).

To be sure, the abstract review system is open to abuse from oppositional legislators within parliament, as it can allow them to stall or even block the legislative agenda of the governing party, through the initiation of abstract review. That being said, for the drafters of the European constitutional courts, the stability and continuity within the public policy realm that abstract review promotes is central and could not be achieved through models that rely solely on judicial invalidation of statutes only after they are in effect, as in the American system. Abstract review serves to reconcile the historically grounded aversion to judicial review with the necessity for constitutional protection in continental European countries.

Scholars analyzing European constitutional courts contend that the ability to engage in abstract review serves to increase the notion of judicialized politics. Donald Kommers (1994), finds that abstract review transforms political conflicts into constitutional issues, serving to involve a third party (the court) aside from the governing party and the opposition, which significantly alters the power structure (1994). In his assessment of several constitutional courts, Stone Sweet finds that abstract review increases the level of judicialization of politics when compared to systems that do not engage in such a process, “Abstract review harnesses the (virtually continuous) struggle between parliamentary majority and opposition over policy outcomes to a particular end: the progressive development of constitutional constraints on law-making” (Stone Sweet 2000: 45). Abstract review allows politicians direct access (or attack) through litigation, serving to increase the power of constitutional courts well beyond those of the American Supreme Court and forces the courts to mediate highly political disputes (Merryman and Pérez-Perdomo 2007).

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In his assessment of the effect of abstract review on the politics of constitutional review in Germany, Vanberg (2005) posits that courts must not be understood as solely non-partisan and technical actors. Instead, when analyzing the strategic interplay between courts and legislatures, constitutional courts have demonstrated the capability to directly influence policymaking in a strategic manner and thus, the mutual strategic actions of the legislature and the court must be taken into the analysis. Vanberg finds that like other political actors, the German Constitutional Court will act not only on the basis of the preferences of the individual justices as shaped by the institution, but also the Court will make decisions in anticipation of the reactions of other actors and institutions. In this view, the German Constitutional Court has moved beyond the strictly legal role of apolitical application of the constitution to interpretation that reflects, to some extent, the goal of maximization of preferences and the minimization of costs, both real or perceived.

When compared to the Canadian case, the processes for abstract review in many European constitutional courts are much more formalized. For example in Germany, laws must be referred within 30 days of their passage by either the Länder or federal parliament and any declarations of constitutional inconsistency result in a suspension of the application of the invalid legislation (Vanberg 2005). In Germany, laws can be referred to the Constitutional Court by the federal government, Länder governments, and one-third of the Bundestag. This process opens up the availability of abstract review to opposition parties or coalitions within parliament. The German system is more formalized when compared to the Canadian reference procedure, as in the Canadian case there are no specific regulations governing the use and effect of reference cases outside from their statutory creation in the Supreme Court Act or corresponding provincial statutes. Additionally, the Canadian system serves to concentrate power over abstract review in the hands of the executive; while the German process is much more accessible, as opposition parties can initiate abstract review, regardless of whether there is a single party majority in Parliament. Indeed, one of the most famous decisions by the German Constitutional Court, the abortion case (known formally as BVerfGE 39, 1), which found legislation that liberalized access to abortions to be unconstitutional, was initiated by opposition in parliament (Currie 1994).
With the expansion of judicialized politics and the increased emphasis on respect for human rights in Europe, courts have come to play an important role in governance, a reality that is incongruent with the traditional view of civil law courts as technocratic actors that simply apply detailed codes to largely apolitical legal controversies. This expansion of judicial power has led scholars to consider the implications of such an expansion on the separation of powers, the judicialization of lawmaking, and the delegation of decision-making by legislators to the courts (for example: Stone Sweet 2000).

The process of abstract review appears much more institutionalized in European courts, compared to what is currently known about the similar process in the Canadian legal system, which opens up interesting avenues for learning and recommendations for the Canadian case. The experience of European civil law constitutional courts informs the present study in its consideration of abstract review and its implications for the political process and decisions of political actors. Previous scholarship considering the Canadian reference power has neglected to address the impact of abstract review on the process and how the abstract nature of reference cases can be understood as an advantage by political actors. Moreover, in a general sense, existing law and politics scholarship has not analyzed the practice of abstract review within a common law legal system and how the Canadian case serves as a middle ground approach in the dichotomy often drawn between American-style common law systems and European civil law systems. The present study will investigate the unique nature of the Canadian abstract review reference system and address some of the empirical and theoretical concerns raised by European scholarship on abstract review as they relate to the Canadian case.

Many of the same or similar issues that populate scholarship of Canadian courts and judicial politics are present in scholarship on European constitutional courts, making the possibilities for comparison fertile and makes the possibility of learning from the European case promising. Indeed, European scholarship has raised important theoretical questions concerning the separation of powers, and more specifically, the separation of the judiciary from the more political branches of government and the implications for judicial independence. The following section will address these concerns as they specifically relate to the reference power. The subsequent section will investigate these
questions imparted from the European literature and will address other theoretical issues related to the reference cases, such as the delegation of decision-making by elected officials and the use of litigation as political strategy.

**THEORETICAL QUESTIONS**

The Canadian reference power raises several theoretical issues. First, the reference power requires that the judiciary provide advice to the executive, which although is a legal function, it is extrajudicial – it is in other words, outside the routine adjudicative function of courts. This extrajudicial nature of references raises questions for the separation of the judiciary from the partisan branches of government, requiring an assessment of the implications of the reference power for the separation of powers in Canada and the preservation of judicial independence. Second, when the executive refers matters of public policy to the courts and then follows the court’s advice it effectively delegates its decision-making authority to the courts. A first glance, this delegation appears to run counter to the goals of a rational political actor that is motivated by power attainment and maintenance. However, delegation to the courts can be a valuable political strategy that can provide means for political actors to avoid blame or attain position legitimization. This delegation involves the courts in political and partisan debates, which like the extrajudicial nature of reference cases, can have negative implications for judicial independence. This theoretical analysis of the reference power articulates an important paradox of the reference power and judicial independence – for delegation to exist and more importantly to be effective, a respect for judicial independence is essential. Yet, the delegation of political controversies to the courts can pose a direct threat to this independence.

This section examines these important issues and provides the theoretical framework for the analysis that follows in subsequent chapters. First, this section will examine the unique problems that the reference power raises for judicial independence. Specifically, it will address if a court has the power to refuse to answer reference
questions that it considers inappropriate and what the power to refuse means for the preservation of the separation of powers. Second, this section will address delegation theory and its central contributions for understanding the interaction between political actors and the courts. This discussion will extend this theoretical framework to the reference power, which will provide an essential foundation for understanding the unique benefits of delegation to the courts and why political actors use the reference power.

The Separation of Powers, and Judicial Independence

In a classic separation of powers system, the three branches of government (executive, legislative, and judicial) are understood to be watertight compartments that are expected to both balance and check the powers of the other branches. Any intrusion into the power of one branch from another should not be tolerated (Vile 1967). A clear separation of powers helps to ensure effective oversight on governmental power and provides an essential accountability mechanism built within the structure of government. The practice of reference questions in Canada has been the subject of criticism from a separation of powers analysis, due to the fact that the executive can directly access the highest courts with a reference, circumventing regular litigation routes, which implicates courts into providing advice to the executive. Moreover, a separation of powers is threatened by the ability of the executive via the (Lieutenant) Governor in Council to demand (rather than request) an advisory opinion under the reference provisions in the Supreme Court Act and corresponding provincial acts. While the Supreme Court has refused to answer reference questions in the past, according to a plain reading of the Act, the Supreme Court does not have any discretion in responding to reference questions posed by the Governor in Council. Section 53 (4) states: “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…” (RSC 1985, c S-26, emphasis added).

McEvo (2005) argues that regardless of the disregard of this section by the Supreme Court in the past, the “will of Parliament is manifestly clear…No margin of appreciation or discretion is conferred on the Court.” Both Huscroft (2006) and McEvo (2005) contend that the discretion the Court has afforded itself in refusing to answer questions lacks any statutory foundation and as such the Governor in Council could push
the Court on a refusal and resubmit unanswered questions, to force their consideration, if it so desired. Hogg posits that the refusal of the court to answer a question posed in a reference is an exception rather than the norm. He believes that the Supreme Court has not “made sufficient use of its discretion not to answer a question posed on a reference” (2012: 8-20). In making these arguments, these scholars do not examine how many times courts have refused to answer reference questions and the reason for these refusals. Chapter Four provides an empirical context to this theoretical discussion and investigates how often courts refuse to answer reference questions and the various arguments for question refusal.

The most well-known and criticized instance of a court refusing to answer a question is in the Same-Sex Marriage Reference. In this case it was argued before the Supreme Court that the subject of this reference was too political and non-justiciable. However, the Supreme Court rejected this argument. It acknowledged that, “the political underpinnings of the instant reference are indisputable. However…these political considerations provide context for, rather than the substance of, the questions before the Court” (paragraph 11). The circumstances surrounding the Same Sex Marriage Reference were highly contentious and political, but the actual questions referred were entirely of a legal nature. The Supreme Court found that questions one to three in this case were justiciable and that politics related to the case provided context, but did not inform their legal analysis. The first three questions (of four) in the Same Sex Marriage Reference essentially asked the Supreme Court if the Parliament of Canada had the constitutional authority to enact same-sex marriage. Although the public was divided on support for same-sex marriage, it was the final question that drew a great deal of attention.

The final question in the reference was submitted approximately five months after the first three questions were referred to the Supreme Court. In the interim, a federal election had occurred between the initial Order in Council and the referral of the fourth question. Although this election returned the Liberal Party to power, it was under the new leadership of Prime Minister Paul Martin and Attorney General/Minister of Justice Irwin Cotler. This new government added the fourth question:

“Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the Federal Law –Civil Law Harmonization Act, No. 1, consistent with the Canadian Charter of Rights and
This question asks if a heterosexual definition of marriage violates the Charter. Most critically, this question asks the Court to consider if it was constitutional to maintain the opposite-sex definition of marriage. This question is noteworthy when considering that the previous three questions in the reference were aimed at enacting legislative change to allow for same-sex marriage, while this final question contemplated the complete reverse: a lack of reform for same-sex marriage. Indeed, while it is quite possible that it is constitutional to provide for the right to same-sex marriage, governments may not be constitutionally obligated to provide for this right, making it also constitutional to take no action on same-sex marriage. If the Supreme Court answered the fourth question finding that the constitution obligated governments to provide the right to same-sex marriage, this could make the Court a target for critics of same-sex marriage, allowing the government to avoid this criticism.

Perhaps realizing this strategy on behalf of the government, the Court refused to answer this final reference question, possibly engaging in some of its own strategic behaviour. However, in refusing this question, the Supreme Court asserted its discretion to refuse questions that are “inappropriate” or prevent a “complete or accurate answer” (paragraph 10). As mentioned above, the Court found it inappropriate to answer the final question, regardless of the fact that the question had the required legal content to be justiciable. The Court clarifies that answering the final question would serve to jeopardize the same-sex marriages that had already taken place in several provinces. Indeed, by time the Supreme Court heard this reference, same sex marriage had already been found valid in several provinces and those provinces had already begun to distribute marriage licenses to same sex couples. In answering the final question the Supreme Court would be in the unusual position of reviewing the appropriateness of decisions of several provincial appellate courts without actually participating in a direct appeal of those cases. Furthermore, the Court explained that the Attorney General had already conceded to the findings in the provincial courts of appeal and making the question unnecessary.

However, legal scholars Huscroft and McEvoy do not accept this reasoning for refusal by the Supreme Court. Both scholars argue that the Court does not hold any discretion in deciding to answer reference questions. Huscroft explains, “…the Court’s
obligation [is] clear: it is duty-bound to hear and consider reference questions and must provide opinions with reasons in regard to each such question” (2006: 41). Huscroft is unconvinced by the Supreme Court’s reasoning for its refusal in the Same-Sex Marriage Reference. Instead, he argues that it was a pragmatic and policy-based, rather than legal, consideration. If the Supreme Court were to answer the fourth question in the reference it would be the subject of intense criticism by either those who supported same-sex marriage or those who were opposed, depending on how the Court answered the question. In other words, in answering the final question, the Supreme Court would become a clear and easy target for the same-sex marriage controversy, arguably shielding parliamentarians from backlash. McEvoy (2005) on the other hand, does not truly engage with the Supreme Court’s reasoning for refusing to answer in the Same-Sex Reference. Instead, relying on the statutory provisions within the Supreme Court Act that grant the reference power, McEvoy argues that the Supreme Court does not hold discretion to refuse to answer and in Reference re Same-Sex Marriage, the Supreme Court never effectively explains where it finds the power to refuse answering reference questions (McEvoy 2005).

This dismissal of the power of courts to refuse to answer reference questions is based on a narrow legal interpretation of the Supreme Court Act and previous reference cases. This position fails to account for the institutional role of the judicial branch within Canadian government and does not fully appreciate the tensions between reference cases and judicial independence. McEvoy engages in a cursory discussion of the Supreme Court’s assertion of judicial independence in the Same-Sex Marriage Reference and concludes that judicial independence is an unwritten constitutional principle, but does not engage with the implications of judicial independence for the reference power and its connection to the discretion to refuse to answer. However it is the importance of judicial independence and the separation of the judicial branch from the more political and partisan branches of government that leads the present analysis to conclude that courts should, when appropriate, decline to answer reference questions. The power to refuse reference questions is critical, because if courts lack the capacity to refuse, any abuse of the reference power could have significant implications for the independence of the judiciary.
The power to refuse is rooted in judicial independence and the notion of a separation of powers in Canada. However, it is debated whether or not Canada actually enshrines a separation of power principle within its institutions, due to the institutional framework established in the 1867 Constitution Act (Baker 2010). The constitution does not contain explicit reference to a separation of powers between the branches of government; rather it focuses on the division of powers between levels of government establishing the Canadian federal structure (Strayer 1988). Indeed, in the Canadian institutional framework, a reflection of the Westminster Parliamentary system, intrusions into the powers of other branches are in some ways routine. The Westminster system is characterized by a fusion of the executive with the lower house of Parliament to facilitate responsible government. This fusion of the executive with the legislature appears to diminish the notion of separation of powers in Canada, conceivably making any critiques regarding reference cases from the separation of powers framework moot. If a separation of powers does not exist, then courts would not hold the power to refuse to answer reference questions and any concerns regarding the extrajudicial nature of references become less problematic.

While some scholars may question the existence of a separation of powers in Canada, the respect for judicial independence in Canada cannot be denied. Baker (2010) explains that the rejection of the separation of powers/institutions by constitutional scholars in Canada overwhelmingly focuses on the lack of separation between the executive and the legislative branches. However, this rejection overlooks the respect for judicial independence in Canada and the practice of separating the judicial branch from the other branches of government (Russell 2001). Since the adoption of section 52 of the Constitution Act 1982, the constitution is now ‘supreme law,’ effectively transforming the Canadian system into one of constitutional rather than parliamentary supremacy. This evolution from parliamentary to constitutional supremacy goes to the heart of the separation of powers in Canada and the priority placed on judicial independence. As Sossin explains, with this transformation and the responsibility of the judiciary to interpret and uphold the constitution, “it is no longer accurate to describe the judiciary as a subordinate branch of government; rather, the judiciary is neither superior nor inferior to the other branches, but rather exists as an independent institution charged with
reviewing actions taken by the other branches” (1999: 11-12). The judicial branch holds its own separate constitutional authority. This authority often places the judicial branch in the position of checking the actions of the other branches of government for compliance with the constitution. This authority is essential to the protection of rights, the limitation of government power, and the functioning of Canadian democracy. The separation of the judiciary from the other branches of government flows from and relies upon judicial independence. Sossin argues that this notion of judicial independence is “an enduring feature of Canadian constitutional landscape,” which has arguably become even more prominent with the expansion of the powers of judicial remedy entrenched in sections 24 and 52 of the Constitution Act 1982 (2006: 65). According to Sossin, instead of the traditional notion of the separation of powers, Canada embodies a separation of institutions.

Separation of the judicial branch and judicial independence is constitutionally supported through various provisions of the Constitution Act 1867, specifically sections 97 through 100 and section 11(d) of the Charter. Statutory supports for the independence of the judiciary from the partisan branches can be found in the Judges Act (R.S.C. 1985, c. J-1), Federal Courts Act (R.S.C. 1985, c. F-7), and the Supreme Court Act (R.S.C. 1985, c. S-26). Finally, judicial independence has been maintained through the jurisprudence of the Supreme Court in several cases, such as: R. v. Valente [1985] 2. S.C.R. 673, MacKean v. Hickman [1989] 2 S.C.R. 796, Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island [1997] 3 S.C.R. 3 (Remuneration Reference), Re Therrien [2001] 2 S.C.R. 3. Furthermore, the prerogative of the courts to check the actions of other institutions of government has been accepted and enforced by the Supreme Court (Fraser v. P.S.S.R.B. [1985] 2 S.C.R. 455). More recently, this theoretical principle was reinforced by the adverse reactions to the allegation that the Chief Justice of the Supreme Court had attempted to influence the appointment of a justice to the Supreme Court (see: Ivison 2014; Baker and Knopff 2014). In this instance the Chief Justice was criticized for allegedly attempting to influence a decision of the executive, while the executive was condemned for publicly criticizing the actions of the

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27 Section 24 contains the enforcement clause and section 52 enshrines the primacy of the constitution (constitutional supremacy).
Chief Justice. This episode and the subsequent public reaction demonstrates that the notion of a separation of the judiciary from the partisan branches of government and judicial independence are alive and well in Canada.

The separation of the powers and the protection of judicial independence require that boundaries must be set on the acceptable role and actions of each branch of government. The democratically elected branches of government must deal with matters that are overtly political and lack legal controversies. It is not for the judiciary to question the wisdom of policy decisions made by other branches of government (Operation Dismantle Inc v. R [1985] 1 S.C.R. 41). Rather, the judicial branch must exercise its authority to ensure that the actions of the other branches of government are done within the proper boundaries of the law and constitution. The separation of the judiciary from the other branches of government must flow from a protection of judicial independence. Political actors must refrain from implicating the judiciary in political matters and the judiciary must avoid participating in the realm of public policy. Chief Justice Lamer recognizes this tension between the political impact of judicial decisions and separation of the judicial branch:

“What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized… I do not mean to deny that… court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which court adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice” (In Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island [1997] 3 S.C.R. 3: para. 140).

With this understanding of how separation of powers functions in a Canadian context, the phenomenon of reference questions can obfuscate the separation between the executive and the judiciary, for two central reasons. The first is that the Supreme Court, in a plain reading of the Supreme Court Act, does not have the ability to refuse to answer reference questions. The second reason is that reference questions place the courts in an extrajudicial role, serving to blur the lines of political responsibility between political and
legal actors. Furthermore, if political actors utilize the reference procedure to gain judicial advice on a contentious issue and then treat such advice as binding as a means to shift decision-making responsibility, references stand to complicate a notion of separation of powers. Indeed, if institutional actors choose to operate as if reference cases are effectively binding like other court decisions, their formal notion of being merely advisory serves to become significantly less relevant. The de facto binding nature of reference opinions can provide real and practical implications for the actions of political actors, regardless of whether the limitation has been self-selected. The technical non-binding nature of references becomes effectively irrelevant if political actors and the courts do not distinguish such cases from other jurisprudence.

This tension between judicial independence and the separation of powers in relation to the reference power was considered by the New Brunswick Court of Appeal in Reference re Judicature Act (NB), s. 23 [1988] 96 NBR (2d) 11.\textsuperscript{28} In this case, the Court of Appeal reviewed the reasoning behind the prohibition on reference cases in the Supreme Court of the United States and the High Court of Australia, explaining that in those jurisdictions advisory opinions are viewed as an affront to the separation of powers. Although the Privy Council refused to implement such limitations on advisory opinions in Canada, they note that the Supreme Court has observed a separation of the judicial branch from other branches of government within the Canadian constitution (paragraph 16). The Court of Appeal notes the tensions between reference cases and the separation of powers: “In performing the nonjudicial function of rendering advisory opinions, the judiciary has been placed in the uncertain position of having to ascertain the boundary between rendering strict legal advice and straying into the realm of public policy” (paragraph 17). The Court of Appeal maintains that judicial independence is of utmost importance in Canada, in both routine and reference cases. Judicial independence can be protected when a court determines if the legislative scheme is constitutionally permissible, not if it is legislatively prudent. This decision of the New Brunswick Court of Appeal demonstrates that courts understand the precarious position that courts are in when delivering advisory opinions. However, this decision maintains that the courts are well

\textsuperscript{28} It is interesting to note that Professor John McEvoy, a critic of the discretion of courts to refuse reference questions, was an intervener on this case.
positioned to assess if reference questions posed are justiciable and are capable of ensuring that its decision does not veer into the territory of policy/political evaluation.

The central mechanism in which the courts can protect judicial independence and avoid participation in political and public policy debates is through the control of the matters that can be heard in Canadian courts. The principle of justiciability provides the courts with an essential gatekeeping function – it allows the judiciary to ensure that any matter it hears will not place it in position contrary to its proper constitutional role. Specifically looking at reference cases, the doctrine of justiciability and the ability of the courts to refuse to answer are arguably even more important compared to routine litigation. In reference cases there is a greater potential for the involvement of the judiciary in public policy debates, as matters referred to the courts can concern specific legislation currently being debated in the legislature. Furthermore, because there are relatively few parameters on what questions can be sent to the courts in a reference, the only gatekeeping mechanism to ensure that the judiciary is not engaging in actions beyond its mandate is through refusing to answer questions. The discretion to refuse questions becomes even more important when considering that references are essentially appeals of right and the courts have no power over granting leave. If the political branch has an unfettered power to refer questions to appellate courts, the courts must maintain discretion in choosing to answer reference questions. The combination of a close link between public policy and reference cases paired with the lack of docket control that makes the assessment of justiciability reference cases of utmost importance.

The Supreme Court explained in *Reference re Canada Assistance Plan* [1991] 2 S.C.R 525: “In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court’s primary concern is to retain its proper role within the constitutional framework of our democratic form of government” (at 545). Courts should continue to exercise discretion and refuse to answer questions that would threaten judicial independence through an analysis of justiciability. Courts should refused to answer reference questions that lack any substantive legal problem or questions that are too abstract and would be better answered through routine litigation. The determination of justiciability in reference cases provides a safeguard for judicial independence and the maintenance of a separation of the judiciary from the partisan branches of Canadian
government. The power of determining justiciability is accepted practice in routine cases and should be maintained in the reference jurisdiction. Indeed as Sossin explains, “It has never been controversial to state that some disputes are better reserved outside a court of law” (1999: v).

This literature on the separation of powers in Canada raises important questions for the operation of the reference power. First, under what circumstances have courts refused to answer reference questions? Second, Is the most cited example of refusal, the Same-Sex Marriage reference an outlier compared to the other instances where courts have refused to answer questions? Third, should the courts have the discretion to refuse to answer reference questions? This discussion regarding the power of courts to refuse to answer reference questions is empirically examined in Chapter Four. This chapter outlines the number of times courts have refused to answer reference questions and their reasons for doing so. This analysis finds that the Same Sex Marriage Reference refusal stands largely as an anomaly in the instances where courts have refused to answer reference questions and that most refusals are for practical and non-controversial reasons. The implication of courts holding the power to refuse to answer reference questions is analyzed in Chapter Six. This chapter argues that it is important that courts maintain the discretion to refuse to answer reference questions that could serve to compromise judicial independence and the separation of the judiciary from the other branches of government.

**Delegation to the Courts and Strategic Litigation**

One effect of a separation of powers model is the difficulty that could arise in identifying which institution or actor is responsible for actions taken or decisions made. The diffusion of power that takes place in the separation of powers also serves to diffuse responsibility between institutions (Lovell 2003). Indeed, when power is separated, institutions can attempt to relinquish responsibility for decisions and blame other branches for a specific outcome. This problem can be materialized in the use of the reference power, as political actors shift decision-making responsibilities to the court through a reference, which could make it difficult to understand which institution is responsible for decision-making.
For example, the response to the *Same Sex Marriage Reference* often credits the Supreme Court for the legalization of same sex marriage in Canada, regardless that the Court simply advised the federal government that its legislation was constitutionally sound. The technical and formal legalization came from the passage of the *Civil Marriage Act* (S.C. 2005, c. 33) by the Parliament of Canada, a fact that political actors used to their advantage when commenting on the controversy surrounding same sex marriage (see Russell 2009). This pivot towards the judiciary to resolve political disputes not only serves to complicate the notion of a separation between the judicial branch and the executive and legislative branches, it also involves the delegation of decision-making capabilities by political actors to the courts to meet their own ends. The following section will examine the theoretical contributions of delegation theory with a particular focus on scholarship that works to explain the delegation of decision-making by political actors to the courts.

The act of delegation is the transfer of authority and power to make decisions from a principal to an agent. According to Salzberger (1993), this transfer of authority can be formal and positive, such as a legislature delegating or transferring specific policymaking powers to a local government or administrative body, codified in statute. However, delegation can also be informal and negative. Negative delegation describes a situation where the institution empowered to make a law (such as a parliament) is inactive in making such laws or this institution creates laws but allows the specific application to be determined by another institution. This negative and informal delegation essentially depicts the function of common law (Salzberger 1993: 359-360). A negative delegation does not necessarily depict a situation where the agent is absorbing decision-making power at the expense of the principal or simply filling a void. Instead, this form of delegation can also describe institutional relationships wherein the principal consciously involves an agent to handle a situation or controversy that it cannot or would rather not address itself (Graber 1993: 36). This arrangement aptly describes instances in which elected officials rely upon judicial review to resolve issues that it lacks the ability or will to address through regular parliamentary or political channels. Finally, it is important to note that the act of delegation does not suppose that the agent is subordinate to the principal (Shapiro 2002).
Delegation theory originated as a framework in American scholarship to explain when legislators give power or decision-making responsibilities to administrative bodies or regulative authorities. This framework is based on the traditional view of legislators as rational actors primarily concerned with maintaining power and ensuring re-election (Downs 1957). These goals are completed through three central activities: advertising, position taking, and credit claiming (Mayhew 1974). Furthermore, political actors that are motivated by credit claiming will also engage in the corresponding behaviour of blame avoidance (Weaver 1986). If political actors seek to avoid blame, they may also attempt to avoid making difficult and controversial decisions altogether. This motivation can result in shifting decision making to another agency in an effort to avoid both the decision-making costs and the political costs in dealing with a difficult issue or file (Fiorina 1982). According to Fiorina, the central goal of this act is to, “avoid the time and trouble of making specific, decisions…or at least disguise responsibility for the consequences of the decisions ultimately made” (1982: 47).

An important contribution of the early literature working with delegation framework is the study of the accountability and independence of American regulatory agencies such as the Federal Trade Commission. Scholars were interested in testing the level of discretion afforded to these agencies and its impact on the implementation of the agenda of elected officials. 29 This work finds that political actors delegate to administrative bodies for technical expertise, to overcome the limitations imposed on time and resource, and the expansion of government regulation that is required by the welfare state (Salzberger 1993). Research in this framework has turned away from solely focusing on the United States, towards comparative work and European politics (Pollack 2002) and has sought to understand delegation to judicial bodies such as tribunals and courts (Aranson et al. 1982). Moreover, the scholarship examining the implications of delegation has expanded theoretical orientation beyond the overwhelming economic-rational focus to account for more historically oriented work such as the studies in American political development (Whittington 2007; Lovell 2003).

Looking exclusively at the implications of delegation for the judiciary has led scholars to confront the concept of the ‘nonmajoritarian/countermajoritarian difficulty’ or when unelected and democratically unaccountable judiciary overrides the will of elected and democratically legitimate individuals such as legislators (Graber 1993; Salzberger 1993; Martens 2007). However, the nonmajoritarian difficulty becomes problematic when considering circumstances when political actors actively delegate decision-making capabilities to courts. If political actors make a conscious decision to invite the courts to wade into political controversies and delegate decision-making over a particular issue to the courts, these actors are either tacitly supporting or actively encouraging judicial power, which has implications for policymaking. With this relationship under consideration, the argument that judicial policymaking is illegitimate within a democracy overlooks the nuances in the relationship between elected policymakers and the judicial branch (Graber 1993). This scholarship provides a reconceptualization of the relationship between policymakers and the judiciary, and an understanding that a rise in judicial power is not necessarily at odds with the goals of elected officials. Furthermore, for the purposes of the current project, this perspective raises several questions. Are the arguments regarding nonmajoritarianism undermined when considering that democratically political actors bear the sole responsibility for the initiation of a reference case? Is judicial review through the reference power ultimately friendly, because it exists solely on the action and invitation of elected officials? Building on this theoretical framework provided by existing delegation scholarship, this project will address these questions as they relate to the reference power.

Beyond a greater understanding of the intricacies of the relationship between the courts and policymakers, the scholarship has sought to understand why political actors choose to abdicate power and the benefits of relying upon the judiciary to make decisions. The most general explanation is that courts provide political actors with an opportunity to remove unwanted issues from the agenda and that judicial review can provide elected officials with the prospect of blame avoidance. However, for this relationship to occur and be effective, two central institutional features must be present. First, political actors view the courts as “relatively friendly,” and judicial review must not be understood as solely antagonistic and adversarial (Whittington 2007: 87). This ensures that political
actors are willing to allow the courts to decide and generally respect the outcome of its
decisions. Second, there must be an appreciation and respect for judicial independence.
Judicial independence differentiates delegation to the courts from other agents or
delegates such as administrative or bureaucratic bodies. The independence of the
judiciary serves to increase the legitimacy of the decisions made by the courts in
delegated situations; the separation between the judicial and executive/legislative
branches also helps to “maximize the responsibility shift,” away from political actors
(Salzberger 1993: 363). Judicial independence provides a level of authority to judicial
decision-making because the courts are understood to be separate and not easily
influenced by elected officials.

Delegating decision-making power to the courts, serves to empower the judiciary,
which can come at the expense of the authority of the principal delegator. Indeed,
delegating or pivoting towards the courts appears counterintuitive for elected officials on
the surface, if we consider the Downsian goals of elected officials: power preservation
and re-election. Empowering the judiciary to render authoritative decisions on political
and/or constitutional controversies appears to be at odds with the central motivations of
political actors. Judicial review can be a zero-sum game (clear winners and losers),
therefore using judicial review as a means to deal with political controversies can
essentially provide the judiciary a veto over the public policy objectives of elected
officials (Whittington 2007). Regardless of the abovementioned caveats to judicial review,
political actors consistently defer to the judiciary and delegate power to the courts to
make decisions regarding politically salient issues. As a result, scholars have sought to
understand why elected officials would delegate to the courts and how judicial review can
be considered ‘friendly’. 30

Expanding on the concept of ‘friendly judicial review’, Hirschl explains that
judicial review can be affable towards political actors, because the judicial and political

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30 Using the term ‘friendly’ to describe judicial review can be attributed to the work of political scientist,
Keith Whittington. See: Whittington, Keith E. 2005. “‘Interpose Your Friendly Hand’: Political Supports
for the Exercise of Judicial Review by the United States Supreme Court.” *The American Political Science
Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History.* Princeton,
elite hold similar interests and preferences. Political actors that face uncertainty regarding their future in power, are wise to empower a likeminded judiciary that can ensure the enforcement of the political elite’s preferences in the future due to the judiciary’s virtually guaranteed future tenure. When faced with the uncertainty regarding the continuation of power, elected officials will seek to empower the judiciary as a form of regime maintenance or what Hirschl (2004) describes as “hegemonic preservation.” This preservation can be a valuable political strategy because the courts can insulate policymaking from the volatility of democratic politics and at the same time, produce judicial decisions that are often compatible with the interests of political elites (Hirschl 2004: 12). Strategically oriented political actors will seek to empower the courts as a means of preserving or constitutionalizing policy preferences, which can lead to circumstances in which political actors will adopt a bill of rights that constitutionalizes a particular vision of rights and empowers a judiciary to interpret those rights. Delegation when used towards this goal of regime enforcement helps threatened political actors ensure that their legacy and rights preferences are preserved in the future, through favourable judicial decision-making.

Hirschl’s hegemonic preservation thesis is useful for explaining political delegations concerning large projects, such as the adoption of a bill of rights, and the macro effects of an empowered judiciary. That being said, a delegation framework can also help to understand more routine delegation and judicial empowerment on a micro scale. Indeed, one of the earliest explanations for the delegation of decision-making to the judiciary by political actors is simple and instrumental: the division of labour. This explanation holds that political actors will delegate powers that are not important to them or concern issues of low political salience. Elected officials simply cannot deal with every issue related to governing. If the issue is not important or pressing, downloading or offloading the issue to another agency becomes a valuable resource. This helps to explain the offloading of mundane and routine issues to the courts, and it also describes why elected officials create administrative or regulatory agencies to deal with issues of low political salience, such as the regulation of telecommunications or trade (Whittington 2007; Fiorina 1989). If elected officials are motivated primarily through a desire to maintain power and to secure future re-election, and are faced with a finite amount of
time and resources, delegation will become a necessity. Issues that are unlikely to aid an
elected official in power maintenance and vote winning, are not “politically profitable,”
and are more likely to be delegated to another decision-making body (Whittington 2007:
121). Indeed, this explanation for delegation helps to depict the majority of delegations
that take place, as most of decisions made by courts are routine and do not gain the
attention of the media or the public (see: Sauvageau et al. 2005).

Another functional explanation for delegating to the courts by elected officials is
to overcome issues of gridlock within a legislature. Judicial decision-making is a
relatively streamlined process; the judiciary does not have to deal with complex rules and
the stalling tactics that may take place within a legislature. When faced with legislating
on a highly divisive topic without a strong governing majority, a parliament may be
unable to reach a consensus to take effective action. Instead, while a judicial decision
may produce dissenting opinions, it will ultimately result in a decisive action, and when
made by a final court of appeal, this decision will be definitive and not subject to further
appeal. Furthermore, because judicial actors are electorally unaccountable, they are able
to make decisions when consensus is lacking in both the preferences of the public and
legislators (Graber 1993). When considering the slow moving and polarized nature of the
American Congress, using the courts to overcome gridlock is a clear benefit to elected
officials in the American case.

However, even with the centralization of power present in the Canadian
parliamentary system, parliamentarians still face the responsibility of making legislative
decisions on controversial matters in which there is little consensus. Indeed, Hennigar
(2009) argues that the lack of consensus regarding same-sex marriage both within
Parliament and the Canadian public made delegating to the courts through a reference a
viable option for the Chretien government, despite its majority in the House of Commons.
This argument was confirmed by some of the present study’s interview participants (see
Chapter Five) that explained that one of the benefits of inviting the courts to decide
controversial matters is as a means to overcome the slow moving nature of parliament
and the procedural stalling tactics of the opposition. Courts, unlike legislatures, have the
ability to engage in unilateral action, unencumbered by the same constraints as
policymakers, making them attractive delegators for political actors in dealing with issues that lack a majority consensus.

Regime enforcement, the division of labour, and overcoming gridlock are compelling explanations for delegation of decision-making to the courts, however the desire to avoid blame as an explanation for delegation directly speaks to the central motivations of elected officials. Blame avoidance for making either difficult or controversial decisions is one of the most common arguments as to why political actors delegate to courts, as it flows directly from the central goals of the rational political actor: the preservation of power and the securing of future power. Blame avoidance can also be understood as the hot potato effect, insofar as when an elected official is faced with a decision that he or she would rather not address for a variety of reasons, it will on occasion toss the metaphorical hot potato to the courts, more or less stating, ‘here you deal with this!’ This reason for delegating to the courts is straightforward. By forcing another institution to make a difficult decision, a political actor can avoid blame from the public and more importantly, voters if that decision is ultimately unpopular. Indeed, several scholars have provided blame avoidance or deflection as one of the central reasons why political actors empower the judiciary (for example see: Lovell 2003; Fox and Stephenson 2011; Vanberg 2015).

While avoiding blame for making decisions can motivate political actors, this cannot be the sole determinant of their decision-making. In order to gain and maintain support from the public, an elected official must engage in some aspect of position taking. In position taking, an elected official or an individual seeking election must attempt to align its public sentiments on particular issues with those of potential voters or constituents (Mayhew 1974). As a result, elected officials experience a tension between a desire to avoid blame for unpopular decisions, but at the same time, attempt to take credit for decisions that are well received. It is an attempt to address this tension that makes delegation to the judiciary appealing to political actors. The courts are traditionally conceived as law enforcers, rather than law producers, and this distinction serves political actors who delegate to the courts. More specifically, if the courts uphold or approve of a policy that is popular with the general public, the tendency will be to give credit to the legislators, rather than the court. On the other hand, if the courts make an unpopular
decision, political actors can make public their dissatisfaction and blame the courts (Salzberger 1993).

In a similar vein, judicial review can provide elected officials a ‘bailout effect’ (Fox and Stephenson 2011). Connected to the goal of blame avoidance, the bailout effect holds that political actors can seek judicial review with the goal of being liberated from imprudent or ill-advised policies. The misguided policies could be the result of political posturing of the current government or could be the remnants of a previous government. Indeed, as will be examined in detail in Chapter Three, the King Government in the 1930s understood that references could be used in this manner in dealing with the Bennett Government’s New Deal policies, which instituted many labour and agriculture oriented reforms. While in opposition, King and the Liberal Party opposed the Bennett Governments policies for dealing with the Depression. Following an election and return to power, Prime Minister King referred many pieces of the Bennett New Deal to the Supreme Court for constitutional review. A reference used in this manner allowed the King Government to escape the legislation of a previous government that it opposed, but at the same time, did not need to be worried about being criticized as being anti-worker/anti-farmer.

Relying on judicial review in this manner also allows legislators to engage in other behaviour aimed at increasing public support. Whittington (2007) explains that legislators can benefit from delegating to the courts to avoid blame when drafting and debating new legislation. The “judicial backstop” allows policymakers to publicize their support of legislation that might be popular with voters, but might be constitutionally questionable: “they may vote in favor of a bill that they personally dislike secure in the knowledge that it will never be implemented” (Whittington 2007: 137). If the courts invalidate such a law, legislators can distance themselves from attempting to implement the controversial law and rally against the courts for striking it down. This analysis centres on the fact that relying on judicial review may encourage legislators to behave irresponsibly or what Tushnet (1999) refers to as ‘judicial overhang’ – the sentiment that policymakers may act without a mindfulness to the constitutionality of proposed policies, knowing that the courts can sort out the legalities afterwards.
Using judicial review in this manner may encourage policymakers to write legislation with ambiguous language or pass bills without seeking proper parliamentary or bureaucratic review with the ultimate goal of relying on the courts to sort out the application of the law. Legislating with this approach creates a role for the judiciary to resolve difficult questions of public policy, while attempting to apply the dubiously drafted legislation to a specific circumstance (Lovell 2003; Stephenson 2006). Similarly, political actors can use the courts as a safety valve for policies that may be good politics, but are perhaps ill advised in other ways such as constitutionality. Delegating to the judiciary in this manner allows elected officials to pass legislation to appease voters or a specific public sentiment, regardless of whether policymakers are certain that such legislation is constitutional. If the legislation is struck down, policymakers can then blame the courts irrespective of whether the legislation was drafted with the genuine belief in its constitutionality.

Using the courts and judicial review for the purposes of blame avoidance and credit claiming is a convincing argument, and one that is supported by empirical evidence. However, there is a flaw in relying on this goal of elected officials as the sole motivation for judicial review, specifically in terms of how the interaction between politicians and the courts is viewed by the public. Matthew Stephenson (2003) argues that for the blame avoidance arguments to be truly convincing, they require a public that is attentive enough to understand that the courts, rather than elected officials, are responsible for a salient policy decision. At the same time, the public must not be too attentive to realize that elected officials could ignore or manipulate the courts if desired. This counterargument is even more important in the context of the Canadian reference power. The technical advisory nature of reference opinions creates the very real possibility that a government could legitimately ignore the court’s advisory opinion in a reference case if it so desired. However, governments are not in the practice of manipulating the courts, centrally out of respect for the principle of judicial independence and the public’s strong support of judicial independence and the courts. According to Stephenson (2003), the public support of judicial review suggests that voters would penalize elected officials who openly manipulate or ignore the courts.
The principle of judicial independence plays an essential role in delegation to the courts by political actors. Judicial independence not only makes the goal of blame avoidance possible, it also helps to explain why the courts are an effective outlet for position legitimization for political actors. The independence of the judiciary and the separation from the more political and partisan branches of government make courts a viable option for blame deflection. Indeed, if the public understands courts as removed from and beyond the reach of elected officials, they become easy targets for elected officials to place blame. This separation from the overtly political is what makes judicial review a more viable avenue for blame deflection compared to other possible targets such as administrative bodies (Salzberger 1993). Political actors are less likely to be blamed for decisions made by the courts, and are less likely to be accused of ‘playing politics’ when allowing the courts to decide controversial political issues.

One of the central benefits of delegation to the courts is the goal of seeking assurance through the authority of the courts, with the related goal of position legitimization. In a constitutional democracy, one of the central functions of courts is to solve constitutional disputes, with authority and the respect of other institutions involved. In fulfilling this role, the courts can be an effective source of protection for the public policy goals of elected officials. If a particular policy is tested before a constitutional court and receives a favourable decision, elected officials will benefit from the assurances that are gained from a court’s approval. Judicial review that validates a particular policy can help protect the legislation-enacting government from future legal challenge. Delegating to the courts for the purposes of seeking assurances can enhance the policy credibility of legislators, which may not only help to support a particular policy goal in the immediate term, but also have longer lasting effects (Stephenson 2003).

Although some Canadian examples have been used to highlight the utility of delegation theory, there has been little application of this framework to the Canadian case by previous scholarship, and no explicit application to the use of reference cases by governments.31 However, with the greater understanding of the judicialization of politics

31 Indeed, delegation in the parlance of Canadian law and politics often refers to interdelegation or the delegation of constitutional jurisdiction between governments. One exception to this can be found in the work of political scientist, Ran Hirschl, who uses Canada as a case within comparative analysis. See: Hirschl, Ran. 2000. “The Political Origins of Judicial Empowerment Through Constitutionalization:
in Canada, some scholars have speculated that political actors will turn to the courts to resolve political disputes with the goal of blame avoidance, or engage in ‘buck passing’ to skirt responsibility or receive legitimization from the courts (Hausegger et al. 2015). Indeed, even justices of the Court have surmised that the reference tool has been employed as a means of “political opportunism” (Macfarlane 2013; Makin 2013). While there are several examples of scholarship that examine the litigation of rights-based interest groups seeking redress through the courts for strategic purposes, there is much less data that examine the government as a litigant and none of this scholarship portrays this relationship as delegation. Moreover there is little analysis of how litigation could be utilized as political strategy aside from avoiding blame. This should be cause for concern, as the government is the most frequent litigant in Canadian courts.

One exception to this trend is found in the work of Matthew Hennigar, who has made great strides in establishing our understanding of the litigation behaviour of the Canadian executive and its lawyer, the attorney general. Like other litigants, the government’s decision to litigate must be considered in light of costs of initiating legal action. Hennigar has demonstrated that the government must be cognizant of the costs that can be incurred when engaging in litigation (specifically the decision to appeal unfavourable outcomes in lower courts), such as the loss of resources like political capital, personnel and time, as well as a loss of control over policy (Hennigar 2002). Thus, the government’s decision to appeal cases is the product of a cost-benefit analysis and calculated decision-making, rather than solely a response to the specific facts of the case.


Hennigar (2007) also examines the institutional constraints that serve to influence the government’s decision to litigate. Unlike other private litigants, the government must not only consider its own costs and benefits of legal action, but also must consider the interests of the Canadian public and must not be seen as wasting public funds on unnecessary litigation. With these factors under consideration, Hennigar finds that the government’s decision to appeal is the result of strategic decision-making that encompasses considerations of the obvious factor of the likelihood of success, the salience of facts of the case, and costs such as invalidation or judicial amendment of government legislation (2007: 245). This work has begun the important task of understanding the government’s litigation behaviour (specifically its propensity to appeal) in routine cases. However, when considering the decision to engage in reference cases and thus delegate decision-making capability, the puzzle of understanding governmental litigation strategy becomes even more perplexing.

In his analysis of a realist conception of the judicialization of politics, Hirschl (2008) explains that judicialization from above (i.e. from those in power) can take place when political actors engage in strategic deference to the judiciary as a means of resolving political conflict. Taking the Secession Reference as one of his examples, Hirschl postulates that the judicialization of politics is not necessarily the byproduct of activist judges; rather, politicians can attempt to deflect responsibility by opening up conflicts to judicial review (2008: 106). Additionally, governments may turn to the judicial branch to mediate conflicts that they either lack the capacity or willingness to mediate themselves (Whittington 2005).

In terms of references in the Canadian case, Hennigar (2009) has attempted to answer similar questions regarding the government’s decision to engage in a reference question to deal with the constitutionality of same-sex marriage. In this analysis, Hennigar looks at how the seemingly counterintuitive decision of the government to ask a reference question and thus render itself virtually powerless in defining the constitutionality of same-sex marriage is actually the product of governmental strategy, when analyzing the multiple arenas in which the government was operating. Hennigar finds that a reference case was the most viable strategy for the Chretien government to deal with the competing demands of voters, lower court decisions in favour of extending
rights to same-sex couples, party members, and the parliamentary caucus. Although Hennigar’s work is limited to a single case study, one can postulate that this analysis by political actors has taken place in other contentious reference cases.

Engaging in a reference case and thus delegating decision-making powers may provide the government a means of strategic litigation. While scholars examining single instances of reference cases in Canada have yet to fully conceptualize this process as a form of delegation, there is quality analysis on the practice of references as a means of strategic litigation. In their analysis of *Reference re Proposed Tax on Natural Gas* [1982] 1 S.C.R. 1004 (*Alberta Gas Tax Reference*) Riddell and Morton (2004) examine how the Alberta provincial government was able to use the reference procedure as a means of political strategy to push back against a federal government program that ran counter to the political interests of the province. The authors assert that references provide governments a unique ability to engage in litigation that aids political strategy in a manner that cannot be achieved by other litigants such as individuals or non-governmental interest groups. Through their analysis, Riddell and Morton demonstrate how the Alberta government was able to manufacture favourable facts to present to the court in their reference against the Trudeau government’s energy policy, a tactic that could only be made possible through a reference question. Through their single case study, the authors provide strong evidence of how reference questions could be utilized as a means of strategic litigation.

Similarly, as previously mentioned, in his analysis of the *Same-Sex Marriage Reference*, Hennigar (2009) claims that executive interaction with the courts can be a means to blur responsibility for public policy that could potentially alienate a portion of the electorate. Moreover, Hennigar points to the high level of public support for the courts as one of the motivating factors behind strategic government use of the courts to seek legitimization of public policy by the judicial branch. When the Chretien government was faced with addressing same sex marriage, the legalization of same sex marriage was not supported by a majority of Canadians, and the Liberal Party caucus was divided internally on the issue. However, with several provincial appellate courts ruling in favour of same-sex marriage, the Chretien government could not simply ignore the issue. As a result, the government was faced with responding to an issue that, no matter
how it decided, some of its supporters would be unhappy with its choice, making it a no-win decision. Hennigar finds that delegating decision making over same-sex marriage through a reference case provided the government with a viable political strategy to deal with the pressing issue of the constitutionality of same-sex marriage.

