Courts Without Cases

The Law and Politics of Advisory Opinions

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Introduction

In 2007 the Attorney General of British Columbia sought to prosecute two men, Winston Blackmore and James Oler, for actions related to a fundamentalist Mormon sect. In the remote community of Bountiful, Blackmore and Oler exercised broad social and personal power over other people, especially women and children. Many people believed that the men engaged in a variety of criminal behaviours, including sexual exploitation, sexual assault and child abuse, and that they deserved to be prosecuted and punished.

But the BC government had a problem. The most serious of those crimes would be tricky to prove in court without victims who were willing to cooperate. And the government was not confident of securing that cooperation from other members of the Bountiful community.

There was one crime for which a lack of cooperation by the alleged victims would be less significant, however. As fundamentalist Mormons, Blackmore and Oler practised polygamy: they each kept several wives. Polygamy is a crime in Canada[1] and it can be proven with evidence of multiple marriage ceremonies or of multi-person marriage-like relationships. While the testimony of the partners to those relationships would be helpful, their absence was thought to be less fatal to the state's chances. As well, the community in Bountiful has not hidden its way of life. Convictions for polygamy, then, did not pose the same challenges as some of the other crimes being considered for prosecution.

But a polygamy trial would create a new problem. The community in Bountiful practises a particular type of Mormonism under which polygamy is religiously sanctioned or even required. Crown counsel became concerned that the law prohibiting polygamy might infringe the fundamental freedom of religion guaranteed under the Canadian Charter of Rights and Freedoms. Believing that such prosecutions might be unconstitutional, those Crown counsel resisted the idea of framing indictments based upon polygamy.

The Attorney General's attempts to overcome that resistance by its own lawyers tell a sorry tale. The tale includes botched investigations, a carousel of special prosecutors (each of whom the government appointed in the hope of securing an indictment) and significant judicial rebuke.[2] That story is very interesting. But, what I want to stress here is that the government persevered and, in November 2011,

[1] Criminal Code RSC, 1985, c C-46, s 293.
[2] *Blackmore v British Columbia (Attorney General)*, 2009 BCSC 1299.

scored a major victory when the British Columbia Supreme Court stated that the offence of polygamy was consistent with the Canadian Charter and, implicitly, that charges could proceed.[3]

The Court's conclusion, which ran to almost 300 pages, followed a months-long proceeding with thousands of pages of evidence and many days of argument. The presiding judge, Chief Justice Bauman, heard from dozens of witnesses, including some members of the Bountiful community, as well as experts – anthropologists, philosophers, psychologists and economists. Bauman CJ permitted a number of groups to present legal argument as third parties, or interveners, including children's rights groups, civil liberties associations, professional societies and religious organizations. Those groups made submissions about (a) the impact on polygamy on Canadian society and (b) whether criminalising it was constitutional.

Among the numerous witnesses and lawyers, though, there were two notable absences: Winston Blackmore and James Oler. To the casual observer, this may be surprising. After all, the Attorney General had been motivated, in large part, by the desire to prosecute those men, to shine a spotlight on their alleged reprehensible activities, and to send a message that British Columbia would not tolerate the exploitation and abuse of vulnerable persons. There is little doubt that Winston Blackmore and James Oler had a significant interest, and personal stake, in the eventual outcome of the proceeding. Having decided that the polygamy offence was constitutional, the Court effectively permitted the Attorney General to proceed with criminal charges against them.[4]

So, how could such a proceeding possibly take place without them? The answer is that the proceeding was not a trial. It involved no accused persons, defence lawyers or prosecutors. Its outcome was not properly described as a verdict. It was, instead, a reference.[5]

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For the last century-and-a-half Canadian courts have considered questions, heard arguments and issued reasons even when there is no live case and no 'disputants' before them. When Canadian courts perform this role, what they produce is called a *reference* or *advisory opinion*.

[3] *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (CanLII).

[4] The Attorney General did just that several years later and a conviction was secured: *R v Blackmore*, 2018 BCSC 367. The relationship between that trial and the prior reference is considered in a later chapter.

[5] The *Polygamy Reference* itself was unusual, because it proceeded before a trial level court. Most Canadian references proceed before provincial courts of appeal or the Supreme Court. Very few jurisdictions even allow for references before lower courts. The British Columbia government selected a trial reference so that it could introduce evidence, including via affidavit and examination of witnesses, that would not be easy to do before an appellate court. Most of the references discussed in this book – and indeed most references anywhere – are issued by appellate courts.

The reference function first appeared in Canadian law in 1875. It was inserted into the federal statute – the Supreme and Exchequer Court Act – that brought into existence the Supreme Court of Canada. The function has remained in place ever since, not just for the Supreme Court but for other courts as well. It sets Canada somewhat apart from similar Anglo-American legal systems.[6] There are few comparators to Canadian references in the United Kingdom,[7] Australia,[8] New Zealand[9] or the US federal judiciary.[10] The function also sets Canada apart from those legal systems with specialist 'constitutional courts'.[11] Numerous countries, in Europe and elsewhere, have instituted courts that are singularly authorised to consider constitutional issues. Those constitutional courts receive issues in numerous ways, including as references.[12] Thus, Canada is not unique in permitting advisory opinions. What is more unusual,[13] however, is to have the same court perform both an adjudicative *and* an advisory function.

[6] The term 'Anglo-American' is intended to denote British heritage, common law tradition, and some influence of American legal history and principles.

[7] The 1988 devolution of powers to Scotland, Wales and Northern Ireland granted a judicial review power to the UK Supreme Court: Scotland Act 1998 (c 46); Northern Ireland Act 1988; Government of Wales Act 2006.

[8] *In re The Judiciary Act 1903–1920 and In re The Navigation Act 1912–1920* (1921) 29 CLR 257; S Crawshaw, 'The High Court of Australia and Advisory Opinions' (1977) 51 Australian Law Journal 112.

[9] No advisory jurisdiction is provided for in the Constitution Act 1986 No 114 or the Senior Courts Act 2016 No 48, Public Act – Part 4: Supreme Court, ss 68–72. Geoffrey Palmer, 'The New Zealand Constitution and the Power of Courts' (2006) 15 Transnational Law & Contemporary Problems 551.

[10] US federal courts may not provide advisory opinions: *Muskrat v United States*, 219 US 346 at 362 (1911). Some states do permit this function: Charles M Carberry, 'The State Advisory Opinion in Perspective' (1975) 44 Fordham Law Review 81; Reuben Goodman, 'Chapter 10: Advisory Opinions', *Annual Survey of Massachusetts Law: Vol 1964*, Article 13 95.

[11] Andrew Harding, Peter Leyland and Tania Groppi, 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective' 2008 3(2) Journal of Comparative Law 3: 'The essential feature of the constitutional court-based system of judicial review … is that only one court, the constitutional court, has authority to adjudicate questions of constitutional interpretation or to review legislation, and this court is separate from the ordinary judicial system, forming, either by deliberate design or as a practical result, a fourth branch of government'. See also Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 West European Politics 77–100; Arne Mavcic, *The Constitutional Review* (Den Bosch: Bookworld Publications, 2001); Wojciech Sadurski, *Constitutional Justice East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer, 2002); Wojciech Sadurski, *Rights Before Courts: a Study of Constitutional Courts in Post-Communist States of Eastern and Central Europe* (New York: Springer, 2002).

[12] Specialist constitutional courts can undertake a variety of tasks including: constitutional drafting; *ex ante* or *ex post* review of legislation; review of government officials and agencies; and review of democratic processes such as elections: Harding et al (n 9) 5. In Anglo-American systems, including Canada, most constitutional review is limited to laws and government action. This book is directed at those particular functions.

[13] India, South Africa and Israel, like Canada, permit advisory opinions. Durga Das Basu, *Introduction to the Constitution of India*, 20th edn (Nagpur: LexisNexis, 2009); Adem Kassie Abebe and Charles Manga, 'The Advisory Jurisdiction of Constitutional Courts in Sub-Sahara Africa' (2013) 46(55) George Washington International Law Review 4; Philip Kurland, *The Supreme Court and the Judicial Function* (Chicago IL: University of Chicago Press, 1975); Richard A Posner, 'Judicial Review, A Comparative Perspective: Israel, Canada, and the United States' (2010) 31(6) Cardozo Law Review 2393.

References resemble cases in a few ways. Like cases, references involve questions about the law, put to law's primary arbiters: courts. References display the procedural trappings of litigation. They feature participants, materials, oral advocacy and written reasons provided by judges. And when the body of references is compared to the body of cases, it can be very difficult to tell them apart, as will be explained in greater detail later in this book.

