Courts Without Cases

The Law and Politics of Advisory Opinions

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Introduction

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

The book proceeds in three general parts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

broader context in which provinces enacting such schemes might be responding to negative circumstances elsewhere.[145] The reference thus impeded those provinces with an interest in preserving such boards – namely Quebec and Ontario – from highlighting additional economic facts that might have explained their protectionism.[146]

For some, the above elements compromised the quality of the opinion. In particular, the reference was criticised for not adequately explaining the Court's shift from earlier jurisprudence, including a 1968 case where the Court upheld a provincial plan controlling the prices of raw milk sold to a company which shipped the bulk of the product intra-provincially.[147]

It is surely an overstatement to blame such doctrinal inconsistency solely on the reference procedure. Nonetheless, Manitoba's tactics illustrate how the advisory function can be manipulated to achieve certain political ends, potentially at the expense of coherent law. The *Manitoba Egg Reference* supports the intuition of some commentators that a hearing cloaked in legal robes, yet disconnected from the broader factual context, cannot truly compete with a live case in terms of providing clarity and precision in adjudication. Acknowledging that the vast majority of 'facts' in litigation are never purely objective, inter partes litigation does provide some constraints that render cases more resistant to bald political manipulation.

Current Battles

In recent years, the Canadian state has faced new challenges to federal–provincial relations. An obvious example is where a threat arises to Confederation itself – for example, when a province seeks to 'secede'. That has been a recurring threat since, at least, the election of a secessionist government in Quebec in 1976. The courts' involvement in that dispute is discussed in Chapter 8. Immediately below are other recent examples. At the time of writing, two had not yet been finally resolved; nonetheless they provide important hints about the motivation of federal and provincial actors (which will be taken up again in Chapter 9).

A. Criminal Law

A number of federal–provincial conflicts have arisen over the scope of Parliament's power to create criminal law. In a society that requires increasingly complex

[145] Kate Puddister notes that Manitoba did not raise the issue of 'the injury caused to Manitoba by agricultural discrimination', Puddister (n 115) 123.

[146] The opinion contains no information regarding the state of affairs in other provinces, such as Quebec and Ontario, and those provinces, being confined to intervenor status, could not present such information.

[147] *Carnation* (n 138).

forms of regulation, the federal government finds itself using criminal law not just to prohibit behaviour outright, but to set boundaries around it. When it does so, it invites challenges that what it produces is not, properly, criminal legislation.

One such reference was *Re Firearms Act.*[148] In 1995 the federal government amended the Criminal Code[149] to include a series of offences relating to firearms registration and licensing. A number of provinces objected and Alberta referred the law's validity to the Court of Appeal. That Court upheld it 2–1.[150]

The Supreme Court agreed. In its view, sub-section 91(27) of the BNA Act (the federal power over 'Criminal Law') provided ample basis for the law. A wish to reduce the public safety risk posed by guns easily met the test for a valid criminal law purpose.[151] The law's complexity and the discretion it reposed in non-judicial actors[152] did not strip it of its criminal character.

The Court emphasised that it was not examining the soundness or efficiency of gun control, but merely whether Parliament had the power to enact it. Gun control is commonly criticised on those bases, though, and the Court's opinion has become part of a political narrative that portrays politically liberal governments as relentlessly urban and out of touch with, or even contemptuous of, rural communities.

A second reference is *Re Assisted Human Reproduction Act.*[153] The Act,[154] which was passed after two years of federal–provincial consultation,[155] completely prohibited human cloning and the commercialisation of human reproductive material. It also created a separate class of 'controlled activities' which could be pursued only in accordance with various regulations.[156]

The Attorney General of Quebec conceded that the absolute prohibitions were valid criminal law but attacked the other provisions. The Quebec Court of Appeal agreed that they were ultra vires. On a narrow, 5–4 split, the Supreme Court largely did as well.

Writing for the four-judge dissent, Chief Justice Beverley McLachlin stated that all of the challenged provisions were acceptable uses of the criminal law: they attacked what Parliament viewed as a 'public health evil'. The legislature's focus,

[148] *Re Firearms Act* (n 113).
[149] Firearms Act, SC 1995, c 39.
[150] *Reference re Firearms Act (Can)*, [1998] AJ No 1028 (1998), 219 AR 201 (ABCA).
[151] *Re Firearms Act* (n 113) at para 33.
[152] The law empowered a chief firearms officer.
[153] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 [*Re AHRA*].
[154] SC 2004, c 2.
[155] The Royal Commission on New Reproductive Technologies (the 'Baird Commission') expressed concern about certain practices and recommended that their use be limited. A majority of the Court interpreted the Committee as having made two principal recommendations: that legislation be enacted to prohibit certain activities and that a federal reproductive technology regulator be established. The Commission defended the latter recommendation as an acceptable use of the federal power to regulate for the 'peace, order and good government of Canada': *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies.*
[156] Those provisions were followed by numerous sections related to administration and enforcement. *Re AHRA* (n 153) at paras 11–14.

she claimed, was not to regulate assisted reproduction as something good or bad in itself, but to 'prevent or punish practices that may offend moral values, give rise to serious public health problems, and threaten the security of donors, donees, and persons not yet born'.[157] Parliament was entirely competent to do this.

