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The Supreme Court's Use of Narratives in Issuing Advisory Opinions

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Abstract

This major research paper looks at how Canadian Supreme Court justices view their role in adjudicating reference questions. Comparing the texts of 21 Supreme Court advisory opinions across two eras of the Court (Chief Justice Laskin: 1973-1984 and Chief Justice McLachlin: 2000-2017), the study examines the use of four narratives – the Guardian of the Constitution, Umpire of Federalism, Institutional and Public Will – to determine how the Court positions its role vis-à-vis the constitutional order and the other branches of government. I use a mixed-method approach that incorporates an empirically oriented content analysis of each decision, complemented by four in-depth case studies of archetypal narrative displays. While evidence of all four narratives exists across both eras of the Court, two – the Guardian of the Constitution and the Umpire of Federalism – dominate both sets of judicial writings.

Keywords

Supreme Court of Canada, Advisory Opinions, Role of Judges

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Table of Contents

List of Tables

List of Figures

List of Appendices

Chapter 1

The Advisory Opinion

Increasingly, Canadians look to the judiciary, rather than the legislature for finality on policy matters.[1] While the Westminster parliamentary system dictates that the fusion of powers embodied in the executive and legislature are the source of law and policy, the rise of divisive partisanship, ideological decision-making and real-time transmission of information from parliament to the public renders governments wary of developing policies that might be viewed as controversial – particularly in close proximity to an election. One of the ways governments have been able to seek out advice on such difficult decisions is by having the courts rule on the legality or constitutionality of laws (enacted or merely under consideration) and, if needed, return them to the legislature for revision, "proofing" or insulating them – at least in part – from scrutiny. The mechanism through which executives can do this is referred to as the advisory opinion.

At the federal level, the advisory opinion or reference question[2] is a function of the *Supreme Court of Canada* (SCC) *Act*, RSC 1985, though similar provisions exist for the federal court and the provincial courts of appeal.[3] The legislation that governs the application of advisory opinions allows the Governor-in-Council (the executive, in a *de facto* sense) in the appropriate jurisdiction to pose questions of legal-political importance with the expectation that an advisory opinion will be handed down, guiding the government in the legal and constitutional elements of the issue in question. For the

[1] Angus Reid, "Canadians have a more favourable view of their Supreme Court than Americans have of their own," 17 August 2015. Available at: http://angusreid.org/supreme-court/.

[2] I use the vocabulary of "reference question" to refer to that which is posed by the executive and "advisory opinion" to refer to the response provided by the Court.

[3] The Federal Court can hear questions related to federal boards, tribunals or commissions. All provinces have built in similar provisions to their own judicature acts.

Supreme Court, this power emanates from section 53 of the *Supreme Court Act*[4], which reads,

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.[5]

The text of section 53 sets out the types of issues that may make up a question asked under this section. Yet in truth, the four classes of questions almost cover the gamut of political-legal questions: constitutional matters, legislative matters, federal matters and institutional matters. Of course, many of these areas are covered in the course of routine litigation. However, advisory decisions are unique as they deviate from courts' traditional caseloads in that they are not addressing a previous case or indeed even a "live" or concrete legal problem in practice. Rather, courts are often asked to assess a legal question in the abstract. In doing so, the courts rely on facts (though their interpretations may be disputed) expert testimony (such as affidavits), submissions by counsel, evidence (where applicable), case law and their own comprehension of the constitution or a relevant piece of legislation under scrutiny.

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[4] *Supreme Court Act* (RSC, 1985, c. S-26).

[5] Section 53(2) and (3) note that the executive may ask other questions that are deemed important, even if they do not refer to constitutional matters.

Advisory opinions have typically been viewed as a strategic, political tool of the executive. Only the federal government can ask questions directly to the Court (though all provinces have built in similar provisions to their own judicature acts that permit them to ask questions of their appeal courts and to appeal, by right, those decisions to the Supreme Court). In the legal and political science literatures, most analysis of advisory opinions consist of single case studies or the political-strategic use of the reference question as a technique of blame avoidance or at least deferral of action on controversial policy matters.[6] Consequently, much has been said on their use for tactical, political purposes.[7] Such analyses tend to downplay the potential for the advisory opinion to serve a laudable political purpose, namely an opportunity for government to engage with the judiciary on matters of legality and constitutionality in advance of finalizing laws that may benefit from careful legal scrutiny.

Regardless of the motivations of the executive, much less has been said about the Court's role in providing the opinion. In addition to its many uses for the executive, the advisory opinion is also a mechanism through which the judiciary can make its legal opinions known. In this view, both branches of government have the potential to be empowered by the mechanism of the reference question, though it could also undoubtedly result in conflict or fracture between the two branches.[8] Such an opportunity presents a unique set of considerations for the Court. They are, by tradition at least, somewhat compelled to consider and advise on the issue under request and, since 1891, the "advisory only" element of the decision has been treated as defunct, meaning that all decisions made by the Court in advisory opinions are treated legally binding and treated as the final word on

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[6] See Kate Puddister, "Seeking the Court's Advice: The Politics of the Canadian Reference Power" (Vancouver: University of British Columbia Press, forthcoming) for an extensive analysis of this political-strategic dimension.

[7] For example: Peter W Hogg, and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures, (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" *Osgoode Hall LJ* 35 (1997): 75; Peter H. Russell, *The Court and the Constitution* (Kingston ON: Institute of Intergovernmental Relations, Queen's University, 1982); Puddister, *supra* note 6.

[8] The scope of the courts' and governments' rights are set out in the Judicial Committee of the Privy Council's *re References by the Governor-General in Council*, [1910] SCJ No. 33, 43 SCR 536, affd [1912] AC 571 (PC) (also called "*Re References*").

that legal issue, even if, according to the letter of the law, they are not.[9] The Court also maintains a good measure of discretion around how they choose to respond: they are not forced to answer the questions as they are laid out, nor are they forced to provide a palatable opinion to the executive who requests the opinion. This has the potential to create conflict when the Court is asked to speculate on matters that should traditionally fall within the scope of such questions that ought to be deliberated and presumably answered by the legislature. In this way, it could be said that the reference question forces the Court to breach the borders, if not act wholly outside, of its traditional bounds as a legal arbiter and wade into the realm of policymaking.

1.1 Research Question

In the absence of a formal declaration by the Court about how they view their role in rendering advisory opinions, we know little about the Court's motivations or whether they apply what I refer to as "a narrative framework" – or an overarching legal understanding communicated in written form – for issuing advice to the executive through this format. Even if such a statement did exist, we should entertain the notion that there could be a fair amount of variance between individual judges and that some evolution of this framework might take place over time as the composition and leadership of the Court changes.

Yet, drawing from the considerable body of literature on the Supreme Court, we can hypothesize that there are many ways that the Court could interpret its role in issuing opinions: as an instrument of the public will; in terms of its relationship with the executive and legislature (as one of three branches of government); as an arbiter of federalism; or in its traditional role as the guardian of the constitution. There is, of course, no need for the Court to locate solely in one space; rather, it is entirely possible that the Court might view its role as multifaceted. Moreover, as the Court operates largely as a composite body (though multiple viewpoints are often rendered in decisions), we should

[9] Carissima Mathen, ""The question calls for an answer, and I propose to answer it": The Patriation Reference as Constitutional Method" (2011) 54 *The Supreme Court Law Review* 143-166.

account for the possibility that external factors such as large political punctuations (i.e. the repatriation of the constitution, the entrenchment of a bill of rights or the passage of institutional reform legislation), may cause the Court to change its evaluation framework over time, much like the legislature and executive have evolved in the way they distribute power and handle legislative matters.[10] Indeed, we could also hypothesize that the Court's framework varies from decision to decision as different legal questions encourage the Court to engage with different aspects of legal doctrine.

This study addresses some of the many questions that arise from these considerations. By engaging in a comparative analysis of two eras of the Supreme Court – the Laskin Court (1973 to 1984) and the McLachlin Court (2000 to 2017) – I seek to understand how judges use the text of their advisory opinions to articulate a narrative framework for decision-making. Subsequent to this broader analysis, I examine whether the introduction of the *Constitution Act*, 1982 and the C*harter of Rights and Freedoms* created a pivot point for way in which the Court issues advisory opinions. Thus, the examination of the Laskin Court which issued 13 advisory opinions (see Appendix A for case listing), including the pivotal *Patriation Reference*[11], and sat up until the implementation of the *Charter* in 1984, contrasted with the contemporary McLachlin Court's 8 advisory opinions (see Appendix A for case listing), provides an opportunity for an assessment of these issues.[12] Following this analysis, I engage in a case study of four of these archetypal narrative frameworks in order to expand upon the understanding of the role of the Court in advisory opinions.

Throughout my work, I find that the Court relies predominantly on two narrative frameworks: the Guardian of the Constitution and Umpire of Federalism. In doing so,

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[10] For an analysis of this evolution, see Donald J. Savoie, *Governing from the Centre: The concentration of power in Canadian politics* (Toronto: University of Toronto Press, 1999).

[11] *Reference re Resolution to amend the Constitution*, [1981] 1 SCR 753.