In at least two respects, though, references and cases are distinct. First, references do not involve a 'plaintiff' in the ordinary meaning of that term. In Canada, a reference is virtually always initiated by the government, but in doing so it does not make a *legal claim* against anyone else. It simply puts questions to a court for an answer. Therefore, it is not accurate to say that the government is the 'plaintiff'; and throughout this book, that term is avoided in favour of the more neutral 'party'. Of course, the government typically offers arguments to assist a court in arriving at an answer and, indeed, often has a clear opinion on what the answer to the questions it has posed should be. And that opinion will tend to correspond with what the government perceives to be in its legal or political interest. Certainly, the actor who initiates a reference is expected to make submissions to the court. But even if it does not, the proceeding can continue. That fact marks a sharp difference from cases. If, in an ordinary case, a plaintiff refused to take a position on one or more of the issues, the opposing party (respondent) almost certainly would prevail. The same does not necessarily apply to references. I say 'not necessarily' because if the initiating government declines to offer any argument on a question, the court may, in turn, decline to provide an answer.[14] But, especially in proceedings where the court has agreed to receive submissions from additional participants, such as other Attorneys General or advocacy groups, the court might well decide to answer the question anyway.

Another distinction between references and cases has to do with the status, in law, of the answers that each proceeding provides. When a court decides a case, it issues a judgment, which binds the parties, and also, in certain instances, binds other courts in how they decide cases – and thus it may be said that it binds generally. If the court is not the highest court in the land, the judgment may be appealed. But, until then, or if no appeal is possible, the judgment, and the reasons supporting it, have the status of 'law' and, indeed, become part of the framework that constitutes a society's commitment to the rule of law. As well, the court's answer may contain a variety of judicial 'remedies', which impose particular consequences on the parties, and those remedies also enjoy legal status.

References do not engage the court's power in the same way. The court provides an *answer* but that answer does not take the form of a *judgment*. The reference, supposedly, is not backed by the power of law and the court is not entitled to directly impose consequences on parties. That does not mean, of course, that

[14] The courts' occasional refusal to answer reference questions is discussed in Chapter 4.

references have no practical consequences. As explored in the chapters below, they do have consequences, sometimes highly significant ones. But the consequences are considered to be ancillary or collateral to what the *court* has done. This distinction is often expressed as the idea that references are not *legally binding*. The soundness of that idea is debated towards the end of the book. The legal status of references, the answers they provide and the true nature of the judicial power that they invoke are the focus of a number of chapters.

References are an important part of Canadian law, especially its constitutional law.[15] They count among the exceptional moments in Canadian legal history.[16] They have been part of Canada's development into a modern nation committed to the rule of law, constitutional order, individual liberties and respect for minorities and other communities. References played a key role in the early battles between the provinces and federal government that shaped the country's particular brand of federalism.[17] They shepherded an approach to constitutional interpretation.[18] The advisory function was pivotal in the debates over the repatriation of Canada's Constitution from the United Kingdom;[19] in path-breaking early decisions concerning the Charter of Rights;[20] and in battles over Canada's status and continued existence. In recent years, advisory opinions have featured in such disputes as whether a province is entitled to secede from Canada,[21] the role of national institutions[22] and the rules of formal constitutional change (amendment).[23]

For all their significance, though, it is necessary to keep the overall role of references in context. This book does not argue that advisory opinions are, necessarily, more important than ordinary constitutional litigation, i.e., constitutional disputes that have been presented to the courts, and considered by them, as cases. For a number of years, references accounted for around one-quarter of the Supreme Court's caseload in constitutional law.[24] That is a significant proportion, but still much less than the total number of cases.

[15] For many years following Confederation in 1867, Canadian cases could be finally appealed to the Judicial Committee of the Privy Council (JCPC). This meant that the JCPC also delivered reference opinions when those were appealed from the Supreme Court of Canada. Both of those routes ended as of 1949, when the Supreme Court became the final court of appeal for all cases arising in any Canadian jurisdiction. For the purpose of this book, I consider the JCPC to be a 'Canadian court' insofar as it considered and delivered arguments in relation to Canadian legal matters.

[16] I am not invoking the idea of an 'exceptional moment' *outside* of law in the sense that Schmitt and Agamben use it. Giorgio Agamben, *State of Exception* (Chicago, IL: Chicago University Press, 2005).

[17] *In re Board of Commerce Act* [1922] AC 191 (PC); *In Re Employment of Aliens*, (1922) 63 SCR 293; *The Attorney General of Ontario v The Attorney General of Canada and others (Canada)* [1937] UKPC 6 [*Labour Conventions*]; *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783.

[18] *Edwards v Canada (AG)* [1930] AC 124, [1929] UKPC 86.

[19] *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753.

[20] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

[21] *Reference re Secession of Quebec*, [1998] 2 SCR 217.

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

[23] *Reference re Senate Reform*, 2014 SCC 32.

[24] Barry L Strayer, *The Canadian Constitution and the Courts* (Toronto: Butterworths, 1998) 311. Strayer cites 91 advisory opinions of 352 decisions issued between 1867 and 1986.

Nor do I argue that references are inherently 'weightier' than cases.[25] The Supreme Court exercises a great deal of discretion in deciding which cases to hear.[26] While some cases are guaranteed a hearing, most are not; and the Court selects from among the applications using a somewhat vague criterion of 'national importance' that, because leave decisions are not accompanied by reasons,[27] has never been the subject of authoritative case law. It would certainly seem that the Court *itself* regards the cases it chooses to hear as momentous.

My purpose in this book is different. References, I argue, raise intriguing questions about the legal system in which they operate; about the motivations and strategies of the actors who initiate and participate in them; about the role of the court that produces them; and about the way that a society understands something as being 'law'. Yet, for all their variety, history, singular nature and impact, references have attracted markedly little attention in legal scholarship. To be sure, where individual advisory opinions deal with highly controversial or dramatic issues, they attract attention, scrutiny and analysis. But, with few exceptions, Canadian references are mostly analysed for their content,[28] as opposed to their significance *as* references.[29] They deserve more focussed scrutiny than has been the case.

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The book proceeds in three general parts.

The first part, spanning Chapters 1–4, provides both conceptual and some historical grounding for the discussion.

Chapter 1 introduces several ideas and concepts. It begins by looking at what courts generally are understood to do: adjudicate cases. Adjudication is linked to the courts' relationship with other arms of the state. That relationship, the separation of powers, has influenced what courts are expected both to do and to refrain from doing. The remaining chapters will show the limitations of that idea.

Chapters 2 and 3 are historical in nature. They situate the advisory opinion in the Canadian legal system, and begin to explain its role. Chapter 2 describes aspects of the British legal tradition that would prove formative to the legal

[25] This was not always the case, particularly in late 19th and early 20th centuries. The *Reference re Refund of Dues Paid under s. 47 (f.) of Timber Regulations*, [1933] SCR 617 concerned a very narrow question regarding the remission of timber duties. In modern times, however, references generally are initiated to address questions that are especially controversial or thought to engage important issues.

[26] SC 1974-75-76, c 18; Supreme Court Act, RSC, 1985, c S-26 s 40.

[27] *Rules of the Supreme Court of Canada* (SOR/2002-156) Part V.

[28] See David Schneiderman (ed), *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Davidson NC: Lorimer Press, 1999); Sujit Choudhry and Robert Howse, 'Constitutional Theory and the Quebec Secession Reference' (2000) XIII Canadian Journal of Law and Jurisprudence 143.

[29] François Chevrette and Gregoire Charles N Webber, 'L'Utilisation de la Procédure de l'Avis Consultatif devant la Cour Suprême du Canada: Essai de Typologie' (2003) 82 Canadian Bar Review 757.

system ushered in by Canadian Confederation. It discusses the role of the Judicial Committee of the Privy Council and its own advisory function, which provided the template for the Canadian Supreme Court.

Chapter 3 examines the Supreme Court's reference function. It looks at why its inclusion in the 1875 Supreme Court and Exchequer Court Act was controversial. Canadian provinces were gravely concerned that the federal government would abuse it. As well, there was a more fundamental worry about situating an 'advisory' and an 'appellate' function in a single body. The chapter discusses early judicial and legislative decisions that sought both to appease provincial concerns, and to reconcile the divergent functions of 'advice' and 'judgment'.

Taking up in more detail some of the arguments introduced in Chapter 1, Chapter 4 examines how an advisory function can affect the separation of powers. First, in asking or requiring courts to do more than adjudicate live cases, references could extend the judicial function beyond its proper boundaries. The concern is heightened when a court, such as the Canadian Supreme Court, already exerts significant influence in the constitutional order. Second, when the power to initiate references rests exclusively in the executive branch, a sort of 'capture' can result. That can complicate the relationship with the legislature, particularly, as will be explained, in a parliamentary system.

The second part, Chapters 5–8, looks at references as both legally and politically exceptional moments. In many countries, including Canada, the boundaries between law and politics have become blurred. Courts exert great influence over what used to be considered matters solely within the purview of expressly political actors. They frequently consider the limits on the state's ability to frame certain policies; they review state initiatives passed or authorised to achieve those objectives; and they impose judgments that may run contrary to the wishes of democratic majorities.[30]

Applying a thematic approach rooted in the history of a court operating in a specific legal system, these chapters consider how references can not only shape the law, but be invoked *in* political debate as a necessary mechanism to determine – and, in some cases, to predetermine – political accountability. The chapters suggest that the reference function has contributed to the role of the Canadian Supreme Court as a 'provider of answers'. The implications of that role are discussed in the book's final chapter.

