

Article

A Question They Can't Refuse? The Canadian Reference Power and Refusing to Answer Reference Questions

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Abstract

The Canadian reference power allows a government to ask courts for advice on any issue it deems important. Despite having no formal authority to do so, courts occasionally refuse to answer reference questions submitted by governments, as was done by the Supreme Court in the *Same-Sex Marriage Reference*. The government's vast reference power raises questions for the separation of powers and judicial independence. Through a discussion of justiciability and the place of the Canadian reference power within the separation of powers, this article examines instances where courts have refused to answer reference questions and their reasons for doing so.

Résumé:

Au Canada, le pouvoir de renvoi permet à un gouvernement de demander conseil à un tribunal sur toute question qu'il juge importante. Bien qu'ils n'y soient pas officiellement autorisés, les tribunaux refusent parfois de répondre aux renvois soumis par les gouvernements, comme l'a fait la Cour suprême dans le *Renvoi Relatif au Mariage Entre Personnes du Même Sexe*. Le vaste pouvoir de renvoi du gouvernement soulève des questions de séparation des pouvoirs et d'indépendance judiciaire. À travers une discussion sur la justiciabilité et la place du pouvoir de renvoi dans la séparation des pouvoirs au Canada, cet article examine les cas où les tribunaux ont refusé de répondre aux questions de renvoi et leurs raisons de le faire.

Keywords: reference power, separation of powers, justiciability, judicial independence

Mots-clés: pouvoir de renvoi, séparation des pouvoirs, justiciabilité, indépendance de la magistrature

Introduction

In the *Patriation Reference* (1981)¹ the Supreme Court of Canada was asked to address a series of questions regarding the federal government's plan to unilaterally amend the Constitution against the wishes of several provinces. Prior to the reference, constitutional negotiations between the federal government and the provinces had reached an impasse and it appeared that the effort spent on obtaining an amending formula were for naught (Mandel 1994; Russell 2011). Rather than address the issues that led to the stalemate, Prime Minister Trudeau attempted to avoid the provinces all together and unilaterally amend the constitution. In response, three provinces submitted reference questions that concerned the legality of this unilateralism to their courts of appeal. The *Patriation Reference* was a culmination of provincial reference cases from the appellate courts of Manitoba, Newfoundland, and Quebec. The provinces asked the Supreme Court if there was a constitutional convention that required provincial agreement for constitutional amendment.² This question is noteworthy as constitutional conventions are (usually) not

justiciable, therefore they are outside the scope of the courts' analysis and enforcement powers (Mandel 1994; Heard 2014). After briefly considering the political nature of this question, and the arguments against the answering the question, the Supreme Court explained (quoting the Manitoba Court of Appeal) that the question is "at least in part, constitutional in character. It therefore calls for an answer, and I propose to answer it" (*Patriation Reference* 1981, 103). In answering the question, the Court found that provincial consent for constitutional amendment was conventionally, but not legally, required. The decision to answer a question that required the interpretation of constitutional conventions was subject to a great deal of criticism. However, this criticism is less focused on the answer the Court provided and is more concentrated on the fact the Court entertained the question in the first place (Mathen 2011; Dodek 2011). For some legal commentators, the Court's action strayed too far from the law and too much into the realm of politics (Mandel 1994; Forsey 1984; McWhinney 1982; Russell 1982).

The Supreme Court's response to the convention question in the *Patriation Reference* is in sharp contrast with the Court's response to Question 4 in the *Same-Sex Marriage Reference* (2004). In the *Same-Sex Marriage Reference* it was argued that the subject matter – the legalization of same-sex marriage – was too political and not justiciable, similar to the concerns that arose in relation to the *Patriation Reference*. One area of particular concern was Question 4, which asked:

Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law – Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?
(*Same-Sex Marriage* 2004, 3)

Essentially, this question asks if a heterosexual definition of marriage violates the *Charter*. After considering this question, the Supreme Court refused to answer. The Court explained that it held the discretion to refuse questions that are 'inappropriate' or prevent a 'complete or accurate answer' (*Same-Sex Marriage* 2004, 10).

Like the *Patriation Reference* episode, the circumstances surrounding the *Same-Sex Marriage Reference* were highly contentious and political, and the Supreme Court's response (or lack of response) in both cases was subject to a great deal of criticism. In *Patriation*, the Court is condemned *for answering* a question regarding conventions, and in *Same-Sex Marriage*, the Court is similarly skewered for *failing to answer* Question 4 (for example: McEvoy 2005; Huscroft 2006; Forsey 1984; McWhinney 1982; Russell 1982). A great deal of scholarship has been devoted to questioning the Supreme Court's willingness to answer questions in the *Patriation Reference* and the Court's refusal to answer in the *Same-Sex Marriage Reference*. However, all of the commentary on the Supreme Court's answers and non-answers exists in an empirical void. In making these arguments, commentators do not examine how many times courts have refused to answer reference questions, the reasons for refusal, and what this means for the role of the courts vis-à-vis parliament and the executive.

When examined through the separation of powers – that is the division of authority between the executive, legislative and judicial branches – the ability of the executive to ask for judicial advice through the reference power presents several difficulties. First, providing advice to the executive requires the judiciary to step outside its routine function of

adjudicating disputes. Reference cases do not contain a dispute that requires adjudication, instead references are advisory opinions provided by the court to the executive. Second, unlike routine cases heard by appellate courts, there is no leave process for reference questions and formally the courts do not have the authority to exercise discretion in deciding to hear reference cases. This second issue gives rise to the third. Although they do not have the statutory authority to do so, courts have asserted the ability to refuse to answer reference questions, thereby creating a self-imposed, but informal, limit on the reference power. The refusal to answer reference questions because the court deems them as inappropriate or not ripe for judicial determination highlights the courts' desire to preserve the separation of the judiciary from the partisan branches of government and to protect judicial independence.

This article takes up these issues through an empirical analysis of when courts have refused to answer reference questions, by examining all Canadian references from provincial courts of appeal and the Supreme Court of Canada from 1949 to 2017 (a total of 97 cases), from an original dataset of appellate court reference cases. This article addresses the number of times courts have refused to answer reference questions and their reasons for doing so. I find that most often courts refuse to answer reference questions for reasons that are non-controversial and demonstrate a desire on behalf of the court to maintain analytical coherence in its decision-making. This article makes three central contributions. First, it situates the reference power within the separation of powers theoretical framework. While scholars have assessed the proper role of the judiciary within the separation powers, the present analysis specifically addresses how the reference power as exercised by the executive and reference cases as decided by courts raises important questions for the place of the judiciary within the separation of powers. Second, this article contributes to the reference power literature by examining and classifying all the instances in which courts have refused to answer reference questions. This work makes an empirical contribution to a debate that has either been entirely normative in nature or has focused exclusively on high-profile instances where courts have refused to answer reference questions. Finally, this article reexamines the role of the courts in refusing to answer reference questions in light of the empirical evidence and situates these findings within a discussion of the role of justiciability for reference cases.

