UNRAVELING REFERENCE QUESTIONS:
THEORETICAL AND POLITICAL IMPLICATIONS IN A CANADIAN CONTEXT

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Many scholars point to the entrenchment of the 1982 *Constitution Act*, which included the *Canadian Charter of Rights and Freedoms*, 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 (for example, Schneiderman and Sutherland, 1997; Knopff and Morton, 2000; Hogg, 2002; Hiebert 2002; Kelly and Manfredi, 2009). Arguably, many of these scholars overlook a striking example of the courts engaging in a political role that predates the *Charter*: the reference question procedure, which allows the executive (of both the federal and provincial governments) to obtain an advisory judicial opinion from a court of appeal or the Supreme Court of Canada on the constitutionality of government legislation, either proposed or enacted, in the absence of a live legal dispute.

Reference questions stray from the traditional adversarial nature of Canadian courts, insofar as there is no concrete legal problem that the court must sort out. Instead, courts are asked to assess the constitutionality of a legal problem entirely in the abstract. As constitutional scholar Peter Hogg explains, abstract or advisory opinions deviate from routine judicial responsibilities in two ways: (1) there is an absence of a genuine dispute or controversy between two parties; and (2) the judiciary is engaging in a function that is traditionally the responsibility of the executive branch of government (2012: 8-17). Through section 53 of the *Supreme Court Act* (RSC 1985, c S-26) or various provisions created by provincial legislatures, the executive branch (more specifically, the Governor-in-Council or the Lieutenant Governor-in-Council) can pose questions directly in front of the Supreme Court or provincial courts of appeal. The reference power provides governments the ability to completely sidestep the normal litigation routes, resulting in a privileged access to the courts for the executive that is denied to citizens, interest groups, legislatures, or opposing political parties.

The queries posed to the courts in reference cases are not merely technical constitutional interpretation. Reference cases have served to pronounce on several deeply contentious and divisive political issues throughout Canadian history, such as the reference regarding the patriation of the 1982 Constitution, the legality of the unilateral secession of Quebec, the constitutionality of same-sex marriage, and, most recently, the constitutionality of the reform or abolition of the Senate. Political actors involved in these highly contentious political episodes abide by the decisions made by the courts in reference cases, making these decisions more binding than advisory in nature (Rubin, 1960; Hogg, 2012). The reference procedure allows governments to insert the courts and the judiciary directly into often highly contentious and normative partisan debates, providing evidence of judicialized politics in Canada and a political role for the judiciary that is independent of *Charter* politics.

Canadian reference questions are a compelling and critical case for analysis. In comparison to other common law countries, Canada stands out as an anomaly. Reference or advisory opinions are prohibited in the United States, Australia, New Zealand, and have not been used in the United Kingdom since the 18th century (Russell, 1987:90; Jay 1997; Huscroft, 2010).[1] While Canada may be relatively unique in the common law legal system world in its practice of reference questions, the process is largely analogous to the practice of advisory opinions or abstract review provided by many civil law constitutional

courts in Europe. Indeed, many constitutional courts allow either the executive or the legislature (and in some cases the opposition in the legislature) to pose questions 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 at various constitutional courts and the impact of these decisions on greater political and institutional dynamics (for example, Stone, 1992; Shaprio and Stone, 1994; Kommers, 1994; Stone Sweet, 2000).

The Canadian case is still distinctive from the practice in civil law countries in the executive-centred nature of the Canadian system and reference question process. Reference questions in Canada are the sole prerogative of the executive via the Governor-in-Council (or Lieutenant Governor-in-Council). Few parameters on this power results in a concentration of power not found in the legislatures of civil law countries, like France and Germany. In the Canadian case, oppositional parties cannot ask reference questions, whereas in Germany abstract review by the federal constitutional court has been a source of power for non-governing parties within the legislature. As a case of study, Canada combines advisory judicial opinions often only found in civil law jurisdictions with the executive-centred nature of a Westminster parliamentary system, creating a set of institutional and political actor-centred variables that provide interesting and unique circumstances for analysis.

The particular process for reference questions in Canada begs important and under explored 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?[2] Why would these actors seek a definitive 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 notion of a 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?