Chapter 5 examines the role of references in what the Supreme Court's creators likely assumed would be its chief focus: arbitrating federalism. Examining both early topics such as the scope of disallowance, the location of the treaty

[30] Judicial invalidation of statutes is dramatic whenever it occurs. But such moments should not be overstated. Even in countries with highly active courts, governments tend to prevail in constitutional challenges. See Christopher Manfredi and James B Kelly, 'Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E Hunter, "Measuring Judicial Activism on the Supreme Court of Canada"' 2004 (49) *McGill Law Journal* 741–64; Christopher Manfredi, 'Conservatives, the Supreme Court, and the Constitution: Judicial-Government Relations, 2006–15' (2015) 52 Osgoode Hall Law Journal 951–83.

power and norms of interpretation, as well as more modern disputes over natural resources and criminal law, the chapter highlights how the Court's arbiter role was abetted by its advisory function.

Chapter 6 discusses how the reference function affected, and even shaped, critical moments in Canada's constitutional development. It begins with the 1949 shift from the Judicial Committee to the Supreme Court as the country's final court of appeal. It then discusses the advisory opinions that ushered in a new constitutional era in 1982, when Canada took full control over the amendment process from the UK and instituted new rights and procedures.[31]

Chapters 7 and 8 discuss advisory opinions post 1982. Chapter 7 looks at the relationship between advisory opinions and constitutional rights. Chapter 8 looks at a number of advisory opinions that have had tremendous impact on certain institutional elements of Canadian constitutional law. These chapters show how the advisory function has cemented the Court's role as a *provider of answers* – one which extends to all of its rulings whether advisory or not.

Alexander Hamilton, an American statesman and one of the 'Founding Fathers' of the United States, famously wrote that the courts have neither the power of the purse, nor the sword.[32] Courts have a special vulnerability: they operate outside the boundaries of practical political power. And yet, when they decide cases, courts do wield considerable authority that is recognised, invoked and respected. Does this authority apply to references in the same way and, if so, why? Is it due simply to the fear of consequences for non-compliance? A political calculation based on the belief that it is best when political opponents agree to respect decisions of external arbiters? Is it what the British legal scholar HLA Hart referred to as the 'internal point of view'[33] analogous to the reasons that players of a game respect the rules? Or, is it something else entirely?

The final part of the book, Chapters 9 and 10, examines more closely the asserted core distinction between advisory opinions and cases. References are said to be 'advisory' rather than binding or coercive. Yet officials and institutions, including courts, do not treat them that way. That is so even when a reference produces a result that the initiating actor finds highly undesirable. That is so even when the court itself is divided about the answer to a reference question. Why? Focussing on, respectively, non-judicial and judicial actors, these chapters suggest broader insights that can be gleaned from Canada's experience with the reference function.

Chapter 9 considers the non-judicial actors who initiate, participate in and react to advisory opinions. It canvasses the reasons that they might trigger an

[31] As a constitutional monarchy, Canada's head of state is still Elizabeth II. However, since 1982 Canada's decision to remain a monarchy or become a republic has been governed by its own constitutional rules, specifically Part V of the Constitutional Act 1982 and constitutional amendment, in particular s 41.

[32] Alexander Hamilton, *The Federalist Papers*, No 78.

[33] HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) 87.

advisory opinion; and why, having done so, they generally treat the resulting opinion as containing reasons for action. It notes the reasons why one might expect these actors to *decline* to comply, at least on occasion. It concludes, however, that a number of powerful considerations ultimately mean that such actors do, in fact, comply.

One of those considerations is that an advisory opinion is in many respects *indistinguishable* from a decision resulting from the end of ordinary litigation. It makes little difference to a party's legal position, and to likely future consequences, whether a judicial resolution is expressed as one or the other. That is, chiefly, because courts *themselves* do not draw such distinctions. Chapter 10 examines why that is.

Chapter 10 argues that advisory opinions have become part of Canadian constitutional common law.[34] The influence of the common law helps to explain how reference opinions can be captured under the doctrine of *stare decisis*. This probably explains, too, why reference opinions that are themselves divided[35] and not unanimous have little effect on their precedential effect. The chapter explains how such a development occurred, *despite* the insistence in early references that it was 'unthinkable' that courts would ever consider themselves bound by their advisory opinions.

The distinction, in the epistemic sense, between how the legal system *classifies* references versus how it *deals* with them is telling. References suggest where the real power of the court lies. References demonstrate that the true significance of the judicial function is its ability to *provide answers*, to declare what law is – that this is more important even than the ability to compel actors to do, and forbear from doing, certain things. This may be an inevitable result when a common law legal system entrusts questions of legality to the courts.

Advisory opinions are not unique to Canada. As noted above, they are frequently issued by formal constitutional courts, as well by international tribunals. The book occasionally refers to those processes. It also tries to avoid presuming the common law, Anglo-American or Canadian legal experience to be a universal lens for understanding law and legal systems. All the same, the discussion focuses heavily on Canada, its Anglo-American heritage and its common law precepts. A fundamental premise of this book is that 'the law' exists within a particular social, historical and political context. Setting forth that context occupies a good number of the chapters below, but a number of the other chapters aim to show how the Canadian experience contains lessons that go beyond

[34] Canada is bi-juridical: the province of Quebec remains a civilian jurisdiction with regard to its own legal rules. Since 1763, though, the public law has been governed by British rather than French rules. Thus, the term 'common law' is accurate when speaking of Canadian constitutional law, which dominates the vast majority of Canadian advisory opinions.

[35] Unlike the Judicial Committee, the Supreme Court of Canada never observed the practice of issuing a single opinion. The JCPC itself abandoned that tradition in 1966 but by then it had ceased to operate as a court of appeal for Canada.

its own legal borders. In short, this is not a book of comparative law, but it is intended to provide larger insights.

Finally, a note about word usage. This book examines a system and legal tradition in which references and cases are thought to be distinct. Although the book ultimately questions whether that is so, the discussion warrants some precision in terminology. As much as possible, then, cases but not references are referred to as involving 'judgments', 'decisions' and 'verdicts'. Other than to illustrate exceptions, the words 'holding', 'finding' and 'remedy' also are reserved for cases. References are described as 'advising' or 'opining'. I believe that the words 'conclusion' and 'answer' apply to both references and cases. For reasons that are explored in the final chapter, I say the same for the word 'declare' and will use it accordingly.

4

Separate Functions – Separate Powers

The previous two chapters explored the advisory opinion's origins in Canada – the primary case study for the book. This chapter considers how the advisory function as practised in Canada raises issues for the separation of powers.

I do not intend here to argue for the independent value of the separation of powers, or that it must take pure, or even robust, form. In Chapter 1, the doctrine was introduced and described as a common feature in many states. Classically, the doctrine has been justified as a safeguard for political liberty – by avoiding the risks of untrammelled power should a single state actor engage in too many government functions. While that account is likely somewhat under-inclusive,[1] I do agree that the separation of powers does have value for governance. Therefore, institutional features which may create tensions or stress in branch relationships are worthy of attention.

Chapter 1 gave an overview of the operation of the separation of powers in Canada. While the doctrine has sometimes been described as having no relevance, that is simply not true. In fact, aspects of the separation of powers have become essential to how the Canadian state is conceived.

This chapter considers two potential problems that the Canadian advisory function poses for the separation of powers. First, by vesting courts with the ability to do more than adjudicate cases, references might be thought to extend the judicial function beyond what many might think to be its optimal boundaries. Second, by concentrating the initiating power for advisory opinions within the executive branch, Canadian references seem to align that branch with the judiciary, and to exclude the legislature, at the same time as the function tends to concern questions related to the latter (ie, statutes).

It should be noted that these problems are not really equivalent. The first, which draws on principles of judicial independence, is more closely correlated with traditional separation of powers concerns. The second problem is complicated by the interdependent nature of the executive and legislative branches in a parliamentary system. The observations offered below are more in the sense of a 'thought-piece' on that way that the advisory function can have effects upon that relationship.

[1] 'Political liberty' would seem to be a classic negative right, ie, one largely dependent on non-interference by state actors. As a goal for governance, it provides little room for, or consideration of, different aims, such as collective goals which might require a sharing of tasks by different actors.

