Feature

Parliamentary Timing and Federal Legislation Referred to Courts: Reconsidering C-14

Parliamentarians frequently express a desire to obtain a Supreme Court of Canada opinion on the constitutionality of proposed legislation. For example, recent legislation regarding medical assistance in dying, Bill C-14, met with calls for such an opinion. In this article, the author explores six reference contexts that exist with respect to federal legislation through the lens of a hypothetical Bill C-14 reference: referral prior to introduction, referral concurrent to introduction, referral after introduction, referral after enactment, enactment conditional on referral, and provincial references. He concludes by noting that although legislators may desire judicial pronouncements regarding the constitutionality of legislation, difficulties arise because the executive primarily controls the current suite of reference powers. As such, parliamentarians resort to other means to inform their legislative choices with respect to constitutional compliance.

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It is easy to understand the oft-expressed desire of parliamentarians to obtain a Supreme Court of Canada opinion on the constitutionality of proposed legislation. Certainly, judicial decisions regarding the constitutionality of a proposed enactment may assist legislators in making their legislative choices and may help to further their understanding of the Constitution.[1] There may also be a strategic perspective as well – sending a proposal to the Court may allow for a matter to be delayed in Parliament while under judicial consideration.[2]

Recent legislation regarding medical assistance in dying, Bill C-14,[3] was met with suggestions in Parliament that it be referred to the Supreme Court.[4] While Bill C-14 was never referred – and is now the subject of a legal challenge[5] – Parliament's experience with this bill highlights the potential interplay between Parliament and the courts in reference cases.

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The *Supreme Court Act* allows the Governor in Council to refer questions to the Supreme Court.[6] These questions may concern federal legislation, whether proposed or enacted. Analogous provincial legislation allows provincial cabinets to refer matters to particular provincial courts and may also be used to question federal legislation.[7]

What follows is a discussion of the six reference contexts that exist with respect to federal legislation; referral prior to introduction, referral concurrent to introduction, referral after introduction, referral after enactment, enactment conditional on referral, and provincial references. Each is examined through the lens of a hypothetical Bill C-14 reference.

Though the *Supreme Court Act* additionally permits the Senate or House of Commons to refer private bills to the Court directly,[8] private bills are now the least common legislative vehicle and this reference power has not been used since 1882.[9] Parliament could not have referred bill C-14 directly to the Supreme Court because it was not a private bill.

Referral Prior to Introduction

The Governor in Council may submit a draft enactment along with questions for the Supreme Court's consideration. Once the Court's decision is

rendered, the government may introduce that draft as a bill in Parliament, modify it prior to introduction to reflect the Court's findings, or refrain from introducing it altogether.

For example, in the *Securities Reference,* the government drafted securities legislation that was sent to the Court for review, but it was not introduced in Parliament after the Court found that the matter was within provincial jurisdiction. [10] In *Reference Re Same-Sex Marriage*, the Court ruled on a draft enactment that was later introduced in Parliament with changes reflecting the Court's opinion.[11]

Though Bill C-14 could have been referred as a proposal that was not yet introduced in Parliament, the timing might have been problematic. The bill was responding to a Supreme Court decision that struck down several statutory provisions but suspended the declaration of invalidity;[12] that suspension was subsequently further extended.[13] In that regard, a reference opinion might not have been received with enough time to legislate before the declaration of invalidity took effect, had Parliament felt it appropriate to legislate after the Court released its opinion.

Importantly, the Department of Justice has stated that "with any legislative proposal, there are risks of litigation".[14] A reference may not have been necessary in the government's view because of the likelihood that litigation would result in an eventual judicial pronouncement on the enactment's validity.[15]

Referral Concurrent to Introduction

A reference to the Court may be initiated concurrent to a bill being introduced in Parliament. This recently occurred when the government introduced amendments to the *Supreme Court Act* and at the same time referred those provisions to the Court alongside questions for consideration.[16]

The risk here is that the legislative process overtakes the judicial one – a bill might be amended substantially such that what was referred to the Court is no longer reflective of what Parliament is considering. In other words, questions one might pose to the Court about a bill as introduced might not be those one would ask regarding an amended version.

It is no easy feat to ensure that the version of a bill before Parliament is also that before the Court. This is not just a matter of legislative process timing – judicial timing must also be considered. Counsel and the Justices would both be in a delicate position if a provision is amended on Tuesday with the arguments on its constitutionality slated for Wednesday.