The present paper is the first piece in a larger, comprehensive project regarding Canadian reference cases and their utilization as political strategy. The central purpose of this paper is twofold. First, it will present an empirical foundation for understanding of the creation and operation of the reference power across both provincial and federal jurisdictions. Second, this paper will assess the theoretical implications of reference cases for notions of a separation of powers in Canada and the act of strategic delegation to the courts by political actors. The theoretical implications of reference cases will be demonstrated through a brief empirical exercise assessing the different ways reference cases can be utilized as strategy. The paper argues that the structure of reference cases and their position with the Canadian political system is not only evidence of judicialized politics that is separate from the *Charter*, but also presents a unique set of implications that are fruitful for political analysis.

The Reference Power: Structure and Operation

In their recent study of Canadian courts, political scientists Hausegger et al. lament the fact that no comprehensive analysis of Canadian reference cases exists, despite the fact that from 1875 to 2009 approximately 170 reference cases have reached

the Supreme Court of Canada or the Judicial Committee of the Privy Council (JCPC) prior to 1949 (2009: 243). Hausegger et al. are correct to state that no political scientist has comprehensively examined the phenomenon of reference cases in Canada. Legal scholars Huffman and Saathoff 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' (1922 to present) which solidified reference cases as statutorily and procedurally legitimate (1990: 263).

While the work by Huffman and Saathoff is commendable, as it is the closest that any study has come to capturing all reference cases, it lacks any considerable acknowledgement of the political nature of reference questions and focuses largely on a descriptive account of cases throughout the time period examined. Additionally, placing all cases post 1922 in a single residual category of adaption and adjustment could conceivably 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.[3] 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), the patriation reference, along with more mundane cases such as *Reference re The Transport Act* (1943), which concerned the authority of the board of transport, under the same label. 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.

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 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. It is therefore essential in any study of judicial review of legislation in Canada to give some particular attention to this device" (1988: 311). In his assessment of the role of these cases 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 through a process that is not nearly as time-consuming as the ordinary channels to the Court (1988: 321).

Reference cases provide a low threshold for governments to challenge the constitutional validity of actions of other governments, allowing for a flexible approach to interjurisdictional relations. The threshold for access in reference cases 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 questions does not need to prove that there has been a wrong committed by another government to challenge the legislation. However, 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.

Earlier legal work on reference cases was critical insofar as it contended that this process could be problematic for the prestige of the courts in terms of perceptions of their impartiality and objectivity, embroiling the court in political controversies (Davison, 1938). This early scholarship doubted the ability of political actors to achieve their legislative goals via reference cases, due to the fact that these judgments were not the product of factual circumstances or a live legal dispute (Davison 1938: 270). Despite this view of the limited political utility of reference questions, Rubin 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 (Rubin 1960). These concerns regarding the creation of the reference jurisdiction have also sparked some political commentary. Jennifer Smith similarly discusses the political foundations of reference cases, describing them as a unique mixture of law and politics, which served to be a means of concern for many members of Parliament and Senators (Smith, 1983).

Creation of References

The reference power was first created in Canada through the adoption of the *Supreme Court Act* in 1875 by the federal Parliament. 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 (as embodied in the executive) the power to request the Court's advice on difficult legal questions. In this early reference scheme, the court was not obligated to provide reasoning for its decisions. Nor were there any formal arguments submitted by the executive, a practice that was satisfactory until the Court's 1885 decision in the *McCarthy Act Reference* which found the federal regulation of liquor traffic to be *ultra vires* (Strayer 1988: 312). This invalidation by the Court, without written reasoning, sparked a backlash within the House of Commons, marking the first instance of criticism for 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 provided reasoning for its decisions, no provision for the inclusion of affected parties (often provincial governments), and no requirement for fact finding (House of Commons Debates, 6th Parl., 4th Sess., 1890: 4089).

In response to this criticism, (and his shared dissatisfaction with the *McCarthy Reference*), Prime Minister Macdonald amended the reference power in 1891. Courts were subsequently required to provide reasoning for their reference case decisions. Additionally, if provincial legislation was implicated in the case, the appropriate attorney general would be notified of the case and given the ability to represent his or her provincial interests (Strayer 1988: 313). Finally, 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; Strayer 1988). These federal provisions remain largely unchanged and serve to guide the present reference process at the Supreme Court of Canada.