This article begins by defining the nature and scope of the Canadian reference power. Next, the article provides an overview of the separation of powers between the legislative, executive and judicial branch in Canada and examines the place of the reference power within this framework. The article then proceeds with an analysis of when courts do not answer all the questions submitted in a reference case and examines the conditions under which courts refuse to answer reference questions. Finally, the article considers the implications of courts refusing to answer given a lack of statutory basis for such refusals, and with respect to judicial independence and the separation of powers.

The Canadian Reference Power

The reference power allows the executive branch (Cabinet) of both provincial and federal governments to seek an advisory opinion from the Supreme Court of Canada or a provincial court of appeal, in the absence of a live dispute. There are few formal restrictions on the reference power and governments can submit reference questions regarding the constitutionality or legality of legislation that is either enacted or merely proposed. Because

governments are not limited by a live dispute, reference cases can concern abstract or hypothetical questions which can require the courts engage in a role that strays from the traditional adversarial nature of Canadian courts. The *Supreme Court Act* (s. 53 RSC 1985, c S-26) allows the federal government to submit questions directly to the Supreme Court of Canada, while provincial governments rely on similar provisions within provincial judicature statutes to submit questions to provincial appellate courts.³

Not only does the reference power allow governments to circumvent the normal litigation route to the Supreme Court and provincial appellate courts, reference questions are not limited by the rules of justiciability. Justiciability is a legal doctrine that defines the appropriate boundaries of judicial review (Kennedy and Sossin 2017). Matters that are justiciable conform to the “judge-made rules, norms and principles” that set out what is appropriate for judicial consideration (Sossin 2012, 7). Applying the boundaries of justiciability, courts will generally refuse to hear matters that do not contain a legal dispute – matters that either not yet “ripe” or have been settled (and are therefore moot). Importantly, matters that are deemed not-justiciable are often better suited to other forums which often include the legislative or executive branches of government.

The Place of the Reference Power in the Separation of Powers

The division of powers and responsibilities between branches of government – executive, legislative, and judicial – has long been a focus of constitutionalism, and the study of law and politics. A key focus has been the value in having power dispersed through different institutions, with the goal of limiting the concentration of power within a single branch of government to promote checks and balances, and ultimately accountability (Kavanagh 2016; Baker 2010). A total or pure separation of powers requires that each branch of government confine itself to its proper function of legislating, adjudicating, or executing policy. It would also prohibit each branch from infringing on the functions of the other branches (Vile 1967). A pure separation of powers is not practical or sustainable for governance because from time-to-time each branch will engage in functions that parallel the responsibilities of another branch. For example, courts routinely modify the law through interpretation and application to live disputes (Kavanagh 2016, 225). Instead some intermingling of functions between branches is not only expected, it is sometimes welcomed (Baker 2010, 11).

This mixing of powers across branches, sometimes referred to as partial agency, promotes checks and balances, which are often considered essential for the functioning of liberal democracy (Baker 2010, 55). When each branch holds the ability enforce the limits of the constitution to another branch, it helps ensure that one branch does not overpower another, ultimately safeguarding the separation of powers (Kavanagh 2016; Baker 2019). Importantly, the constitutional status of each branch is not undermined when another branch interferes with its power, provided that this interference is not a usurpation of power, but instead remains only partial (Baker 2019). In such a system, the efforts at limiting the concentration of power in one branch (the checks and balances) are paired with a division of labour, meaning each branch fulfills separate responsibilities to ensure the functioning of government (Kavanagh 2016, 234). Because this system only provides for partial separation, there are opportunities for coordinated action between branches. For example, legislatures that create policy with attention to the possible impacts on the constitutionally protected rights of individuals and the possibility that such legislation may

be subject to future judicial review, are not infringing on the jurisdiction of the judiciary. Such a system demonstrates “the deeper value of coordinated institutional effort between branches of government in the service of good government” (Kavanagh 2016, 235).

Though the American system is often considered the ideal-type separation of powers framework, the Westminster (and Canadian) system does demonstrate some elements or “less-than-strict” separation between institutions of government (Baker 2019, 412). Because the executive is drawn from the legislature, some are quick to dismiss the existence of a separation of powers framework in the Canadian context. This dismissal may be premature for two reasons. The first is that even though the executive is drawn from the legislature, on occasion the legislature may reject initiatives emanating from the executive (Baker 2019). Denials from the legislature are a very real challenge for governments that hold a minority of seats in the legislature and a possibility (albeit a rare one) in a majority government context (Baker 2019). The second reason the Canadian system demonstrates a separation of powers, with partial agency, is that strict separation is often imposed between the executive/legislature (the more partisan branches) and the judiciary by the means of judicial independence (Sossin 2006; Sossin 2012; Baker 2019). Scholars working within this framework focus on the concerns raised by judicial power (or judicial supremacy) since the adoption of the *Constitution Act, 1982*, which included the *Charter of Rights and Freedoms*. The concerns regarding judicial power speaks to what is known as the counter-majoritarian difficulty – when the courts invalidate or overturn the duly enacted policies of democratically-elected governments (Bickel 1962; Graber 1993). Scholars confronting the counter-majoritarian difficulty in the Canadian context have focused on how to navigate the supremacy afforded to judicial interpretation and its relationship to the executive and legislative branches. This relationship has been framed in two ways: as a dialogue, with the judiciary taking primacy in constitutional interpretation (Hogg and Bushell 1997; Hogg, Thornton, and Wright 2007; Roach 2001), and as a coordinate relationship, where the executive, legislative and judicial branches are empowered and obligated to engage in constitutional interpretation (Baker 2010; Manfredi 2001; Huscroft, 2009). Dialogue and coordinate theorists have been principally concerned with which institution (Parliament or courts, or both) holds the authority for constitutional interpretation, and this focus has prevented a thorough consideration of the Canadian reference power and its place within the separation of powers.⁴

Yet, the reference power and how courts respond to reference questions in practice demands greater attention and consideration from a separation of powers perspective. Greater attention to the reference power is warranted for three reasons. First, the extra-judicial nature of reference cases. When a court addresses a reference question, it is asked to provide advice to the executive, requiring it to fulfill a function that is conceptually different from adjudicating disputes within an adversarial framework. Providing advice to a government by rendering a reference opinion a court takes on a legal, but extrajudicial, function (*Reference re Secession of Quebec* [1998] 2 SCR 217, at para 14). Indeed, providing legal advice to government in general, and Cabinet in particular, is the routine responsibility of the Attorney General, the chief legal advisor of the Government of Canada. The second issue arises from the origins of a reference case. References are not the product of a live dispute, instead a reference originates as a decision of the executive (and Cabinet in particular). It exists solely because a government has sought a reference opinion by submitting questions to a court. Importantly, because a reference case exists outside of an

adversarial context, there are essentially no limits on what governments can put to courts in a reference question.⁵ Finally, the third issue follows from the first. Because reference cases exist in a space that is extrajudicial, the limits routinely imposed by a court when it considers if a matter is justiciable are not present in the reference context. Even though courts do not have the authority to formally impose a doctrine of justiciability on reference cases, courts have refused to answer reference questions. When the refusal to answer reflects a court's concern of the appropriateness of the reference question in light of its position relative to the executive and/or legislature, it provides another example of partial agency within the Canadian separation of powers framework.