A block of four judges disputed the Chief Justice's characterisation. Instead, they classified the law's 'pith and substance'[158] as 'the regulation of a specific type of health services provided … to individuals who for pathological or physiological reasons need help to reproduce'.[159] As such, those provisions related to the regulation of such activity fell within the exclusive provincial jurisdiction over hospitals, property and civil rights, and matters of a local nature,[160] and were consequently ultra vires Parliament. The ninth judge, who disagreed with the analytical approach of both camps, concluded that fewer provisions were ultra vires.[161] As a result, much of the attempted national regulation of assisted reproduction failed and Canada has a patchwork system under which the provinces regulate such activity very differently if, indeed, they do at all.[162]

Re AHRA was a significant defeat for the federal government. That the loss came in relation to criminal law was all the more striking. Previously, the Supreme Court had been very tolerant of federal attempts to employ criminal prohibitions and related provisions to address large and complex social issues. The reference asserted that there are limits to criminal law's elasticity, and seemed to retrench on the previously broad latitude granted to Parliament.

The matter again came to a head in the debate over Bill S-201: An Act to prohibit and prevent genetic discrimination. Passed in 2017, the law was the first in Canada to deal with genetic testing. S-201 was proposed as a necessary protection against the increasing prominence of the practice and its possible invasion into insurance and employment matters.

The federal Attorney General expressed concerns that, to the extent that it affected insurance contracts, the law was ultra vires. Since 1916, the regulation of insurance has been held to fall outside federal competence.[163] On that basis,

[157] ibid at para 32.

[158] 'Pith and substance' is a term of art developed in division-of-powers jurisprudence. It inquires into the essential gravamen or domain of a particular law. It is the first step in classifying legislation with regard to eventually deciding under what head of jurisdiction (enumerated in ss 91–93 of the CA 1867 it falls). See *Union Colliery Co. v Bryden* [1899] AC 580; Hogg (n 8) ch 15.5(a); WR Lederman (ed), *The Courts and the Canadian Constitution* (Toronto: McLelland and Stewart, 1964) 186.

[159] *Re AHRA* (n 153) at para 227.

[160] ibid at paras 259–73.

[161] ibid per Cromwell J at para 294.

[162] Laura Eggertson, 'Patchwork Regulations Likely Outcome of Reproductive Technologies Ruling' (2011) 183(4) Canadian Medical Association Journal E215–E216; Angela Cameron and Vanessa Gruben, 'Quebec's Constitutional Challenge to the Assisted Human Reproduction Act: Overlooking Women's Reproductive Autonomy?' in Stephanie Patterson, Francesca Scala and Marlene Sokolon (eds), *Fertile Ground: Exploring Reproduction in Canada* (Montreal: McGill-Queen's University Press, 2011).

[163] *AG Can. v AG Alta* [1916] 1 AC 588.

she and fellow Cabinet members voted against the Bill. The vote was not whipped, however, and when 104 members of the governing Liberal Party voted for it, it passed easily.

The result created a conundrum. Shortly after the law's passage in the House, the Attorney General announced that she intended to put a reference to the Supreme Court. She asserted her continuing doubts about the law's constitutionality and her belief that the Court's input was required. Before such a reference was initiated, the Quebec government referred it to its own Court of Appeal. The possible choices facing the federal government were discussed in Chapter 4.

B. Economic Regulation

Advisory opinions have played a crucial if episodic role in financial regulation. In the post-1982 period, one of the most noted is the *Reference re Securities Act*.[164] The purpose of the (proposed) Act was to create a single Canadian securities regulator in order to 'provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system'.[165]

In the past, securities regulation was an area in which the courts recognised what is called 'double aspect', meaning an intersection of federal and provincial jurisdiction that can accommodate laws regulating the same activity.[166] For example, both orders of government have created laws prohibiting creating a false prospectus,[167] or insider trading.[168] In such cases, the laws may coexist so long as they do not conflict. If they do, the courts will apply the doctrine of federal paramountcy so as to render the provincial law 'inoperative' to the extent of the conflict.[169]

Parliament has cited various heads of federal power to justify securities regulation, including its criminal power and company incorporation power. In the *Securities Reference*, it cited sub-section 91(2): 'trade and commerce'. That head of power encompasses two 'branches': the power to regulate inter-provincial and international trade; and a 'general' power to regulate trade, including trade occuring entirely within a province, that affects the country as a whole.[170] In the *Securities Reference*, the federal government said it was legislating under its general power.