In the C-14 context, its concurrent introduction and referral might create difficulties in ensuring that the Court is seized of only the text that would ultimately pass. The parliamentary process may be unpredictable, and a reference regarding a bill in one form may be of limited use compared to a reference regarding the final text.

What would happen if the legislation were ultimately defeated? This could occur after a court has heard a reference but before rendering judgment and thus raise questions of the appropriate use of judicial resources.[17] That said, such judicial review might yet inform future legislative choices.

Finally, it should be considered that a new statute enacted while still before a court on referral might not be fully applied and enforced until the relevant actors have constitutional certainty.[18]

Referral After Introduction

Another possibility is a reference in respect of bills under consideration by Parliament. In the *Senate Reference,* for example, the government asked questions of the Supreme Court regarding provisions of various legislative proposals.[19]

If Bill C-14 had been referred after some parliamentary debate had already occurred, the same risks in the proceeding reference context regarding amendment or defeat arise, as do the concerns over judicial and enforcement resources. However, heightened here is the issue of parliamentary resources. The government need not wait for parliamentary debate to occur before referring a matter, and Parliament may decide to continue debating it after referral occurs. While parliamentary time is perhaps squandered if the Supreme Court ultimately finds the debated bill invalid, contemporaneous parliamentary debate might also inform judicial consideration given the Court's use of *Hansard*.[20] The dynamics here are worth considering.

As well, there is a perception question associated with referring C-14 after introduction. Would referral be seen as compromise to mollify critics or viewed as capitulation that fuels calls to delay the bill's passage until the Court's decision? Practically speaking, the risk of an adverse decision might be reason enough not to proceed down this route.

Conversely, if a reference were decided before Parliament completed its deliberations, it might be possible to amend a bill quickly to accord with the decision as necessary.

The considerations associated with referral concurrent to and post introduction are admittedly similar. However, depending on the nature of the bill and when referral occurs, there may be additional legislative process considerations. For example, if a private member's bill were referred to the Court while under consideration by a House committee, the committee might report the bill before having the benefit of the Court's judgement.[21]

Referral After Enactment

Legislation having received Royal Assent may also be referred to the Supreme Court.[22] For example, the *Margarine Reference* was initiated by the Governor in Council after the Senate passed the *Dairy Industry Act* and adopted a motion – referenced in the Court's decision – suggesting it be referred to the Court.[23]

If referral occurs after passage, questions of compliance may arise – will actors apply the law knowing it may be struck imminently? Practically, there is a benefit to such references insofar as a confirmed law continues to operate as is; however, if struck down, Parliament, if it wishes to legislate, may have to start fresh.

In the case of C-14, an ex-post reference would have been possible; however, a constitutional challenge was initiated through non-reference means not long after it received Royal Assent.[24] The government could still opt to refer the matter if it desired the Supreme Court's opinion faster than it would result from the current challenge working its way through the courts. Further, the government could submit a reference to pose additional questions – including those regarding alternative approaches that might form the subject of amendments, for example.

Enactment Conditional on Referral

An additional possibility exists alongside the above, and it was observed during Parliament's consideration of Bill C-14. An amendment was proposed in the Senate that a particular provision not come into force until a Supreme Court reference confirmed its constitutionality. Though the Senate negatived this amendment, it is important to consider this way of proceeding. Indeed, Parliament has enacted such provisions in the past.[25]

This approach arguably addresses many of the concerns that exist vis-à-vis other reference contexts because it ensures the Court is only seized with the final version of the legislation and only those portions that are of most concern to Parliament; however, other complexities arise. To examine these, consider the amendment proposed to Bill C-14: "That the Supreme Court render an opinion pursuant to Section 53 of the *Supreme Court Act* stating that paragraph 212.2(2)(d) is consistent with the *Canadian Charter of Rights and Freedoms*".[26]

The invocation of the *Supreme Court Act* means that a Governor in Council reference is sought. First, it is important to recall that the Governor in Council would not be obligated to initiate such an order initiating a reference and might instead elect never to bring the provision into force. Second, it is necessary to consider that the Governor in Council has only two options once the decision is rendered: either bring the provision into force or not.