These issues surrounding the reference power with respect to the separation of powers has been addressed by courts in the past when reviewing challenges to the reference power. However, courts have only engaged in this analysis on two occasions: in *Reference re References* (1910 at the Supreme Court of Canada and 1912 at the Judicial Committee of the Privy Council⁶) and in *Reference re Secession of Quebec* (1998). In *re References*, Supreme Court Chief Justice Fitzpatrick recognized that in providing advisory opinions in a reference, a court was engaging in a role, albeit a legal role, that would ordinarily be fulfilled by Cabinet. This incursion into the routine role of Cabinet was not problematic for Fitzpatrick because, as he characterizes it, the court is providing advice and not making binding decisions. All of the justices that heard this case agreed with the conclusions of the Chief Justice regarding the extrajudicial nature of references. However, the acceptance of the reference power by the majority in *Reference Re References* (1910) is contingent on the fact that a reference opinion is advisory only. Regardless of how closely reference proceedings mirror routine litigation, the fact that reference decisions are advisory makes them markedly different from all other decisions rendered by appellate courts. For the Court, any potential problems that arise from the extrajudicial function of references are mitigated by the fact that reference opinions are simply advice and do not bind or dictate executive action.

Dissenting in *re References*, Justice Idington expresses concern that references might erode the separation of the legislative, executive, and judicial functions of government. For Justice Idington, this issue is not resolved by references being an advisory-only. He explains, "if we degrade this court by imposing upon it duties that cannot be held judicial but merely advisory and especially in the wholesale way submitted herein, we destroy a fundamental principle of our government" (*Re References* 1910, 29). Justice Idington is concerned that the reference power imposes a duty that is outside the realm of judicial jurisdiction, requiring that courts fulfill a duty of the executive and legislative branches. For Justice Idington, this imposition is a violation of the independence of the judiciary from the partisan branches of government. Unfortunately for Justice Idington, no other justice in this case shared his concern for the separation of powers and the threat posed by the extrajudicial function in reference cases. In *Reference re References*, the Supreme Court declared the reference power constitutional.

On appeal to the Judicial Committee of the Privy Council (JCPC) the Supreme Court's finding that the reference power is a valid exercise of the jurisdiction of the Parliament of Canada was upheld. The JCPC's reasoning relies on the same arguments as the Supreme Court: because references are advisory, they do not bind the executive nor future courts. As a result, the JCPC finds that references do not pose a threat to the independence of the judiciary and the separation of powers. The JCPC concludes its decision with the caveat that "mischief and inconvenience...might arise from an indiscriminate and injudicious use of the

Act,” but left the policing of the boundaries of the proper use of the reference power to the Canadian courts (*Re References* 1912, 16).

In the *Secession Reference* (1998), the Supreme Court was asked to revisit the constitutionality of the reference power. Given the difference of time and change in stature of the Court from *Re References*, it was possible that the Court would reach a different conclusion on the legality of the reference power. Indeed, in *Re References* the Supreme Court was not concerned that providing advice through a reference case could make the courts subservient to the executive. This position arguably reflects that the court (and its members) were not afforded the same authority and legitimacy associated with the Supreme Court in the latter half of the 20th century⁷ (Snell and Vaughan 1985, 178). One might expect that a post-*Charter of Rights and Freedoms* Supreme Court might be willing to flex its institutional authority and push back against the requirement that it provide advice to the executive through the reference power. The amicus curiae appointed to represent the interests of Quebec in the *Secession Reference* argued that the Supreme Court’s role had greatly changed since it had last ruled that the reference power was valid, and that the reference power or the ability to render advisory opinions was not expressly provided for in the constitution, and therefore should be prohibited to maintain a separation of powers (*re Secession of Quebec* 1998, paras 6-12). The amicus curiae also argued that the reference power confers original jurisdiction on the Supreme Court and that this is inappropriate concerning the Court’s core constitutional function to serve as a general appellate body (via section 101 of the *Constitution Act, 1867*).

The Supreme Court dismissed both arguments explaining that there was nothing to bar a court from exercising other legal duties aside from its routine judicial function (*Secession Reference* 1998, paras 10-15). The Court noted that the Canadian Constitution does not preclude courts from engaging in actions that are outside their traditional adjudicative role. In regards to the concerns regarding original jurisdiction, the Court explained that the “general court of appeal,” as defined in section 101, is not a restrictive definition, and that it is legitimate for the Court to occasionally undertake responsibilities that are outside of its jurisdiction as an appellate court (*Secession Reference* 1998, para 9). In reaching this conclusion, the Court noted that appellate courts in other jurisdictions, like the English Court of Appeal and the U.S. Supreme Court, have the authority to exercise original jurisdiction and, “that there is nothing inherently self-contradictory about an appellate court exercising original jurisdiction on an exceptional basis” (*Secession Reference* 1998, para 10).⁸ On the question of the legitimacy of the reference power, the Supreme Court concluded that because the Canadian Constitution does not provide a strict separation of powers, it is appropriate for the Court to advise the government through reference cases even if it blurs the boundaries between the legislature and the judiciary (*Secession Reference* 1998, para 15). Indeed, unlike the American Constitution which restricts the jurisdiction of the U.S. Supreme Court to “cases” or “controversies” (via art. III, sec. 2) the Canadian Constitution does not contain a similar restrictive clause.

In the *Secession Reference*, the Supreme Court does not rely on the same “advisory only” reasoning as in the earlier challenges to the reference power. It is possible that the Supreme Court avoided relying on the formally non-binding nature of the reference power because reference decisions have become advisory in name alone. There are no documented examples of a government flagrantly ignoring the findings of a reference case. Even in instances where the courts serve as a roadblock to the actions of a government, governments

generally abide by the findings in the reference case. For example, in 2014 the Supreme Court found that the federal government's plans to reform the Senate, without provincial participation and constitutional amendment, to be invalid (*Reference re Reform of the Senate* 2014). The Harper government complied with the Court's decision that unilateral reform was unconstitutional and did not pursue further Senate reform, regardless that Senate reform was a long-standing political promise of the Conservative Party of Canada that can be traced back to its Reform Party roots. If one were to follow the logic implied by the early decisions affirming the reference power, the Harper Cabinet could have simply disregarded the Supreme Court's advice and proceeded with the reform measures. Furthermore, as Hausegger et al. (2015) and Puddister (2019) note, reference cases are cited like any other legal precedent; they are not distinguished as merely advice. The informally binding nature of reference cases speaks to the institutional relationship between the judiciary and the executive/legislative branches, and it presents unique implications for judicial independence.