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 utilized at provincial appeal 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 Newfoundland (as it was then known) following its addition to the federation, all provinces had the ability to engage in a reference case with their provincial court of appeal, whose decisions could be appealed to the Supreme Court of Canada.

While the specificity and wording of each government's reference legislation varies slightly, they all generally achieve the common result of providing the executive the power to achieve 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. Additionally, 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. For a complete overview of Canadian reference legislation, please consult Appendix A to this paper.

Reference Case Process

Although there appears to be quite a bit of uniformity of reference question legislation across both provincial and federal governments, there appears to be 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. To uncover and analyze the internal reference processes, access to information requests were submitted to all governments with the goal of identifying the actors involved in the decision to ask a reference question. This would suggest whether 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 and asked whether there were any formal departmental memoranda or directives created to structure the reference process.

Responses from the governments were 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 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, the content of which hopefully can be ascertained in future interview based research for this project.

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 set formal procedure for initiating reference cases. Presumably, without a manual or set procedural guidelines, these governments initiate reference cases on an ad-hock or informal basis. The response from the Saskatchewan Ministry of Justice and Attorney General explained that the department decided to engage in reference cases in 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 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 (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.[4] 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.[5] The senior official from the NL Department of Courts and Legal services provided that the reference power is used sparingly by the Province and as such, the procedure surrounding its usage is informal and dependent upon the specific context of the reference being made.[6] In this 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.[7] 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.

Finally, although the Ministry of Attorney General Ontario found the requested documents to be under solicitor client privilege, the response to access of information provided a detailed description of the process mentioned in correspondence to the Australian High Commission in 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."[8] As this correspondence suggests, there are some reservations regarding the reference procedure and these concerns of a both practical and theoretical nature will be assessed in the following section of this paper.

Theoretical and Practical Implications of Reference Cases

Recent reference case scholarship critiques the reference procedure due to the possibility that political actors may rely on this power to avoid dealing with politically divisive issues. Hausegger et al. posit that political actors may engage in 'buck passing' insofar as politicians will ask the courts to pronounce on the issue when faced with an issue that cannot be ignored that could potentially alienate a portion of the electorate, allowing them to blame the courts in response to unfavourable feedback from voters (2009: 252-54). A reference case may thus 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. Peter Russell is similarly critical of reference questions, suggesting that they allow the executive privileged access to the courts that other litigants, such as citizen-backed interest groups, do not have (1987: 91). Indeed, if a government wanted to challenge the constitutionality of a piece of legislation from another government, a court could be compelled to pronounce on constitutionality, potentially resulting in the legislation being declared invalid and thereby completely sidestepping the time and resource consuming route via routine litigation. While these are certainly valid concerns regarding the practical usage of reference cases in Canadian politics, at a more theoretical level reference cases can raise complications for the separation of powers doctrine in Canada.

In an archetypical separation of powers system, the three branches of government are conceived of as watertight compartments, that are expected to both balance and check the powers of the other two branches, without toleration of intrusions of power from one branch to another (Vile, 1967). The practice of reference questions in Canada can be subject to criticism from a separation of powers analysis, due to the fact that the executive can directly access the highest courts with a reference, completely circumventing regular litigation routes. This privileged access to the courts can be viewed as a threat to a traditional notion of the separation of powers. Additionally, the ability of the executive to compel or demand an advisory opinion by the courts in a reference case serves to further encroach on the separate domain of the judicial branch, weakening the separation between these two branches of government.

While the Court has refused to answer reference questions, as it did in the same-sex marriage reference, according to section 53(4) of the *Supreme Court Act* the Court technically does not have any discretion on choosing to respond to reference questions posed by the Governor in Council.[9] Indeed, regardless of the disregard of this section by the Court in the past, the "will of Parliament is manifestly clear…No margin of appreciation or discretion is conferred on the Court"(McEvoy 2005: 38). Both Huscroft and McEvoy 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 this finding and resubmit unanswered questions to the Court, to force their consideration, if it so desired (Huscroft 2006; McEvoy 2005). Alternatively, Hogg posits that the refusal of the court to answer a question posed in a reference, as in the same-sex marriage reference, is an exception rather than the norm, and he believes that the court has not "made sufficient use of its discretion not to answer a question posed on a reference"(Hogg 2012: 8-20).

