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## Politics and the Reference Power

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Unlike the highest courts in United States, the UK, Australia, and New Zealand, the Supreme Court of Canada performs an advisory role: it answers reference questions posed by the federal and provincial governments.<sup>1</sup> Indeed, some of the Court's most significant contributions to constitutional law have been made in the context of reference cases. The federal nature of the country was shaped through a series of reference cases in the 19<sup>th</sup> and 20<sup>th</sup> centuries;<sup>2</sup> the 1982 constitutional reforms that among other things established the amending formula and entrenched the *Charter of Rights and Freedoms* were heavily influenced by the *Patriation Reference*;<sup>3</sup> and the future of the Canadian constitutional order itself was addressed by the Court in the *Secession Reference*.<sup>4</sup>

Proponents of the reference power are likely to endorse it for reasons having nothing to do with the Court's legal acumen. Its decisions the *Patriation Reference* and the *Secession Reference* are celebrated in many quarters as acts of great wisdom and statescraft. The Court is often complimented for the political judgment it exercises in the context of the reference power.<sup>5</sup>

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Prepared for "The Judicialization of Politics and the Politicization of the Judiciary in Comparative Perspective", Congress of the Humanities and Social Sciences, June 1, 2010. Comments welcome: <grant.huscroft@uwo.ca>

<sup>1</sup> The federal government can refer matters to the Court directly; references from provincial governments begin in provincial courts of appeal and are heard by the Supreme Court as appeals of right pursuant to s. 36 of the *Supreme Court Act* R.S., 1985, c. S-26.

<sup>2</sup> The Privy Council played the largest role in these, sitting as an appeal court above the Supreme Court of Canada until 1949.

<sup>3</sup> *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, which advised that although Parliament had the legal authority to request amendment of the Canadian Constitution without provincial consent, as a matter of constitutional convention a "substantial degree of provincial consent" was required. The Court's opinion spurred the negotiations that culminated in the agreement of nine of the ten provinces to passage of the *Canada Act 1982* by the UK Parliament, which among other things established the current amending formula and the *Canadian Charter of Rights and Freedoms*. See Romanow, Whyte & Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (2007) 155-87.

<sup>4</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

<sup>5</sup> Reaction to the Court's opinion in the *Marriage Reference*, discussed in the text below, is typical. Dean Patrick Monahan of Osgoode Hall Law School described the Court's decision as "a beautifully crafted judgment": John Ibbitson, "Same-Sex Ruling: Here's the Bottom Line: The System Works" *The Globe and Mail* (10 December 2004) A8. Ibbitson paraphrases Jennifer Koshan from the University of Calgary Faculty of Law as saying that the Court's judgment defended and upheld the Constitution, proving that the system works. Kirk Makin's story in *The Globe and Mail* also praised the decision: "Same-Sex Ruling: Analysis: Deft court crafts elegant opinion" (10 December 2004) A7, quoting Professors Bruce Ryder and

I do not want to take issue with any particular reference opinions here. My point is more general: The reference power has a distorting effect on the political processes and the role of the Court. It exalts the place of the Court in the constitutional order and the process of judicial review as a means of resolving disputes more properly dealt with by the executive branch of government and the legislature. We would be better off, I suggest, if the executive and the legislature exercised independent judgment in interpreting the Constitution rather than relying on the Court – especially in regard to the *Charter*.

### **Judicial advice**

Let me begin with the concept of judicial “advice”.

We would think it surprising if a prime minister were to seek the counsel of a justice of the Supreme Court – even a matter of the highest constitutional importance – and more surprising still if a justice were to provide that counsel.<sup>6</sup> Yet this is, in effect, what the reference power permits. The difference is that the reference power places the advisory process above board, requiring everything to be done out in the open pursuant to what appears to be a traditional judicial process. And the consequence is that the Court’s advisory “opinion” acquires the force of law.

If reference opinions were truly advisory in nature, they could be rejected by the government that sought them. But of course, the rejection of the Court’s opinion in a reference case would be futile even assuming that it were somehow a viable political option: inevitably, actions taken contrary to the Court’s opinion would lead to litigation and, barring a significant change in circumstances, the Court could be expected to reaffirm the opinion it provided in the reference case. As a practical matter it would be under enormous pressure to do so, for its credibility and institutional authority would be at stake.

Consider the matter from the perspective of the government. Having referred a question to the Court the government has asserted not only that it is a question fit for judicial determination but also that the government requires such a determination. The government is, as a result, in no position to gainsay the Court’s opinion no matter what the Court advises, and however divided the Court itself may be. It has devalued its moral authority to interpret the Constitution and cannot reclaim it in regard to the question it has referred to the Court.