Executive Requests and Judicial Resistance

The first potential problem with advisory opinions is that providing such opinions *outside* the normal boundaries of justiciability threatens the legitimate functions, and legitimacy, of the courts. This was one of the claims in the *Reference re References* previously discussed in Chapter 3.[2] Recall that the provinces had argued that a court of appeal should not exercise an advisory function. (Seventy years later, the argument would be repeated in the *Quebec Secession Reference*.)[3]

That premise has been accepted in certain countries. In 1793 US Supreme Court Chief Justice John Jay refused to accept questions posed by President George Washington's administration regarding US relations with France and Britain during the French Revolution. Jay stated that 'The lines of separation drawn by the Constitution between the three Departments … and our being judges of a court in the last Resort, are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to …'.[4] In Australia, since the early twentieth century at least, it has been thought improper for courts to go beyond hearing 'facts and law' and, thereby, be 'drawn into the region of political controversy'.[5] And in 2004, when UK parliamentarians debated the creation of that country's Supreme Court,[6] some insisted that it was wrong to 'see the courts as having an advisory function; they are bodies which resolve disputes between people'.[7]

As noted in Chapter 3, Canadian courts have rejected that sort of argument. They largely accept that they may perform functions other than deciding disputes that present as 'cases'. That has had numerous implications for the role of the courts.

An entity that is expected to perform at the command of another could be perceived as being subordinate to it. To be sure, it is common in any system of governance for branches of the state to have to respond to each other as a matter of practical or constitutional reality. In a presidential system, the executive must

[2] *In re References by the Governor-General in Council* (1910), 43 SCR 536 at 547 (SCC), aff'd [1912] AC 571 (PC) [*Reference re References*].

[3] *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession Reference*] (discussed in Chapter 8).

[4] *Letter from the Supreme Court to President George Washington* (1793). See also *Muskrat v United States*, 219 US 346 (1911).

[5] See the statement from the Chief Justice of the Supreme Court of Victoria known as the *Irvine Memorandum*: 'The duty of His Majesty's Judges is to hear and determine issues of fact and law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary'. Quoted in Sir Murray McInerney, 'The Appointment of Judges to Commissions of Inquiry and other Extra-Judicial Activities' (1978) 52 Australian Law Journal 540, 541–42.

[6] Constitutional Reform Act 2005.

[7] https://api.parliament.uk/historic-hansard/lords/2004/feb/09/supreme-court (Lord Falconer). See also Byron Karemba, 'Brexit, the Reference Jurisdiction of the UKSC and the New Separation of Powers', UK Constitutional Law Blog (30 July 2018): at https://ukconstitutionallaw.org/.

respond to a Bill passed by the legislature, indicating his or her consent (or veto). Such relationships do not necessarily imply subordination. The particular concern here is whether the fact that the court is expected to modify its actions, priorities and tasks because of an executive demand may indicate, in a non-trivial sense, diminished independence. When references are initiated, the courts are expected to respond. The Supreme Court of Canada, for example, must modify its schedule to accommodate the necessary hearings. It must devote both administrative and judicial resources[8] to dealing with the myriad requests that accompany them. And it must allocate time to sifting through the arguments, both written and oral; discussing the issue in conference; and, finally, delivering a written opinion.

Canadian courts do retain a significant degree of control over the process. Under the Supreme Court Act,[9] for example, the Court retains full say over such things as: appointing *amicus curiae*, directing process, deciding on additional participants,[10] assigning the judges who will review and hear the argument, deciding on the content of the opinion and determining the timing of its release.

Such control may help mitigate the perception that Canadian courts, and the Supreme Court in particular, are captive to another branch. Yet, the fundamental character of the reference seems largely unaffected. It is important, then, to consider other responses, by the judiciary itself, that seem intended to resist the limiting effect of a reference on its institutional autonomy. The most important of those is resisting or refusing to provide an answer.[11]

On numerous occasions, the Supreme Court simply has refused to engage with the question posed to it by the executive.[12] At times, the Court has seen fit to *modify* the question in some way; at others, it has declined to respond altogether.

[8] For example, the Supreme Court docket in the *Reference re Senate Reform*, 2014 SCC 32 [*Senate Reform Reference*] indicates at least eight motions between the initial filing in February 2013 and the date of closure in May 2015. The hearing involved 18 participants, all of whom were permitted to file submissions and some of whom were permitted to make oral submissions. Numerous additional parties applied for leave to intervene unsuccessfully. The appeal was heard over three days before the eight sitting members of the Court (Justice Marc Nadon had been sworn in but, because of the challenge to his appointment discussed in Chapter 8 did not participate).

[9] Supreme Court Act RSC, 1985, c S-26.

[10] Under the Supreme Court Act, provincial and federal governments are accorded notice of proceedings, initiated by other actors, that raise constitutional issues and may indicate their intention to intervene.

[11] In a helpful taxonomy, Kate Puddister includes within this broader category those references where the Court declined to answer a question where it was deemed unnecessary by virtue of its answer to another. That most commonly occurs where a reference asks a broad question of validity and then separates out validity into constituent components, for example concerning the division of powers on one hand and the Charter on the other. The discussion in this chapter excludes such instances. Kate Puddister, *Inviting Judicial Review: A Comprehensive Analysis of Canadian Appellate Court Reference Cases*, PhD Thesis, McGill University, Montreal, December 2015.

[12] Puddister, ibid, has identified the following examples from 1949 to 2014: *Earth Future Lottery (PEI)*, [2002] 215 DLR (4th) 656; *Interpretation of Human Rights Act*, [1998] 50 DLR (4th) 647; *Constitution Act 1867, ss. 26, 27 and 28 (BC)*, [1991] 78 DLR (4th) 245; *Workers Compensation Act 1983 (NL)*, [1989] 1 SCR 922; *Freedom of Informed Choice (Abortions) Act (SK)*, [1985] 25 DLR (4th);

The 1981 *Patriation Reference*[13] was initiated in relation to several aspects of the constitutional reform package that eventually would become the Canada Act 1982. The questions included the following:

> Question 2 – Is it a constitutional convention that [the Parliament of Canada] will not request Her Majesty the Queen to … amend the Constitution of Canada affecting federal-provincial relationships or [provincial powers, rights or privileges] without first obtaining the agreement of the provinces?
>
> Question 3 – Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters [provincial powers, rights or privileges] granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?[14]

The Supreme Court justices disagreed on what the questions were asking. Question 3 related to how a constitutional amendment affecting existing provincial powers might occur. At that time, the Canadian Constitution could only be amended by legislation passed by the Westminster Parliament.[15] Seven of the nine justices said that they would consider *only* the Canadian Parliament's ability to *initiate* the process for such a law to be passed by Westminster, but that their answer did not in any way relate to the UK's subsequent *disposition* of that request, which was not a matter 'upon which this Court would presume to pronounce'.[16] Ultimately, the majority concluded, there were *no* legal constraints upon the Canadian Parliament's ability to pass those resolutions.

The two judges in dissent approached the question quite differently. In their view, it was necessary to recognize that Westminster was highly likely to accede to any such request from the Canadian Parliament. Therefore, the issue was whether the Canadian Parliament possessed the legal authority to pass a resolution that would fundamentally change provincial powers without first obtaining those provinces' consent.[17] They found that passing a resolution of *that* kind would be inconsistent with the nature of Canadian federalism.

Upper Churchill Water Rights Reversion Act, [1984] 1 SCR 297; *Legislative Privilege*, (1978) 18 OR (2d) 182; *Jones v Canada (AG)*, [1975] 2 SCR 182; *Validity of a by-law respecting taxi cabs*, [1958] 16 DLR (2d) 348; *Railway Act, Canada v Canada Pacific Railway*, [1958] SCR 285; *Moratorium Legislation Act (SK)*, [1955] 35 CBR 135; *Interpretation of Human Rights Act*, [1998] 50 DLR (4th) 647; *Goods and Services Tax*, [1992] 2 SCR 858; *Public Service Employee Relations Act (AB)*, [1987] 1 SCR 313; *Stony Plain Indian Reserve*, [1981] AJ No 1007; *Legislative Authority of the Parliament of Canada in relation to the Upper House*, [1980] 1 SCR 54; *MB (AG) v Manitoba Egg and Poultry Association*, [1971] SCR 698; *Same Sex Marriage*, [2004] 3 SCR 698; *Constitution Act 1867, ss. 26, 27 and 28 (BC)*, [1991] 78 DLR (4th) 245.

[13] *Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*]. The Reference is discussed in detail in Chapter 6.

[14] These questions are taken from the reference initiated by the provinces of Manitoba and Newfoundland to their respective courts of appeal.

[15] Constitutional amendment is discussed in Chapters 6 and 8.

[16] ibid at 774.

[17] ibid at 815.

Question 2 asked whether there existed a *constitutional convention* that the Canadian Parliament would not pass such resolutions without provincial consent.

The panel again divided on the question's meaning. This time, they differed over concerned the *level* of provincial 'agreement' contemplated. Was the question whether *all* of the provinces must agree, or only *some*? In the majority's view:

> It would have been easy to insert the word 'all' into the question had it been intended to narrow its meaning. But we do not think it was so intended. The issue raised by the question is essentially whether there is a constitutional convention that the House of Commons and Senate of Canada will not proceed alone. The thrust of the question is accordingly on whether or not there is a conventional requirement for provincial agreement, not on whether the agreement should be unanimous assuming that it is required. ...
>
> If the questions are thought to be ambiguous, *this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no* ...[18]

It ultimately concluded that there *was* such a convention, but one that could be satisfied by securing the 'substantial consent' of the provinces. Exactly how many provinces would be required for consent to be 'substantial', the majority did not say.