[12] A total of 10 provincial references, requested of provincial superior courts, were also issued during Laskin's tenure as chief justice and 5 provincial references during McLachlin's tenure. These references were started and finished in provincial court and were not appealed to a higher court.

they firmly entrench the widely held belief in the legal scholarship and legal community at large, that the Court views its role somewhat narrowly and endeavours to maintain a relatively conservative approach to applying such narrative frameworks (which is not to say that the actual outcomes of the decisions are conservative). However, at particular moments of social and legal importance, the Court does engage in readings of the law that reflect a Public Will or Institutional reading of legislation or the constitution as well.

Chapter 1

The Reference Power – Uses, Abuses and Legal Utility

The existence of the advisory opinion mechanism is somewhat unique to Canada. Although the *Supreme Court Act* draws the reference feature through emulation of British common law, the UK's reference power is unused in present day. Courts in other common law jurisdictions such as New Zealand, Australia and the United States have not been empowered to issue advisory opinions (though some individual states do permit questions asked by the state legislature or the governor).[13] Civil law jurisdictions do have similar mechanisms in place to advise governments on constitutional matters,[14] however, none has the executive-centered approach featured in Canada, which places reference questions as the sole prerogative of the executive via the Governor-in-Council (or Lieutenant Governor-in-Council for provincial references).[15] The Canada-as-a-legal-outlier motivation alone makes the act of studying advisory opinions an interesting one. However, the within-case contrast of how each institution views the advisory opinion is equally useful to position the Court's role in applying this mechanism for constitutional and legal study.

Since the introduction of the *Supreme Court Act* in 1875, the Court as the final court of appeal for Canada, its predecessor, the Judicial Committee of the Privy Council (JCPC), and its provincial counterparts have produced over 200 advisory opinions for their respective executives. The content of questions has ranged in subject matter from

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[13] From Puddister, s*upra* note 6 at 10: "The state constitutions of Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island and South Dakota authorize advisory opinions, while, Alabama and Delaware provide the advisory power through statute".

[14] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (New York: Oxford University Press, 2000).

[15] Puddister, s*upra* note 6.

agricultural or resource policy[16], "New Deal"-era social policy[17] to institutional reform[18]. While many have had implications across multiple areas of law, most (if not all) have focused on questions of constitutional importance.

Many scholars have opined on the reasons why executives would call upon the judiciary to answer constitutional or policy-oriented questions through the mechanism of the advisory opinion. It has been the interest of many scholars to point to the strategic elements of the reference power, sometimes characterised as the abuses of the availability of the reference question. The JCPC itself recognized the potential for this abuse early on, citing "mischief and inconvenience […] might arise from an indiscriminate and injudicious use of the Act".[19] Smith observes its historical use was largely as an alternative or replacement for the disallowance power, permitting federal governments to have the Court invalidate provincial legislation without having to do so directly.[20] Many constitutional scholars point out a more evolved inter-government or federalism dimension of the reference question, namely that it serves as a "practical device [for governments] to police the constitutional excesses of the other", while also noting its power to be used as a political weapon in inter-governmental sparring.[21] The 1984 *Reference re Newfoundland Continental Shelf*[22] points to such an occasion. The federal government used their reference power to ask the Supreme Court about the constitutionality of off-shore natural resource exploration before the provincial court

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[16] *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198; *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86

[17] *AG BC v. AG Cda* [1937] AC 377 III Olmsted 228; *AG Cda v. AG Ontario* [1937] AC 326.

[18] *Reference re Senate Reform*, 2014 SCC 32; *Reference re Supreme Court Act* ss. 5 and 6, 2014 SCC 21, [2014] 1 SCR 433

[19] *Reference*, *supra* note 8 at para16.

[20] Jennifer Smith, "The Origins of Judicial Review in Canada" (1983) 16 *Canadian Journal of Political Science* 1: 115–134.

[21] Barry Strayer, "Constitutional References" in F. L. Morton, *Law, politics, and the judicial process in Canada* (Calgary: University of Calgary Press, 2002) at 262; Russell, *supra* note 7 at 7.

[22] *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86.

could return their own answer. As the SCC ruled in favour of the government, the federal government effectively stemmed the provinces rights and upended the provincial court's decision.

Puddister, reviewing the political science literature, neatly categorizes the executive's choice to submit a reference questions as stemming from one of five motivations: to avoid decision-making particularly in controversial policy areas (a delegation motivation), to protect jurisdiction (an inter-governmental conflict resolution function), to determine constitutionality of a policy (a proofing function), to benefit from institutional authority of the courts (a legitimation function), and to address pressing issues in a timely manner to allow for some amount of control in framing the policy debate (a strategic agenda-management function).[23] These functions are corroborated in many analyses of individual reference cases[24], some of which point to the volatility introduced into the system by reference questions. For example, Strayer notes that the executive's relative freedom to be able to ask for advisory opinions threatens to erode the independence and authority of the courts.[25] While others (including the Court itself) have taken the view that the Court's ability to decline to answer certain questions protects it from such abuses, the potential for politicization of the advisory opinion remains one of its more controversial elements.

Yet, reference decisions are neither a purely instrumental device to clarify the bounds of Canada's political institutions, nor are they solely used to obtain advantages in inter-governmental relations. Many reference decisions speak to a wide variety of constitutional matters that have profound implications for the lives of Canadians, ranging

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[23] Puddister, *supra* note 6 at 14.

[24] See Lori Hausegger, Troy Riddell, and Matthew Hennigar, *Canadian Courts: Law, Politics, and Process*, 2nd ed. (Don Mills: Oxford University Press, 2015); Carissima Mathen, "Mutability and Method in the Marriage Reference" (2005) 54 *UNBLJ* at 43; Kate Glover, "The Supreme Court in a Pluralistic World: Four Readings of a Reference" (2015) 60 *McGill LJ* 4 at: 839.

[25] Strayer, supra note 21 at 262.

from their freedom to marry, to the status of their citizenship within the country.[26] The advisory opinion has particular purchase in issues of constitutional reform and institutional change with fully one quarter of all final appellate court decisions involving constitutional law stemming from references.[27]

While scholars point to the more strategic elements of the government's ability to ask reference questions, the mechanism itself may also have more laudable uses. References can be used as an opportunity to test the legality of policy goals and initiatives.[28] Emergency conditions make it imperative that government can be assured of the validity of a proposed action.[29] The Court may also be used to provide legal advice on a parliamentary issue that is largely non-justiciable. Advisory opinions can confirm jurisdiction, can bring levels of government together in deliberation and discussion outside of the usual forum of the First Ministers Meetings.[30] The outcomes of advisory opinion may produce uniformity in standards across the country, as all governments will have had the benefit of hearing the Court's deliberation on the issue. It may also have the benefit of preventing further litigation in areas of constitutional opaqueness.

Certainly these advantages can largely be viewed as the other side of the strategic motivation coin. But it is also imperative to note that the federal government gives up some of its authority when deferring a question to the Court. Certainly, governments are able to frame questions as they wish; however, doing so always introduces an element of risk of having their position declined or ruled unconstitutional. Glover, for example, notes that once reference questions are submitted to the Court, governments lose control

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[26] *Re Same-Sex Marriage* [2004] 3 SCR 698; *Reference re Secession of Quebec*, [1998] 2 SCR 217.

[27] Strayer, supra note 21 at 261.

[28] Glover, supra note 24.

[29] Strayer, supra note 21 at 267.

[30] When a reference is before the Court, all governments are notified and requests to serve as interveners are automatically accepted

over the process, arguments and outcome.[31] As evident in the Harper government's experiences with the *Supreme Court Act Reference* and *Senate Reference*, such gambles can have political consequences that may stymie or frustrate federal objectives.

Regardless of the focus on the relative positives or negatives of the use of the reference question as a political tool, this executive-centred discourse has been the dominant narrative in explaining the use of the reference question. Far less has been said about the Court's position in producing advisory opinions. I endeavour to fill that gap.

2.1 A Singular Mechanism

The Court has traditionally used the practice of delivering written decisions not only as a means to convey their ruling on a particular fact set, but also to communicate broader constitutional or legal principles to be applied by the legal community going forward. Most famously, in *Edwards v Canada (AG),* A.C. 124, 1929 UKPC 86, Justice Sankey's communication of the "living tree capable of growth" principle that encourages courts to give the constitution a "large and liberal interpretation" has resonated with future Courts and been applied expeditiously in cases ranging from institutional reform to freedom of expression. This may be particularly true in their deliberation and delivery of decisions in advisory opinions precisely because these are opportunities for the Court to engage in conversation with the executive directly on issues of legal-political importance.

While it is possible the Court does not see their role in references any differently than they view their role in routine litigation, the effect of their writings in response to reference questions may not only provide clarity on particular legal questions, it might also afford a legal audience a view of the Court's broader understanding of an issue. Of course, this is not necessarily different than the clarity afforded through the Court's regular jurisprudence; however, In short, the Court's writings are a trove of information about the broader frameworks that they use to come to more particularized decisions.

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[31] Kate Glover Berger, "The Impact of Constitutional References on Institutional Reform" in Emmett Macfarlane (ed), *Policy Change, Courts, and the Canadian Constitution* (Toronto: University of Toronto Press, 2018) at 126.

The availability of these decisions is longstanding, but with an important caveat. Prior to 1891, the SCC did not write up accompanying reasoning for the decisions it made with respect to reference questions. Amendments to the *Supreme Court Act* made in 1891 allowed interested parties to submit oral and written arguments and have the Court hand down a written opinion.[32] This change in procedure has yielded information, not only on outcomes, but process. Since provinces then gave themselves their own reference power through their appeal courts in the decade following the 1891 reforms, a tremendous volume of text is available to consider the opinions of courts as it relates to the provision of advisory opinions.