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Alan Hutchinson of Osgoode Hall Law School, and Professor Errol Mendes of the University of Ottawa Faculty of Law (Common Law).

<sup>6</sup> Yet for all we know this may have occurred. Advisory relationships between the President of the United States and Supreme Court Justices have occurred, notably between President Franklin Roosevelt and Justice Felix Frankfurter (a relationship that began when Frankfurter was a law professor), and President Lyndon Johnson and Justice Abe Fortas. See Jaffe, “Professors and Judges as Advisers to Government: Reflections on the Roosevelt-Frankfurter Relationship” 83 Harv. L. Rev. 366 (1969).

No matter how a question comes before the Court – whether pursuant to an appeal that the Court elects to hear or a reference by the government – the Court knows that its decision will be followed.<sup>7</sup> In no meaningful sense does the Court *advise* the government. A government that refers a question to the Court shifts decision-making authority to the Court.

Why would a government want take this step? I will consider some of the reasons below. Before doing so, however, I want to address the Court’s powers and responsibilities in the reference process. As we will see, although the government is free to refer questions to the Court, the Court is by no means the government’s handmaiden. It has its own interests to protect and promote and is willing and able to do so.

### **Master or Servant?**

The reference power is set out in the *Supreme Court Act*.<sup>8</sup> The Act conveys the impression that the Court is at the disposal of the government when it comes to the reference power, but in practice this is not the case. Section 53 provides as follows:

#### *Referring certain questions for opinion*

53(1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

- (a) the interpretation of the *Constitution Acts*;
- (b) the constitutionality or interpretation of any federal or provincial legislation;
- (c) the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or
- (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

#### *Other questions*

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *esjudem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

#### *Questions deemed important*

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

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<sup>7</sup> Hogg, *Constitutional Law of Canada* ch 8.6(d): “[T]here do not seem to be any recorded instances where a reference opinion was disregarded by the parties or where it was not followed by a subsequent court on the ground of its advisory character.”

<sup>8</sup> R.S., 1985, c. S-26.

*Opinion of Court*

(4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons. ...

Section 53 suggests that the power of the federal government to refer questions to the Court is boundless. Although subsection 53(1) specifies a requirement of “important questions” of law or fact that concern essentially matters of constitutionality, subsection (2) immediately renders this limitation redundant by extending the reference power to questions of law or fact concerning “any matter” the government “sees fit to submit”. For greater certainty, subsection (2) precludes the Court from limiting “any matter” by means of an *esjudem generis* interpretation. Subsection (3) precludes the Court from using the “important questions” modifier to limit the reference power by deeming any question referred by the government an important question. Telescoping these subsections, it is difficult to see any limitations on the ability of the government to refer questions to the Court. The government, it seems, can demand Court’s opinion at any time, on any matter, and for any reason.

The notion that the Court is at the government’s disposal is further reinforced by subsection 53(4), which establishes a “duty” to “hear and consider ... and to answer” each question referred to it. This subsection is replete with mandatory language. The Court “shall certify” its opinion on each question, along with reasons; the Court’s opinion “shall be pronounced” as an appellate judgment would be; and dissenting judges “shall” issue dissenting judgments with reasons. The reference power does not posit a relationship of equals; it casts the Court in a subservient position. A Court that for the most part has the discretion to control its docket is required to provide opinions to the government on demand.

At least, this is the impression conveyed by the *Supreme Court Act*. Things are not quite what they seem, however, because at the end of the day the government cannot make the Court do anything and the Court knows it. Thus, although the Court may be required to provide its opinion to the government on a reference question, the Court has full control over the process pursuant to which its opinion will be rendered. The Court determines how brief or lengthy that process will be, who will be allowed to participate in it, and the basis on which they will participate. Far from simply considering the submissions of the government and advising upon them, the Court allows interventions and may appoint *amicus curiae* to make arguments it wants to consider. The result is a hearing that is indistinguishable from a traditional appeal and the issuance of an advisory opinion that is indistinguishable from a traditional appeal decision. For its part, the Court does not differentiate reference opinions from appeal decisions. Its reference opinions are published in the Supreme Court Reports alongside its decisions in appeal cases, and the

Court does not distinguish between the two types of decisions in regard to their precedential force.

More important than the Court's control over the reference procedure is its control over the reference opinion itself. Regardless of the question(s) posed by the government the Court determines the scope of the opinion it will render, just as it does in the context of an appeal. The Court may make as much or as little law in the context of a reference opinion as it considers appropriate in the circumstances.