The reference question procedure raises concerns for judicial independence for two central reasons. The first is that in submitting a reference question to an appellate court, the executive can circumvent the traditional barriers to judicial review (such as the requirements of a live case or controversy) and obtain direct access to an appellate court (Russell 1987; Strayer 1988; Hogg 2010). This serves to complicate or more pessimistically, weaken, the separation of the judicial branch from the political executive branch of government (Baker 2010). This tension between judicial independence and the reference power was addressed by the New Brunswick Court of Appeal in *Reference re Judicature Act (NB)*, s. 23 (1988). In this case, the Court of Appeal reviewed the reasoning behind the prohibition on reference cases from the Supreme Court of the United States and the High Court of Australia, explaining that in those jurisdictions advisory opinions are viewed as an affront to the separation of powers. Although the Court refused to implement such limitations on advisory opinions in Canada, they note that the Supreme Court has observed a separation of the judicial branch from other branches of government within the Canadian Constitution. The Court notes the tensions between reference cases and the separation of powers: "in performing the non-judicial function of rendering advisory opinions, the judiciary has been placed in the uncertain position of having to ascertain the boundary between rendering strict legal advice and straying into the realm of public policy" (*Reference re Judicature Act (NB)* 1988, 17). The Court maintains that judicial independence is of utmost importance in Canada, in both routine and reference cases, and judicial independence can be protected when a court determines if the legislative scheme is constitutionally permissible, not if it is legislatively prudent. The New Brunswick Court of Appeal demonstrates that courts understand the precarious position that the judiciary is in when delivering advisory opinions. However, this decision maintains that the courts are well positioned to assess if references veer into the territory of asking the courts for policy/political evaluation.

The second concern for judicial independence raised by the reference power is that once a question is submitted, courts have a duty to answer (Hogg 2010). This aspect of the reference power means that the courts cannot (in a plain reading of the acts) apply the doctrine of justiciability and exercise discretion in choosing to answer reference questions. This lack of discretion over accepting reference questions results in a scenario where the executive can oblige a court to provide advice. Indeed, as discussed above, some scholars argue that in a formalistic reading of the acts, an executive can re-submit reference questions

that go unanswered by courts, demanding a response. This particular interpretation of the reference power has clear implications for judicial independence. However, this second concern for judicial independence is further complicated in the fact that even though reference statutes do not provide an express ability to refuse to answer, courts have on occasion found it necessary to do so. In light of how the reference power operates in practice – with courts occasionally refusing to answer – in contrast to the statutory foundation for the reference power – which affords no discretion – it is important to understand the conditions under which courts refuse to answer. How courts explain the decision to refuse can raise issues related to the separation of powers.

Refusing to Answer: Empirical Evidence and Analysis

The tension between the reference power and the ability of the courts to refuse to answer reference questions has received some attention in previous scholarship. In his analysis of the reference power, Hogg (2010) focuses on general reasons as to why courts may refuse to answer reference questions. Hogg surmises that the courts have refused to answer questions in instances where the issue has become moot, the questions do not concern any real controversy of interpretation, the questions concern an issue that is not legal, or the court does not have enough information to formulate an opinion – although he provides no analysis of how often the courts use these reasons to refuse to answer (Hogg 2010, ch. 8, at 8-6). Hogg's hypothesized reasons for refusing to answer consider many of the same issues that a court's analysis of justiciability would review. Sossin explains that the assessment of justiciability must be done in tandem with three factors: "(1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court" (2012, 2). When granting leave to a case, a court bears the responsibility of ensuring the particular case (or questions) will not have serious negative consequences for its position within the Canadian institutional framework.

Other scholarship that addresses the refusal by courts to answer reference questions is case-specific, focusing on the most well-known instance of a court refusing to answer a reference question in the *Same-Sex Marriage Reference*. In responding to this case, legal scholars Huscroft (2006; 2010) and McEvoy (2005) do not accept the Supreme Court's reasoning for refusing to answer Question 4. Both scholars argue that the Court does not hold any discretion in deciding to answer reference questions. Huscroft is unconvinced by the Supreme Court's reasoning for its refusal in the *Same-Sex Marriage Reference*. Instead, he argues that it was a pragmatic and policy-based, rather than legal, consideration. If the Supreme Court were to answer the fourth question in the reference it would be the subject of intense criticism by either those who supported same-sex marriage or those who were opposed, depending on how the Court answered the question. In other words, in answering the final question, the Supreme Court would become a clear and easy target for the same-sex marriage controversy, arguably shielding parliamentarians from backlash.⁹ McEvoy on the other hand, does not truly engage with the Supreme Court's reasoning for refusing to answer in the *Same-Sex Marriage Reference*. Instead, relying on the statutory provisions within the *Supreme Court Act* that grant the reference power, McEvoy (2006) argues that the Supreme Court does not hold discretion to refuse to answer and in *Reference re Same-Sex Marriage*, the Supreme Court never effectively explains where it finds the power to refuse answer reference questions. While there has been scholarly debate over the capacity of courts to

refuse to answer reference questions, this scholarship has not empirically investigated the actual number of times courts refuse to answer reference questions and their reasons for doing so.

In the majority of references (81.4 percent) from 1949 to 2017, courts answered all the questions referred. Courts refused to answer all reference questions in 17.5 percent (17 cases).¹⁰ Across all reference cases from 1949 to 2017, an average of 3.33 questions per reference were submitted to the courts, with a response rate of 2.84 questions answered. This demonstrates that on several occasions (in 17 cases) courts have found it to be within their discretion to refuse to answer some of the questions posed to them in a reference case. I find that courts will refuse to answer reference questions for the following three reasons: (1) it is unnecessary to answer, (2) the court lacks information, or (3) the question is inappropriate or of a political nature.

Additional details on each category can be found below, however, it is important to note that cases are coded by a plain reading of the reasons provided by the court for refusing to answer. This analysis does not capture instances where courts provide ‘answers’ that do not actually or fully address the questions referred to the satisfaction of the parties involved. Nevertheless, verifying such responses (or refusals) would ultimately sacrifice the reliability of coding. Cases are coded by the individual question, as courts may refuse to answer more than one question per case and may refuse to answer each question for a different reason.

Table 1: Reasons for Refusing to Answer

Reason for Refusal	#	Case Names
Necessary	11	<i>Earth Future Lottery</i> (PEI) [2002] 215 DLR (4 th) 656; <i>Interpretation of Human Rights Act</i> [1998] 50 DLR (4 th) 647; <i>Constitution Act 1867, ss. 26, 27 and 28 (BC)</i> [1991] 78 DLR (4 th) 245; <i>Workers Compensation Act 1983 (NL)</i> [1989] 1 SCR 922; <i>Freedom of Informed Choice (Abortions) Act (SK)</i> [1985] 25 DLR (
Lack of Information	6	<i>Interpretation of Human Rights Act</i> [1998] 50 DLR (4 th) 647; <i>Goods and Services Tax</i> [1992] 2 SCR 858; <i>Public Service Employee Relations Act (AB)</i> [1987] 1 SCR 313; <i>Stony Plain Indian Reserve</i> [1981] A.J. No. 1007; <i>Legislative Authority of the Parliament of Canada in relation to the Upper House</i> [1980] 1 SCR 54; <i>MB (AG) v. Manitoba Egg and Poultry Association</i> [1971] SCR 689;
Inappropriate	2	<i>Same Sex Marriage</i> [2004] 3 SCR 698; <i>Constitution Act 1867, ss. 26, 27 and 28 (BC)</i> [1991] 78 DLR (4 th) 245

First, (and most often) a court will not answer a question because answers to previous questions asked in the same reference precluded it from answering additional questions. In this instance, the refusal to answer remaining questions referred is out of practicality rather than a clear rejection by the court. Second, a court may refuse to answer a question because it lacks the proper amount of information to provide a well-informed answer. Courts have

provided this reasoning for refusing to answer when either the questions are unclear, or the government has not provided enough related information or facts (if applicable) to permit clear judicial analysis. The final reason why courts have refused to answer reference cases is because the questions are deemed inappropriate or ask the court to work beyond its role of interpreting the law. This final category includes refusals to answer based on the overt political nature of the question. While the first two reasons are largely practical, the third reason relies more on the court's interpretation of its role and the proper divide between the judiciary and the partisan branches of government and the protection of judicial independence. Table 1 below details the breakdown of the three reasons for refusing to answer in cases where courts refused to answer one or more questions.