These texts permit a number of forms of analysis. Most readily, observers of the Court's decisions can glean from them a considerable amount of information with respect to their views on legal questions. As noted above, the Court has used the occasion of providing an advisory opinion to reflect on the nature of these opinions, their breadth and limits, as well as their utility with in the broader framework of Canadian jurisprudence. Yet, legal-political and institutional conflict can also arise from advisory opinions as they may place limits on other branches or orders of government. In posing reference questions, the executive has challenged their legitimacy and legality more than once. In one decidedly meta-constitutional reference, the *Re References by the Governor-General in Council*, [1910] 43 S.C.R. 536, or the so-called "References Reference"[33], the JCPC was asked to adjudicate whether the reference power of the executive was within the legislative jurisdiction of Parliament.[34] Though it recognized that, in providing the advisory opinion, the Court was essentially engaging in an extrajudicial function (potentially compromising

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[32] Strayer, supra note 21 at 261.

[33] *Reference*, *supra* note 8. Interestingly, the JCPC ruled that, although answering references was a "non-judicial function", it could nonetheless be imposed on the court by statute. This reflects the prevailing notion at the time of the *SCA*, 1875 was merely statute, and not, as it is considered now, quasi-constitutional legislation.

[34] The question was framed as "whether under the Canadian Constitution the Governor-General in Council has power to frame and refer to the Supreme Court questions as to the constitutional powers of the Provinces as to the effect of Provincial statutes and as to the interests of individuals who may be unrepresented upon such reference and to require the Supreme Court to answer such questions." *Reference, supra* note 8 at 2.

its independence), it clarified that it was permitted to do so because the opinions are solely advisory and not legally binding.[35] The Court was called upon for this sort of self-reflection again in the Reference *re Remuneration of Judges of the Provincial Court (P.E.I.),* [1997] 3 S.C.R. 3, wherein the Court was, in effect, asked to comment on its own independence as well as core functions of the judiciary.[36] Similarly, in the *Senate Reform Reference*, the Court further outlined its "proper role", that of determining "the legal framework for implementing the specific changes", rather than the desirability of such changes.[37] The Court's ruling in the *Supreme Court Act Reference* is another clear example of the Court weighing in on its own independence and status within the constitutional order.

The executive has pushed back on the legitimacy of the advisory opinion in further cases.[38] In the *Reference re Canada Assistant Plan (BC)* [1991] 2 SCR 525, the Court asserted limits around the requirement to answer reference questions, stating that it could decline to answer a reference question where it would take the court beyond "its proper role within the constitutional framework of our democratic form of government".[39] In the *Secession Reference*[40], the Court revisited this issue and addressed the critique that the advisory opinion fell outside routine judicial function[41]. In their decision, the Court

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[35] Advisory opinions, though not binding, are cited in case law as would any other legal precedent. Thus, they take on, in many ways, the characteristics of binding decisions. Strayer, supra note 21 at 261 notes that they are "Technically not binding, but still authoritative".

[36] Kent Roach, *The Supreme Court on Trial: Judicial Activism Or Democratic Dialogue* (Toronto: Irwin Law, 2016) at 157.

[37] *Reference, supra note 18* at para 4.

[38] However, looking at the disposition of the Court in reference cases, Puddister, *supra* note 6, finds that only in 21% of cases was government law invalidated (Invalid in part 16%; Valid 46%; N/A 17%).

[39] Florian Sauvageau, David Schneiderman, and David Taras, *Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2011) at 125; *Reference re Canada Assistant Plan (BC)* [1991] 2 SCR 525 at 545.

[40] *Reference, supra* note 26.

[41] The Amicus Curiae for Quebec questioned the function of the Court's advisory power as follows: "[e]ither this constitutional power [to give the highest court in the federation jurisdiction to give advisory

clearly articulated that, while the reference power might not be expressly enumerated within either of Canada's constitutions, "there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role".[42] They also used the opportunity to clarify that it would not be compelled to answer questions put to it by government that were "outside the court's expertise, the interpretation of the law, broadly construed".[43] In essence, the Court has been able to use the very mechanism that contains an attack in its own defence – suggesting that the advisory opinion is truly a unique political tool.

The Court has also used the advisory opinion to provide clarity on legal matters that had not been (or could not be) brought to the Court through tradition litigation. For example, in the *Patriation Reference*, the Court made a statement about the use of conventions and remedy for their violation. In looking at the justiciability dimension of the convention question, which, though not a matter of law according to justices Estey, Laskin and McIntyre, one that they would take up owing to in the Patriation Reference because of the "unusual nature of these References".[44] This comment clearly reflects the fact that advisory opinions, while part of the broader set of case law, hold a special place in this body precisely because they are a type of executive-judicial engagement that permits a wider set of legal issues to be adjudicated. The practical outcome is that the Court's decision elevated conventions from a mere political nicety to a quasi-justiciable element within constitutional law.

Similarly, the Court has used the mechanism of advisory opinions to make statements writ large on the nature of constitutional law in Canada with profound effects for political

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opinions] is expressly provided for by the Constitution, as is the case in India (Constitution of India, art. 143), or it is not provided for therein and so it simply does not exist. (Emphasis in original).

[42] *Reference, supra note 26* at para 15.

[43] *Reference, supra note 26* at para 26.

[44] *Reference, supra* note 11 at 849.

actors and institutions. Glover notes that in the *Senate Reference*, the Court used theories of unwritten constitutional law and precedent to conclude that the constitution has an internal architecture (upholding and expanding upon their statement in *OPSEU*[45]), thereby limiting the legislature's unilateral ability to tinker with institutional structure.[46] From a theoretical perspective, the decision filled many textual gaps in constitutional law that were exposed in the writing of the 1982 *Constitution Act*[47]. However, from a practical perspective, the Court used the reference decision to reinforce norms about inter-governmental relations set out in early decisions.[48]

In all of the above decisions, the Court has used the process of deliberation and creation of a written advisory opinion to make a series of (largely) inter-connected statements about constitutional law with profound effects for the practice of politics in Canada. As noted by Mathen, in each decision, "the Court appears to be performing the same function: identifying broad principles and applying them to produce a particular legal rule".[49] Of course, the Court does not have to wait for a reference question to be asked to make such declarations (they could do so in routine case law), but the advisory opinion offers the Court a few opportunities that are unique to the mechanism: (1) to respond to constitutional questions more broadly than is usually done in routine litigation; (2) to directly engage with the executive on matters of legal-political importance; (3) to selectively answer questions (and in doing so, make implicit statements about the appropriateness of the tool's use or the question at hand)[50]; and, (4) to expand on the scope of questions asked with far-ranging implications for core elements of the Canadian

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[45] *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2

[46] Glover, supra note 24 at 845.

[47] *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

[48] *Reference*, *supra* note 11; *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793.

[49] Mathen, *supra* note 9 at 150.

[50] Evidence of this can be found in the refusal to answer such in *Re Goods and Services Tax* [1992] 2 SCR 445 and *Reference*, *supra* note 26.

political structure. This singular mechanism provides ample scope for the study of not only constitutional law, but also judicial behaviour. It is to this issue that I now turn.

2.2 A Framework for Advice: Assessing Judges' Role in Advisory Decisions

Across the aforementioned decisions and the myriad other reference questions that have been asked of the Court, we can see preliminary evidence of the Court commenting on its role in the advisory capacity and setting out norms for judicial behaviour. For example, in the *Secession Reference*, the Court asserts, "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".[51] In doing so, the courts puts limitations around how far its advisory capacity goes and suggests that the prevailing norm of judicial behaviour, in the aggregate, is to impose self-restraint in its position of constitutional advisor. There are a number of implications that arise from this statement. First, the courts tend not to comment on matters that are currently under review by the courts or in another jurisdiction. To do so would be to interfere with a lower court's jurisdiction or would jeopardize ongoing hearings. Second, broader comments on constitutionality, as related to the legal framework or constitutional architecture are well within the courts' purview and the courts may address some of these in an opinion even if it is not within the narrow question asked by the Governor-in-Council. The Court's pronouncement on constitutional architecture embedded in the *Senate Reference* might be an example of this. Third, advisory opinions are (presumably) part of a broader dialogue between the executive and the judiciary. Though the legislature rarely does pose a question to the Court, they are permitted to do so under section 54 of the *Supreme Court Act* (1875), and they are certainly implicated in the outcomes of advisory opinions in their legislative work. A fourth mechanism may also be at play in the mechanical structure of the advisory opinion. That the federal government has the

[51] *Reference, supra* note 26.

agenda setting power to ask questions of the Court, and provincial governments of their Courts of Appeal, suggests that reference questions can also be used in opposition to one another as an instrument of intergovernmental relations. In sum, there are at least four mechanisms at play here: (1) protecting the rule of law; (2) addressing questions of constitutionality; (3) institutional relations; and (4) "umpiring" federalism.[52]

Though the presumed implication of an advisory opinion is largely a legal matter, reference questions and the advisory opinions that are rendered in response are not immune from political influence. As noted above, the questions themselves may have political or strategic value. Thus, this research endeavour focuses on the narratives that the Court creates and how these have evolved over time. As Glover notes, externally applied narratives have surrounded the Court since its inception.[53] These include the "evolving Court", which grew from a secondary court to the highest judicial body in the land with elevated power post-Charter, as well as the Court as a powerful actor/check on government/sometimes-policymaker.[54] Such narratives socially construct a role for the Court from the outside. However, the Court goes a long way to contribute to the narratives through the discourses about constitutional law, political institutions and federalism that it creates inside of its own decisions.