*Expansive approaches to reference opinions and answering questions not asked*

The Court's propensity to address matters in *obiter dicta* is well known in the context of *Charter* appeal decisions. The Court may rationalize this on a number of bases including the need to provide greater certainty in future litigation, the economy of addressing matters that have been argued, and so on. The Court often has its own reasons for addressing matters in *obiter*. It is a means of changing the law, or at least signaling a future change in the law, without waiting for a case that presents the matter squarely.<sup>9</sup> From the Court's perspective, its pronouncements are law regardless of the context in which they are made.<sup>10</sup>

The same is true in the context of reference opinions. The process is commenced by the government, but once the questions are in the hands of the Court the reference takes on a life of its own. Consider the *Secession Reference*,<sup>11</sup> in which the Court was asked three questions about the ability of Québec to secede from Canada unilaterally. The enduring significance of the case stems not from the Court's answers to these questions – answers that were never in doubt – but instead from the Court's extensive discussion of what it described as the “general constitutional principles” underlying the constitutional order, principles that were “not merely descriptive, but ... invested with a powerful normative force”. These principles – federalism, democracy, constitutionalism and the rule of law, and respect for minorities – led the Court to create a constitutional duty to negotiate secession with a province in the event of clear majority support on a clear referendum question.

Whether or not the Court's decision was wise is not the point. The point is that the Court did far more than simply answer the questions referred to it. The Court answered a

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<sup>9</sup> So, for example, the Court revisited its approach to equality recently in *R v Kapp* [2008] 2 S.C.R. 483.

<sup>10</sup> As the Court explained in *R. v. Henry*, [2005] 3 S.C.R. 609 para 57, however, there is *obiter* and then there is *obiter*:

All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not “binding” ... The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

<sup>11</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

question that was not asked, and in doing so established unprecedented constitutional obligations on the federal government. Peter Hogg puts the point bluntly: "There is no historical basis for the proposition that a referendum in the province that desires to secede should impose an obligation of negotiation on the other parties to the amending procedures. However, this is now the law of Canada."<sup>12</sup>

*Narrow approaches to reference questions and the refusal to answer*

In the context of appeal cases the Court is not precluded from deciding *Charter* issues by doctrines of standing, ripeness, mootness, or the hypothetical nature of proceedings. These doctrines are understood as preserving the Court's discretion to hear and decide a matter, and only rarely is the Court dissuaded from doing so. Moreover, the Court has rejected an American-style "political questions" doctrine, pursuant to which the Court may refuse to answer a question otherwise properly before it on the basis that it is best determined in the political branch of government.<sup>13</sup> In general, the Court eschews what Alexander Bickel described as the "passive virtues",<sup>14</sup> the various means the US Supreme Court employs to limit the extent of constitutional adjudication or avoid it altogether.

It would be surprising in light of this if the Court were reticent to answer reference questions on the basis of any of these doctrines. After all, the very point of the reference power is to allow the government to raise matters with the Court outside the normal range of appeal cases – to ask hypothetical questions, political questions, or in fact just about any question the government thinks it important to ask<sup>15</sup> – and the *Supreme Court Act* makes clear that the Court is duty-bound to answer.

Nevertheless, the Court has long asserted a discretionary authority to provide partial answers to reference questions and even to refuse to answer reference questions at all. This authority is not limited to questions that *cannot* be answered, for example because they are too vague or lack the necessary factual foundation. A refusal to answer a question that cannot be answered is different in kind from a refusal to answer a question that, in the Court's opinion, *should not* be answered. In *Reference re Canada Assistance Plan (B.C.)*<sup>16</sup> the Court discussed the Court's purported discretion in terms of justiciability/non-justiciability:

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<sup>12</sup> Hogg, *Constitutional Law of Canada* (2009) ch 5.7(c) (footnotes omitted).

<sup>13</sup> *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441

<sup>14</sup> Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) ch. 4.

<sup>15</sup> The Court acknowledged as much in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 para. 25.

In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

<sup>16</sup> *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

- (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
- (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

Subsequently, in the *Secession Reference*, the Court asserted what appears to be a political questions doctrine, albeit one that applies only in the context of the reference power. The Court said that it "should not ...entertain questions that would be inappropriate to answer", on the basis that the dispute was not "appropriately addressed in a court of law".<sup>17</sup> In short, the Court has made clear on several occasions that it will not answer reference questions that it does not want to answer.