The work by Hennigar, like that of Riddell and Morton serves to provide the initial theoretical pieces to the puzzle of strategic litigation and delegation of the executive in reference cases. This work can be expanded and carried forward with a comparative approach that takes into consideration different situational and institutional factors that may cause a government to litigate strategically, by assessing more than a single reference case. That being said, this work helps to further the assumption that the simple conception of activist courts as a counter-majoritarian force that runs counter to the goals of democratically elected officials in Canadian politics is not a wholly accurate explanation. Indeed, when taking into consideration the unique theoretical problems posed by reference questions and how political actors can utilize these cases as a strategic tool, the possibilities for further analysis and contributions to this area of scholarship are quite fruitful.

**CONCLUSION**

As previously discussed, this study marks the first comprehensive political analysis of the Canadian reference power and cases. This analysis rests on the foundation built by previous scholarship on reference cases, abstract review, and the phenomena of delegation by political actor to the courts. As such this project brings together several different threads of scholarship to address the unique questions posed by the Canadian reference power. Previous literature offers several explanations that help to address why governments ask reference questions. Although the majority of this literature focuses on a single reference case episode, the insights gained from a single case can be extrapolated to create a more general explanation for why governments ask reference questions and the advantages of the reference power. Moreover, reliance on in-depth examinations of single reference episodes allows this study to benefit from the advantages of case study work, such as high conceptual validity and complex understanding of variables and causal mechanisms. In addressing why governments ask reference questions, previous
Scholarship can be categorized into two central explanations. First, political and strategic based explanations, which account for the use of references for the purposes of position legitimization or to pass the buck/engage in blame avoidance. Second, previous scholarship provides legal and process based explanations, which include descriptions of reference power use to challenge constitutional jurisdiction of another government and reference cases as a means to circumvent routine barriers to litigation.

Scholars such as Hausegger et al. (2015) and Hennigar (2009) have argued that reference cases can be used by governments to avoid making difficult decisions, to ‘pass the buck’, or to attempt to have a policy position legitimized by the courts. This literature demonstrates that when faced with a divisive and controversial decision (like same-sex marriage), governments may seek a reference opinion to avoid having to deal with the answer itself. A reference case in this instance allows a government an escape route – if the public is happy with the reference decision of the court, it can take credit for referring the matter to the courts. If the reference decision is ill received, a government can blame the court for the decision, passing responsibility. Political and strategic based explanations demonstrate that there may be other motivations for asking a reference question beyond obtaining clarity on a legal or constitutional issue.

On the other hand, legal and process based explanations focus largely on the use of the reference power to gain understanding of the legal/constitutional powers of a government. Legal and process based explanations also account for the use of the reference power as a means to circumvent traditional barriers to judicial review. In speaking to this explanation for the advantages of the reference power, Strayer (1988) explains that references allow governments to obtain a judicial opinion on an issue that may not be ordinarily justiciable. Other legal based explanations also provide insight into how the reference power can be an effective tool of federalism. Strayer (1988) explains that the reference power provides governments with a low threshold to challenge the actions of other governments. In other words, a reference case allows a provincial or federal government to protect its constitutional jurisdiction and to challenge the policy decisions of another government. The examinations of offshore resources by Taylor (1970) and natural resources by Cairns (1992) demonstrate how governments employed reference cases as part of a larger jurisdictional dispute. Both scholars demonstrate that in
dealing with the division of powers, a reference case and judicial review can have a negative effect on the relationships between governments.

Along with explanatory value, this scholarship helps to demonstrate the importance that reference cases and the reference power have throughout Canadian political history. Through in-depth analysis of individual cases, previous reference case scholarship demonstrates the impact that individual reference cases have had on some of the most important political debates and issues in Canadian politics. Although this study benefits from the detailed accounts provided by authors that address important reference case episodes, the explanations offered by existing scholarship are incomplete and do not fully address the questions central to this study.

While there are strengths particular to the case study nature of previous reference case scholarship, this case study analysis also subject to several limitations. Previous single case study accounts cannot speak to the larger trends relating to the use of the reference power. Moreover, while this literature can provide intimate details of an individual case and the motivations behind the government’s participation in the reference, this analysis cannot provide a generalizable answer as to why governments ask reference questions. Furthermore, literature that attempts to answer why governments use the reference power in a more generalizable manner, such as the work by Stayer (1988) and Hausegger et al. (2015) are principally theoretical in nature. Thus, while this scholarship does provide important hypotheses as to why governments ask reference questions, these assumptions remain at a theoretical level and have not been empirically tested or generalized across multiple cases. Furthermore, the existing scholarship on Canadian reference cases generally does not address theoretical concerns raised by the reference power. More specifically, previous literature often does not address the implications of the reference power for the separation of the judicial branch from the more political (and partisan) branches of government. In a related manner, this literature often does not investigate the problems that the reference power could pose for judicial independence.

The present study builds upon previous scholarship and seeks to improve on the limitations imposed by this existing literature through an approach that moves beyond a single case study. This study seeks to overcome the limitations of the existing scholarship
in several ways. First, it will address all reference cases from Canadian appellate courts over time, creating a comprehensive dataset. The comprehensive nature of this project allows for the understanding and analysis of reference case use over time, and the trends related to the use of the reference power by governments. Second, this project seeks to address theoretical issues posed by the reference power, such as the separation of powers and the judicial independence. In addressing these theoretical concerns, this project relies upon literature largely under utilized in Canadian law and politics scholarship, such as work on abstract review in European constitutional courts. Furthermore, by employing the framework of delegation theory, this project not only provides a different structure for thinking about decision-making and the reference power, it also serves to connect this study to a larger and relatively non-Canadian literature. Finally, through the use of archival resources and interview data, this project attempts to move beyond theoretical understandings of why governments use the reference power to explanations based on empirical evidence.
CHAPTER THREE: CANADIAN REFERENCE CASES 1875 TO 2014, A BIMODAL DISTRIBUTION

This chapter provides analysis of the creation of the reference power by the federal government and the subsequent adoption of a similar power by provincial governments. Additionally, this chapter documents the structure of the reference power and details how this power operates at both a provincial and federal level. Following this introduction to the reference power, this chapter outlines the parameters of the dataset of reference cases and the methodology of data collection and case coding. This original dataset assembles all Canadian reference cases from the Supreme Court of Canada and provincial appellate courts from 1875 to 2014. This chapter also provides the results of analysis of all Canadian appellate court reference cases over time. This chapter documents which courts have heard reference cases and which governments have submitted reference questions. More specifically, this analysis addresses the ability of governments to refer the legislation or action of another government, comparing the rate at which provincial and federal governments employ the reference power in this manner.

The analytical description of reference cases documents the use of the reference power over time, demonstrating that the number of reference cases has varied greatly in a manner unrelated to the global expansion of judicial power that occurred in the later half of the twentieth century. Instead, the variation in reference cases corresponds to important societal and economic events in Canadian politics rather than simply the judicialization of politics, indicating the importance of temporality and context. In particular, there are two peaks for the number of reference case: the 1930s and the 1980s. Both decades mark periods of significant transition for Canadian politics and governance, which resulted in an increase of conflict between levels of government. Each of the high reference periods are examined in detail below, which provides insight into the major concerns facing Canadian governments during the two periods and how these concerns

translate directly into various reference case episodes. This analysis demonstrates that political actors have used references as a means to deal with political controversies throughout Canadian history and that this phenomenon is not the byproduct of the expansion of judicial power and judicialization of politics.

There are two central goals of this chapter. First, to provide an understanding of how the reference power was created and how the use of reference cases has changed over time, through an internal case comparison of all reference cases. Second, this chapter helps to provide the initial answers why governments ask reference questions. Detailing how the reference power has been used over time demonstrates that governments will use the reference power during times of great political contestation to deal with a variety of issues, such as the economic crisis of the Great Depression and during mega constitutional politics. More specifically, the in-depth look at the 1930s and the 1980s demonstrates the different ways a reference case can be useful to a government when dealing with a political controversy. Finally, this chapter presents an overview of all Canadian reference cases across time, which provides an essential foundation for the empirical and theoretical analysis that follows in subsequent chapters.

**The Creation of the Reference Power**

The Parliament of Canada first created the reference power through the adoption of the *Supreme Court Act* in 1875. Mirroring a similar provision found in the *Judicial Committee Act* of 1833 (United Kingdom, c. 41), section 53 of the Act provided the Governor-in-Council (effectively the executive and cabinet) the power to request the Supreme Court’s advice on difficult legal questions. The Canadian reference power was created partly because Canadian legislators simply followed the United Kingdom’s *Judicial Committee Act*, which provided for a statutory reference system, giving the Crown the ability to seek judicial opinion on difficult questions, (*A.G. Ont. v. A.G. Can.* [1912] A.C. 571). The motivation for creating a reference power in Canada was to provide the federal government another tool to control provincial legislation, outside the powers of reservation and disallowance (Rubin 1960). In other words, the federal government could protect its constitutional jurisdiction from provincial incursions through referring provincial legislation to the Supreme Court of Canada for review and
perhaps invalidation. However, a reference need not be understood solely as an alternative to the powers of reservation and disallowance. Instead, Rubin (1960) notes that in the debates concerning the amendment of the reference power in 1890s, some members of parliament supported the use of the references as a preliminary step prior to exercising the power of disallowance. The Minister of Justice at the time, Sir John Thompson explained that referring a matter that was also disallowed would give the decision to invalidate provincial legislation much more legitimacy because it would be supported by a judicial opinion and would not be simply the minister of justice acting alone (Rubin 1960: 172).

In this early reference scheme the Supreme Court of Canada was not obligated to provide reasoning for its decisions, nor was there any formal arguments submitted by the executive. This practice was satisfactory until the Court’s 1885 decision in Sess. Papers No. 85a 1885 (Canada) (McCarthy Act Reference), which found the federal regulation of liquor traffic ultra vires (Strayer 1988: 312). This invalidation by the Court, without written reasoning, sparked a backlash within the House of Commons, marking the first criticism of the reference power. Former Attorney General and member of the opposition, Edward Blake, argued that the reference power as it currently stood was illegitimate and problematic, as there was no requirement that the Court provide reasoning for its decisions, nor was there a provision for the inclusion of affected parties (often provincial governments) or a requirement of fact finding (House of Commons Debates, 6th Parl., 4th Session, 1890: 4089).

In response to this criticism, (and shared dissatisfaction with the McCarthy Reference), Parliament led by the government of Sir John A. MacDonald, amended the reference power in 1891. This amendment required the Court to provide reasoning for its reference case decisions, and if provincial legislation was implicated in the case, the appropriate attorney general would be notified of the case and provided the right to represent his or her provincial interests (Strayer 1988: 313). Additionally, the amendments to the Act respecting the Supreme and Exchequer Courts, stipulated that a decision by the Supreme Court in a reference case was considered a final judgment that could be appealed to the Judicial Committee (S.C. 1891, c. 25, s. 4). These federal
provisions remain largely unchanged and serve to guide the present day reference process at the Supreme Court.

Following the creation of the federal reference power, several provinces amended their judicature statutes to allow for the creation of a similar power to be used at provincial appellate courts. The provincial governments of Manitoba, Ontario, and Nova Scotia introduced reference power legislation in 1890 that largely mirrored the provisions found in the *Supreme and Exchequer Court Act*, which granted the Lieutenants Governor-in-Council the power to request a judicial opinion from the provincial court of appeal. The governments of British Columbia and Quebec followed suit, creating similar legislation in 1891 and 1898, respectively. By 1953, with the creation of a reference provision by the Government of Newfoundland (as it was then known) following its addition to the federation, all provinces had the ability to initiate a reference case at their provincial court of appeal. The decisions of the provincial courts of appeal in these references could be appealed to the Supreme Court of Canada. The *Supreme Court Act* was amended in 1922 to provide provinces with a right of appeal to the Supreme Court in a reference case. Thus, unlike the federal government, provinces have two opportunities to obtain an advisory opinion from an appellate court: first, at the provincial court of appeal and second, at the Supreme Court.

While the specificity and wording of each government’s reference legislation varies slightly, on a whole they all achieve the common result of providing the executive the power to seek an advisory opinion from the bench. Although beyond the scope of the present analysis, the Federal Court of Canada also has the ability to consider reference questions arising from the proceedings of federal commissions, tribunals or boards. The Province of British Columbia’s reference provisions allow the provincial executive to refer questions to either the British Columbia Court of Appeal or the British Columbia Supreme Court, a lower court.34 Similarly, the Province of Manitoba has the ability to refer questions to the Court of the Queen’s Bench (a lower court) and the Manitoba Court of Appeal. However, these are the only two provinces that have the power to refer to a lower court along with the provincial court of appeal. Cases from these two lower courts

34 A recent example of a lower court reference can be found in the decision of the B.C. Supreme Court regarding polygamy: *Reference re: Section 293 of the Criminal Code of Canada*, [2011] BCJ No. 2211 (QL); 2011 BCSC 1588.
are excluded from the present analysis to preserve a consistent comparison across all provinces. For a complete overview of Canadian reference legislation, please consult Appendix A.

Although there appears to be quite a bit of uniformity of reference question legislation across both provincial and federal governments, there is variance across governments in terms of process and execution of reference questions. To date there exists no scholarship that details the internal governmental process of engaging in reference cases. As a result, access to information requests were submitted to all governments with the goal of understanding what actors are involved in the decision to ask a reference question to understand if the process is entirely contained within cabinet as the governing legislation suggests, or if there is involvement from department of justice/attorney general officials. Additionally, the information requests inquired about each government’s process for engaging in a reference case, as well as whether there was any formal departmental memoranda or directives created to structure the reference process.

Responses from the governments varied across jurisdictions. Several governments would not provide any information, claiming that the information requested fell under the exceptions afforded by solicitor-client privilege. Regardless of the fact that the application submitted specifically requested information that was general and not case specific, several governments found that the documents requested amounted to legal advice in litigation or contemplation of litigation. As a result, no information was gained from the governments of Ontario, Quebec, and Canada, although their responses did confirm that such reference case procedural documents did exist. The request to the Department of Justice Canada yielded a completely redacted copy of chapter 12 of the Supreme Court of Canada Department of Justice Deskbook, which allows the author to assume that the Department does have a specific process for the submission of reference questions to the Supreme Court.

Several governments: British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia, responded to the information requests claiming that their ministries/departments of justice/attorney general did not have a defined formal procedure for initiating reference cases. Presumably without a manual or set procedural
guidelines, these governments initiate reference cases on an ad-hoc or informal basis. The response from the Saskatchewan Ministry of Justice and Attorney General explained that the department decided to engage in reference cases on a case-by-case basis. Interestingly, none of the aforementioned governments made any assertions relating to solicitor-client privilege in their response to the access to information requests.

The final two provinces, Prince Edward Island (PEI) and Newfoundland and Labrador (NL) responded to the requests to the effect that no written records concerning the operation of provincial reference cases existed. However, both of these provinces provided contact information for senior bureaucratic officials in the Department of Environment, Labour and Justice (PEI) and Department of Justice and Public Safety (NL). In the response from PEI the senior departmental solicitor explained, “[that] decisions to use the reference process would be case by case,” and that the process followed the “same procedure in bringing matters before Cabinet” (Senior Department Solicitor, Department of Environment, Labour, and Justice, PEI, Interview 26 February 2013). This process included, “a memorandum to Executive Council, including the facts and proposed reference questions, signed by the Minister and Deputy Minister,” with the final decision to proceed made by Cabinet alone.

The senior official from the NL Department of Justice and Public Safety indicated that the Province uses the reference power sparingly and as such, the procedure surrounding its usage is informal and dependent upon the specific context of the reference being made (Senior Department Official, Department of Justice (Courts and Related Services), NL, Interview 21 March 2013). In that province, the Department of Justice drafts a request to the Cabinet regarding the necessity of a reference by the Lieutenant-Governor-in-Council, with the creation of this memorandum done in consultation with other affected departments and other interested parties such as the Law Society or Canadian Bar Association. It appears that, although bureaucratic officials may be involved in the drafting of reference questions, the ultimate decision to proceed with a reference case is concentrated in the executive through cabinet, as outlined by the reference statutes.

Finally, although the Ministry of Attorney General of Ontario found the requested documents to be under solicitor client privilege, the response to access of information
provided a detailed description of the process as mentioned to the Australian High Commission in correspondence from 1983. This letter detailed largely the same process as was explained by senior bureaucratic officials from the governments of PEI and NL. However, this letter did provide one interesting caveat, “Although reservations about the efficacy and propriety of the reference case procedure has been expressed in academic writing, it has been our experience that those reservations are not shared by the government, the courts, nor by the practicing bar” (Ministry of the Attorney General Ontario, 1983). This letter implies that most governments in Canada are likely aware that the reference power can be subject to criticism, but have decidedly chosen not to concern themselves with these criticisms. Indeed, if the courts are generous in their acceptance reference cases, governments are likely to continue submitting reference questions.

**DATA COLLECTION AND METHODOLOGY**

This chapter outlines the results of an analysis of all Canadian reference cases from their inception in 1875 to 2014, for a total of 207 cases. Every effort was made to collect all reference cases from provincial appellate courts, the Supreme Court of Canada and the Judicial Committee of the Privy Council (JCPC). As such, this total case number reflects an effort to examine the entire population of cases, rather than a sampling or a subset. For the purposes of this analysis, to be considered a reference case the questions referred to the court must have been made through the powers outlined in the various judicature acts of the provinces and the federal *Supreme Court Act*. This analysis excludes reference questions posed to administrative tribunals, lower courts, and the Federal Court of Canada to ensure uniformity across jurisdiction.\(^{35}\)

To achieve a comprehensive collection of all Canadian appellate court reference cases, several methods were employed. First, all decisions of the Supreme Court of Canada are available for public examination on its website. This list of decisions was consulted for titles of cases bearing the typical reference case identification: ‘*Reference re.*’ The list gathered from the Supreme Court’s website was cross-referenced against the list of cases provided by the 1990 article by Huffman and Saathoff. Second, LexisNexis

\(^{35}\) The number of these non-appellate court references is unknown, as they have not been subject to scholarly analysis.
Quicklaw and Carswell Law Source, pay-for-use legal search engines, were examined for additional Supreme Court cases and provincial appellate court cases. These databases were searched in several ways, both provincial appellate court legal reporters and the Supreme Court reporters were examined individually for cases bearing the following terms in both the text and title of the decision: Reference re; Re; order-in-council; governor general in council and lieutenant governor general in council; and constitutional questions. Additionally, reference power granting statutes of both the provinces and the federal government were examined for citations linked to the specific section that allows the Governor General or Lieutenant Governor General to refer questions to the court. Finally, access to information requests were filed with all provincial government ministries of justice and the federal Department of Justice requesting a list of all reference cases from that jurisdiction. When lists were provided, they were cross-referenced with the dataset to ensure all cases were included.

All cases selected for inclusion in the dataset were examined to ensure that they were indeed reference cases: legal action initiated by an order-in-council through the various provincial and federal judicature acts. This project relies on a strict definition of reference cases. To be considered a reference case, it had to be clear from the decision that the initiation of the legal proceeding was the product of the reference method by the political executive via the Governor General-in-Council or Lieutenant Governor General-in-Council. As such, this definition would exclude instances where some trial judges have the power to refer questions to provincial appellate courts, as in Nova Scotia. Additionally, the citation records and history of each case were verified to ensure that the case selected in the dataset included the most recent version of the case. In many

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36 The governments of Newfoundland and Labrador, Manitoba, Saskatchewan, and Ontario provided lists of their provincial reference cases, while other provinces and the Federal Government claimed they did not have such lists.

37 One of the limitations of the dataset created by Huffman and Saathoff is that they only include Supreme Court of Canada cases, regardless if a particular decision was further appealed to the JCPC. Additionally, upon examination of cases in their dataset, it was discovered that the authors included some cases that are not true references, but rather appeals from various administrative tribunals, such as Re Transport Act 1938 [1943] S.C.R. 333, which is an appeal of a decision from the Board of Transport Commissioners of Canada. Of the 115 decisions Huffman and Saathoff examine, five cases are eliminated in this study’s dataset because they are not true references, as defined by the present study.

instances, references submitted by provincial governments to their appellate courts are
further appealed to the Supreme Court of Canada, just as Supreme Court of Canada cases
were often appealed to the JCPC (until 1949). In these instances, the final decision was
selected, and with some cases not being further appealed, this dataset thereby includes
cases from provincial appellate courts, the Supreme Court of Canada and the JCPC.
Finally, when assessing the decisions selected for the dataset, any citation made to other
reference cases was examined for their inclusion into the dataset.

All cases were coded for various descriptive features related to the parties
involved in the case, the issue area under concern, the government that initiated the case,
and how many third party groups (both government and non-government) participated in
the case as interveners. Other features salient to the case were analyzed, including the
type of questions asked and the area of law. Cases were coded by subject area based on
the area of law that the reference questions submitted to the court concerned. For example,
if the majority (or plurality) of questions referred considered the *Constitution Act, 1867*,
this would be considered the cases primary subject area. The primary subject was then
further specified. For example if the case was coded as *Constitution Act, 1867*, as primary
subject area, this could be specified as either a division of powers case (concerning
sections 91 and 92 of the *Constitution Act, 1867*) or a non-division of powers case
(concerning all other sections of the *Constitution Act, 1867*). Similarly, cases coded as
*Constitution Act, 1982* could be specified as a *Charter of Rights and Freedoms* case or a
non-Charter case. Finally, cases coded as statutory interpretation asked a court to
interpret the particular language of a statute (rather than constitutional document) either
internally against itself or for compatibility with another statute. Case dispositions were
also coded, which often included a court’s finding legislation unconstitutional in full or in
part, or that the legislation was found to be constitutionally sound. Cases were analyzed
in terms of the behavior of the courts and justices involved, and if the court answered all
the questions posed to it by the government that initiated the case.

Coding reflects when the case was initiated and the individuals and parties who
were in power when the question(s) were referred to the court, instead of when the case
was heard. Although the reference case process is less time consuming than routine
litigation, a case is often not heard or a decision rendered until several months after
questions were referred, allowing time for the possibility in change in government, cabinet, or minister portfolios. This coding choice was to reflect a desire to understand why governments choose to initiate references, as the date the questions were referred reflects the moment when the government made an active decision to pursue a case. Cases were coded based on the year the decision rendered and reported, instead of the date the court heard the case. Often courts will render reference decisions the very same year the questions are referred, however in instances where this is not the case, for the purpose of consistency the year of the reported decision is included in this dataset.\textsuperscript{39}

**Analytical Description of Canadian Reference Cases**

As mentioned above, the total number of cases gathered for the present analysis is 207, which includes all reference cases from provincial appellate courts, the Supreme Court and the JCPC from 1875 to 2014. The plurality of cases in this dataset are from the Supreme Court of Canada (44 percent, 92 cases), while cases from provincial appellate courts comprise 29 percent of the population of cases (59 cases), and the cases from the JCPC total 27 percent of the cases (56 cases). Figure 1 below provides an illustration of the distribution of cases from all courts, with the provincial courts individually represented.

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\textsuperscript{39} Indeed this is how the Court itself organizes its decisions made available on its website. It should be noted that, if there was different reporting years provided by different court reporters, the most recent year was selected as the date for coding.
When looking at the dispersion of cases across the various appellate courts, it is important to keep in mind that the federal reference power has been in operation longer than provincial reference powers and that many cases that begin in the provincial appellate courts will eventually end up in the Supreme Court of Canada. In this dataset 41, or 44.5 percent of the Supreme Court cases, originated in provincial appellate courts. Similarly, prior to 1949, many decisions of both the Supreme Court and the provincial appellate courts were further appealed to the JCPC. All JCPC cases in this dataset are appeals from either a provincial appellate court or the Supreme Court, as no government held the power to refer questions directly to the JCPC. In the 56 references that were appealed to the JCPC, a majority was originally heard at the Supreme Court of Canada, at 39 cases or 69.7 percent, with 17 cases or 30.3 percent of JCPC cases originating in provincial appellate courts.

While the above illustrates the most frequent sources for reference cases in the dataset, it does not demonstrate the frequency at which each government has initiated references. Figure 2 below details the percentages for each government initiating a reference case.

These data indicate that the federal government is the most frequent initiator of reference cases from 1875 to present, when looking at each province individually. However, to truly understand the trends associated with reference use by governments, it

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40 Multiple governments refers to instances in which several provincial references dealing with the same issue were combined upon appeal to the Supreme Court or JCPC as in: Reference re Resolution to Amend the Constitution [1981] 1 S.C.R. 54, commonly known as the Patriation Reference.
is best to look at the provinces collectively. When considering a great deal of references concern the constitutional division of powers between the federal government and all provincial governments, it is best to consider the provinces as one group, rather than individual governments. This collective assessment of provincial reference use is competed in Figure 3 below. These data indicate that while the federal government initially used the reference power at a greater rate than provinces, provinces have begun to outpace the federal government.

Figure 3 – Federal and Provincial Use of References

In examining Figure 3, there are three trends in the data that are important to note. First, even though the federal government first created the reference power with the intention at using it as a tool to influence the provinces, provinces generally use the reference power at a similar rate to the federal government until the 1930s. Indeed, as Figure 3 demonstrates, the differences between the federal and provincial rate between the 1870s and 1890s reflect the non-existence of a provincial reference power until 1890. After the creation of a provincial reference power, the difference between federal and provincial use is relatively minimal. The second trend is the stark increase of reference use by the federal government during the 1930s. The reference activity in the 1930s is a reflection of several circumstances unique to this period of Canadian political history, stemming largely from the economic crisis and Great Depression. This era of reference use is subject to an in-depth investigation below. Finally it is important to note that beginning in the 1940s, provincial governments begin to use their individual reference power at a much greater rate compared to the federal government. This is a trend that spikes in the 1980s to 1990s and carries through to present date.
The initial more frequent use of the reference power by the federal government until 1940 can reflect several things. First the federal government initially had a much greater bureaucratic capacity compared to the provinces, providing them with more legal, financial, and other resources compared to provincial governments, which can serve to influence directly a government’s decision to litigate, in general (Hennigar 2007). Second, the greater proportion of cases by the federal government in the earlier period may demonstrate that the referencing power granting statute (circa 1875) of the federal government has been in existence longer than comparable provincial powers. Finally, a greater use of references by the federal government in the early era may reflect the original intent behind the creation of the reference power by the federal government. As mentioned previously, the federal reference power was enacted as another means to control provincial legislation, either instead of or in combination with the power of reservation and disallowance (Rubin 1960). A reference concerning provincial legislation can provide the federal government with the same ends as the disallowance power, if the court invalidates the provincial law finding it to be ultra vires. However, even with these explanations under consideration, it is important to note that the difference between provincial and federal government use 1875 to 1940 is relatively minimal (excluding the anomaly of the 1930s).

To understand the rate at which governments refer the actions or legislation of other governments please refer to the cross tabulation in Table 1, below. This table demonstrates that both provincial governments and federal governments are quite willing to refer the legislation or action of the other government to court. As displayed in Table 1, in this dataset, the Federal government refers provincial legislation in approximately 9 percent of all references, while provinces refer federal government legislation in over 12 percent of all references. Taken together, these data demonstrate that almost 22 percent (21.8) of all references are cross-government references, in which a government refers the legislation of another order of government: either provinces submitting federal legislation, and federal governments submitting provincial legislation. Examining the statute or action under consideration, Table 1 demonstrates that of the 103 cases concerning provincial statutes/action, a sizeable portion of these cases (19 cases) are referred to the courts by the federal government. Comparatively, of the 86 cases that
concerned federal statutes/actions, 26 cases are referred to the courts by provincial governments. This demonstrates that governments use the reference power to ask the courts to review the actions of other governments, illustrating the essential dynamic of federalism that characterizes a large portion of reference cases.

Table 1–Government Initiating Reference and Statute/Action Referred

<table>
<thead>
<tr>
<th>Statute or action under consideration</th>
<th>Reference Initiating Government</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Provinces</td>
</tr>
<tr>
<td>Provinces</td>
<td>84(40.6%)</td>
</tr>
<tr>
<td>Federal</td>
<td>26 (12.6%)</td>
</tr>
<tr>
<td>Other(^{42})</td>
<td>6 (2.9%)</td>
</tr>
<tr>
<td>Both(^{43})</td>
<td>2 (1%)</td>
</tr>
<tr>
<td>Total</td>
<td>118 (57%)</td>
</tr>
</tbody>
</table>

A recent example of a provincial government referring the legislation of the federal government is *Reference re Bill C-7 Concerning the Reform of the Senate* [2013] Q.J. No. 771 (Quebec Senate Reform Reference), a case in which Quebec referred the proposed Senate reform legislation of the Parliament of Canada to the Quebec Court of Appeal. The Government of Quebec saw the reference as a means to block unilateral action by the federal government on Senate reform (Wells 2013).\(^{44}\) The most recent example of a federal government’s referring the legislation of a provincial government also involves Quebec. In 1993, the Government of Canada led by Prime Minister Campbell referred Quebec legislation providing for a provincial sales tax to the Supreme Court of Canada,

\(^{41}\) It is important to note that this analysis does not consider inter-provincial reference cases (where one province refers the action of another) as a separate category. This is a limitation of the binary coding used in this analysis.

\(^{42}\) The Secession Reference is example of a case coded as ‘other,’ as the Supreme Court was asked to assess if a province could unilaterally secede from the federation, in the abstract. The Court was not referred a piece of legislation that provided a government the power to secede. Instead, the questions ask the Supreme Court to consider these questions in the light of domestic Canadian law and international law. Another example is *Reference re Mineral and Other Natural Resources of the Continental Shelf* [1983] 145 D.L.R. (3d) 9, where the Court of Appeal for Newfoundland and Labrador were asked to decide if the Province held the authority over particular lands off the coast of Newfoundland and Labrador.

\(^{43}\) Cases coded as ‘both’ include cases where a court was referred a series of questions that asked it to consider both provincial and federal legislation, as was the case in *Reference re Agricultural Products Marketing* [1978] 2 S.C.R. 1198. In this case the Supreme Court was referred questions that concerned the Agricultural Products Marketing Act R.S.C. 1970, c. A-7, a federal statute, and the Ontario Egg Order and Egg Marketing Levies, S.O.R. 72-743, a provincial statute.

\(^{44}\) The goal of blocking or slowing down the legislative action of another government as a motivation for initiating a reference is a sentiment that has been confirmed through interviews with individuals involved in past reference cases, including former attorneys general. This phenomenon will be address more fully in Chapter five.
arguing that the legislation was *ultra vires* the power of the Province (*Reference Re Quebec Sales Tax [1994] 2 S.C.R. 715, Quebec Sales Tax Reference*).\(^{45}\) In both of these examples, the Government of Canada was unsuccessful, with the Quebec Court of Appeal finding Bill C-7 unconstitutional and the Supreme Court of Canada finding Quebec’s tax legislation a valid exercise of provincial constitutional power.

However, it appears that the federal government has shied away from using references to challenge the legislation of provinces. Other recent examples of the federal government’s referring the legislation or action of a provincial government are rare. Aside from the 1994 *Quebec Sales Tax Reference*, the next most recent examples include the 1992 and 1985 references concerning language rights in Manitoba (*Manitoba Language Rights [1992] 1 S.C.R. 212; Reference re Manitoba Language Rights [1985] 1 S.C.R. 721*). However, aside from the Manitoba language references, one must go back to 1957 to find another example of the federal government referring provincial legislation to the Supreme Court, when the Federal Government led by St. Laurent referred Ontario legislation concerning the marketing of farm products in Ontario in *Reference re Farm Products Marketing Act R.S.O., 1950 [1957] S.C.R. 198*. To be sure, this discussion does not mean that the federal government has not challenged the provinces in reference cases by acting as an intervener against provincial legislation or action, but it does demonstrate that the overtly confrontational act of referring provincial legislation by the federal government has largely fallen out of favour. This movement away from directly challenging provincial legislation mirrors the abandonment of the powers of disallowance by the federal government. Indeed, the federal power of disallowance has not been exercised since 1943 and would have been formally abolished through the Charlottetown Accord (see: Hogg 2012: 5.3). This change in reference use by the federal government demonstrates that the use of the reference power and the reasoning behind reference case initiation can vary according to time period and may reflect other contemporaneous trends in Canadian politics.

\(^{45}\) The Order in Council that initiated the *Quebec Sales Tax Reference* was passed by the Campbell government, on August 26, 1993, (Order in Council P.C. 1993-1740) and as such, the Campbell government is credited with the initiation of this case. It should be noted that following the Order in Council a federal election occurred and when the case was decided by the Supreme Court in 1994, a Liberal government led by Prime Minister Chretien was in power.
This trend of moving away from overtly challenging the legislation or action of another government in references does not appear to be present when assessing the actions of provincial governments in recent years. Since 2000, provincial governments have challenged Government of Canada legislation five times in provincial courts of appeal. Interestingly, four of the five examples involve Quebec challenging the federal government on a diverse range of legislative initiatives. Along with the most recent example of the Senate reform legislation, Quebec has challenged Government of Canada action on legislation concerning assisted human reproductive technologies (*Reference re: Assisted Human Reproduction Act* [2010] 3 S.C.R. 457), unemployment insurance (*Reference re: Employment Insurance Act (Can.) ss. 22 and 23* [2005] 2 S.C.R. 669) and the *Youth Criminal Justice Act* (*Reference re: Bill C-7 respecting the criminal justice system for young persons* [2003] Q.J. No. 2850). The final instance of a provincial government challenging the legislative initiative of the Government of Canada is in *Reference Re Firearms Act (Can.)* [2000] 1 S.C.R. 783 (*Fire Arms Reference*), in which the Government of Alberta challenged federal legislation providing for a national gun registry, claiming that it was not a valid exercise of the federal power over criminal law, and the legislation encroached on the provincial power relating to property and civil rights. However, it is important to keep in mind that when considering the practice of governments referring the statutes/actions of other governments with the reference power, this practice is relatively uncommon. Indeed, the data provided in Table 1 (above) demonstrates that the vast majority of references do not concern cross-government appeals.

**Figure 4 – Canadian Reference Cases Across Time**

![Diagram showing the number of Canadian reference cases across different decades from 1870s to 2010s]
Figure 4 above demonstrates that the use of reference cases by Canadian governments has ebbed and flowed over time. Clearly, some governments have been much more likely to refer questions to the courts, compared to other time periods, with the decades of the 1930s and the 1980s being the height of reference cases in Canadian political history. It should be noted however, that both decades 1870 and 2010 do not represent a full ten years in the above figure, as the reference power was not created until 1875 and, at the time of writing the latter decade is incomplete. However, they are included here to provided the fullest picture of all reference case activity. Additionally, when looking at the trends of references over time, the high periods of cases do not appear for a single decade and then disappear, rather the level of cases gradually peak over time. Instead as Figure 4 illustrates, the other high points in reference cases flank the two decades with the highest counts of reference cases. Indeed, the 1930s decade is preceded by the third highest number of references (1920s), and the 1980s is succeeded by the fourth greatest amount of references per decade (1990s). To explain the peak instances of Canadian reference cases, temporality, and an understanding of concurrent events in Canadian politics are essential. While this analysis does not intend to engage in a path dependency argument, it grounds itself in an understanding of the importance of timing and process as necessary to explain a phenomenon that has multiple explanatory factors (Pierson 2000). In other words, it is important to recognize that the peaks of reference cases over time do not exist in a vacuum; instead, they are reflective of other events taking place in Canadian political and constitutional history, such as the economic crisis of the 1930s and the era of mega constitutional politics of the 1980s.

Reference Case High Point I: 1930s

The 1930s marks the decade in which greatest numbers of reference cases occur across Canadian history. This period in Canadian politics is marked by the leadership of prime ministers Bennett and King, and the struggle to deal with the depression by political actors. Indeed, it is the legislative attempt (both federal and provincial) to ameliorate the disastrous effects of the depression within the confines of the Canadian

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constitution that characterizes many of the political conflicts of this period and the reference case jurisprudence. Political conflicts of this era spilled into the courts through reference cases concerning the New Deal legislation of the Bennett Government and the Social Credit legislation of Alberta Premier William Aberhart, most often at the hands of the federal government led by Prime Minister Mackenzie King. It is not surprising to find that of all first ministers in Canada, King referred the highest number of reference cases, with 32 cases (15.5 percent of all reference cases) – a count that not only reflects the political environment of the time period examined here, but also the longevity of King’s time as prime minister.

Table 2 illustrates below, the vast majority of cases during this time period asked the courts to consider issues relating to the Constitution Act 1867 and the division of powers, demonstrating that the reference jurisprudence of this decade is largely centered on issues of federalism. For contextual purposes Westlaw legal database reports 83 division of powers cases during this decade in both provincial courts of appeal and the Supreme Court of Canada. The 21 division of powers reference decisions during this decade represent approximately one quarter of all division of powers litigation during the 1930s. Division of powers references ask the courts to consider if a particular policy either proposed or enacted is *intra* or *ultra vires* the legislation—enacting government, serving to bring clarity to the many contours of Canadian federalism. The focus on the division of powers instead of statutory interpretation ensures that the reference cases of this era are largely concerned with the powers of governments rather than minority rights. This focus on the constitution and federalism is not indicative of the power itself, as most reference granting statues allow governments to refer any matter of importance to the courts, regardless of whether it engages the constitution. Cases that concerned the Constitution Act 1867, but did not present a division of powers question include the Persons Case and Reference re: The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of the Reservation of a Lieutenant-Governor of a Province [1938] S.C.R. 71 (Powers of Disallowance and Reservation Reference). The latter case is nevertheless still related to the issues of federalism, as it was rooted in the dispute between the Social Credit Government in Alberta and the King Government in Ottawa (to be discussed below).
Table 2 – Issues of Reference cases in the 1930s

<table>
<thead>
<tr>
<th>Case Subject Area</th>
<th>Primary Issue</th>
<th>Secondary Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Constitution Act 1867:</strong></td>
<td>23 (76.6%)</td>
<td>21 (70%)</td>
</tr>
<tr>
<td>Division of Powers</td>
<td></td>
<td>2 (6.7%)</td>
</tr>
<tr>
<td>Non-Division of Powers</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statutory Interpretation</td>
<td>6 (20%)</td>
<td>2 (6.7%)</td>
</tr>
<tr>
<td>Other</td>
<td>1 (3.3%)</td>
<td></td>
</tr>
<tr>
<td><strong>N=30 (100%)</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In an attempt to deal with the economic depression of the early 1930s, the federal government led by Prime Minister Bennett introduced several statutes often referred to as Bennett’s ‘New Deal,’ a reference to the legislative package of the same name introduced by President Roosevelt in the United States, also aimed at addressing the depression. The Bennett government introduced eight different pieces of New Deal legislation. The earliest attempts at dealing with the depression by the Bennett Government involved two acts that attempted to protect agricultural producers. The *Farmers’ Creditors Act* (24-25 Geo. V, 1934, c. 53) allowed farmers to negotiate a compromise with creditors enforceable through the courts to stay on their land when failing into debt. While the *Natural Products Marketing Act* (24-25 Geo. V, 1934, c. 57) aimed at the improvement of distribution and marketing of produce through the enforcement of legally binding marketing schemes, with the goal of decreasing the discrepancy between the buying price of consumers and the producer’s selling price (McConnell 1968). These acts are known as the early New Deal legislation.


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47 Please see above section on Data Collection and Methodology for details of case coding.  
48 As demonstrated here, most cases during this decade only concerned one issue.
eight-hour workday and a 48-hour workweek for industrial labourers, with exceptions for urgency. The Employment and Social Insurance Act provided unemployment benefits to workers who had previously contributed to the fund for a minimum of forty weeks. While the last act, the Minimum Wages Act provided the Governor in Council the powers to establish a minimum wage in ‘rateable trades,’ a category that could be defined by the Governor in Council. The above-mentioned acts comprise the treaty related New Deal legislation.49

Finally, the last type of legislation enacted as part of the New Deal legislation comprised the government’s two statutory responses to the Royal Commission on Price Spreads report (1935). The first involved an amendment to the Criminal Code of Canada, section 498A, which prohibited discriminatory and predatory trading practices. While the second statute, the Dominion Trade and Industry Commission Act (25-26 Geo. V, c. 59), was primarily concerned with creating a commission with jurisdiction over the Combines Investigation Act and other statutes related to the regulation of trade.

While in opposition, the Liberal Party led by King questioned the constitutionality of these various legislative schemes, believing that many of the provisions encroached on provincial powers (McConnell 1968; Neatby 1976). The early legislation was enacted on questionable constitutional grounds as the Natural Products Marketing Act and the Farmers’ Debit Relief Act appeared to regulate local transactions, a matter of provincial jurisdiction. The treaty related legislation was also enacted on weak constitutional grounds as it concerned property and civil rights, a power solely under jurisdiction of the provinces. Finally, the price-spread enactments were problematic for two reasons. First, the amendments to the Criminal Code appeared to infringe on ‘property and civil rights’ and the regulation of individual industries and trades, both within provincial jurisdiction. Second, the Dominion Trade and Industry Commission Act raised concerns because it appeared to engage in the administration of justice and the ‘contract and civil rights of individuals and corporations,’ again a provincial responsibility (Hart 1991).

49 However, it should be noted that the Employment and Social Insurance Act was specifically enacted without reference to articles of the Treaty of Peace, as Bennett wanted to prevent CCF from demanding that Parliament also adopt relief assistance, which was associated with the corresponding unemployment insurance conventions in the Treaty (McConnell 1968).
The Liberal Party struggled with how to deal with its opposition to the different aspects of the Bennett New Deal, as King did not want to appear opposed to labour reform regardless of his uncertainty that the legislation was constitutional (Neatby, 1976: 93). Instead, the Liberals led by King went into the 1935 election promising to refer the questionable New Deal legislation to the Supreme Court. After winning a majority government, King and the Liberals returned to power and shortly thereafter referred the eight statutes that were constitutionally questionable, resulting in six different reference cases.

Submitting reference questions concerning these acts was not the only option available to the King Government. Alternatively, it could have allowed provinces to challenge the legislation themselves through references at their provincial courts of appeal or repeal/amend the legislation through an act of Parliament, as are the options available to most governments faced with statutory legislation to which it is opposed. The decision to refer to the Supreme Court by the King Government, instead of allowing provinces to challenge the legislation in provincial courts of appeal, allowed it to frame the debate, as it could draft the questions and shape the terms of the reference. A reference at the Supreme Court also dealt with the issue in a timely manner, as the provincial decisions would have been almost certainly appealed to the Supreme Court in the end. Repealing the legislation would open up the government to anti-labour criticisms and would force it to supplement the repealed legislation with its own response to the depression. As McConnell (1968) explains, the references not only forced the decision out of the hands of the government, it also provided them with time to create an alternative legislative scheme to deal with the economic crisis.

The King Government referred eight pieces of the Bennett New Deal legislation to the Supreme Court through six reference cases, which resulted in only two acts emerging from the Court unscathed. The analysis by the Court found the Farmers’

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Creditors and s.498A Criminal Code, to be fully within the constitutional jurisdiction of the federal government. Two acts, Employment and Social Insurance and Natural Products Marketing were found to be entirely ultra vires the Parliament of Canada, with a unanimous Court in Natural Products Marketing Act. A unanimous Court found several sections of the Dominion Trade and Industry Commission Act to be ultra vires, effectively nullifying the legislation in practice. The Court was evenly divided (three to three) on the constitutionality of the remaining three pieces of legislation, Minimum Wages Act, Limitation of Work Act, and Weekly Rest in Industrial Undertakings Act, which were referred together as they all emerged from the International Labour Organization and hinged on the interpretation of the treaty making power of the Parliament of Canada. As only six justices heard the references, the final piece of legislation was left at a standstill, as no majority decision emerged from the evenly divided court.

The Supreme Court decisions were appealed to the JCPC, not because the King Government was unhappy with the result at the Supreme Court, but because the final appeal would end all questions about the constitutionality of the New Deal legislation, providing finality. Moreover, the Government was confident that the findings of the Supreme Court would be affirmed by the JCPC, as King explained in his correspondence, the appeal to the JCPC, “arises in no way from dissatisfaction on the part of the government with the opinions given or the expectation of their being reserved” (as quoted in Hart 1991: 60). In a result similar to the Supreme Court decisions, the JCPC found five pieces of the Bennett New Deal to be ultra vires of the Parliament of Canada. Both the Natural Products Marketing Act and the Employment and Social Insurance Act were again found to be constitutionally invalid. Unlike the even divide by the Supreme Court on the International Labour Organization treaty legislation, the JCPC provided clarity, finding all three statutes to be ultra vires the Parliament of Canada. The Farmers’ Creditors Act and section 498A Criminal Code were again found to be valid, affirming the previous findings by the Supreme Court. The JCPC found the Dominion Trade Act to be valid, reversing the Supreme Court, providing the only real point of divergence from the original decisions by the Supreme Court.
Even though the JCPC decisions effectively limited federal powers, making it difficult for the federal government to pursue social reform in the future, King took satisfaction in the confirmation that he was correct regarding the constitutionality of Bennett’s New Deal (Neatby 1976). Indeed, through effective use of the reference power, the King Government was able to achieve its goal of largely voiding the Bennett legislation, while at the same time not having to appear anti-labour in the process. However, reaction to the JCPC decision was not all favourable. Instead, the imperial judicial body appeared to be preventing the Government of Canada from responding to the economic disaster that was the Depression. Indeed, the disposition of the New Deal legislation by the JCPC served to fuel calls for the abolition of appeals to the JCPC (McConnell 1968; Cairns 1971).

Moreover, the reliance on the courts through the New Deal references demonstrated how political actors can rely on the judiciary to deal with politically contentious matters, instead of using more routine, political channels. The New Deal references allowed the Liberal government to achieve its goal of invalidating the previous government’s legislation without having to take a public stance against labour and employment protections that could have been politically disastrous. As Snell and Vaughan argue, the references allowed the King Government not only to avoid any public backlash, but also to redirect public discord towards the Court, resulting in a “political exploitation of the reference system” (1985: 165). Indeed even though the King Government had referred the legislation of its own jurisdiction and had lost at the Supreme Court and the JCPC, King did not appear disappointed with the findings of ultra vires by the courts (Cairns 1971).

The King Government would again use the reference power to deal with politically contentious issues when faced with the Social Credit legislation of the Aberhart government in Alberta. The nullification of the majority of the Bennett response to the Depression by the courts left a legislative void in terms of economic and social policy. However, this did not prevent provinces from attempting to develop their own responses to the problems of the Depression. To this aim, the Social Credit party led by

51 The British North America Act was amended by Westminster in 1940 to transfer jurisdiction over unemployment insurance to the Parliament of Canada from the provinces, as a response to the Employment and Social Insurance Act reference, and to avoid this inability to act in this policy sphere in the future.
William Aberhart introduced a series of legislative reforms resulting from its commanding majority, 56 of 63 seats in the provincial legislature. The Social Credit Party supported a policy program based on distrust and hostility towards financial institutions and creditor interests. Support for the Social Credit Party was largely comprised of lower-middle class and agrarian individuals. One of the goals of the Party was to increase individual purchasing power, arguing that all individuals have a right to communally produced wealth (Mallory 1956: 183).