It is, however, 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 within the constitution; rather it focuses on the *division* of powers between *levels* of government establishing the Canadian federal structure (Stayer 1988: 137). The Canadian institutional framework, created in reflection of the Westminster Parliamentary system, implies that intrusions into the powers of other branches are in some ways routine, exemplified by the fusion of the executive with the lower house of Parliament. This fusion of the executive with the legislature diminishes the notion of a pure separation of powers model in Canada, conceivably making "separation" critiques of reference processes moot.

This dismissal of separation of powers in Canada is, however, premature. There are aspects of a separation between sources of power within the structure of Canadian government. The jurisprudence of the Supreme Court has recognized a notion of the separation of powers in the constitution and finds it to be compatible with a Westminster-style constitution. Furthermore, the high esteem placed on judicial independence supported via institutional arrangements designed to uphold this independence reflects the principles of separation of powers, at least between the judiciary and the other two branches of government (Russell 2001). Indeed, judicial independence has been preserved through both the constitutional and statutory provisions, which have been reinforced through case law and judicial review.[10] As Lorne Sossin explains, 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.

While the strict separation between the executive and the legislature, as found in the American system, may not exist in Canada, aspects of the separation of powers model can still be found in the Canadian system. The separation of powers in the Canadian context implies distinct division between the judiciary and other more partisan aspects of governance. Similarly, Dennis Baker suggests that the conception of a separation of powers is not mutually exclusive to the notion of responsible government; instead, the legitimacy of the Canadian institutional framework depends on the ability of institutions and branches of government to exercise the ability to check the power of the others (Baker 2010: 8). Furthermore, the power 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). In this way, the Canadian system demands that the courts are not held to be subservient to either the legislature or the executive.

With this understanding of how the separation of powers doctrine functions in Canada, the phenomenon of the reference question can arguably obfuscate the separation between the executive and the judiciary for two central reasons. First, the Supreme Court technically does not have the ability to refuse to answer reference questions. Second, reference questions can serve to blur the lines of political responsibility between political and legal actors. In a narrow understanding of the *Supreme Court Act*, the Court does not hold any discretion in relation to accepting and answering reference questions. The Court, through its jurisprudence, has given mixed signals on its discretion in reference cases. In the same sex marriage reference, the Court refused to answer the fourth question submitted by the Governor-in-Council, while in the reference regarding the patriation of

the 1982 constitution, the Court declared itself "duty bound" in responding to the questions submitted in that case (McEvoy 2005: 37-8, 41-2). As a result, until there is authoritative direction provided by Parliament regarding the statutory duty of the Court to respond to reference questions, the belief in a lack of discretion by the Court creates opportunities for incursions into the separation between the judiciary and both the executive and legislative branches of government.

As reference cases require the judiciary to provide advice to the executive on legislation or other governmental action, this advice can be characterized as 'extra-judicial' and outside the proper role of the judiciary as neutral arbiter.[11] 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. This informal conception can provide real and practical implications for the actions of political actors, regardless if the limitation has been self selected. The technical, non-binding nature of references becomes effectively irrelevant if actors do not distinguish such cases from other jurisprudence.

The separation of powers can become even more complicated when political actors shift their decision making responsibilities to the court through a reference, seemingly capitalizing on one of the negative aspects of separating power: the inherent difficulty 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: 19). This problem becomes even more apparent when engaging in abstract review, since political actors are calling on the judiciary to make decisions on issues that would have been the decision of the executive alone. 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.

Armed with a greater understanding of the judicialization of politics 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 by receiving legitimization from the courts. Indeed, even justices of the Court have surmised that the reference tool has been utilized as a means of "political opportunism" (Macfarlane 2013: 89). While there are several examples of high quality scholarship that examines the litigation of rights-based interest groups seeking redress through the courts for strategic purposes (for example: Olson 1990; Scheppele and Walker 1991; Hein 2001; Manfredi 2004), there is much less data that examine the government as a litigant. Moreover there is no analysis on 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. The work of Matthew Hennigar, on the litigation behaviour of the Canadian executive and its lawyer, the attorney general, serves as an exception to this trend (see Hennigar 2002; 2007; 2009; 2010). 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 (2002: 91). Thus, the government's decision to appeal cases is the product of a cost-benefits analysis and calculated decision-making. 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. When considering the decision to engage in reference cases and thus delegate decision-making capability, the puzzle of understanding governmental litigation strategic becomes even more perplexing.