Unnecessary to Answer

Courts may refuse to answer reference questions simply because, based on the answers to previous questions in the same case, remaining questions may not warrant an answer. It is interesting to note that courts appear to answer reference questions in the order in which they are referred, which can have significant implications for the questions that courts refuse to answer. In reference cases that centre on the interpretation of a statute against the Constitution, the first question will ask if the entire act is *ultra/intra vires* a particular government's constitutional jurisdiction, and any remaining questions ask the courts to consider specific sections in isolation. This is a common use of the reference power: 70 percent of all reference cases from 1949 to 2017 concern the constitutional jurisdiction of governments (Puddister 2019, 80). This approach places the survival of the entire piece of legislation under scrutiny on the first question. The structuring of reference questions in such a manner impedes the court from providing specific guidance on the legality or constitutionality on the specific sections and restricts the court's assessment of the act in its entirety.

For example, in *Reference re Constitution Act 1867, ss.26, 27 and 28 (B.C.)* (1991) the Government of British Columbia challenged the legality of the appointment of additional senators by Prime Minister Mulroney through a series of five reference questions submitted to the British Columbia Court of Appeal. The first three questions, which the court answered, inquired if sections 26, 27, and 28 of the *Constitution Act 1867* (the provisions the federal government relied upon to appoint additional senators) were still operative. Since the Court of Appeal found that these sections were indeed still valid and operative law, it did not need to answer questions four and five that were premised on an interpretation that the aforementioned sections were inoperative. In a similar manner, the Saskatchewan Court of Appeal refused to answer a second question in *Reference re: Freedom of Informed Choice (Abortions) Act* (1985), because it would be "purely academic" due to its answering in the previous question that the act in question was *ultra vires* provincial jurisdiction. Denials in these cases are a reflection of circumstance rather than an assertion of power.

Lack of Information

Courts have also refused to answer reference questions because the questions are too abstract or hypothetical. Cases that fall into this category are illustrative of the pitfalls of adjudication of abstract issues. Courts have found in some instances, that without facts or context of a concrete dispute, categorical answers to reference questions are difficult or

would require too much speculation and conjecture in its decision. For example, in *Reference re Goods and Services Tax* (1992), the Supreme Court refused to answer Question 6 referred to it on appeal from the Court of Appeal for Alberta. The refusal was due to the fact that it was “a hypothetical question which cannot be answered with any assurance of correctness” (*Reference re Goods and Services Tax* 1992, 71). Question 6 in the *Goods and Services Tax Reference*, was a complex, yet vague, four-part question regarding the compatibility of sections 125 and 126 of the *Constitution Act, 1867* (exception of public lands from taxation) with hypothetical and unspecified provincial institutions.¹² Instead of admonishing the Government of Alberta for posing such a question, the Court simply stated that it was “entitled to exercise its judgment on whether it should answer referred questions if it concludes that they do not exhibit sufficient precision to permit cogent answers” (*Reference re Goods and Services Tax* 1992, 71). It is important to note that in making this assertion, the Court supports its refusal by citing other instances in which it refused to answer questions on similar grounds – it does not provide any statutory basis for this power of denial. It does not appear that the Alberta Government channeled the theory of Huscroft (2006) and McEvoy (2005) and simply re-referred the unanswered question to the court. A government’s failure to challenge the court’s decisions to refuse questions may help to further the court’s inclination to believe it is within their prerogative to refuse such questions.

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

...the court has discretion to give qualified answers to, or to decline to answer, the reference questions if the record does not permit a definitive response...The very limited factual basis for the reference impedes the Court in making definitive pronouncements about the issues raised to the point of putting the utility of the reference process in question. (*Reference re Broome v. Prince Edward Island* 2010, 6-7).

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

While courts have refused to answer questions in several instances due to a lack of information, this problem does not always prevent courts from answering reference questions. In *Re Court of Unified Criminal Jurisdiction* (1983), the Supreme Court notes that the questions before it “suffer from excessive abstractness,” yet the Court still answered the questions in this case (1983, 2). In this reference, the Government of New Brunswick referred three questions that asked the Court to consider the constitutionality of creating a unified criminal court in the province. The Government of New Brunswick did not submit draft legislation with the reference, nor was there any explanatory material provided. This lack of factual aids to assist in its decision caused the Supreme Court to explain its discretion to refuse reference questions “...[that] do not exhibit sufficient precision to permit cogent answers...irrespective of the fact that the reference power is couched in broad terms” (*Re*

Court of Unified Criminal Jurisdiction 1983, 2). The Supreme Court defended this reasoning through an examination of other instances in which courts have refused to answer reference questions due to the fact that the questions lacked 'specificity.' Although the Supreme Court criticized the questions referred by the New Brunswick Government for being raised on "extremely flimsy material," the Court explained that it will not abort the questions referred in this case, as the "Court has enough of the essential features of the proposed scheme" to permit judicial analysis (*Re Court of Unified Criminal Jurisdiction* 1983, 7). Thus, while the Court did answer the questions referred in this reference, the Court's analysis provided a compelling argument for the necessity for judicial discretion in answering reference cases relying on past examples where courts have refused to answer.

Appropriateness and Political Refusals

The last type of refusal involves cases where the courts consider whether the reference questions submitted are appropriate for judicial consideration. This type of refusal involves the analysis of the place of the judiciary within the constitutional framework and a sensitivity to the possibility that the independence of the judiciary could be compromised if a court entertains questions that are overtly political and should be decided by elected legislators. While arguably all decisions by high courts can be viewed as political in some sense, as they often serve to supervise and impact the actions of political actors, courts are highly sensitive to a separation between questions of law and questions of politics (see Sossin 2012).

As discussed above, in the *Secession Reference* (1998) the Supreme Court was presented with arguments that claimed that the issues before the Court were of a political nature and therefore non-justiciable. This argument provided the Court an opportunity to explain the instances where it holds the power to refuse to answer reference questions. The Court provided two reasons why it might refuse to answer questions. First, if the reference questions required the courts to engage in a role that was "beyond its own assessment of its proper role in the constitutional framework of our democratic form of government" (*Secession Reference* 1988, 26). Second, if the questions posed to the court fall outside the court's expertise: the interpretation of law broadly construed. In this case, the Supreme Court concluded that it was acceptable for it to answer the questions referred in the *Secession Reference*.