There is only one problem with this: The Court has never established that it has the power to refuse to answer reference questions.<sup>18</sup>

This is not to say that there may not be good reasons for the Court to refuse to answer reference questions – reasons that sound both in terms of the national interest and the Court's own institutional and political concerns. But the *Supreme Court Act* could not be clearer in terms of the duty it establishes. Peter Hogg acknowledges the Court's statutory duty, but refuses to criticize the Court's purported discretionary power to refuse to answer reference questions. On the contrary, he expresses the view that the Court "has not made sufficient use of its discretion not to answer a question posed by a reference".<sup>19</sup>

It is difficult to see how one can both support the reference power whilst encouraging the Court to refuse to answer reference questions. If it is important for the executive to be able to call on the Court to provide advice, why should the Court be able to refuse to provide that advice? To say that the Court should be able to answer only those questions it wants to answer is promote a political role for the Court, emboldening it to define the terms of its relationship with the executive regardless of Parliament's intention as set out in the *Supreme Court Act*. As the *Marriage Reference*<sup>20</sup> demonstrates, the Court is only too willing to do so.

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<sup>17</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 para. 26, citing *Reference re Canada Assistance Plan (B.C.)*, *ibid.* at 545. There the Court put the matter as follows:

"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."

<sup>18</sup> John McEvoy argues the case in "Separation of Powers and the Reference Power: Is there a Right to Refuse?" (1988) 10 S.C.L.R. 429 and in "Refusing to Answer: The Supreme Court and the Reference Power Revisited" (2005) 54 U.N.B.L.J. 29. See also Huscroft, "Political Litigation and the Role of the Court" (2006) 34 S.C.L.R. 35.

<sup>19</sup> Hogg, *Constitutional Law of Canada* (2009), ch. 8.6(d)

<sup>20</sup> *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 [*Marriage Reference*].

## **The Marriage Reference**

Recall that advocates of same-sex marriage commenced litigation across Canada seeking declarations that the limitation of marriage to opposite-sex couples infringed the right to equality in the *Charter*. Although the federal government defended the law of marriage initially, it threw in the towel following the decision of the Ontario Court of Appeal in *Halpern v. Canada (Attorney General)*<sup>21</sup> (which established same-sex marriage in Ontario with immediate effect) and turned to the courts to help it to establish same-sex marriage across the country. The government refused to appeal the decision in *Halpern* and fought to preclude other groups from appealing the decision.<sup>22</sup> At the same time, the government changed its position in ongoing litigation in other provinces, purporting to concede that an opposite-sex based conception of marriage was unconstitutional. In addition, the government announced that it would introduce legislation to establish same-sex marriage into Parliament.

The centerpiece of the government's strategy was a reference to the Supreme Court of Canada. The reference initially asked three questions:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?<sup>23</sup>

As in the *Secession Reference*, the government was asking questions to which it knew the answers. Parliament had undoubted legislative authority to legislate in regard to the capacity to marry pursuant to section 91(26) of the *Constitution Act 1867*.<sup>24</sup> As for the consistency of same-sex marriage with the *Charter*, no one doubted that an expanded

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<sup>21</sup> 65 O.R. (3d) 161 (C.A.) [*Halpern*].

<sup>22</sup> [2003] S.C.C.A. No. 337.

<sup>23</sup> *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 2.

<sup>24</sup> Provincial legislative authority in regard to marriage is limited to "The Solemnization of Marriage in the Province" pursuant to s. 12 of the *Constitution Act 1867*. Although at trial in British Columbia it was held that the federal power over marriage did not allow legislative amendment to the concept of marriage on the basis that constitutional amendment was required, this was opposed by both the Attorney General of Canada and the Attorney General of British Columbia and was overturned in the British Columbia Court of Appeal. See *EGALE Canada Inc. v. Canada (Attorney General)*, 13 B.C.L.R. (4th) 1 (C.A.)

definition of marriage was consistent with the equality right; the point was never really in issue. The third question was essentially a throw-in, designed to address opposition to same-sex marriage in various religious communities.

In fact, the government could have introduced legislation establishing same-sex marriage into Parliament at any time. It chose to invoke the reference procedure, however, because it was keen to diffuse its responsibility for establishing same-sex marriage. It knew that the introduction of legislation following the receipt of favourable answers on the reference questions would help neutralize political opposition, and as far as the government was concerned, the longer the Court took in dealing with the reference the better. Same-sex marriage would be removed from political debate while it was before the Court, and a new status quo would be established in the meantime pursuant to ongoing litigation on a province-by-province basis – litigation the government was now supporting.

The only question that mattered was whether the limitation of marriage to opposite-sex couples was consistent with the *Charter*, and this was the very question the government had precluded the Court from answering in the first place by declining to appeal the decision of the Ontario Court of Appeal in *Halpern*. Before the reference questions were considered by the Court, however, Paul Martin succeeded Jean Chretien as prime minister, and the government added a fourth question to the reference:

4. 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?