The Social Credit legislative program began to fully manifest itself in 1937 through the introduction of three bills: Credit of Alberta Regulation Act (1937, c. 1, Session II), Bank Employee Civil Rights Act (1937, c. 2, Session II), and Judicature Act Amendment Act (1937, c. 5, Session II). Each of these bills raised serious questions of constitutionality. The first bill, Credit of Alberta Regulation Act, would transfer control over licensing of banks to the province and would create a Social Credit Board that would oversee the activities of the banks. The second Act, prevented bank employees and banks from seeking legal redress from the courts. Finally, the amendment to the Judicature Act prohibited the courts from questioning any provincial government legislation. While the first two pieces of legislation served as a direct attack on the federal power over banking provided by section 91 of the British North America Act 1867 (as it was then known), the latter act served as a direct affront to the rights and freedoms of individual Albertans. Although this questionable legislative triad had received royal assent from the Lieutenant Governor General of Alberta, it resulted in the resignation of the provincial Attorney General, John Hugill (Mallory 1956).

More importantly, these three pieces of legislation had caught the attention of the King Government, which disallowed the legislation, after it had been in force for a mere 10 days. Aberhart reacted to the disallowance by passing a resolution that the federal power of disallowance no longer existed. The Social Credit Government then reintroduced the Credit Act (1937, c. 8, Session III), but changed the references from ‘banks’ to ‘credit institutions,’ and passed the Bank Taxation Bill (1937, c. 1, Session III), which imposed a substantial levy on reserve funds and paid-up capital, with the goal of eliminating or severing limiting banks in the province (Neatby 1976). Finally, Aberhart responded to dissenters by passing the Accurate News and Information Bill (1937, c. 9,
Session III) which required newspapers to provide sources for any news item by request of the government and to publish in full any governmental statement (Mallory 1956; Neatby 1976). Once again, the Aberhart government had gained the unwanted attention of the federal government in Ottawa, which responded by reserving the three new pieces of provincial legislation.

This chain of political events served to provoke referral of the reserved bills to the Supreme Court by the King Government and a reference asking the Court to rule on the constitutionality of the powers of reservation and disallowance. The six-member panel of the Supreme Court unanimously held that the federal powers of reservation and disallowance were valid powers that were not deemed to be in disrepute, regardless of their infrequent use in more recent years. Furthermore, the federal government powers of disallowance and reservation were largely unfettered and subject to few limitations. For the specific statutes referred, the Court held that the acts were ultra vires and voted unanimously to strike them down. Again, like the New Deal references, the Supreme Court was placed directly in the middle of a political conflict by King, which once again vindicated the political goals of Prime Minister King and the federal government.

The references by the King Government to the Supreme Court in the 1930s served not only to confirm the utility of the reference power, but also the political utility of the Court itself (Snell and Vaughn 1985; Mallory 1956). Through these two episodes, Prime Minister King with the aid of his extremely capable Minister of Justice/Attorney General Ernest Lapointe was able to measure the constitutionality of the legislative schemes of opponents, and utilize the benefits of seeking a reference from the Supreme Court of Canada. In the first instance, referral of the New Deal legislation not only allowed the King Government to challenge the acts of the previous government led by R. B. Bennett, it also allowed it to avoid appearing anti-labour. Additionally, by posing the reference to the Supreme Court, the King Government was able to shape the terms of the debate with a greater amount of power than would have been possible had provinces initiated references at provincial courts of appeal or if the laws had been challenged through

References


53 The Court’s decision in the Alberta Statutes reference was further appealed to the JCPC, which affirmed the findings of the Supreme Court.
routine litigation. Similarly, effective use of the reference power by the King Government in the response to the assertion of power by the Aberhart government in Alberta, served not only to invalidate the legislation that challenged the power of the federal government, but it also allowed King to shape the terms of the debate while relying on the courts to sort out the political conflict. This political strategy of reference use will be further examined in Chapter five.

The federal government initiated the majority of references during the 1930s: only 7 of the 30 references during this decade were initiated by provincial governments. Other cases of note during this decade involve the Aeronautics reference, which concerned the federal treaty making power. Reference re the Regulation and Control of Aeronautics in Canada [1930] S.C.R. 663 (Aeronautics Reference) was a favourable decision for the federal government, holding that the negotiations of the Treaty of Versailles by the federal government regarding the regulation of aerial navigation were constitutional. The JCPC’s decision in the Aeronautics Reference also served as a strong reading of federal paramountcy when conflicts arise regarding the division of powers between the federal government and the provinces, and is used as an example of the national dimensions test of ‘peace, order, and good government’. It was this reading of the treaty-making power of the federal government that Prime Minister Bennett believed supported the legislation regarding minimum wage and hours of work tested by the courts in the Reference re Minimum Wages Act, Limitation of Work Act, and Weekly Rest in Industrial Undertakings Act (Neatby 1976). As detailed above, this reading of the treaty making power as it applied to matters of a civil nature was not supported by either the Supreme Court or the JCPC. The JCPC decisions on the New Deal legislation signaled


56 The national dimensions test assess if the legislation under scrutiny “goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole.” (Hogg 2012: 17.3(a)) Understandably, the national dimensions test has the ability to greatly increase the powers of the federal government at the expense of the provinces. However, it should be noted that the Supreme Court has not relied on this test to inform many of its division of powers jurisprudence.
the move away from the interpretation of federal power provided by Aeronautics, and demonstrate a move towards a greater respect for provincial constitutional jurisdiction.

Another important case of this era was Reference re Meaning of the Word ‘Persons’ [1928] S.C.R. 276; [1930] AC 124 (Persons Case), which was referred to the Supreme Court in 1928 and finally disposed of by the JCPC in 1930, making it one of the earliest cases considered as part of the 1930s. As a case that concerns minority rights, this case stands apart from other cases of this era. This case asked whether women were considered ‘persons’ in the Canadian Constitution, with reference to the provision that outlined appointments to the Senate. That being said, as Claire L’Heureux-Dubé (2000a) notes, this case made very little mention of the real issue of the case: discrimination against women. What is most influential about this case is the means by which the JCPC arrived at its conclusion that women are indeed considered ‘persons.’ Instead of relying on legislative intent, Lord Sankey (the author of the decision) explained that the constitution can be viewed as a ‘living tree capable of growth and expansion within its natural limits” ([1930] AC 124: 136). This reasoning was based on the fact that Parliament had not explicitly used the word ‘men’ but instead, used ‘person’ a term that could also include women. The living tree approach first described in this reference has expanded far beyond its immediate use in the Persons Case and has become an influential line of constitutional interpretation. The living tree approach has served to influence a broad of the reading of ‘civil rights’, as provided in the Constitution Act 1867, as a means to foster provincial human rights codes, in a manner far beyond its original purpose. Furthermore, it serves to underpin much of Canadian Charter of Rights and Freedoms jurisprudence that has taken a broad interpretation of rights (Manfredi 2001: 190).

In comparison to Canadian reference cases in general (across all decades), the Persons Case stands as an anomaly – it is one of the only instances in which a reference case has been used to protect the rights of a minority. Furthermore, it is one of the only cases in the decade of the 1930s that concerns the rights of individuals and not the rights of governments. However, it should be noted, that this was not the intended effect of the case. Instead, the JCPC’s decision was primarily concerned with interpretation of the meaning of the word persons, and if it could include women as well as men. As a result,
if the statute under consideration by the JCPC had explicitly stated men and not ‘persons’ it is likely that women would not have been protected by its decision. Furthermore, it is important to remember that even though this case effectively extended a right to a minority group, this case was still essentially about government power – specifically the power (and indeed the right) of the Governor General to appoint women to the Senate.

During the 1930s, governments in Canada found it necessary or advantageous to seek a reference opinion from Canadian courts at a greater rate than any other decade. As detailed above, a significant number of these references were the result of the political maneuvering of the federal government led by Prime Minister King. The King government was able to utilize the reference procedure successfully to achieve several political goals. First, the King government was successful in blocking the implementation of R. B. Bennett’s New Deal legislation without appearing anti-labour and anti-reform. In this instance, the reference acted as a stopgap measure, it invalidated the legislation while at the same time it did not require the government immediately to fill the legislative void. References were also used effectively by the King Government as a means to respond to legislation by the Social Credit government in Alberta infringing federal jurisdiction. Although this political episode only resulted in two reference cases, these two cases served to not only prevent the Aberhart government from implementing the three specific policies referred to the court in the Reference re Alberta Statutes [1938] S.C.R. 100, [1939] AC 117, it also served to demonstrate to the Aberhart government that the federal government was willing to protect its legislative jurisdiction through the courts.

These two political episodes demonstrate that the high number of cases during the decade of the 1930s is fundamentally reflective of the political episodes of that particular time. Reflecting on this time period, Mallory explains, “A particular judicial decision in a particular case, or even a body of case-law made up of a series of decisions, does not take place in a vacuum in which the result is a simple arithmetical conclusion from purely abstract data” (1956: 181). Instead the references of the 1930s not only reflect central priority of the time period, dealing with the economic depression, the references also serve to demonstrate the difficulties of applying the federal division of powers as outlined in the Constitution to various problems such as the making of treaties, the recognition of minority rights, and the expansion of social reform. The reference power proved to be an
effective tool to secure a timely response to deal with questions of constitutionality regarding the New Deal legislation. Furthermore, because references can be initiated at the whims of a government, any increase of references use can be highly reflective of external events and debates taking place in the more political realms of Canadian Government. Beyond the fact that the topics of reference cases often concern the major debates between governments, their increase in number can reflect periods of greater political contestation in which more issues are open for debate. The fact that the reference power allows governments to initiate judicial review as a means to deal with political conflicts is a relationship that carries forward in Canadian political history and one which will be demonstrated again in the following section on the other high period of Canadian reference cases, 1980s.

Reference Case High Point II: 1980s

During the 1980s, there were 29 instances in which governments sought a reference opinion from either an appellate court or the Supreme Court of Canada. When looking at this time period in conjunction with the successive decade, the spike in reference case activity directly corresponds to a period of time that Russell (2004) defines as being characterized by mega constitutional politics. Mega constitutional politics refers to a specific period in Canadian politics (1980s to mid-1990s, see Russell 2004) in which constitutional politics are highly emotional, intense, and concern issues centered around the very foundation in which the constitution and political community stands. Many of the issues arising during a time of mega constitutional politics relate to questions of identity and the stability of the nation state. This style of politics is distinguished from routine constitutional politics because it concerns large theoretical questions, instead of addressing more technical constitutional reform (Russell 2004: 75). Mega constitutional politics in Canada has four different sources: Canadian nationalism, Quebec nationalism, regionalism, and indigenous self-government (Lusztig 1994; Russell 2004). These four forces are often in conflict with one another, seeking distinct and different ends, with competing understandings of constitutional sovereignty, making constitutional discussions intense and passionate, and constitutional change incredibly difficult (Lusztig 1994; Manfredi and Lusztig 1998).
The height of mega constitutional politics in Canada is certainly during the decades of the 1980s and the 1990s (Russell 2004: 74-75). Three different constitutional proposals and negotiations take place during this period: the 1981 constitutional negotiations, and the proposals adopted in Meech Lake, and Charlottetown. Also during this time, Quebec nationalism and sovereignty is heightened with the 1995 referendum, the reference case regarding the legality and constitutionality of the secession of Quebec, and the resulting 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 (Clarity Act). Regionalism is also at its height at this time, with the 1993 election seeing the election of the Bloc Quebecois as the official opposition and the electoral breakthrough of the Reform Party of Canada, a party rooted in sentiments of alienation in western provinces (Flanagan 2009). Finally, indigenous self-government and rights make inroads into national debates through the rejection of Meech Lake (led by Elijah Harper in Manitoba), the Oka crisis in Quebec, and the participation of indigenous groups in patriation and the drafting of the Charter.

In the era of mega constitutional politics, political episodes spill over into the courts both directly and indirectly through reference cases, with fifty cases taking place in this twenty year period, almost one quarter of the entire number of reference cases in Canadian history (207 cases). The indirect impact of mega constitutional politics is reflected in cases that concerned some of the same issues that gave rise to disputes between the provinces and the federal government during the constitutional negotiations, such as disagreements over natural resources. Direct impacts are references cases that are the direct result of a mega constitutional episode.

Another important feature of this era that serves to influence not only the number of reference cases, but also the subject of such cases is the rise in executive federalism. Executive federalism can be identified as a process of intergovernmental negotiation between the executives (prime ministers, premiers, and members of cabinet), which is often removed from both public participation and scrutiny (Watts 1989; Meekison et al. 2003). Executive federalism relies on high-level discussions between executives of governments often in the form of first minister’s conferences. Along with a lack of public participation, executive federalism contributes to the centralization of power within
Canadian parliamentary government, as it often does not provide a role for the legislative branch and parliamentarians (Savoie 1999). Indeed, it is executive federalism that provides the vehicle for the many episodes of mega constitutional politics; best illustrated through the 1981 constitutional negotiations, and both the Meech Lake and Charlottetown accords. The expansion of executive federalism has occurred alongside the growth of government activity and priorities in policy spheres that cut across jurisdictional boundaries. This expansion not only serves to distort the division of constitutional jurisdiction between governments, it also means that policy change of one level of government can have a significant impact on another government and its legislative agenda (Meekison et al. 2003).

Considering these features of executive federalism, it is not surprising that there is a corresponding increase in reference cases during the height of executive federalism. As will be demonstrated with an analysis of some of the cases during this era, it is clear that the reference case process not only shares many of the same features of executive federalism, it also serves as an extension of this style of intergovernmental relations into the courts. As mentioned previously, the decision to pursue a reference is made at the highest level of the executive through cabinet. It does not involve the participation of members of parliament or the public. Moreover, as will be demonstrated by the analysis that follows (in Chapter Five), references can serve as a useful tool for the executive when relations with other governmental executives reach an impasse. Additionally, as constitutionally defined jurisdictional boundaries become less clear, an advisory opinion from the Supreme Court or provincial appellate court can prove to be an extremely valuable policymaking tool, in a manner that is faster and allows for more control compared to routine litigation. Furthermore, as will be detailed below, the majority of references during this era concern governmental power and the relations between governments. Regardless of the fact that the Charter becomes an intervening factor during this decade, the majority of the cases still concern the division of powers and the Constitution Act, 1867, further demonstrating that the reference procedure is an effective tool of political executives/elites and has not been utilized by rights seeking Charter groups (see Cairns 1992). It is interesting to note that even though governments have the power to initiate reference cases concerning the Charter, Charter-based references are
much less common and governments do not make great use of the reference power in this manner.

As demonstrated by Table 3 below, a majority of the reference cases (over 55 percent) during the 1980s concerned the Constitution Act, 1867, which is indicative of disputes over federal-provincial powers and jurisdiction. With the focus on constitutional questions and the powers of governments, only a small portion of the cases (just under 14 percent) concerned issues of statutory interpretation. Additionally, although the Charter becomes an important factor during this decade in Canadian politics, it did not come to dominate the reference cases of this era. A majority of references during this era concern the division of powers and sections 91 and 92 of Constitution Act, 1867, which demonstrates that the cases of this era focus largely on the powers of governments, rather than the powers of individuals or groups.

This finding echoes the arguments regarding the differences between Canada’s two constitutional documents made by Cairns (1992). According to Cairns, the Constitution Act, 1982 is the citizen’s constitution, concerned with individual and collective rights and limiting governmental power. In comparison, the Constitution Act, 1867, is centrally a government constitution, primarily concerned with defining the power of governments and the division of powers between governments, leaving no room for citizens. Cairns argues that following the introduction of the 1982 Constitution and the Charter, the debate shifts and opens up to include the participation of individual citizens and groups. This democratization of constitutional debates to include the rights of citizens that occurs elsewhere is not replicated within the reference cases of this era. Indeed, as the reference power is solely the tool of governments, it serves to continue as a site of executive federalism, and does not demonstrate the greater shift towards individual rights/post-materialist values that occurred in the courts in general, following the Charter.
Table 3 – Issues of Reference Cases in the 1980s

<table>
<thead>
<tr>
<th>Case Subject Area</th>
<th>Primary Issue</th>
<th>Secondary Issue</th>
<th>Tertiary Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Constitution Act 1867:</strong></td>
<td>16 (55.2%)</td>
<td>4 (13.8%)</td>
<td></td>
</tr>
<tr>
<td>Division of Powers</td>
<td>13 (44.8%)</td>
<td>2 (6.9%)</td>
<td></td>
</tr>
<tr>
<td>Non-Division of Powers</td>
<td>3 (10.3%)</td>
<td>2 (6.9%)</td>
<td></td>
</tr>
<tr>
<td><strong>Constitution Act 1982:</strong></td>
<td>7 (24.1%)</td>
<td>2 (6.9%)</td>
<td>1 (3.45)</td>
</tr>
<tr>
<td>Charter of Rights</td>
<td>7 (24.1%)</td>
<td>2 (6.9%)</td>
<td></td>
</tr>
<tr>
<td>Non-Charter</td>
<td></td>
<td></td>
<td>1 (3.4%)</td>
</tr>
<tr>
<td><strong>Statutory Interpretation</strong></td>
<td>4 (13.8%)</td>
<td>4 (13.8%)</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>2 (6.9%)</td>
<td>2 (6.9%)</td>
<td></td>
</tr>
<tr>
<td>Missing</td>
<td>0</td>
<td>17</td>
<td>57</td>
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<tr>
<td>N=29 (100%)</td>
<td></td>
<td></td>
<td>28^58</td>
</tr>
</tbody>
</table>

Reference re: Authority of Parliament in Relation to the Upper House [1980] 1 S.C.R. 54 (Upper House Reference) marks the first case of the 1980s decade, and as a case considering the complete reform of the Canadian parliament, it sets the tone for the constitutional reform cases of the 1980s. This case marked one of first times that the discussions of constitutional reform in the legislative branches of government made its way into the courts during the era of mega constitutional politics. Yet, this case did not appear out of a void. The provincial election of the Parti Quebecois in the fall of 1976, and the very real prospect of Quebec sovereignty served to push the Canadian Constitution back onto the public debate, forcing the federal and provincial governments to participate (Russell 2004: 92). While intergovernmental negotiations regarding constitutional reform were ongoing, little progress was made, prompting the Trudeau government to introduce Bill C-60, a unilateral attempt by the federal government to force constitutional change and reform of the Senate (McMurtry 1983). Bill C-60 was quite ambitious; it not only proposed to fundamentally change the Senate from a house of appointment to an elected body, it also proposed a Charter of Rights, a domestic constitutional amending formula, and constitutionally entrenched the Supreme Court and to limit the power of the executive (see: Desserud 2008).

In the Upper House Reference, the Supreme Court of Canada was asked two multi-part questions that concerned the reform of the Senate through various provisions such as reforming the selection method of members, tenure, and the representation of provinces and territories. Although the Trudeau government referred the questions, this

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57 Missing data represents the cases that did not have two issues.
58 Missing data represents the cases that did not have three issues.
action was in response to the opposition of provincial governments to the proposed reform package (Mendelsohn 2013). Ultimately, this reference provided the Court with one of the first opportunities to advise on the federal government on how to amend the constitution vis-à-vis the UK power to amend the Canadian constitution. In a unanimous decision, the Court found the unilateral reform attempt by the federal government to be outside its constitutional jurisdiction. The Parliament of Canada’s ability to amend the Senate is limited to ‘housekeeping’, as provinces have a legitimate claim in the functioning of the Senate, which entailed that changes to the constitutional role of the Senate could not be duly enacted without the participation of the provinces.

Although through the *Upper House Reference*, the Supreme Court essentially blocked the Trudeau government’s plan for constitutional change via Bill C-60; this did not quell the desire for constitutional amendment and reform. While the calls for constitutional change became more subdued following the reference, the re-election of the Trudeau Liberals in Ottawa and the lead up to a referendum campaign in Quebec, pushed constitutional reform back into the bargaining table, this time with more force than any previous period (Russell 2004). Indeed, speaking at a rally, just days before the referendum vote in Quebec, Trudeau promised that a ‘No’ vote for sovereignty would ensure the return to constitutional negotiations and a renewal of the constitution. Although executive level negotiations resumed following a successful ‘No’ campaign, they were ultimately unsuccessful. The impasse in negotiations was met with a public announcement from Prime Minister Trudeau that the federal government would proceed unilaterally with constitutional reform and repatriation. It should be noted that previous constitutional amendments that directly affected provincial powers proceeded with the unanimous consent of all provinces. That being said, as Hogg (1992) notes, the role of the provinces in constitutional amendment was unclear and federal practice of obtaining provincial consent was inconsistent. Furthermore, Trudeau’s proposed amendments, the Charter of Rights and a constitutional amending formula, had clear implications for provincial powers (Hogg 1992).

Understandably, the public declaration by Trudeau was not met with enthusiasm from the governments of several provinces. The governments of Quebec, Manitoba, and Newfoundland initiated reference cases at their respective provincial appellate courts,
which questioned the constitutionality of the federal government’s declaration of unilateral amendment as a matter of both law and constitutional convention (Mandel 1994). These references are remarkable for two reasons. First, it was generally agreed that the proposed amendments did conventionally require the consent of the provinces (Hogg 1992; Mandel 1994). As a result, the three provinces were seeking a reference opinion from the courts to confirm what was generally already accepted. This not only directly implicated the courts in the political conflict; it also spoke to the power of a pronouncement from the courts as a mechanism of protecting or supporting a particular position within a political debate (the power of this institutional authority will be further examined in Chapter Five). Second, these references mark the first time that courts were asked to make a direct ruling on the existence of a constitutional convention (a norm of political behavior that has been accepted over time), which in Canadian law are considered non-justiciable and outside the purview of the courts (Mandel 1994).

The provincial appellate courts returned conflicting answers to the reference cases: Quebec and Manitoba (in divided decisions) in favour of the unilateral move, while Newfoundland was unanimously opposed. All three provincial references were further appealed to the Supreme Court and combined for *Reference re Resolution to Amend the Constitution of Canada* [1981] 1 S.C.R. 753 (*Patriation Reference*). This case garnered more attention from the public and media than any other episode in the Court’s history up to this point (Snell and Vaughan 1985). Indeed as Russell (2011) notes, this case marks the first and last instance in which the Court released a decision on live television. Ultimately, the *Patriation Reference* did not fully propel the federal government forward with amendment, nor did it serve to block the unilateral movement by Trudeau. Neither side could be fully satisfied with the outcome. The Court unanimously found that the constitutional reform package affected the powers of provinces, yet this was the only aspect of the decision that provided a clear direction. The Court was asked to sort out if either legal or constitutional conventions prohibited the patriation of the constitution without the provinces. Addressing constitutional conventions, six of the justices found that a ‘substantial degree of provincial consent’ was

59 Mandel (1994) notes that of the 13 justices that heard the provincial references, 6 were against the federal government and 7 in support, further demonstrating the ambiguous force of these appellate court decisions.
necessary, but did not define what constituted a substantial degree. The majority found that the federal government could legally submit a resolution to amend the constitution to the U.K. Parliament without the consent of all provinces, but doing so would offend constitutional convention. More specifically, because the formal power to amend the Canadian constitution still belonged to the U.K. Parliament, the majority’s decision was limited to examining the power of the Canadian Parliament to pass such a resolution, without the participation of the provinces. The majority concludes that there is no limitation on the power to submit a resolution by the Parliament of Canada.

The Supreme Court’s decision in the *Patriation Reference* was highly criticized by scholarly commentators (see: Snell and Vaughan 1985; Mandel 1994; Russell 2004; Russell 2011). This analysis questioned the quality of the jurisprudence largely because of the opacity of the Court’s decision and reasoning, which did not provide a clear direction to either party in the debate. Additionally, many were critical of the Court’s willingness to address matters of constitutional convention, based on the principle that conventions are not enforceable by law and through the courts. This engagement with convention not only occurred with a lack of precedent (Mandel 1994); it also inserted the Court into a highly political debate on the basis of addressing conventions, an extra judicial matter beyond their purview in principle (Snell and Vaughan 1985; Russell 2011). The opaqueness of this decision did not stop political actors from respecting the findings of the Court. Instead, in his reaction to the decision, Trudeau explained that his government would respect the decision (Russell 2004). Regardless of the fact that the decision did not find a clear winner in the political conflict over patriation, it forced the parties back to the bargaining table in November of 1981, finally resulting in a constitutional package that received the support of all provinces except Quebec.

The absence of Quebec support in the 1981 agreement leads to the final constitutional negotiation reference case of this era, *Reference re Amendment to the Canadian Constitution* [1982] 2 S.C.R. 793 (*Quebec Veto Reference*). As a direct result of the agreement reached in November 1981 without Quebec, the Government of Quebec referred the following to the Quebec Court of Appeal: “Is the consent of the Province of Quebec constitutionally required, by convention, for the adoption by the Senate and the House of Commons of a resolution the purpose of which is to cause the Canadian
Constitution to be amended…” (at page 798). The Court of Appeal found that, as a matter of convention, the consent of Quebec was not required for the constitutional amendment, a ruling that was subsequently appealed to the Supreme Court. Unlike the previous decision regarding constitutional amendment, in the *Quebec Veto Reference*, the Supreme Court provided a unanimous decision with a clear direction: the Province of Quebec did not hold a veto over constitutional amendments. As the *Constitution Act, 1982* was already in place by the time the Supreme Court rendered its decision; the *Quebec Veto Reference* did not receive the same attention as its predecessor, the *Patriation Reference*. That being said, according to Russell (2011) the decision of the Court helped to provide essential impetus that led towards the highly contested 1995 sovereignty referendum, demonstrating that reference cases and episodes of mega constitutional politics are linked beyond the specific issues decided by the courts in the immediate case.

The constitutional negotiation cases are part of a larger trend of disputes between governments in Canada in the 1980s. Indeed conflicts between governments resulted in several federalism-based reference cases during this decade. One reoccurring theme in these cases is disputes over the division of powers and the management and ownership over natural resources. This pattern is indicative of greater trends of conflict between provinces and the federal government over natural resources beginning the 1970s and the OPEC oil crisis. As Cairns et al. (1985) explain, during this period, when negotiations between provinces or between provinces and Ottawa ceased or a case appeared to be clearly in favour of the initiating government, legal action in the courts, including reference cases, were an essential “bargaining chip” in disputes over natural resources. Six of the division of power cases concerned control, ownership, and regulation of natural resources, most often in disputes between the federal government and a particular province. However, one case, *Reference re: Upper Churchill Water Rights Reversion Act*

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60 *Mining and Mineral Rights Tax Act* [1982] 2 S.C.R. 260; *Mineral and Other Natural Resources of the Continental Shelf* [1983] 145 D.L.R. (3d) 9; *Upper Churchill Water Rights Reversion Act* [1984] 1 S.C.R. 297; *Ownership of the Bed of the Straight of Georgia and Related Areas* [1984] 1 S.C.R. 388; *Reference re Seabed and Subsoil of the Continental Shelf offshore Newfoundland* [1984] 1 S.C.R. 86; *Reference re Proposed Federal Tax on Exported Natural Gas* [1982] 1 S.C.R. 1004; it should be noted here that *Newfoundland Continental Shelf* and *Mineral and Other Natural Resources* concern largely the same matters, however the provincial decision, *Mineral*, was not directly appealed to the Supreme Court in *Newfoundland Continental Shelf*, as the first case is a reference from the provincial government, while the second is a federal reference. Additionally, each reference poses different questions. It is for these reasons that they are considered separate cases, regardless of overlapping subject matter.
1980 (Newfoundland) [1984] 1 S.C.R. 297 (Upper Churchill Water Rights) was a dispute between the provinces of Newfoundland and Quebec, and Reference re: Mining and Mineral Rights [1982] 2 S.C.R. 260, was a reference in which Newfoundland was opposed by several corporations.

Three cases—Reference re: Mineral and Other Natural Resources of the Continental Shelf [1983] 145 DLR (3d) 9 (Newfoundland Continental Shelf Reference); Reference re: Seabed and Subsoil of the Continental Shelf offshore Newfoundland [1984] 1 S.C.R. 86; and Reference re: Ownership of the Bed of the Straight of Georgia and Related Areas [1984] 1 S.C.R. 388—all concerned the ownership over specific areas of land and the natural resources associated with that area of land. The first two consider the coast of Newfoundland and Labrador, while the last the coast of British Columbia. Each case asked the courts to grant ownership over the lands to either the federal or provincial government, as jurisdiction over the specified areas would be an economic asset with the expansion of oil and gas development (Hildreth 1991). According to Hildreth (1991) these cases are indicative of the approach that Canada has chosen to take when dealing with offshore federalism and demonstrate that the governments in Canada have preferred a case-by-case basis rather than create comprehensive legislation, as litigation has proven to be more profitable for coastal jurisdictions of lesser political and economic status. In Newfoundland Continental Shelf Reference, the Supreme Court found in favour of the federal government, finding support for its position in the fact that provincial powers are confined by section 92 of the Constitution and that the area under debate extended beyond the provincial geographical boundaries. In Mineral and Other Natural Resources of the Continental Shelf, a case that was decided prior to Newfoundland Continental Shelf, the Newfoundland Court of Appeal largely found in favour of the federal government. The Appeal Court held that the federal government held jurisdiction over the continental shelf (and potential for natural resource development), but that the province did retain power over the seaward limit of the territorial sea. However, despite these rulings, once Prime Minister Mulroney and the Progressive Conservative Party came into power in the mid-1980s, the government moved away from combative negotiations (and thus the courts) with the provinces and adopted the cooperative federalist agreement in the Atlantic Accord (Cairns 1992).
Reference re Proposed Federal Tax on Exported Natural Gas [1982] 1 S.C.R. 1004 (Alberta Gas Tax Reference) and Reference re Mining and Mineral Rights Tax Act are two reference cases that concern the governmental regulation of natural resources. In Mining and Mineral Rights, the Government of Newfoundland referred to its Court of Appeal, the Mining and Mineral Rights Tax Act to verify its constitutional validity, as several corporations that would be subject to the new taxation under the Act opposed it. The Court of Appeal found the act to be a valid exercise of the provincial power over direct taxation in s.92 of the Constitution Act, 1867 and intra vires the Province. This ruling was upheld on appeal to the Supreme Court of Canada. Similar to Mining and Mineral Rights, the Alberta Gas Tax Reference was also born out of opposition to a governmentally imposed tax on a natural resource. This interesting case demonstrates how a reference can be utilized effectively to attain a political goal (in the same vein as the references of Prime Minister King), along with a means to adjudicate jurisdictional disputes. The Government of Alberta, in opposition to the Trudeau Government’s National Energy Program (NEP) launched a reference at the Alberta Court of Appeal as a means to challenge a proposed export tax to be imposed by Ottawa on the province.

When negotiations over energy policy between the Province of Alberta and the federal government stalled, the Trudeau Government introduced the NEP, which included a tax on exported gas, something that the Alberta government, led by Premier Lougheed, vehemently opposed. The province submitted a reference case based on a hypothetical contract with an American company on a non-existent pipeline as a means of testing the constitutionality of the proposed federal government tax. This case demonstrates a highly strategic use of the reference power, as the Alberta Government was able to manufacture hypothetical facts favourable to its position in order to achieve a desired outcome in the courts, a mechanism that would not be possible with routine litigation (Riddell and Morton 2004). Thus, like the Alberta Social Credit reference, the reference power can be effectively utilized as a means to block another government from legislative action, regardless of the fact that the legislation was not yet in effect. Furthermore, in both instances, reference-initiating governments were able to achieve their political goals when negotiations between governments had stalled.
1930s and 1980s Compared: References Become a Tool of the Provinces

The two decades highlighted in this analysis, the 1930s and 1980s mark two unique periods of significant transition and challenge in Canada. Addressing the Depression and creating new ways to regulate the economy consumed Canadian politics in the 1930s, while national unity and a new constitutional regime dominated the political landscape of the 1980s. These two moments of profound transition inevitably led to conflict between levels of government and an increase in the number of reference cases. One feature of the reference cases during the 1980s that stands in stark contrast to the 1930s is the fact that provincial governments initiated the overwhelming majority of the cases during this period: 26 of 29 cases or 89.7 percent. When looking at the 1930s this figure is almost completely reversed, with the federal government initiating 23 of the 30 reference cases, or 76.7 percent of all cases during this decade.

In the 1930s the greatest proponent of the reference power was the central government under Prime Minister King. As part of his strategy to deal with the Bennett New Deal legislation, King relied on the courts to find it ultra vires (Cairns 1971). Considering that the issues of constitutionality of the legislation centred on an infringement of provincial jurisdiction, it is quite likely that provincial governments would have challenged the legislation. However, due to the King Government’s position on its predecessor’s legislation, provinces did not have to challenge the legislation themselves. During this era, the federal government was technically challenging its own legislation and as such, the reference was not being used in an anti-provincial power fashion. Instead, by submitting the New Deal legislation to the courts through a reference, with the belief that the legislation would be ultimately found ultra vires, the federal government was actually inadvertently strengthening provincial jurisdiction. While it is unknown if provinces would have challenged the Bennett New Deal, the King Government’s opposition of this legislative scheme and the resulting the reference cases helped to increase the number of federal government references, while not adding to the provincial total of reference cases.

Furthermore, as a result of the Depression, the provinces simply lacked the financial capacity to effectively manage the economic turbulence. As Russell explains,
“provinces were going bankrupt and it was evident that only a strong central government could deal effectively with the economic and social consequences of a worldwide depression” (2004: 61). The inability to effect legislative change on behalf of the provinces only served to aid the centralist orientation of the federal division of powers. Indeed, during this time (the 1930s) until into the 1950s, the Canadian system was highly skewed towards Ottawa, and provinces were unable effectively to protect their own constitutional jurisdiction (Smiley 1962; Cairns 1977; Russell 2004).

The strong centralist nature of the Canadian political system was further aided by the outbreak of World War II, with a corresponding rise in nationalism and postwar reconstruction led by the federal government (Russell 2004). This era is often referred to as cooperative federalism – a period where the federal government established itself as the provider of social programs and national standards, a reflection of the strength of the federal public service and the economic abilities of the federal government, largely with the consent of the provinces (Stilborn 1997; Cameron and Simeon 2002). Cooperative federalism inherently results in a decrease in provincial autonomy. Indeed, provinces contribute to this decrease of autonomy either through inaction or lack of opposition to the expansion of federal power. As a result, provincial governments would be less likely to challenge federal incursions into their constitutional jurisdiction simply because they could not fill the void themselves, making it less likely that provinces would initiate a reference case. Instead, provinces generally acquiesced to federal government development of many social programs. This centralist orientation was further aided by the 1937 Rowell-Sirois Commission on federal-provincial relations that recommended the transfer of provincial debt to the federal government and the constitutional amendment to section 91.2(a), which resulted in the transfer of jurisdiction of unemployment insurance to the federal government (Smiley 1962). As a result, provinces are less likely to initiate references when they simply are not creating legislation that could prompt the need for a constitutional reference. Moreover, provinces were also less likely to challenge the federal government legislation through a reference case, as federal incursions into provincial jurisdiction were accepted and at times welcomed.

The shift towards the greater provincial use of the reference power following the 1950s is reflective of the increase in provincial autonomy and the move towards a more
collaborative style of federalism (Cairns 1977; Baier 2006; Cameron and Simeon 2002). The awakening of Quebec through the Quiet Revolution resulted in the province’s becoming the main force in fostering provincial powers through its campaign to be maîtres chez nous. This desire for the increase in provincial power by Quebec and the search for a ‘made in Canada’ amending formula served to reinvigorate provincial powers across Canada, leading to a movement away from the cooperative style of federalism that prioritized the central government (Russell 2004). Federal-provincial relations were now either collaborative or competitive, in that provinces are now viewed as an equal partner or adversary of the federal government in the production and delivery of Canada-wide policy and national standards (Cameron and Simeon 2002; Meekison et al. 2003).

This increase takes place not only because provinces are simply legislating more, providing more opportunities for references, but also because the increase in provincial power allows for a greater ability to challenge federal incursions into provincial power through a reference case. Indeed, when analyzing the snapshot of references in the 1980s, we are presented with many instances in which provinces challenged the federal government and attempted to protect provincial jurisdiction. This can be evidenced through the above-mentioned examples such as the Alberta challenge to the Federal government’s NEP legislative program, and the Government of Newfoundland’s challenge to the federal assertion of jurisdiction over the continental shelf.

Following the 1950s, there was an expansion of provincial power, which stemmed from the increased importance of areas of provincial jurisdiction, like health care and education. At the same time, relations between federal and provincial governments became more collaborative (provinces as equals) or competitive (provinces actively protecting their jurisdiction). These changes are mirrored in the use of references by government over time. Indeed, following the 1950s, provincial governments become much more active in their use of the reference power. References can provide governments with the means to protect legislation from jurisdictional challenge by another government through a supporting reference decision by an appellate court. Furthermore, references can be used as a means to challenge the constitutionality of legislation of another government that can provoke a finding of unconstitutionality in
manner that is much more expedient than a challenge based on routine litigation. When considering that references can be utilized in such a manner, it is not surprising that we find the increased use of the reference power by provincial governments during instances of increased provincial autonomy in intergovernmental relations and constitutional process, as following the 1950s and peaking in the 1980s. As a result, through the expansion of provincial constitutional power in terms of importance and demand, and the evolution of intergovernmental relations, provinces have come to use references effectively – a power that was created to control them – to attain their own goals.

CONCLUSION
This chapter has provided an overview of all Canadian appellate court reference cases from 1874 to 2014, through a comprehensive analysis of all reference cases across time. The goal of this chapter was to explain the foundation of reference cases through an analytical description of their creation and current use and statutory status. Through a within-case comparison, this chapter has provided a comprehensive assessment of these cases cross time, with specific analysis of the two periods (the 1930s and the 1980s), in which more references were initiated by governments (both federal and provincial) compared to any other time. This analysis has demonstrated that the fluctuations in the number of reference cases over time is both reflective of, and directly related to, other events taking place within Canadian politics, such as the Depression, the Social Credit experiment in Alberta, mega constitutional politics and evolutions in federal–provincial relations.

In tracing the roots of the Canadian reference power, this chapter has demonstrated that the federal government created the ability to ask reference questions as a means to supplement the powers of reservation and disallowance. During the early years of the reference power and when the power of disallowance was still routine exercised, parliamentarians believed that references would provide important legitimacy to the invalidation of legislation in a way that simply could not be achieved from simply exercising disallowance. Indeed, if a court found provincial legislation to be ultra vires through a reference and that legislation was subsequently disallowed by the Governor General acting on the advice of the minister of justice, then the disallowance would be
more legitimate as it would be supported by the constitutional advice of the Supreme Court. This early motivation for the use of the reference power as action or position legitimization tool is one benefit of the reference power that carries through to present date. As the independence and authority of the Supreme Court has increased over time, the effectiveness of using a reference in this manner will undoubtedly also increase. This is a reoccurring theme when discussing the use of the reference power and one that will be revisited in greater detail in Chapter Five.

Aside from supplementing or replacing the power of reservation and disallowance, this chapter has demonstrated that the Parliament of Canada created the reference power with the intention to allow a government to directly challenge the constitutionality of legislation of another government without having to engage in routine litigation that would require a concrete dispute and a set of facts to litigate. Governments have demonstrated that initiating a reference case can be a means to sort out constitutionality, and a finding of *intra vires* by the courts can help to insulate the legislation from future legal challenge. When assessing which government (either federal or provincial) initiates references over time, these data demonstrate a shift from references being the tool created by the federal government to one more routinely utilized by provinces. Through a temporal analysis of the concurrent events taking place in Canadian politics at the time, context has been provided and has helped to explain the changes in reference cases across time.

This analysis has demonstrated that even though there are few restrictions on what governments can refer to courts in reference cases, the subject of these cases have remained largely about the powers of governments and the division of powers between the provinces and the federal government. Only a small portion of reference cases have been used to ask the courts about responsibilities regarding the protection of individual rights, with cases concerning the *Constitution Act, 1867* forming the basis for the majority of references across the time period under analysis. Additionally, the cases concerning the rights of indigenous Canadians and the responsibilities of governments in relation to indigenous groups are noticeably absent from the content of reference cases.

The evaluation of all Canadian reference cases in this chapter lays the essential foundation for the analysis that follows. It provides a necessary and essential description
of the creation of the reference power and how it has been used over time. Relying on this analysis, the following chapter will undertake a deeper examination of references cases post-1949, following the end of appeals to the Judicial Committee of the Privy Council. This post-1949 analysis will allow for an examination and comparison of these cases in relation to the trends associated with Canadian appellate courts in general, with particular attention to the behavior of the courts in references, the parties who participate in reference cases and the style of review.
CHAPTER FOUR: CANADIAN REFERENCE CASES POST-1949, ROUTINE POLITICS AND NON-ROUTINE LITIGATION

This chapter provides an analysis of all reference cases from 1949 to 2014 and compares the findings to trends associated with Canadian courts in general, allowing for contextualization and comparison. The starting point for the analysis is 1949 because this is the year in which appeals to the Judicial Committee of the Privy Council (JCPC) were abolished, profoundly changing the Canadian court system. Starting in 1949, the Supreme Court became the highest point in the Canadian judicial system and the final arbiter of all legal matters in Canada. Prior to this, the Supreme Court of Canada was only viewed as a step on the way to the JCPC, and its decisions (and often its members) were not afforded the same respect and stature associated with the Court in the more recent era (Snell and Vaughan 1985). In 1949, the membership of the Court was increased from seven members to the current nine and the jurisdiction of the court expanded to reflect the jurisdiction previously held by the JCPC. The quality of individuals appointed to the Court post-1949 substantially increased and the Supreme Court was no longer viewed as a place of patronage (Snell and Vaughn 1985). The judiciary was now understood to be an independent and separate branch of government. Interactions between members of the Court and members of the executive and legislative branches became much less frequent (Russell 1987). Moreover, for purposes of comparison, existing scholarship on Canadian courts often does not include the pre-1949 period.

This chapter details the behaviour of courts and parties in reference cases, comparing it to the findings of previous scholarship on courts and judicial politics, when possible. This comparison with existing literature provides an understanding of how reference cases compare to routine litigation. The analysis in this chapter is essential as it provides an understanding of many features and trends of reference cases that are previously unknown. This chapter seeks to understand if courts, governments, and other parties to reference cases, such as third-party interveners, respond to reference cases in a manner that is distinct from routine review and previous research on Canadian appellate
courts. This chapter seeks to address the following questions: are courts less likely to invalidate government action because of the abstract nature of many references? Do courts refuse to answer reference questions and what are their reasons for doing so? More theoretically, how does question refusal relate to a separation of powers and the protection of judicial independence? In terms of government behaviour, what types of questions do governments ask in references – do they use references for concrete or live disputes? Has there been a noticeable increase in the number of Charter based reference cases, following the introduction of the Charter in 1982? Finally, do reference cases present a unique opportunity for participation for third-party interveners and do interveners participate in reference cases at greater rate than routine litigation?

This chapter provides answers to these questions through an analysis of the reference case data set and comparison to existing empirical literature. The context provided in this chapter increases the ability to engage in descriptive inference and assess how reference cases relate to litigation in Canadian appellate courts, in general. By looking at references in a comparative manner, the analysis in this chapter provides insight into the reference power beyond internal case comparison, serving to increase explanation and aid in theory development (see George and Bennett 2005). This analysis not only broadens our understanding of reference cases and how the reference power is used, it also provides insight into any distinctions between reference cases and routine litigation in Canadian appellate courts. Finally, understanding government reference behaviour helps to explain why governments use the reference power and the advantages that can be gained through a reference case, such as the unique opportunities provided by abstract review. The analysis in this chapter along with Chapter Three helps to provide a foundational understanding of why governments ask reference questions through an analysis of existing cases bringing the present study closer to fully addressing the

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61 The comparison with existing scholarship in this chapter must be done with acknowledgement that the scholarship on Canadian courts is disproportionately focused on the Supreme Court of Canada, and often does not include provincial appellate courts. As Hausegger et al. (2013) note, this focus on the Supreme Court is understandable given its position in the Canadian judicial hierarchy. However, considering the Court only hears approximately 100 cases per year, provincial appellate courts serve as the final court of appeal for the majority of legal matters in Canada and thus warrant greater scholarly analysis. The inclusion of data on provincial courts in the present analysis is thus done with the intention of furthering our understanding of these important, but under examined courts.
research question, which is carried through and completed in Chapter Five’s empirical and theoretical analysis.

This chapter documents several noteworthy findings. In terms of subject matter, these data demonstrate that there has not been a great influx of Charter related reference cases, post 1982. Instead, the majority of references still consider the division of powers between provincial and federal governments and the Constitution Act, 1867. This analysis also finds that courts are quite willing to invalidate (either partially or in-full) government action in reference cases and they do not respond to references in a manner that is markedly different than routine litigation. This finding is especially interesting considering the unique circumstances in which reference cases come about and the fact that most cases do not concern a live, concrete dispute. Indeed, this chapter also demonstrates that the majority of reference cases are abstract review. That being said, this analysis also documents, for the first time, use of the reference power to deal with concrete matters, an aspect of the reference power that has not been discussed in previous literature. On a related note, although scholars have made theoretical claims about the ability of courts to refuse to answer reference questions, this chapter provides the first empirical assessment of how often this actually takes place. This chapter finds that courts refuse to answer all questions referred to them in a substantial number of cases (almost 18 percent of cases post 1949); however the majority of these refusals are for practical reasons. This empirical finding is examined in light of the theoretical concerns regarding judicial independence and a separation of powers that underpin discussions over reference question refusal.

Focusing on participation in reference cases, this chapter demonstrates that political parties from all points along the spectrum have initiated reference cases, with conservative parties (Conservative Party of Canada and the Progressive Conservative Party) employing this power more than all other parties. Additionally, this chapter finds that majority governments have initiated reference cases at a much greater rate than governments that hold a legislative minority, with almost 90 percent of all reference questions submitted by a government with a legislative majority. This finding is likely indicative of the shortsighted nature of minority parliaments, which are less apt to adopt expansive public policy projects that are often the subject of reference cases. Finally, the
analysis in this chapter finds that reference cases attract a high level of participation by interest groups, and other third-party interveners, at a rate of almost 93 percent of all cases. The high rate of third-party intervention in reference cases demonstrates that reference cases are not merely mundane constitutional interpretation, instead they can be contested and controversial matters that gain the attention of groups that are not immediately involved in the case.

**OVERVIEW OF REFERENCE CASES POST-1949**

This chapter analyzes 95 reference cases. Included in this analysis are cases from provincial appellate courts and the Supreme Court of Canada. Any remaining JCPC decisions that were released after 1949 are excluded. As was demonstrated in Chapter Three, there is a clear spike in the number of reference questions submitted to appellate courts during the 1980s, a trend that slowly deceases into the 1990s, and then decreases more drastically in the 2000s (Figure 5, below). During this period, the majority of reference cases were initiated by provincial governments with 74 cases, compared to 21 cases initiated by federal governments. However, a majority of provincially initiated reference cases were appealed from provincial appellate courts to the Supreme Court, as 60 of the cases are from the Supreme Court and 35 cases from provincial appellate courts.

![Figure 5 – Reference Cases Post-1949](image)

The majority of post-1949 reference cases concerned either the *Constitution Act, 1867* or the *Constitution Act 1982* (Table 4) based on the questions referred. The majority
of cases regarded the *Constitution Act, 1867*, with the greatest proportion of these cases considering the division of powers between the federal and provincial governments or other federalism issues. An example of a division of powers case can be found in *Reference re: Securities Act* [2011] 3 S.C.R. 837 (*Securities Reference*), which asked the Supreme Court if the federal government’s proposal for a national security regulator was a valid exercise of its power to regulate trade and commerce, as provided by section 91 of the *Constitution Act, 1867*. Alternatively, a case that concerned the *Constitution Act, 1867* but did not revolve around issues of federalism (or division of powers) is *Reference re: Education Act (Que.)* [1993] 2 S.C.R. 511, in which the Government of Quebec referred a question to the Quebec Court of Appeal (subsequently appealed to the Supreme Court), regarding the constitutionality the province’s proposed plan to transfer religious based school boards (Catholic and Protestant) to school boards based on language (French and English).