Though only interested in one provision, Parliament may be informed by the Court that others are unconstitutional. Further, the Court might find it appropriate to decline to answer a specific question.[27] While a plain 'yes' or 'no' is what Parliament and the Governor in Council would hope to hear, one must also consider the precarious possibility of a "yes, but…" response.

How should the Governor in Council proceed if the Court finds the paragraph consistent with the *Charter* but only if read down to mean something, or if certain words are read in? How does the Governor in Council interpret a "yes but…" while being true to Parliament's intent? Consider in the context of Bill C-14 if Parliament had referred a provision making group X eligible for access to medical assistance in dying but the Court's "yes but" meant that X had to be read as also including groups Y and Z. While Parliament's contemplation of X is clear from the statute – Y and Z might have been groups Parliament either did not turn its mind to or perhaps purposely chose to exclude. Bringing the provision into force might both satisfy and frustrate Parliament's intent.

Practically, Parliament may find itself starting from scratch or addressing additional provisions depending on how the Court finds. Further, fairness questions might arise if some individuals benefitted from a regime in its first enacted state in a way that others cannot once changes are made.

Provincial Referral

In addition to these federal reference possibilities, a province may initiate a reference regarding bills before Parliament under provincial legislation. This is where timing issues are most keenly at play.

For example, consider Alberta's provincial reference regarding federal GST legislation. The Order in Council submitting the question to Alberta's highest court defined the phrase "GST Act" to mean Part IX of the *Excise Tax Act* either "as proposed in Bill C-62, an Act to amend the Excise Tax Act passed by the House of Commons" or "as enacted if the assent occurs before the beginning of the hearing".[28]

While the reference acknowledges the legislative process, it can sit uneasily with it. Consider, for example, the possibility of some Senate action, such as adopting an amendment.[29] As well, there are no guarantees that a bill will complete the legislative process and receive Royal Assent – reasons for this include a bill's progression being halted by the prorogation or dissolution of Parliament.[30] Indeed, it is possible to envisage a number of circumstances in which the court could be seized with a bill that was not advancing or that had been modified by Parliament since being referred.

As another example, consider the Alberta reference regarding the proposed federal gas tax. At the time, no bill was before Parliament as only a ways and means motion had been tabled. The referred questions to the court were hypotheticals which included an assumed fact that "the Parliament of Canada has enacted legislation in the terms of the Ways and Means Motion".[31] While the Government would have perhaps been unlikely to deviate from the ways and means motion's text in its subsequently introduced bill, this theoretical possibility must be considered along with those of the bill's defeat or amendment.

Importantly, provincial references can be appealed to the Supreme Court – as were the GST Act Reference[32] and that regarding the gas tax.[33] The relevant legislation in both cases had received Royal Assent and the Supreme Court considered the enacted versions.

Historically, provinces have had incentive to challenge federal legislation through the reference process. Obtaining a judgement in their favour might strengthen their position in federal-provincial relations and related negotiations, as was the case with the gas tax reference.[34] Alternatively, a reference might allow provinces to assert their ability to regulate a matter in the face of proposed federal legislation.[35]

As it relates to Bill C-14, any province could have initiated a reference at any time, though none chose to do so. That province, however, may have wished to word its reference questions rather carefully to reflect the full panoply of legislative process possibilities.

Other Parliamentary Considerations

Proposed amendments in House committees to refer a portion of a bill to the Supreme Court before it can come into force may be limited by a procedural rule prohibiting amendments that make the coming into force of an enactment conditional.[36] Further, such provisions have also drawn rebuke from the Speaker of the House, who in 1975 ruled: "It seems to me to be repulsive to any act of Parliament that it should contain within it a condition that the Act must be referred in any part or in any particular to any other body for interpretation before it comes into force".[37]

Though such a provision might still be proposed today – as it was in Bill C-14, albeit in the Senate – it may raise questions regarding Parliament's role vis-à-vis other institutions. From a similar perspective, consider the *sub judice* convention – that "certain restrictions should be placed on the freedom of Members of Parliament to make reference in the course of debate to matters awaiting judicial decisions".[38]

In this regard, the Speaker of the House ruled in 1948 that an amendment proposing that the Supreme Court hear something that a committee was considering at the same time was inadmissible because, in his words, "If submitted to the Supreme Court it thereby becomes *sub judice* – the question cannot be before two public bodies at the same time".[39] This ruling was not found applicable by the Speaker to House debate on legislation in relation to which a provincial reference had been initiated.[40]

As discussed above, it is possible for a bill to be before both the courts and Parliament simultaneously. Whether this is the epitome of efficiency or a conceptual conundrum is perhaps a matter of perspective. How the *sub judice* convention ought to operate in these circumstances – particularly if something were before the court at Parliament's insistence– is beyond the scope of this paper.[41]

Conclusion

Though legislators may desire judicial pronouncements regarding the constitutionality of legislation, process difficulties exist given that the executive primarily controls the current suite of reference powers. Parliamentarians must thus resort to other means to inform their legislative choices with respect to constitutional compliance.