In an era of judicialized politics, politicians may welcome judicial review to further their own interests. In his analysis of a realist conception of the judicialization of politics, Hirschl 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 resolving political conflict (2008: 97-8). Taking *Reference re Secession of Quebec* as one of his examples, Hirschl postulates that the judicialization of politics is not necessarily the byproduct of activist judges but rather that politicians can attempt to deflect responsibility by opening up conflicts to judicial review. Furthermore, political actors not only find that the courts are useful as a means to deflect responsibility, judicial review can be considered friendly to governments. In his analysis of the American case, Whittington finds that the conception of the courts as a counter-majoritarian and anti-legislative actor is not an accurate characterization. In terms of dealing with federal issues, Whittington contends that judicial review may be viewed as a means of the central government to monitor the behaviour of the state governments (2006). Additionally, governments may turn to the judicial branch to mediate conflicts that they either lack the capacity or willingness to mediate conflicts themselves (Whittington 2005).

However, not all delegation of decision making to the courts is the product of a lack of political capital or will. In some circumstances this behaviour may be part of political strategy. Courts are not self-starting institutions insofar as they can only act when other actors bring cases before them. As a result, a complete understanding of judicial behaviour must take into consideration those who sought remedy through the court to achieve their own political goals. Voigt and Salzberger employ a rational choice analysis to understand the conditions that would cause a political actor to delegate decision-making power to the courts, a phenomenon they claim can be a product of a separation of powers system, as it tends to pit one institution against the others (2002). The authors provide several explanations that would make it rational for a political actor to engage in delegation with the courts, such as: the usage of delegation as a means to shift responsibility; to provide certainty to uncertain policy problems; as a tool to maintain power of legitimacy; and to protect policies against reversal (such as the constitutionalization of policy preferences) (Voigt and Salzberger 2002: 294-8). While Voigt and Salzberger do not empirically test their hypotheses, it is clear how their work could be applicable to the practice of delegation of decision-making to the courts by the executive when engaging in the reference procedure. For example, in the recent

Reference re Securities Act, the government may have delegated the decision-making power over the creation of a national securities regulator to the courts for the certainty of a judicial pronouncement on the constitutional compatibility of such legislation with the division of powers between the federal and provincial governments. This observation requires empirical analysis.

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 (see: Riddell and Morton 2004; Hennigar 2009). These scholars find that executive interaction with the courts through reference questions can be the product of a means to blur responsibility or to achieve a desired public policy outcome. This serves to provide the initial theoretical pieces to the puzzle of the strategic litigation and delegation of the executive in reference cases. This work can be expanded and carried forward with a comparative approach, using multiple cases, that takes into consideration different situational and institutional factors that may cause a government to litigate strategically. Grounded in this scholarship, this paper hypothesizes that a government's decision to engage in a reference case can be understood as a means of political strategy and will now speculate on the multiple ways reference litigation can be utilized strategically.

Rather than a genuine desire to understand the technical constitutionality of an issue, a government's decision to ask a reference question may be the product of the following strategic political considerations: an attempt to *avoid blame*, to manage a *lack of political capital*, a means to *circumvent institutional limitations*, and as a *negotiation tactic*. Before providing further details on each of these factors it is important to note that these categories are by no means mutually exclusive and a government's decision to initiate a reference case can be the product of a combination of several of these political strategies, rather than evidence of a single strategy.[12] Finally, not all reference cases are a means of political strategy. Some cases may actually reflect a genuine concern over the constitutionality of a particular piece of legislation.

A government may ask the court a reference question to 'pass the buck' or avoid blame. In other words, the government may see reference cases as a viable option when they do not want to take responsibility for deciding a divisive or 'hot button' political issue. Hennigar (2009) has postulated that this was the impetus behind the Chretien government's reference to the court regarding the constitutionality of same-sex marriage. Hennigar argues that cases such as same-sex marriage policy may be understood as a "no win" decision and that politicians delegate that decision making power to the courts to avoid taking responsibility for making a no win decision. Indeed, *Reference re Same-Sex Marriage* (2004) 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. 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 simply ignore the issue. With these factors under consideration, it becomes apparent how delegating the decision making over same-sex marriage to the Supreme Court appears as a politically advantageous decision. As a result, 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.