Table 4 – Case Type 1949 to 2014

<table>
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<tr>
<th>Case Subject Area</th>
<th>Primary Issue</th>
<th>Secondary Issue</th>
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</thead>
<tbody>
<tr>
<td><strong>Constitution Act 1867:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Division of Powers</td>
<td>50 (52.6%)</td>
<td>8 (8.4%)</td>
</tr>
<tr>
<td>Non-Division of Powers</td>
<td>5 (5.3%)</td>
<td>4 (4.2%)</td>
</tr>
<tr>
<td><strong>Constitution Act 1982:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16 (16.8%)</td>
<td>5 (5.3%)</td>
<td></td>
</tr>
<tr>
<td><strong>Charter of Rights</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-Charter</td>
<td>16 (16.8%)</td>
<td>3 (3.2%)</td>
</tr>
<tr>
<td><strong>Statutory Interpretation</strong></td>
<td>26 (27.4%)</td>
<td>15 (15.8%)</td>
</tr>
<tr>
<td>Other</td>
<td>2 (2.1%)</td>
<td>4 (4.2%)</td>
</tr>
<tr>
<td><strong>Missing data</strong></td>
<td>1 (1.1%)</td>
<td>63 (66.3%) 62</td>
</tr>
<tr>
<td><strong>N=95</strong></td>
<td></td>
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</tr>
</tbody>
</table>

The greater proportion of cases concerning the *Constitution Act, 1867* reflects two things. First, the *Constitution Act, 1982* is simply non-existent for the first portion of this analysis. Second, many of the issues that can arise concerning the compatibility of government legislation with the *Charter* are often dealt with by courts through routine litigation (Kelly 1999). References that did concern the *Constitution Act, 1982* (almost 17 percent of cases) addressed issues of consistency of government legislation with the *Charter*. For example, in *Reference re: Marriage Act, Marriage Commissioners Act, 1995, S.S. 1995, c. M-4.1* [2011] 327 D.L.R. (4th) (*Saskatchewan Marriage

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62 Not all cases concern more than one issue.
Commissioners Reference), the Saskatchewan Court of Appeal was asked whether certain proposed amendments to the Marriage Act, 1995 to accommodate the religious beliefs of marriage commissioners when performing same-sex marriages would be in conflict with the Charter.

Finally, the category of statutory interpretation refers to reference questions that were not concerned with either constitutional document, instead asking the court to interpret whether a new piece of legislation conflicted with existing and related statutes. For example, in Reference re: Canada Assistance Plan (B.C.) [1991] 2 S.C.R. 525, the government of British Columbia challenged the legality of the federal government’s cancellation of the Canada Assistance Plan against an agreement between the Province and the federal government made in 1967. Other non-constitutional questions include instances where governments asked the courts to review a criminal conviction when doubt was raised about the guilt of individuals convicted and other means of appeal were not available, such as Re: R. v. Truscott [1967] S.C.R. 309 (Truscott Reference).

Looking at the post-1982 era exclusively (Table 5, below), it is interesting to note that cases that concern the division of powers still comprise the majority of reference cases. This demonstrates that the reference case procedure is largely used by governments to help understand constitutional jurisdiction and the division of powers, instead of the interpretation of the Charter of Rights and Freedoms. This finding is interesting considering that Charter cases comprise a majority of the Supreme Court’s constitutional law decisions, following 1982 (Hausegger et al 2015). The low number of Charter based reference cases likely demonstrates that issues concerning specific sections of the Charter reach the courts via litigation and motions during routine trials. As a result, a substantial amount of the Charter has been litigated in routine cases though the legal action of individual citizens. Charter challenges that arise out of routine litigation can force a government to defend its action or inaction in relation to the rights and freedoms of an individual citizen, in a way that cannot be achieved through a reference due to the inability for individuals to submit reference questions to the courts. The greater number of division of powers reference cases also reflects the argument made by Strayer (1988), that the reference power is an effective tool for addressing issues which individual citizens are either unable or unwilling to litigate themselves, which is especially pertinent
when considering the powers of governments. Furthermore, the greater number of division of power reference cases demonstrates that the reference power is primarily used to deal with controversies between governments, fulfilling the original purpose for the creation of the reference power. Governments are much more likely to initiate a reference case out of concern for violating the constitutional jurisdiction of another government, rather than a concern over the protection of the rights of individuals citizens or groups.

Table 5 – Case Type 1982 to 2014

<table>
<thead>
<tr>
<th>Case Subject Area</th>
<th>Primary Issue</th>
<th>Secondary Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution Act 1867:</td>
<td>27 (47.4%)</td>
<td>6 (10.6%)</td>
</tr>
<tr>
<td>Division of Powers</td>
<td>23 (40.4%)</td>
<td>3 (5.3%)</td>
</tr>
<tr>
<td>Non-Division of Powers</td>
<td>4 (7%)</td>
<td>3 (5.3%)</td>
</tr>
<tr>
<td>Constitution Act 1982:</td>
<td>16 (28.1%)</td>
<td>5 (8.8%)</td>
</tr>
<tr>
<td>Charter of Rights</td>
<td>16 (28.1%)</td>
<td>3 (5.3%)</td>
</tr>
<tr>
<td>Non-Charter</td>
<td>0</td>
<td>2 (3.5%)</td>
</tr>
<tr>
<td>Statutory Interpretation</td>
<td>11 (19.3%)</td>
<td>6 (10.5%)</td>
</tr>
<tr>
<td>Other</td>
<td>2 (3.5%)</td>
<td>3 (5.3%)</td>
</tr>
<tr>
<td>Missing data</td>
<td>1 (1.8%)</td>
<td>37 (64.9%)</td>
</tr>
<tr>
<td>N=57</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

COURTS

Although many reference cases have had significant implications for Canadian politics, it is essential to examine if the courts respond to these cases in a pattern that is distinct from routine litigation. Are courts more deferential in reference cases? Are reference cases more likely to be unanimous? Due to the high profile and controversial nature of many reference cases, are these decisions more likely to be per curiam, unanimous and anonymous like the Secession Reference or the recent Senate Reference?

63 To be sure, governments can disagree about interpretation and application of the Charter; however in Charter-based cases (both references and routine litigation) governments generally do not directly oppose one another as appellant and respondent. Instead, in Charter-based cases, the dispute is routinely between one government and a respondent (either private citizen, interest group or otherwise) and an additional government would participate indirectly as an intervenor. For example, in Reference re: Motor Vehicle Act (British Columbia) s. 94(2) [1985] 2 S.C.R. 486 (B.C. Motor Vehicle Reference), the central issue was the interpretation of section 7 of the Charter vis-à-vis an absolute liability provision in the Motor Vehicle Act, R.S.B.C. 1979. c.288, B.C. as the referring government was the central participant in the case, while several other governments (Canada, Ontario, Saskatchewan, and Alberta) acted as interveners, rather than in direct opposition to B.C.

64 Not all cases concern more than one issue.
These assumptions regarding the behavior of the courts are tested through an examination of the patterns of invalidation, unanimity, and authorship of reference cases.

**Case Dispositions**

If courts are willing to invalidate government legislation or action in reference cases, these decisions can directly block the attainment of a public policy goal by a government. A reference decision could shape how the government legislates on the public policy issue in the future or could block further government action in this policy area. In the present analysis, when a statute or act was found to be invalid, it was seen as either *ultra vires* (or outside), the jurisdictional power of the government acting, or it was found to be in violation of one of the sections of the *Charter* (Table 6). If the disposition was invalid *in part*, the court pointed to specific sections of legislation or aspects of a government action, instead of finding the action or legislation invalid in its entirety. From 1949 to present, the court most often sided with the government initiating the reference case, finding the legislation (both enacted or proposed) to be compliant with the constitution (approximately 46 percent of all cases examined). However, this 46 percent validation rate viewed in isolation is misleading. It is important to examine the first two categories (invalidation in full and in part) in conjunction with one another. When these categories are combined, courts serve as a roadblock to government action in 34 instances or 35.8 percent of the time. This figure of 35.8 percent of invalidation or partial invalidation in reference cases largely reflects the same findings for the Supreme Court’s disposition of all cases in general (Manfredi and Kelly 2004). Indeed, for example, according to Manfredi and Kelly (2004), the Supreme Court heard 177 division of powers cases (including both references and non-reference cases) from 1950 to 1984 and invalidated sixty-five governmental statutes, almost 37 percent of cases.

<table>
<thead>
<tr>
<th>Disposition by the Court</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invalid or potentially invalid in <em>full</em></td>
<td>19 (20%)</td>
</tr>
<tr>
<td>Invalid or potentially invalid in <em>part</em></td>
<td>15 (15.8%)</td>
</tr>
<tr>
<td>Valid</td>
<td>44 (46.3%)</td>
</tr>
<tr>
<td>Not applicable</td>
<td>17 (17.9%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>95 (100%)</strong></td>
</tr>
</tbody>
</table>
The disposition of reference cases demonstrates two things. First, considering that this finding is comparable to the outcome of routine litigation before the Supreme Court, it demonstrates that the courts do not view their role in finding government policy or action unconstitutional to be any different in references versus litigation. Arguably, the courts do not see their power or role to be limited by the fact that references often do not arise out of a concrete dispute with a genuine controversy between two opposing parties, as they are clearly willing to find government actions to be either invalid in full or in part. Second, due to the fact that Canadian appellate courts block the goals of legislators in over one-third of all reference cases suggests that the courts can be a strong influence on both the legitimation and creation of public policy. This demonstrates the external judicialization of politics by the judiciary, diverting power away from political actors.

Unanimity Rate and Authorship

Assessing the unanimity rate further demonstrates how courts view their role in reference cases. A high rate of unanimity can reflect that the individual preferences of the justices were less important than achieving consensus (Songer et al. 2012). A unanimous opinion could demonstrate that a court found it important to set a clear precedent on an issue of high political salience. A low number of divided opinions can either reflect a genuine agreement on the court or it could be evidence of strategic decision-making by the justices, whereby a justice would agree to sign on to a colleague’s opinion in one case in exchange for agreement on another issue or another case.\(^{65}\) Considering the highly divisive and partisan nature of some reference cases, the courts may prioritize speaking in a single voice over displaying a difference of opinion among the justices.

Beyond a unanimous decision, a court may issue an anonymous decision when facing a matter that is highly contentious and important. Macfarlane (2013) argues that when the Supreme Court is concerned with protecting its institutional legitimacy as in the Secession Reference, this style of authorship may be a priority for the justices. If this reasoning holds true, one could assume that reference decisions will be more likely to be unanimous and anonymous – *per curiam*, because references can ask the courts to step

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\(^{65}\) Teasing out the difference between these two explanations is beyond the present analysis, as it requires access to the internal decision-making of the court. For more on the strategic model see: Epstein, Lee, and Jack Knight. *The Choices Justices Make*. Washington, D.C: CQ Press, 1998.
outside the traditional institutional role of adjudication of concrete cases, and engage in the abstract review of public policy. The institutional role of a court may be threatened when a case serves to blur the line between interpretation of law and interpretation of policy/political actions. This separation between the interpretation of law from political considerations is more probable when a case lacks a concrete controversy. Furthermore, this authorship style demonstrates that the court finds it important to speak not only as one voice, but also speak with the legitimacy of the court as an institution, rather than the justices that currently fill its bench (L’Heureux-Dubé 2000).

Under the leadership of Chief Justice Laskin, the Supreme Court adopted the practice of issuing *per curiam*, by ‘the Court’ decisions, in a select number of cases. Although not an extremely common practice, occurring at a rate of 1.6 percent of all decisions of the Laskin Court and 9.8 percent of all the Dickson Court decisions (L’Heureux-Dubé 2000). That being said, there is relatively little known regarding the Supreme Court’s practice of the anonymous and unanimous ‘by the court.’ In the initial study of the emergence of the ‘By the Court’ practice of the Supreme Court of Canada, Zanoni and McCormick (2014) note that the origins of this style of authorship is relatively unknown and its use by the Supreme Court does not fit a specific pattern. While the Canadian case suffers from a lack of academic analysis, American scholarship on the *per curiam* practice of the United States Supreme Court explains that this practice has evolved to be used in the most challenging and complex cases, such as *Bush v. Gore* 531 U.S. 98 (2000) (Ray 2000). However, Zanoni and McCormick find that in the Canadian case, ‘by the court’ is not a reliable indicator of major decisions, disconfirming their initial hypothesis regarding the practice. In Canadian reference cases from 1949 to 2014, 11.6 percent of cases were attributed to ‘the Court.’ While this number is indeed greater than the percentages of the Court under two different chief justices, it does not occur at a rate that is remarkably higher than Supreme Court decisions in general. Furthermore, the lack of data on *per curiam* rates for the Supreme Court and provincial appellate courts makes it difficult to draw significant conclusions on this simple comparison.

Turning to unanimity rates, in the period of 1949 to 2014, references have a 54.7 percent unanimity rate (52 cases). While the courts did provide unanimous decisions in
more than half of all cases, this rate of unanimity is actually lower than the Supreme Court’s overall unanimity rate. From 1982 to 2003, the unanimity rate for the Court hovered around 70 to 80 percent. In 1984 the rate reached almost 90 percent, a period when the Court first started making decisions under the Charter (Songer et al. 2012: 154). When comparing to pre-Charter rates, Muttart finds that unanimity dips as low as below 30 percent in 1949 to 1954, with a high of just over 60 percent in 1963 to 1973 (Muttart 2007: 95). Following the passage of the Charter, the Supreme Court’s unanimity rate increased (L’Heureux-Dubé 2000b), and as such one could expect that Charter based references would be unanimous at a higher rate than division of power and statutory interpretation cases. Although there are a relatively low number of Charter references to examine, this trend does not hold: of the 16 cases, slightly more than half were unanimous, at 9 cases (56.25 percent). However, when compared to analysis of unanimity rates of highly visible Supreme Court of Canada decisions, scholars have found that the unanimity rate is actually lower compared to all Supreme Court cases, in general (Macfarlane 2013). Thus, while courts may wish to prioritize speaking with one voice in high profile cases, these cases are often also the more difficult and contentious issues before the court, making consensus more challenging compared to other, less visible, cases (L’Heureux-Dube 2000b).

It is important to note that a divided decision does not necessarily mean that dissenting opinions were issued. Instead, of the total number of divided opinions (43 in total), 30.2 percent were dissenting opinions, while 44.2 percent were concurring opinions. In 25.6 percent of divided opinions, the court issued both a concurring and a dissenting judgment. When justices write a concurring opinion they agree with the result of the majority opinion, but find different areas of the law to support their opinion or disagree on the specific path taken to the majority’s conclusion. Thus, a concurring opinion does not signify a great disagreement on the constitutionality of an issue. Rather, it often demonstrates a different legal reasoning used by the concurring justice. Furthermore the work of Belleau and Johnson (2008) demonstrates that a decision to concur or dissent can also be a reflection of personal characteristics and identity, rather than solely the issue before the court.
The high rate of divided opinions issued by courts in reference cases could be
demonstrative of the abstract nature of many reference cases (more on abstract review
below). In routine litigation, appellate courts address issues that have already been
examined by a trial justice and are expected to address questions of the law, rather than
questions of fact. This position in the judicial hierarchy means that appellate courts often
have the benefit of at least one previous judicial opinion to guide their assessment of the
case. When the courts engage in abstract review, as they do in many reference cases, they
do not have the benefit of a previous decision or a factual context to help shape and
inform their decision. Therefore, justices participating in reference cases can have a much
larger scope for analysis, which could foster a greater range of reasoning and
understanding of the issues raised by the question, resulting in a wide array of legal
arguments.

**TYPE OF JUDICIAL REVIEW**

As there are few parameters on what governments can ask courts in reference
cases, there is a great variation in the style of judicial review and type of case. Cases were
analyzed to measure if the questions being referred asked the court to engage in either
concrete or abstract review. Understanding what types of questions and what style of
judicial review governments initiate reference cases to address helps to understand why
governments ask reference questions. More specifically, the structural differences
between a reference case compared to routine litigation that may motivate a government
to seek a reference opinion. Abstract review requires the adjudication of an issue or
controversy entirely in the absence of a live dispute, case, or controversy. In many
instances, abstract review asks a court to rule on the constitutionality or legality of
hypothetical government action or a piece of legislation that may or may not be in
force. This style of review requires the court to consider questions in the absence of facts
resulting from a dispute between two or more parties. Concrete review on the other hand,
is what most would envision as the routine behavior of courts. It often involves the
litigation of a dispute between two parties, either both private individuals, or an
individual and the state, in which one alleges the violation of a law or rights protected in
the constitution by the other and seeks redress from the courts (Stone Sweet 2000;
For the purposes of the present analysis, concrete review is defined as one that contains one or more of the following (but most often contains all three): an agreed statement of facts; parties are named in the title of the case/headnote (i.e. xxx v. yyy, or r v. xxx, instead of Reference re:); and non-governmental entities listed as direct parties to the case. However, there are some instances where there was a clear concrete dispute that preceded the referral of questions to the courts, but the questions were asked in a general and abstract manner, without reference to this specific dispute. In such instances, these cases are considered abstract review, as the question put before the court is still abstract in nature and does not ask the court to consider the related factual situation. Finally, it should be noted that the coding of a case as either abstract or concrete is based on the questions referred, not if the court makes any connections to concrete disputes or related routine litigation in its decision. This reflects a desire for consistency and reliability in coding and the overall goal of understanding why and how governments ask reference questions.

In more than two-thirds of all the cases in this dataset, the reference question asked courts to engage in some form of abstract review (see Table 7).

<table>
<thead>
<tr>
<th>Question Type</th>
<th>Number of cases</th>
<th>Total number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concrete</td>
<td>30</td>
<td>31.6%</td>
</tr>
<tr>
<td>Abstract</td>
<td>62</td>
<td>65.2%</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>1.1%</td>
</tr>
<tr>
<td>Both Concrete and Abstract</td>
<td>2</td>
<td>2.1%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>N=95 (100%)</strong></td>
<td></td>
</tr>
</tbody>
</table>

The discovery that courts are referred concrete issues in approximately one-third of all cases is a novel finding. All previous work on reference cases has neglected to address the use of references to deal with concrete disputes. In some instances, governments referred questions to the courts because it was the only avenue available to receive a judicial ruling on a matter, notably in several criminal law references.
Concrete Review Reference Cases

In the Truscott Reference, the Attorney General of Canada referred a question regarding the guilt of the accused, Steven Truscott, when his conviction became questionable in the eyes of the public.\footnote{[1967] S.C.R. 309} Following the publication of a national bestselling book, The Trial of Steven Truscott (LeBourdais 1966), the public became increasingly doubtful of Truscott’s guilt. Many parliamentarians became interested in the Truscott case, prompting action from the government (Snell and Vaughan 1985). However, the Supreme Court had already rejected Truscott’s application for leave for appeal. With no available avenues for appeal remaining, a reference provided the attorney general a means to have the case heard by the Court, regardless of its previous rejection of leave. The Government of Canada referred the following question to the Supreme Court:

“Had an Appeal by Steven Murray Truscott been made to the Supreme Court of Canada…what disposition would the Court have made of such an Appeal on consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider?” (Truscott Reference, at page 4)

In a unique use of the reference procedure, the Truscott Reference marks the first time in the Supreme Court’s history that new evidence was presented (including witness testimony), requiring the Court to act as a trial court, rather than appellate (Snell and Vaughan 1985). Unfortunately for Truscott even with a reconsideration of his case and the acceptance of new evidence, a majority of the Supreme Court found the original verdict of guilty to be valid.\footnote{It should be noted however, that Justice Hall wrote a rather stinging solo dissent in this case, finding that the original trial “was not conducted according to law…I find that there were grave errors in the trial brought about principally by Crown Counsel’s method in trying to establish guilt…” (Truscott Reference, at page 65). In his conclusion, Justice Hall finds that the conviction should have been quashed and a new trial to be directed.} However, the Court’s opinion in the Truscott Reference was reexamined in 2007 by the Ontario Court of Appeal, which declared the original guilty verdict a miscarriage of justice (see Truscott (Re), 2007 ONCA 575, 225 CCC (3d) 321).

This case demonstrates that the reference power is largely unrestricted, and it can provide governments with the ability to engage judicial review in virtually any circumstance, including concrete cases with significant implications for the parties involved. The Truscott Reference was initiated as a means to circumvent the usual
structural restrictions on litigation and force the issue before the Supreme Court. Using the reference power in this manner – to obtain judicial review where it was previously denied – highlights the complications that the reference power can raise for a separation between the judiciary and the political branches of government, implicating judicial independence. Indeed, in this case a court already determined that the conviction of Truscott should stand, yet through the reference power a government is able to force a court to reconsider its ruling. Perhaps in this case, more than any other, does the ability for a government to use a reference to force matters onto a court’s docket become more apparent. To be sure, the present study is not arguing that the courts were correct in the initial finding of guilt in the Truscott case, instead the point of contention is the method in which the Supreme Court was forced to re-examine this conviction and the implications of this for the separation of powers.

This practice of using a reference to compel the Supreme Court to re-assess a criminal case (where leave was previously denied) occurred more recently in *Reference re Milgaard* [1992] 1 S.C.R 866 (*Milgaard Reference*). As in the *Truscott Reference*, the government was concerned that the criminal conviction of an individual was false and constituted a miscarriage of justice. This case also asked the Court to examine new evidence and decide if a new trial for Milgaard was warranted. The Court’s decision in the *Milgaard Reference* had significant implications for the convicted, David Milgaard. Finding that a miscarriage of justice had occurred and Milgaard was likely wrongfully convicted, the Supreme Court’s reference decision prompted the Government of Saskatchewan to stay proceedings against Milgaard and release him from prison. Milgaard was later exonerated through DNA analysis and compensated by Saskatchewan (MacCallum Commission 2008).

Not all concrete reference cases concern the reexamination of verdicts in criminal cases. For example, in *Reference re Ng Extradition* [1991] 2 S.C.R. 858, the Government of Canada asked the Supreme Court to consider if the decision of Minister of Justice to surrender an accused person, Charles Chitat Ng, to the United States of America to stand trial for homicide, without seeking assurances with regards to the application of the death penalty, constituted an error of law. Other examples of concrete review concern non-criminal matters. For example, in *Reference Re Broome v. Prince Edward Island* [2010] 1
S.C.R. 360, the Government of P.E.I. referred several questions asking the courts to consider if the Province owed a general duty of care to a group of children that suffered abuse in a private orphanage, based upon an agreed statement of facts describing the events that took place in the orphanage. In *Reference re Provincial Electoral Boundaries (Sask.)* [1991] 2 S.C.R. 158, the Supreme Court was asked to assess if changes to the provincial electoral boundaries in Saskatchewan, as proposed by s.14 of *The Electoral Boundaries Commission Act*, S.S. 1986-87-88, c. E-6.1, would violate or deny any of the freedoms provided by the *Charter*, and if so, was the limitation a reasonable and proportionate as understood by section 1 of the *Charter*. In this case, the Supreme Court was provided with maps of the electoral consistencies and was asked to contemplate the proposed changes on the existing boundaries within Saskatchewan. Other examples of concrete reference cases ask courts to consider the regulation of bypass pipelines by a province and minority language education rights applied to a specific school district.\(^6^8\)

**Abstract Review Reference Cases**

In some cases, governments referred abstract questions even though the questions have clear connections to a dispute or current event. For example in *Reference re Supreme Court Act, ss. 5 and 6* [2014] SCC 21 (*Nadon Reference*), the Supreme Court was asked to consider the legality of appointing a justice from Quebec who was not a member of the Barreau du Quebec at the time of appointment, to fill one of the three seats on the Supreme Court reserved for Quebec jurists. This controversy stemmed out of the appointment of Justice Marc Nadon to the Supreme Court, a semi-retired justice from the Federal Court. The federal government asked the following reference questions:

1. Can a person who was at any time, an advocate for at least 10 years standing at the Barreau du Quebec be appointed to the Supreme court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?  
2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013, No. 2*?

This case is an example of abstract review, because the questions posed to the courts make no reference to the specific example of Justice Nadon and did not ask the Supreme Court if Justice Nadon in particular was qualified for appointment to the Court.

Most often, abstract review cases asked the courts to engage in statutory interpretation. This involves the referral of a particular piece of legislation, either a proposed bill before a legislature or a law that is already enacted and in force. A recent example of the referral of questions concerning a bill that was before parliament, but not enacted can be found in the Securities Reference. In this case, the federal government asked the Supreme Court to consider if the proposed Securities Act was within the legislative jurisdiction of the Parliament of Canada. Although several provincial governments opposed the federal government’s move to create a national securities regulator, there was no concrete dispute for the Supreme Court to sort out – there was no lawsuit or illegal wrongdoing alleged by one party against another. As a result, the Court was required to base its analysis of the law solely on the interpretation of the proposed statute and its interaction and compliance with the Constitution. Moreover, because the act was not in force the Court had to assume how the legislation would operate in practice, if the act were adopted.

In some instances of abstract review, governments exercise great effort to pursue a reference case that is abstract, regardless if a concrete dispute and possible grounds to initiate routine litigation exists. A clear example of this is (Manitoba (A.G.) v. Manitoba Egg and Poultry Association [1971] S.C.R. 689) (Egg Reference), which arose out of the ‘chicken and egg war’ between the provinces of Ontario and Quebec. As a major producer of eggs, the Government of Quebec enacted legislation restricting the importation of eggs to the province, to protect its egg producers. In response, the Government of Ontario enacted similar legislation that served to protect its chicken producers and restricted the importation of broiler chickens, a major export of Quebec (Magnet 2007).

With the restriction of imports in two of the largest provincial markets in Canada, the province of Manitoba claimed its agricultural exports were injured by these restrictive legislative schemes. Instead of challenging the constitutionality of the provincial legislation through routine litigation (or a reference), the Manitoba legislature adopted
parallel legislation based on the Quebec model, with the sole purpose of referring it to the Manitoba Court of Appeal. This legislation was promptly referred to the Court of Appeal and then further appealed to the Supreme Court. The reference made no mention of the injury caused to Manitoba by the agricultural discrimination, instead the courts were asked to assess the constitutionality of the legislation in the abstract. As a result, the Supreme Court’s decision in the Manitoba Egg Reference is puzzling, as the Court was required to assess the impact of the regulatory scheme and its possible discriminatory effects without any facts. This reliance on abstract review in this manner in this particular case resulted in a confusing and highly criticized decision by the Supreme Court (Hogg 2012).

In other instances governments referred questions to the court in an abstract manner, regardless of the fact that there was routine litigation concerning the same issue already in progress. This was the case when the Same Sex Marriage Reference was referred to the Supreme Court of Canada. Prior to the reference, the British Columbia Court of Appeal ruled in EGALE Canada Inc. v. Canada (A.G.) [2003] BCCA 251 that the denial of the right to marry to homosexual couples was a violation of the equality rights guaranteed under section 15 of the Charter. Similarly, the Ontario Court of Appeal ruled in Halpern v. Canada (A.G.) [2003] O.J. No. 2268, that the definition of marriage as between one man and one woman in the common law was a violation of section 15. The Attorney General of Canada the ability to appeal in both of these cases to the Supreme Court of Canada. In fact, the Attorney General had previously hinted that his government would appeal the decision in EGALE (Hennigar 2009). However, the government did not follow through on its intention to appeal the cases from the BC and Ontario appellate courts. Instead, the government led by Prime Minister Chretien drafted a bill providing for the legalization of same-sex marriage and then referred the draft legislation along with several reference questions to the Supreme Court of Canada.

The questions referred to the Supreme Court did not make reference to the concrete cases of Halpern and EGALE; instead they were referred in an abstract manner without any connection to the particular facts or circumstances of the two lower court decisions. To be sure, the Court’s decision in this reference did not take place in a vacuum. While the individuals involved in the EGALE and Halpern cases appeared
before the Court as intereners in the *Same Sex Marriage Reference*, the Court only considered their particular circumstances when it refused to answer the final question in the reference. The Court acknowledged that if it chose to answer question four, its answer could serve to invalidate the marriages of the intereners and the other individuals that had been granted same sex marriages in several provinces (B.C., Ontario, and Quebec), depending on how it answered the question. The Court recognized that its abstract decision could have tangible consequences for concrete cases regardless of the fact that these immediate cases were not included in the terms of the reference.

**Refusing to Answer**

Unlike routine litigation, courts do not have to grant leave to hear a reference case. Instead, they must accept reference questions from the (Lieutenant) Governor-in-Council or the executive in practice. As a result, through the reference procedure, the executive can force issues onto the docket of provincial appellate courts and the Supreme Court. A court can gain some control over the reference process when it refuses to answer all the questions referred. Furthermore, as the majority of reference cases are abstract review, the questions referred to the courts are often hypothetical and some justices who have sat on reference cases have noted their disagreement with the court’s participating in such an exercise. This disagreement has resulted in the courts or individual justices’ refusing to answer some of the questions referred to them in reference cases.

While there has been scholarly debate over the capacity of courts to refuse to answer reference questions (see Huscroft 2006; 2010; McEvoy 2005), as reviewed in Chapter Two, this scholarship has remained at a theoretical level and has not empirically investigated the actual number of times courts refuse to answer reference questions and their reasons for doing so. That being said, in his coverage of the reference power, Hogg (2012) surmises that the courts have refused to answer questions in instances where: the issue has become moot; the questions do not concern any real controversy of interpretation; the questions concern an issue that is not legal; or the court does not have enough information to formulate an opinion – although he provides no analysis of how often the courts use these reasons to refuse to answer.
Hogg’s hypothesized reasons for refusing to answer revolve around the issue of justiciability. Even though governments referring questions to courts in reference cases are not bound by the limitations of standing and leave, courts will analyze if the questions are justiciable. When assessing justiciability, courts must determine if the issue is “capable of being tried in a court of law... [and] that is appropriate for judicial determination” (Barron’s Canadian Law Dictionary 2009). The practical implications of justiciability impose “a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life” (Sossin 1999: 2). The doctrine of justiciability provides the parameters of what types of issues can be heard by courts. If an issue is justiciable it is ripe (cannot be solved through other means) and is not moot (a live dispute). Moreover, questions that are deemed too political or not involving a legal controversy can be found to be non-justiciable by a court. The assessment of justiciability by a court must be done in tandem with three factors: “(1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court” (Sossin 1999: 2). When granting leave to a case, or deciding whether to answer reference questions a court bears the responsibility of ensuring the particular case (or questions) will not have serious negative consequences for its position within the Canadian institutional framework, which is inherently related to judicial independence.

In appellate court reference cases from 1949 to present, the courts answered all the questions referred in the majority of cases. In 81 percent (77 cases) of all cases courts answered all the questions referred. Courts refused to answer all reference questions in 17.9 percent (17 cases). In terms of all cases during this period, an average of 3.4 questions per reference were asked, with a response rate of 1.3 questions answered. This demonstrates that on several occasions courts have found it to be within their discretion to refuse to answer some of the questions posed to them in a reference case – some of the questions were not justiciable. Courts will refuse to answer reference questions for the following three reasons: (1) practical limitations, (2) a lack of information, or (3) appropriateness and/or political nature of questions.

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69 Sossin (1999) notes that the Supreme Court has not provided parameters for the concept of ‘ripeness.’ For the criteria assessing ‘mootness’ see: Borowski v. Canada (Attorney General) [1989] 1 S.C.R. 342.
70 Missing data = 1.1% (1 case)
First, (and most often) a court will not answer a question because answers to previous questions asked in the same reference precluded it from answering additional questions. In this instance, the refusal to answer remaining questions referred is out of practicality rather than a clear rejection by the court. Second, a court may refuse to answer a question because it lacks the proper amount of information to provide a well-informed answer. Courts have provided this reasoning for refusing to answer when either the questions are unclear or the government has not provided enough related information or facts (if applicable) to permit clear judicial analysis. The final reason for refusal to answer a reference question stem from the court’s understanding that the questions are inappropriate or ask the court to work beyond its role of interpreting the law. This final category includes refusals to answer based on the overt political nature of the question. While the first two reasons are largely practical reasons why courts will refuse to answer, the third reason relies more on the courts interpretation of its role and the proper divide between the judiciary and the partisan branches of government, and the protection of judicial independence.

Table 8 below details the breakdown of three reasons for refusal in all reference cases (1949 to 2014) in which courts refused to answer one or more questions. The coding of answer refusals is based on the clear and apparent reasoning provided by the court for declining to answer, in attempts to increase consistency and reliability of coding. However, considering only clear examples of courts declining to answer could not capture all refusals, limiting the present analysis. More specifically, instead of a clear refusal to answer, courts could provide ‘answers’ that do not actually address the questions referred to them to the fullest extent possible or to the satisfaction of the parties involved. Nevertheless, verifying such responses (or refusals) would require too much independent judgment of the researcher and would ultimately sacrifice the reliability of coding. The operation of the coding of this section is explained in the examples detailed in the sections below.
Table 8 – Reasons for Refusing to Answer

<table>
<thead>
<tr>
<th>Reason for Refusal</th>
<th>Cases</th>
<th>Case Names</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inappropriate</td>
<td>2</td>
<td><em>Same Sex Marriage</em> [2004] 3 SCR 698; <em>Constitution Act 1867, ss. 26, 27 and 28 (BC)</em> [1991] 78 DLR (4th) 245</td>
</tr>
</tbody>
</table>

**Refusals of Practicality**

Refusal to answer can be a practical matter, rather than an aggressive assertion of the court’s assumed discretion. Courts may refuse to answer reference questions simply because, based on the answers to previous questions in the same case, remaining questions may not warrant an answer. It is interesting to note that courts appear to answer reference questions in the order in which they are referred, which can have significant implications for the questions that courts refuse to answer. In most cases references that centre on the interpretation of a statute against the constitution, the first question will ask if the entire act is *ultra/intra vires* a particular government, and any remaining questions ask the courts to consider specific sections in isolation. This format creates question refusals, by placing the survival of the entire piece of legislation under scrutiny on the first question. The structuring of reference questions in such a manner impedes the court from providing specific guidance on the legality or constitutionality on the specific sections and restricts the court’s assessment to the act in its entirety.


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71 In two cases, courts refused to answer different questions for different reasons resulting in two cases being counted twice. The PEI Court of Appeal provided both practical and lack of information reasoning for refusing to answer all the questions referred to it in *Interpretation of Human Rights Act* [1998] 50 DLR (4th) 647. Similarly, in *Constitution Act 1867, ss. 26, 27, and 28 (BC)* [1991] 78 DLR (4th) 245, the BC Court of Appeal did not answer all the questions referred to it for reasons that were both practical and due to the inappropriateness of some of the questions referred.
British Columbia challenged the legality of the appointment of additional senators by Prime Minister Mulroney through a series of five reference questions submitted to the British Columbia Court of Appeal. The first three questions, which the court answered, inquired if sections 26, 27, and 28 of the Constitution Act 1867 (the provisions the federal government relied upon to appoint additional senators) were still operative. Since the Court of Appeal found that these sections were indeed still valid and operative law, it did not need to answer questions four and five that were premised on an interpretation that the aforementioned sections were inoperative. Similarly, in Reference re Upper Churchill Water Rights Reversion Act [1984] 1 S.C.R. 297, the Supreme Court was asked nine different questions relating to the constitutionality of legislation that was aimed at reasserting the Province of Newfoundland and Labrador’s right over Churchill Falls. In finding the entire Act ultra vires, through answering the first question, the Court declined to answer the remaining eight questions that concerned the constitutionality of specific portions of the Reversion Act. This denial by the court to answer all the questions in these instances is a reflection of circumstance, rather than an assertion of power. In a similar manner, the Saskatchewan Court of Appeal refused to answer a second question in Reference re: Freedom of Informed Choice (Abortions) Act [1985] 25 DLR (4th) 751, because it would be “purely academic” due to its answering in the previous question, that the act in question was ultra vires the province.

Lack of Information

While the majority of the refusals by the courts to answer questions are based on practical considerations, this was not the case for all refusals. Courts have refused to answer reference questions because the questions are too abstract or hypothetical. Cases that fall into this category are illustrative of the pitfalls of adjudication of abstract issues. Courts have found in some instances, that without facts or context of a concrete dispute, categorical answers to reference questions are difficult or would require too much speculation and conjecture in its decision.

For example, in Reference re Goods and Services Tax [1992] 2 S.C.R. 445, the Supreme Court refused to answer one of the six questions referred to it on appeal from the Court of Appeal for Alberta. The refusal was due to the fact that it was “a
hypothetical question which cannot be answered with any assurance of correctness” (at paragraph 71). Instead of admonishing the Government of Alberta for posing such a question, the Court simply stated that it was “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.” It is important to note that in making this assertion, the Court supports its refusal by citing other instances in which it refused to answer questions on similar grounds and it does not provide any statutory basis for this power of denial. It does not appear that the Alberta Government channeled the theory of Huscroft and McEvoy and simply re-referred the unanswered question to the court. A government’s failure to challenge the court’s decisions to refuse questions may help to further the court’s inclination to believe it is within their prerogative to refuse such questions.

In a similar manner, the Supreme Court refused to answer questions in Reference re Broome v. Prince Edward Island [2010] 1 S.C.R. 306. In this particular case, the Court was referred 21 different questions supplemented only by a brief set of facts and a compendium of legislation. Asserting its discretion to refuse to answer, the Court explained:

“…[T]he court has discretion to give qualified answers to, or to decline to answer, the reference questions if the record does not permit a definitive response…The very limited factual basis for the reference impedes the Court in making definitive pronouncements about the issues raised to the point of putting the utility of the reference process in question” (paragraphs 6-7).

This particular case asked the Court to consider the liability of the Government of Prince Edward Island in the abuse of children in a provincially funded orphanage. Both the PEI Court of Appeal and the Supreme Court complained that its decision was impeded by the lack of facts and that the answers to some reference questions are limited in scope.

While courts have refused to answer questions in several instances due to a lack of information, in Re Court of Unified Criminal Jurisdiction, the Supreme Court notes that the questions before it “suffer from excessive abstractness” ([1983] 1 S.C.R. 704). In this case, an appeal from a reference at the New Brunswick Court of Appeal, the Government of New Brunswick referred three questions that asked the court to consider the constitutionality of creating a unified criminal court in the province. The Government
of New Brunswick did not submit draft legislation with the reference, nor was there any explanatory material provided. This lack of factual aids to assist in their decision caused the Supreme Court to explain its discretion to refuse reference questions “…[that] do not exhibit sufficient precision to permit cogent answers…irrespective of the fact that the reference power is couched in broad terms” (p. 2-3). The Supreme Court defended this reasoning through an examination of other instances in which courts have refused to answer reference questions, due to the fact that the questions lacked ‘specificity’. Although the Supreme Court criticized the questions referred by the New Brunswick Government for being raised on “extremely flimsy material,” the Court explained that it will not abort the questions referred in this case, as the “Court has enough of the essential features of the proposed scheme” to permit judicial analysis (p. 7). Thus, while the Court did answer the questions referred in this reference, the Court’s analysis provided a compelling argument for the necessity for judicial discretion in answering reference cases relying on past examples where courts have refused to answer.

**Appropriateness and Political Refusals**

The last type of refusal involves cases where the courts consider whether the reference questions submitted are appropriate for judicial consideration. This type of refusal involves the analysis of the place of the judiciary within the constitutional framework and sensitivity to the possibility that the independence of the judiciary can be threatened or compromised if the court entertains questions that are overtly political and partisan. While arguably all decisions by high courts can be viewed as political in some sense, as they often serve to supervise and impact the actions of political actors, courts are highly sensitive to a separation between questions of law and questions of politics (Sossin 1999). It is important to note (as previously mentioned above) that the categorization of cases in general and most importantly for ‘appropriateness and political refusals’ is based upon the clear refusals by the court. As a result, this analysis only captures the most obvious refusals. Ostensibly, instead of declining, courts could provide ‘answers’ that do not fully address the questions asked of them to the satisfaction of referring governments, which would not be captured by this analysis.
As discussed in Chapter Two, in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 (*Secession Reference*), the Supreme Court was presented with arguments that criticized the reference procedure and claimed that the issues before the Court were of a political nature and therefore non-justiciable. This line of argument caused the Supreme Court to explain in its decision the instances where it holds the power to refuse to answer reference questions. The Court provided two reasons why it might refuse to answer questions. First, if the reference questions required the courts to engage in a role that was “beyond its own assessment of its proper role in the constitutional framework of our democratic form of government” (paragraph 26). Second, if the questions posed to the court fall outside the court’s expertise, the interpretation of law, broadly construed (paragraph 26). In this case, the Supreme Court concluded that it was acceptable for it to answer the questions referred in the Secession Reference.

This focus on appropriateness of the question referred was echoed in *Reference re Canada Assistance Plan* [1991] 2 S.C.R. 525, an appeal from the B.C. Court of Appeal. In a more deferential decision, the Supreme Court noted that, after assessing the B.C. Constitutional Questions Act, the Lieutenant Governor General has the power to ask *any* question of the court, and that the Court has the duty to attempt to answer the questions, as long as the questions are justiciable, regardless of whether the questions are confusing and unclear (at paragraph 54). In this case, the Court considers the possibility that some reference questions could involve courts in the legislative process and/or a political controversy. When determining the justiciability of reference questions, it is essential that courts consider the implications of such decisions on the constitutional framework. The Supreme Court explains, “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” (at paragraph 26).

Another aspect of justiciability is the concept of mootness. If the issue that gave rise to a reference case had already been resolved thereby making a decision by a court redundant, the court can refuse to answer the reference on the account of mootness (Hogg 2012). A refusal based on the grounds of an issue being deemed moot can be fairly apolitical. It would most likely be clear to the parties involved that the issue had
previously been resolved. According to Sossin (1999) the Supreme Court has a liberal approach to issues of justiciability and it is uncommon for the Supreme Court to refuse to hear a case on the grounds of mootness. Due to the structure of the reference procedure it is even less probable that a reference question would be declared moot. Often cases become moot upon appeal to a higher court due to the amount of time it takes for a case to be appealed. For example, during the time it took for the higher court to hear the case, the issue between disputing parties may have been resolved. This issue of time is often not a factor in references. As mentioned previously, references are a relatively timely process compared to routine litigation and it would be unlikely that an issue would resolve itself before a court had the opportunity to hear a reference case.

However, with this understanding, the reference case in which the Supreme Court explained the discretion over ‘mootness refusals’ is slightly more controversial than would be expected. In Reference re: Objection by Quebec to A Resolution to Amend the Constitution [1982] 2 S.C.R. 793 (Quebec Veto Reference), the Supreme Court explained that courts hold the discretion to refuse to answer reference questions where the issue before them has been rendered moot or the legal controversy no longer exists. A discussion of mootness in reference cases was of particular importance in the Quebec Veto Reference, as this case asked the Supreme Court if the Province of Quebec had a constitutionally protected veto over constitutional amendment. This particular dispute rose out of the Canada Act, 1982, which effectively became the Constitution Act, 1982, which was promulgated without the signature of Quebec. However, when the Quebec Veto Reference reached the Supreme Court, the Act had already been adopted and come into force, and therefore made the question of a Quebec veto moot (a fact conceded by the Supreme Court). While the Court maintained that it held discretion to refuse reference questions that were moot, in this particular case, the constitutional controversy was of great importance and deserved an answer. Furthermore, the Quebec Court of Appeal had already rendered an opinion on the Quebec Veto Reference (prior to the adoption of the Canada Act) and the Supreme Court explained that it was duty bound to review this constitutionally important case.

This analysis has demonstrated that, regardless of whether legal statute permits courts to refuse to answer reference questions, they have chosen to do so in 17 cases from
1949 to 2014. The reasons for refusal range from the least controversial, practical reasons to the most controversial reason that the question is too political and would be inappropriate for a court to answer. It is important to note that the Supreme Court’s refusal to answer question four in the Same Sex Marriage Reference is not indicative of the majority of reasons why courts refuse to answer reference questions. Yet, it is the Same Sex Marriage Reference that consumes the scholarship on the ability of courts to refuse to answer reference questions. Instead of focusing on this single case, the present analysis examines how this case compares to all other reference question refusals by courts over time, demonstrating that the overwhelming concern with the Same Sex Marriage Reference refusal ignores that this case is an anomaly and that courts do routinely comply with the request to answer reference questions. That being said, considering the implications for a separation of powers and the independence of the judiciary if the courts can be forced to hear reference cases, courts should maintain the discretion to refuse to answer inappropriate reference questions. This refusal should be grounded in the standards of justiciability that apply to routine cases. This argument concerning judicial independence and the discretion to refuse to answer questions in reference cases is considered in greater detail in Chapter Six, when discussing the implications of the reference power.

PARTIES IN REFERENCE CASES 1949 TO 2014

The following section will detail the behaviour of groups who participate in reference cases. First, this section will provide the fundamental characteristics of the governments that have initiated reference cases. Understanding the features of governments that have referred questions in the past provides essential foundational information that will help to explain why governments ask reference questions. Second, this section will detail the rate of participation by third party intervening groups in reference cases and compare this figure to the rate of participation at the Supreme Court in general. The rate at which groups participate in references can speak to the importance of reference cases in general and demonstrate how references are more than merely technical abstract advisory opinions.
Governments

Considering that all reference cases result from a formal decision by a government to pursue a case before a court of appeal or the Supreme Court, it is important to know if there are any patterns that emerge regarding the types of governments that initiate references. Furthermore, to help inform an understanding of why governments ask reference questions, it is important to document what types of governments have asked references in the past. For example have more references come from governments led by the Conservative Party or the Liberal Party? Similarly, are governments more likely to refer questions when they are in a minority parliament compared to a majority parliament? Are there certain first ministers who have led governments that have initiated reference cases at a rate that is distinct from other first ministers? It is essential to understand the features and patterns of the governments who choose to litigate reference cases, not only for an understanding of the cases in general, but also, to contribute to our understanding of the litigation behaviour of governments – the most frequent, but understudied litigant.

As mentioned in Chapter Three, William Lyon Mackenzie King is credited with referring the most reference cases during his tenure as prime minister, with an impressive 32 cases, a number that certainly reflects King’s lengthy tenure as prime minister, but also, his willingness to rely on reference cases to deal with disputes with other governments (both provincial and previous federal governments). However at over thirty reference cases, the King Government stands as an outlier. In the post 1949 era, Premier Bill Davis of Ontario is credited with referring the most reference cases with 6 cases. Table 6, below details the governments that asked the most reference questions during the post 1949 era, listing all governments that referred four or more cases. What is most interesting about the findings in Table 9 is that the government with the shortest time in power referred the second highest amount of cases. Prime Minister St. Laurent was in power for just over eight and half years, but still referred as many cases as the Bennett Government (in power for over twenty years), the Lougheed Government (in power for over fourteen years) and the Trudeau Government (in power for over fifteen years).