The fourth question asked what the decision of the Ontario Court of Appeal in *Halpern* had been presumed to settle: did the traditional conception of marriage violate the *Charter*? No doubt, the government assumed that the Court's answer to the fourth question would quell opposition to its proposed legislation. If the opposite-sex based definition of marriage was not consistent with the *Charter*, the government could hardly be criticized for seeking to change it. As an added benefit, addition of the fourth question to the reference bought additional time for the government and kept the issue at bay during the election campaign.

In short, all of the circumstances surrounding the *Marriage Reference* were highly political, and for its part the Court responded politically. Starting from a bald assertion of its power to refuse to answer reference questions (“The first issue is whether this Court should answer the fourth question, in the unique circumstances of this reference”),<sup>25</sup> the Court announced that it refused to answer the fourth question, citing several reasons that rendered it “unwise and inappropriate”<sup>26</sup> to do so. All of the Courts reasons are problematic and, ultimately, self-serving.

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<sup>25</sup> *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 61.

<sup>26</sup> *Ibid.* at para. 64

First, the Court noted the government's position. Counsel for the Attorney General for Canada had purported to concede in oral argument that the government intended to introduce same-sex marriage legislation regardless of the Court's answer to the fourth question. In other words, even assuming that the Court were to advise that limiting marriage to opposite-sex couples did *not* infringe the *Charter*, the government would proceed to attempt to broaden the capacity to marry by legislative amendment. The Court described the significance of the government's concession as follows:

The government has clearly accepted the rulings of lower courts on this question and has adopted their position as its own. The common law definition of marriage in five provinces and one territory no longer imports an opposite-sex requirement. In addition, s. 5 of the *Federal Law–Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, no longer imports an opposite-sex requirement. Given the government's stated commitment to this course of action, an opinion on the constitutionality of an opposite-sex requirement for marriage serves no legal purpose. On the other hand, answering this question may have serious deleterious effects...

The difficulties with this argument are many. Start with the obvious: the government was entitled to ask the Court's opinion on the fourth question *even if it intended to introduce legislation in any event*. There are all kinds of reasons why the government might seek the Court's opinion prior to legislating – reasons both good and bad – but this is hardly the Court's concern. Then there is the problem of the government's role in the legislative process. The government is merely a supplicant for legislation and cannot guarantee its passage in Parliament. Counsel's concession that the government intended to legislate binds neither Parliament nor, for that matter, the government or its successors. Why, then, should the government's intention to legislate be considered a good reason for the Court to avoid addressing what it knew to be a national controversy on the meaning of constitutionally protected *Charter* rights – especially given that, by the time the reference was decided, the government was in a minority position in the House. It was entirely possible that its proposed legislation would not pass, and the Court's refusal to answer the fourth question might well affect the political outcome.

Secondly, the Court expressed the concern that answering the fourth question would jeopardize the rights that had been acquired pursuant to the litigation that same-sex couples had won. This should have been an irrelevant consideration – even assuming that a discretionary power to refuse to answer reference questions exists – since it is for Parliament to determine whether or to what extent vested rights should be protected. The Court threw two additional points, both of them make-weight. It noted that there was no precedent for answering a reference question that could have been answered had a matter been appealed, and expressed concern about undermining the decisions of lower courts and the federal government's goal of establishing uniformity in regard to civil marriage.

It is remarkable that the Court could not bring itself to answer a question that was treated as beyond any doubt in the lower courts. The Court thought it more important to stay out of the same-sex marriage issue than to resolve any lingering constitutional uncertainty about it.

## Why use the reference power?

Why do governments use the reference power? It is possible that a government genuinely wants the Court's advice on an important matter. It may doubt the constitutionality of its position and think it unwise to act without the Court's approval. Or it may simply seek to have its views affirmed prior to acting. That is the position outlined recently by the Minister of Justice in regard to the federal government's proposal to establish a national securities regulator:

"The Government strongly believes that Parliament has the constitutional authority to enact a comprehensive *Federal Securities Act* and is initiating preparatory steps in that direction," said Minister Nicholson. "In coming to this view, the Government is supported by many of Canada's foremost constitutional experts. However, for greater certainty, we will be asking the Supreme Court for its opinion, which is why we are proceeding with this reference."<sup>27</sup>

Some might laud a government that takes this sort of position on the basis that it demonstrates respect for the constitution and the rule of law. But it would be naïve to assume that governments act out of such pure motivations. Political interests are likely to be important, if not predominant, considerations in any government's decision to invoke the reference procedure.