Along with blame avoidance, initiating a reference case may be a strategic move to achieve a desired goal when experiencing a lack of political capital. In this case, a government may not have a majority in the legislature and cannot rely on another party for support or may not have the support within its own caucus to achieve a desired policy outcome. With a reference case, a lack of political capital or support within the legislature is not determinative of the issue, as the executive can directly access the courts and receive a declaration of constitutionality of an issue, bypassing the need to shore up political support with caucus members or oppositional party members. This strategy is similar to blame avoidance insofar as it relies on the courts when there is a lack of political will. However, the central difference is that in a lack of political capital, the government is not seen as passing a 'political hot potato' to the courts. Instead, the government turns to the courts due to the sheer inability to achieve a certain ends via regular parliamentary channels.

The most recent reference to the Supreme Court – the constitutionality of Senate reform that includes a question regarding abolition of the Senate – may be evidence of the "lack of political capital" type of political strategy.[13] When Prime Minister Harper was first elected in 2006, his platform included policy regarding the reform of the unelected Canadian Senate, which at the time was dominated by the Liberal Party. However, the Senate now has a Conservative Party majority and past attempts at reform have not reached the campaign promise of a 'Triple E' Senate. Even the Senate Reform Act (Bill C-7) introduced with a majority government has made little progress through regular parliamentary channels. This lack of action has been paired with rumors of a divided Conservative Party caucus, causing some commentators to assume that Harper has begun to back away from his promise of a reformed or abolished Senate (Kheiriddin 2013). Furthermore, the Government could not choose to ignore the issue any further due to the initiation of a reference question regarding the constitutionality of Senate reform at the Quebec Court of Appeal by the Province of Quebec. As a result, by initiating a reference case, Harper may be able to escape reform through a declaration of *ultra vires* (on Bill C-7) or, if there is a finding of constitutionality, can force the reform through regardless if he lacks the political capital on this particular issue. Regardless of how the Court decides, it is suggested, "the PM can claim he tried, and blame the failure on the justices" (Wells 2013).

The third type of political strategy that may serve as the impetus to engage in a reference case is in the form of institutional limitations. This factor is different from a lack of political capital in the sense that the roadblock to routine government action is not a lack of political support within the legislature or the parliament, but rather limitations imposed by the institutional structure within which the government must operate. When dealing with a novel or unique issue a prime minister or provincial premier may be limited by the path dependency of the institution. In comparison to the regular litigation routes, reference cases are relatively expeditious, as the issue is forced on to the agenda of the Supreme Court or provincial court of appeal without being bound by issues of standing or slowed down by appellate review. Moreover, parliamentary institutions can

create limitations on governmental action due to a lack of institutional legitimacy, either real or perceived by political actors and the public.

An example of such a case can be found in the Quebec secession reference. Following an incredibly close referendum on the subject of the secession of Quebec from Canada, the public and parties involved would simply not accept a declaration of the legality of this separation from either the Parliament of Canada or the Quebec National Assembly, due to their involvement within the referendum and their inherently political nature. Instead, by posing the legality of secession to the Supreme Court, the parties involved could rely on the institutional capacity of the courts due to their non-partisan nature and the respect for the rule of law, without being impeded by the slower route of regular litigation. In this case, the Court responded with a well-balanced decision that appealed to both sides of the conflict, and the decision allowed the country to move forward (Russell 2004: 245). By providing a token to each side of the conflict, the reference case was able to calm the unrest with legitimacy (to all parties involved), something that could have never been achieved via a declaration from either of the legislatures.

The last way that reference cases might be understood as an advantageous political strategy is their use as a way to break through an impasse in negotiations between governments. By posing a reference question to a provincial court of appeal or the Supreme Court the federal or provincial government can force a legal declaration on the actions of another government, which can bring parties back to the negotiation table or prevent the other government from acting. An executive can, through a decision of the court, have another government's policy declared *ultra vires*, making it void. It is a strategic function that scholars such as Rubin (1960) have pointed to as the original intent of the creation of the reference power by the federal government in the late 19th century, following the abandonment of the federal government power of disallowance. Moreover, this strategy serves to allow political actors to capitalize on the Court's institutional legitimacy within the Canadian political system and its foundation of diffuse support (see Radmilovic 2010).