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72 It is worth noting that the Harper government is responsible for three reference cases: Reference re: Securities Act, [2011] 3 S.C.R. 837; Reference re: Supreme Court Act, ss. 5 and 6, [2014] 1 S.C.R. 433 (Nadon Reference); Reference re: Senate Reform [2014] 1 S.C.R. 704, during its 10 year period (at the time of writing) in power, placing it just outside of the data represented in Table 6.
When the number of reference cases initiated by government is averaged over the number of years in power, the St. Laurent government still used the reference power at a much greater rate compared to the other governments listed at .63 references per year.

Table 9 – Most Reference Initiating Governments (four or more cases)

<table>
<thead>
<tr>
<th>First Minister</th>
<th>Party</th>
<th>Number of References</th>
<th>Days in Power</th>
<th>Average Reference Per Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Davis (ON)</td>
<td>PC</td>
<td>6</td>
<td>13 years, 10 months</td>
<td>.46</td>
</tr>
<tr>
<td>Lougheed (AB)</td>
<td>PC</td>
<td>5</td>
<td>14 years, 2 months</td>
<td>.36</td>
</tr>
<tr>
<td>Trudeau (Federal)</td>
<td>LP</td>
<td>5</td>
<td>15 years, 5 months</td>
<td>.33</td>
</tr>
<tr>
<td>St. Laurent (Federal)</td>
<td>LP</td>
<td>5</td>
<td>8 years, 7 months</td>
<td>.63</td>
</tr>
<tr>
<td>W.A. Bennett (B.C.)</td>
<td>SC</td>
<td>5</td>
<td>20 years, 1 month</td>
<td>.25</td>
</tr>
<tr>
<td>Peckford (NL)</td>
<td>PC</td>
<td>4</td>
<td>10 years</td>
<td>.40</td>
</tr>
<tr>
<td>Hatfield (NB)</td>
<td>PC</td>
<td>4</td>
<td>16 years, 11 months</td>
<td>.25</td>
</tr>
</tbody>
</table>

As evidenced in Table 9 above, the majority of reference cases have been initiated by governments led by the Progressive Conservative Party (PC). In all reference cases from 1949 to 2014, just over 47 percent of cases were initiated by either a PC party (including federal and provincial parties)\textsuperscript{76} and the Conservative Party of Canada. The second highest amount of cases can be attributed to the Liberal Party (again including federal and provincial parties) with 30.5 percent of all cases from 1949 to 2014. For context, Social Credit governments have referred 8.4 percent of all references and the New Democratic Party has referred 6.3 percent. The domination of these two parties (over 77 percent of all cases) is reflective of the fact that these two parties have governed in Canada both provincially and federally more than any other party. This result also demonstrates that no single political party has engaged in reference cases more than others. Indeed all parties, regardless of their position on the left—right political spectrum, are willing to initiate judicial review through a reference case.

Finally, it is interesting to note that governments are much more likely to initiate a reference case from a position of parliamentary strength. Majority governments are the

\textsuperscript{73} PC = Progressive Conservative; LP = Liberal Party; SC = Social Credit.

\textsuperscript{74} Including multiple terms if applicable. Number rounded to the nearest month.

\textsuperscript{75} Rounded down to full year.

\textsuperscript{76} This combination of provincial and federal parties into one category reflects recent research that documents the linkages and vertical integration between federal and provincial associations of the same party are much closer than previously believed (see: Pruysers 2014).
source of 88.4 percent of all reference cases, while governments in minority parliaments have initiated just 11.6 cases from 1949 to 2014. This is a trend that holds even when the peak point for reference cases in the post-1949 era, the 1980s are removed from the data. Excluding the 1980s, majority governments were responsible for 86.4 percent of all reference cases and minority parliaments only 13.6 percent of references, for a total for 66 cases. This is an interesting finding when compared to the rate of minority government in Canada. Looking at both provincial and federal legislatures since 1910, Thomas and White (2015) find that Canadians are more likely to be governed by a minority government. Addressing just federal parliaments, Russell (2008) finds that half of elections since 1957 have produced minority governments. Indeed, minority governments are a frequent occurrence in Canadian politics. The frequency of minority parliaments is a reflection of both the single member plurality electoral system and the fact that Canadian voters do not strongly support any single political party (Dufresne and Nevitte 2014; Russell 2009). As a result it is noteworthy that majority governments have instigated reference cases at a much greater frequency compared to minority governments.

Minority governments do not participate in reference cases for the central reasons of time and uncertainty regarding government survival. While Canadians have elected as many minority governments, these governments do not last as long as majority governments. Even though the reference process is relatively quick compared to routine litigation, decisions in reference cases can take several months to over a year from the time of referral. A government that is uncertain about its future survival might be reluctant to initiate a reference case, as they may be out of power by time the court renders its decision. Furthermore, the uncertainty of a minority government has direct implications for the public policy outputs and governmental policy plans. Public policy developed by minority governments is done with short-term goals and on an urgent basis (Bourgault 2011). The types of large constitutional questions (especially those addressing issues of mega constitutional politics) that have given rise to many reference cases do not align with the shortsighted public policy mindset of a minority government and do not become a priority for governments that are preoccupied with legislative survival.
Third-Party Interveners

The participation of third-party interveners can signal that a case has gained the interest of groups that are not direct parties in the dispute and that the court’s decision may have wider political or public policy effects. Third-party interveners can include other governments (both provincial or federal), business or corporate-based groups, unions, and rights-based interest groups such as, LEAF (Women’s Legal Education and Action Fund) and the Canadian Civil Liberties Association. The participation of an intervenor typically includes the filing of a legal brief that details the group’s arguments and opinions regarding the case. Additionally, groups are often permitted to make oral arguments and respond to questions during the case proceedings, although they are typically afforded less time than the direct parties in the case. These groups often provide expertise or legal arguments not addressed by the direct parties in the case. In some instances, intervening groups represent individuals or groups that could be affected either directly or indirectly by the decision of the court. For example, the Canadian Association of the Chiefs of Police and the Law-Abiding Unregistered Firearms Association intervened in Reference re Firearms Act [2000] 1 S.C.R. 783 (Fire Arms Reference), a case concerning the constitutionality of the Canadian Firearms Registry, because the Supreme Court’s decision would directly affect the members of both associations, even though neither group was a direct party in the case. It is important to note that both provincial attorneys general and the federal attorney general have the automatic right to intervene in any reference case, unlike routine litigation.

Some scholars argue that the participation of interveners signals that a court not only exerts a great deal of influence on the society within which it operates, but also that a higher or increased number of interventions is indicative of a court that has either become politicized or has moved towards a policy-making role, signifying judicialized politics (Epp 1998; Manfredi 2004). Moreover Radmilovic (2013) finds that government intervention in Charter cases is strongly associated with the Supreme Court’s tendency to find legislative acts unconstitutional, showing that intervention can have a tangible impact on case outcomes. However, contrary to Radmilovic’s findings, interviews with justices of the Supreme Court demonstrate that the justices generally welcome the
participation of intervening groups, but doubt the impact of interveners on their decisions (Songer et al. 2012; Macfarlane 2013).

Nevertheless there is no clear pattern of how many groups are granted access to intervene at the Supreme Court and unfortunately there is no data that considers provincial appellate courts. Songer et al. (2012) find that the number of applications to intervene at the Supreme Court varies from year to year, without any discernable pattern. However, the success rate of groups applying to participate as third parties at the Supreme Court has dramatically increased post-1987 due to changes in the Court’s rules governing participation, with a rate often over 90 percent (Songer et al. 2012: 86). According to Muttart, this high acceptance rate can be viewed as a self-reinforcing cycle. Now that the Supreme Court has fallen into the practice of granting rather than denying applications to intervene, any refusals of interventions can be viewed as political or a pre-judgment of the case, and thus courts are more likely to grant access (2007: 21). Interviews and public statements by Supreme Court justices appear to confirm Muttart’s hypothesis. Macfarlane finds that justices are sensitive to public perception over which groups are granted access as interveners and make an effort to appear objective and not overtly to favour particular groups in granting access (2013: 51)

In this dataset, 92.6 percent of cases included the participation of a third-party intervener group, either another government or an interest group. 66.3 percent of cases included government interventions (average of 2.3 per case) and 72.6 percent included non-governmental interveners (average of 3.1 per case), with several cases including the participation of both non-governmental and governmental groups. Only seven cases did not include the participation of a third party or another government. However, of these seven cases, four included the appointment of a third-party non-governmental group by the court to present arguments in opposition to the government in the case. These instances still demonstrate the participation of an outside group, albeit in a different (and more direct) capacity. Fifteen cases included the participation of ten or more third-party intervener groups, including both governmental and non-governmental parties[77] and six

cases included the participation of more than 15 intervening groups (see Table 10, below). *Reference re Bill 30, An Act to Amend the Education Act (Ont.)* [1987] 1 S.C.R. 1148, a 1987 Supreme Court case concerning the funding of a separate Catholic school board in Ontario had the highest number of third party participants in this dataset, with 24 non-governmental groups and 2 governments.

Table 10 – Cases with the Highest Number of Third Party Interveners

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Subject</th>
<th>Number of Non-Government Interveners</th>
<th>Number of Government Interveners</th>
<th>Total Number of Interveners</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Reference re Bill 30</em></td>
<td>Is the funding of a separate Catholic school board constitutional?</td>
<td>24</td>
<td>2</td>
<td>26</td>
</tr>
<tr>
<td><em>Reference re Same-Sex Marriage</em></td>
<td>Constitutionality of same-sex marriage</td>
<td>23</td>
<td>2</td>
<td>25</td>
</tr>
<tr>
<td><em>Re Education Act of Ontario and Minority Language Education Rights</em></td>
<td>Minority language education rights</td>
<td>18</td>
<td>1</td>
<td>19</td>
</tr>
<tr>
<td><em>Reference re Senate Reform</em></td>
<td>Can the Parliament of Canada amend or abolish the Senate without provincial consent</td>
<td>5</td>
<td>12(^{78})</td>
<td>17</td>
</tr>
<tr>
<td><em>Reference re Firearms Act</em></td>
<td>Is the <em>Firearms Act</em> intra vires the criminal law power of the Federal Parliament</td>
<td>8</td>
<td>7</td>
<td>15</td>
</tr>
<tr>
<td><em>Reference re Securities Act</em></td>
<td>Is the <em>Securities Act</em> a intra vires the Federal Parliament power to regulate trade and commerce</td>
<td>8</td>
<td>7</td>
<td>15</td>
</tr>
</tbody>
</table>

Figure 6 below demonstrates the rate of intervener participation over time; it details each individual occurrence of participation by an intervener. The trend regarding intervention participation follows the trends of the number of reference cases over time – as possibility for participation is contingent on the presence of a reference case. As to be expected, there is a large spike in the number of interveners during the 1980s, as this is the decade with the most number of reference cases. The increase of participation of interveners beginning in the mid-1960s is reflective of general trends of intervener participation over time.

\(^{78}\) Including territorial governments.
participation at the Supreme Court in general. Epp finds that the rate of intervention by third parties begins to increase post-1965, resulting in a substantial increase of intervener participation by 1980 (1998: 175). While the participation of governments as intervening parties in reference cases largely mirrors that of non-governmental groups, a split between the two occurs in the 2000s, with the rate of government participation declining. It is interesting to note that although there was a large decline in the number of references in the 2000s (Figure 1) the participation of interveners does not closely follow this dramatic decline.

**Figure 6 – Rate of Participation of Government and Non-Government Interveners**

When comparing the participation of interveners in reference cases to all cases heard by the Supreme Court of Canada the results are striking. Epp (1998) finds that between 1985 and 1990, only 30 to 40 percent of all Supreme Court cases included third-party interveners. Hausegger et al. document trends regarding intervener participation post-1986 at the Supreme Court, excluding reference cases, finding a general trend towards an increase in participation of both non-governmental and governmental interveners over time (2015: 228). However, the percentage of cases that include the participation of an intervening group (both governmental and non-governmental) does not surpass 50 percent (Hausegger et al. 2015). Thus, finding that over 90 percent of references include the participation of an intervening group demonstrates a stark difference between reference cases and routine litigation.
The inclusion of interveners at a much higher rate in reference cases than in routine litigation may be the result of several factors. First, along with signaling the importance of reference cases, this high rate of participation is indicative of the unique nature of reference cases. When a piece of legislation either proposed or not yet in force is the subject of a reference, the parties intervening have the opportunity to participate in the shaping and perhaps writing of this legislation. For example, in the Same Sex Marriage Reference, the Court was asked to consider the constitutionality of proposed legislation that had not yet passed the Parliament of Canada. The groups that intervened in this case would have been motivated by the opportunity to shape the civil definition of marriage. Participation in a reference thus provides access to the legislative process that may otherwise be unavailable. Similarly, considering that many reference cases center on statutory interpretation, intervening groups have a unique opportunity to argue how a particular statute or provision should be understood. This influence has the potential to be substantial when the questions referred to the courts are done so in the absence of a factual dispute. In the absence of facts, parties can approach their legal arguments in a broad manner, molding the interpretation to a particular situation that best suits their preferences for interpretation and eschewing the need to rely on a parliamentarian or political party to present their views. Additionally, the high rate of government interveners could reflect that all governments are invited to participate in a reference once questions are referred to a court.

CONCLUSION: CONTEXTUALIZATION OF REFERENCE CASES

This chapter has detailed the central trends of reference cases from 1949 to 2014 and contextualized the findings with existing scholarship on Canadian courts and judicial politics. During this time, the majority of references still concerned the Constitution Act, 1867, regardless of the introduction of the Constitution Act, 1982 and the Charter of Rights and Freedoms. References concerning the 1982 Constitution accounted for fewer than 17 percent of all cases, with statutory interpretation (just over 27 percent) and the 1867 Constitution cases (over 52 percent) surpassing the 1982 act as subject matter for reference cases. This finding reflects the fact that the 1982 Constitution simply does not exist for the earlier period of this study and that Charter issues are more likely to reach
the courts via litigation and motions during routine trials. Additionally, this finding demonstrates that the reference power still operates in the same manner in which it was created: to sort out constitutional controversies regarding the division of powers between governments. The empirical analysis in this chapter demonstrates that reference cases have not been used by governments to assess if government legislation violates the protected constitutional rights of individuals. The rights revolution spurred by the *Charter* that has greatly impacted other areas of Canadian governance is not present in reference cases.

The findings of this study demonstrate that courts do not view their role in reference cases to be markedly different from other types of litigation, regardless of the unique characteristics of references. Indeed, appellate courts have been quite willing to invalidate government action – either proposed or enacted – through findings of unconstitutionality or statutory invalidation in reference cases. Courts do not appear to limit themselves in reference cases, regardless of the technical advisory nature of these cases. This invalidation rate is comparable to the rate of invalidation by the Supreme Court in general. This finding has important implications for the debates regarding judicial activism in Canadian courts, in the specific context of reference cases. If judicial activism is understood as the invalidation of governmental action by courts, instead of deference to the legislature, the findings of unconstitutionality and statutory invalidation in reference cases demonstrate this principle. However, the unique characteristics of references require a reconsideration of how judicial activism is framed and understood. Indeed, if governments self-initiate reference cases they are inviting the judicial branch to participate in political debates regarding the legality and constitutionality of government action and legislation. Activism in this sense cannot be framed as the judicial branch usurping the powers of elected officials; instead political actors have realized some benefits of inviting the courts into debates and relying on the bench to make decisions on complex normative and legal issues.

While reference cases reach the dockets of courts in a manner that is entirely distinct from routine litigation, the analysis in this chapter demonstrates that courts do not view their role differently in these cases. This becomes apparent when analyzing the unanimity rate of reference cases. Considering the high profile and controversial nature of
many reference cases, it might be assumed that references would generally have a high rate of unanimous decisions, as a court may prioritize speaking with one voice to set a clear precedent. However, this assumption is not supported by the data and courts do not appear to prioritize speaking with one voice in reference cases. Instead, with a unanimity rate of less than 55 percent, Canadian appellate courts have produced more divided opinions in reference cases compared to routine litigation. It is important to note that the majority of divided opinions do not include strong dissenting opinions; rather the majority of non-unanimous opinions contain concurring decisions. The high rate of divided opinions in reference cases may be a reflection of the fact that many reference cases engage in abstract judicial review, which may result in more divided opinions.

Unlike the routine litigation normally heard by appellate courts, reference cases do not come with a trial record and the justices do not have the benefit of a previous decision by a lower court judge. Unlike a routine appeal, justices are not bound by the analysis of the issues raised on appeal. References can allow for judicial creativity and wider breadth of legal analysis.

One of the features of reference cases that distinguish them from all other types of litigation in Canada is the ability of governments to refer questions that do not rise out of a concrete dispute. This lack of a concrete dispute causes the courts to engage in abstract review. However, as the present analysis has demonstrated not all reference cases concern abstract problems. Approximately one third of all appellate court reference cases are concrete judicial review. The fact that reference cases have been used to sort out live legal disputes is a novel finding and poses implications for understanding why governments refer question to the courts in this manner. If a government selects a reference case in instances where there is a concrete dispute, it can mean that a government deliberately chose to avoid the routine litigation route and selected a reference instead. That being said, in the specific examples of the referral of criminal cases, the reference initiating government may have had no other option as all other avenues of review had previously been exhausted, as in the Truscott Reference.

The majority of reference cases from 1949 to 2014 are considered abstract judicial review. That being said, many of the abstract review cases have clear connections to ongoing concrete disputes, as in the Nadon Reference. However, instead of referring
narrow questions based solely on the specific dispute, governments have referred questions in an abstract manner. This use of abstraction potentially allows the parties involved to receive a broad judicial decision that could be used in future cases instead of being limited to the specific case at hand. Yet, reliance on abstract review can raise important issues for the role of the judiciary within the political system. First, abstract review can have the effect of requiring courts to hypothesize the effects of legislation without having a factual context. Second, the reliance on abstract review can cause governments to partake in unusual legislative behaviour, such as passing legislation that conflict with the public policy goals of the government with the sole purpose of challenging it in the courts through a reference, as in the Egg Reference. This type of legislative maneuvering results in a distortion of both the policymaking process and also the reference question procedure. Third, abstract review serves to further the judicialization of politics. Abstract review, unlike concrete review serves to embroil the courts and policymakers into a conflict over the constitutional meaning and its constraints on the creation of public policy (Stone Sweet 2000). When governments refer legislation that is not in force to the courts through a reference case, the public policy making process is slowed down, as policymakers will await the decision of the courts before taking further action. Finally, abstract review has the ability to place the courts in the position of dictating the acceptable parameters of public policy in a manner that is much more direct compared to in concrete review. Without the benefit of a concrete case or controversy, abstract review places the courts in the position of directly questioning the wisdom of policymakers, instead of reviewing the implementation and application of a public policy as in routine litigation.

This tension surrounding the proper role of the courts vis-à-vis reference cases is also evident in the debate concerning the ability of the courts to refuse to answer reference questions. While previous legal scholarship has debated the ability of courts to refuse to answer reference questions, there has been no empirical investigation into how often and under what circumstances courts refuse to answer questions in reference cases. As a result, this chapter has filled an essential gap in this debate by finding that the courts have found it in their discretion to refuse to answer reference questions on several occasions. To be sure, most of the time courts refuse to answer questions for practical
reasons as its specific answers to previous questions supersede its ability to answer remaining questions. However, there are several instances in which the courts have found the questions referred as too abstract to permit worthwhile judicial analysis or the questions place the court in a role that is contrary to separation of the judiciary and the more partisan branches of government. For these reasons, and the safeguarding of judicial independence, that the present analysis argues that courts should exercise discretion not to answer reference questions that are deemed an affront to the principles of judicial independence.

The final section of this chapter analyzed the behaviour of parties in reference cases, specifically, third-party interveners and governments. It was found that governments are more likely to initiate reference cases from a position of parliamentary strength. Majority governments are much more likely to refer questions to the courts compared to minority governments. Furthermore it was documented that the reference power is a tool used by governments led by parties of all political stripes, both conservative and liberal. References have not been strongly associated with one particular party over others. These findings help contribute to our understanding of the litigation behaviour of governments and provide an understanding of the types of governments that have participated in past reference cases. Finally, this chapter documented the participation of third party intervening groups and found that the rate of participation of intervening groups is much higher compared to routine litigation. This can reflect that courts may be more willing to grant access to interveners in reference cases and that more groups may apply to participate in references compared to routine litigation. What can be established from this finding is that intervening groups have deemed participation in reference cases as worthwhile, as they would not dedicate their (often limited) resources to references if they did not believe reference cases had any impact outside the courtroom. Intervening groups may believe that reference cases provide a unique opportunity to influence the policymaking process in a manner that is not possible through regular parliamentary channels. Finally, the high level of participation by interveners in reference cases further demonstrates that although references are advisory opinions in theory, in practice they can have important practical implications for public policy and governance.
With these findings considered, it becomes apparent that there is a slight disjuncture between how courts and participants understand reference cases. When considering several different measures of how courts have responded to references, such as unanimity rate, and authorship, the trends are not markedly different from routine litigation. While it is reasonable to assume for a variety of reasons, such as the often high profile nature of reference cases and the unique structural characteristics of this form of judicial review (abstract and advisory), that courts would respond to these cases in a manner distinct from routine litigation – this is simply not the case. Instead, on a whole, Canadian appellate courts have not altered their behaviour when hearing a reference case.

That being said, with the overwhelming participation rate of third party interveners (both interest groups and other governments) demonstrates that these parties understand reference cases in a different manner. As reference cases elicit a much higher rate of participation of interveners compared to routine litigation. While this finding is contingent on the courts granting access, it also reflects a higher level of interest from third parties who still must apply to participate in these cases. Finally, it is important to consider that that the initiation of a reference cases is entirely at the will of the government. Comparatively, governments are most often in a reactionary role in routine litigation, while self-initiated\textsuperscript{79} references require the government to be proactive and place the power over litigation entirely in the hands of the government. This unique characteristic of references, the proactive and conscious decision to initiate legal action, allows the present analysis to document the that conditions explain why governments turn to the courts and participate in reference litigation. The following Chapter will directly address this question of why governments use the reference power and will do so by engaging in an analysis of interview and archival data from individuals involved in previous reference cases.

\textsuperscript{79} It is important to note that reference cases can be reactionary in some sense when one government refers the legislation of another as in recent example: Reference re Bill C-7 Concerning the Reform of the Senate [2013] Q.J. No. 771 (Quebec Senate Reference), wherein the Government of Quebec referred the federal government’s Bill C-7 to the Quebec Court of Appeal. However, this type of reference case still demonstrates the proactive selection of litigation by one party (in this case Government of Quebec), regardless if the case concerns the legislation of another government.
CHAPTER FIVE: Why Governments Use the Reference Power

This chapter directly addresses why governments ask reference questions and what benefits can be derived from the reference power. The previous two chapters provided a foundational understanding of the conditions under which governments have used reference cases, and began to address the possible motivations behind pursuing a reference case. The present chapter builds on this foundation and seeks to explicitly address why governments have asked reference questions in the past and why some governments have rejected the reference option. This chapter moves beyond the examination of individual reference cases as the unit of analysis to analyzing interview data and the political papers from individuals who have participated in past cases, to help understand their decision-making process. This chapter seeks to answer why governments ask reference questions from sources (both live and archival) that can provide a first hand account of the reference process.

There are two central goals of this chapter, the first empirical and the second theoretical. First, this chapter addresses causality and asks: why do governments initiate reference cases? Building on the findings gained from the dataset analysis in Chapters Three and Four, Chapter Five provides insight into the causal mechanisms that help to explain why governments ask reference questions. This analysis is accomplished by addressing why governments have engaged in reference cases in the past and why in some instances governments have rejected seeking a reference opinion when faced with pressure to do so. Second, this chapter engages in theory building and refinement. It seeks to explain the causality of reference cases through the lens of delegation theory, extending the application of this theoretical framework to the Canadian reference power.

This chapter will review and analyze qualitative data gained from in-depth interviews with individuals who have participated in previous reference cases, with an emphasis on former attorneys general. These data will be analyzed for evidence that help to explain why governments ask reference questions, which will be evaluated against
specific reference case examples and previous literature. The interview data is contextualized with archival work that addresses three different historical reference case episodes. Two of the historical case studies are instances where governments experienced pressure to initiate reference cases on particular issues and ultimately did not select the reference option, Quebec’s *Padlock Act* and blasphemy. A third case study, Alberta Social Credit legislation, involves the same decision-makers as a rejected reference (*Padlock Act*), but with the opposite outcome – the selection of a reference case. This comparison provides insight into the decision-making process concerning references and helps to explain why some issues are more likely to be the subject of a reference compared to others. Finally, this chapter will conclude with an analysis of these findings that situate them within a discussion of delegation theory, extending the application of this theoretical framework to the application of the Canadian reference power.

The analysis and empirical foundation of the two previous chapters allows for the creation of several hypotheses as to why governments use the reference power and the particular benefits that can be derived from this type of judicial review. First, governments will use references to deal with highly salient and politically controversial issues. This hypothesis builds upon previous literature on reference cases that argue that governments have used references in this manner. Third-party intervening groups demonstrate evidence of the salient nature of reference cases in their high rate of participation, as almost 93 percent of all references from 1949 to 2014 had the participation of at least one intervening group (see Chapter Four). As argued in Chapter Four, a high rate of intervener participation can signify the importance of the case and that the case might have implications for a wider group of individuals or groups that are outside the direct parties to the case. Furthermore, when looking at the use of the reference power over time, Chapter Three documents that increases in the number of references corresponds to periods in Canadian politics that are marked by great political contestation. This signifies periods in which a government’s legislative agenda attempts to address large issues that go to the heart of Canadian identity and institutions we see a corresponding increase in the number of reference cases.

Second, governments will use reference cases to deal with issues relating to federalism and to help navigate relationships with other governments. Indeed, as
discussed in Chapter Three, the reference power was originally created with the intention of providing the federal government a mechanism to influence (and perhaps control) provincial legislation in a manner that is distinct from the powers of reservation and disallowance. Chapter Three also details that both provincial and federal governments will refer the legislation of another government to a provincial appellate court or the Supreme Court for review, as in the 2013 Quebec Senate Reference in which the Government of Quebec referred the federal government’s Senate reform bill to the Quebec Court of Appeal.\textsuperscript{80} Indeed, provincial governments refer federal government legislation at a higher rate, and over 12 percent of all provincial references involve referral of federal government legislation. Additionally, analysis in Chapter Four demonstrates that the majority of all reference cases from 1949 to 2014 concern the \textit{Constitution Act, 1867}, with the greatest proportion of these cases concerning the federal division of powers and federalism-based questions, a trend that holds constant in the post-\textit{Charter} era.

Third, previous literature has presumed that governments will ask reference questions as a means of position legitimization, a hypothesis that is derived and supported by general literature on Canadian courts and case studies of individual reference cases (see Hausegger et al. 2015; Hennigar 2009). This hypothesis relies on the fact that the courts maintain a relatively high level of public support and for the most part, political actors abide by court decisions, regardless of whether they run counter to interests or preferences. This hypothesis is supported by analysis in Chapter Three that documents several instances where governments referred legislation to obtain constitutional/legal certainty prior to implementation, as in the King Government’s referral of the Bennett New Deal legislation in the 1930s.

Fourth, governments will ask reference questions because the structure and process of reference cases allows for a great deal of control and, arguably, manipulation that is not possible in routine judicial review. Due to the fact that references can be based on abstract questions, a government does not need to wait for a factual circumstance to arise to obtain judicial review. Furthermore, the power to craft the reference questions gives governments a great deal of control over the circumstances of the case and the

\textsuperscript{80} \textit{Projet de loi federal relatif au Sénat (Re), [2013] QCCA 1807 (Quebec Senate Reference)}
terms of the debate. A reference seeking government can create reference questions with caution to attempt to secure the most favourable response from the court. In some cases, governments will ask reference questions over seeking routine judicial review because a reference can provide a government with a relatively quick, and authoritative opinion from a high appellate court. An authoritative opinion may be especially valuable for a government that is introducing sweeping legislative changes or a controversial new policy. These structural benefits are not possible through routine or concrete judicial review and are unique to the reference power.

Finally, based on the review and analysis of delegation theory provided on Chapter Two, a government’s decision to ask a reference question will be demonstrative of delegation theory, highlighting the specific benefits of delegating to the courts. The hypotheses outlined above, if confirmed, demonstrate the mechanism of delegation to the courts in reference cases and the theoretical principles of delegation theory. In terms of mechanics, at the most basic level the reference power demonstrates the delegation of decision-making from a principal (the reference initiating government) to an agent (the courts). On a more theoretical level, the government reasoning and perceived benefits for engaging in a reference case highlight the unique benefits of delegating to the courts. Such benefits include the possible political capital that is gained through having matters decided by the courts with the legitimacy gained from judicial independence. Other benefits include the ability to avoid blame/engage in blame deflection, and over coming legislative gridlock.

**WHY DO GOVERNMENTS ASK REFERENCE QUESTIONS?**

In order to investigate and confirm the reasons why governments choose to initiate reference cases, this project used semi-structured elite interviews. Interviews are a valuable source of data for the present study for two central reasons. The first, and the reason why interviews are useful in most circumstances, is that interviewees can provide insight into phenomena that is relatively unknown (See: Lilleker 2003). The present study is the only existing work to date that has attempted to interview the decision-makers involved in reference cases, with the goal of understanding general patterns across
Second, interview data is essential to the present study because it is one of the few means to access the inner workings of cabinet decision-making and the choice to use the reference power by governments. This analysis uses semi-structured interviews, as this method allows for the probing of perceptions and opinions. Although this method requires more preparation by the interviewer, it is valuable because it provides the opportunity for in-depth conversation and the ability for subjects to clarify responses, which serves to maximize response validity (Aderbach and Rockman 2002).

The central focus of interviews was former attorneys general/ministers of justice. This focus is based on the results from earlier data collection regarding reference case process and the crucial role that an attorney general plays in the reference decision-making process. However, in order to obtain a larger sample of interview subjects, effort was made to interview counsel and constitutional experts, and former first ministers that participated in previous reference cases. That being said, the inclusion of constitutional experts also helps to provide the perspective of a reference case insider that is not influenced by the same constraints and incentives faced by elected officials/attorneys general, which can help to verify the motivations and claims made by the attorneys general, in a general sense. The analysis that follows is based on eight in-depth semi-structured not-for-attribution interviews. Included in this sample are five former attorneys general, one former first minister, and two former counsel/constitutional experts. This sample was gathered from nineteen previous reference cases, which includes all reference cases going back twenty years (2014 to 1994), with the exclusion of two cases that were initiated by a current sitting attorney general. Limiting the reference cases to the past twenty years provided fifteen different attorneys general as possible subjects, all of which were contacted for interviews.

The participation of five former attorneys general provides a response rate of one-third. The attorneys general interviewed by this project have served in both provincial and federal cabinets. Five former reference case counsel/constitutional experts were invited to participate in interviews, with two accepting. Former reference case counsel

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81 Strayer (1988) provides the only example of scholarly analysis that attempts to generalize across reference cases for explanations as to their advantages and disadvantages. Although an important contribution, this work is grounded in legal perspective and does not investigate how elected officials view reference cases and the effect of these cases on political institutions and events. Furthermore, his analysis relies predominately on case law and does not rely on interviews.
that refused to participate did so on the basis of the limitations imposed by attorney-client privilege. Fortunately, the counsel that did participate in interviews had a much larger role than simply acting as solicitors for a government. Both of the counsel subjects have served as high-level legal advisors to several different governments (across political parties and level of government), and as either a high-ranking public servant or as an outside expert consultant. While the counsel interview subjects may not have held the power to initiate a reference case, both advised governments during the decision-making process. Interviews took place over a three-month period during the spring and summer of 2014. Subjects were questioned about the specific reference case (or cases) in which they had participated and about the reference case process in general. The central goal of the interviews was to understand why a government would choose to initiate a reference case and to assess the benefits and possible drawbacks related to the use of the reference power. The analysis that follows is primarily based on direct quotations, with minimal editing (when possible), to maintain the integrity of the interviewee statements. Furthermore, as confidentiality of the subject’s identity was a condition to gaining access to the participants, all interviewees will be referred to by gender-neutral language and pseudonyms that identify their previous position as it relates to the project.

Interview responses largely relied upon the subject’s first hand knowledge of specific reference episodes, however some respondents were able to provide insight into other reference episodes that took place during their time in office, but outside of their time as attorney general. Some subjects had direct participation in more than one reference case. Respondents were asked to comment on their specific experience with a reference case or cases and were also asked to provide their perspective and opinion on the reference power in general, which often prompted the discussion of other reference cases to which the individual may not have had direct involvement.

The analysis that follows provides an assessment of the central themes emerging from the interviews, which allows us to understand why governments ask reference questions. The interview data are supplemented by secondary scholarship that also attempts to understand the motivations behind a government’s choice to initiate a reference case and the benefits attributed to a reference decision. It is important to note that these thematic answers are not mutually exclusive and a government’s decision to
initiate a reference case is likely the product of a combination of several of these explanations. Indeed, every subject interviewed made it clear that there were multiple motivating factors that led each government to begin a reference case.

**Politics, Controversy, and Hot Potatoes**

Perhaps the most hypothesized reason why governments ask reference questions is to avoid dealing with a particular controversial issue or what is often referred to as the ‘hot potato’ effect. This explanation holds that when dealing with an issue that might prove to be divisive or unpopular with the public, political actors may wish to transfer decision-making responsibility to the courts. For example, Hennigar (2009) argues that this was the impetus behind the Chretien government’s reference to the Supreme Court regarding the constitutionality of same-sex marriage. Hennigar contends that issues such as same-sex marriage, may be understood as a “no win” decision and that politicians transfer decision making power to the courts to avoid taking responsibility for making a no win decision. Indeed, the *Same-Sex Marriage Reference* is perhaps the strongest example of this type of political strategy, as the caucus of the governing party was divided on this issue and there was not an overwhelming majority of support for same-sex marriage among Canadians (Hennigar 2009). However, due to several court decisions that supported the notion of same-sex marriage and the constitutional protection of sexual orientation, the government could not ignore the issue. With these factors under consideration, delegating the decision making over same-sex marriage to the Supreme Court became a politically advantageous decision (see Hennigar 2009).

The strategy of blame avoidance may occur when a government passes decision-making power to the courts, in an attempt to diffuse responsibility for deciding a politically divisive issue that could alienate both caucus members and voters. In throwing the ‘hot potato’ to the courts, governments can blame the court for an unpopular decision, or conversely, if the court’s decision is well received by the public, the referring government can take credit for bringing the issue to the court in the first place. This first explanation as to why governments ask reference questions is perhaps the most overt example of references-as-political-strategy. It is important to note that the use of

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references in this manner has not escaped the justices that are saddled with finding answers to these political controversies. Through interviews with justices of the Supreme Court, Macfarlane documents that the justices are conscious to the “political opportunism that arises in the context of the reference procedure” (2013: 89). This awareness of political opportunism has caused courts to refuse to answer reference questions that are too political or would jeopardize the role of the judiciary in the Canadian constitutional framework. Although reference question refusals of this manner are rare, courts have refused to answer questions in two reference cases on the basis that answering would be inappropriate for the court (see Chapter Four).83 Considering how uncommon it is for courts to refuse to answer ‘hot potato’ questions, it is puzzling to understand why the courts are so willing to deal with these difficult questions.84

Almost all interviewees (except one former attorney general and one counsel) mentioned politics, or dealing with political controversy, to explain the motivation for using the reference power. Some of the subjects relying on this explanation expressed the view that any important decision made by a government will have some form of political consideration. For example, commenting on a specific case in which they were involved, former Attorney General C frankly stated: “[it was] a political aspect, a political evaluation in the decision to go to court like we did” (Author interview 5 May 2014). When discussing the use of references in general, the same respondent continued with the premise explaining, “It’s a mix between the legal and political…if you look at every reference and the reason for it, maybe not 100%, but a large part of it is politics.” In a similar sentiment, Former Attorney General D explained, “These are important questions…therefore they are always going to have a political dimension to them, small p. It goes without saying” (Author interview 9 May 2014).

Other interviewees reasoned that the reference power is a valuable tool for governments to deal with political controversies. Respondents that spoke to this theme explained that when dealing with a particularly controversial piece of legislation, it was prudent to seek assurance and have the courts pronounce on the issue either before the


84 Understanding the answer to this puzzle is unfortunately beyond the focus of the present analysis, as it would require an investigation into the internal decision-making of a court.
passage of the bill or shortly following the adoption of the new law. In this situation, a
government may be facing criticism leveled at the constitutionality of a proposed or
recently enacted policy from a wide array of commentators such as parliamentarians,
opposition parties in the legislature and other concerned private citizens, such as
academics. Former Attorney General A explains, “Not surprisingly in these cases there is
a political controversy following the passage of the legislation and the legitimacy of the
constitutional legal question resulted in the reference” (Author interview 7 April 2014). A
reference decision before the adoption of a new policy can help protect a government
initiative that may cause political controversy. Former Attorney General B demonstrated
this reasoning when stating, “The simple answer is that it was going to be controversial
so why go out on a limb and do something that is possibly illegal without going to the
court and having the determination made beforehand” (Author interview 25 April 2014).
Using a reference case to deal with a political controversy that arises out of the
constitutionality or legality of a government initiative was also apparent to counsel that
appeared in previous reference cases. Counsel B explained, “it was obviously politically
controversial, there were serious questions about the legal validity and whether it was
going to be a violation of the constitution” (Author interview 20 June 2014).

When governments are faced with political controversy based on the
constitutionality of a new policy or legislative project, referring the matter to the courts is
just one of many options available. Instead of a reference, a government could request
extensive study in parliamentary committee with the aid of experts, such as academics or
practitioners or utilize the bureaucratic expertise available within the public sector. Yet,
there are distinct benefits from delegating the political/constitutional controversy to the
courts. Attorney General D spoke at length about the benefits of sending a controversial
matter to the courts and out of the routine parliamentary domain:

“These are political hot potatoes usually and what you’re doing is taking it out of
the political realm, at least for a period of time, and sending it to the court, where
in fact you actually freeze the political discussion” (Author interview 9 May 2014).

Attorney General D’s comments refer to the norm of sub judice, a parliamentary
convention and common law principle that prevents public officials from commenting on
matters that may serve to prejudice an ongoing judicial proceeding. In other words, by sending the matter to the courts, the governing party can rely on *sub judice* to essentially mute parliamentary debate. Indeed, according to Attorney General D, this ability to halt a political debate over a proposed policy or a government action through a reference is one of the benefits unique to the reference power, “…when a reference is referred it’s the government deciding that this is a political hot potato and that better to send it up to the court, better to give us some time, some breathing room” (Author interview 9 May 2014).

As indicated in Chapter Four, majority governments initiated over 88 percent of all reference cases. As a result, the use of a reference as a means of providing a government ‘breathing room’ is an interesting finding, considering majority governments have greater autonomy in terms of time and are not usually concerned with survival in the legislature, compared to minority governments. Reference cases for majority governments are less likely to be driven by electoral pressures and the desire to obtain ‘breathing room’ infers that a government might be facing pressures within its caucus and party, rather than solely from opposition parties within the legislature.

A reference not only allows a government to rely on the courts to decide difficult political issues, it can also have the effect of limiting debate and effectively silencing legislative opposition and criticism, at least until the court decides the case. In his analysis of the *Same-Sex Marriage Reference*, Huscroft (2004) hypothesizes that using a reference in this manner was precisely the government’s political strategy in this case. Huscroft argues that the Chretien government embarked on a reference to deal with the issue of same-sex marriage as “crass partisan advantage…to fend off political criticism and buy time” (2004: 258). The comments provided by individuals with direct involvement in reference cases appear to largely confirm Huscroft’s assumptions – a reference can be a valuable tool that can effectively silence criticism and allow governments to distance themselves from a particular controversy while it is under consideration by the courts.

References are not only a tool that can be used to impede or pause a debate in the legislature, they can also be used to appeal to voters. A government can signal its disagreement with the actions of another government and engage in position taking through a reference case. One of the interviewees discussed an episode where another government had referred a proposed policy of its government. In this example, along with the legitimate constitutional concerns that the reference-initiating government may have held, the proposed legislative scheme received vocal opposition within its jurisdiction. As a result, by submitting the legislation for review through a reference case, the referring government was provided with a national platform to express its opposition to the legislation-enacting government. This purpose of the reference was not lost on the interviewee and its government: “I can’t speak to their motivations, I don’t know what they were, other than the fact that I can assume that it was a dose of politics involved, playing to their base” (Author interview 9 May 2014). In this particular episode, the reference allowed the referring government to insert itself into a policymaking process that would otherwise be closed off to it. This is a benefit that exists regardless of the outcome of the specific reference case.

Arguably, every decision made by an elected official could be interpreted as having some political considerations. As a result, we should not expect a difference when considering the decision to pursue a reference case by political actors. The practice of blame avoidance through a reference case demonstrates one of the most basic principles of motivation for political actors according to rationality-based perspectives. Rational choice institutionalism holds that political actors are motivated by a central desire to take credit and to avoid blame (Weaver 1986). This relationship between the reference power and its use as a strategy to avoid political controversy is important to note here, and it will be revisited in greater depth in the section on references as delegation, below. It is interesting to note that the decision to use a reference to deal with a ‘hot potato’ appears to be more concerned with delegating decision-making and less concerned with the case outcome. It does not appear that decision-makers are overly concerned with how the court will decide; rather the judicial outcome is secondary to the benefits that are achieved through referencing a politically controversial issue. That being said, we can conclude from the findings above that the reference power is not merely a legal tool.
available to governments, it is also a viable means to deal with political controversies, as First Minister A explained: “it’s always a little bit of politics” (Author interview 2 April 2014).

Federalism

In his assessment of the general benefits of the reference power, legal scholar Barry Strayer (1988) argues that references are a useful tool for governments to challenge the actions of other governments. As explained in Chapter Three one of the motivations behind the creation of the reference power by the Government of Canada was to provide itself with another means to challenge provincial legislation aside from the powers of reservation and disallowance. Governments are quite willing to challenge the legislation or action of another government through a reference case, with provincial governments using references in this manner more often than federal governments. Indeed, provincial governments have referred the legislation or action of federal governments (13 percent of references) at a greater rate than federal governments submitting reference questions on provincial legislation (9 percent of references). Furthermore, as demonstrated in Chapter Four, the vast majority of reference cases consider federalism based questions with more than half of all cases (52.6 percent) considering the Constitution Act, 1867 as its primary subject, with the majority of these cases considering division of power based issues. This trend of federalism remains constant following the introduction of the Constitution Act, 1982 and the Canadian Charter of Rights and Freedoms.

It is clear through quantitative data that references are employed to deal with issues relating to federalism, a finding that becomes even more convincing when contextualized with qualitative data and interview responses. References can be a means to deal with federal relations between governments as way to mount an ultra vires challenge. Governments using a reference in this manner submit the action and/or legislation of another government for review by an appellate court on the basis that the actions of the other government are outside its legislative jurisdiction. These cases focus on the constitutional division of powers and provide governments a means to protect constitutional jurisdiction. An example of reference used in such a manner can be found in the Fire Arms Reference, in which the Government of Alberta challenged the
Government of Canada’s gun registry legislation on the basis that it infringed on civil and property rights, a matter of provincial constitutional jurisdiction. Similarly, in Reference re Quebec Sales Tax [1994] 2 S.C.R. 715, the Government of Canada challenged the constitutional validity of amendments to the Quebec sales tax on the basis that it was too similar to the federal sales tax. In each instance, a government uses a reference to invoke judicial review to challenge the actions of another government. The use of references in this manner should be unsurprising, considering it largely demonstrates the original intentions behind the creation of the reference power.

Referring the legislation of another government has other benefits aside from the purpose of protecting constitutional jurisdiction. According to interview subjects, the reference power can be a valuable tool of federalism in several other ways and that the referral of another government’s legislative project is not necessarily indicative of a disagreement on that legislative goal by the referring government. Instead as Attorney General C explained, going to court through a reference case can be a tool to force the other government to listen: “It was clear what [they] were doing…but it was clear that to have our position considered we had to go directly to court to speak to them” (Author interview 5 May 2014). In this particular example, the Attorney General C’s government felt that the only way to gain the attention of the legislation-enacting government was to bring the courts in and force judicial review of the project. Attorney General C explained that its government did not necessarily disagree with the ultimate goal of the legislation-enacting government, but found that a reference case was a means to force the other government to negotiate with them. Attorney General C elaborated on its government’s logic, “We are forced to listen to you because we are partners in federalism and it’s our mutual advantage to be respectful of one another and do the same for us, listen to us” (Author interview 5 May 2014).

Using a reference to force negotiation between federal partners is what Russell (1987) and Mandel (1994) point to as the impetus for the Patriation Reference. The Supreme Court’s decision in this case found merit in the position of the federal government (provincial approval not required for constitutional amendment) and the argument of provincial governments (provincial involvement is essential for constitutional amendment) by holding that provincial participation in the amendment
process was conventionally, but not legally, required. According to both Russell and Mandel, the reference was the linchpin in bringing the parties back to the negotiation table, moving the constitutional amendment process forward. In his analysis of the *Patriation Reference*, Brandt (1983) takes the logic of negotiation one step further by contending that this particular case put the Supreme Court in the role of mediator rather than adjudicator, noting the highly political rather than legal nature of the dispute. The *Patriation Reference* illustrates the same reference tactic explained by Attorney General C, insofar as a reference can be a valuable negotiating tactic with other governments in federal—provincial relations, in moving negotiations forward or forcing the inclusion of another government, as in the example described by Attorney General C. Using a reference in this manner can provide a government a means to force itself into the policy debates of another government, gaining media attention in the process, a benefit for the excluded government regardless of the case outcome. To be sure, if the challenging/reference initiating government is successful in its reference case it will have a greater deal of influence on the policy debate, but the benefits to be gained solely from taking another government’s legislation to court cannot be discounted.

If the routine political channels of negotiation are not available or have not been successful, a reference may be the final measure to force the involvement of another interested government in the policy making process. When a government refers proposed legislation of another government it can pause the policymaking process and it can ensure that external parties can have a role in the process. If a government refers an existing policy to the courts, it could serve to impede or stop the implementation of the policy. Using a reference to submit another government’s action and/or legislation to the courts not only serves to slow down or pause policy implementation, it forces open the policymaking process, allowing other governments, and possibly intervening groups, to have an input in the process. Indeed, using a reference as a means to open up the policy debate to include more groups was one of the explanations Attorney General E gave to describe their government’s decision to initiate a reference case:

“In my view it was better to facilitate that process by the reference question which had a number of advantages in this regard…[such as] allowing a whole group of interveners to come before the court and that was something that I thought was
very important given the fact that it was a matter of national importance” (Author interview 9 June 2014).

In the opinion of Attorney General E, using a reference to deal with this particular policy issue provided a valuable means to include many different groups in the debate, and allowed for a public conversation on the issue outside the regular parliamentary process.

A reference case can help to address an issue unique to a federal system – the reality of differences in public policy across jurisdictions. In terms of the development of case law through the courts, until an issue receives a ruling from the Supreme Court, provincial courts can issue different rulings creating a dissimilar access to public policy or an uneven application of rights across provincial boundaries. Instead of waiting for the issue to be appealed from provincial appellate courts, a reference can produce a national ruling in a relatively timely manner. According to Attorney General D the differences between provinces could mean that a particular group would have access to a right while it would be denied to similarly situated individuals in a different jurisdiction (Author interview 9 May 2014). In such a circumstance, obtaining a ruling from the Supreme Court would ensure an equality of access across the country, adding clarity to the situation. Attorney General E made a similar argument and explained that a reference case can create policy convergence across jurisdictions, “[the reference] allowed for a national appreciation of the issue, so it all converged from the disparate hearings in the courts in the provinces, it all converged at the Supreme Court” (Author interview 9 June 2014). According to this perspective, references can be a valuable tool to force national standards in a federal jurisdiction in a manner that is timelier than the organic development of concrete review through the provinces.