### *The government may want to diffuse its moral/political responsibility*

The government's handling of same-sex marriage is the classic example in this regard.<sup>28</sup> Although the government did not get everything it wanted in the *Marriage Reference* – in particular, an answer to the fourth question that would, in effect, have required Parliament to legislate same-sex marriage as a remedial matter – its use of the Court proved politically strategic in the short term.<sup>29</sup>

### *The government may require the Court's moral authority*

The *Secession Reference* is a good example here. The government may have concluded that it lacked the moral authority to provide answers to the questions it referred to the Court in this case – questions to which it knew the answers surely. The government had no reason to suppose that a decision of the Supreme Court of Canada would have any moral force amongst hardened separatists in Québec, but it might have thought that the

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<sup>27</sup> "GOVERNMENT OF CANADA INTENDS TO SEEK OPINION OF SUPREME COURT OF CANADA ON CONSTITUTIONALITY OF PROPOSED CANADIAN SECURITIES LEGISLATION", Department of Justice Press Release, October 16, 2009  
<[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc\\_32437.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32437.html)>

<sup>28</sup> For fuller accounts, see Huscroft, "Thank God We're Here: Judicial Exclusivity in Charter Interpretation and its Consequences" (2004) 25 S.C.L.R. (2d) 241, at 255-63 and Huscroft, "Political Litigation and the Role of the Court" (2006) 34 S.C.L.R. 35, 36-47.

<sup>29</sup> See the discussion above. Note too, the reception to the Court's decision, the media suggesting that same-sex marriage legislation had been "approved" by the Court: "Supreme Court OK's (sic) same-sex marriage" (CBC, December 10, 2004, <http://www.cbc.ca/canada/story/2004/12/09/scoc-gaymarriage041209.html>); Supreme Court approves same-sex marriage (CTV, December 10, 2004, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1102592743862\\_17/?hub=TopStories](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1102592743862_17/?hub=TopStories))

Court's opinion would be influential with soft-separatists, while providing comfort to federalist forces in Québec as well the rest of the country. No doubt, the reference strategy also satisfied the government's need to be seen as doing something – anything – rather than simply waiting for yet another referendum on sovereignty to be held in Québec, especially after the 1995 referendum had come so close to succeeding.

*Practical concerns may make a reference attractive*

A number of practical considerations may make a reference to the Court an attractive option. As in the *Marriage Reference*, government may wish to buy time, and remove a matter from the political arena in the short term. Alternatively, the government may wish to expedite what it considers to be inevitable litigation, and take on the litigation on its own terms. The federal government's strategy of referring proposed legislation establishing a national securities regulator to the Court provides a good example. In the face of clear provincial opposition to the establishment of a federal regulator – and provincial desire to get the matter before their own provincial courts of appeal – the government's decision to refer the matter to the Supreme Court appears to take the initiative.

**Why not use the reference power?**

The reasons not to use the reference power mirror the reasons for using it.

*The government may want to assert its moral/political responsibility*

Not all governments will want to fob difficult moral/political issues off to the Court. Although this has not been the norm in Canadian politics, a government may want to take the lead in national debate on a contentious moral/political issue rather than leaving things to the Court.

I am not naïve about the likelihood of this occurring any time soon. It is conceivable, however, that the government might oppose the Court's presumed position on a matter, or consider that the Court is likely to be hostile to its conception of the Constitution. In these circumstances, it would be odd for the government to invite the Court to, in effect, take ownership of the matter.

*Practical concerns may make a reference unattractive*

A government that wants to legislate has a choice: it can seek the Court's authorization pursuant to the reference procedure or it can simply introduce the legislation and promote its passage in Parliament in the knowledge that its constitutionality might subsequently be challenged. Why choose one route rather than another?

The answer, I think, lies in the aphorism: "it is easier to get forgiveness than approval". Where there is good faith disagreement about the meaning of the Constitution

it is easier for the government to defend the constitutionality of legislation already on the books than it is to obtain the Court's approval for proposed legislation. From the Court's perspective, it is more difficult to strike down democratically enacted legislation than it is to provide advice that dissuades a government from seeking to legislate in the first place.

As we have seen, the outcome of a reference may be unpredictable to say the least, and unpredictability is in general a good reason for governments not to embark on a particular course of action. In the context of a reference, the problem of unpredictability is compounded by the certainty of consequence: reference decisions are as binding as any other decision the Court makes, and may limit or foreclose the government's political options not only in the particular matter that gave rise to the reference but in future matters as well.