The dissent[19] sharply criticised the majority's narrowing of the question. It stated that in 'plain English', the terms 'of the provinces' or 'of the provinces of Canada' means *all* of the provinces of Canada.[20] The Court 'would not be justified in editing the questions to develop a meaning not clearly expressed'.[21] The dissent went on to find that the asserted convention did not exist.

In one sense, the above examples are in line with ordinary legal interpretation. I have highlighted them to demonstrate that the Court clearly did not consider itself bound by either the wording of a particular reference question or the favoured reading of that question by the initiating actor (in this case, the provinces). That the Court felt able to approach a question differently, or even to modify it, suggests that it did not view the reference as significantly different from any other legal proceeding, at least not in that respect. Notwithstanding, then, that a Canadian reference is grounded in an executive request for answers, the Court has asserted a type of firewall against that request.

Perhaps the most dramatic response to a reference question is to refuse to answer it at all. This the Canadian Supreme Court has done on numerous occasions. Although the total number of such refusals is small, they nonetheless represent a considerable assertion of juridical power.

[18] ibid at 875 (emphasis added).

[19] The dissenting jurists on Question 3 were Martland and Ritchie JJ. Laskin CJC and Estey and Martland JJ dissented on Question 2.

[20] ibid at 851.

[21] ibid.

In Britain, judges were often requested by the House of Lords to provide advice on terms that suggested that they were not free to decline.[22] Those judges, too, asserted an occasional discretion to refuse, most often when they anticipated that the same issue would arise in subsequent litigation.[23] Thus, it is not surprising that the JCPC noted that references were vulnerable to 'indiscriminate and injudicious' uses.[24] One instance of evasion is found in the *Local Prohibition Reference*.[25] That Reference was one of several matters arising from the controversial issues of alcohol regulation. At play were federal[26] and provincial[27] statutes containing a 'local option' provision permitting municipalities to adopt a prohibitory scheme via plebiscite. The Supreme Court had issued conflicting judgments about whether such laws could coexist in the same locality.

Much of the opinion[28] was taken up with whether Ontario had the jurisdiction to impose a local option. The Judicial Committee advised that the provincial Act was intra vires 'subject to this necessary qualification, that its provisions are, or will become, inoperative in any district of the province which has already adopted, or may subsequently adopt[,] the second part of the [federal law]'.[29]

With regard to the other six questions,[30] the Committee stated that they related 'to *matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy*'. They were 'better fitted for consideration of officers of the Crown, than of a court of law'.[31] The Board noted, as well, that its answers would not have 'the weight of a judicial determination'.[32] It nonetheless proceeded to answer some of the remaining questions, though it determined that the two did not require a 'categorical reply'.[33]

Similar refusals would recur over the ensuing decades. In the memorable words of one judge, a court need not provide '[an] answer to such questions, for instance, as "whether the moon is made of green cheese"'.[34] The Supreme Court has given

[22] See the discussion in Chapters 2 and 10.

[23] E Foster, *The House of Lords 1603–1649* (Chapel Hill, NC: North Carolina Universiy Press, 1983) 79–82; E Coke, *The First Part of the Institutes of the Laws of England* L.2, C 10, § 164 n.5 (13th edn, 1823); W Jones, Politics and the Bench (1971) 62, cited in Stewart Jay, 'Servants of Monarchs and Lords: The Advisory Role of Early English Judges' (1994) 38 American Journal of Legal History 117.

[24] *Reference re References* (n 2) at para 16.

[25] *Attorney General (Ontario) v Attorney General (Canada)* [1896] AC 348 [*Local Prohibition*].

[26] Canada Temperance Act, RSC 1887 c 106.

[27] Local Option Act, SO 1890 c.56.

[28] The questions may be found at *Local Prohibition* (n 25), Appellant's Case.

[29] The JCPC upheld the law as being in relation to either 'property and civil rights in the province' or 'matters of a merely local or private nature in the province', ie, s 92(13) or (16) of the BNA Act.

[30] Above note 25.

[31] *Local Prohibition* (n 25) at 20 (emphasis added).

[32] ibid.

[33] Questions 5 and 6 asked specifically about the remaining powers of prohibition available to Ontario should the Board find that the local-option provision was ultra vires. The Board found that its answer to Question 7 was sufficient and further elaboration was not required.

[34] *Reference re: Ontario Medical Act*, [1906] OJ No 147, per Meredith JA at para 68. The judge went on to suggest that the broad power granted to the Lieutenant-Governor of Ontario by RSO (1897),

that idea much greater heft. The Court has cited as reasons to refuse mootness,[35] lack of specificity,[36] vagueness[37] and the risk of creating legal uncertainty.[38]

In examining the Supreme Court's assertion that it may refuse to answer a reference question, several points are noteworthy. The first point is that the stated reasons for refusal constitute, for all intents and purposes, a doctrine of 'reference justiciability'. Mootness, prematurity, insufficient factual context, lack of specificity – all of these reasons constrain the courts' intervention in issues that do not correspond to the limits, integral to the separation of powers, that are imposed on the court in view of their role as *legal* arbiters. Thus, reference justiciability plausibly demonstrates an intention by the Court to retain first and foremost a *legal* role.

The second point is that the Supreme Court sometimes asserts the *ability* to refuse while not actually doing so. For example, in the *Quebec Veto* Reference Quebec argued that the Constitution Act 1982 had proceeded contrary to constitutional convention because the proposal sent to Westminster had not included its agreement.[39] By the time the reference arrived at the Supreme Court, the Queen had proclaimed in force the Constitution Act 1982. While the matter was indisputably moot, the Court nonetheless concluded that it was 'desirable that the constitutional question be answered in order to dispel any doubt over it'.[40] The Court would employ similar reasoning in the *Quebec Secession Reference*[41] against the *amicus curiae* who urged the Court to refuse to answer the questions. The Court decided that it would answer, but not before noting two circumstances in which it might be appropriate to refuse, namely where the Court believed that to answer would stray 'beyond its own assessment of its proper role in the

ch 84 – essentially, the provincial advisory function – was nonetheless restricted to '(1) legal questions; (2) respecting matters within the jurisdiction of the Court; and (3) of Provincial concern', ibid.

[35] *Re Objection by Que. To Resolution to Amend the Constitution*, [1982] 2 SCR 793, 806 [*Quebec Veto*]. The reference is further discussed in Chapter 6.

[36] *Re Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54 [*Upper House Reference*]. The Court declined to answer several questions relating to possible changes to the Senate of Canada 'in the absence of a factual context or actual draft legislation'. See also *Re The Educational System in the Island of Montreal*, [1926] SCR 246 at 270; *Reference re Waters and Water-Powers*, [1929] SCR 200 at 224.

[37] *McEvoy v Attorney General (New Brunswick)*, [1983] 1 SCR 704 at 707. In considering the validity of establishing a 'unified criminal court' within a province, the Supreme Court noted the lack of 'draft legislation' or 'even any draft proposals to infuse the three questions which, in our view, suffer from excessive abstractness'. It complained of being forced to 'speculate as to the form the legislative schemes contemplated by the questions might take'. It continued, at 714–17, that, 'while we deprecate the practice of bringing before the Court as important constitutional questions as are raised in this case on extremely flimsy material, we would not abort the appeal on this ground', 714–15.

[38] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 [*Same-Sex Marriage*].

[39] *Quebec Veto* (n 35). See also Chapter 6.

[40] ibid at 805–06.

[41] Above n 3. The *Secession Reference* is discussed in Chapter 8.

constitutional framework of our democratic form of government'; or where the question fell outside of the Court's core area of expertise, which it defined as legal interpretation.[42]

For at least two reasons, this second point is significant. First, it finds a counterpart in the Court's approach in ordinary cases. Especially since 1982, the Court has entertained cases that strictly speaking, were moot, because it determined that the hearing would serve some additional interest.[43] In so doing, the Court acknowledges limits to its jurisdiction while retaining the authority to determine what those limits are. To be sure, this is common to many types of judicial craft. In the context of references, though, which strain the ordinary understanding of what a court does, it is noteworthy that the Supreme Court does not consider itself bound to observe what *another* branch wants it to do. In other words, while the refusal seems on the surface an acknowledgment of the *limits* of judicial power, in practice it may serve to *enhance* it, by both entrenching a certain type of interpretative role and highlighting the court's independence.

The third point is the most striking. The Court has never *explained* the source of its discretion. Nor has it reconciled such refusals with the plain, mandatory language of its enabling statute. Section 53(4) of the Supreme Court Act proclaims, inter alia, that 'it is the *duty* of the Court to hear and consider it and to answer each question so referred, and the Court *shall* certify to the Governor in Council, for his information, its opinion on each question ...'.[44] The section clearly fames the reference function as an *obligation* imposed upon the Court. Yet, the Court has never mentioned that aspect of its reference function.