The above examination of the political and legal dimensions of the advisory opinion points to a testable proposition about the presence of and relative weight of internally-constructed narratives emanating from the Court's advisory opinions. The observations above suggest four way(s) in which the Court may narrate its role vis-à-vis reference questions:

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[52] Gerald Baier, "The EU's Constitutional Treaty: Federalism and intergovernmental relations–lessons from Canada" (2005) 15 *Regional and Federal Studies* 2: 205-223.

[53] Glover, *supra* note 24.

[54] *Ibid*, at 861.

(1) In issuing advisory opinions, the Supreme Court contributes to a narrative of deference to the authority of the executive in law/policymaking matters (the Institutional role);

(2) In issuing advisory opinions, the Supreme Court contributes to a narrative of limiting the authority of the executive to act unilaterally, instead promoting some conception of what the public wants or the current temperature of society (broadly speaking) on a particular social issue (the Public Will role);

(3) In issuing advisory opinions, the Supreme Court contributes to a narrative of itself as the protector of constitutional architecture (the Guardian of the Constitution role [55]);

(4) In issuing advisory opinions, the Supreme Court contributes to a narrative of itself as an arbiter of intergovernmental relations (the Umpire of Federalism role).

Of course, these four narratives may be interdependent and could be at play in varying combinations to varying degrees, depending on the question(s) at hand. As Glover notes, these metaphors are relational – they suggest the nature of relationships between actors.[56] It may also be the case that some advisory opinions contain none of these narratives. However, understanding the presence and volume of these narratives and how the Court has applied them over time (particularly before and after critical junctures such as the introduction of the Charter) provide legal scholars a basis upon which they can build over-time analyses of the Court's behaviours with respect to constitutional law and judicial-executive relations. The importance of understanding the decision-making processes that courts undertake when responding to a reference question is central to understanding legal and political processes (i.e. how government works), and the legality

[55] For reference to these metaphors, see *Re Anti-Inflation Act* [1976] 2 SCR 373 at 405 (Guardian); *R. v Lippé*, [1991] 2 SCR 114 (Umpire).

[56] Glover, *supra* note 24 at 850.

of political outcomes that have implications for the relationships between governments, constitutional architecture and public policy matters.

On the process side, the advisory opinion is a clear example of the tensions that exist within intergovernmental relationships. It reflects the necessary connection between the branches of government – in this case the judiciary and an executive whose power emanated from its position within the legislative branch. In this sense, the significance of asking how judges view their role is directly connected to the extent of their authority in providing legal advice to the executive branch. This rather benign statement carries with it considerable implications for the way that legal scholars have traditionally understood the bounds of the judiciary's authority. Legal scholarship has demonstrated a wide variety of opinions as to how much the courts should weigh in on matters of public policy that, according to a strict constitutional interpretation, ought to fall solely within the legislative purview of the legislature and executive.[57]

This may prompt the question of whether the provision of advisory opinions constitutes one of the Court's essential features. As defined in the *Supreme Court Act Reference* (2015), the essential features of the Court, which are protected from simple statutory change under s. 42(1)(d), include the Court's composition, its jurisdiction as the final court of appeal on matters of constitutional interpretation (and other legal matters) and its independence from government. Although the decision notes that the entirety of the *Supreme Court Act* is not necessarily covered by the protections to its framework governed by Part V of the *Constitution Act* of 1982[58], it is possible that, by reflecting on the Court's adjudication of its role in the context of the reference opinions, we may find evidence that it is plausibly protected as such.

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[57] See for example, Hogg and Bushell, *supra* note 7, Christopher P Manfredi, and Antonia Maioni, "Courts and health policy: Judicial policy making and publicly funded health care in Canada" (2002) 27 *Journal of Health Politics, Policy and Law* 2: 213-240, and Byron M Sheldrick, "Judicial review and the allocation of health care resources in Canada and the United Kingdom" (2003) 5 *Journal of Comparative Policy Analysis: Research and Practice* 2-3: 149.

[58] *Reference, supra* note 18 at para 94.

The burden has repeatedly fallen to the courts to adjudicate such matters. While those committed to a firm line between the courts and the legislature in terms of policymaking might argue that the courts should not accept reference questions to prevent them from having to engage in matters beyond the scope of their judicial duties, a critic might point to the legislative point of origin (the *SCA*) which has subsequently taken on constitutional status. Therefore, understanding the courts' view on the scope of their duties in hearing debates and issuing advisory opinions is necessary to understanding how the court sees the scope of its power, and how, if at all, this has changed over time.

Finally, this question also further engages with the literature on judicial behaviour.[59] Judges are perceived to be rational actors, and even though their positions call for independence from the political process, a lifetime of judicial decisions often renders evident certain views of how political processes ought to be or how the law ought to function. This implicitly normative element, even when suppressed by a textualist read of law or the constitution, highlights that judges, like everyone else, have political and ideological views that underscore their decision-making. Part of this concern, and others listed above, is dealt with in the references themselves. The 1910 reference *Re References*[60], adjudicated by the JCPC, states that references are not a threat to the separation of the powers between the legislative, executive and judicial branches of government. It also gave further discretion to the courts to decide appropriate use of the reference power by the executive, thereby implying that (to some extent, at least), just as the Court has control of its docket, so does it have control over what reference cases it hears.[61]

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[59] See, for example, Lawrence Baum, *The puzzle of judicial behavior* (Ann Arbor: University of Michigan Press, 2009) and Lori Hausegger and Lawrence Baum, "Inviting congressional action: A study of Supreme Court motivations in statutory interpretation" (1999) *American Journal of Political Science* 1: 162.

[60] *Reference, supra*, note 8.

[61] *Reference, supra* note 26.

Chapter 2

Methodology

At first glance, it may be logical to think that the problem above is a relatively straightforward question that could best be solved by carefully interrogating the texts of the advisory opinions and inferring based on the results. Yet, such an approach would necessarily leave out the many policy implications or strategic considerations by other relevant actors (namely, the federal government and governments in other jurisdictions, as well as the legal and (often) corporate communities that are the subjects of these references). If we are to acknowledge that agency is relevant in this discussion, then examples of attitudinal models of judicial behaviour are relevant here.[62] It would also be sensible to acknowledge the potential for the Court's role to shift over time, thus prompting an inherent temporal comparative element to the research at hand. Thus, the question evokes elements of doctrinal, empirical and comparative methodological approaches, each offering a different way to triangulate the Courts' view of their role.

We may think of this question as lending itself quite nicely to a mixed methods approach. While mixed methods approaches are not mainstream within legal analysis at present, their adoption in other fields within the social and behavioural sciences suggests they might have purchase in the analysis of legal questions as well. Mixed methods emerge from a positivist tradition and seek to employ a combination of quantitative and qualitative methodological techniques to better triangulate outcomes of interest.[63] Similarly, multi-method approaches use multiple methodological techniques within the

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[62] See Cynthia L Ostberg and Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2007) and Jeffrey Allan Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002) for examples.

[63] Charles Teddlie, and Abbas Tashakkori, *Foundations of mixed methods research: Integrating quantitative and qualitative approaches in the social and behavioral sciences* (Toronto: Sage, 2009).

same quantitative or qualitative tradition.[64] The advantage of mixed- or multi-method designs (and methodological pluralism in general) is not only that it permits a more robust assessment of a research question, but also in its ability to bridge methodological divides between researchers, promoting greater acceptance of scholarship across sub-disciplines.

To answer the questions I have set out above, I will provide a summary analysis of all reference cases across the two time periods of interest. The summary analysis will include differentiation of the cases using broad empirical indicators such as structure of the decision (unanimous, number of opinions/dissents) and presence or absence (and degree) of any of the relevant conceptions of the SCC's role. This empirical analysis will also include the results of an in-depth manual coding exercise where the text of the opinions is coded for the presence of the four narratives on a per-sentence basis to permit some broader observations to be drawn from the larger corpus of text under investigation (see below for further information). The second part of the analysis will be more qualitatively focused and feature a case study of four decisions (two from the Laskin Court and two from the McLachlin Court) that typify some of the patterns observed in the quantitative analysis. Although the selection of four cases will necessarily exclude some of the empirical richness that can be observed in the other available cases, they will be presented in a manner that reflects upon which trends are representative of the court's broader stance on the issues at the time and which are unique to the case study under observation.

Thus, I take a mixed-methodological approach that integrates three different positivist epistemological approaches: a doctrinal approach, an empirical approach and a cross-case comparative approach. Each is discussed briefly below.

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[64] Morse, J.M. "Principles of mixed methods and multi-method research design" in Charles Teddlie, and Abbas Tashakkori. *Foundations of mixed methods research: Integrating quantitative and qualitative approaches in the social and behavioral sciences* (Toronto: Sage, 2009).