The creation of a reference power by all provincial governments allows them to use this negotiation tactic, demonstrated by Premier Lougheed in the Alberta gas tax reference in opposition to the actions of the federal government. In the *Reference re Exported Natural Gas* (1982), the Government of Alberta was able to push back against the Trudeau's National Energy Program to protect provincial interests through an Alberta Court of Appeal decision that declared a portion of the Trudeau government's policy *ultra vires* (Riddell and Morton 2004). In a similar strategy, the Government of Manitoba forced the Supreme Court to pronounce on the constitutionality of the regulation of the marketing of eggs, a legislative scheme that it had enacted to mirror the provisions found in Quebec (see *A.G. Manitoba v. Manitoba Egg and Poultry Association*, 1971). By having the Court declare such a marketing model *ultra vires*, Manitoba was able to gain an upper hand in the so-called 'chicken-and-egg wars,' in which its chicken and egg producers were unable to export their products into the larger markets of Ontario and Quebec due to marketing regulations of those provinces. The decision of the Manitoba Court of Appeal, which was upheld by the Supreme Court, served to force negotiations between all provincial agricultural ministers and the federal government to create a new legislative scheme that was less discriminatory to interprovincial trade.

Conclusion

In an era of judicialized politics, traditional non-legal processes are influenced by judicial determinations and procedures, causing an increased dependence on the judiciary and courts to resolve issues of public policy, political disputes, and normative controversies. The judicialization of politics infers that political actors will behave in a manner that reflects and anticipates the actions of the judiciary. But judicialization is a symbiotic relationship and also results in an increased participation from the judiciary in public policy and governance debates. The analysis of reference cases has demonstrated that judicialized politics in Canada is not simply a reflection of the entrenchment of the *Charter*, rather judicialized politics is present in reference cases.

This paper marks the first step in a larger research program addressing reference questions in a both a comprehensive and strategic manner. The paper provides essential groundwork in a study of reference questions and contributes to understanding how the reference power was created and how it operates at both federal and provincial governments, finding that for the most part the process is largely informal and operated on a case-by-case nature. Additionally, this paper addresses the theoretical implications from the usage of reference questions by political actors, such as the conflicts that may arise with the notion of a separation of powers between the judiciary and the executive/legislative branches and the ability for political actors to engage in strategic delegation with the courts. Finally, the present analysis postulates on the possible ways engaging in a reference case could be utilized as a political strategy.

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Appendix A: Canadian Reference Questions Legislation

Jurisdiction	Original Statute	Current Statute	Current Section
Federal – Supreme Court	*Supreme and Exchequer Court Act*, S.C. 1875, c. 11	*Supreme Court Act* R.S.C, 1985, c. S-26	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…"
Federal – Federal Court	*Federal Court Act*, S.C. 1970-1971, c. 1	*Federal Courts Act*, R.S.C., 1985, c. F-7	Section 18.3 (1): "a federal board, commission or other tribunal may…refer any questions or issue of law…to the Federal Court for hearing and determination. (2): The Attorney General of Canada may…refer any question or issue of constitutional validity, applicability or operability of an Act of Parliament or of regulations made under and Act of Parliament to the Federal Court."
British Columbia	*An Act for expediting the decision of Constitutional and other Provincial Questions*, S.B.C. 1891, c.5	*Constitutional Questions Act* R.S.B.C. 1996, c.68	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"
Alberta	*An Ordinance for expediting the decision of Constitutional and other Legal Questions*, Ord. N.W.T. 1901, c. 11	*Judicature Act* R.S.A. 2000, cJ-2	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."
Saskatchewan	*An Ordinance for expediting the decision of Constitutional and other Legal Questions*, Ord. N.W.T. 1901, c. 11	*The Constitutional Questions Act*, 2012, c. C-29.01	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."
Manitoba	*An Act for Expediting the Decision of Constitutional and other Provincial Questions*, S.M. 1890, c.16	*Constitutional Questions Act*, C.C.S.M. c. C180	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."
Ontario	*An Act for expediting the decision of Constitution and other Provincial Questions*, S.O. 1890, c.13	*Courts of Justice Act*, R.S.O. 1990, C.43	Section 8(1): "The Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration."
Quebec	*An Act to authorize the reference, by the*	*Court of Appeal Reference Act*,	Section 1: "The Government may refer to the Court of Appeal, for hearing and consideration, any