Timing matters immensely in legislative references. Ensuring that the right version of a bill is before a court at the right time may prove difficult. Similarly, ensuring that Parliament has time to respond to a reference opinion may be challenging, particularly if there is a suspended declaration of invalidity involved, such as occurred in the context of Bill C-14.

When Parliament created the federal reference powers in 1875,[42] it conferred upon itself the ability to refer private bills, which are now exceedingly rare.[43] Historically, it should be recalled that other reference powers existed from time to time as Parliament saw fit.[44]

While Parliament has adopted certain measures respecting the constitutionality of bills,[45] it has been suggested that other means might be considered to inform legislators' choices.[46] That said, it should also be recalled that, where applicable, Parliament may invoke the notwithstanding clause to safeguard legislation from judicial scrutiny.

Undoubtedly, the relationship between Parliament, the Supreme Court, and the constitution is complex, intricate, and evolving. However, Parliament's constitutional certainty need not always come from courts, and the constitutional pecking order – to the extent one exists – remains the subject of sustained academic debate.[47]

Whether the reference power in its current incarnation best suits the needs of Parliament and Parliamentarians is something only Parliament can pronounce upon. Ultimately, while legislators may express a desire for legislative references, it is uniquely up to them to give this desire legislative expression.

Notes

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1 Indeed, the first Supreme Court reference arose when the Minister of Justice doubted Parliament's ability to incorporate an entity and suggested consulting the Supreme Court; the Senate adopted a motion referring the matter. *Re: Brothers of the Christian Schools in Canada, 1876 Carswell PEI 1, Cout. Dig. 1.*

2 For a discussion of motivations for reference cases based on interviews with Attorneys-General see Kate Puddister, "Inviting Judicial Review: A Comprehensive Analysis of Canadian Appellate Court Reference Cases" Ph.D. Thesis, McGill University, December 2015 [Unpublished].

3 Enacted as *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3.

4 See, for example, a Question Period exchange about referral and a Member's comments in *Debates of the House of Commons*, 42nd Parl, 2nd Sess, No 74, 16 June 2016 at 4634 and 4616, respectively. See also Evidence, Standing Senate Committee on Legal and Constitutional Affairs, Issue No 10, 6 June 2016 at 10:52.

5 *Julia Lamb v Attorney General of Canada*, Supreme Court of British Columbia docket 165851 (2016).

6 *Supreme Court Act*, RSC, 1985, c S-26, s 53.

7 For a listing of the various provincial statues see Appendix A in Puddister, *supra* note 2.

8 *Supra note* 6 at s 54.

9 The last case referred under this power is *In re The Quebec Timber Company*, 1882 CarswellNat 5.

10 *Reference Re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837.

11 See Mary C. Hurley, *Bill C-38: The Civil Marriage Act*, Publication no. LS 502-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 14 September 2005.

12 *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 33.

13 *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 SCR 13.

14 Sessional Paper 8555-411-1169 at 3.

15 It is suggested that where "judicial review through a concrete case is feasible, it should be preferred". Barry L. Strayer, The Canadian Constitution and the Courts 2nd ed. Butterworths: Toronto, 1983, ch 9 at 295.

16 *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 at 11.

17 For in-depth consideration of the advantages and disadvantages of references see *supra* note 15 at ch 9.

18 Consider, as a parallel, the enforcement of provisions for which a declaration of invalidity has been suspended. See: Allison Jones, "Ontario 'likely' won't pursue charges under struck down prostitution laws", The Canadian Press, February 6, 2014.

19 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

20 See John James Magyar, "The Evolution of Hansard Use at the Supreme Court of Canada: A Comparative Study in Statutory Interpretation" Statute L Rev 33:3 (2012) at 363-389.