3.1 Doctrinal Approach

First, I used a case-driven method – doctrinal analysis of the advisory opinions themselves. Where possible, I supplement this analysis with secondary sources. The doctrinal method, as noted by Morris and Murphy focuses "almost entirely on the law's own language of statutes and case law to make sense of the legal world".[65] In other words, it does not concern itself with the policy implications (except to the extent that policy is related to the analysis of the law) of the reference questions (though this is a useful, if separate, area for further analysis). Doctrinal analysis does, however, enable a study of the principles of the law that undergird the inclusions of the reference decision as a mechanism for constitutional clarification in the *Supreme Court Act* (1875). Thus, statutory interpretation plays an integral role in this study. In analysing the intentions set out by the framers of the *Act* and comparing those with the contents of the reference cases, I can investigate how the Court's role has evolved with respect to how it addresses advisory opinions and what the original intent of the *Act* suggests it ought to have been.[66] This deductive doctrinal analysis provides the contextual reading required to make assertions about what the scope of the court's role according to legislation baseline for measuring what it has become over time.

3.2 Empirical Approach

Second, I take an empirical approach in examining the content of the reference cases using a content analytical method. A considerable effort has been devoted to attitudinal or behavioural studies of judicial behaviour that look at judicial decisions and infer judges' motivations from their writings.[67] Indeed, this is both a useful and practical

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[65] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Portland: Hart Publishing, 2011) at 31.

[66] This statement sounds like it carries implicit normative elements, which are not common to doctrinal analysis. However, Morris and Murphy (*ibid.* at 31) point out that some doctrinal analysis does, in fact, base itself on the idea that the law "is underpinned by a particular moral or political philosophy and therefore needs to be analysed in light of its closeness not the ideal situation. In other words, the comparison of legal intention and legal outcomes is very relevant to doctrinal analysis.

[67] See Ostberg and Wetstein and Segal and Spaeth, *supra*, note 62.

methodological exercise as the judges declare openly their process of deliberation and their reasoning for coming to the decision. From a practical perspective, the public availability of these often-lengthy decisions provides scholars with ample material to study using a content analysis approach. Such approaches are not often used, but are also not completely novel in legal research. Work by Slotnick and Sauvageau, Schneiderman and Taras illustrate the utility of content analysis approaches in looking at media coverage of the US and Canadian Supreme Court.[68] More broadly, Krippendorf recognizes the utility of applying content analysis across all areas of the humanities and social science, as they permit systematic analysis of text for both manifest (i.e. surface-level) and latent (i.e. meaning intensive) content.[69]

This portion takes on both an inductive and deductive element. The deductive approach is evident in the process of setting out a series of indicators that are reflective of the concepts specified in my hypothesis. The inductive element is reflective of the fact that the coding process is somewhat iterative. While the coding process may be automated, the process of manual verification of the application of the coding permits the researcher to continuously refine the coding to enhance validity and reliability of the measures. These objective-style[70] indicators are then used to code the cases for the presence or absence of my four motivations interest. One the coding is complete, I apply the analysis comparatively across the two Chief Justice's Courts by analyzing the frequencies of my four hypothesized expectations. A coding framework and elaboration on the technique can be found in Appendix B.

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[68] Elliot E. Slotnick, "Media coverage of Supreme Court decision-making: Problems and prospects" (1991) 75 *Judicature* 128.

[69] Klaus Krippendorff, *Content analysis: an introduction to its methodology* (London: Sage, 1990).

[70] Of course, no analysis can be truly objective when it is done by a sole researcher without intersubjectivity analysis and confirmatory inter-coder reliability scoring. However, the presence of a coding scheme and adherence to coding rules helps mitigate that bias.

3.3 Comparative Approach

Finally, the added element of the Laskin/McLachlin Court comparison necessitates a comparative research design. Unlike traditional cross-national comparisons, this study takes on a within-case comparison across time.[71] This sort of within-case study stems some of the critiques often levelled at comparative work – namely, that it does not allow in-depth analysis of the legal contexts across comparators. Within-case analysis, such as that of Judith Resnick on the comparison across three US Supreme Court Chief Justices provides a useful model for examining the institutional and jurisprudential developments that occur under different judicial leadership.[72] Of course, the over-time analysis adds a historical dimension to the paper; however, I am cautious about characterising this analysis as historical in terms of its methodology. While the analysis recognizes the implicit historical dimension and context under which each Court laboured, it does not specifically treat historical era as an independent variable that could affect outcome.

This tri-partite method is well suited to answer the overarching research question as it robustly addresses three different areas of analysis for the question. It takes on the careful legal text-based analysis through the doctrinal aspect. It provides an analytical approach through the collection and analysis of quantitative data. And finally, it recognized the implicit dimension of change and continuity that exists across courts by comparing two different time periods – particularly one that represents a potential pivot point in the way the court addresses issues of constitutional importance through references.

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[71] See John Gerring, *Case study research: Principles and practices* (Cambridge: Cambridge University Press, 2006) at 30 for the utility of within-case designs.

[72] Judith Resnik, "Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist" (2012) 87 *Ind LJ* 823.

Chapter 3

Results

An examination of the secondary literature in this area suggests that we should expect some degree of adhesion to each of the five hypotheses set out above. Indeed, work by Mathen[73], Puddister[74], and Glover[75] has suggested that the reference power is not only a useful tool for the executive to escape the pressures of some of the more controversial questions, but it also represents a venue for the courts to engage in the protection of constitution, the maintenance of the federal system and the delineation of the executive's policymaking boundaries, and their ability to wade into contemporary social-political issues. The following analysis determines to what degree each of these themes or narratives (these terms are used interchangeably) exist in the two sets of advisory opinions.

The results section proceeds as follows: I begin with some general observations about the structure of the advisory opinion cases across the Laskin and McLachlin eras. This includes some cursory observations about the origin of the cases, the structure of the response from the Court (i.e. per curiam, unanimous, split decisions, etc.), the subject matter of the cases and the general thematic disposition or narrative contained in the decision. Following these observations, I engage in a comparative analysis of the dominant trends of the Laskin Court and the McLachlin Court. Given the quantitative, tabular thrust of this analysis, it is necessarily based on objective indicators (e.g. how many mentions of a particular narrative are in a given case?), rather than in-depth analysis of any one theme or case. However, this aggregate analysis alone may lack the descriptive richness of case-based study as is found in analyses of specific references.[76]

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[73] Mathen, *supra* note 9.

[74] Puddister, *supra* note 6.

[75] Glover, *supra* note 24.

[76] See Mathen, *supra* note 9 and Glover, *supra* note 24.

Therefore, after concluding the empirical section of the comparative analysis, I engage in a qualitative analysis of four cases that typify the dominant narratives discussed in the earlier portion of this study. This portion of the analysis allows me to draw out some of the themes in greater depth than is permitted by the empirical analysis alone.

4.1 Advisory Opinions in Two Eras: Structure and Trends

Beginning with some cursory observations about the nature of the advisory opinions in the Laskin era (1973-1984) and the McLachlin era (2000-2017), one immediately notes that Laskin served as a Chief Justice for a comparatively "short" 11 years, compared with McLachlin's 18. Yet, the length of the eras appears to have no discernible impact on the trends of how many or what type of reference questions was asked of the Courts. Each Court's decisions, their origins, the structure of the Court's response, case type and dominant theme or characteristic are catalogued in Tables 1 and 2. The Laskin Court provided a total of 13 advisory opinions. Three of these were questions asked directly by the Governor-in-Council, while the remaining 10 were cases on appeal from the provinces (2 from Ontario, 2 from Newfoundland, 2 from Alberta, 1 from New Brunswick, 1 from British Columbia, 1 from Quebec and 1 – the *Resolution to Amend the Constitution Reference* – from Manitoba, Newfoundland and Quebec). Four decisions were issued per curiam, a much higher proportion of per curiam decisions then rendered by the Laskin Court during the equivalent time.[77] An additional three decisions were unanimous, suggesting a high level (7 out of 13 or 54%) of agreement among the Court on advisory issues. Of the remaining split decisions, only two – the *Patriation Reference* and the *Ownership of the Bed of the Strait of Georgia and Related Areas Reference* had multiple dissents.[78]

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[77] Per curiam decisions under Laskin represented only 2% of cases, see Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38 *Osgoode Hall Law Journal* 3: 495.

[78] I do not take on the issue of when the Court decides not to answer questions as was the case in the *Same Sex Marriage Reference, supra note 26* (question 4) and in *McEvoy v. Attorney General for New Brunswick et al.* [1983] 1 SCR 704 where the Court spends most of the time commenting on why the questions are not particularly well articulated questions in the first place. Though this is an interesting dimension of advisory

Table 1 Advisory Opinions (Laskin Court)

Case	Origin	Structure	Case Type	Dominant Characteristic
Re Anti Inflation Act	Reference by Governor-in-Council	Majority, concurrence, dissent (Beetz, Grandpré)	Constitutional	Institutional
Re Agricultural Products Marketing	On appeal from ON Court of Appeal	Majority with unwritten dissent[79] (Spence and Dickson)	Constitutional; Resource	Federalism
Re Authority of Parliament in relation to the Upper House	Reference by Governor-in-Council	Per curium	Constitutional	Guardian of the Constitution
Re Residential Tenancies Act, 1979	Provincial appeal from ON Court of Appeal	Unanimous	Constitutional	Guardian of the Constitution
Re Resolution to amend the Constitution	On appeal from MB, NF and QC Courts of Appeal	Majority with two dissents (Martland and Ritchie) (Laskin, Estey, McIntyre)	Constitutional	Guardian of the Constitution
Re Newfoundland and Labrador Corporation Ltd. et al. v. Attorney General of Newfoundland	Provincial appeal from NF Court of Appeal	Unanimous	Constitutional; Resource	N/A

opinions, it is not particularly relevant to the discourses used by the Court in the way that it is discussed here.