[164] 2011 SCC 66, [2011] 3 SCR 837 [*Re Securities*].
[165] ibid at para 29.
[166] Hogg (n 8) ch 15.5(c).
[167] *Smith v The Queen*, [1960] SCR 776.
[168] *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 161 [*Multiple Access*].
[169] *Crown Grain Co. v Day* [1908] AC 504; *Bank of Montreal v Hall*, [1990] 1 SCR 121.
[170] *Parsons* (n 138).

The federal trade and commerce power has long challenged federal–provincial relations. Critics tend to view it as a swamp capable of swallowing up provincial jurisdiction. After receiving generally restrictive interpretations from the JCPC, the power enjoyed a resurgence beginning in the 1950s when the Supreme Court and other courts began to uphold various federal laws directed at economic regulation.[171]

Many provinces opposed the idea of a national securities regulator. Ontario alone was in favour. Nonetheless, given the general thrust of the case law, it would have been reasonable for the federal government to anticipate a favourable response from the Court.[172] Instead, in an unsigned *per curiam* opinion, the Court advised that the proposed law would be ultra vires.

Given prior case law,[173] 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. It did not. Instead the Court examined the very different question of what can best maintain the appropriate balance between federal and provincial powers.[174] It perceived the proposed legislation as an attempt by the federal government to oust provincial competence altogether – something that it viewed with great concern. Even with respect to a scheme structured as 'opt-in',[175] the Court said 'Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension'.[176] The Canadian federal system 'rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other … [and, consequently], a federal head of power cannot be given a scope that would *eviscerate* a provincial legislative competence'.[177]

The Court did note the possibility that the relevant actors could 'exercise their respective powers over securities harmoniously, in the spirit of cooperative

[171] *R v Klassen*, (1959) 20 DLR (2d) 406 (Man CA); *Caloil Inc. v Attorney General of Canada*, [1971] SCR 543; *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198; *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641. But see *Dominion Stores Ltd. v R*, [1980] 1 SCR 844; *Labatt Breweries of Canada Ltd. v Attorney General of Canada*, [1980] 1 SCR 914.

[172] *Re Securities* (n 164) at paras 34–35. In two provincial references, courts of appeal had advised that it was unconstitutional: (2011 ABCA 77, 41 Alta LR (5th) 145); (2011 QCCA 591 (CanLII)).

[173] *Re Securities* (n 164) at para 80, citing *General Motors* (n 171) at 661–62.

[174] Poonam Puri has critiqued the focus on balance: 'Rather than focusing on the preliminary question of whether Parliament has the jurisdiction to enact securities legislation and then moving to a discussion of the application of the "paramountcy" doctrine, the Court immediately engaged in what appears to be a novel discussion of the appropriate balance between federal and provincial power and attempted to ensure that provincial regulatory capacity is not prejudiced by federal action … [T]he decision assumes that the Court's role is to create balance between the provinces and the federal government, while dismissing the concept that such balance is achieved by the proper application of a division of powers analysis'. 'Twenty Years of Supreme Court Reference Decisions: Putting the Securities Reference Decision in Context', in Anita Anand (ed), *What's Next for Canada? Securities Regulation after the Reference* (Toronto: Irwin, 2012) 13, 15.

[175] *Re Securities* (n 164) at para 123.

[176] ibid at para 7.

[177] ibid at para 71.

federalism'.[178] Such an approach could 'ensure that each level of government properly discharges its responsibility to the public in a coordinated fashion'.[179] But,

> [f]ederalism is an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers. The 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.[180]

The *Securities Reference* is redolent of an older approach to federalism.[181] It showed a court more invested in policing jurisdictional boundaries than permitting legislative powers to adapt to fit current contexts and needs.[182]

Scholars have noted how the reference function itself may have played a role in the result. For example, Poonam Puri argued that the *Securities Reference* is emblematic of a court leaning towards more 'originalist' analysis than it generally has in the Charter of Rights (post-1982) era.[183] Puri also criticised the Court for failing to engage adequately with the materials.[184]

The merits or lack thereof of the *Securities Reference* cannot be addressed here. But the opinion does represent a potentially important turning point in the Court's attitude towards federalism, and a potentially harder line against initiatives perceived to have been crafted outside of federal–provincial cooperation. In that regard, the *Securities Reference* is one of a series of post-1982 reference opinions taking a firm line both on preserving provincial powers against federal encroachment and, further, on staking out the Court's self-described unique role and responsibility to do so. A number of those other references are discussed in Chapter 8.