### **Impoverishing and precluding debate on rights questions**

Some proponents of the reference power consider that the Court's performance in modern times vindicates the reference power and its use. What would have happened of the Court had not clarified that Québec could not separate unilaterally? For others, any concern about particular reference cases is more than outweighed by concern about the executive and legislative branches. Sure, it might be conceded, the Court may make mistakes from time to time. But, on balance, the Court has acted wisely in handling references and served the Canadian people and the constitutional order well.

I don't expect to convince anyone who has faith in judicial review that the reference power is problematic. I do not share this faith for a host of reasons that I have discussed elsewhere, nor do I share the distrust of the executive and legislative branches that motivates so many proponents of judicial review. My concern is that judicial review impoverishes and precludes debate on rights questions, and the reference power simply makes things worse. I can do no better than cite the eloquent words of American constitutional law scholar James Bradley Thayer at the turn of the last century:

The tendency of a common and easy resort to this great function [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.<sup>30</sup>

Consideration of some of the issues that have come before the Court in recent years demonstrates Thayer's point. Take, for example, the corporal punishment, permitted by a provision in the *Criminal Code* that permits "reasonable" force for the correction of children.<sup>31</sup> It is not remarkable that the issue came before the Court; nor is it remarkable that the Court upheld the constitutionality of the impugned provision.<sup>32</sup> What is remarkable is that the outcome of the *Charter* challenge was, in effect, a rewriting of the *Criminal Code* provision, achieved without any legislative study or debate on the matter. The Court simply proffered a new conception of "reasonableness" in the use of force and

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<sup>30</sup> Thayer, *John Marshall*, (1901, reprinted 1974) at 107.

<sup>31</sup> R.S.C. 1985, c. C-46, s 43.

<sup>32</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 [Canadian Foundation].

upheld the constitutionality of the provision based on its new conception. Note that the Court did not declare the provision unconstitutional and leave it to Parliament to revise the law. Note, too, that Parliament did not do anything following the Court's decision. It did not need to; the provision had been rewritten, and no doubt the government was glad not to have to deal with the political fallout in handling the matter itself.

But consider the way in which reform of the law was achieved. It was not the result of a grassroots campaign – knocking on doors, holding public meetings, organizing protests, or anything of that sort. No, reform was achieved through litigation, a process driven by elites and ultimately decided by them. The law was changed without any democratic process.

It is remarkable, too, and sadder still, that no one seems concerned about any of this. Gone are the days our legislators discuss and debate difficult moral issues.<sup>33</sup> They are not expected to, it seems, and many think it is illegitimate for them to do so in any event. The mere assertion of rights is thought to preclude deliberation in the democratic forum, since rights provide protection against majoritarian outcomes and, in particular, the “tyranny of the majority”. This is a simplistic view, of course, since the existence and scope of the right asserted may well be the subject of reasonable disagreement. Some consider that legislators are simply unable to deal with complex moral issues because they are used to such issues being dealt with by the Court – albeit that the Court does not deal with them as moral issues strictly speaking.<sup>34</sup> They cannot imagine that legislators can discuss what they take to be highly sophisticated questions of constitutional law.

Once constitutional rights are expounded by the Court there is little that is left for Parliament to do. This suits “dialogue” theorists and the Court itself, since both believe in judicial supremacy where the *Charter* is concerned. Dialogue theorists insist that the only recourse for Parliament in the event of disagreement about the interpretation of the *Charter* is the invocation of the notwithstanding clause,<sup>35</sup> and this is not about to happen for a host of reasons.<sup>36</sup> The result is *de facto* judicial exclusivity.

This is what makes the government's position in the *Marriage Reference* so disingenuous. Recall that the government added a fourth question to the reference, asking the Court whether limiting marriage to opposite-sex couples infringed the *Charter*. Why did it do so rather than simply introduce its legislation into Parliament? According to the

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<sup>33</sup> Jeremy Waldron has described the debate in the British House of Commons on abortion as “as fine an example of serious dialogue and deliberation as you could hope to find on an issue of rights”. See Waldron, “Some Models of Dialogue Between Judges and Legislators” in Huscroft and Brodie eds., *Constitutionalism in the Charter Era* (2004).

<sup>34</sup> Waldron, “Do Judges Reason Morally?” in Huscroft ed., *Expounding the Constitution: Essays in Constitutional Theory* (2009).

<sup>35</sup> See eg, Hogg, Bushell Thornton, and Wright, “*Charter* Dialogue Revisited – Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall L.J. 51, and their “A Reply on ‘*Charter* Dialogue Revisited’” at 200; and see the my critique, “Constitutionalism from the Top Down” (2007) 45 Osgoode Hall L.J. 91 and “Rationalizing Judicial Power: The Mischief of Dialogue Theory” in Kelly and Manfredi eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (2009) 50.