21 See Standing Order 97.1, *Standing Orders of the House of Commons*.

22 At the time of this writing, the Minister of Justice is considering a reference regarding Bill S-201, *An Act to prohibit and prevent genetic discrimination*, legislation that has passed both Houses of Parliament but has yet to receive Royal Assent – the House adopted a technical amendment that has yet to be considered by the Senate. See Joan Bryden, "Ottawa asks for advice on new bill; Supreme Court invited to provide guidance on genetic non-discrimination rules," *Halifax Chronicle Herald* (March 11, 2017) at A8.

23 *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1.

24 *Supra* note 5.

25 See *An Act to amend the Liquor License Act*, 1883, 47 Vic., c 32. See Also: *An Act to amend the Special War Revenue Act*, SC 1941, c 27, s 29.

26 See *Journals of the Senate of Canada*, 42nd Parl, 2nd Sess, June 17, 2016, Issue 52.

27 See John P. McEvoy, "Refusing to Answer: The Supreme Court and the Reference Power Revisited" (2005) 54 UNBLJ 29.

28 *Reference re: Judicature Act*, RSA 1980, 1991 ABCA 248, Appendix.

29 Parliament of Canada, PARLINFO, Bills Introduced in the House of Commons and Amended by the Senate 1960 to Date. http://www.lop.parl.gc.ca/ParlInfo/compilations/HouseOfCommons/legislation/HOCBillsAmandedBySenate.aspx

30 Parliament of Canada, PARLINFO, Bills sent to the other House that did not receive Royal Assent http://www.lop.parl.gc.ca/ParlInfo/compilations/HouseOfCommons/legislation/billsbyresults.aspx

31 Alberta Order in Council No. 1079/80.

32 *Reference re Goods and Services Tax*, [1992] 2 SCR 445.

33 *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004.

34 See Troy Riddell and F.L. Morton, "Government Use of Strategic Litigation: The Alberta Exported Gas Tax Reference," *American Review of Canadian Studies* (Autumn, 2004), 485-509.

35 See Ubaka Ogbogu, "The Assisted Human Reproduction Act Reference and the Thin Line Between Health and Crime," *Constitutional Forum*, 22 (2013) 93.

36 See House of Commons Compendium of Procedure, Rules of Admissibility of Amendments to Bills at Committee and Report Stage. Online: http://www.parl.gc.ca/About/House/compendium/web-content/c_d_dmissibilityamendmentsbillscommitteereportstages-e.pdf.

37 *Journals of the House of Commons*, 30th Parl, 1st Sess, Vol 121, Pt 2, October 16, 1975 at 772.

38 Audrey O'Brien and Marc Bosc, House of Commons Procedure and Practice, 2nd ed. Yvon Blais: Cowansville, 2009 at 99.

39 *Journals of the House of Commons*, 20th Parl, 4th Sess, Vol 89, 9 April 1948 at 344.

40 *Debates of the House of Commons*, 34th Parl, 2nd Sess, Vol. 7, March 8, 1990 at 9006-9009.

41 *Sub judice* may also motivate a reference; see *supra* note 2 at 155-156.

42 *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, 38 Vict., c. 11.

43 See Parliament of Canada, PARLINFO, Table of Legislation Introduced and Passed by Session. Online: http://www.lop.parl.gc.ca/ParlInfo/compilations/houseofcommons/BillSummary.aspx.

44 For example, various bodies could also initiate reference questions. See *Reference by the Board of Transport Commissioners of Canada*, [1943] SCR 333. See also: *Reference re Angliers Railway Crossing*, [1937] SCR 451.

45 See Charlie Feldman, "Legislative Vehicles and Formalized Charter Review" *Constitutional Forum*, 25, 2016, 80.

46 See Canadian Civil Liberties Association, "Charter First: A Blueprint for Prioritizing Rights in Canadian Lawmaking" September 2016. Online: https://ccla.org/cclanewsite/wp-content/uploads/2016/09/Charter-First-Report-CCLA.pdf.

47 "There are actually three possible positions on the question of final say when it comes to the interpretation of the Constitution: (1) the judicial power to interpret is subordinate to the interpretive power of Parliament; (2) the judicial power to interpret is superior to that of Parliament; or (3) the judicial power is coordinate with the parliamentary power." Denis Baker, Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation, McGill-Queen's University Press: Montreal, 2010 at 145.