This focus on appropriateness of the question referred was echoed in *Reference re Canada Assistance Plan* (1991), an appeal from the B.C. Court of Appeal. In a more deferential decision, the Supreme Court noted that, after assessing the B.C. Constitutional Questions Act, the Lieutenant Governor General has the power to ask *any* question of the court, and that the Court has the duty to attempt to answer the questions, as long as the questions are justiciable, regardless of whether the questions are confusing and unclear (*Reference re Canada Assistance Plan* 1991, 54). In this case, the Court considers the possibility that some reference questions could involve courts in the legislative process and/or a political controversy. The Supreme Court explains, "in considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch" (*Reference re Canada Assistance Plan* 1991, 26).

The reference process is much timelier compared to routine litigation. Indeed, a government can submit a question and obtain a decision from an appellate court or the

Supreme Court in a matter of months.¹³ The relatively quick process largely eliminates the possibility that controversies could be declared moot before the reference is heard. However, even with the quick response time in a reference case, the Supreme Court has considered and addressed its discretion over ‘mootness refusals.’ In *Reference re: Objection by Quebec to A Resolution to Amend the Constitution (Quebec Veto)* (1982), the Supreme Court explained that courts hold the discretion to refuse to answer reference questions where the issue before them has been rendered moot or the legal controversy no longer exists. The *Quebec Veto Reference* asked the Supreme Court if the Province of Quebec had a constitutionally protected veto over constitutional amendment. This particular dispute arose out of the *Canada Act, 1982*, which effectively became the *Constitution Act, 1982*, which was promulgated without the signature of Quebec. However, when the *Quebec Veto Reference* reached the Supreme Court, the Act had already been adopted and come into force, and therefore made the question of a Quebec veto moot (a fact conceded by the Supreme Court). While the Court maintained that it held discretion to refuse reference questions that were moot, in this particular case, the constitutional controversy was of great importance and deserved an answer. Furthermore, the Quebec Court of Appeal had already rendered an opinion on the *Quebec Veto Reference* (prior to the adoption of the *Canada Act*) and the Supreme Court explained that it was duty bound to review this constitutionally important case.

Regardless of whether legal statute permits courts to refuse to answer reference questions, both provincial appellate courts and the Supreme Court of Canada have done so in 17 cases from 1949 to 2017. The reasons for refusal range from the least controversial, practical reasons to the most controversial reason that the question is too political and would be inappropriate for a court to answer. Importantly, the Supreme Court’s refusal to answer Question 4 in the *Same Sex Marriage Reference* is an outlier and generally not indicative of the majority of reasons why courts refuse to answer reference questions. Indeed, this analysis has demonstrated it is only one of two instances where courts have refused to answer the grounds that the question is inappropriate. Yet, it is the *Same Sex Marriage Reference* that consumes the scholarship on the ability of courts to refuse to answer reference questions and this focus provides us little understanding of reference question refusal in general. Instead of focusing on this single case, the present analysis has examined how this case compares to all other reference question refusals by courts over time, demonstrating that the overwhelming concern with the *Same Sex Marriage Reference* refusal ignores that this case is an anomaly and that courts do routinely comply with the request to answer reference questions.

Discussion and Conclusion: The Power to Refuse

The reference power provides the executive the ability to obtain a judicial opinion on virtually any matter it wishes, bypassing normal routes to litigation. This power, coupled with a lack of leave process, creates a situation where a court has little control over what issues will come before it in a reference case. The empirical analysis above details that courts routinely answer all the reference questions submitted and refusals to answer are a rare occurrence. To be sure, this lack of regularity to refuse should not be considered unimportant. On the contrary, considering there is no statutory basis for the courts to refuse to answer, doing so demonstrates as Mathen explains, “a considerable assertion of juridical

power” (2019, 65). Because this assumption of discretion to refuse to answer is not founded in the reference granting statutes, it necessarily raises questions for the separation of powers.

When responding to reference questions, courts are asked to engage in the extrajudicial role of providing advice directly to the executive. As a result, references are understood to occupy territory that, although exercised by the judicial branch, is conceptually different from all other functions of the judicial branch. The distinction between activities that are considered ‘routine’ for courts, specifically the adjudication of live disputes and references cases, relies on the formal advisory nature of references. However, the de-facto binding nature of reference cases and the lack of distinction made in Canadian jurisprudence between reference opinions and other judicial decisions renders this distinction essentially meaningless. Mathen refers to this as the core tension of the reference power: the “tension [that] arises from the asymmetry between references’ formal and practical status” (2019, 180). Formally, a reference is distinguished from the routine role of appellate courts because a reference question simply asks the court to provide advice, and this advice does not bind the executive, nor does it formally adjudicate a dispute (Mathen 2019, 180; Puddister 2019, 211). Yet, in practice, a reference is not distinguished from other judicial decisions. An opinion provided in a reference is respected and viewed as legitimate by governments, other courts, and interested parties. In essence, references for all intents and purposes are treated like other ‘routine’ jurisprudence, but at the same time, the courts are prohibited from exercising essential gatekeeping functions aimed at protecting independence and separation from the executive.

The lack of formal limits on the types of questions that can be put to courts in a reference case paired with the indistinguishability between reference opinions and all other judicial decisions in practice, creates the space for courts to assert the authority to refuse to answer reference questions. In routine cases where the constraints of justiciability are applied courts seek to protect judicial independence and while also providing a check on the executive and legislature. For example, in imposing a political questions doctrine, we entrust courts to decide if an issue that is seeking adjudication contains a legal, rather than purely political, dispute and refuse to hear cases that do not meet this threshold (Sossin 2012, 162; Baker 2019, 407). In such cases, the judiciary’s refusal to decide political questions respects a separation of powers because it is a limit that is self-imposed by the judiciary itself (Baker 2019, 407). Therefore, the judiciary’s self-created power to refuse to answer reference questions can be seen in the same light – a self-imposed limit on its authority with the ultimate goal of attempting to maintain a separation from the more partisan branches of government.

That being said, in the absence of statutory authority, the courts have not articulated a robust set of guiding principles that apply to reference questions to assess their appropriateness for judicial advice. Instead observers are left with instances where reference questions that appear to contain the requirements to be answered by a court go unanswered, like Question 4 in the *Same-Sex Marriage Reference* (McEvoy 2005; Huscroft 2006). At the same time, there are other instances as in the *Patriation Reference* where many believed that in answering the questions put to the court, the Supreme Court was overstepping its role by discussing matters that are unusually considered purely political (Mathen 2011; Dodek 2011; Mandel 1994; Forsey 1984; McWhinney 1982; Russell 1982). When considering that judicial independence from the executive could be threatened by the

de-facto binding nature of references, a mechanism for protecting the separation of the courts would be to formally apply the parameters of justiciability to all reference cases, which could result in courts refusing to answer reference questions more often compared to what was found by the present study. Providing courts with the power to refuse to answer in reference cases would allow for the safeguarding of judicial independence while working within the current institutional framework for reference cases.