	Lieutenant-Governor in Council, of certain questions to the Court of the Queen's Bench, S.Q. 1898, c.11	R.S.Q. c R-23, 1975	question which it deems expedient, and thereupon the court shall hear and consider the same."
New Brunswick	*Act to provide for references by the Governor-in-Council to Appeal Division of the Supreme Court,* S.N.B. 1928, c.47	*Judicature Act* R.S.N.B. 1973, c. J-2	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 maters aforesaid, so referred by the Lieutenant-Governor in Council, shall be conclusively deemed to be an important question."
Nova Scotia	*An act for expediting the decision of Constitutional and other Provincial Questions,* S.N.S. 1890, c. 9	*Constitutional Questions Act* R.S., c.89	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."
Prince Edward Island	*An Act to Amend the Judicature Act*, S.P.E.I. 1941, c.16	*Judicature Act*, R.S.P.E.I. 1988, c J-2.1	Section 7(1): "The Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration."
Newfoundland and Labrador	*The Judicature (Amendment) Act*, S.N., 1953	*Judicature Act*, R.S.N.L. 1990, c J-4	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."

[1] The basis for the prohibition on advisory opinions in the United States can be found in the 'cases and controversies' clause in the Constitution, found in Article III, section 2, clause 1; the Australian High Court has refused to receive reference cases in *Re Judiciary and Navigation* Act (1921) 29 C.R.L. 257. Reference cases were once permissible in the United Kingdom, but have fallen out of favour in the mid-18th century following the 'Sackville' Case. Additionally, it should be noted that although prohibited by the United States Supreme Court, several state courts do accept reference questions from state legislatures. See: Rogers, James, and Georg Vanberg. "Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective." *American Journal of Political Science* 46, no. 2 (2002): 379–397.

[2] 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

[3] On conceptual stretching see: Sartori, Giovanni. "Concept Misformation in Comparative Politics." *The American Political Science Review* 64, no. 4 (1970): 1033-1053. Collier, David, and James E. Mahon. "Conceptual 'Stretching' Revisited: Adapting Categories in Comparative Analysis." *The American Political Science Review* 87, no. 4 (1993): 845–855

[4] Personal email correspondence with a senior departmental solicitor, Department of Environment, Labour, and Justice, 26 February 2013.

[5] Ibid.

[6] Personal email correspondence with a senior departmental official, Department of Justice (Courts and Related Services), 21 March 2013.

[7] Ibid.

[8] Ministry of Attorney General Ontario, Constitutional Law division, letter addressed to the Australian High Commission, 2 November 1983.

[9] 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]

[10] For example, various provisions of the *Constitution Act 1867* specifically sections 97 through 100 and section 11(d) of the *Charter of Rights and Freedom*; statutory protections can be found in *Judges Act* R.S.C. 1985, c. J-1, *Federal Courts Act*, R.S., 1985, c. F-7, *Supreme Court Act*, R.S., 1985, c. S-26, example case law: *R. v. Valente* [1985] 2. S.C.R. 673; *Mackeigan v. Hickman* [1989] 2 S.C.R. 796; *Reference re Remuneration* [1997] 3 S.C.R. 3; *Re Therrien* [2001] 2 S.C.R. 3

[11] Peter Hogg contends that reference cases are extrajudicial for two central reasons: first, they lack a concrete and genuine adversarial controversy; second, the rendering of a decision on a reference case requires the judiciary to engage in a role that is typically the function of the executive. See: Hogg, Peter W. 2012. *Constitutional Law of Canada*. 2012 student ed. Toronto, Ont: Carswell, 8-17.

[12] Furthermore, it should be noted that these particular strategies are simply suggestions that will be shaped and reshaped by the empirical findings of the larger project.

[13] The reader should be reminded that the questions in this reference case were submitted to the court far before the outbreak of the current Senate expense scandal. As such, the factors that have risen out of that scandal would not have influenced the government's decision to pose a reference to the court on Senate reform, and thus are not subject to the present analysis.