At times, the omission seems deliberate. For example, in the *Same-Sex Marriage Reference*, the Court 'reproduced and interpreted the first three subsections of section 53 of the Supreme Court Act which detail the authority of the Governor General in Council to refer questions to the Court' but did not mention 'the fourth subsection detailing the Court's duty on a reference'.[45] One would have thought that final subsection particularly material to the Court's decision to decline to answer Question 4.

What can explain such a pattern?

It may be that even though section 53(4) of the Supreme Court Act squarely articulates a 'duty', the Court does not feel that the language is material. It may be that no one has ever put the question squarely to the Court. Or, it may be that the Court believes that it is operating in a different register – one where its institutional and functional independence supersedes any countervailing directive from another branch.

[42] ibid at para 26.
[43] See the discussion in Chapter 10.
[44] Supreme Court Act, RSC, 1985, c S-26 (emphasis added).
[45] John McEvoy, 'Refusing To Answer: The Supreme Court and the Reference Power Revisited' (2005) 54(29) University of New Brunswick Law Journal 37; *Same-sex Marriage Reference* (n 38).

The latter point seems the most likely. That is, the Court has never explicitly considered the obligation framed in section 53(4) because the Court does not consider it relevant to its current context, a context that, at least in part, presumes that its institutional independence must prevail.

The Supreme Court functions as the chief constitutional arbiter and the primary interpreter of its norms; and it enjoys independence from the other branches. Any doubts about that independence appear to have been laid to rest by the 2014 *Supreme Court Act Reference*.[46] Discussed more fully in Chapter 8, the Court stated that it is no longer a creature of statute that can be repealed at Parliament's command. Rather, because of the integral role that it plays in Canada's underlying legal and political arrangements, the Court's 'composition' and 'essential features' are protected against unilateral change at the federal level. Such changes require constitutional amendment.

The *Supreme Court Act Reference* arose because of a question about the eligibility requirements for judges appointed to the Court. But to the extent that the Court's conclusion rests on the need to maintain its status as an independent arbiter, it might well resist an expectation to answer a reference question it views as inappropriate.[47] To be sure, the matter is not black and white. For one thing, the *Supreme Court Act Reference* related to Parliament's ability to *change* aspects of the current Act, while the mandatory duty to answer has been part of the Act since 1875.

For another, there are separate aspects of the Court's appellate jurisdiction, such as criminal appeals as of right, that are not wholly under its control.[48] There, however, the Court's appellate jurisdiction is triggered because Parliament has judged that certain circumstances warrant, in the interests of justice, a final determination from the country's apex court. At the very least, the *executive* capture of the Court by forcing it to submit to questions would seem to be of a very different character. And that prospect seems to have inspired the Court on numerous occasions to assert that it has the right to refuse to engage.

Thus, the unwritten constitutional principle of judicial independence, articulated as an aspect of the separation of powers, best explains the Court's repeated insistence that it can not be *compelled* to answer any reference question the executive chooses to put before it. The doctrine insulates the Court from being in a truly subordinate position to the executive, and provides a check of sorts on the latter. This is not, of course, to say that refusal doctrine is a cure-all for the political *consequences* of the advisory function. But it is an important part of the fuller picture of executive–judicial relations when an advisory function is in play.

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

[47] The extent to which the *Supreme Court Act Reference* complicates the Court's current appellate jurisdiction remains an outstanding question.

[48] Criminal Code of Canada, RSC 1985 c C-46 s 691 (granting an accused person an automatic right of appeal in certain circumstances).

The relationship between the judiciary and executive is one facet of the separation of powers that is affected, in intriguing ways, by the advisory function. Another, not entirely symmetrical, facet is the fact that the *initiation* of advisory opinions is vested in the executive alone. That issue is explored below.

The Lonely Legislature?

When it comes to Canadian advisory opinions, the legislative branch seems to be left out of the process. On one view, that may be unsurprising. As discussed in a previous chapter, English courts were initially conceived of as advisers to the sovereign. The advisory function is perhaps the last vestige of that historical role. In addition (and leaving aside administrative tribunals) the judiciary is institutionally associated with the interpretation of statutes. The judiciary and legislature perform distinctive functions related to positive law. In that sense, they stand somewhat apart from the executive, which primarily approaches law and legal norms as tools for operationalising policy.

In other words, it may be more tolerable for the judiciary to act as adviser to the executive than to the legislature. To draw the legislature and judiciary too close together risks undermining the latter's independence and complicating the former's work. Of course, the Canadian legislative branch is bound by constitutional norms and limits. But it enjoys a significant degree of latitude in how it interprets them. Inserting a pre-emptive judicial opinion into such matters could well represent an unwise intrusion.

Nevertheless, there is an argument to be made that the Canadian advisory function privileges the executive branch at the legislature's expense. By granting the executive special access to the Court outside of the ordinary litigation process, the advisory function draws the executive and judiciary into a relationship that not only affects future judicial review, but may give the executive a significant strategic advantage. It is noteworthy that, compared with other countries that authorise the provision of advisory opinions, Canada is unusual in limiting them to executive requests.[49]

[49] Peter H Russell, 'A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada, Brief to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness', 23 March 2004, p 1, as cited in Erin Crandall, 'Intergovernmental Relations and the Supreme Court of Canada: The Changing Place of the Provinces in Judicial Selection Reform' (2010) Working Paper, Institute of Intergovernmental Relations School of Policy Studies, Queen's University, www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/pub/archive/DemocraticDilemma/ReformingTheSCC/SCCpapers/CrandallFINAL.pdf. See also Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) ch 5.

Here, several caveats require mention. First, section 54 of the Supreme Court Act does permit the Houses of Parliament to seek a specific advisory opinion. It provides:

> The Court, or any two of the judges, shall examine and report on any private bill or petition for a private bill presented to the Senate or House of Commons and referred to the Court under any rules or orders made by the Senate or House of Commons.[50]

The above provision was virtually identical to a practice that persisted in the UK House of Lords for centuries.[51]

Section 54 is a most interesting clause. First, it restricts the advisory function to 'private bills' or petitions of same. The term 'private bills' does not mean 'private members' bills'. In Canadian parliamentary practice, they are laws intended to 'confer special powers or benefits (in excess of or in conflict with the general law) upon one or more persons or group of persons (including corporate entities) or to exempt them from the application of a statute'.[52] They are, in other words, laws directed at private parties. Historically, such Bills tended to be introduced in the Canadian Senate. Second, section 54 refers to 'rules or orders' made by either chamber, suggesting that both retain the authority to determine the procedure by which a request may be made.[53] Third, it can be satisfied by a 'report' issuing from as few as two members of the Court. The provision does not require an opinion, a hearing or notice to other parties, perhaps because of the latitude granted to the legislative branch to frame the process.

There have been very few section 54 references. The last one was in 1882.[54] All proceeded from the Senate rather than the House of Commons: *An Act to Incorporate the Brothers of the Christian Schools in Canada* (1876);[55] *Quebec Timber Company* (1882);[56] and *Canada Provident Association* (1882).[57] Two were reported as opinions; one was not. Note that, in the *Brothers* case, the Minister of Justice raised a concern that the Bill might be ultra vires, and offered to refer the matter himself. The Senate did not take up the offer.[58] That may well have reflected a latent separation of powers concern: the idea that it would be unseemly for

[50] Supreme Court Act RSC, 1985, c S-26.

[51] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765) 175–76, noting that 'In the house of lords, if the bill begins there, it is (when of a private nature) perused by two of the judges, who settle all points of legal propriety'. See also the discussion in Jay (n 23).

[52] www.parl.gc.ca/procedure-book-livre/document.aspx?sbdid=da2ac62f-bb39-4e5f-9f7d-90ba3496d0a6&sbpidx=3.

[53] The current Senate practice is covered by Senate Rule 11-18: https://sencanada.ca/en/about/procedural-references/rules/11/.

[54] Charlie Feldman, 'Legislative Vehicles and Formalized Charter Review' (2016) 25(3) Constitutional Forum 79, 83.

[55] *Re Brothers of the Christian Schools in Canada*, 1876 CarswellPEI 1, Cout Dig 1.

[56] Senate, *Journals of the Senate*, 4th Parl, 4th Sess, vol 1 (30 March 1882) at 158.

[57] *In re Canada Provident Assn*. 1882 CarswellNat 6 at 1.

[58] *Debates of the Senate*, 3rd Parl, 3rd Sess, vol 1 (4 April 1876) at 287 (Hon Mr Bellerose).

a Minister to intervene to secure the aid of the court for a Bill that was the product of the Senate.

After 1882, the practice fell into disuse. But, even if section 54 was revived, its limitation to 'private bills' severely constrains the possibility that it might enable a comparable role for the Court as does section 53. One might argue that that constraint is justified on the basis that, where a Bill is introduced by the executive, another branch should not have the freedom to seek a judicial opinion about it. But is that persuasive? Given that enacting such a Bill into law is within the peculiar province of Parliament, it is difficult to see why seeking advice about it ought to be confined to the executive.