C. Environment and Development

Another 'emergent' area that has challenged federal–provincial relations is environmental regulation. Public concern for the environment has greatly

[178] ibid at para 9 (emphasis added). Indeed, as this book was going to press, the Court approved a pan-Canadian cooperative scheme: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48.

[179] ibid.

[180] ibid at paras 61–62.

[181] See Lorne Sossin's discussion and promotion of an alternate view, called 'purposive federalism' in 'Can Canadian Federalism be Relevant?' in Anand (n 174) 101 citing David Smith, 'National Political Parties and the Growth of National Political Community' in R Kenneth Cart and W Peter Ward, *National Politics and Community in Canada*.

[182] Anand (n 174). David Schneiderman argues that most 'English-speaking constitutionalists' predicted that the Court would side with the federal argument: 'Making Waves: the Supreme Court of Canada Confronts Stephen Harper's Brand of Federalism' in ibid at 75.

[183] Puri (n 174) 23.

[184] ibid. Here, Puri cites *Reference re Quebec Sales Tax*, [1994] 2 SCR 715, *Reference re Amendments to the Residential Tenancies Act* (NS), [1996] 1 SCR 186, and *Reference re Same-sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79.

increased since Confederation but the BNA Act (like most eighteenth- and nineteenth-century documents) does not mention it. It instead recognises diffuse, related areas of jurisdiction belonging in some cases to the federal government (criminal law, fisheries and inter-provincial 'works and undertakings') and in others to provincial governments ('property and civil rights', 'local matters' and 'lands and waters entirely within provincial boundaries'.)

The Supreme Court has been cautious about simply recognising 'the environment' as a 'new matter' that would fall under federal POGG power. It views the environment as 'too diffuse' to fall exclusively under the control of one order of government.[185] At the same time, the Court recognised certain aspects of environmental regulation as falling within federal control, including marine pollution[186] and punishing environmentally harmful behaviour.[187]

Often, disputes over the environment tend to involve disagreement not over the risk posed by such things as climate change, but the appropriate government and legislative response to that risk.[188] A particularly trenchant topic has concerned the imposition of a federal 'carbon tax'. The carbon tax was a key electoral plank of the federal Liberal Party in 2015. Upon assuming power the government set up the structure to institute it. The structure involves numerous motivators[189] for provinces to create and sustain initiatives that can assist reducing the country's total carbon emissions by 2030 in order to honour the 2016 Paris Agreement.[190] However, the federal plan also includes a so-called 'backstop' to impose a carbon tax in those provinces opposed to it.[191]

The plan has generated significant provincial resistance. Some provinces oppose the plan on a policy basis, finding it unlikely to improve environmental outcomes. But more and more, provinces have begun to cite constitutional concerns.

In April 2018 the province of Saskatchewan referred the validity of the federal plan to its Court of Appeal. The government claims that the regulation of carbon emissions falls within provincial jurisdiction. Following an election in June 2018, the country's largest province, Ontario, announced that it would join the proceeding to support Saskatchewan's and it has since launched its own challenge.

[185] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

[186] *R v Crown Zellerbach Canada Ltd*., [1988] 1 SCR 401.

[187] *R v Hydro-Québec* (n 113).

[188] Obviously, disputes about the phenomenon itself still remain, with some people displaying marked scepticism towards the idea that climate change is solely, or even primarily, caused by human activity.

[189] The chief such incentive was access to a $1.14 billion 'clean energy fund' available only to those provinces who signed the Pan Canadian Framework on Clean Growth Climate Change: www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html; /www.cbc.ca/news/canada/saskatchewan/premier-says-sask-should-get-federal-funding-to-reduce-emissions-despite-saying-no-to-carbon-tax-plan-1.4550709.

[190] UN Doc FCCC/CP/2015/L/9, 12 December 2015: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement.

[191] At the time of writing, the federal policy was contained in the Greenhouse Gas Pollution Pricing Act contained in Part 5 of Bill C-74: An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures: http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9727472.