[79] Dubin J.A. dissenting only as to the validity of s. 2(2)(a) of the federal *Agricultural Products Marketing Act* and of s. 4(a) of the *Ontario Egg Order*.

Re Objection by Quebec to a Resolution to amend the Constitution	On appeal from QC Court of Appeal	Per Curium	Constitutional	Guardian of the Constitution
Re Exported Natural Gas Tax	Provincial appeal from AB Court of Appeal	Majority with one dissent (Laskin, McIntyre, Lamer)	Constitutional; Resource	Guardian of the Constitution
Re McEvoy v. Attorney General for New Brunswick et al.	On appeal from NB Court of Appeal	Per curium	Constitutional; Criminal	Guardian of the Constitution
Re Newfoundland Continental Shelf	Reference from Governor In Council	Per curium	Constitutional; Resource	Guardian of the Constitution
Upper Churchill Water Rights Reversion Act	On appeal from NF Court of Appeal	Unanimous	Constitutional; Resource	Federalism
Ownership of the Bed of the Strait of Georgia and Related Areas	On appeal from BC Court of Appeal	Majority with two dissents (Ritchie) (Wilson)	Constitutional; Resource	Guardian of the Constitution (Negligible)
Wiretap Reference	On appeal from AB Court of Appeal	Majority with one dissent (Dickson and Chouinard)	Criminal	Public Will (Negligible)

Table 2 Advisory Opinions (McLachlin Court)

Case	Origin	Structure	Case Type	Dominant Characteristic
Re Firearms Act (Can)	Provincial appeal from AB	Per Curium	Constitutional	Guardian of the Constitution
Re Same Sex Marriage	Reference by Governor-in-Council	Per Curium	Constitutional; Civil	Guardian of the Constitution
Re Employment Insurance Act (Can) ss. 22 and 23	On appeal from QC Court of Appeal	Unanimous	Constitutional	Public Will
Re Assisted Human Reproduction Act	On appeal from QC Court of Appeal	Plurality, plurality, one dissent (Cromwell)	Constitutional; Criminal	Guardian of the Constitution, Federalism
Re Broome v PEI	On appeal from PEI Court of Appeal	Unanimous	Tort	N/A
Re Securities Act	Reference by Governor-in-Council	Per Curium	Constitutional	Federalism, Guardian of the Constitution
Re Senate Reform	Reference by Governor-in-Council	Per Curium	Constitutional	Guardian of the Constitution
Re Supreme Court Act, ss. 5 and 6	Reference by Governor-in-Council	Majority, one dissent (Moldaver)	Constitutional	Federalism, Guardian of the Constitution

The subject matter of the reference cases is also of great interest. While all 13 were noted to address questions of constitutional law in the case summary provided by the Court, almost half (N=6) were cases that dealt with some aspect of natural resource distribution or ownership. These decisions, including cases on access to resource deposits, water rights and agricultural products, appeared to consume the Court's reference docket from the 1970s to the early 1980s. Of course, this is commensurate with the debate over and ultimate institution of section 92A, which altered the balance of natural resource rights to

favour the provinces, in the *Constitution Act*, 1867. Two further cases dealt with constitutional law as they relate to criminal matters. Yet, in summary, the Court, in this era, exclusively dealt with constitutional matters in their advisory opinions.

The McLachlin Court, by contrast, provided only 8 advisory opinions, half of which were questions asked directly by the Governor-in-Council. Of the remaining 4 cases, 2 cases were on appeal from Quebec, one from Alberta and one from PEI. Again, four decisions were issued per curiam and an additional two decisions were unanimous. It is possible that a high rate on unanimity reflects the need to appear to be in consensus, particularly in higher profile reference cases, particularly since the overall rate in unanimous and per curiam decisions is higher in this subset of cases than it is in the Court's unanimity rate from 1949 to 2017 (56%).[80] Similar to the Laskin Court, the McLachlin Court showed a high level of agreement in reference cases with only two divided decisions: one containing two plurality decisions and one a majority with a lone dissent (the *Assisted Human Reproduction Act Reference*). Almost all cases revolved around constitutional questions with one (the *Same Sex Marriage Reference* having a strong civil dimension), one (the *Assisted Human Reproduction Act Reference*) having a criminal aspect, and the lone non-constitutional case (*Broome v PEI*) dealing with a tort matter.[81]

Turning to the question of which narratives were dominant in these reference decisions, we can observe two notable trends embedded in the written decisions of each Court. To explore the dominant themes of the case, I summed the number of thematic codes (see Appendix B for the detailed coding guide) across each case. Tables 1 and 2 feature each case, listed with its dominant theme and a secondary theme, if appropriate. Where use of any of the themes was scant, the presence of the theme is noted as being "negligible". Tables 3 and 4 clarify the relative "strength" of that theme by observing the number of

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[80] Puddister, *supra* note 6 at 104

[81] Note that two decisions, the *Newfoundland and Labrador Corporation Ltd. et al. v. Attorney General of Newfoundland Reference* and *Broome v PEI* do not factor into the analysis here as the subject matter of the reference was exclusively related to provincial content and did not, in the same manner of the other advisory opinions, give the Court the same opportunity to engage in any of the listed narratives. Though they are included in tables for posterity sake, they are otherwise omitted from the analysis.

sentences coded as belonging to one or more themes. It is first useful to note that overall numbers of thematic cues are low (ranging from none to 43). Given the considerable length of these documents, it may initially appear that an obvious finding is that the Court quite simply does not engage in as much narrative cueing as the literature might suggest. However, this is likely a product of the amount of space the Court dedicates to material that is not coded in this exercise (see Appendix B), such as the text of decisions, repetition of legislative sections, and so forth. Additionally, while only specific sentences that cue a specific theme were coded as such, it is often the case that the surrounding text reinforces a consistent theme even if the text itself does not explicitly cue the theme. In this sense, the results reported here may be conservative, but they are likely more nuanced than they might have been had wider swaths of text been coded simply because they accompany a thematic cue.

Not all cases presented strong elements of the four narratives. In some, such as *Newfoundland and Labrador Corporation Ltd. et al. v. Attorney General of Newfoundland* [1982] (Laskin) and *Broome v. Prince Edward Island* [2010] (McLachlin), the Court made no mention of any of the four narratives. In two others, *Ownership of the Bed of the Strait of Georgia and Related Areas* [1984] and the *Wiretap Reference* [1984], there was only scant mention of one theme. Of course, as suggested in the methodology section, it is not necessary that the Court would conform to any of these narratives, therefore the absence of such thematic cues is a reflection of the wide variety of roles played by the Court and the fact that other thematic elements (not expanded upon here) may play into the Court's presentation of the law.

Turning, however, to those cases that did feature one or more of the four outline narratives illustrates that these four hypothesized themes are, indeed, present in the Courts' reasoning of a vast array of legal subject matter. Starting with the Laskin Court, Figure 1 gives us an overview of the distribution of thematic cues (all cases aggregated). Almost 60% of all coded statements were in relation to the Guardian of the Constitution theme. A further 30% were coded as representing the Federalism theme, leaving only 10% coded as Institutional and less than 1% coded as Public Will. These initial findings promote several useful observations: first, it is clear that the Laskin Court articulates its

decisions predominantly according to the two most common themes associated with the Court – their role in adjudicating the constitutional order and maintaining the workings of federalism. Second, the overwhelming emphasis on constitutional questions, as opposed to federalism, may reflect the pending constitutional renegotiations, but also the relative cooperative era in federalism that predated the comparatively raucous inter-governmental affairs of the early 1980s. Finally, the lack of Public Will narrative statements suggests, as we might expect, that the Court, pre-Charter, did not see itself as an instrument of the public interest and instead, reflected more traditional notions of the Court as an arbiter of governmental issues.