**Institutional Authority and Protection of the Courts**

In their recent book on Canadian courts, Hausegger et al. (2015) list position legitimization as one of the benefits of the reference power for governments. The authors explain that courts are often an attractive venue for dealing with issues because courts generally enjoy a greater level of support by the public compared to the other, more political, branches of government. Hausegger et al. argue that a reference case not only provides legitimization to a position for elected officials, it can also do so at the expense
of the power of political opponents (2015: 250). This logic is quite convincing, as there is high quality scholarship that documents both the popularity of the Supreme Court of Canada and the powerful nature of the Court’s decisions (Fletcher and Howe 2000; Hausegger and Riddell 2004; Radmilovic 2010). Indeed, the rich debate on the existence of a dialogue between the Supreme Court and policymakers demonstrates the inability or unwillingness by policymakers to overrule the Court’s decisions (Manfredi and Kelly 1999, 2001; Manfredi 2004, 2007). It is important to note the incompatibility between the explanation of institutional authority and the first explanation of political hot potatoes. If governments increasingly rely on the courts to deal with hot potato-issues the institutional authority and legitimacy of the courts will likely suffer over time. This incongruence between the use of the reference power by political actors and the effect of the reference power for the courts is a conflict that will be examined in further detail the subsequent sections of this study.

Interview subjects largely validate this legitimization hypothesis. However, the related motivations behind using a reference in this manner are slightly more nuanced, which is reflected in the selection of institutional authority/protection rather than legitimization as the title of this thematic section. Indeed, every interviewee made comments that speak to this theme, and the explanations spoke to three different reasons related to institutional authority/protection of the courts. Respondent’s comments varied on the following sub-themes: using a reference to seek assurance for a controversial decision, the power of an authoritative opinion from a court, and protection for public policies that would be difficult to unravel once implemented. To be sure, these themes are interrelated. Furthermore it is essential to note that if decisions from courts and the Supreme Court in particular were not respected and considered authoritative, political actors would not use a reference case as a means to seek assurances from the court. Finally, it is important to note that this explanation differs from those previously examined as the benefits are more contingent on a favourable decision from the courts. That being said, an authoritative decision from a high court may still be benefit to a government, even if it invalidates government legislation as it will provide the government certainty regarding its legislative program and/or the court’s decision may detail how to amend the legislation to make it more legally or constitutionally permissible.
A government may want to seek assurance that a new policy or program is constitutional prior to implementation, as a finding of unconstitutionality after implementation that could result in the dismantling of the problem would be extremely problematic. An example to demonstrate is useful. In the 1980s, the Ontario government wanted to fund Roman Catholic secondary schools, a program that once in operation would be quite difficult to unwind, as it would create an entirely separate Catholic school board and school system. However, this proposal was quite controversial in terms of its compliance with the Charter protections regarding religion and equality. The controversy of this case is demonstrated in part by the very high rate of participation by third-party intervening groups, as this case had the highest rate of intervener participation of all reference cases post 1949, with 26 intervening groups (see Chapter Four). As a result, to seek assurance and protect this program from a likely future challenge under the Charter, the government referred the foundational legislation to the Ontario Court of Appeal.

This reference was subsequently appealed to the Supreme Court in Reference re Bill 30, An Act to Amend the Education Act (Ont.) [1987] 1 S.C.R. 1148, which held the provincial legislation to be a valid exercise of the provincial constitutional jurisdiction over separate schools. The Supreme Court’s decision provided the Ontario government with an authoritative opinion that the new separate Catholic school system was constitutional and valid. The authority of the Court’s opinion served to undermine any future challenge on the basis of the Charter. Although referring Bill 30 to the courts made the Ontario government’s legislative program vulnerable to invalidation, it was quite clear that the legislation would have been challenged by oppositional groups once in place. Submitting the legislation in a reference allowed the government to circumvent the likely future challenge and also maintain a degree of control over the case, as it was able to create the reference questions and frame the terms of the debate.

Four of the participants interviewed made specific comments regarding the authority of the courts and the respect that a judicial decision is afforded in the partisan and political sphere. This authority and respect means that policymakers are unlikely to ignore or reject a reference decision, regardless of the technical advisory nature. For example, Attorney General E commented, “I think the authoritative power of the courts is such that governments would seek to reject it at their peril” (Author interview 9 June
Most interview subjects, when commenting on the authority of the courts spoke specifically in relation to the Supreme Court and its position within the Canadian legal and political system. For Counsel A, the Court’s position within the legal system affords its decisions a higher level of authority than afforded to decisions from appellate or lower courts, “The government wants to get a ruling and it wants to get a ruling by the Supreme Court because lower courts may be reversed. It’s not fully authoritative unless it comes from the Supreme Court” (Author interview 3 April 2014). A reference decision can provide a government clout when making decisions regarding policy in a manner that is more powerful than obtaining an opinion from experts or commissioning a study from policy experts. Attorney General B explains, “An opinion is an opinion. It’s not a court ruling. A court ruling is concrete. [If] you’ve got a court ruling then you’re on safe grounds. If you don’t, you’re taking chances” (Author interview 25 April 2014). Furthermore, a reference opinion may simply provide a government with clarity on a complicated area of law, which could help to resolve the issue with the authority of the court (Counsel A, Author interview 3 April 2014).

Although none of the interview subjects were speaking directly about the Nadon Reference, their comments can help to explain the Government of Canada’s decision to initiate a reference in this case. The Nadon Reference concerned the legality of the appointment of a Federal Court judge to the Supreme Court of Canada. In this reference episode, the government had commissioned an opinion from a former justice of the Supreme Court regarding the legality of Nadon’s appointment under the Supreme Court Act. This opinion was supported through the concurrence of one of Canada’s leading constitutional scholars, Peter Hogg, and another retired Supreme Court Justice. However, even with support of this expert opinion, the government still faced public criticism and legal challenge in the Federal Court by a lawyer from Ontario. Although the Supreme Court’s decision in Reference re Supreme Court Act ss. 5 and 6 [2014] 1 S.C.R. 433 (Nadon Reference), did not agree with the expert opinion that supported the appointment of Nadon, it provided clarity with authority and effectively circumvented any future challenge regarding the eligibility of a justice from the Federal Court to the Supreme Court. If the federal government had gone forward with the appointment of Justice Nadon
without the reference opinion, it could serve to jeopardize any Supreme Court case that Nadon participated in, if his appointment was found to be invalid at a later date.

With the high level authority provided to decisions by Canadian courts and the Supreme Court in particular, it should be unsurprising that elected officials would rely on such decisions to seek assurances for legislative projects and as an attempt to gain insulation from future legal challenge. Indeed, this line of reasoning speaks to the explanation offered by Hausegger et al. regarding the use of references as legitimization by political actors. Six of the interview participants commented specifically on the benefits of obtaining a reference opinion that clarified the legality of a policy or validated the proposed policy scheme. For example Counsel B explained, “We are generally going to use a reference to gain clarity on a measure that might be subject to challenge” (Author interview 20 June 2014). Even though there is always a possibility that the courts could find a legislative initiative invalid, the assurance that results from this act can outweigh the risk of invalidation. In the words of Attorney General B:

“From my point of view it is a pretty simple issue – controversial proposed scheme, we could have gone ahead and done it without the reference, but then you’re really placing yourself at jeopardy and we knew that someone was going to challenge us if we went ahead and did it…the reference determines if for once and for all, you get the red light or the green light” (Author interview 25 April 2014).86

Governments will initiate references when they know their proposed legislative scheme will be controversial and will likely result in challenge. If the referring government is successful in its reference case, they can not only continue forward with a great deal of confidence, but also knowing that future legal challenges to their policy have been largely preempted by the reference case. Indeed, two attorneys general (E and C) and First Minister A explicitly stated that in their experience, a reference case provided each of their governments with a means of protecting themselves in going forward with proposed legislative projects. Although a reference does not serve to completely insulate a government from future challenge, according to Attorney General E, “it makes it very difficult for a challenge to be effectively mounted” (Author interview 9 June 2014).

As mentioned above, seeking legal assurances from courts through a reference case will be arguably more important to governments seeking to implement new policies...

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86 In this example, Attorney General B’s government was concerned that another government and several interest groups would challenge its legislative project.
that would have significant repercussions if they were found invalid once in effect, like Ontario’s creation of the separate Catholic school system. Speaking in general about a case s/he was involved, Counsel B explained:

“In a situation where if you go ahead and implement a change that is then very difficult to unwind, it is probably prudent before the fact and if you think there is a plausible cause to be made that the initiative would be, could be, found unconstitutional, that you get legal authority to get the matter cleared up by the courts beforehand” (Author interview 20 June 2014).

Certainly, the referral of a legislative project that would be difficult to unravel once implemented is a byproduct of using a reference to seek assurance or protection from the courts. That being said, using a reference in this manner requires a government that is willing to slow down or pause the legislative process until it has the court’s decision. Furthermore, a government in this position should be willing to accept an unfavourable ruling from the court, which could serve to potentially negate its ability to pursue the policy altogether.

These findings largely validate the arguments made by Russell (1977) regarding the Anti-Inflation Reference. In his assessment of this case, Russell explains that the Ontario government pushed the federal cabinet to submit the Anti-Inflation Act, S.C. 1975, c.75 as a reference to the Supreme Court. According to Russell, the Attorney General of Ontario was concerned with the uncertainty that would result from the protracted outcome of litigation across the country. Furthermore Ontario wanted assurance regarding the constitutionality of the Anti-Inflation Act (which it supported) from the Supreme Court. In this particular episode, the Government of Ontario was led by a minority government under Premier Bill Davis, who wished to avoid dealing with the matter through the legislature as it was faced with opposition from the other parties, who opposed the anti-inflation legislation. In Reference re Anti-Inflation Act [1976] 2. S.C.R. 373, the Supreme Court held that the Anti-Inflation Act was a valid exercise of federal government constitutional jurisdiction, under the residual clause of peace, order, and good government. The reference case in this episode not only assured the Government of Ontario that the legislation was indeed a valid act of the Parliament of Canada; it also gave the federal government (the referring party) the authority to move forward with its anti-inflation policy.
Time and Resource: Pausing the Debate

Matthew Hennigar has completed extensive work analyzing the federal government’s decision-making in appealing Charter cases. Looking at the internal workings of the Department of Justice and the political calculations that can shape this legal decision, Hennigar (2007) has demonstrated that time and resource considerations influence this decision-making process. Governments are not only concerned with the financial costs that can be incurred through litigation, they also consider other resource issues such as policy costs. Policy costs include issues such as loss of control over a policy, and loss of political capital (Hennigar 2007: 233). We should expect to see similar considerations made by governments in reference cases. Although a different process than appealing a lower court decision, participation in a reference would still impact these resources. Arguably, in situations where governments refer legislation that is proposed and not yet in force, the impact of policy costs, such as the loss of control over policymaking can be more obvious and direct, as a negative reference decision could cause a government to cancel its policy plans.

Aside from resources, governments will also consider the impact of time. Strayer argues that one of the most significant benefits provided to governments by a reference is the ability to obtain judicial review from a high court in a relatively timely manner (1988: 321). In routine or concrete judicial review, cases can take several years before reaching a provincial appellate court and even longer yet to reach the Supreme Court of Canada. While, in a reference case, a government can submit a question and obtain a decision from an appellate court or the Supreme Court in a matter of months. For example, in the recent Nadon Reference, the Supreme Court returned a decision five months after reference questions were submitted via an order-in-council. The Nadon Reference is possibly one of the speediest references, which is understandable considering the specific circumstances and that the Court was operating with less than a full bench. Comparatively, the Saskatchewan Court of Appeal reached a decision in Reference re: Marriage Commissioners Appointed Under the Marriage Act, 1995, S.S. 1995, c. M-4.1 [2011] 327 D.L.R. (4th) 669, approximately seventeen months after the questions were first submitted by the Saskatchewan cabinet through an Order in Council. Similarly the
Supreme Court of Canada provided a decision in the *Senate Reform Reference* fourteen months after the federal cabinet initiated the proceedings.

The ability to obtain a ruling from one of the highest courts in Canada or the Supreme Court in under two years is an important benefit of the reference power for governments. If a government wishes to implement a wide-ranging program, but would like to seek assurance that the proposal is constitutionally valid before proceeding, it can obtain the courts’ advice regarding constitutionality in a timely manner. Counsel A provided this reasoning as one of the central motivations behind the use of the reference power by governments, “…they usually want to get a timely ruling and if you wait for a case to follow the normal course you might wait several years before it reaches the Supreme Court” (Author interview 3 April 2014). A reference allows a government not only to directly access an appellate court in a timely manner, it can do so without waiting for a concrete dispute or a set of facts to pursue a case. Attorney General A agreed that one of the central benefits of the reference power is that it addresses, “[the] need for a government to obtain a constitutional decision from the courts in a relatively timely manner rather than have disputes involved drag through the courts in a number of actions” (Author interview 7 April 2014). It is interesting to note the juxtaposition between the rationale of using a reference to obtain a timely ruling from a high court, but also use a reference to give a government more time in relation to dealing with the legislature, as discussed in Section 1 – *Politics, Controversy and Hot Potatoes*. A government could seek a reference to gain time and ‘breathing room’ in relation to the legislature, but not as much time as routine litigation could require.

The benefit of time not only speaks to the generally slow moving judicial system; it also can serve to circumvent a slow moving legislative process. If a government is pursuing a legislative program that spurs a great deal of opposition within parliament, it can be faced with an uphill battle, even if the government holds a majority in the legislature. In such circumstances, those who oppose the governing party’s policy proposal can yield a variety of parliamentary rules and procedures to attempt to prevent or delay the passage of government’s bill. Understandably, these delaying tactics are even more powerful when the governing party holds only a minority of seats within the legislature. In such situations, a reference case may not only save the governing party
time, but also can help avoid the expenditure of other resources such as political capital in effort to secure the passage of the legislative proposal. Attorney General D finds that this aspect of the reference power makes it quite valuable to governments:

“You get a clear indication what your power is more quickly than if it was legislated and gone through parliament with what an undoubtedly controversial legislation held up with all the parliamentary procedural rules that opposition can use…I think a reference short circuits that” (Author interview 9 May 2014).

A favourable reference decision advising a government that its legislation is constitutional can lend a great deal of authority to the government’s objective, and without having to potentially expend a great deal of political resources in attempting to marshal the bill through the legislature.

A reference can save the government time and resources when embarking on a new legislative agenda and it can help to prevent the expenditure of resources in the future, if the legislation becomes subject to legal challenge. A reference case requires much fewer resources compared to routine review. As there is only one or two legal proceedings (in situations where a provincial reference case is appealed to the Supreme Court), the required amount of time and legal resources will likely be much lower when compared to a routine case. As a result, a government can limit the expenditure of such resources in the future by submitting the legislation or government action to the courts earlier on in the process. According to Attorney General B, this was certainly one of the central factors that drove its government to submit its proposed policy to the courts in a reference: “If you go and get the opinion right or the decision then you don’t go and waste a lot resources or a lot of time with something that could be eventually over turned later on and there could be a lot of costs as well, legal costs and political costs too” (Author interview 25 April 2014).

Although not considered by the individuals interviewed for the present study, the reference power may be useful for governments dealing with emergency situations in which a quick assurance that actions are legal and/or constitutional is essential. Strayer (1988) points to the use of the reference power during wartime, in which governments must respond to exigent circumstances with confidence in the legal validity of their policies. For example, in Reference re Regulations in Relation to Chemicals [1943] S.C.R. 1 the Supreme Court validated actions taken by the Parliament of Canada under the War
Measures Act (5 George V, 1914 Chap. 2) as a domestic aspect to Canada’s war effort in World War II. Although the findings from Chapter Three do not demonstrate a significant increase in the use of the reference power during the two world wars, this does not rule out that the reference power can be useful to governments in these circumstances. That being said, looking at the 1940s exclusively, the data demonstrate that the reference power was used at a higher rate than at other times periods, such as post 1990, with double the number of reference cases occurring (19 reference cases).

The relatively quick process and the limited number of resources required are both practical and significant benefits of the reference power for governments. Obtaining the advice of the court in a reference decision can help a government silence critics concerned with the legal and constitutional implications of a new piece of legislation, helping it to push its policy agenda forward. Furthermore, if a government suspects that it will be challenged on a piece of legislation in the future, it can conserve future resources by preempting the challenge and submitting the legislation to the courts itself in a reference case. Again, as mentioned above, unlike some of the other explanations for why governments ask reference questions, these benefits cannot be truly realized by a government unless it receives a favourable ruling in its reference case. Furthermore, while a reference can be an attractive choice for a government concerned with a timely response to an issue, it is important to note that selecting a reference also requires a deal of restraint, as the referring government must be willing to pause its agenda while it waits for a ruling from the courts. As a result, in considering the motivation for pursuing a reference case, the concept of time can cut both ways. A reference can save a government time in the present by silencing criticism, and in the future by limiting the possibility that it will be challenged. However, using a reference requires a government to slow its agenda down and seek the advice of a court, before moving forward. As Counsel B explained: “[a reference] actually requires a measure of restraint from the executive branch…because typically governments want to proceed, they want to go ahead and act

87 This case provided the basis of the JCPC decision in Reference re Persons of Japanese Race [1947] AC 87, which infamously found the Government of Canada’s deportation of individuals of Japanese descent to be valid. The Chemicals Reference also provided the basis for Reference re Wartime Leasehold Regulations Reference [1950] S.C.R. 124 held that the federal parliament’s incursion into provincial jurisdiction during the War was legitimate considering the emergency circumstances.
Abstract Review and the Structure of the Reference Power

As demonstrated in Chapter Four, the majority of reference cases rely on abstract rather than concrete review, as over 65 percent of all reference cases from 1949 to 2014 were in the form of abstract review. References allow governments to obtain judicial review without a live dispute or a set of concrete facts. While participants in reference cases will typically present factums and participate in oral arguments before an appellate court, this is often done in the absence of a trial record. In routine or concrete review, appellate courts are generally dealing with matters that have already been heard by at least one other court. In routine cases, this previous hearing provides the appellate court with an accepted set of facts and evidence, and the reasoning and opinion of at least one other judge. This previous record could serve to constrain or at the very least serve as guidance for the appeal proceedings.

A reference case on the other hand, places the appellate court in a completely different position – it has no previous record to examine and has little to examine in the way of factual material, aside from some filings (such as affidavits or Brandeis briefs) that may have been provided by the applicant, the reference initiating government. In an abstract reference case the reference questions submitted, also known as the order of the reference, become the central focus of the proceeding. Without having to respond to a specific set of facts, participants in reference cases can construct their arguments in a manner that is most beneficial to their particular case, unencumbered by the inconvenience of a particular situation or conflict. Considering the weight that is placed on the questions submitted in a reference, the party that has the ability to craft the questions can yield a great deal of control and influence over the proceedings. The ability to draft reference questions creates a unique source of power for governments and a clear advantage of the reference power.

The ability to frame the reference questions and the terms of the case is recognized as one of the distinct benefits of the reference power by interview participants. Both former attorneys general and counsel who have appeared in past reference cases
noted that the abstract nature of reference cases provides two distinct advantages: the ability to frame arguments in a broad fashion and the power to try to craft questions in a manner that is most likely to elicit the desired response from the court. Although governments can exercise a great deal of control in reference cases compared to routine litigation, they can never be certain on how the court will decide. As a result, governments considering a reference case place great emphasis on the creation of the reference questions, with the hopes of ensuring the best possible outcome. Attorney General B explained this situation, “the danger is the answer…you have to be careful to frame the questions in the way you want, to get the answers that you want” (Author interview 25 April 2014).

A reference can allow a government a deal of manipulation that is simply not possible in routine litigation, which stems in part from the abstract nature of reference cases. Indeed Riddell and Morton (2004) demonstrate the lengths that the Alberta government went to oppose the federal government’s imposition of a gas tax. Instead of simply challenging the legality of the federal law, the Government of Alberta went through the trouble of manufacturing a hypothetical fact situation to attempt to demonstrate how the gas tax would function in practice. Similarly, in the Egg Reference, the Province of Manitoba went through the highly unusual process of passing legislation solely for the purpose of referring it to the Court of Appeal. This case, which arose out of the ‘chicken and egg wars’ (discussed in greater detail in Chapter Four), also demonstrates the high level of control that a government can wield over the reference process, as it involves a charade of the legislative process with the goal of constructing an ideal reference scenario. In these examples, the level of maneuvering by the government went even further than simply the creation of reference questions in a particular manner; it also involved the manufacturing of facts.

The latitude that comes with participating in judicial review without a set of facts was also recognized as a benefit by counsel that have held the responsibility of presenting arguments for governments in past reference cases. Counsel B explained that the preparation for a routine appeal proceeding requires the study and analysis of all prior trial records and requires that counsel be aware of the possible questions that could be raised by the appellate court justices based on the trial record. While a reference case
requires a much different style of preparation, as Counsel B described, “You don’t have a defined record, you don’t have a trial, you don’t have parties and you don’t have a bunch of facts that are inconvenient or difficult to explain. It’s a pure law case…it’s a more defined, narrow scope” (Author interview 20 June 2014). This scope allows counsel to craft the most convincing argument, untethered to any facts or evidence, creating a great source of control for reference case counsel.

The abstract style of reference cases allows governments and its counsel a great deal of liberty when crafting the questions, presenting arguments and in some circumstances, even the manufacturing of hypothetical fact situations. These aspects of abstract review can also result in reference decisions from courts that are also quite broad and wide ranging. For example, in the Secession Reference, a unanimous Supreme Court offered four underlying principles of the Canadian constitution – federalism, constitutionalism and the rule of law, respect for minorities, and democracy. These constitutional principles are expansive and do not speak solely to the issue of the unilateral secession of a province. Furthermore, the constitutional principles articulated by the Court in the secession reference were not mentioned in the proceedings, nor were they argued by counsel in the facta submitted to the Court. In the Secession Reference, the Court was unconstrained by a specific dispute or a set of facts, permitting it engage in a broad and wide-ranging analysis.

According to some of the interview participants, the possibility for such broad review in a reference case can be viewed as a benefit by governments. Attorney General E spoke at length regarding the benefits of the abstract nature of a reference when compared to routine litigation:

“It has the freedom that it was not structured within an appellate review that would have narrowly framed the question and this is what would have given a court…the opportunity to address the issue in an open ended way…and to pronounce in an authoritative way” (Author interview 9 June 2014).

In this particular case, Attorney General E’s government could have pursued routine litigation, instead of a reference case, but the possibility for a more broad based review by a court through a reference was more appealing. In this example, Attorney General E’s government wanted to introduce legislation on the particular issue and valued a decision by the court that would address as many issues and arguments as possible against its
preferred policy. As such, for this government it was more advantageous and a better political strategy to seek a broad decision from a court, rather than be constrained by a particular dispute or set of facts. A wide-ranging reference decision can serve to address many of the issues that may be connected to a particular matter, rather than just the specific issues resulting from a specific dispute. This possibility of an expansive answer on a reference question can provide the significant assurance for a government when moving forward with corresponding legislation.

On the Reference Power in General

Along with discussing their views on the specific reference cases, interview participants were also asked to discuss their opinions about the reference power in general. The data gained from the participants is extremely valuable as it helps to provide a better understanding of how individuals who have had the ability to use the reference power understand it and its place within the Canadian political framework. Attorney General D explained that there should be a high threshold for deciding to invoke the reference power, “It has to be an important question…you shouldn’t refer less than major questions that are considered to be important in some way or dimension to the Canadian public” (Author interview 9 May 2014). Attorney General E agreed with the need to be cautious in deciding to use the reference power, but felt that the reference power had not been abused in the past by other governments (Author interview 9 June 2014).

Both Attorney General C and D explained that in using the reference power, governments should be conscious of the proper role of the courts and that judicial independence does not become sacrificed through the overuse or abuse of the reference power. Indeed, if courts are increasingly understood as the venue for highly contested political questions, the independence of the courts from the more overtly political branches of government could potentially suffer, regardless of how the courts decide reference cases. In discussing the role of the reference power, Attorney General C explained “they [the courts and governments] are certainly aware of the politics of the reference…and of course the link between the judicial and the executive branch and the way it can be interfered” (Author interview 5 May 2014). Attorney General D was concerned that political actors will avoid deciding contentious issues themselves and will
rely on references instead. They explained, “I think references, [should] not become simply a device by which governments attempt to dump difficult political questions on the courts” (Author interview 9 May 2014). Even though both of these individuals are aware of the issues that the reference power can have for the proper role of the executive/legislature and the courts, they each decided on at least one occasion that a reference was the best possible solution to a particular political problem. Counsel A also commented on the unique role of the reference power within the Canadian institutional framework, explaining that it required the courts to engage in an extrajudicial function, “there is something different about giving advice to a government – that is not a judicial function” (Author interview 3 April 2014).

Interview participants were asked if they thought there were disadvantages or problems associated with the reference power. Interestingly, five of the participants explicitly stated that there are no real shortcomings to references, including the individuals that explained the need for caution when using the reference power, such as Attorneys General C and D. Indeed, when asked to consider if there were negative aspects to the reference power, Attorney General C responded that, “No – well the only thing that I can say is the possibility that you could lose” (Author interview 5 May 2014). Attorney General C’s candid comment may be startling, it is more surprising that no other interviewee mentioned the possibility that a government could lose a reference case, when the quantitative data demonstrates that courts are quite willing to invalidate government action or legislation in reference cases. Indeed, as determined in Chapter Four, courts have invalidated in part or in full government action or legislation in almost 36 percent of cases (20 percent full invalidation, 15.8 percent partial invalidation), post-1949. Courts do not act as a ‘rubber stamp’ in reference cases. As such, governments should employ references with caution, as it is quite likely that the court could invalidate government legislation either proposed or enacted in a reference case.88 Each decision to seek a reference marks a conscious decision by a government to engage in the risk of an unknown and open itself up to the uncertainty of judicial review.

88 The fact that a government can lose reference cases that they have referred is quite evident when examining the current federal government’s reference case success record. The Harper Government initiated a total of three reference cases: the Securities Reference, the Senate Reform Reference and the Nadon Reference, in which the Supreme Court has found government action to be invalid in all three, save for a minor legislative proposal regarding property qualifications in the Senate Reform Reference.
All interview participants found that the reference power was a unique tool that benefits governments and none of the participants suggested that the power be eliminated. Interestingly, even though some participants recognized that the power could be open to abuse by governments, it was not suggested by any subject that the power be amended or reformed in any manner. There are clear legal and political benefits to the reference power for governments. A reference can be used by a government to avoid dealing with a highly controversial issue, allowing it to ‘toss’ the hot potato to the courts to sort out. Governments can initiate a reference case as part of a political strategy to address a particularly controversial issue. The majority of interview participants explicitly stated that the decision to use the reference power by their government was either a political consideration or a means to deal with a political controversy. In speaking about the specific reference case(s) they participated in, none of the interview subjects mentioned any hesitation in involving a court in their particular political controversy.

Governments have also found that references are a useful mechanism to deal with some of the problems associated with federalism. References have been used not only to sort out conflicts relating to constitutional jurisdiction between governments, they have also been used as a way of affecting a decision of another government. When a government refers the action or legislation of another government, the government that originated the legislation is forced to pause and consider the reference. In a federal system, a reference can help to ensure a uniformity of standards or access to a particular benefit and avoids the possibility of different rulings across provincial jurisdictions, when the matter is heard by the Supreme Court. Governments that have used the reference power recognize the political utility of an authoritative opinion from an appellate court or the Supreme Court. An authoritative opinion can help to clarify a controversial or complicated legal issue, creating a level of legislative assurance for the government. In the same manner, a reference decision that essentially approves a government’s legislation, either proposed or enacted, can help to insulate the government from future challenge or in the least, make a legal challenge difficult to mount in the future. This assurance may be even more important to governments that are considering adopting a new policy that would have significant repercussions if found invalid once in operation.
The structure and abstract nature of the reference power can have distinct advantages for governments. With the reference power at their disposal, governments do not need to wait for a real dispute to manifest before obtaining the advice of a court. Instead, by bringing the matter to a court itself, a government can short-circuit a process that could potentially take years. At the same time, references can serve to pause political debates, giving governments the ability to avoid confrontation with critics or avoid publicly commenting on the issue while the matter is under consideration by the courts. Due to the fact that a reference can provide abstract review, allows a government to obtain judicial review on virtually any topic or issue, without the typical barriers to judicial review such as justiciability and standing. The range of matters that could be subject to a reference is only limited by the willingness of a government to refer questions to an appellate court.

To be sure, governments are likely aware that for the reference power to function properly, courts must be willing to cooperate in the reference process. As such, referring governments should be conscious of how a court could respond to a particular reference case. Although courts have refused to answer specific questions in some reference cases, they have yet to refuse to hear a reference altogether. Furthermore, if Huscroft (2006) is correct, governments could simply re-submit reference questions until it is satisfied with the answer received from the court. While no government has ever attempted to force a court to rule on a question that it previously refused, a plain reading of the federal reference power granting statute does appear compel the Supreme Court to answer reference questions: Section 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…” (RSC 1985, c S-26. [emphasis added]).

Notwithstanding the debate surrounding the ability of courts to refuse to answer reference questions and the corresponding government power to re-submit references, the reference power still provides the executive a great deal of control within the reference case process. Considering the abstract nature of reference cases, and the resulting importance placed on the reference questions, the ability to frame the questions and thus the central terms of the case becomes an important source of power for governments. The significance of this power becomes more impressive when compared to routine litigation.
In a routine case, applicants and respondents must formulate their arguments in relation to the concrete dispute that gave rise to the case. Unencumbered by a specific set of facts, a referring government can present the best possible argument for their particular case. In some instances such as the *Gas Tax Reference* and the *Egg Reference*, the reference power allowed governments to go beyond simply constructing the most beneficial questions and legal arguments, to also creating favorable hypothetical fact scenarios. Such examples demonstrate the degree of control and manipulation that can be exercised by governments in reference cases.

It is interesting to note that the two most common explanations provided by interview subjects for why his or her government initiated a reference case are political controversy/blame avoidance, and the institutional authority/protection of the courts. Yet, these two benefits of the reference process for governments are ultimately in conflict with one another. If governments increasingly rely on the courts to deal with political hot potatoes, embroiling the courts in political controversies, then the independence of the judiciary will ultimately suffer. If the courts are not fully independent, and more importantly, perceived to be independent, then the power of the courts to enhance the legitimacy of government action through a reference case will be less effective. Thus, while governments stand to benefit from the independence of the courts in the form of institutional authority and legitimacy through a reference case, an overuse of the reference process (especially for highly controversial and normative issues) stands to eventually diminish the effectiveness of references to provide this legitimacy. Although, based on the information provided by interview subjects, it appears that using a reference for the purpose of position legitimization occurs more often than the reference-as-hot-potato, thus alleviating some concerns regarding overuse of references as a means of dealing with political controversies. That being said, a government could initiate a single reference case as a means to both avoid making a difficult political decision and also to have that decision made with the institutional legitimacy of the courts. This disjuncture between the goals of political actors using the reference power and the ultimate effectiveness of the reference power is a theme that will be addressed in the analysis below and again in Chapter Six.
Even with all of the above-mentioned advantages of the reference power for governments, there must be some drawbacks to using the reference power, as reference cases are not a routine aspect of Canadian politics, with only approximately 200 occurring since the first creation of the reference power by the federal government in 1875. All interview subjects were asked to comment on any situation in which their government considered a reference case but rejected this option, and no interview subject offered such an example. As a result, in an effort to understand why a reference may not be an advantageous political strategy aside from the answer offered by Attorney General C, that a government could lose the case, the present analysis will look at available examples of references considered but rejected, by past governments. The following section will consider two such examples of rejected references. This counterfactual analysis not only helps to provide a fuller understanding of the reference power as a political option, by detailing instances where this option was rejected by governments this analysis also helps to provide an interesting and necessary variation on the dependent variable.

WHY NOT REFERENCE: THE DOG THAT DIDN’T BARK

The previous section outlined the many advantages to the reference power for governments, leading one to assume that governments always use the reference power whenever faced with a matter that could be the subject of a reference case. However, it is important to remember that the number of reference cases addressed by this study when compared to all litigation in Canadian appellate courts comprises only a fraction of litigation in Canada. Clearly not all issues or political hot potatoes become reference cases. Indeed, there are some drawbacks to relying on the reference power. This section will address the limitations to the reference power and will examine two specific instances, the Quebec Padlock Act and the criminalization of blasphemy. In both of these case studies, governments considered initiating a reference case but ultimately abandoned the reference route. The Padlock Act episode will be contrasted with the King
Government’s contemporaneous intervention into the Social Credit’s legislative program in Alberta. This comparison helps highlight both the advantages and disadvantages of using the reference power, while holding constant the political actors between the two examples.

Understanding why governments decide not to reference and the potential pitfalls of a reference case helps to present a more complete picture of the utility of the reference power. Although there can be tangible benefits for governments that initiate reference cases, there are disadvantages to relying on the courts to referee partisan debates or matters of public policy. Scholars have criticized judicial review of legislation on both practical and theoretical grounds. An overview of the limitations and disadvantages of judicial review will help provide a greater understanding of some of the pitfalls of relying on the reference procedure and why governments may avoid the reference route. Governments may oppose using the reference power for several reasons, such as: the preservation of democratic process, the desire to protect power, to avoid the negative effects of litigation, and the loss of control over an issue. Each of these factors will be expanded upon below and then applied to the two examples of almost references.

The judicial review of legislation poses a countermajoritarian difficulty when unelected judicial actors invalidate or strike down the legislative actions of democratically elected individuals (Bickel 1962; Graber 1993). In other words, the judiciary can be understood as countermajoritarian when it thwarts the will of majoritarian actors such as democratically elected legislators. Countermajoritarian actions of courts can be problematic because ordinary mechanisms of democratic accountability do not apply to the judiciary and the power of judicial review (Manfredi 2001). Critics of judicial review, such as Jeremy Waldron, argue that it is a misconception to view the judiciary as the protector of minority rights against those who oppose minority rights. Instead, judicial review is simply the “confrontation between one view of rights and another,” in which courts adjudicate between different conceptions of rights and rival policy preferences (Waldron 2006: 1366).

In relation to reference cases specifically, some political actors may reject the reference case route when dealing with complicated or controversial matters of public policy out of respect for the ideal of democratic policymaking. A reference case could be
viewed as a mechanism by which an appellate court must select between rival policy preferences. This concern is most apparent in reference cases in which a court is asked to rule on the legality of legislation in the abstract. In such references, the court is not assessing the application of a law to a set of facts or the alleged violation of rights by one party against another. Instead, in abstract review the court is tasked with assessing motivations behind the law and how it could be applied, actions that are also the function of policymakers. “Abstract review harnesses the (virtually continuous) struggle between parliamentary majority and opposition over policy outcomes to a particular end,” because it asks courts to assess the law without the parameters of application to a specific individual or situation (Stone Sweet 2000: 51). As a result, policymakers’ concern for democratic accountability result in a rejection of a reference case because they believe that debates regarding public policy are more legitimate when handled by duly elected legislators.

The argument that political actors do not ask reference questions out of respect for the democratic legitimacy and parliamentary process is arguably based on an ideal conception of elected actors. Many scholars have demonstrated that elected officials do not always act with the noble goal of upholding and strengthening legislative representation, sometimes engaging in practices like gerrymandering (see: Manfredi and Rush 2008). Alternatively, the decisions of political actors concerning public policy may be motivated by credit claiming and blame avoidance, rather than a goal of the best public policy (Weaver 1986). Decisions regarding public policy can reflect strategic motivations more than serving the public and a respect for democratic accountability. A rational choice perspective views policymakers as goal oriented actors that make decisions to maximize goal attainment and preferences, however the individual actor defines or understands his or her preferences (Tsebelis 1990; Hall and Taylor 1996). According to this perspective, elected individuals will make decisions with the goal of protecting their power/interests and the long-term goal of ensuring re-election (Voigt and Salzberger 2002).

With this understanding of decision-making, one can assume that rational actors will make strategic decisions regarding public policy as a means of safeguarding power, and to avoid judicial review and the expansion of judicial power (Tushnet 1996).
Hennigar demonstrates that governments, specifically the Canadian federal government, engage in rational strategic decision-making to litigate/appeal in Charter cases through the weighing of pros and cons (Hennigar 2002; 2007). According to Hennigar, governments will consider several factors that are external to the merits of the specific case such as time and resources. However, one of the most significant factors that influence a government’s decision regarding litigation is the constraint of policy-making power that could result from the court’s decision (Hennigar 2007). When applied to the decision to initiate a reference case, a government, upon weighing the costs of referring to the courts, may conclude that the loss of control over an issue may be too high. A reference can prevent a government from engaging in credit claiming and could result in the creation of a constraint on future policymaking. That being said, these factors can cut both ways – the very same considerations that may draw a government to a reference case could serve to repel another government away from the reference option. Indeed, a government’s reasoning could be specific to the particular decision-makers involved or the issue that the government must address.

Regardless of the motivations behind a government’s decision-making regarding a reference case, it remains that if a government initiates a reference case, it is ceding the power to decide to the courts. While there are certain benefits from delegating decision-making to the courts, as outlined above, the benefits do not negate the fact that the referring government cannot be certain about how the court will decide. Scholtz (2009) documents that a government is more likely to negotiate, rather than seek judicial review, when faced with judicial uncertainty. Although it is beyond the scope of the present analysis to determine changes in levels of judicial uncertainty in relation to reference cases, it is reasonable to assume that when a government has a significant stake in the outcome of a policy dispute, it is unlikely to allow the courts to decide in the face of judicial uncertainty. A self-interested rational government that has a serious concern regarding the outcome of a public policy debate is unlikely to initiate a reference case, regardless of whether the issue is a political ‘hot potato’.

Reference case opinions have been used to clarify complex constitutional law, the legality of a legislative enactment and to identify the constitutional jurisdictions of governments. However, the clear articulation that can result from a reference opinion is
not always an advantage for a government. First, like all litigation, a reference decision can create the appearance of clear winners and losers to a dispute. As Morton and Knopff (2000) note, the general public’s interpretation and media coverage of a court case often follows the simplistic pro vs. con, winner vs. loser format, regardless of whether the decision by the court actually provides such clear lines between successful and unsuccessful litigants. When a case concerns the violation of rights, as in many Charter cases, the winner/loser format translates into one party being characterized as pro-rights, while the other being anti-rights (Morton and Knopff 2000: 159). The pro-rights characterization adds a level of legitimacy to the parties forming this side of the dispute that is unattainable to the opposing party. A government may avoid a reference case on a particular piece of legislation, especially one concerning the Charter because it does not want to appear anti-rights.

Furthermore, in creating clear winners and losers the outcome of litigation can be much more rigid and inflexible to compromise. When dealing with some types of political disputes, governments may prefer a more flexible approach that can be achieved through routine legislative routes that allow for negotiation and compromise. For example, when looking at the disputes concerning offshore resource rights between the provincial and the federal governments, relying on judicial review through a reference may have done more harm than good in this case. According to Taylor, provincial governments resented the federal government’s reliance on a reference for this dispute, and that, “adjudication may have done more harm than good; it may have added salt to an open constitutional wound” (1970: 392). Taylor finds that the reference likely strengthened the diverging views of the governments, making the dispute more difficult to negotiate through traditional, political means.

In a similar vein, taking an issue to court requires clear articulation of an issue and related arguments, resulting in a framing of the terms of debate. Litigation can create structured conflicts that are often much more inflexible in routine public policy debates (Scheppele and Walker 1991). While not all reference cases have a party that forms a clear opposition to the reference initiating government, the submission of specific reference questions can still foster a structured conflict. Questions referred in these cases generally ask for the courts opinion regarding the legality of a specific piece of legislation.
or act of government. Typically, questions are framed in a manner that allows the court to answer in either the affirmative or negative, which in many cases causes courts to say either ‘yes’ or ‘no’ to a government’s action.

For example in the *Firearms Reference*, the Government of Alberta referred four questions to the Alberta Court of Appeal, which were subsequently appealed to the Supreme Court of Canada. The first question asked the Court: “Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?” (Appendix A, [2000] 1 S.C.R. 783) This question clearly articulates the argument of the Government of Alberta, that the *Firearms Act*, S.C. 1995, c. 39 violated the provincial jurisdiction of property and civil rights and serves to structure the conflict between the province and the federal government. In response to this question, after providing its reasons for its decision, the Supreme Court responded with a simple: “No” (Para. 61). In this case, the articulation of a reference question structured the conflict over the firearms policy and framed debate around the provincial power over property and civil rights. The Supreme Court’s answer creates a clear winner to the dispute and does so in a manner that does not easily lend itself for further negotiation.

Finally, a government may avoid initiating a reference case with the belief that the issue may resolve itself or fade from public concern without government action. In other words, a government may decide that the best political strategy to dealing with an issue is inaction. As Weaver (1986) argues, inaction on a file allows a strategic decision-maker to avoid articulating a position on a particular controversy while also allowing for blame avoidance. Inaction and the status quo may be preferable to a government than the risks associated with raising a particular issue, especially when the issue is highly divisive among the public, such as abortion (Howitt and Wintrobe 1995). If a government chooses to initiate a reference case, it can no longer avoid blame through ambiguity. Instead, through the creation of reference questions, a government will be forced to articulate a position and formulate specific arguments surrounding the legality or constitutionality of the issue. Moreover, a reference case could serve to increase media attention and scrutiny. For example, discussions regarding the Harper government’s Senate reform proposals
had largely faded from public debate until the Government of Quebec referred Bill C-7 to the Quebec Court of Appeal, bringing media and public focus back to the issue (Wells 2013). On the other hand, while inaction may result in criticism in the short term for a government, if the issue falls off the public or opposition party’s radar, a government may benefit from a lack of action.

After a review of the criticisms of judicial review and the strategic account of political decision-making, several factors emerge to help explain why a government would reject the choice of a reference case. The first two factors concern power and legitimacy in decision-making, while the latter considers how both inaction and ambiguity can be viable political strategies. First, if a government is concerned about the lack of democratic legitimacy that can be attributed to judicial decisions, it will likely not seek a reference case. Instead, such a government would determine that democratically elected parliamentarians should make decisions regarding public policy. Second, a government that is concerned with power over decision-making would seek to avoid empowering the courts and would not initiate a reference case. Additionally, a court decision can serve to create winners and losers to a policy debate that may not allow for nuance in position or negotiation between parties involved. Governments may avoid reference cases because the costs associated with the possibility of having policymaking options limited is greater than the benefits that may result from passing the ‘hot potato’ to the courts through a reference. Finally, a reference case requires the clear articulation of the terms of a debate over public policy and it requires the referring government to formulate arguments regarding the legality or constitutionality of that policy. A government may find that the best strategy for dealing with a divisive issue is inaction and/or to avoid taking a clear position. These factors that explain ‘why not reference’ will be demonstrated through the analysis of two case studies in which governments considered pursuing reference cases but ultimately abandoned or ignored the reference option due to one or more of the factors outlined above.

In order to examine instances where governments considered reference cases but did not pursue, the present study analyzed cabinet conclusions. Cabinet conclusions, prepared by the Clerk of the Privy Council, provide an overview of the topics discussed at cabinet and a summary of the debate and decisions made during the meetings. This
documentation will often provide the title (but not name) of the minister who presents an item for discussion, and will provide a summary of the discussions, but will generally not attribute specific arguments or statements to specific individuals. While many aspects of cabinet are not subject to public disclosure, Library and Archives Canada provides access to all cabinet conclusions from 1944 (the year conclusions were initially recorded) to 1976.

Considering that the decision to initiate a reference case is a decision of cabinet, any discussion of a reference case should appear on the record provided by cabinet conclusions. That being said, the analysis that follows does not examine all instances in which references were considered, rather these data are subject to the restrictions imposed by the availability of Government of Canada cabinet conclusions. Furthermore due to the restrictions of access and resources, the present analysis does not examine instances where provincial governments considered a reference and did not pursue the reference option. Information gained from cabinet conclusions are cross referenced and supplemented through biographical literature available on the actors involved in the episodes, political writings, the diaries of former Prime Minister William Lyon Mackenzie King,89 legislative debates available through Hansard, and secondary scholarly literature.

An examination of this database yielded two instances where governments considered reference cases but ultimately did not follow through – the Padlock Act in 1938 by the King Government, and the criminal prohibition on blasphemy in 1954 by the St. Laurent Government. It is interesting to note that both of these cases involve policies that were relatively popular in Quebec, but drew criticism from the rest of Canada. In both examples, one of the central factors that caused governments to pause before referring the offending legislation to the Supreme Court was a concern of how this action would be received within Quebec. The Padlock Act was a statute passed by the Duplessis Government that drew concern for the restrictions it placed on civil liberties in Quebec and the possibility that the law invaded the federal law jurisdiction over criminal law. The refusal to meddle in the affairs of Quebec and lack of action on the Padlock Act by the

89 The King Diaries are made available to the public by Library and Archives Canada. King maintained a daily diary from 1893 to his death in 1950, providing over 30,000 pages of text.
King Government is interesting when juxtaposed against the King government’s confrontation with Alberta over Social Credit legislation, which took place at the same time. This differential treatment of Quebec and Alberta by King and Minister of Justice Lapointe is analyzed below, as it provides insight into government decision-making regarding references and highlights that many of the same factors that motivate a government to seek a reference are present in this political episode. The blasphemy episode concerns the existence of a prohibition on blasphemy, a law that is largely considered out of touch with modern secular values in Canada. The lack of governmental action in relation to blasphemy helps to provide further insight into some of the drawbacks of the reference power. It is important to note that the first case study, the Padlock Act, will be examined in greater detail than the second, due to access and availability of scholarly literature and archival materials, as blasphemy in Canada has received relatively little scholarly analysis to date.

The Padlock Act
During the 1930s the ideals of communism gained popularity in Canada, as a direct response to the Great Depression and the ineffectiveness of the governmental response to the financial disaster. While some Canadians embraced communism and the Communist Party of Canada, many political leaders responded with vilification of the movement. This vilification was most prevalent in Quebec through the actions of the Duplessis Government. In 1937, Duplessis introduced An Act to Protect the Province against Communist Propaganda (1 George VI Ch.11), colloquially known as the Padlock Act. The Padlock Act empowered the Attorney General of Quebec, a post filled by Duplessis himself, to direct the police to lock any residence or building that was used to disseminate bolshevism or communism through any means. While the powers provided by the Act were wide-ranging, their broad application was aided through the fact that the law did not define communism or bolshevism. When observers criticized this aspect of the Act, Duplessis responded that communism could simply be “felt” and that the Attorney General could employ his own understanding and definition (Betcherman 2002). The Padlock Act allowed the Attorney General to seize private property for a period of one year without judicial review or oversight. Shifting the burden of proof to
the accused, the *Act* required that the property owner convince a judge that the law had not been broken or that the property would no longer be used for illegal purposes (Neatby 1976). This *Act* not only appeared to invade the criminal law jurisdiction of the federal government, it also raised significant questions for the protection of civil liberties.