It is unclear how other provinces will participate. Manitoba, for example, commissioned a legal opinion from a constitutional law professor who predicted that the Canadian Supreme Court will likely uphold a federal 'carbon tax' as, inter alia, a valid exercise of the federal taxation power which is enumerated in very wide terms. At least initially, Manitoba chose to treat such 'advice' as containing sufficient reasons to frame its policy response accordingly. Other provinces did not consider the opinion important enough to overcome their independent reasons for seeking a judicial answer.

The reference function also can become important as a political tool in its own right – even where the underlying issue is, arguably, neither new nor particularly unsettled (in other words, not especially in need of the court's 'advice'.) An example of this is with respect to the rancorous debate over oil pipelines. Canada has garnered worldwide attention (some of it quite negative) over the Alberta oil sands – the largest known deposits of crude bitumen in the world. The province has been keen to ship this product directly to Canada's west coast for transportation to foreign markets. As a result, there is an initiative to build a new pipeline concurrent to an existing pipeline called Trans Mountain. A proposal was submitted to a federal regulator, the National Energy Board, which approved it subject to a large number of recommendations and required safeguards. The federal Cabinet authorised the so-called 'Trans Mountain Expansion' (TMX) in 2017.

TMX has spurred an extremely bitter dispute among federal and provincial governments. The two provinces most at loggerheads are British Columbia and Alberta. Ironically, in 2018 they had governments belonging to the same political party (NDP). Nonetheless, they are diametrically opposed on the question of whether a second pipeline carrying diluted bitumen should be permitted to proceed.

Under the BNA Act, pipelines are considered a 'local work or undertaking' that fall under the jurisdiction of the territory in which they are situated. Pipelines that extend to two or more provinces fall under federal jurisdiction. There would seem little scope to challenge, on division-of-powers grounds, federal construction of a pipeline than begins in Alberta and ends in British Columbia. Even if the federal government's decision ran entirely contrary to a province's environmental aims, policy and law, the Constitution prevents otherwise valid provincial laws from either impairing federal entities,[192] or rendering federal law nugatory.[193]

[192] This is the result of the doctrine of interjurisdictional immunity: *Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536; *Bell Canada v Quebec (CSST)*, [1988] 1 SCR 749.

[193] This is prevented by the doctrine of federal paramountcy: *Rothmans, Benson & Hedges Inc. v Saskatchewan*, [2005] 1 SCR 188, 2005 SCC 13; *Canadian Western Bank v Alberta*, [2007] 2 SCR 3, 2007 SCC 22; *Multiple Access* (n 168).

Yet, the province of British Columbia decided to do just that, initiating a reference to its court of appeal in 2018.[194] The province proposed amendments to its own laws[195] that would authorise the provincial Cabinet to restrict the flow of certain designated substances into the province. To date, the only proposed designated substance is diluted bitumen. Were a court to confirm that authority, it clearly would hamper the primary function of the pipeline. To be sure, the province has articulated a sincere concern about the effect of transporting the substance through its borders, citing the possibility of a spill or tanker accident and the unknown effects given that the substance is relatively unfamiliar. Nonetheless, the province has a weak case in division-of-powers terms. It appears that part of the value to the reference is simply to slow down the pace of the project, while adopting a very reasonable stance of simply seeking 'clarification'.

* * *

As a modern federal state, Canada regularly encounters issues involving complex facts and unclear legal rules. While sometime eclipsed by very high-profile battles over entrenched individual rights and freedoms, the fault lines of federalism continue to require elucidation, to attract rivalries and to spur unsettling national conflicts. Throughout, the advisory opinion has played an important role, at times even superseding parallel ordinary litigation.

The Supreme Court's performance in arbitrating federalism has long been a matter of controversy, including whether the Court had any legitimate role to play.[196] Though that question has been long settled in the affirmative, the Court's decisions have provoked various, often competing, commentary and criticism, often reflecting deeply opposed visions of the federal project.

[194] The questions were as follows.

> On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the questions set out below be referred to the British Columbia Court of Appeal for hearing and consideration under the Constitutional Question Act:
>
> 1 Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form set out in the attached Appendix?
> 2 If the answer to question 1 is yes, would the attached legislation be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?
> 3 If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the attached legislation inoperative?

Office of the Premier, 'Province submits court reference to protect BC's coast' https://news.gov.bc.ca/releases/2018PREM0019-000742.

[195] Environmental Management Act, SBC 2003, c 53.

[196] Weiler (n 96).

Throughout that debate, the advisory function has remained a forum for examining fundamental legal principles concerning the division of powers. The references discussed above reflect a broad array of doctrinal, political and real-world issues. Their cross-cutting element is the fact that the judicial branch, at the request of one of the Confederation parties, may be called upon to settle fraught disputes. That role has been enhanced in the current era of high-profile, high-stakes constitutional review.