In any event, such a concern as applied to the House clearly does not obtain for the Senate or at least not to the same degree. The Senate of Canada was mandated as a second chamber of 'sober second thought'.[59] While politically partisan for much of its history, the chamber was not intended to be partisan as such.[60] Thus, any alleged unwarranted imbalance as between the executive and House of Commons, in respect of the advisory function, is heightened in respect of the Upper House.[61]

The second caveat, of course, is the overlap between the executive and legislature in a system of responsible government. The precise make-up of the Commons, and of the government, may vary, but the necessary relationship does not. In an archetypal majority government, where the executive's members come from a single party controlling a majority of seats, the decision to refer advisory opinions may not pose cause for concern, or, indeed, for comment.[62] Over much of Canada's history, that appears to have been be the case. In majority Parliaments, references are initiated based on the executive's say-so, with input mostly from Cabinet and little concern, or even notice, from the caucus or the House. Of course, that does not prevent the opposition from suggesting that a reference occur and even bringing the matter to a vote.

A minority government creates greater opportunity for conflict.[63] That is because, while the *executive* continues to be drawn from only one party, the House of Commons is not, and the Cabinet thus cannot count on party discipline to control outcomes. The primary 'check' available to MPs is to bring down the government and history shows that non-ruling parties approach the question of confidence with caution. It seems unlikely that, outside of an extraordinary circumstance, a decision simply to *initiate* a reference would itself qualify as

[59] *Re Upper House* (n 36) at 76.

[60] *Reference re Senate Reform*, 2014 SCC 32 at para 57.

[61] I leave, for now, the prospect that such a change to s 54 is now impossible absent a formal constitutional amendment. That point is taken up in Chapter 8.

[62] But see Motion reading in part 'the House call on the government to refer the Comeau decision and its evidence to the Supreme Court for constitutional clarification of Section 121'. Defeated 184–131: www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-72/journals.

[63] I will not discuss the potentially special situation posed by a coalition government that draws from more than one party to populate the executive.

sufficiently serious to risk bringing down a Ministry. However, it may be that in such cases the parties work towards forcing a reference indirectly.

For example, the opposition might seek to insert a provision that certain portions of the legislation will not operate until such time as a reference opinion confirms their validity.[64] Though such provisions are rare, one was recently proposed in the Canadian Senate to address concerns over the constitutionality of government legislation in respect of medical assistance in dying.[65]

There have been occasions on which the reference function *was* affected by minority dynamics. A good example is the *Same-Sex Marriage Reference*.[66] There, the court was asked a series of questions about a proposed federal law, the Civil Marriage Act,[67] which sought to confirm a gender-neutral definition of 'marriage'.[68] The law was proposed after several provincial courts ruled that the common law definition of marriage violated the Charter of Rights and Freedoms.[69]

In 2003, while those rulings were being appealed in Quebec, Ontario and BC, the federal Minister of Justice announced a standing committee of Parliament would conduct hearings on the issue. A discussion paper was released. Hearings were held across the country.[70] Then, after two provincial courts of appeal confirmed the lower court rulings, the federal government (which held power in a minority parliament) announced that it would not seek an appeal to the Supreme Court of Canada.[71] It declared instead an intention to legislate the effects of the BC and Ontario decisions.

The government referred that legislation to the Supreme Court in draft form.[72] The initial questions concerned the division of powers and protection of religious freedom. No question was posed about whether the existing common law definition of marriage was consistent with the Charter – a curious evasion of the central issue. When, after significant criticism and political pressure, the government did pose that question, it declined to offer any arguments about it.[73]

Some viewed the government's determination to trigger a reference as a problematic intrusion into what was, at bottom, an issue peculiarly within the province

[64] An Act to amend the Liquor License Act 1883, 47 Vic. c 32.

[65] *Journals of the Senate of Canada*, 42nd Parl, 2nd Sess, 17 June 2016, Issue 52.

[66] Above n 38.

[67] Bill C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes, 1st Sess, 38th Parl, 2005.

[68] SC 2005, c.33.

[69] *Hendricks c Québec (PG)*, [2004] RJQ 851 (CA); *Halpern v Toronto (City)*, (2003) 65 OR (3d) 161 (CA); *EGALE Canada v Canada (AG)*, (2003) 13 BCLR (4th) 1, 2003 BCCA 251. At common law, marriage was defined as 'the union of one man and one woman for life, to the exclusion of all others': *Hyde v Hyde*, (1866) LR 1 P & D 130 at 133.

[70] Canada, Standing Committee on Justice and Human Rights, *Evidence of 34th Meeting*, 37th Parl, 2nd Sess (8 April 2003); see also House of Commons, News Release, 'Justice Committee's Tentative Cross-Canada Travel Plans' (28 February 2003).

[71] Kim Lunman, 'Ottawa backs gay marriage: Court decisions won't be appealed', *The Globe and Mail* (18 June 2003) A1.

[72] The draft legislation is discussed in Chapter 7.

[73] The questions and their answers are discussed in Chapter 8.

of Parliament. At the time, the lower courts' redefinition of marriage had become a lightning rod.[74] Many Canadians, suspicious of the idea that abstract rights theory could mandate the reordering of long-standing social mores, were threatened by the prospect of changing the definition of marriage. When the reference cut short parliamentary committee work on the very issue, it exacerbated existing tensions. To critics, it appeared that the executive had seized the issue out of Parliament's hands.[75] The minority government was criticised as having politicised the issue. The Leader of the Opposition, Stephen Harper, accused the federal government of no less than a conspiracy to further a 'hidden agenda'.[76]

The revolutionary change in Canada's marriage laws is a testament to focussed constitutional rights advocacy. But the *Same-Sex Marriage Reference* can be critiqued for contributing to the phenomenon of 'democratic debilitation' – encouraging the legislature to withdraw from constitutional deliberation in favour of judicial pronouncements.

Reasonable people can disagree on the utility or principles behind the government's strategy. The point is that, where the reference function appears politicised, it can create resistance to laudable law reform, give opportunities for mischief in public debate, and draw the Court into tricky institutional conflicts. The *Same-Sex Marriage Reference* demonstrates the power inherent in framing a reference, and determine (at least initially) its focus, over significant objections by a good number of legislative branch members.

At the opposite end of the spectrum, the *failure* to seek an advisory opinion can also spur political controversy. That may arise if Parliament is considering legislation about which there is a credible constitutional concern. In that case, a reference might seem like a principled alternative to simply ploughing ahead.

In recent years, parliamentarians have urged the executive to pursue references before passing controversial legislation. For example, in *Bedford v Canada*, the Supreme Court concluded that several prostitution-related criminal offences violated the Charter.[77] One of the noteworthy aspects of the decision was the Court's repeated emphasis of the fact that the actual exchange of sex for money had never been the subject of criminal prohibition in Canada.[78] At points in its decision, the Court appeared to imply that if prostitution *itself* were to be prohibited,

[74] The push for marriage equality was very new. As recently as 1999, the federal Cabinet had acquiesced in a House of Commons motion 'that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada.' Hansard (8 June 1999) 15960.

[75] C Mathen, 'Developments in Constitutional Law – The 2004–2005 Term: A Court in Transition' (2005) 50 Supreme Court Law Review 89, 137.

[76] Alexander Panetta, 'Harper accuses Liberals of setting up court losses on gay marriage' *Canadian Press* (4 September 2003) (ProQuest) quoting Harper: 'I think it's a typical hidden agenda of the Liberal party. They had the courts do it for them [change the definition of marriage], they put the judges in they wanted, then they failed to appeal – failed to fight the case in court. I think the federal government deliberately lost this case in court and got the change to the law done through the back door'.

[77] *Canada (Attorney-General) v Bedford* 2013 SCC 72, [2013] 3 SCR 1101 at para 2 [*Bedford*].

[78] ibid at paras 5, 87.

a different balancing of constitutional interests would ensue.[79] The Conservative federal government responded with a series of sweeping changes to Canada's prostitution laws that went some way to doing that.[80] In response, several MPs proposed that prior to its passage, the government should seek further clarification from the Supreme Court, and were highly critical when the government failed to do so.[81]

Another example involves a case called *Carter v Canada*. There, the Court held that sections 14 and 241 of the Criminal Code (which, respectively, bar anyone from consenting to their own death, and from assisting in another's suicide) are unconstitutional to the extent that they apply to competent adults who are suffering from irremediable conditions (for example, amyotrophic lateral sclerosis) and wish for medical assistance in dying.[82] In response, the government proposed amending the Code to exempt such cases from criminal punishment, but it made the exemption subject to a number of additional limitations and qualifications. Many persons argued that the new provisions fell short of the Court's ruling in the *Carter* case.[83] Once again, the government faced calls to return to the Court for an opinion about the proposed legislation. And it was criticised when it did not.[84]

The converse is also true. In 2017, Parliament passed S-201, An Act to prohibit and prevent genetic discrimination. The law prohibits requiring an individual to undergo a genetic test or disclose the results of a genetic test as a condition of providing goods or services, including contracts of insurance. The Bill originated in the Senate and was co-sponsored by a Liberal backbencher. It was, thus, a private

[79] ibid at para 5:

> Under the existing regime, Parliament has confined lawful prostitution to two categories: street prostitution and 'out-calls' – where the prostitute goes out and meets the client at a designated location, such as the client's home. This reflects a policy choice on Parliament's part. Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes.