The threshold for leave in a reference case, and thus the agreement to answer a reference question, should be lower compared to routine cases, as standards relating to mootness would not apply to abstract review. Imposing a doctrine of mootness presents clear difficulties since this standard is concerned with instances where a dispute is no longer live and thus a judicial determination would have no real effect on the parties (Sossin 2012, 107). References that are based on abstract questions exist in the absence of a live controversy, rendering considerations of mootness irrelevant. Conversely, the requirement of ripeness could potentially limit some reference questions from materializing into reference cases, if courts decide that other venues (such as the legislature) are more appropriate to address issues raised by the reference questions. The doctrine of ripeness is focused on ensuring that courts address legal controversies and factual matters, rather than purely hypothetical matters (Sossin 2012, 33). When a court reviews ripeness, it does so with consideration of the constitutional separation of powers, the legitimacy of the judicial process, and the nature of the dispute, with the first factor possibly holding greater importance in reference cases compared to routine litigation. To be clear, a strict application of ripeness to reference cases would result in the elimination of virtually all abstract reference cases. Instead, a modified doctrine of ripeness could be adopted that requires references to be based on legislation that exists, at a minimum, in draft form. This requirement of a draft statutory framework would provide a more defined scope for the terms of the reference. In *Reference re Court of Unified Criminal Jurisdiction*, the Supreme Court criticized the New Brunswick government for failing to provide a legislative scheme that would help to guide the proposed unified criminal court in its analysis of the reference questions. The lack of materials supporting the reference led the Court to reflect on whether it should answer the questions posed in the reference. Although the Supreme Court went on to answer the questions, there is a benefit to the court pausing to reflect on the appropriateness of answering reference questions and on the greater implications for the policy-making process.

If courts were to consider some form of ripeness in deciding to grant leave to a reference case, this could help to ensure that a reference decision does not become a means of limiting emerging political or social debate. Indeed, if a court were to pronounce on a matter before political deliberation had taken place in the executive and legislature, it could serve to stave off political deliberation. Creating the minimum requirement of a draft bill for reference cases is merely one suggestion aimed at promoting careful reflection by the courts in reviewing the justiciability of reference questions. A more candid discussion of the appropriateness of the questions in all reference cases would ensure thoughtful reflection by the courts and greater transparency for observers.

It is the consideration of these factors (albeit informally) that has led courts to refuse to answer reference questions in the past, specifically in the *Same-Sex Marriage Reference* (2004) and *B.C. Senate Appointment Reference* (1991). If in practice reference cases are not functionally different from routine review, then courts should have some control over answering reference questions and the ability to refuse to answer questions that offend the

principles of justiciability. In order to maintain the intended purpose of the reference power, the requirements for the hearing or answering of reference questions should be interpreted in a liberal fashion and the refusals to hear a reference case or answer specific questions should be rare. However, in cases where the judicial independence or the proper functioning of the constitutional separation of powers could be threatened through a reference case, courts should maintain the discretion to refuse to answer such questions and partake in such reference cases. When considering the many factors that are external from legal considerations regarding a governmental program or legislative proposal that have influenced a government to ask a reference question — courts should maintain this mechanism of docket control. This control would ensure that courts do not become an outlet for the delegation of all difficult political questions through the reference power. The explicit and formal application of justiciability requirements to all questions submitted in reference cases could provide a valuable safety valve to protect against reference cases that could raise negative implications for judicial independence. The nature of the reference power creates greater potential for the involvement of the judiciary in public policy debates, as matters referred to the courts can concern specific legislation currently before the legislature. The combination of a close link between public policy and reference cases, paired with the lack of docket control, makes the assessment of justiciability reference cases of utmost importance. If the political branch has an unfettered power to refer questions to appellate courts, the courts must maintain discretion in choosing to answer reference questions.

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Notes

¹ Formally known as *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R. 753

² Question 2: “Is it a constitutional convention that the House of Commons and the Senate of Canada will not request Her Majesty the Queen...a measure to amend the Constitution of Canada affecting federal-provincial relationships or powers...without first obtaining the agreement of the provinces?” Question B: “Does the Canadian Constitution empower, whether by statute, convention or otherwise, the Senate and the House of Commons of Canada to cause the Canadian Constitution to be amended without the consent of the provinces...?” (Patriation Reference, at p. 9-10).

³ Provincial reference power legislation largely mirrors the federal power in the *Supreme Court Act*. Provincial governments may appeal “by right” to the Supreme Court of Canada after a reference decision has been rendered by a provincial court of appeal.

⁴ Baker (2010) briefly considers how reference cases challenge the separation between the legislative and judicial branch in his analysis of coordinate construction. Because reference decisions are non-binding and advisory only, Baker finds that they have “no direct formal effect” on lawmaking (93, 2010).

⁵ Carissima Mathen raises similar concerns in *Courts Without Cases: The Law and Politics of Advisory Opinions* (Hart Publishing, 2019), see chapter four.

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- ⁶ The Judicial Committee of the Privy Council (JCPC) was Canada’s final court of appeal until 1949. While the JCPC adjudicated disputes for Canada and other Commonwealth jurisdictions, it is not technically a court – rather it is committee of the British Privy Council and its members were drawn from the House of Lords, though some members are now judges from various Commonwealth countries, see Hausegger, Hennigar, and Riddell (2015, 385).
- ⁷ The Supreme Court’s modern era began in 1949 when appeals to the JCPC ended, making the Court the final court of appeal in Canada. At this time, the Supreme Court’s bench increased from seven to the current nine jurists, and the Court moved to its now current building. For more, see Snell and Vaughan (1985).
- ⁸ The Court’s comparison to the original jurisdiction of the United States Supreme Court is arguably tenuous because the American Constitution explicitly provides its Supreme Court with original jurisdiction (in art 3, s. 1, cl. 2), while the Canadian Constitution does not.
- ⁹ For more on the various legal and political strategies associated with the Same-Sex Marriage Reference, see: Hennigar, Matthew. “Reference Re Same-Sex Marriage: Making Sense of the Government’s Litigation Strategy.” In *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*, edited by James B. Kelly and Christopher P Manfredi, 209–30. (Vancouver: UBC Press, 2009).
- ¹⁰ Missing data = 1.1 % (1 case)
- ¹¹ In two cases, courts refused to answer different questions for different reasons resulting in two cases being counted twice. The PEI Court of Appeal provided both unnecessary to answer and lack of information reasoning for refusing to answer all the questions referred to it in *Interpretation of Human Rights Act* [1998] 50 DLR (4th) 647. Similarly, in *Constitution Act 1867, ss. 26, 27, and 28 (BC)* [1991] 78 DLR (4th) 245, the BC Court of Appeal did not answer all the questions referred to it for reasons that were both necessary and due to the inappropriateness of some of the questions referred.
- ¹² For example part (a) of Question 6 reads: “Having regard to ss. 125 and 126 of the Constitution Act, 1867, (a) is the purchase of taxable supplies by provincial authorities, or any of them, in the course of their exercising a delegated constitutional power of the Government of Alberta exempt from tax under the GST Act?” (*Goods and Services Tax Reference*, at para. 5)
- ¹³ For example, in *Reference re Supreme Court Act, ss. 5 and 6* [2014] 1 S.C.R. 433 (*Nadon Reference*), the Supreme Court returned a decision five months after reference questions were submitted via an order in council, from the governor in council (cabinet). The *Nadon Reference* is possibly one of the quickest reference cases, which is understandable considering the specific circumstances and that the Court was operating with less than a full bench. Comparatively, the Saskatchewan Court of Appeal reached a decision in *Reference re: Marriage Commissioners Appointed Under the Marriage Act, 1995, S.S. 1995, c. M-4.1* [2011] 327 D.L.R. (4th) 669, approximately seventeen months after the questions were first submitted by the Saskatchewan cabinet through an Order in Council.