Figure 1 Thematic Distribution (Laskin Court)

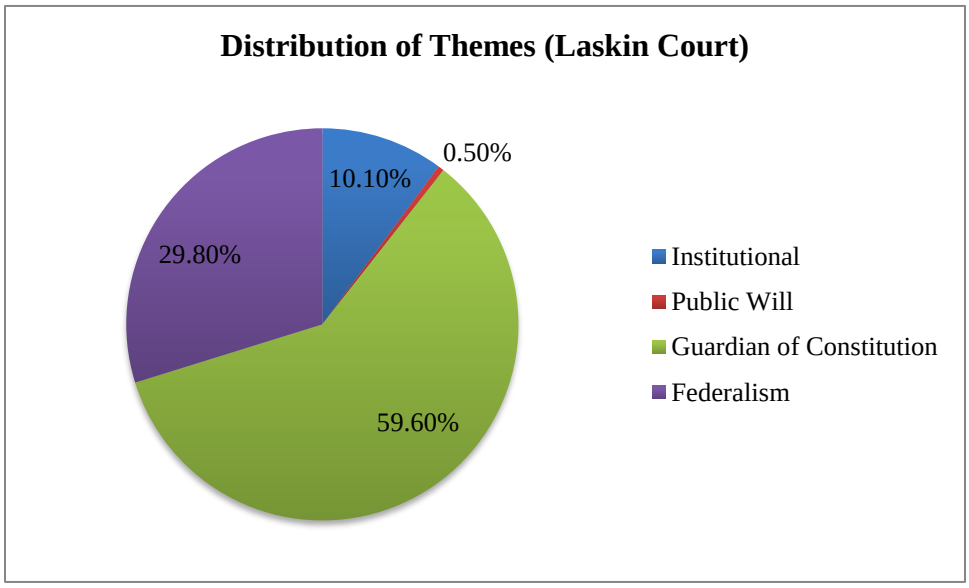
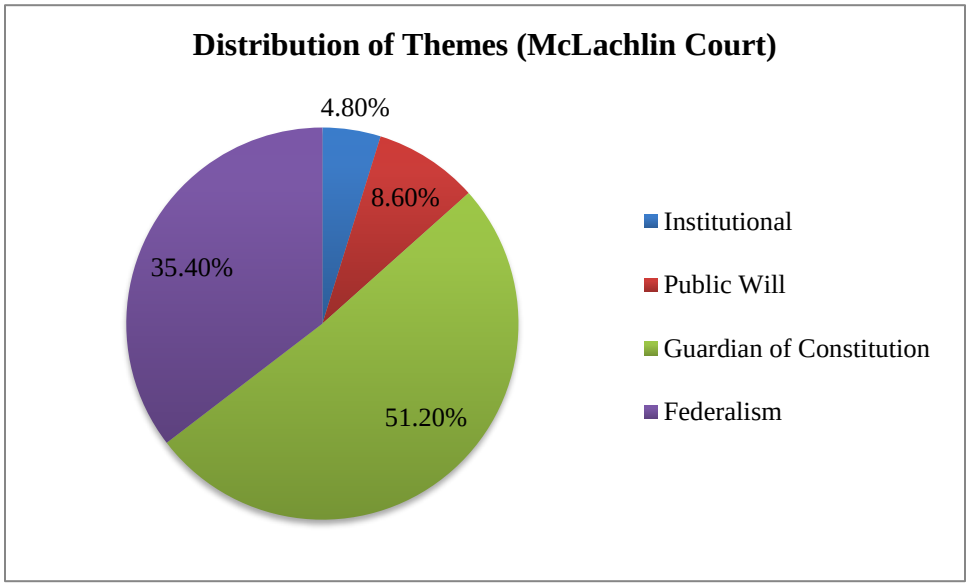


Figure 2 Thematic Distribution (McLachlin Court)



Breaking this analysis down by case (see Tables 3 and 4) reveals the considerable amount of variation in the application of these narratives. The 10% of Institutional cues come primary from the *Reference re Anti-Inflation Act* where the Court appeared to take the part of the federal executive in protecting their agenda (see below for an expansion of this analysis). We see similar, though less pronounced tendencies in the *Agricultural Products Marketing Reference*, the *Residential Tenancies Act Reference* and the *Patriation Reference*. As the Institutional frame is representative of a more protective stance of the federal government, anticipated to be the leading government, it is perhaps one that we might expect to see less from a judicial body that values its independence from the executive. It differentiates itself from the Guardian or Federalism narrative because it is an example of the (rare) instance wherein the Court appears to defer to the executive's agenda rather than simply delineating federal-provincial boundaries from a constitutional or (relatedly) jurisdictional control.

Table 3 Thematic Distributions by Case (Laskin Court)

	Institutional	Public Will	Guardian of Constitution	Federalism
Anti-Inflation Act [1976]	**10**		4	5
Agricultural Products Marketing [1978] (Egg Reference II)	4		3	**11**
Authority of Parliament in Relation to the Upper House [1980]			**7**	2
Residential Tenancies Act [1981]	2		**6**	4
Resolution to Amend the Constitution [1981]	3		**43**	19
Newfoundland and Labrador Corporation Ltd. et al. v. Attorney General of Newfoundland [1982]				
Constitution of Canada [1982]			**9**	5
Exported Natural Gas and Gas Liquids Tax [1982]			**25**	5
McEvoy v. Attorney General (NB) Court of Unified Criminal Jurisdiction [1983]			**7**	1
Newfoundland Continental Shelf [1984]			**5**	1
Upper Churchill Water Rights Reversion Act [1984]			2	**3**
Ownership of the Bed of the Strait of Georgia and Related Areas [1984]			**1**	
The Wiretap Reference [1984]		**1**		
Total Percentage of all Codes	**10%**	**.5%**	**59.5%**	**30%**

*Modal Theme in Bold

Table 4 Thematic Distributions by Case (McLachlin Court)

	Institutional	Public Will	Guardian of Constitution	Federalism
Firearms Act (Can) [2000]			**6**	1
Same Sex Marriage [2004]	1	2	**3**	1
Employment Insurance Act (Can) ss22 and 23 [2005]		**13**	7	2
Assisted Human Reproduction Act [2010]	1		**16**	10
Broome v. Prince Edward Island [2010]				
Securities Act [2011]		1	28	**40**
Senate Reform [2014]			**34**	2
Supreme Court Act, ss 5 and 6 (Nadon) [2014]	8	2	13	**18**
Total Percentage of all Codes	**5%**	**9%**	**51%**	**35%**

*Modal Theme in Bold

The Federalism narrative has a stronger presence than its Institutional counterpart in the Laskin era, but not nearly as strong as that of the Guardian of the Constitution narrative. The Federalism narrative is predominant in only one case (the *Agricultural Products Marketing Reference*), where it receives 4 mentions. It is the primary narrative in one other (*The Upper Churchill Water Rights Reversion Act Reference*) (N=3), but narrative content in that reference is both close in number to that of the Guardian narrative (N=2) and decidedly low overall, therefore, the finding is less compelling. The majority of advisory opinions provided by the Laskin Court fall into the category of majority Guardian narratives. Two in particular, the *Patriation Reference* and the *Exported Natural Gas Reference* have strong Guardian narrative elements, the former with a complementary Federalism narrative component as well. That the former case – one that specifically deals with the subject matter of amending the Constitution – has a strong

Guardian narrative is not at all surprising and, indeed, very much in line with extant research on the subject.[82] However, the latter is of interest. As of one of six references in this era that focus on resource-related questions (four of which are also categorized as Guardian narratives[83]), the preponderance of Guardian narrative cues in this particular reference is notable. The decision is the first of five references that deal with the distribution of resource wealth or opportunities between the two levels of government and, as such, set the tone for the Court's response to resource issues, particularly in a time of evolving jurisdictional questions with the adoption of section 92A in 1982.

Turning to the McLachlin Court's use of narrative elements, Figure 2 displays the narrative distribution from 2000 to 2017. Notably, the general trend found in the Laskin data holds for the McLachlin Court. The Guardian of the Constitution narrative is the dominant narrative (51%), followed by the Federalism narrative (35%). Interestingly, the relative frequency of the Institutional and Public Will narratives remains low overall, but their individual prominence is reversed. Also relevant is the subtle loss of dominance of the Guardian narrative and the relative increase in the use of the Federalism narrative.

Looking to the individual cases, we have no clear examples of a dominant Institutional narrative with only three cases making use of this narrative in any capacity. By contrast, we see one clear example of the Public Will narrative take hold (in the *Employment Insurance Act Reference*). Contrary to what one might expect, there is a lack of Public Will thematic cues in the *Same-Sex Marriage Reference*. Given the societal shift of the time toward public acceptance and approval of same-sex marriage, the Court appeared reluctant to explicitly use the language of the will of public in its reasoning. As might be expected, the same two narratives (Guardian and Federalism) that drove the reasoning in the Laskin era are prominent again, but this time in greater balance with one another. As evident in Table 4, two cases have a clear majority Federalism narrative (the *Securities*

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[82] See Mathen, *supra* note 9.

[83] The fifth – the *Newfoundland and Labrador Corporation Ltd. et al. v. Attorney General of Newfoundland Reference* – is excluded as it did not posses any relevant narrative cues.

Act Reference and the *Supreme Court Act Reference*), while the Guardian narrative is predominant in the *Senate Reform Reference* and the *Assisted Human Reproduction Act Reference*. To a lesser extent, the *Same Sex Marriage Reference* and the *Firearms Act Reference* also posses a Guardian element, but much weaker than the others listed in this category with only 3 and 6 mentions, respectively.

Yet, contrasted with the Laskin era, the case distribution is perhaps more surprising. Cases in the Laskin era that possessed a strong Guardian dimension were often around the era of the actual constitutional negotiations and patriation. By contrast, those that are noted as Guardian cases in the McLachlin era reference a wider variety of subject matter including criminal matters (*Firearms Reference*), civil matters (*Same Sex Marriage Reference*), health (the *Assisted Human Reproduction Act Reference*) and finance (the *Securities Act Reference*), among others. Similarly, cases that that might be expected to have a strong Public Will element (the *Same Sex Marriage Reference* and the *Assisted Human Reproduction Act Reference*) have comparatively little or no references to this theme.