[80] Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v Bedford and to make consequential amendments to other Acts, 2nd Sess, 41st Parl, 2014. The law adopted an asymmetrical approach, criminalising the buying but not the selling of sex, enacting limits to discourage as much as possible what it termed the 'commodification' of sex and the 'objectification' of the human body. In the Bill's preamble, the government explicitly articulated a commitment to the values of 'equality and human dignity' and the belief that prostitution is inconsistent with both.

[81] *Debates of the House of Commons*, 42nd Parl, 2nd Sess, No 74, 16 June 2016 at 4634 and 4616. Cited in Charlie Feldman, 'Parliamentary Timing and Federal Legislation Referred to Courts: Reconsidering C-14' [2017] Canadian Parliamentary Review 18.

[82] *Bedford* (n 77) at para 4.

[83] *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331. The government included two threshold criteria – that the condition be 'incurable' and that death be 'reasonably foreseeable' – that appear to interfere with medical aid against the prior ruling. That said, any judicial consideration of the new law would have to consider the law's purported objective, which could affect the section 7 analysis and the degree to which further limits could be found to be over-broad.

[84] Charlie Feldman points out that the *Carter* case was complicated by the fact that the Supreme Court suspended the effect of its ruling for one year. Some might argue that it was inappropriate to use the reference function when Parliament was operating under a 'deadline'. Feldman (n 81) 23.

members' Bill, which ordinarily is not subject to party discipline – so government caucus members could vote as they wished.

The federal Minister of Justice expressed concern that, in its extension to insurance contracts, S-201 was ultra vires. Insurance regulation has long been held to be a matter of provincial jurisdiction, and so, she believed, Parliament lacked the jurisdiction to intervene.[85] The Bill's supporters claimed that Parliament was well within its criminal law powers[86] to target discriminatory behaviour for punishment. (When the Bill was examined by parliamentary committees, expert opinion on the issue was mixed.)

Ultimately, the Bill was passed but the entire Liberal Cabinet voted against it.[87] Such an unprecedented result was the product of diverse motivations: honest support for the Bill among many MPs, but also a willingness on the part of opposition parties to exploit a division within the governing Liberals.

A few days after the law's passage, the Minister of Justice announced that she would seek a reference opinion on its validity.[88] The juxtaposition of that decision together with her refusal to seek a similar opinion on the *Carter* legislation was attacked as a 'glaring inconsistency'.[89] The Minister was perceived to be acting purely politically, in tension with the broader role she also performs as Attorney General wherein she must dispassionately assess the validity of laws submitted to Parliament.

On S-201, the reference function provided the executive with a highly potent tool to advance its concerns about the law. For one thing, seeking a reference could effectively encourage a delay in the law's implementation. For another, it would grant the executive the critical advantage of setting the questions.[90] That could well make a difference if, for example, Cabinet asked the Court to advise on the law's general validity versus its potential intrusion into provincial jurisdiction over insurance.

At the time of writing, the federal Cabinet had not referred the matter to the Supreme Court. That may be, in part, because Quebec initiated its own reference about the Bill to its Court of Appeal.[91]

Had the federal government acted before Quebec did, some unusual questions would arise. Normally, the executive defends laws passed by the legislature

[85] *Debates of the House of Commons* 42nd Parl, 1st Sess, No 77, 20 September 2016 at 1810.

[86] Under s 91(27) of the Constitution Act 1867 Parliament has exclusive authority over 'the Criminal Law'.

[87] The vote was 222–60.

[88] Joan Bryden, 'Bill S-201: Government Seeking Supreme Court's Advice on Genetic Discrimination Bill', *Canadian Press*, 10 March 2017, www.huffingtonpost.ca/2017/03/10/bill-s201-supreme-court-advice_n_15283628.html.

[89] ibid.

[90] The advantage of setting reference questions is elaborated in Chapter 9.

[91] Order in Council of the Government of Quebec #522-2017, *Reference to the Court of Appeal of Quebec concerning the Genetic Non-Discrimination Act enacted by sections 1 to 7 of the Act to prohibit and prevent genetic discrimination* (7 July 2017).

from all attacks on their validity. One wonders whether the Minister of Justice would so do in this circumstance. It is arguable that a Minister who has good-faith, serious doubt as to a law's validity cannot defend it in court and should resign before doing so. It also is unclear that the government must defend every law passed by Parliament. Would it be proper, though, for the government, to actively argue *against* validity? Although there is no obvious legal barrier to it doing so, such a move would highlight the division between the executive and legislative branches in an unprecedented way. It might in fact, be highly relevant that such a rift would occur in the context of an advisory opinion as opposed to a live case.

Could some of the issues discussed above be mitigated? Perhaps one could lessen the degree of executive control by permitting the legislature to decide that a reference (that is more expansive than the current section 54) ought to proceed. The House of Commons or Senate might be authorised to initiate a proceeding on a majority resolution of members.[92] Or, such a power could fall to either a standing committee of Parliament or an independent parliamentary officer. Perhaps, as occurs in France, a reference could be triggered if a certain number of parliamentarians petitioned the Court after passage of a Bill to ensure its validity prior to its coming into force.[93] One could even simply ensure a method for providing for legislative input into reference questions or hearings, such as granting automatic intervenor status to the Senate or House of Commons.

To be sure, such changes would pose issues. They would add time to the legislative process. A government might regard a legislative reference launched in defiance of its wishes as a confidence matter. Preventing a new law from taking effect where the old one has been found unconstitutional could create a legislative vacuum. A reference also could delay other matters within the machinery of government – such as regulations.

An expanded function might also make more sense if Parliament were able to maintain independent carriage of the subsequent litigation – currently, such litigation is undertaken by government lawyers subject to the direction of the Minister of Justice (in her executive rather than legislative capacity). A litigation guardian could be appointed by the Court or managed by a parliamentary actor. Nonetheless, in a parliamentary system, there may well be limits to the degree of legislative independence that is feasible.[94]

Such operational constraints aside, expanded parliamentary references might exacerbate the existing difficulties in determining legislative intent. A Bill's sponsor might have had a different vision in mind than her colleagues and all of them might be opposed to the government. In references requiring some investigation of legislative intent (as many constitutional questions do) a court

[92] One could extend this to the Senate.

[93] Constitutional Revision 1974. See the discussion in Alec Stone, 'In the Shadow of the Constitutional Council: The "Juridicisation" of the Legislative Process in France' (1989) 12(2) West European Politics 12.

[94] I am grateful to Aniz Alani and Charles Feldman for their very helpful discussion of this issue.

may face a difficult situation if it has before it, say, Senate and House sponsors who present different explanations for a law; or who depart from interventions they made in their respective chambers, interventions that might otherwise be relied upon.

A more general complication, which cannot be further explored here, is whether such attempts at reform could be enacted through ordinary legislation. That is because of the uncertain implications of the 2014 *Supreme Court Act Reference* with respect to any changes to that Act, or to the Court's functions.[95]

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This chapter has focussed on the Canadian experience with the separation of powers. In other systems, the balance of factors will be different, as will the corresponding issues. In countries with specialist constitutional courts, to cite one example, it is common for 'ordinary', non-constitutional courts to be able to refer constitutional questions.[96]

As discussed in Chapter 1, the separation of powers is an important Canadian principle despite the country's adherence to Parliamentary democracy and to the conventions of responsible government. The idea that the separation of powers has no application in Canada does not hold given the specific features of the Canadian Constitution that assume in at least some respects a separation of government functions. In addition, the Supreme Court has repeatedly confirmed that the doctrine has non-trivial significance. This chapter has highlighted possible separation of powers implications of an advisory opinion function. It does not argue that these issues are symmetrical. The effect on the judiciary of an advisory opinion is different from the relationship that it may promote between the explicitly political branches. Nor do I mean to suggest that the issues described above are somehow fatal indictments of the advisory function.

Nonetheless, the Canadian experience shows how references can present challenges to inter-branch relationships. It is noteworthy that the Supreme Court has engaged in 'self-help' – relying on separation of powers principles to mitigate the most extreme of those challenges. Where those challenges relate to the tension that emerges between the executive and legislative branches, however, there are few obvious escape routes if an executive actor is determined to press its advantage.

[95] See n 46 above.

[96] Spain and Italy employ this type of reference: Tania Groppi, 'The Italian Constitutional Court: Towards a Multilevel System of Constitutional Review' (2008) 3 Journal of Comparative Law 100.