References

- Baker, Dennis. 2010. *Not Quite Supreme: The Courts and coordinate Constitutional Interpretation* (McGill-Queen’s University Press).

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- . 2019. "A Feature, Not a Bug: A Coordinate Moment in Canadian Constitutionalism," in *Constitutional Dialogue: Rights, Democracy, and Institutions*, Geoffrey Sigalet, Grégoire Webber, and Rosalind Dixon eds. (Cambridge University Press), 397-420.
- Bickel, Alexander M. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill).
- Constitution Act, 1867*. (UK) 30 & 31 Vict, c 3.
- Constitution Act, 1982*. Schedule B to the Canada Act 1982 (UK), 1982, c 11.
- Dodek, Adam. 2011. "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*." *Supreme Court Law Review* 54: 117-142.
- Federal Courts Act* R.S.C. 1985, c. F-7.
- Forsey, Eugene. 1984. "The Courts and the Conventions of the Constitution." *University of New Brunswick Law Journal* 11-42.
- Graber, Mark A. 1993. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development* 7, (01) (March): 35-73.
- Hausegger, Lori, Troy Q. Riddell, and Matthew A. Hennigar. 2015. *Canadian Courts: Law, Politics, and Process* (Don Mills: Oxford University Press Canada).
- Heard, Andrew. 2014. *Canadian Constitutional Conventions: The Marriage of Law and Politics*. 2nd ed. (Oxford: Oxford University Press).
- Hogg, Peter W. 2010. *Constitutional Law of Canada* (Toronto: Carswell).
- Hogg, Peter W. and Allison A. Bushell. 1997. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)." *Osgoode Hall Law Journal* 35: 75-124.
- Hogg, Peter W., Allison Bushell Thornton, and Wade K. Wright. 2007. "Charter Dialogue Revisited or Much Ado About Metaphors." *Osgoode Hall Law Journal* 45: 1-65.
- Huscroft, Grant 2006. "Political Litigation and the Role of the Court." *Supreme Court L. Rev.* 34, (2d): 35-56.
- . 2007. "Rationalizing Judicial Power: The Mischief of Dialogue Theory," in *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*, James B. Kelly and Christopher P. Manfredi eds. (Vancouver: UBC Press), 50-65.
- . 2010. "Politics and the Reference Power". Paper presented at the Canadian Political Science Association annual conference.
- Kavanagh, Aileen. 2016. "The Constitutional Separation of Powers," in *Philosophical Foundations of Constitutional Law*, David Dyzenhaus and Malcolm Thorburn eds. (Oxford: Oxford University Press), 221-239.
- Kennedy, Gerard J. and Lorne Sossin. 2017. "Justiciability, Access to Justice, and the Development of Constitutional Law in Canada." *Federal Law Review* 45: 707-723.
- McEvoy, John. 2005. "Refusing to Answer: The Supreme Court and the Reference Power Revisited." *University of New Brunswick Law Journal* 5: 29-42.
- McWhinney, Edward. 1982. *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press).
- Mandel, Michael. 1994. *The Charter of Rights & the Legalization of Politics in Canada*. Updated and expanded ed. (Toronto: Thompson Educational Publishing).
- Manfredi, Christopher P. 2001. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. 2nd ed. (Don Mills, Ont: Oxford University Press).
- Mathen, Carissima. 2011. "The Question Calls for an Answer and I propose to Answer it': The *Patriation Reference* as Constitutional Method." *Supreme Court Law Review* 54: 143-166.

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- . 2019. *Courts Without Cases: The Law and Politics of Advisory Opinions* (London: Hart Publishing).
- Puddister, Kate. 2019. *Seeking the Court's Advice: The Politics of the Canadian Reference Power* (Vancouver: UBC Press).
- Reference re Broome v. Prince Edward Island* [2010] 1 S.C.R. 306.
- Reference re Canada Assistance Plan* [1991] 2 S.C.R. 525.
- Reference re Constitution Act 1867, ss.26, 27 and 28 (B.C.)* [1991] 78 D.L.R. (4th) 245 (B.C. Senate Appointment Reference).
- Reference re Court of Unified Criminal Jurisdiction* [1983] 1 S.C.R. 704.
- Reference re Freedom of Informed Choice (Abortions) Act* [1985] 25 D.L.R. (4th) 751.
- Reference re Goods and Services Tax* [1992] 2 S.C.R. 445.
- Reference re Judicature Act (NB), s. 23* [1988] 96 NBR (2d) 11.
- Reference re Objection by Quebec to A Resolution to Amend the Constitution (Quebec Veto)* [1982] 2 S.C.R. 793.
- Reference re References* [1910] 43 S.C.R. 536.
- Reference re References* [1912] A.C. 571.
- Reference re Reform of the Senate* [2014] 1 S.C.R. 704.
- Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3.
- Reference re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753 (Patriation).
- Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698.
- Reference re Secession of Quebec* [1998] 2 S.C.R. 217.
- Roach, Kent. 2001. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law).
- Russell, Peter. 1982. "Bold Statecraft, Questionable Jurisprudence," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, Keith Banting and Richard Simeon eds. (Toronto: Methuen Publications), 210-238.
- . 1987. *The Judiciary in Canada: The Third Branch of Government*. McGraw-Hill Ryerson Series in Canadian Politics (Toronto: McGraw-Hill Ryerson).
- . 2011. "The Patriation and Quebec Veto References: The Supreme Court Wrestles with the Political Part of the Constitution." *Supreme Court Law Review* 54 (2d): 69–76.
- Snell, James G., and Frederick Vaughan. 1985. *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press)
- Sossin, Lorne. 2006. "The Ambivalence of Executive Power in Canada," in *The Executive and Public Law: Power and Accountability in Comparative Perspective*, Paul Craig and Adam Tomkins eds. (New York: Oxford University Press), 52–88.
- . 2012. *Boundaries of Judicial Review: The Law of Justiciability in Canada*. 2nd ed. Scarborough: Carswell.
- Strayer, Barry L. 1988. *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*. 3rd ed. Toronto: Butterworths.
- Supreme Court Act* RSC 1985, c S-26.
- Vile, M. J. C. 1967. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon).