

References, Law, and Political Decision-Making: A Review Essay on Carissima Mathen's *Courts Without Cases: The Law and Politics of Advisory Opinions*, and Kate Puddister's *Seeking the Court's Advice: The Politics of the Canadian Reference Power*

Emmett Macfarlane*

Reference opinions are among some of the most important and scrutinized decisions in Canadian law. From the famed *Persons* case on the eligibility of women to be appointed to the Senate,¹ to landmark *Charter* rights² and language rights decisions,³ to questions concerning the future of the country itself,⁴ a multitude of so-called 'advisory' opinions are at the core of constitutional law in Canada. While some reference opinions are undoubtedly more important than others, many of these decisions receive intense media and academic scrutiny. *Reference re Secession of Quebec* is perhaps the most significant example, and the reference context was not lost on commentators and critics of that decision.⁵

The reference power as employed in Canada is unique among countries that share its system of government or exercise of robust judicial review. Many other common law systems refuse to permit the use of advisory opinions on

* Associate Professor, University of Waterloo.

1 *Reference re Meaning of the Word "Persons" in s 24 of British North America Act*, [1928] SCR 276, 4 DLR 98. The opinion of the Supreme Court was appealed to the Judicial Committee of the Privy Council in *Edwards v Canada (AG)* [1930] AC 124, 1929 UKPC 86.

2 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536; *Reference re Same-Sex Marriage*, 2004 SCC 79.

3 *Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1.

4 *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 [*Amend Reference*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

5 Alan C Cairns, "The Quebec Secession Reference: The Constitutional Obligation to Negotiate" (1998) 10:1 *Const Forum Const* 26; Robert A Young, *The Struggle for Quebec: From Referendum to Referendum?* (Montreal: McGill-Queen's University Press, 1999); Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1 *Can Bar Rev* 67; Patrick J Monahan, "The Public Policy Role of the Supreme Court of Canada in the Secession Reference" (2000) 11 *NJCL* 65.

the basis that they are not a proper function of the judiciary.⁶ The High Court of Australia's refusal to entertain references was based on this reasoning.⁷ The Supreme Court of the United States reportedly refused through informal communication between the justices and President Washington in 1793, based on the "cases" and "controversies" requirements under the judicial function outlined in Article III of the constitution.⁸

Despite the historic and ongoing magnitude of references in the Canadian context, we have gone without a systematic analysis of the reference power since its creation in 1875. The publication of two recent books remedies this lacuna. Carissima Mathen's *Courts Without Cases: The Law and Politics of Advisory Opinions*⁹ and Kate Puddister's *Seeking the Court's Advice: The Politics of the Canadian Reference Power*¹⁰ each manages to provide a superb and comprehensive analysis of the development, evolution, and purposes of the reference power. Especially useful for scholars and students of the constitution is the fact that the two books so wonderfully complement each other. The disciplinary strengths of the two authors — Mathen, a legal scholar, and Puddister, a political scientist — shine through, both in terms of the framing of the questions they ask and their high quality analysis. Both ably recount the history and development of the reference procedure, and the myriad challenges that arise from its use, especially for the separation of powers. References often mean that courts get drawn into the policy-making process in a context that usually does not include a traditional adjudicative function with litigants and a trial. It is difficult to see how the two books could complement each other better than if the authors had actually coordinated their efforts. Nonetheless, there are also some common threads, and shared gaps, in the two works. In what follows, I analyze each in turn.

Advisory in Name Only?

Mathen's *Courts Without Cases* provides a splendid jurisprudential analysis of major reference opinions across a host of categories. Organizing such a volume was likely a challenging task, but following a historical set of chapters Mathen separates the substantive chapters along the following lines: federalism issues in

6 Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013) at 88 [Macfarlane, *Governing*].

7 *Re Judiciary and Navigation Acts* (1921), 29 CLR 257.

8 Macfarlane, *Governing*, *supra* note 6 at 207, n 78.

9 Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019).

10 Kate Puddister, *Seeking the Court's Advice: The Politics of the Canadian Reference Power* (Vancouver: UBC Press, 2019).

chapter 5, the mega-constitutional politics cases — including the patriation¹¹ and Québec veto references,¹² and the upper house reference¹³ — in chapter 6, rights in chapter 7, and institutional decisions — the secession reference and the Senate reform¹⁴ and Supreme Court Act references¹⁵ — in chapter 8. This portion of her book ought to be considered mandatory reading not only for students of the reference power but also of constitutional law generally.

Mathen largely retains a detached, analytical voice throughout her exploration of these decisions, but this is not presented in staid legal prose. Despite the clear disciplinary focus on legal reasoning throughout her exploration of the decisions, Mathen is acutely aware of the broader stakes surrounding them, and she consistently reminds the reader that these are “highly contested disputes that were inescapably political.”¹⁶ Most of the critical analysis of individual decisions are deftly woven in via citations to other commentators rather than reflecting her own normative viewpoint, an issue to which I will return. Chapter 8 in particular is a masterclass of concision and readability. Mathen provides excellent coverage of the political context surrounding decisions and illuminates the uncertain ground the Supreme Court often finds itself on, even if the justices sometimes display a mindboggling confidence in the correctness of their own pronouncements.

The Court’s decision in the secession reference became an obvious target for critics. Indeed, it reads more like a political essay than a judicial decision. This is a product of the fact that, despite the core issue before it — can the province of Québec unilaterally secede from Canada — the justices avoided engaging with the amending formula, which from a strictly constitutional view would govern any actual secession process. Instead, the Court relied on unwritten constitutional principles to invent a “duty to negotiate” on the part of Parliament and the other partners to Confederation in the event a clear majority of Québécois people voted to leave when presented with a clear question on secession. The decision has received praise and harsh criticism.¹⁷ Notably, the Court disavowed itself of any responsibility to oversee the negotiations its new-found rule would mandate. Mathen astutely notes that this perhaps “signalled the Court’s awareness that it was on less-than-solid constitutional ground,”

11 *Amend Reference*, *supra* note 4.

12 *Re: Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793, 140 DLR (3d) 385.

13 *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54, 102 DLR (3d) 1.

14 *Reference re Senate Reform*, 2014 SCC 32.

15 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 [*Supreme Court Act Reference*].

16 Mathen *supra* note 9 at 158.

17 See note 5, above.

and that this apparent caution flew in the face of the fact that the Court has evinced a willingness to engage in precisely these sorts of political questions in the past.¹⁸

Mathen is similarly sharp on the other cases examined throughout the book. In the context of federalism disputes, she brings nuance and clarity to fundamental issues relating to the securities reference,¹⁹ which dealt with whether Parliament could establish a national securities regulator. She correctly notes that “one might have expected the Court to focus on the inability of the provinces to achieve what it could vis-à-vis effective control over the securities market, and the negative repercussions of such inability.”²⁰ Instead, the Court viewed the federal proposal as a threat to provincial authority over regulation writ large. She notes the decision “is redolent of an older approach to federalism. It showed a court more invested in policing jurisdictional boundaries than permitting legislative powers to adapt to fit current contexts and needs.”²¹ This is a crucial point that less perceptive analysts might miss given the Court’s emphasis in its opinion that “cooperative federalism” would allow the federal government to achieve in concert with the provinces what the Court would not permit it to do unilaterally. Yet the Court’s plea for cooperation came at the end of a decision that jealously guarded provincial authority, almost to the neglect of the policy context at stake. The decision ultimately had real-world policy implications, and Canada remains the only major federation in the world without a national regulator, a social fact that the Court would likely have considered more carefully in other contexts.

One of the core questions at the heart of *Courts Without Cases* concerns the extent to which the technically advisory opinions are treated as binding, not only by courts but by other political actors as well. Mathen provides evidence for this throughout the book but delves deeply into the issue in the final chapter. Indeed, she notes the Court itself has imposed remedies in references in the same way it would ordinary cases.²² For example, the remedial power of the suspended declaration of invalidity emanates from the Manitoba language rights reference, which saw the Court suspend the application of its decision, in effect invalidating all law in the province for failing to enact laws in both official languages. This remedial invention emerged despite the nominally advisory nature of the reference, a context that Mathen takes pains to emphasize.

18 Mathen *supra* note 9 at 163-64.

19 *Reference re Securities Act*, 2011 SCC 66.

20 Mathen *supra* note 9 at 102.

21 *Ibid* at 103.

22 *Ibid* at 228.

Suspended declarations have become routine practice in normal *Charter* cases, a phenomenon some scholars, including Mathen herself, sharply criticize.²³

The Court has also occasionally refused to answer the questions posed to it. In the same-sex marriage reference this was in part on the fear that its decision would cause legal confusion in light of otherwise authoritative appellate court decisions on the issue in several provinces, highlighting the uncertainty around the binding nature of references in practice.²⁴ Similarly, the Court made the effort in the *Bedford* case,²⁵ striking down laws indirectly prohibiting prostitution, to distinguish its reasoning from the prostitution reference²⁶ over twenty years earlier, despite that decision's formal status as an advisory opinion. These patterns are a product of the legislative and executive branches unfailingly treating references as having the same authority as regular constitutional cases. Mathen attributes this to "fidelity to a special idea. A constitutionally ordered society is bound by a higher law. Actors should *care* about whether their actions (generated either at the level of a democratic formal assembly or by a single executive actor) are consistent with the Constitution."²⁷

It remains, to some degree, an open question how much all actors do care about or maintain this notion of fidelity, or the extent to which we ought to treat the courts as having the exclusive and final word about the meaning of the constitution and its limits, *especially* in the reference context where judges are often dealing with abstract rather than concrete questions of higher law. One immediately sees how Mathen's book serves as a jumping off point for a host of questions that have preoccupied constitutional scholars without the benefit of a systemic inquiry into the reference context, including the separation of powers, dialogue theory, judicial power, and coordinate interpretation.²⁸

23 *Ibid* at 231; Emmett Macfarlane, "Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*" (2017) 49:1 *Ottawa L Rev* 107; Bruce Ryder, "Suspending the Charter" (2003) 21 *SCLR* (2d) 267; Kent Roach, "Principled Remedial Discretion Under the Charter" (2004) 25 *SCLR* (2d) 101.

24 Mathen, *supra* note 9 at 217.

25 *Canada (AG) v Bedford*, 2013 SCC 72.

26 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 109 NR 81.

27 Mathen *supra* note 9 at 231.

28 Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010); Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures: (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 *Osgoode Hall LJ* 75; Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2013) 34:1 *Intl Political Science Rev* 39; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed (Oxford: Oxford University Press, 2000).

Decision Calculus and Political Strategy

In *Seeking the Court's Advice*, Puddister presents an excellent social scientific analysis of the reference power. Drawing on a database of every reference decision rendered in Canadian history — notably, both by provincial appellate courts and the Supreme Court — she deftly traces trends and the broader evolution of the use of advisory opinions. In chapter 2, she uncovers facts that may have been intuitive but for which we never had systemic evidence. For example, Puddister finds a shift from federal to provincial in terms of which governments use the power more frequently. She also identifies historical peaks of intensity in the use of the power, for example in the 1930s, decisions involving the New Deal and Alberta Social Credit legislation, and in the 1980s a series of mega-constitutional decisions.

Puddister's analysis is also able to provide comprehensive evidence for something Mathen examines qualitatively: courts do not alter their behaviour in the reference context relative to normal cases. In chapter 3, for example, she notes that in over a third of reference decisions legislation is invalidated, something that aligns with the general statistical trend in regular constitutional cases. Further, there is only slightly lower levels of unanimity, and high third party participation rates.

Puddister also draws on interview research to further delineate the ways politics and strategy, unsurprisingly, play a huge role in governments' decision-making calculus over whether to pose advisory questions. This is a particularly illuminating section of the book. She finds that governments will use the reference power to deal with hot potato issues — opening the door to allowing them to engage in blame-shifting strategies — freeze the politics around an issue for a time, force negotiations between governments, or seek assurance — not just constitutional or legal assurance about proposed policies but political legitimization. There is also acknowledgment by former attorneys general of the benefits of abstract review, including the ability to frame questions broadly and to try to craft them to wield influence over the proceedings for a positive outcome. Few interviewees apparently saw any major drawbacks to references. Puddister's thorough discussion here is invaluable, and the clear disciplinary perspective — a degree of emphasis on politics and strategy — highlights important ways of thinking about and understanding the reference power that may not be possible in the context of an exclusively legal lens of analysis. In chapter 5, she also examines reasons governments may choose *not* to refer questions to the courts, including issues relating to political popularity or concerns over national security.

Seeking the Court's Advice closes with a superb analysis of the reference power through the frame of delegation. In short, references are the act of governments delegating policy-making power to courts. They also allow governments to leverage power in the context of disputes or uncertainty. Puddister notes how Québec's decision to refer the question of Senate reform in light of the Harper government's proposals to institute term limits and consultative elections for the Senate delayed the legislation and even forced the federal government to refer its own questions to the Supreme Court. The legislation was defeated and Québec's interests in the federation defended.

Puddister's analysis also elaborates on the implications of the reference power for judicial power and judicial independence, with the judiciary's role, while sometimes antagonistic to the executive or legislative branches in performing its counter-majoritarian function of judicial review, complicated by the reference procedure. There is a 'friendly' relationship of referral by the executive to answer what are often deeply political questions. Puddister writes that "[w]hen using a reference to seek assurances or to take advantage of the institutional legitimacy of the courts, a government is anticipating that an authoritative judicial decision will help to insulate its policy making from future challenges — both political and legal."²⁹ Her analysis thus might further our understanding of regime theory, positing a symbiotic relationship between the judiciary and existing governing regime and that brings temporality into broader analyses of judicial power and activism.³⁰ Indeed, Puddister cites Ran Hirschl on the important point that judicial and political elites often hold similar preferences.³¹ She notes that the reference power also has implications for debates about the concentration of power in the executive,³² given that it essentially provides a form of agenda-setting tool. Like Mathen's book, Puddister's comprehensive assessment of the reference power serves as a brilliant launching pad for new considerations across a host of issues ranging from the separation of powers to institutional relationships and the locus of power under the constitution.

29 Puddister, *supra* note 10 at 190.

30 Emmett Macfarlane, "You Can't Always Get What You Want': Regime Politics, the Supreme Court of Canada, and the Harper Government" (2018) 51:1 Can J Political Science 1.

31 Puddister, *supra* note 10 at 187-89, citing Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

32 See Donald J Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); Peter Aucoin, Mark D Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery, 2011).

The Dangers of the Reference Power: A Recipe for Judicial Overreach?

The Canadian scholarly literature now benefits from two rich, detailed accounts of the reference power. The two books complement each other incredibly well, a partial result of the distinct disciplinary frames animating each study. Readers of either book will absorb fine accounts of the history, development, and practice of advisory opinions. Where Mathen's book provides an unparalleled jurisprudential account of the most salient reference decisions, Puddister's analysis generates a systematic empirical picture of the reference power in practice, especially as it relates to governmental decisions to employ it.

If there is something missing from both accounts of the reference power it is, somewhat ironically, a specific account of an aspect of what makes reference opinions *distinct* from ordinary cases. Indeed, both books pay so much attention to what makes advisory opinions so similar in practice to regular cases, be it in terms of outcomes, remedies, and authority — their treatment by all actors as binding — that the degree to which the reference context produces a distinct mode of judicial reasoning does not always seem apparent.

Yet there are many high profile references that suggest the reference context enables or somehow encourages a form of judicial activism, overreach, or creativity in decision-making. Sometimes this might be the result of the questions posed to the Court. For example, the patriation reference asked the Court directly whether there exists a constitutional convention regarding provincial consent to amendments affecting their interests. The Court for the first time identified and recognized constitutional conventions, something it historically avoided for good reason: conventions are not legally enforceable, and judicial recognition of them arguably brings the Court too far into the political sphere. Indeed, the Court has been rightly criticized for this aspect of the patriation reference.³³

References have also been the site of outright judicial invention of constitutional rules based on the unwritten principles of the constitution, decisions that arguably amount not to judicial interpretation of the constitution but judicial amendment.³⁴ As noted above, the Court effectively amended the constitutional amending formula itself by creating the 'duty to negotiate' in the secession reference. An even more stark example, given the judiciary's self-interest

33 Adam M Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*" (2011) 54 SCLR (2d) 117.

34 Emmett Macfarlane, "Judicial Amendment of the Constitution" Intl J Constitutional L [forthcoming].

at stake, comes from the judicial remuneration reference.³⁵ In that decision, a majority of the justices mandated “independent compensation commissions” for judges based on the unwritten principle of judicial independence, grounded in part in the preamble to the *Constitution Act, 1867* of “a Constitution similar in Principle to that of the United Kingdom” and an analysis of section 11(d) of the *Charter*. Nothing in the constitutional text supported the idea of such a process let alone the preamble itself. It is a decision that appears to receive scant attention in either book.

Along similar lines, the Court effectively entrenched itself in the constitution in the *Supreme Court Act Reference*, where it found that at least parts of the Act — including the eligibility requirements for appointment to the Court — were constitutionally protected by virtue of the amending formula’s reference to the “composition of the Supreme Court.” On its own, this conclusion was certainly plausible, but the decision itself goes much further by implying the Court was effectively entrenched even before the amending formula was itself established in 1982.³⁶ Mathen discusses many important criticisms of the decision, but ends her otherwise excellent discussion by emphasizing that although “it was criticised on a number of bases, those bases did *not* include the fact that it was merely an advisory opinion.”³⁷ Thus while she concludes the reference “is surely one of the oddest advisory opinions” and that it “morphed into a high-stakes battle over the power and legacy of the Court itself”³⁸ implicit in the way she concludes the discussion is that this is *despite* its status as an advisory opinion and not at least in part *because* of it. Similar sorts of criticisms can and have been directed at other references, including the Senate reform reference³⁹ and the Motor Vehicle reference.⁴⁰

This is not to say that judicial creativity or ‘activism’ are absent in ordinary constitutional cases. Yet something about the style of judgment produced in many high profile references seems to reflect a judicial willingness for pronouncements less grounded in precedent and less rooted to the constitutional text, a phenomenon that warrants more attention. It is clear that there remain open avenues for future research, including empirical work, on the nature of judicial decision-making in the context of advisory opinions. Scholars have

35 *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 150 DLR (4th) 577.

36 *Supreme Court Act Reference*, *supra* note 15 at paras 85-87.

37 Mathen *supra* note 9 at 179 [emphasis in original].

38 *Ibid.*

39 See Emmett Macfarlane, “Unsteady Architecture: Ambiguity, the *Senate Reference*, and the Future of Constitutional Amendment in Canada” (2015) 60:4 McGill LJ 883.

40 See FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview, 2000) at 45.

had a lot of difficulty attempting to identify nebulous concepts like judicial activism,⁴¹ but there may be ways to devise measures of the breadth or tenor and style of decisions, the nature of remedies, or the invention of new (unprecedented) rules.

One possible explanation for the omission of any deep appraisal of references as a site for what I might call ‘adventurous’ judicial logic is that both Mathen and Puddister refrain from engaging in normative appraisals of the reference power altogether. Their books are steadfastly empirical projects, even while Mathen incorporates extant commentary and criticism of aspects of the jurisprudence or Puddister investigates the various motives and strategic choices by political actors. Ultimately, this is not a criticism. Given the extant lack of systemic inquiry into the Canadian reference power that sparked the creation of these two books, the decision not to engage in protracted discussions about whether this is all ‘a good thing’ should be viewed as welcome and appropriate. Indeed, each book illuminates and provides an empirical grounding in the evolution of references that will serve scholars for generations to come. To that extent, the strict empirical focus is a breath of fresh air. Both books provide a foundation for understanding the important advisory function and contribute tremendously to our broader understanding of Canadian constitutionalism.

41 See, for example, the following debate: Sujit Choudhry & Claire E Hunter, “Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v NAPE” (2003) 48:3 McGill LJ 525; Christopher P 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) 49:3 McGill LJ 741.