The *Padlock Act* was a legislative response to a growing fear of communism in Quebec. This fear was promulgated through the dominance of the Roman Catholic Church and the strength of rural values within the province. Communism quickly became a catchall for everything that Catholic rural French society opposed and was easily applied to anything that appeared to threaten this identity (Neatby 1976). As a result, communism quickly became a scapegoat for all the problems faced by Quebec such as the depression and the crippling provincial debt. Within this environment, the *Padlock Act* did not receive strong opposition within Quebec. Quebecers and the Quebec media either ignored the *Act* and the various police raids that took place, or did not speak out in opposition for fear of being labeled a communist (Mills 2005). Indeed, with the extreme fear of communism within the province, those who opposed the actions of the Duplessis Government were placed in a zero-sum dilemma: opposition to the Act could be read as aiding communism, while supporting the act allowed the violation of civil liberties to continue.\(^90\)

Although the *Padlock Act* did not receive significant opposition within Quebec, it did not go unnoticed by the federal government and the rest of Canada. Parliamentarians in Ottawa were quick to criticize the *Act*, demanding a response from the federal government. J. S. Woodsworth, leader of the Co-operative Commonwealth Federation (CCF) Party was the Padlock Act’s loudest critic in the House of Commons. Within weeks of the passage of the Act, Woodsworth detailed for the House the problems of the *Act*, including the argument that the legislation was enacted *ultra vires* the constitutional jurisdiction of the Quebec National Assembly. Although Woodsworth did not support the federal power of disallowance in general, he argued that here the federal government must step in as the protector of civil liberties and demanded a response from Minister of

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\(^{90}\) For example, Eugene Forsey, a leading academic at McGill University, was labeled a defender of communists for publicly condemning the *Padlock Act* as a threat to civil liberties. This label forced Forsey to write several letters defending his position, clarifying that he was not a communist sympathizer. See: Hodgetts, J. E. 2000. *The Sound of One Voice: Eugene Forsey and His Letters to the Press* (Toronto: University of Toronto Press).
Justice/Attorney General Ernest Lapointe. Failing the use of the federal disallowance power, which at this point had not been employed by the federal government in several years, Woodsworth suggested that the Governor in Council refer the Quebec legislation to the Supreme Court of Canada (House of Commons Debates, 18th Parl., 2nd Session, 1937: 2290). Responding for the government, Lapointe accepted Woodsworth’s suggestions, but avoided committing his government to action, explaining that he had not received an official copy of the Act (House of Commons Debates, 18th Parl., 2nd Session, 1937: 2294).

Woodsworth’s criticisms of the *Padlock Act* continued in the House and were echoed by other members of the CCF party. However, this criticism of the Act was met with opposition from Quebec parliamentarians who argued that it was not the place of the federal government to meddle in the affairs of the province, noting that the people of Quebec had not voiced strong opposition to the Act. Vital Mallette, Liberal Party of Canada member for Jacques-Cartier opposed Woodsworth’s demands for disallowance or a reference case and argued that the *Padlock Act* represented the views of the people of Quebec and repealing the law should be left to the population of Quebec (House of Commons Debates, 18th Parl., 3rd Session, 1938: 114). Outside Parliament many groups voiced their opposition to the *Padlock Act*, labeling the Act “one of the most oppressive pieces of legislation in Canadian history” (Mills 2005: 9). Ernest Lapointe and the King Government received letters from all over Canada that criticizing the Act, demanding government action, and a reference to the Supreme Court. Citizen groups concerned with the protection of civil liberties mobilized in opposition to the Act, such as the League for Social Reconstruction, which included leading scholars such as F.R. Scott and Eugene Forsey (Mills 2005). Opposition to the *Padlock Act* was instrumental in the creation of the Canadian Civil Liberties Union (Clément 2008).

Although some parliamentarians from Quebec like Mallette spoke out against federal government intervention in the *Padlock Act*, Minister Lapointe remained relatively tight-lipped on the subject in the House. However, in cabinet and in private conversation with Prime Minister Mackenzie King, Lapointe voiced his concern over the act and struggled with the dilemma in which the Act placed him as a minister in the

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91 See statements from E.J. Poole and A.A. Heaps (18th Parliament, 3rd session, 1938: 126-128).
federal cabinet and as a Quebecker (Betcherman 2002). According to Prime Minister King’s personal diary, Lapointe was extremely conscientious about how any federal action would be perceived in Quebec, as he was concerned about creating another division between Quebec and the rest of Canada (5 July, 1938).

The public positioning of the King government and inaction on the Padlock file became more precarious following the federal government’s feud with the Social Credit government in Alberta and the reference and disallowance of that province’s legislation. Lapointe and the King government were accused of giving Quebec special treatment and were perceived as protecting the rights of banks in Alberta over the civil liberties of the citizens of Quebec (Mallory 1976). A more in-depth discussion of the Alberta Social Credit episode is provided below.

In cabinet meetings, the ministers from Quebec struggled with what action the government should take on the Quebec Law. In the summer of 1938, after the Padlock Act had been in effect for approximately a year and a half, cabinet met to discuss options and select a government response. Lapointe argued that the Act could not be viewed as an incursion into the federal criminal law power because communism itself was not made a crime by the act (King Diary 5 July 1938). Lapointe believed that the federal government should show deference to the preferences of Quebecers who largely supported the law (Betcherman 2002). Furthermore, according to Lapointe, disallowance by the federal government could not only provoke an election in Quebec, an election would provide an almost certain win for Duplessis. Ultimately, for Lapointe the issue surrounding the Padlock Act was a French vs. English issue and any federal action could threaten national unity (Betcherman 2002). Lapointe believed that the law should be tested by individuals with a specific case in the courts, it should not be disallowed nor be the subject of reference questions (King Diary 5 July 1938). Lapointe clearly recognized that the Padlock Act was a political hot potato, but because the legislation was Quebec’s and did not directly implicate the King Government, his government was not obligated to address the Act’s controversy.

Prime Minister King and other ministers from Quebec did not share Lapointe’s position on the Padlock law; instead, all preferred a Supreme Court reference case on the Act (King Diary 6 July 1938). However, that being said, King had a great deal of respect
for Lapointe and would not overrule him on matters pertaining to Quebec, as King prioritized federal unity above all other matters when dealing with Quebec (Betcherman 2002; King Diary 6 July 1938). As a result, regardless of the pressure to pursue a reference from parliamentarians, within cabinet, from the public and interest groups, the King Government allowed the Padlock Act to stand.92

To address the Padlock Act, the King Government had several options: inaction, disallowance, and reference. Considering the benefits that governments can receive from using a reference to deal with a highly divisive issue, it initially appeared that referring the Quebec legislation to the Supreme Court would have been the most advantageous option. A reference would remove the decision-making power from the King Government and provided the option of blaming the Supreme Court for the outcome, regardless of how the Court decided. If the Court found the legislation to be ultra vires, the King Government could position itself as a defender of civil liberties to observers outside of Quebec, while within Quebec it could deflect blame to the Supreme Court and deflect responsibility for the invalidation. Using a reference case in this strategic manner would not be unusual for the King Government considering that it had employed essentially the same tactic to deal with the Bennett New Deal legislation, as discussed in Chapter Three. However, a closer look at the issues present in this particular episode provides a good case study into instances where a reference case is not always an advantageous political strategy.

In dealing with the Padlock Act, Minister of Justice Lapointe believed that referring the matter to the Supreme Court through a reference case would serve to aggravate tensions between French and English Canada. Lapointe’s reservations about a Padlock Act reference highlight the problems and restrictions associated with judicial review and relying on the courts to deal with political controversies through reference cases. First, as mentioned above, one of the explanations that Lapointe provided for being

92 The Padlock Act did eventually make its way to the Supreme Court in a 1957 case that concerned the cancellation of a lease by a landlord who believed that the sub-lessee had allowed the residence to be used for the dissemination of communist doctrines. In Switzman v. Elbling (1957) 7 D.L.R. 2d 337, the Supreme Court ruled the Padlock Act ultra vires Quebec and fell within the federal constitutional jurisdiction over criminal law. See: McWhinney, Edward. 1957. “Mr. Justice Rand’s Rights of the Canadian Citizen - The Padlock Case.” Wayne Law Review 4: 115.
hesitant to refer the Padlock matter to the Supreme Court was that the law was fairly popular within Quebec, a position that was supported by some Quebec parliamentarians in the House of Commons. Lapointe explained to King and the cabinet that this issue would be best decided by the people of Quebec out of respect for the fact that aside from being relatively popular, the bill was passed by a democratically elected legislature (Betcherman 2002). Sending the law to the Supreme Court for review through a reference could result in a non-majoritarian institution overruling the generally popular and legitimate actions of a democratic institution.

Although Lapointe was hesitant to refer the Padlock Act to the Supreme Court for the lack of democratic legitimacy of the courts, his refusal to refer was likely the result of more strategic reasons. According to the diaries of Prime Minister King, Lapointe was concerned that making a reference out of the Padlock Act would turn the issue into an election issue and would aid the re-election of Duplessis, something that the federal Liberal Party had strongly opposed (King Diary 6 July 1938). Indeed, throughout his political career, King had considered Duplessis to be a political opponent and, at the same time, Duplessis was not timid in suggesting that Ottawa was his enemy (Neatby 1976). King and his cabinet were sensitive to the fact that Duplessis was very capable of vilifying the federal government to Quebecers and that doing so was a powerful political strategy for Duplessis (King Diary 5 July 1938). To Lapointe (and eventually King), it was a better political strategy to avoid the issue of the Padlock Act, and avoid providing fuel to a political opponent. Referring the matter to the Supreme Court would undoubtedly draw attention to the issue and would allow Duplessis to position himself as the protector of the interests of Quebec against the interfering federal government in Ottawa. The fact that Lapointe and the King Government wanted to avoid providing any fuel to the power of Duplessis was a significant motivation for avoiding wading into the Padlock Act debate.

The framing that would result in involving the courts into the debate over the Padlock Act speaks to another reason why Lapointe was hesitant to refer the matter. As argued by Morton and Knopff (2000), the structure of judicial review can lead to a framing of issues in a pro versus con, winner versus loser format. Inserting this type of framing into the Padlock Act matter would serve to exacerbate the already narrow debate.
surrounding communism in Quebec. As mentioned previously, those who opposed the *Padlock Act* specifically, or the anti-communist actions of the Duplessis Government in general, would be labeled as either communist sympathizers or communists. This debate was already lacking nuance in position and would likely not benefit from the structuring process that can take place as a debate is moved into the judicial arena. Referring this matter to the courts would only serve to intensify this framing and Lapointe was conscious of the polarizing and narrow debate surrounding the anti-communist legislation in Quebec.

Finally, Lapointe decided that inaction rather than a reference case was the best political strategy for dealing with the *Padlock Act* due to the great amount of tension surrounding communism in Canada and specifically in Quebec. As Howitt and Wintrobe (1995) demonstrate, the more divided the public is on an issue, the more likely that political decision makers will prefer the status quo or inaction on the issue, regardless of whether the status quo is unsatisfactory to their genuine preferences. Political actors are motivated more by a desire to avoid blame rather than claiming credit, making inaction on highly controversial an attractive political strategy (Weaver 1986). Applying this understanding of decision-making to the current example, even though Lapointe, King, and the Liberal Party were concerned about the curbing of civil liberties within Quebec, this unsatisfactory status quo was preferable as it allowed for avoidance of blame. Fear of communism was prevalent in Quebec and it served as a force to unite Quebecers, fostering nationalism. The opposition and fear of communism became part of the French Catholic identity, as Neatby explains, “the result was that most responsible or respectable French Canadians had no interest in and no sympathy for left-wing views…in French Canada the strength of rural values and the official denunciation of communism by the Roman Catholic Church intensified this fear. Communism seems to be the antithesis of everything which French Canada stood for” (1976: 234-235). With such heightened public concern over communism, the most politically attractive mechanism for dealing with the *Padlock Act* was one of inaction. As a result, as King notes in his diary, although it was not the most courageous decision in terms of the protection of civil liberties, the refusal to act by the federal government was the best political option (King Diary 6 July 1938).
The refusal to initiate a reference case on the Quebec *Padlock Act* by Minister of Justice Lapointe and the King government demonstrates some of the negative aspects of relying on the courts through the reference mechanism and helps to explain why governments do not refer all political ‘hot potatoes’ to the courts. First, in this case, the offending law was quite popular within its enacting province and referring the matter to the courts could result in circumventing the popular will. Second, the refusal to refer the *Padlock Act* was for strategic political purposes. Lapointe and King knew that, if the federal government stepped into the debate over the *Padlock Act*, it could easily be used by Duplessis as a wedge to help divide French and English Canada, strengthening his power in the province. Lapointe was deeply concerned about exacerbating any French and English tensions. Moreover, King viewed Duplessis as a political opponent and was hesitant to take any action that would benefit Duplessis and guarantee his re-election in a future provincial election. Third, the discourse concerning communism in Quebec was extremely polarizing, and opening the issue of the *Padlock Act* to the courts would likely only intensify this polarization and would serve to further structure the debate into supporter of communism/anti-Padlock vs. anti-communism, leaving little room for nuance. With such heated debates over communism in Canada in general and in Quebec in particular, inaction on the *Padlock Act* became the best political strategy for dealing with the matter. Simply put, it was easier for the King Government to be criticized for not protecting civil liberties within one province than it was to be labeled as a sympathizer of communism.

This episode over the drastic *Padlock Act* is telling when compared to how the King Government dealt with radical legislation of the Aberhart Social Credit government in Alberta, which took place at the same time as the *Padlock Act*. As examined in Chapter Three, the King Government confronted the Province of Alberta on several legislative projects that were aimed at fulfilling the Social Credit government’s attempt to deal with the economic depression that plagued Canada during the 1930s. First, King and Lapointe (via the Governor General) disallowed the three pieces of the Aberhart Government’s legislative program: *Credit of Alberta Regulation Act* (1937, c. 1, Session II), which transferred licensing of banks to the provincial government; *Bank Employee Civil Rights Act* (1938, c. 2, Session II), prevented bank employees from accessing judicial review and
Judicature Act Amendment Act (1937, c. 5, Session II), prohibited courts from reviewing provincial legislation. After disallowing the three Alberta acts, Lapointe was subject to a great deal of criticism for continuing to refuse the Padlock Act and was accused of governing with one set of justice for Quebec and a different for Alberta (Mallory 1948; 1976).

This disallowance did not stop Aberhart from pursuing his agenda and his government responded by introducing three additional constitutionally dubious pieces of legislation. The Bank Taxation Bill (1937, c.1, Session III) which significantly limited the power of banks in Alberta and attempted to eliminate them altogether; the Accurate News and Information Bill (1937, c. 9, Session III) which limited the freedom of the press and finally, the Aberhart Government reintroduced the Credit Act (1937, c. 8, Session III) but amended any reference of banks to credit institutions. Again, the Federal Government took notice and instead of disallowing the legislation it referred the legislation to the Supreme Court of Canada for review in Reference re Alberta Statutes [1938] S.C.R. 100, which found the legislation not only to be ultra vires Alberta, but also in violation of the implied bill of rights within the Canadian Constitution.93

King and Lapointe were criticized for wading into provincial affairs in Alberta, but at the same time allowing Quebec to exercise a great deal of latitude with the Padlock Act. Comparing the treatment of these two provinces is interesting for several reasons. First, it allows for the controlling of several variables – the events took place within the same time period94 and there is no variation in the central players. Second, both provinces passed legislation that gained both national attention and opposition from interest groups. Third, in both instances, the legislation was controversial and was criticized for limiting the rights of individual citizens and businesses. Fourth, both instances demonstrate the impact that the reference power can have in dealing with federalism-based disputes between provincial and federal governments. Finally, the similarities between the two situations was not lost on parliamentarians who pressured the King Government to intervene and specifically called for references to the Supreme Court regarding the legislation from both provinces (Betcherman 2002).

93 This was upheld by the JCPC in Reference re Alberta Statutes [1939] AC 117.
94 Indeed as Wilson (1975) notes, Lapointe’s formal refusal to disallow the Padlock Act came merely three weeks after disallowing the initial Social Credit legislation in Alberta.
Yet, the King Government’s response to the situation in Alberta was markedly different compared to Quebec. In both cases, the federal government was faced with a controversial political hot potato. The King Government could have avoided dealing with the divisive issue of the provincial legislation by asking the courts to intervene. However, as argued above, using a reference to deal with a political controversy is not the only reason why governments use the reference power. Although delegating the controversies to the courts would prevent federal government from having to deal with the provinces directly, the King Government could not be certain on how the court would rule and could face the possibility that the Supreme Court would uphold the provincial legislation. While a level of uncertainty is present in every reference episode, there are instances where governments can be more certain on how a court will decide, based upon legal advice and previous jurisprudence. In relation to the Padlock Act, Lapointe was uncertain that the Act infringed on federal constitutional jurisdiction, while the Alberta Social Credit legislation was a clear invasion into federal jurisdiction over banking, as Aberhart’s legislation sought to explicitly regulate banking within the province (Bletcherman 2002; Mallory 1976).

Although in both cases the King Government faced pressure within Parliament to reference the provincial legislation, the pressure external to parliament for federal government intervention was comparatively quite different. As mentioned above, there was strong criticism to the Padlock Act from left wing civil liberties groups both within Quebec and across Canada. Indeed, the Canadian Civil Liberties Union formally requested that Minister Lapointe either refer the Padlock Act to the Supreme Court or to ask the Governor General to disallow the legislation. Similarly, in Alberta non-governmental groups came out in opposition to the Social Credit legislation, however these groups included the powerful banking industry and business community, both within Alberta and across Canada, which had the ability to exert a great deal of influence on government. The opposition to the Padlock Act came primarily from “poor people or organizations of poor people,” while supporters of the Act were powerful members of

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For example, among several individuals and corporations, the Canadian Life Insurance Officers Association, the Dominion Mortgage and Investment Association, the Investment Dealers’ Association of Canada, Canadian Bankers Association, the Edmonton Chamber of Commerce and the boards of trade of Toronto, Winnipeg, Calgary, Lethbridge and Montreal all petitioned against some of the Social Credit legislation, see Wilson (1975).
Quebec Society such as the Roman Catholic Church and members of the Montreal business community (Wilson, 1975: 177).

The anti-Social Credit legislation movement not only had the ability to influence government with greater effect compared to the Padlock opposition, the area of constitutional concern in relation to the Social Credit legislation was of more importance to the King Government –banking and business compared to civil rights. To be sure, the greater importance placed on the Social Credit legislation is indicative of the fact that this legislation had more obvious implications for federal constitutional jurisdiction. However, the King Government was more willing to intervene in Alberta compared to Quebec because, according to Mallory, “property and civil rights are less valuable in monetary terms…the Padlock Act failed to signally arouse the Department of Justice to the pitch of indignation it might have reached if the property padlocked had been a branch of a chartered bank” (1976: 176). In considering the Social Credit legislation, not only was the King Government subject to more powerful lobbying efforts, it was also more receptive to the external pressure in this issue area compared to the Padlock Act. In reflecting on the thematic reasons why governments ask reference questions, although both provinces had enacted controversial legislation, the King Government could simply afford to ignore the situation in Quebec, while it faced stronger and more convincing pressure to intervene in Alberta.

In terms of federal relations, Alberta and Quebec were differently situated in respect to bargaining positions vis-à-vis the federal government. At the time, Quebec in comparison to Alberta was much more important politically to the King Government, as it was an economic/manufacturing centre and was essential to secure a majority government in national elections (Mallory 1976). Indeed, King’s diaries detail the concerns that both he and Lapointe had about making enemies with both Quebec and Premier Duplessis. King and Lapointe were concerned that disallowing or referencing the Padlock Act would secure re-election for Duplessis and would make future electoral success for the Liberal Party of Canada challenging in Quebec. Simply put, Alberta did not have the ability to bargain with the federal government in the same manner as Quebec. Alberta was not a centre of economic power, nor was it essential to winning a majority government. This inferior relationship with the federal government meant that the King
Government was much more willing to intervene into provincial affairs, regardless of whether it would create a negative response from the provincial government.

This difference between the positions of Alberta and Quebec and the differing federal government response to the provinces speaks to the theme of federalism as an explanation for use of the reference power. Indeed, as discussed above, the reference power was initially created to provide the federal government another means of challenging provincial legislation aside from the power of disallowance. The decision by King and Lapointe to refer the Social Credit legislation effectively demonstrates this explanation. Reference re: Alberta Statutes [1938] S.C.R. 100; [1939] A.C. 117, provided the federal government a means to challenge Alberta’s legislation and to protect its constitutional jurisdiction over banking. However, according to Mallory (1976) the federal government could have just as easily disallowed this legislation as the same grounds it had used to justify the disallowance of the first round of Social Credit legislation applied to this legislation as well. The Padlock Act on the other hand, did not pose a direct and clear threat to federal constitutional power, and according to Lapointe the Act did not fulfill the accepted requirements for disallowance. Lastly, in terms of federalism based explanations, the Padlock Act did not impact any individual outside of Quebec, while the Social Credit legislation and its implications for national banking and credit agencies would affect individuals and businesses that operated on a national basis, beyond the provincial boundaries of Alberta. Thus, the decision to refer the Social Credit legislation reflects the same arguments provided by interview subjects, that a reference was a means of insuring national standards, and that cross-national banking regulation would operate the same regardless of provincial jurisdiction.

Finally, the King Government’s decision to refer the Alberta legislation, demonstrates the theme of institutional authority and protection of the courts, insofar as a reference provides a means for a government to seek protection (or judicial approval) for new policies that would be difficult to unwind. If the Social Credit legislation was implemented it would have effectively terminated all banks currently operating within the

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96 According to Mallory (1976) and Wilson (1975), the accepted requirements for disallowance are the following: (1) provincial legislation clearly invades federal constitutional power or impedes a fundamental national interest; (2) legislation is *ultra vires* and no other remedy is available; or (3) legislation is unreasonable, contrary to good government, discriminatory and no other remedy is available. That being said, formally, the disallowance power has no specific limitations.
province and created a provincial banking system. If this system was put into place and then found to be unconstitutional at a later date, through routine litigation, it would potentially create a great deal of chaos both within the province and the national financial markets. Instead, referring the legislation before enactment prevented the implementation of unconstitutional legislation and the creation of an entirely new banking system. On the other hand, the implementation of the Padlock Act did not pose the wide ramifications that the Social Credit legislation would have likely produced. The Padlock Act did not create a new policy scheme or program; instead it was simply a new law to be enforced by the police. Indeed, the subsequent challenge and invalidation of the Padlock Act in Switzman v. Elbling (1957) 7 D.L.R. 2d 337 was relatively unremarkable (see McWhinney 1957 and footnote 88, above). The King Government’s decision to refer the Social Credit legislation helped to prevent future disorder that could have occurred if the legislation was implemented and subsequently struck down by the courts. On the contrary, the Padlock Act simply did not pose this problem and therefore did not require a reference to seek assurances and prevent future invalidation.

**Blasphemy**

Section 296 of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46 (*Criminal Code*) criminalizes blasphemous libel and states that those found guilty of this indictable offence can be subject to a prison sentence not exceeding two years. Patrick (2008) notes that although blasphemy has not been the subject of a reported case since 1935, Canada stands alone in the Western world with the existence of a law against blasphemy, a fact that is arguably an affront to modern secularism in society. It is important to note that blasphemy most often refers to blasphemous libel which refers to written statements, and while the former simply concerns spoken statements, and all Canadian blasphemy cases have only concerned written words (Patrick 2008). According to Patrick (2010), although the criminalization of blasphemy predates confederation, there have only been five prosecutions under the law, four of which have taken place in Quebec. Indeed, in pre-Quiet Revolution Quebec, the law against blasphemy was quite popular, indicative of the prevalence of Catholicism within the province (Seljak 2000).
Prior to the consideration of a reference case on blasphemy, there was one significant attempt to repeal the blasphemy law. The move to repeal the prohibition on blasphemy was a response to the conviction of Victor Sterry for the crime of blasphemous libel in 1927. Interestingly, the Sterry case was the only blasphemy case to take place outside of Quebec and it marks the last time an individual was prosecuted in Canada under this section of the Criminal Code. Sterry had published several stories in a publication called The Christian Enquirer, in which he criticized Catholicism, the Bible, and the Christian God. Sterry was convicted for blasphemous libel and was sentenced to 60 days in jail at trial. The Ontario Court of Appeal denied Sterry’s appeal. As Patrick (2010) documents, the Sterry case received a great deal of national media attention and also gained the attention of J.S. Woodsworth, the same Parliamentarian who would later speak out against the Padlock Act.

Shortly following the conviction of Sterry, Woodsworth introduced Bill 5, An Act to amend the Criminal Code (Blasphemous libels), an act that would repeal section 296 of the Criminal Code (Parliament of Canada, 16th Parl. 2nd Session, 1928). Woodsworth’s bill was straightforward; it simply repealed the Criminal Code section on blasphemous libel. However, this simplicity would be the bill’s downfall, as it did not address the common law crime of blasphemous libel. Although it is no longer the case, in 1938 common law crimes still existed in Canada. This meant that if a section of the Criminal Code was repealed, like section 296, the common law crime would simply be reactivated, making the repeal of no force or effect (Patrick 2010). Woodsworth’s mistake did not go unnoticed by Minister of Justice Ernest Lapointe who supported the prohibition on blasphemy and exploited the bill’s flaw to defeat it in the House of Commons (House of Commons Debates, 16th Parl. 2nd Session, 1928: 364). Several other parliamentarians supported Lapointe’s opposition to the repeal bill and Woodsworth’s motion was defeated.

The next significant move towards repealing the criminal prohibition on blasphemous libel in Canada was the consideration of a reference case by the St. Laurent Government in 1955. Blasphemy returned to the public debate following the passage of An Act Respecting Freedom of Worship and Maintenance of Good Order (S.Q. 1953-4,

2-3 Eliz. 11 c. 15), by the Quebec National Assembly. The Act prohibited actions that insulted religious practices, beliefs and/or members of the religious profession by anyone in Quebec. This statute was indicative of the public Catholicism favoured by the Duplessis Government, which often blurred the lines of state secularism in pre-Quiet Revolution Quebec (Seljak 2000). St. Laurent’s Minister of Justice, Stuart Garson bought the Quebec blasphemy law to cabinet for discussion, not because he opposed the act, but because it appeared to overlap with the Criminal Code provision on blasphemy, creating confusion in the law (Privy Council of Canada, Cabinet Conclusion, 06 April 1955).

In his report to cabinet, the Minister of Justice suggested that a reference could be sent to the Supreme Court of Canada for an opinion as to the validity of the Quebec law. As the cabinet members discussed this possibility, it was argued that, if the federal government were to submit the Quebec legislation to the court, it “would be criticized in many quarters in the province of Quebec,” regardless of the fact that it was the federal responsibility to ensure the compatibility of laws in Canada (Privy Council of Canada, Cabinet Conclusion, 06 April 1955). In the discussion it was argued that if the law was ultra vires the jurisdiction of Quebec it would likely be subject to challenge by a private citizen. Thus, making it unnecessary for the federal government to preemptively challenge the law at the Supreme Court. Furthermore, cabinet considered that a reference would likely make the federal government unpopular in Quebec, which would be unwise prior to the upcoming federal—provincial conference. The cabinet meeting concludes with cabinet deciding to defer making a decision regarding a Supreme Court reference on the Quebec blasphemy law.

This cabinet discussion marks the first and last instance in which the St. Laurent cabinet considered blasphemy and a reference regarding the Quebec law. According to the extensive study of Canadian blasphemy laws by Patrick (2013), there were no other attempts at reference cases considering the Criminal Code provision regarding blasphemy, nor have there been any significant attempts at repealing the law. The lack of government interest in repealing the blasphemy law arguably is reflective of the fact that no charges have been laid under the law since 1935.98 That being said, following the recent terrorist

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98 Bowal and Horvat (2011) provide the two most recent examples where the prohibition on blasphemous libel was engaged. In 1978 a temporary injunction was placed against the book Les Fees Ont Soif after
attack on the satirical magazine *Charlie Hebdo* in France, the Canadian blasphemy law became a subject for public debate, with groups opposing the law reviving calls for the Parliament of Canada to repeal it (Nasser 2015). Furthermore, recent legal analysis finds that it is unlikely that the blasphemy law would survive a legal challenge made under the freedom of expression protections provided by the *Charter* (Bowlal and Horvat 2011; Ross 2012).

Little is known regarding the St. Laurent government’s consideration of the Quebec blasphemy law, beyond what is made available in a cabinet conclusion. However, what is discussed regarding the law does speak to the government’s considerations and motivations behind debating a reference case. The cabinet discussion does not consider the merits of laws against blasphemy in relation to the restriction of civil liberties. Furthermore, the discussion does not prioritize the Parliament of Canada’s responsibility in ensuring the clarity of laws nationally and the potential problems that could arise with the similarities between the federal and provincial laws. Interestingly, at no point does the cabinet discussion consider that the provincial law likely invades the federal constitutional power over criminal law, unlike the discussions had by the King cabinet over the *Padlock Act*. Instead, in this instance, the central considerations by the government are political. The government was primarily concerned how a federal reference would be received in Quebec and how would it impact upcoming intergovernmental discussions.

The decision to avoid referring the Quebec blasphemy law demonstrates that inaction is not only a conscious decision made by governments, it can also be a viable political strategy. Indeed, this episode demonstrates the claims made by Weaver (1986), that political actors have a greater propensity to be motivated by blame avoidance rather than praise. This motivation often results in the conscious selection of inaction as a policy response to a problem. In the case of the Quebec blasphemy law, the St. Laurent government was not under pressure to address the law or to clarify the jurisdictional

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negative response from religious groups. In this case, the judge who approved the injunction cited the *Criminal Code* provision on blasphemous libel as a deciding factor. The second example is from 1980 when the Canadian distributor of the Monty Python film *Life of Brian* was charged with blasphemous libel, however the charges were later dropped.  
99 Indeed, the leading expert on Canadian blasphemy law, Jeremy Patrick has also been unable to uncover more information regarding the Laurent cabinet’s consideration of blasphemy.
issues that could arise from competing provincial and federal laws. As a result, in this particular episode the St. Laurent cabinet demonstrated the adage – ‘let sleeping dogs lie’. There was no concrete problem with the application of the blasphemy law for the government to address nor was there any imminent threat posed by the Quebec law that required the St. Laurent cabinet to respond. Those involved in the cabinet decision understood that bringing the blasphemy issue to the Supreme Court would certainly draw a negative response from the Duplessis government and attention from the public and media. The St. Laurent cabinet was more concerned with an upcoming federal—provincial meeting than the relative non-issue of dual blasphemy laws. As a result, decision-makers understood that a reference in this instance could open the government to a negative response, while inaction provided no issues for the government for the interim. It is important to note that in both the Padlock Act and in blasphemy, there was a strong possibility that a private citizen would challenge the acts, through routine litigation. Indeed, in the Padlock episode, Lapointe was aware that citizens and interest groups (like the CCLA) were likely to challenge the act, making government intervention unnecessary.

The second example of a rejected reference parallels the first in many ways. Like the Padlock Act, the blasphemy episode concerns the federal government intervention into a Quebec law. In both instances, the laws, although perhaps controversial elsewhere in Canada, are relatively well received and popular in Quebec. In both cases, decision-makers were cognizant of the possible implications of federal government action in Quebec. Decision-makers were acutely aware that federal government intervention could serve to sour relations between Ottawa and Quebec. A federal government decision to refer the acts could pit it as an aggressor against Quebec, as its decision to reference would be seen as a deliberate act against the provincial legislation, and not a reaction to a real conflict/live case. Instead, with the possibility of private citizen litigation possible with government inaction, it was better political strategy to wait for a concrete case to materialize.

Finally, it is important to note that these two political episodes are connected by the fact that they concern Quebec laws instituted under the political leadership of Premier Maurice Duplessis and the Union Nationale party. Duplessis’ reign over Quebec politics is characterized by policies that were aimed at protecting Quebec culture and advancing
Quebecois nationalism and autonomy (Leslie 1988). With these goals, Duplessis’ style of governance served either to isolate Quebec from the rest of Canada or brought the province into direct conflict with the federal government. Through the avoidance of reference cases regarding the Padlock Act and the Quebec blasphemy law, the federal governments of King and St. Laurent successfully managed to avoid confrontation with Duplessis and Quebec in one area over which they could exercise complete control: the initiation of a reference case.

**ANALYSIS: REFERENCE CASES AS DELEGATION**

The previous discussion provides an understanding of the strategic and political benefits that are available to governments through the reference power. It has also examined the negative consequences of deferring political controversies to the courts and why some governments have rejected the reference option in the past. The following section will take these findings and engage in an analysis through a delegation theory framework. There are three main objectives of this analysis. First, delegation theory provides a theoretical structure for understanding the relationship between the courts and the executive as they relate to the reference power, which will help to organize the findings above. Second, it serves to link the Canadian case to a larger literature that is typically associated with the European and American cases, in a way that has been underexplored in previous Canadian scholarship. Finally, the delegation framework helps to articulate some of the potential problems of this power for democratic governance.

When political executives in Canada invoke the reference power, they are engaging in positive and informal delegation. This is an act of delegation because the executive and legislative branches hold the principal decision-making power over matters of public policy. When an executive invokes the reference power and refers questions regarding legislation, they effectively cede decision-making power to the courts. A reference case serves to empower a court to decide matters of public policy – a fact that is most pronounced in reference cases in which a government asks for a court’s advice on legislation that is only proposed and not yet enacted. Indeed, in such a scenario, a court could invalidate a government’s legislative proposal, serving to marginalize the role of legislators, especially members of the parliamentary opposition. That being said, although
a reference serves to remove a debate from the purview of legislators, a reference decision can serve to vindicate a particular position, as demonstrated above in the section on institutional authority of the courts. However, to be sure, this vindication comes at the expense of delegating decision-making power over matters of policy to the courts.

The delegation in a reference case is positive, because the executive must take the proactive step and adopt an order-in-council to initiate a reference case. This positive delegation is what makes references theoretically different from routine judicial review. Indeed, in routine or concrete review, the parties involved are reacting to a real dispute or wrong that has occurred. This dispute exists externally to the court proceedings. While in the case of an abstract reference, there is no live and external dispute to which the court must adjudicate as a third party. Instead, a reference case manifests entirely from a conscious, proactive decision by the executive to invite the courts to pronounce on an issue.

Although the decision to delegate to the courts through a reference is a positive form of delegation, it is also informal. This delegation is informal because political actors choose to be bound by reference decisions. Indeed, a plain reading of the federal reference power makes it clear that it empowers the Governor in Council to obtain an advisory opinion from a court on important legal and constitutional questions. Yet, political actors generally abide by the decisions made by courts in reference cases, regardless whether they run counter to the preferences of that actor. Presumably, a government that was dissatisfied with a decision rendered in a reference case could take the court’s decisions as advisory only and proceed with its desired policy choice. To be sure, ignoring a reference decision and pursing legislation that a court has found to be invalid would not be a wise political choice, for several reasons. First, the Supreme Court has explained that if confronted with the same issues as a reference in a concrete/routine case, it would follow its previous decision in the reference case (Reference re: Wartime Leasehold Regulations [1950] 2 D.L.R. 1; paragraph 3). Second, if a government were to continue to pursue legislation that was found to be invalid in a reference case, groups opposed to the policy would have the strength of the court’s reasoning in their ammunition, forcing the government to confront the courts’ reasoning for invalidation. However, although it may not be prudent for governments to ignore a reference decision,
this does not negate the fact that deference to reference decisions by governments is entirely self-imposed and not founded on statute, which makes it informal.

When dealing with some normative and political controversies governments will ask reference questions to delegate decision-making to the courts to take advantage of the unique benefits of this power. Reasons for this delegation include: (1) a means to deal with a political controversy; (2) to respond to other governments and to deal with issues of federalism; (3) to benefit or receive protection from the authority of the court; (4) to overcome time and resource limitations and (5) to capitalize on the unique structure and abstract nature of reference cases. As stated previous the reasons for delegation in reference cases are by no means mutually exclusive, as a single reference case may allow a government to capitalize on several of the benefits of delegation.

Governments can initiate references as a means to deal with a political controversy. If a government is faced with controversy regarding a particular policy that it wishes to pursue, it may seek judicial review through a reference to obtain certainty regarding the legality or constitutionality of the policy. Delegation scholars have demonstrated that courts can provide a valuable means to deflect blame for making controversial policy decisions. Political actors can delegate decision-making power to the courts when faced with a decision that may be ‘no win’. Yet, unlike routine judicial review, a reference case allows for a unique form of political opportunism for blame avoidance. A government can seek a reference opinion on a controversial subject, removing the burden of making a decision regarding a controversial policy matter. If the court makes a decision that is unpopular, the referring government can avoid blame for the decision and can blame the court. On the other hand, if the decision is well received, the referring government also has the ability to claim credit for referring the matter to the courts in the first place and can simply follow the court’s guidance. Using the reference power in this manner can also free political actors from the burden of ensuring that a proposed policy is legal and constitutional, knowing that the government can require the court to sort out the constitutionality or legality of a policy through a reference, providing a ‘judicial backstop.’ Thus a reference can serve two of the most rudimentary goals of political actors, to avoid blame and to engage in position taking, in a unique way that cannot be achieved in routine litigation.
If a government is faced with strong criticism in response to a particular policy choice, either within parliament or from the public (or both), it has the ability to send the policy to the courts in a reference, forcing the judiciary to sort out the legality/constitutionality and with the hope of reaching a suitable decision. Simply the process of seeking a reference opinion on a controversial matter benefits a government because it forces the immediate criticism and debate to subside, at least until the court renders its decision. According to Aranson et al. (1982), this argument reflects one of the central goals of delegating to the courts, that delegation serves to transplant the political problem from the legislature to a forum that is portrayed as rational and non-political. Indeed several of the interview subjects explained that a reference was a means to remove the controversy from the political/legislative arena for a period of time, placing it in the realm of the judiciary. This not only serves as a means to attempt to solve the constitutional controversy, it also allows the cabinet/government some “breathing room,” in the words of Former Attorney General D.

References can also allow governments to claim that they are achieving results and making progress on election promises, even if the corresponding legislation might be unconstitutional. A government faced with such a situation could pass legislation with the ultimate goal of delegating the final decision to the courts in a reference case. If the court finds the particular policy to be constitutional, the government can take credit for passing the law. Conversely, if the court renders the law invalid a government can avoid blame for the law and criticize the courts for vetoing its policy. As Graber explains, judicial review and delegating to the courts provides a valuable means of “pushing unwanted political fights off the political agenda” (1993: 41).

Delegating to the courts can provide political actors with a ‘bailout effect’ (Fox and Stephenson 2011). In other words, courts can allow governments to vacate themselves from the policies of predecessors, in a way that is less confrontational and direct than simply repealing the legislation of the previous government. Arguably, the decision of the King Government to refer the Bennett New Deal legislation to the Supreme Court demonstrates this bailout effect. As documented in Chapter Three, while in opposition, King and members of the Liberal Party opposed the New Deal legislation, but needed to be conscious of the possibility of being accused of being anti-worker. Thus,
following an election and the King Government’s return to power, the New Deal legislation was subject to several reference cases. Using a reference in this manner provided King with a bailout, his government did not have to worry about implementing legislation that was questionable in terms of constitutionality and that it did not support.

The fact that a government can prompt judicial review on its own accord through a reference opens up this power to greater use as a blame avoidance/credit claiming tool than routine judicial review. For example, a government can use a reference to signal its dissatisfaction with another government’s policy, by referring that government’s policy to a court of appeal or the Supreme Court of Canada. This act can allow a government to play to a particular base of voters, while at the same time achieving national coverage of its opposition to the policy of the policy-enacting government. In such an instance, a government can take credit for standing in opposition to the other government’s policy, which might be especially appealing to a government seeking re-election. For example, the Government of Quebec managed to stall the federal government’s Senate reform plans by referring Bill C-7, one of the reform bills before the Parliament of Canada to the Quebec Court of Appeal in a provincial reference case. This provincial case not only served to pause the reform plans of Ottawa, it also prompted the federal cabinet to initiate a reference of its own concerning Senate reform at the Supreme Court of Canada. The provincial reference made Quebec the central opponent of the federal government, to the approval of Quebeckers (Wells 2013). Using a reference as a tactic to stand up to Ottawa allowed the Government of Quebec to claim credit as the defender of the interests of the people of Quebec.

The possibility that a reference can be employed to appease or claim credit with a particular constituency or base of voters, is understood as a political benefit by individuals involved in past references. Indeed, Attorney General D, interviewed for this project, was a member of a government that had its legislation referred to a court by another government. Although Attorney General D was not able to comment with certainty as to the motivations of the referring government, s/he explained that its

Provincial governments have been quite successful in securing the support of constituents through vocal opposition to the federal government, such as former Newfoundland and Labrador Premier Danny Williams provincially popular ABC, Anything But Conservatives campaign against the federal conservative party. This campaign not only put Williams on the national stage, it also made him incredibly popular with voters (see Marland and Kerby 2014).
government was aware that one of the motivations behind the reference was the referring government’s likely playing to its base (Author interview, 9 May 2014). Using a reference case in this manner highlights one feature of delegation to the courts for the goal of blame avoidance/credit claiming, as articulated by Whittington. Legislators motivated by position taking, can use the courts to attempt to align a public persona with the attitudes of constituents: “Independent and active judicial review generates position-taking opportunities by reducing the policy responsibility of the elected officials” (Whittington 2007: 137). Moreover, “The visibility of the exercise of judicial review creates another opportunity for legislators to publicize their position on an issue” (Whittington 2007: 138). The ability to invite the courts into a political conflict, including disagreements between governments, makes the reference power amenable to the goal of credit claiming in a different (but perhaps greater) manner than originally contemplated by delegation theory. In a reference the goal of seeking to avoid blame or to claim credit is more readily at the disposal of a government, as it does not need to wait for a live dispute to challenge the actions of another government or invite a court to wade in on its own policy proposals.

References also help governments to deal with the particular implications of federalism. First, a reference can provide the federal government a means of eliminating differences in public policy across provincial jurisdictions and a means of ensuring national standards. When faced with different judicial interpretations at the provincial level, a reference can provide a means of obtaining an authoritative decision from the Supreme Court that will have national implications. Using the reference process instead of appealing a lower court ruling, a case will not be limited to the specific facts of a particular case in a particular province. Second, a reference also provides governments with a means of challenging the public policy of another government. If the routine political channels of negotiation have failed or are unavailable, a reference provides a valuable tool to affect the actions of another government. The referral of another government’s legislative project can serve not only to stall that project, it can also provide the referring government a means of making its opinion on the legislation heard. Similarly, a government can use a reference as a powerful way to protect its constitutional jurisdiction, if it believes that the legislation of another government is
infringing on its constitutionally prescribed powers. Indeed, provincial governments were able to effectively use the reference power to combat the expansion of the federal government jurisdiction throughout the earlier portion of 20th century, through a series of provincially empowering JCPC decisions.

The most cited reason for using the reference power by interview participants is the political assurance that can be gained through an authoritative decision of the court – or what some scholars refer to as position legitimization. Governments who are unsure of the constitutionality or legality of a proposed policy can have the courts decide on the matter through a reference case, allowing them to legislate with assurance. This assurance may be more important for a government attempting legislative change that would be problematic to unwind once in place. A reference can provide a government with an authoritative opinion, which if it serves to legitimize a government’s policy preference and can help circumvent future legal challenges. Although submitting the proposed policy to the courts can open up a government to the possibility of invalidation, the assurance that can be achieved through an authoritative court ruling can outweigh this negative possibility.

Several interviewees explained that a reference opinion is a valuable tool in dealing with a constitutional controversy. A reference decision in such a case would help to assure a government that it was operating on a valid interpretation of the constitution before moving forward. For some subjects, this assurance was vital to obtain in situations where the proposed legislative scheme would be problematic to disentangle if found unconstitutional or illegal at a later date. While other interviewees explained that obtaining a reference opinion prior to enacting a particularly controversial piece of legislation would serve to “short circuit” litigation that was likely to occur once the legislation was in place. In such circumstances, a reference opinion in support of a government’s proposed legislative scheme would help to eliminate future challenges, both political and legal. When employed in this manner, a reference and, incidentally the courts, can act as a shield for a government that must address a controversial political issue. References when used in this manner highlight the benefits of delegation to courts in terms of a means to reduce policy uncertainty and to attempt to prevent future reversal, as a form of political insurance (Salzberger and Voigt 2002; Tridimas 2009).
Perhaps the most functional explanation for why governments submit reference questions to appellate courts is the benefits related to time and resource. Compared to routine litigation, a reference allows a government to obtain a ruling from a penultimate appellate court or the Supreme Court in a relatively short amount of time. Unlike other parties that may wish to challenge a government act, in a reference a government does not need to wait for a concrete dispute with an ideal fact scenario in order to obtain judicial review. Furthermore, in a reference a government can reduce the expenditure of resources (such as financial and personnel) that would be required for routine judicial review. Similarly, if a government is facing an uphill battle over a particular legislative project, a favourable reference decision will provide the government with a great deal of momentum to move forward, avoiding the unnecessary expenditure of political capital. As a result, a government can help to conserve future resources by preempting challenges that may be mounted in response to a particular legislative program.

The benefits surrounding time and resource that can be gained by a government in a reference case speak to the specific structure of the reference power, however this is not the only structure related benefit that would prompt a government to engage the reference power. Governments will also initiate references to profit from the abstract nature of reference cases. Unencumbered by a specific set of facts, a government can manufacture the ideal hypothetical fact scenario to test a particular policy in court through a reference case. Indeed, a reference provides a government with the unparalleled power to frame the terms of a case. Since the reference question becomes the central terms of the case, a government can attempt to frame the reference questions in a manner that best suits its particular goal, to attempt to elicit a particular decision from the court. Furthermore, without a specific set of facts a government can rely on a reference to achieve a broad ruling from a court, instead of a narrow decision that only applies to a particular dispute. A reference allows a government to control aspects of a case in a way that is simply not possible when dealing with a concrete case bound by a particular set of facts.

The reference power provides a government with a unique set of advantages that cannot be achieved through routine judicial review or through the ordinary legislative process. The above analysis demonstrates that the benefits that can be attained through a reference can become the primary motivation for submitting reference questions and the
outcome of the case, win or lose, is *almost* secondary. Furthermore, there are aspects of the political system in general that also help to explain a government’s decision to delegate decision-making over policy to a court in a reference case. Indeed, the impetus to delegate to the courts in order to benefit from the effects of judicial review becomes more powerful in systems where political actors are unable or unwilling to override the constitutional interpretation of the courts. In such a system, the public often sees the courts as infallible on any controversy regarding the constitution, while political actors are wise to avoid confronting the court on constitutional disputes (Martens 2007). Although her analysis is centred on the American case, Martens’ arguments could certainly be applied to the Canadian case, especially post-1982.

Following the adoption of the *Charter of Rights and Freedoms* in 1982, the Supreme Court expanded its authority for constitutional and rights interpretation at the expense of political actors. This rise in judicial power in Canada is evident in the marginal use of *s.33*, the notwithstanding clause, which allows legislatures to override the judicial interpretation of rights. Manfredi (2001) demonstrates that for several reasons, including the wording of the provision itself, Canadian political actors have not made great use of the notwithstanding clause and have essentially rendered it de facto ineffective. The ineffectual status of the notwithstanding clause serves to negate the most powerful tool legislators have to uphold a constitutional interpretation that deviates from that of the courts. Furthermore, aside from the notwithstanding clause, Manfredi and Kelly (1999; 2001) have established that legislators are often subordinate to courts in constitutional interpretation and likely simply to follow the decisions of courts, rather than engage in a level dialogue. All of this demonstrates that in the Canadian case, political actors are unlikely to override the constitutional interpretations of the courts, regardless whether they hold a constitutional power to do so.