<sup>36</sup> Huscroft “Rationalizing Judicial Power”, *ibid.* at 54-7.

Minister of Justice, Irwin Cotler, addition of the fourth reference question allowed the Court to deliver a “more comprehensive opinion”, one informed by the many groups and individuals the Court allowed to intervene in the proceedings. Their participation, the Minister said, ensured “a full range of views before the Court”.

Cotler was, in effect, likening the reference proceedings to the democratic process the government was circumventing. He did not acknowledge as much, of course. On the contrary, he insisted that there would be a full debate in Parliament. “But before that happens”, he said, “we need clear advice from the Supreme Court on the legal framework within which choices must be made.”<sup>37</sup>

But Cotler expected that future Parliamentary debate would, as a practical matter, be foreclosed by the Court’s answer to the fourth question. That was one of the government’s motivations in adding the fourth question to the reference: the government would urge Court to advise that limiting marriage to opposite-sex couples was unconstitutional; the Court would so advise; that would be the end of things. It would be practically impossible to oppose the government’s legislation in the face of an opinion that same-sex marriage was constitutionally required.

The Court knew all of this and ultimately wanted no part of the government’s strategy. I have argued that the Court does not have the discretionary power to refuse to answer questions that it asserted, but that is beside the point. The important point for present purposes is that there was room for democratic discussion and debate on same-sex marriage only because the Court deigned to allow it, and it cannot be counted upon to be solicitous of Parliamentary debate in future. In truth, concerns about its own role in establishing same-sex marriage rather than any concern about the role of Parliament led to the Court’s decision in the *Marriage Reference*.

### **The future of the reference power**

The reference power appears to be used relatively infrequently. That is a good thing, in my view – especially where the *Charter* is concerned – but the reference power has a distorting effect on the constitutional order nonetheless. It perpetuates the idea that constitutional issues are the province of the Court and encourages reliance upon judges to resolve some of our most profound disputes.

Resort to the reference power devalues the government’s claim to legitimate interpretive authority where the Constitution is concerned. The more it is used, the greater will be the demands that it be used in future cases, and the more difficult it will be to resist those demands. After all, if it is good for the Court to pre-authorize the constitutionality of legislation in one case, why not in all cases?

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<sup>37</sup> “Government of Canada Reaffirms its Position on Supreme Court Reference”, Ottawa, January 28, 2004 (Press release of Minister of Justice and Attorney General Irwin Cotler).

We are about to begin the long process of a reference in regard to the constitutionality of the *Criminal Code* prohibition of polygamy.<sup>38</sup> Unusually, the matter will commence in a trial court in British Columbia before being heard by the British Columbia Court of Appeal and ultimately the Supreme Court of Canada, in a process that will take several years. The process will appear have some of the trappings of democratic deliberation and debate – religious organizations, womens’ rights groups, civil liberties organizations, and others will participate in the proceedings – and eventually the government will receive the Supreme Court’s advice. But there is nothing democratic about this process. The reference means that true democratic debate will not occur in the meanwhile, and depending on the Court’s decision it may never occur.<sup>39</sup> The reference practically invites the Court to rewrite the law,<sup>40</sup> much as the Court did in regard to the *Criminal Code* provision allowing the use of reasonable force in correcting children,<sup>41</sup> and if the Court does so the government may see little benefit of Parliamentary debate on the matter.

## Conclusion

Much scholarly debate about the reference power has focused on questions surrounding its constitutionality. Is it appropriate for an appellate court to have original jurisdiction? Does an advisory function compromise the separation of powers? For good or ill, however, the constitutional debate was settled by the Court in the *Secession Reference*. The reference power is constitutional, and that is that.

But governments are under no obligation to invoke it, and in my view they should be reluctant to do so. The less judicial review, the better.

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<sup>38</sup> R.S.C. 1985, c. C-46, s. 293.

<sup>39</sup> The polygamy file has been mishandled by succession of governments in British Columbia and perhaps in the circumstances we should be grateful for a reference: something is finally happening in the face of a deliberate and ongoing violation of the *Criminal Code* that has gone unprosecuted for a host of reasons, some of which are illegitimate. See Huscroft, “The Attorney-General and *Charter* Challenges to Legislation: Advocate or Adjudicator” (1995) 5 N.J.C.L. 125.

<sup>40</sup> The two questions, posed by Order in Council dated 22 October 2009, are as follows:

- a. Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?
- b. What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

The second question invites a substantial limitation of the scope of the law

<sup>41</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, discussed in the text above.