In understanding why political actors ask reference questions, it has become apparent that the decision to initiate a reference case, when the product of strategic political considerations, demonstrates a lack of consideration of future consequences for the role of the courts. Indeed, a reference offers a short-term solution to an immediate political problem without a concern for long-term implications, especially for judicial independence. In speaking about the Canadian case in particular, Hirschl explains that the
delegation to the Canadian Supreme Court is contingent upon, “the court’s reputation for expertise, rectitude and political impartiality,” all of which speaks to the strength of its independence (2000: 129). However, when considering the reference power it is essential to note the paradox that is present between judicial independence and delegation to the courts in these episodes. Governments that use the reference power understand the advantages that can be gained from an authoritative constitutional interpretation by the court in dealing with political controversies. At the same time, they do not recognize the threat that the reference power could pose for judicial independence. For delegation to exist and more importantly, sustain, the independence of the judiciary – and a respect for that independence – is essential. Yet, the delegation of political controversies to the courts in reference cases can be a direct threat to this independence.
CHAPTER SIX: IMPLICATIONS AND CONCLUSION

The reference power outlined in the *Supreme Court Act* and corresponding provincial acts provide the executive the ability to seek judicial advice and receive a judicial opinion on any matter it deems important. The role of a court in a reference case is extrajudicial and outside the routine function of appellate courts. In a reference, a court is asked to provide the government, more specifically the executive, with advice regarding the legality or constitutionality of existing or proposed government action. Engaging in this advisory role, courts effectively fill the responsibility of the attorney general in providing advice on the legality of government action. While providing a reference opinion is certainly a legal function, in principle it is not adjudicative when the reference is abstract and lacks a concrete case or controversy. Furthermore, unlike routine litigation, the opinions rendered in references are advisory only and therefore not binding on the parties involved.

However, this legal depiction of the reference power does not reflect the reality of how reference cases have been used and how the actors in these episodes understand them. In practice, political actors have used the reference power to receive judicial opinions on matters both highly controversial and normative. The reference power is a valuable tool available to governments to delegate decision-making to the judiciary over virtually any issue. In some instances, the act of involving the judiciary in a political dispute is viewed as a primary benefit of a reference case, with the actual case outcome being almost a secondary consideration. Indeed, as demonstrated in Chapter Five, a government need not “win” a reference case to benefit from the unique features of this power. A decision to use a reference in this manner is often shortsighted and does not consider the long-term implications for the role of the judiciary. When considering how the reference power functions in practice, there are significant implications concerning the relationship between the executive and the courts, specifically for judicial independence and the centralization of power in the executive.
This concluding chapter considers two implications of the reference power for judicial independence and the centralization of power in the executive, and will consider possible reforms to the reference system in Canada. First, when considering the problems that references can pose for judicial independence, this chapter argues that a majority of these concerns could be alleviated if courts were provided the formal power to refuse to answer inappropriate reference questions or maintain the power to grant leave in reference cases. Second, focusing on the great deal of power a reference case can provide an executive; Canada could democratize the reference power and allow more parties to initiate abstract review, taking a lesson from European constitutional courts. The chapter will conclude with: (1) an overview of the central findings of this project; (2) a short discussion of the empirical and theoretical contributions of this study for the field of constitutional and judicial politics and the study of Canadian politics; and (3) some final thoughts about Canadian reference cases and possible areas for future research.

**Implication I: References as Confounding Judicial Independence**

In the first case that questioned the validity of the federal reference power, *Reference Re References* [1910] 43 S.C.R. 536, both the Supreme Court and the Judicial Committee of the Privy Council addressed the place of the reference power within the Canadian constitutional framework and the role of courts in participating in reference cases. At the Supreme Court, Chief Justice Fitzpatrick recognized that in providing advisory opinions in a reference, a court was engaging in a role, albeit a legal role, that would ordinarily be fulfilled by cabinet. This incursion into the routine role of cabinet was not problematic for Fitzpatrick because, as he characterizes it, the court is providing advice and not making binding decisions. Indeed, all of the justices participating in this reference agree that the role of the courts in a reference case fulfills a legal function, albeit an extrajudicial one. In his concurring seriatim opinion, Justice Davis agrees with the Chief Justice that a reference case requires a court to step outside its routine function of adjudicating disputes between parties. Importantly, although this practice is extrajudicial, it is characterized as a legal function and constitutionally permissible. This acceptance of the reference power by the majority in *Reference Re References* is
contingent on the fact that a reference opinion is advisory only. As Justice Davis explains:

“...These answers are simply to aid the Governor in Council in reaching conclusions for which they must be held entirely responsible. The answers do not bind the Governor in Council. He may act in accordance with them or not, as he pleases, giving them just such weight as he pleases. They are advisory only. They do not bind even this court as has been often said before if at any time it is called upon in its strictly judicial capacity to decide the very question asked” (at paragraph 17).

Echoing the arguments of the other justices in the majority, Justice Duff also focuses on the non-binding nature of references, explaining that a reference is technically not a judicial judgment and does not contribute to legal precedent set by the Supreme Court (Reference re References, at page 32). Regardless of how closely reference proceedings mirror routine litigation, the fact that reference decisions are advisory makes them markedly different from all other decisions rendered by appellate courts. For the majority, any potential problems for the independence of the judiciary and the implications that arise from the extrajudicial function of references are mitigated by the fact that reference opinions are simply advice and do not bind or dictate executive action.

This simple solution to the potential problems for the separation of the judiciary from the more political branches of government is not satisfactory for the dissenting justices in this case. Justice Idington expresses concern that references might erode the separation of the legislative, executive, and judicial functions of government, which is not saved by the safety valve of the advisory nature of references. He explains, “If we degrade this court by imposing upon it duties that cannot be held judicial but merely advisory and especially in the wholesale way submitted herein, we destroy a fundamental principle of our government,” (at page 29). Justice Idington is concerned that the reference power imposes a duty on the courts that is outside the realm of judicial jurisdiction, requiring that courts fulfill a duty of the executive and legislative branches. For Justice Idington, this imposition is a violation of the separation and independence of the judicial branch from the partisan branches of government. Unfortunately for Justice Idington, no other justice in this case shared his concern for the separation of the branches of Canadian governance and the threat posed by the extrajudicial function in
reference cases. In *Reference re References*, the Supreme Court declares the reference power constitutional.

The Province of Ontario appealed the Supreme Court’s decision in *Reference re References* on behalf of several other provinces to the JCPC. The JCPC unanimously upheld the Supreme Court’s finding that the reference power is a valid exercise of the jurisdiction of the Parliament of Canada and does not violate judicial independence. The reasoning of the JCPC relies on the same arguments as the Supreme Court: because references are advisory, they do not bind the executive nor future courts. As a result the JCPC finds that references do not pose a threat to the independence of the judiciary and the separation of powers. The JCPC concludes its decision with the caveat that “mischief and inconvenience…might arise from an indiscriminate and injudicious use of the Act,” but left the policing of the boundaries of the proper use of the reference power to the Canadian courts (*Reference re: References* [1912] A.C. 571, paragraph 16).

In this early case both courts were asked to confront arguments that criticized the reference power from the perspective of judicial independence. The provincial governments participating in the case argued that the reference power requires courts to provide advice to the executive and fulfill a responsibility of cabinet. Indeed, as this study has argued, if courts engage in a function that is a routine responsibility of cabinet they become implicated in the political arena, which violates the separation of the judiciary from the other more political branches of government. The fulfillment of a political function erodes the independence of the judiciary, as it requires that the judiciary be answerable to the executive in providing advice. This issue becomes of even greater concern when considering that courts do not hold any formal power to reject reference cases and the executive could force the courts to answer reference questions, if it so desired. For judicial independence to be effective there must be a degree of institutional separation between the judiciary and the more political branches of government, facilitating ‘checking’ of the actions of the other branches of government by the courts.

Judicial independence is both a relational and behavioural concept.\(^{101}\) It is relational because the courts must be protected from undue interference by the political

\(^{101}\) It is important to note that judicial independence conceptually distinct from judicial impartiality. Judicial impartiality refers to neutrality and absence of bias in the attitude/state of mind of the adjudicator.
branches in the system. It is behavioural in that judicial decision-making must be (and be seen to be) autonomous and independent (Russell 2001; Hausegger et al., 2015). Focusing on the relational aspect of judicial independence, autonomy of the judiciary is protected by allowing courts to exert a great deal of control over its docket and administration, as well as through the protection of judicial tenure and salaries. Reference cases require that the courts answer to the executive, violating the administrative control aspect of judicial independence. However, for both the Supreme Court and the JCPC in Reference re: References, the questions relating to judicial independence that are raised by the reference power are easily solved through the safety valve of the ‘advisory only’ nature of reference cases. Indeed, according to this reasoning, if the executive can simply reject the advice of the courts there is no significant implication for the division of institutions and the separation of the judiciary.

In the Secession Reference, the Supreme Court was asked to revisit the constitutionality of the reference power. The amicus curiae appointed to represent the interests of Quebec argued that the Supreme Court’s role had greatly changed since it had last ruled that the reference power was valid, and that the reference power or the ability to render advisory opinions was not expressly provided for in the constitution. The Supreme Court rejected this argument explaining that there was nothing to bar a court from exercising other legal duties aside from its routine judicial function (paragraphs 10 to 15). The Court affirmed the validity of the reference power, explaining that the Canadian constitution does not prescribe a strict separation of powers. Courts are not precluded from engaging in actions that are outside their traditional adjudicative role (paragraph 15). It is important to note that the Supreme Court does not rely on the same “advisory only” reasoning as in the earlier challenges to the reference power.

It was prudent of the Supreme Court to avoid relying on the “advisory only” logic of the earlier rulings that affirmed the validity of the reference power. The informally binding nature of reference cases speaks to the institutional relationship between the judiciary and the executive/legislative branches in general, and which presents unique implications for judicial independence when addressing the reference power. As

in relation to the issues and parties in a particular case. Judicial independence on the other hand speaks to both a relation between the judiciary and other branches of government and the autonomy of action by the members of the judiciary (see: Valente v. R [1985] 2 S.C.R. 673).
demonstrated throughout this study, reference decisions are advisory in name alone. There are no documented examples of a government flagrantly ignoring the findings of a reference case. Hausegger et al. (2015) note that reference cases are cited like any other legal precedent. Likewise, all individuals interviewed in this project confirmed that they did not view a reference case to be different from other legal decisions. Even in instances where the courts serve as a roadblock to the actions of a government, governments generally abide by the findings in the reference case.

For example, in 2014 the Supreme Court blocked the federal government’s plans to reform the Senate, a long-standing promise of the Conservative Party of Canada that can be traced back to its Reform Party roots. The Harper government complied with the Court’s finding that unilateral reform was unconstitutional and did not pursue further Senate reform. If one were to follow the logic implied by the early decisions affirming the reference power, the Harper cabinet could have simply disregarded the Supreme Court’s advice and proceeded with the reform measures. Another good example, also from 2014, is the Nadon Reference. In this particular case the federal government had already obtained independent advice that validated the Supreme Court appointment of Mr. Justice Nadon and the Chief Justice of the Supreme Court had already sworn in Justice Nadon. In this case, instead of complying with the Court’s decision in the Nadon Reference, that Nadon was ineligible for the Supreme Court, the government could have respectfully disagreed and followed the independent advice that validated the appointment. To be sure, the rejection of the reference opinion could have created difficulties for the government in the future, if a concrete case that challenged the appointment of Justice Nadon materialized. That being said, in the interim, ignoring the reference opinion would have allowed the government to fill the vacant seat. Furthermore, with Justice Nadon participating in hearings at the Supreme Court, it would be unlikely that the Supreme Court would find his appointment invalid at a later date, as it would serve to jeopardize the cases in which he partook, creating a greater institutional problem.

The acceptance of judicial advice, even when it runs counter to a government goal, should be unsurprising considering the relationship between political actors and the courts. As argued in Chapter Five, political actors are unlikely to override the constitutional interpretation of the courts. When political actors are unwilling to pursue
their own constitutional interpretation in the face of a contrary judicial interpretation, those political actors are relegated a subordinate position in constitutional interpretation. This not only prevents legislators and the executive from engaging in constitutional interpretation that differs from the courts in the short term, it also serves to reinforce the superior interpretation of the courts going forward. The implications of this relationship between the courts and political actors for reference cases means that political actors are unlikely to override reference case decisions, making references advisory in name alone. This realistic understanding of the reference power and how actors respond to reference decisions heightens the concerns regarding the independence of the judiciary and the separation between courts and more political branches of government.

However, this concern regarding judicial independence stemming from the informally binding nature of reference cases is eased in part if courts can refuse to answer reference questions. Indeed, Hausegger et al (2015) note that the concerns for judicial independence that arise from reference cases are neutralized if courts continue to refuse to answer some reference questions as the Supreme Court did in the Same Sex Marriage Reference. As argued in Chapters Two and Four, if the judiciary maintains the power to refuse to answer reference questions, it can safeguard its independence and avoid answering questions that it considers inappropriate. Courts are reactive institutions, they must respond to the matters that other parties bring before them and they cannot seek out matters to adjudicate. As a consequence of their reactive nature, courts must maintain a great deal of control over what matters are appropriate for judicial determination, governed through the common law rules of justiciability. Justiciability is a gatekeeping power that helps to ensure that courts will not engage in matters that are contrary to their legitimate constitutional role. Given the mandatory wording in the reference granting statutes and lack of a formal leave process, courts, in a plain reading of the reference power legislation, do not hold the power to refuse reference questions.

When considering that judicial independence can be threatened by the extrajudicial role required by courts in reference cases and that reference decisions have become effectively binding on political actors, a mechanism for protecting the separation of the courts would be to apply the parameters of justiciability to reference cases. Providing courts with the power to grant (or refuse) leave in reference cases would allow
for the safeguarding of judicial independence while working within the current institutional framework for reference cases. Indeed in the majority of routine cases heard by appellate courts in Canada must undergo a leave process and must be granted access to the court’s docket. This leave process requires that courts consider issues of justiciability. As discussed in Chapter Four, assessing justiciability ensures that matters heard are not moot and are ripe for judicial determination and cannot be solved through other means. This analysis is completed in consideration of three concerns related to the constitutional responsibility of the courts and the separation of powers. In agreeing to hear a matter a court must consider the following: the legitimacy and capability of the judicial process to address the specific matter, the constitutional role of the legislative, executive and judicial branches, and the specific nature of the dispute (Sossin 1999). The common law requirements of justiciability help to protect the constitutionally prescribed roles of the judiciary and other branches of government and help to ensure that the disputes heard by courts do not endanger this institutional framework.

However, reference cases have no leave process. Instead, courts are required by statute to answer the reference questions submitted by governments. This would not be a problem if the reference process functioned in an advisory only capacity. However, a realistic understanding of how the reference process operates and how governments respond to reference cases makes it clear that viewing references as simple advice overlooks the implications that these cases pose for judicial independence. When considering that references have become effectively binding in practice, it is essential that courts be allowed to safeguard the proper role of the judiciary and judicial independence by imparting a leave process to the reference cases. To be sure, the requirements for leave in a reference case would be much lower compared to routine cases, as standards related to mootness would not be applicable to abstract review. On the other hand, the requirement of ripeness could potentially limit some reference questions from materializing into reference cases, if courts decide that other venues (such as the legislature) are more appropriate to address issues raised by the reference questions. This analysis will be done in consideration of the constitutional separation of powers, the legitimacy of the judicial process, and the nature of the dispute, with the first factor holding greater importance in reference cases compared to routine litigation.
Indeed, it is the consideration of these factors (albeit informally) that has led courts to refuse to answer reference questions in the past, specifically in the Same Sex Marriage Reference and Reference re Constitution Act 1867, ss.26, 27 and 28 (BC) [1991] 78 D.L.R. (4th) 245 (B.C. Senate Appointment Reference). The Supreme Court’s refusal to answer a question in the Same Sex Marriage reference was highly controversial and has been the subject of much scholarly analysis (see for example: McEvoy 2005; Huscroft 2006). However, this work does not address the role that justiciability could/should play in reference cases. If it is accepted that reference cases are not functionally different from routine review, then it should also be accepted that courts should have some control over entertaining reference questions with consideration of the principles of justiciability. In order to maintain the intended purpose of the reference power, the requirements for the hearing or answering of reference questions should be interpreted in a liberal fashion and the refusals to hear a reference case or answer specific questions should be rare. However, in cases where the judicial independence or the proper functioning of the constitutional separation of powers could be threatened through a reference case, courts should maintain the discretion to refuse to answer such questions. When considering the many factors that are external from legal considerations regarding a governmental program or legislative proposal that may influence a government to ask a reference question, courts should maintain this mechanism of docket control. This control would ensure that courts do not become an outlet for the delegation of all difficult political questions through the reference power. The application of justiciability requirements and a leave process to reference cases could provide a valuable safety valve to protect against reference cases that could raise negative implications for judicial independence.

IMPLICATION II: REFERENCES AS CONTRIBUTING TO THE CENTRALIZATION OF POWER

One of the central implications of this study is a documentation of the great deal of autonomy and power that is available to the executive in the initiation of a reference case. The power to obtain an advisory opinion and initiate abstract review is the sole prerogative of the executive via the (Lieutenant) Governor in Council. As there are few
parameters on this power, the ability to initiate a reference case is a great source of power for an executive, with the potential for a reference to serve many ends aside from constitutional or legal clarification. A reference case provides the executive the ability to engage in issue management and provide the means to delegate decision-making of politically controversial issues to the courts, making references a valuable political strategy.

The reference power, when used to circumvent the legislative process, can serve to marginalize the role of the legislature. When a government decides to use a reference to deal with an issue, it not only pauses legislative debate on the matter, it also prevents legislators from engaging in position taking, limiting one of the essential characteristics of the legislative role. Indeed, according to interviewee Attorney General D, this was a valuable aspect of the reference power for governments because submitting a reference takes the issue out of the routine legislative domain and the principle of sub judice prevents all political actors from commenting on the matter. When a reference case is used to curtail a debate, the result is the marginalization of the legislature and an increase in the centralization of power in the executive, specifically in the attorney general and the prime minister or premier. A government can capitalize on the abstract nature of a reference and can engage in a great deal of manipulation with the ability to manufacture or propose hypothetical fact scenarios unencumbered by a live dispute. All of these factors can amount to a great deal of power in the hands of cabinet/the executive, with little impediments to this power and virtually no accountability mechanisms.

Scholars assessing the role of the legislature, and the power of executive, have convincingly demonstrated that power has become centralized in the executive at to the detriment of the legislature, line departments, and ministers (Savoie 1999; 2010). Focusing solely on the federal government and the power of the prime minister, some scholars have argued that the Canadian system demonstrates elements of ‘presidentialization’ without the powerful checks and balances that are germane to the presidential system (Bakvis and Wolinetz 2005). According to this literature, the only real domestic constraints on executive power are the federal division of powers and the strength of provinces. While strong provinces serve as a valuable counterpoint to the centralization of power in the federal executive, the power invested in provincial first
ministers parallels and in some respects exceeds\textsuperscript{102} that of the prime minister (Marland 2014). With these factors considered, the reference power is another example of the various power sources available to Canadian first ministers, both federal and provincial.

However, obtaining advisory opinions from the courts or engaging in abstract review does not need to operate in such a centralized manner. Comparatively, the Canadian reference case process serves as an example of one of the most centralized systems for abstract review by the fact that only the executive can engage in this process. In many European constitutional courts there is more than one access point for this form of review and the power is not limited to the executive alone. For example, in Italy, Germany, and Spain regional governments can access review at the constitutional court, without having to go through regional lower courts first. In Spain, France, and Germany both the executive and the legislature have the power to engage abstract review. In these countries, the ability to refer governmental legislative proposals to the constitutional courts has become a valuable tool for opposition parties in the legislature, who use this power at a greater rate than governing parties (Stone Sweet 2000). As Figure 7 (below) demonstrates there are multiple access points for abstract review in France, Italy, Spain and Germany, which is quite striking when compared to Canada.\textsuperscript{103}

\textsuperscript{102} Marland explains that there are several practical and institutional reasons why a provincial first minister can hold more power than the prime minister. He points to the fact that unicameral provincial legislatures are more often governed by a majority or supermajority government, there is simply a lower level of public scrutiny/media attention on premiers, and compared to the federal government, there is less stringent accountability mechanisms available in provinces (2014: 11).

\textsuperscript{103} The analysis here is solely on the Supreme Court of Canada here for simplicity of comparison.
<table>
<thead>
<tr>
<th>Name of Court</th>
<th>FRANCE</th>
<th>GERMANY</th>
<th>ITALY</th>
<th>SPAIN</th>
<th>CANADA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Conseil Constitutionnel/Constitutional Council</td>
<td>Bundesverfassungsgericht/Federal Constitutional Court</td>
<td>Corte Costituzionale della Repubblica Italiana / Italian Constitutional Court</td>
<td>Tribunal Constitucional de España/ Spanish Constitutional Tribunal</td>
<td>Supreme Court of Canada</td>
</tr>
<tr>
<td>Authority to Initiate Abstract Review</td>
<td>• President • President of National Assembly • President of Senate • 60 Assembly deputies • 60 Senators</td>
<td>• Federal Government • Länder governments • 1/3 Bundestag</td>
<td>• National government (referring regional laws) • Regional governments (referring national laws)</td>
<td>• Prime Minister • President of Parliament • 50 Deputies • 50 Senators • Executives of autonomous regions • Ombudsman</td>
<td>• Governor in Council105</td>
</tr>
<tr>
<td>Laws Referred</td>
<td>National</td>
<td>Federal and Länder</td>
<td>National and regional</td>
<td>National and regional</td>
<td>National and regional</td>
</tr>
<tr>
<td>Restriction on Referral</td>
<td>Within 15 days following parliamentary adoption</td>
<td>Within 30 days following parliamentary adoption by federal or Länder parliaments</td>
<td>Within 30 days following adoption by national or regional government</td>
<td>Within 90 days following adoption by national or regional government</td>
<td>No time restriction</td>
</tr>
<tr>
<td>Composition of Court</td>
<td>9 members, fixed 9 year term</td>
<td>16 members, fixed 12 year term</td>
<td>15 members, fixed 9 year term</td>
<td>12 members, fixed 9 year term</td>
<td>9 members, retirement at age 75</td>
</tr>
<tr>
<td>Power to Appoint/Selection Mechanism</td>
<td>• 3 members appointed by President • 3 members appointed by president of the National Assembly • 3 members appointed by the President of the Senate</td>
<td>• 8 members elected by Bundestag • 8 members elected by Bundesrat</td>
<td>• 5 members appointed by national government • 5 members appointed by judiciary • 5 members elected by parliament</td>
<td>• 2 members appointed by national government • 2 members appointed by judiciary • 4 members elected by congress • 4 members elected by Senate</td>
<td>• All members appointed by the Governor General in Council106</td>
</tr>
</tbody>
</table>

This brief comparison with four European constitutional courts demonstrates some unique features of the Canadian Supreme Court and its exercise of abstract review. First, Canada is the only case that restricts access to abstract review to the executive alone. All European countries allow at least one other party to access abstract review at

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104 European data adapted from Stone Sweet (2000).
105 In practice the executive.
106 Effectively the executive/prime minister.
the constitutional court. In France, Germany, and Spain groups of ordinary parliamentarians can initiate abstract review. Due to the fact that oppositional parties or parliamentarians can initiate abstract review, it is believed that the review by constitutional courts serves to extend parliamentary debates over the law into the courts (Vanberg 2005; Stone Sweet 2000). While the Italian framework does not provide ordinary legislators the power to initiate abstract review, it is still not as restrictive as the Canadian system. Unlike in Canada, the Italian abstract review system allows regional governments direct access to the Italian Constitutional Court, while Canadian provincial governments must first submit reference questions to provincial appellate courts and do not have direct access to the Supreme Court of Canada. This comparison is interesting considering that individuals interviewed for the present project explained that a reference can be an effective means to circumvent the stalling tactics of the parliamentary opposition when dealing with controversial legislation. Conversely, in the European case, where the reference power is open to use by legislators, abstract review has become a valuable tactic for the parliamentary opposition, who utilize the abstract review power at a greater rate than governing coalitions (see Vanberg 2005).

In terms of time restrictions on the referral of legislation to the courts, Canada stands as an outlier again, by having no formal time restrictions on when legislation can be referred to the Supreme Court, leaving the period for contestation over legislation through a reference to be unlimited and ongoing. Indeed, in the recent Nadon Reference, the Supreme Court was asked to interpret sections 5 and 6 of the Supreme Court Act, both of which have been in operation since 1974 (section 5 since 1875). Ostensibly, an executive could refer any law that has been adopted in Canada, regardless of how long it has been in force. A government could refer major legislative projects of previous governments, as a means of nullifying legislation that it opposes, if it desired. Indeed, as previously examined, the King Government was able to effectively dismantle the Bennett New Deal by employing references in this manner. Comparatively, in the constitutional courts examined above, the referral of laws for abstract review is limited to laws that are not yet in force. More specifically, in France, laws can be subject to abstract review when they have been adopted by parliament but not yet promulgated, while in Germany, Spain and Italy, laws can be referred that are promulgated but not yet in force. Imposing a
limitation on when laws can be referred has three central consequences. First, the examination of laws before they are in force is aimed at limiting the possibility that unconstitutional laws will be struck down by courts at a later date (avoiding future invalidation), seeking to avoid the criticisms of judicial activism that are often attributed to the American style of review (Stone Sweet 2000; 2003). Second, the early examination of laws by constitutional courts helps to amend unconstitutional laws before they can have any effect, which can help prevent circumstances where an unconstitutional law could be enforced against an individual or group. Third, the limitation period eliminates the potential for use of abstract review as a tactic to invalidate the laws of a previous government by the current governing coalition (as in the Canadian New Deal example).

Another structural feature that differentiates the Canadian case from the European cases is the selection/appointment mechanism for the justices that sit on the high court. In Canada the appointment of a Supreme Court justice is the sole prerogative of the Governor-in-Council, (in practice the prime minister in consultation with the minister of justice), making the appointment of a Supreme Court justice a great source of power for a government. To be sure, the Canadian system is not only an outlier in relation to European constitutional courts; according to Peter Russell the Supreme Court of Canada is, “the only constitutional democracy in the word in which the leader of government has an unfettered discretion to decide who will sit on the country’s highest court,” (2004:17). In the four European cases examined, one group does not hold the power to appoint all the justices on the constitutional court. In the cases that hold an election as a selection mechanism (Germany, Spain, and Italy), justices selected for the constitutional court must be elected by a majority of legislators, either two-thirds (Germany and Italy) or three-fifths (Spain). Due to the fact that all three of the European cases are multiparty systems, no party has controlled enough seats to push a desired appointee through, making appointees to the constitutional courts the product of a multiparty negotiation (Stone Sweet 2000). In France, elections are not used, although no single political actor holds the power to select all members of the Constitutional Council. It is interesting to

107 Although beyond the scope of the present study, the vast amount of power and autonomy that is afforded to the executive in the selection of judges (including the power to unilaterally amend the appointment process) to the Supreme Court of Canada is unquestionably a threat to judicial independence as well. This power and related concerns have been well documented in the Canadian literature, see for example: Russell 2004, Hogg 2009, Crandall 2010, and McCormick 2012.
note the French system has no formal requirements regarding previous legal experience for appointment to the Constitutional Council, resulting in the appointment of many former parliamentarians and ministers, although most appointees do have some legal training (Stone Sweet 1992; 2000).

An additional feature of the European system that is different from Canada is the detachment of constitutional courts from the rest of the judiciary, a central feature of the Kelsen model. Comparatively, the Canadian Supreme Court is the apex of the Canadian judicial system, which means that all legal matters have the possibility of being appealed to the Supreme Court, regardless of the court of origin. Moreover, in the Canadian judicial system every court has the ability to apply and interpret the constitution. In the European-Kelsen model, the constitutional court is the sole interpreter of the constitution and is separated from the rest of the judiciary (Sadurski 2005). The divorce of constitutional courts from the judicial system means that any constitutional matter that arises in a lower court must be sent to the constitutional court for review. The separation of constitutional courts is aimed at preserving the formal separation of powers that permeates most European constitutional systems. As a result, constitutional courts exist in a separate legal realm that is “neither clearly judicial nor political” (Stone Sweet 2000: 34). This separation would suggest that most of the problems arising from a court participating in the abstract review of legislation and the implications of this extrajudicial function could largely be eliminated.

The abstract review in these four European cases demonstrates a process that is highly structured and requires the participation of multiple groups, ensuring that power is not concentrated in any single actor/institution. When compared to European constitutional courts, the Canadian system is an outlier. Canada is the only case where abstract review is the sole power of one institutional body, the Governor-in-Council. This power over abstract review becomes even more impressive when considering that the same actor that has the sole power to attain abstract review also has the exclusive power to appoint justices to fill the bench of the court that provides abstract review. This striking concentration of power is simply not possible within the European constitutional court system. It is important to note that the purpose of this discussion is not to suggest that the exclusive appointment powers of the prime minister will result in sympathetic
reference decisions from appointees. Instead, the objective is to highlight the concentration of power that is present in the Canadian reference system and to examine the other possibilities for the institutional structure of abstract review. Finally, it is important to remember that the exercise of abstract review by constitutional courts in Europe is a routine practice, while in Canada the Supreme Court deals with reference cases much less frequently, which can help to explain why the European system is much more structured compared to the Canadian reference system. That being said, the European system does provide important lessons on how to make the reference power less centralized and more democratic.

OVERVIEW OF FINDINGS AND CONTRIBUTIONS

As the first comprehensive political analysis of the Canadian reference power, this study makes several important contributions to the study of Canadian politics and judicial politics. The first of these contributions is in the creation of an original dataset of all reference cases from Canadian appellate courts. This study brings together all reference cases and provides essential descriptive information about Canadian reference cases. Previous scholarship on references has been case study oriented and has focused on individual reference episodes. Although this case study work makes valuable contributions to our understanding of individual reference episodes, this work cannot provide understanding of the general trends related to reference cases nor can it engage in comparison across cases. Conversely, there are some examples of legal scholarship that moves beyond single case analysis, this literature is limited in the fact that it remains largely descriptive, its empirical analysis is minimal, and it does not consider the political nature of the reference power.

As a result, through the creation of an original dataset of all reference cases, this study has provided insight into how the reference power has been used and how other actors such as courts and third-party interveners have responded to reference cases. This study documents that there has been over two hundred reference cases since the creation of the power by the federal government in 1875. While the majority of reference cases are from the Supreme Court of Canada (44 percent of cases), penultimate provincial appellate courts account for almost 30 percent of all cases, meaning that provincial
governments will initiate references and do not exercise the right to appeal to the Supreme Court. Furthermore, when looking at the history of reference cases, decisions from the JCPC still play an important part of the reference story, as its decisions comprise over 27 percent of Canadian reference cases.

The overview of references provides several noteworthy insights into the provincial use of the reference power. At a basic level, the provincial use of the reference power is interesting in that federal government originally created the reference power to provide another means of controlling provincial legislation aside from the powers of disallowance and reservation. Provincial governments were quick to notice the many benefits that the reference power provided the federal government, and followed by enacting parallel legislation that granted provincial governments the power to ask reference questions. Since the 1940s, provincial governments have consistently outpaced federal governments in use of the reference power. Provincial governments have now made it a practice to refer federal government legislation for review in provincial appellate courts, at a rate that surpasses federal government referral of provincial legislation. Indeed, it appears that successive federal governments have backed away from referring provincial legislation altogether, as one must go back over twenty years to find a case where a federal government referred provincial legislation. Provincial governments have effectively turned the original purpose of the reference power on its head, making it a valuable tool for provincial governments in intergovernmental relations.

This study has also documented the parallels between periods of great political consternation and an increase in the number of reference cases, demonstrating that peaks in reference cases are reflective of other events taking place in Canadian political and constitutional history. Looking at references overtime, two periods stand out: first, the 1930s and attempt to respond to the Great Depression, and the battles between the King Government and the Social Credit movement in Alberta. Second, the 1980s and rise in mega constitutional politics. During each of these periods, major political conflicts and controversies spilled over into the courts through reference cases. Governments demonstrate that reference cases provide an opportunity to thwart the action or legislation of other governments, as in the federal government’s successful blocking of the Social

Credit program and the unsuccessful attempt by the Quebec Government to block the constitutional amendment through *Quebec Veto Reference*. During both of the peak reference periods, reference cases became an effective tool in pursuing policy change and the navigation of federalism and the relations between governments.

While provincial use of the reference power has led to a conversion of the reference power from its roots as a tool of federal dominance to an effective strategy for provincial governments, the subject matter of references has changed little since the creation of the reference power. Indeed, the reference power was created with the central goal of determining the application of the division of powers outlined in the *Constitution Act, 1867* to the practical concerns of governance. This study establishes that a majority of reference cases concern the division of powers between federal and provincial governments, a trend that remains constant following the introduction of the *Charter of Rights and Freedoms*. Governments use the reference power to understand the parameters of their own power and that of other governments; the reference power has not become a tool to determine the rights of citizens and groups vis-à-vis government action. This is an interesting finding considering that post-1982 constitutional jurisprudence at the Supreme Court overwhelmingly concerns the *Charter*.

In terms of government behaviour in reference cases, this study has found that the majority of questions referred to the courts are abstract in nature. In some instances of abstract review, governments refer questions that are clearly related to a live dispute but chose to refer the issue in an abstract manner. While this study provides the first documentation of the number of abstract reference cases, the more interesting finding is that governments have used references to deal with concrete matters, as in the several criminal law based reference cases. In the concrete use of reference cases, governments rejected routine avenues for judicial review, opting for a reference instead. This demonstrates that in some instances even when the possibility of routine appeals exist, a reference can offer a benefit for reference initiating governments that is distinct from routine litigation.

This project has also demonstrated that majority governments initiate reference cases at a rate that greatly exceeds minority governments. This finding speaks to the fact that minority governments tend to have short-sighted policy goals, are consumed with
government survival in the legislature, and are unlikely to take on expansive legislative projects that are often subject of reference cases. Furthermore, in assessing the descriptive features of governments that use the reference power, this study demonstrates that all political parties are willing to use the reference power, regardless of their position on the left—right political spectrum.

Along with analyzing the features of reference cases and the use of the reference power by governments, this study also documents how courts respond to reference cases. Data analyzed by this project demonstrates that courts do not appear to understand references as distinct from other cases. In references, courts do not prioritize speaking in one voice. Indeed, the rate of unanimity in reference cases is actually lower compared to the Supreme Court’s general unanimity rate. Furthermore, despite that most reference cases are abstract and do not concern a live dispute, courts do not view their power to invalidate government action as limited.

While courts may not treat reference cases as distinct from routine litigation, third-party interest groups do appear to understand references as different, as found in the high rate of intervener participation in reference cases. Nearly 93 percent of all reference cases post 1949 involved the participation of at least one intervening party (both non-governmental and other governments), with the majority of third-party participation coming from non-governmental groups. The high rate of intervention speaks to the salient nature of many reference cases, as these cases have attracted the participation of groups that, although they are not direct parties to the case, have found it important to expend (often limited) resources on these cases. Although the participation of third-party intervening groups peaked during the era of mega constitutional politics, their presence has remained constant in reference cases over time. Reference cases present intervening groups with a unique opportunity to influence the policymaking process in a manner that is different from regular legislative channels.

This analysis of a comprehensive dataset of all reference cases while an important contribution alone provides the necessary foundation for this study to investigate why governments ask reference questions. Previous scholarship has theorized why governments use the reference power and the advantages that a reference case could provide, but this has not been subject to empirical analysis. This study applies an
empirical examination into this important question through the interviews with former attorneys general, a first minister, and reference case counsel. This data, paired with archival work and previous scholarship, provides insight into the motivations of individuals involved in previous reference cases and constructs a theoretical argument as to why governments use the reference power. This study has demonstrated the unique benefits of delegating decision-making to the courts in general and specifically related to the structure of the reference power. In exploring this relationship, this study highlights the implications that the reference power can pose for a separation of powers and judicial independence.

Governments will use the reference power to deal with controversial political issues. In such instances, it can benefit a government not to have to make a decision on a divisive matter or to deflect blame for an unpopular decision. Seeking a reference in such circumstances is a valuable political strategy that can benefit a government, regardless of how the court decides. The reference power is also valuable for governments to deal with matters related to federalism and to police the division of powers between governments. This demonstrates that the reference power can still benefit governments in the way it was originally envisioned when the power was created in the late 19th century. Interviewees explained that the referral of another government’s legislation does not necessarily mean that the reference-initiating government opposed the particular legislation. Rather, a reference can provide an effective means of intergovernmental negotiation and/or provide the means for a government to include itself in a policy debate.

In the first two explanations for why governments use the reference power, the advantage of the reference case is not contingent on a successful case outcome. Instead, by simply involving the courts a government can realize some political rewards. However, case outcome is more important for governments that are using a reference as a mechanism of position legitimization or to capitalize on the institutional authority of the courts. When a reference is employed in this manner, governments have realized the benefit of an authoritative opinion on a constitutional controversy from a court. A reference case opinion can be used to validate a government policy agenda or can be used as a form of insurance against future challenge. Such insurance may be more important to governments enacting policy that would be problematic to unwind once in place. A
decision from a court that validates a government policy is highly valuable due to the institutional authority of the courts, which rests on the foundation of judicial independence. It is the independence from political actors that makes judicial decisions powerful and the delegation to the judiciary more effective than other agents such as administrative bodies.

The remaining two advantages of the reference power stem from the structure of the reference power itself. A reference case can provide a government with a timely legal opinion using fewer resources compared to routine review. Similarly, a government can obtain judicial review without having to wait for a live dispute or a set of facts. A government need not wait several years before obtaining an authoritative opinion from a penultimate court of appeal or the Supreme Court. Additionally, because a reference case provides the ability for abstract review, a government need not be concerned with specific facts and has the power to manufacture the ideal hypothetical fact scenario, if it desires. Simply put, a reference case can provide a government a great deal of control that is not possible in routine litigation. It is important to note that these advantages are available to governments through a reference case, regardless of case outcome.

In assessing why governments ask reference questions, this study has provided two important insights. First, that in many instances the case outcome or disposition can be almost a secondary concern for governments. The discussion in Chapter Five demonstrates that the submission of a reference question can be the product of multiple factors aside from constitutional or legal clarification. Involving the courts through a reference case has many distinct strategic advantages for governments that are not contingent on winning or losing a particular case. Second, in making the decision to involve the courts through a reference case, the reasoning of government decision-makers demonstrates a logic that is focused on a short-term solution with little concern for the long-term implications. One of the central reasons why the reference power is useful to governments and why the courts are a valuable agent for delegation is judicial independence. However, reliance on the courts in this manner can serve to harm judicial independence. As a result, there is a direct and real tension between the use of the reference power as a political strategy and the effectiveness of a reference opinion for political actors.
Finally, in a larger comparative sense, this project contributes to the understanding of judicial review that moves beyond the simple divide between European civil law constitutional courts and American style judicial review. When looking at the reference power, the Canadian case demonstrates a system that provides for both abstract review and advisory opinions within a common law legal system. The Canadian system is a middle ground between the two systems and displays a combination of features from both systems. As a result, scholars that seek to compare the American style judicial review with European constitutional courts should recognize the uniqueness of the Canadian case and its departure from this dichotomy. In a related manner, this study offers one of the first examinations of abstract review within a common law system in general, and specifically within Canada. This study defines for the first time how Canadian abstract review operates and highlights multiple implications of abstract review for governance and judicial power. Last, in terms of comparative work, this project expands delegation theory to the Canadian case demonstrating that the Canadian reference power typifies delegation, and that criticisms of delegating to the courts especially in terms of judicial independence are relevant when assessing the reference power.

**SUGGESTIONS FOR FUTURE RESEARCH**

As the first comprehensive political analysis of reference cases, this study provides essential foundational, historical, and descriptive information about the reference power. However, this focus has precluded any in-depth comparison with other jurisdictions that provide the ability for courts to engage in abstract review. One potentially valuable comparison could be made with the Federal Republic of Germany. The German Federal Constitutional Council is considered one of the most powerful courts in Europe and has been subject to a vary array of high quality empirical analysis (for example, Kommers 1994; Currie 1994; Vanberg 2005). Furthermore, Germany shares many institutional similarities with the Canadian case, especially in terms of federalism and the role that courts have played in both countries in shaping the boundaries of the division of powers between the central and regional governments. This comparison could provide insight into what the Canadian case could learn from the
Germany and could assess the impact of a constitutional court on federal relations between governments.

Second, this study turns away from the overwhelming focus on the Supreme Court of Canada in Canadian judicial politics literature by including provincial appellate courts in its analysis. Considering the important role the Supreme Court has played in Canadian politics, this focus on the top court in existing literature is understandable. However, provincial appellate courts have a much larger caseload compared to the Supreme Court, serving as the final court of appeal for most legal matters in Canada. As such, it is imperative that the decisions of these courts and their role within the Canadian judicial framework are the subject of more empirical analysis.\(^\text{109}\) It is important to understand how each of these courts operates individually and in comparison with one another. The inclusion of provincial appellate courts in the present analysis hopes to encourage more scholars to investigate these important, but relatively understudied courts.

**Concluding Thoughts**

Canadian courts have been called on time and again to deal with some of the most difficult issues facing Canadian democracy. There is little doubt that Canadian courts and the Supreme Court in particular are political institutions. What makes the courts distinct from the political and partisan institutions of government is judicial independence and the separation of the judiciary from the partisan branches of government. However, the reference power serves to complicate this relationship. Reference cases are distinct from any other legal proceeding heard by Canadian courts. As the power to initiate a reference case is the sole prerogative of the executive through the (Lieutenant) Governor General-in-Council, every reference case exists because a political actor made the conscious decision to delegate decision-making and involve the courts in a particular political or constitutional problem. A reference case provides the initiating government unparalleled power before the courts. Through the creation and submission of reference questions, a government has the ability to frame the terms of the case, free from a particular conflict or set of facts. In pursuing a reference case, some governments have manufactured elaborate hypothetical fact scenarios, while others enacted legislation with the sole

\(^{109}\) Hausegger et al. 2013 make similar calls for more scholarship on provincial appellate courts.
purposed of referring it to a court. This power becomes even more impressive when considering that reference decisions have been afforded the same respect as all other judicial decisions, regardless of their technical advisory status. One of the central goals of this study is to focus attention on how political actors use the courts to serve their own ends, suggesting that the courts alone do not bear responsibility for the increase of judicial power. Instead, the analysis of the reference power demonstrates that courts have a powerful role in the normative and public policy debates because political actors have either welcomed or actively encouraged judicial power.
## APPENDIX A: CANADIAN REFERENCE QUESTION LEGISLATION

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Original Statute</th>
<th>Current Statute</th>
<th>Current Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Supreme and Exchequer Court Act, S.C. 1875, c. 11</td>
<td>Supreme Court Act R.S.C, 1985, c. S-26</td>
<td>Section 53: (1) “The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning...[examples]... (2) “The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter...”</td>
</tr>
<tr>
<td>British Columbia</td>
<td>An Act for expediting the decision of Constitutional and other Provincial Questions, S.B.C. 1891, c.5</td>
<td>Constitutional Questions Act R.S.B.C. 1996, c.68</td>
<td>Section 1: “The Lieutenant Governor in Council may refer any matter to the Court of Appeal or to the Supreme Court for hearing and consideration, and the Court of Appeal or the Supreme Court must then hear and consider it”</td>
</tr>
<tr>
<td>Alberta</td>
<td>An Ordinance for expediting the decision of Constitutional and other Legal Questions, Ord. N.W.T. 1901, c. 11</td>
<td>Judicature Act R.S.A. 2000, cJ-2</td>
<td>Section 26(1): “the Lieutenant Governor in Council may refer to the Court of Appeal for hearing or consideration any matter the Lieutenant Governor in Council thinks fit to refer, and the Court of Appeal shall hear or consider the matter that is referred.”</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>An Ordinance for expediting the decision of Constitutional and other Legal Questions, Ord. N.W.T. 1901, c. 11</td>
<td>The Constitutional Questions Act, 2012, c. C-29.01</td>
<td>Section 2(1): “The Lieutenant Governor in Council may refer to any matter to the Court of Appeal for hearing and consideration, and the Court of Appeal shall hear and consider the matter.”</td>
</tr>
<tr>
<td>Manitoba</td>
<td>An Act for Expediting the Decision of Constitutional and other Provincial Questions, S.M. 1890, c.16</td>
<td>Constitutional Questions Act, C.C.S.M. c. C180</td>
<td>Section 1: “The Lieutenant Governor in Council may refer any matter to the Court of Appeal or to the Court of the Queen’s Bench for hearing or consideration and the Court of Appeal or the Court of Queen’s Bench shall hear or consider the matter.”</td>
</tr>
<tr>
<td>Ontario</td>
<td>An Act for expediting the decision of Constitution and other Provincial Questions, S.O. 1890, c.13</td>
<td>Courts of Justice Act, R.S.O. 1990, C.43</td>
<td>Section 8(1): “The Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration.”</td>
</tr>
<tr>
<td>Province</td>
<td>Act Description</td>
<td>Act Name</td>
<td>Section</td>
</tr>
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<td>---------------------------</td>
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<tr>
<td>Quebec</td>
<td>An Act to authorize the reference, by the Lieutenant-Governor in Council, of certain questions to the Court of the Queen’s Bench, S.Q. 1898, c.11</td>
<td>Court of Appeal Reference Act, R.S.Q. c R-23, 1975</td>
<td>Section 1: “The Government may refer to the Court of Appeal, for hearing and consideration, any question which it deems expedient, and thereupon the court shall hear and consider the same.”</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Act to provide for references by the Governor-in-Council to Appeal Division of the Supreme Court, S.N.B. 1928, c.47</td>
<td>Judicature Act R.S.N.B. 1973, c. J-2</td>
<td>Section 23(1): “Important questions of law or fact touching…may be referred by the Lieutenant-Governor in Council to the Court of Appeal for hearing and consideration, any question touching any of the matters aforesaid, so referred by the Lieutenant-Governor in Council, shall be conclusively deemed to be an important question.”</td>
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<tr>
<td>Nova Scotia</td>
<td>An Act for expediting the decision of Constitutional and other Provincial Questions, S.N.S. 1890, c 9</td>
<td>Constitutional Questions Act R.S., c.89</td>
<td>Section 3: “The Governor in Council may refer to the Court for hearing or consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same.”</td>
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<tr>
<td>Newfoundland and Labrador</td>
<td>The Judicature (Amendment) Act, S.N., 1953</td>
<td>Judicature Act, R.S.N.L. 1990, c J-4</td>
<td>Section 13: “The Lieutenant Governor in Council may refer a matter to the Court of Appeal and upon the reference the Court of Appeal shall hear and determine that matter.”</td>
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</table>
APPENDIX B: CASE LIST

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228 D.L.R. (4th) 63
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241
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