Table 5 Majority/Dissent Thematic Comparisons

Case	Structure	Majority Themes	Dissent Themes
Re Anti Inflation Act (Laskin)	Majority, concurrence, dissent (Beetz, Grandpré)	Institutional	Guardian of the Constitution
Re Agricultural Products Marketing (Laskin)	Majority with unwritten dissent[84] (Spence and Dickson)	Federalism	No theme
Re Resolution to amend the Constitution (Laskin)	Majority with two dissents (Martland and Ritchie) (Laskin, Estey, McIntyre)	Guardian of the Constitution	Guardian of the Constitution
Re Exported Natural Gas Tax (Laskin)	Majority with one dissent (Laskin, McIntyre, Lamer)	Guardian of the Constitution	Guardian of the Constitution
Ownership of the Bed of the Strait of Georgia and Related Areas (Laskin)	Majority with two dissents (Ritchie) (Wilson)	No theme	Guardian of the Constitution (Negligible)
Wiretap Reference (Laskin)	Majority with one dissent (Dickson and Chouinard)	No theme	Public Will (Negligible)
Re Assisted Human Reproduction Act (McLachlin)	Plurality, plurality, one dissent (Cromwell)	Guardian of the Constitution, Federalism	No theme
Re Supreme Court	Majority, one dissent	Federalism,	Institutional

[84] Dubin J.A. dissenting only as to the validity of s. 2(2)(a) of the federal Agricultural Products Marketing Act and of s. 4(a) of the Ontario Egg Order.

Act, ss. 5 and 6 (McLachlin)	(Moldaver)	Guardian of the Constitution	(Negligible)

One last element of empirical analysis that provides a useful contrast is comparing narrative tendencies in divided decisions. Tables 5 and 6 provide the dominant narrative themes for the majority and dissents in those decisions that have more than one (non-concurring) reasoning. Some interesting trends can be observed in comparing the data between the Laskin and McLachlin Courts. First, in all but a few cases, the trends discourses found in the majority decision are found in the dissenting opinions – often to a greater extent. Interestingly, in the case of the *Patriation Reference*, while the same narratives were used in the majority decision and the dissent, a greater number of all three narratives (Institutional, Guardian and Federalism) were present in the dissent than the majority opinion, signalling that the dissenting judges were particular concerned with establishing their voice with respect to these frequently used narratives. The same was true in the *Exported Natural Gas Tax Reference*. However, not all dissents follow the majority. In the *Anti-Inflation Act Reference*, the dissent made use of the Guardian narrative, which was absent from the majority's written opinion. In the *Agricultural Products Marketing Reference*, the dissent used no thematic cues; all were observed in the majority's decision. Finally, in the two split decisions in the McLachlin era, narratives were found almost exclusively in the majorities' decisions, with the dissents omitting any of the four narratives almost completely.

As these findings relate to the stated hypotheses, we do see evidence of all four narratives to varying degree. However, we see no particular trend toward one style of decision (unanimous vs. divided decision) or even one era of the Court using narratives more than others. Rather, the dominant trends appear to be related to how often both Courts use two of the four themes – the Guardian of the Constitution and the Federalism themes – to a far greater extent than the others. There is some evidence, as noted above, that the Public Will narrative was all but absent in the pre-Charter era – confirming with the expectations in the comparative hypothesis. However, the overall rate of the use of the Public Will narrative is too low to truly be able to extract a meaningful trend. Another nuanced, but ultimately limited finding relates to the use of the Institutional theme – one that was used

to a great extent in the *Anti-Inflation Act Reference*, but little elsewhere (across either era of the Court).

Table 6 Majority/Dissent Thematic Comparisons

	Majority				Dissent			
	Institutional	Public Will	Guardian	Federalism	Institutional	Public Will	Guardian	Federalism
Laskin								
Re Anti Inflation Act	10			4			4	1
Re Agricultural Products Marketing	4		3	11				
Re Resolution to amend the Constitution	**3**		**16**	**6**			**27**	**13**
Re Exported Natural Gas Tax			**6**	**1**			**19**	**4**
Ownership of the Bed of the Strait of Georgia and Related Areas				0			1	
Wiretap Reference						1		
McLachlin								
Re Assisted Human Reproduction Act	1		16	10				
Re Supreme Court Act, ss. 5 and 6	7	2	13	18	1			

While the empirical analysis provides a useful guide to aggregate trends in the two eras of the Court's decision, further exploration of the individual themes through exemplar cases is a useful way to comment in greater depth on how these themes are applied in advisory opinions. The analysis below takes four cases, each of which contains a high

proportion of one of the four narratives. Two cases, the *Patriation Reference* (Guardian of the Constitution) and the *Anti-Inflation Act Reference* (Institutional) are found within the Laskin era, while the other two, the *Securities Act Reference* (Federalism) and the *Employment Insurance Act Reference* (Public Will), are a product of the McLachlin era (see Table 7). These four cases were chosen, not only because they represent archetypal cases, but because one in each pair includes one of the two dominant themes. Where useful, I bring in narrative comparisons with additional cases from the other era of the Court, specifically where there is evidence of evolution in the use of that narrative. In this way, I am able to perform cross- and within-case comparisons.

Table 7 Exemplar Cases

Court	Origin	
	Governor In Council	Appeal from Province
Laskin	*Anti Inflation Act Reference* [1976]	*Patriation Reference* [1981]
McLachlin	*Securities Act Reference* [2011]	*Employment Insurance Act (Can) ss 22 and 23* [2005]

4.2 Four Narratives Unbound: Exemplar Cases

Guardian of the Constitution

Reference re Resolution to Amend the Constitution [1981] 1 SCR 753

The 1981 *Reference re Resolution to Amend the Constitution* is one of the more well-tread pieces of Supreme Court jurisprudence.[85] The details of the *Patriation Reference* (as it is often called) are well-known and not recounted in detail here; however, the general thrust of the case was that it arose from three provincial appeals from Manitoba,

[85] See Peter H. Russell, "The Patriation and Quebec Veto References: The Supreme Court Wrestles with the Political Part of the Constitution" (2011) 54 *SCLR* (2d) 69, Mathen, *supra* note 9, among others.

Newfoundland and Quebec – each having posed questions to their own Courts of Appeal about the level of accord required for the patriation of the Constitution (in the proposed *Constitution Act*, 1981), which would ultimately take place the following year. While the nature of the questions posed by the provinces was similar, the Court faced a challenge in navigating a series of complex legal issues with a heavy political dimension. To say that the *Patriation Reference* was a clear example of shifting the venue to obtain a strategic advantage in inter-governmental relations is an understatement.[86]

Without repeating the lengthy text of the three sets of reference questions, they can be summarized as dealing with two core issues: First, whether the federal government had the ability to unilaterally request an amendment of the Constitution (which had to be done through Westminster)[87], and second, whether there is a convention or a constitutional obligation that the federal government should have the agreement of the provinces to amend the Constitution as it relates to federal-provincial relations.[88] These can be referred to as the constitutional question and the convention question, respectively.[89]

The complexity of the questions gave rise to an equally complicated set of answers. In their divided decision (two majority opinions and two dissents – one on the constitutional question and one on the issue of conventions), the Court found common ground on the first question: the federal government's proposed amendment of the constitution was indeed "within the legislative competence of the Houses of the Parliament of Canada notwithstanding the fact that it affected provincial legislative powers."[90] On the second

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[86] See Mathen, *supra* note 9.

[87] Declining to answer, the Manitoba Court of Appeal described Question 1 as "premature":

[88] Newfoundland included a fourth questions specific to the province's consent which the Court declined to answer. Quebec framed its two questions (each with its own two sub-questions along similar lines, but using different text.

[89] Russell, *supra* note 85.

[90] *Patriation Reference*, *supra* note 11 at 758. Martland and Ritchie JJ. asked whether Parliament possessed the legal authority to pass a resolution, arguing that such an act would be inconsistent with the federal arrangement as determined in the *BNA Act*, 1867.

issue, the Court reaffirmed the existence and value of conventions, and indeed, agreed that there was a convention of a "substantial degree of provincial consent"[91], but they stopped short of saying that conventions were justiciable.[92]

The Court appeared well-aware that they were engaging in a meta-constitutional analysis that was outside of their routine case load. Thus, it is unsurprising that they elected to articulate what Mathen refers to as "a narrative focused on structural legitimacy and systemic safeguards" of the Constitution – a sort of conservation effort of the original constitutional order, lest the appetite for a new constitutional legacy ran roughshod over the existing constitutional structure.[93] In their expression of their own role in this decision, the justices, both in their majority opinions and in their respective dissents made clear that they were articulating the bounds of the constitution.

Writing for the majority, the Chief Justice applied the Guardian narrative in two areas in particular. The first is with respect to the preservation of the federal arrangement as it is envisaged in the 1867 *British North America Act*. Speaking to the issue of whether the proposed amendments would risk the positions of the provinces and their spheres of influence, ultimately rendering Canada a quasi-unitary state, the Chief Justice noted, "[T]hat is not what the present Resolution envisages because the essential federal character of the country is preserved under the enactments proposed by the Resolution."[94] In doing so, he made a clear statement of the Court's protection of the federal character of the country by preserving the hierarchy of the federal government's authority over the provinces in key areas (also an articulation of the Institutional motivation). Continuing on, the Chief Justice further preserved the constitutional structure, again basing the Court's argument for constitutional authority in the text of the *British North America Act*. The proposed *Constitution Act*, he argued, "does not, either in terms or by implication,

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[91] *Patriation Reference*, *supra* note 11 at 904-905.

[92] See Mathen, *supra* note 9 at 164.

[93] *Ibid* at 165.

[94] *Patriation Reference*, *supra* note 11 at 807.

control this authority or require that it [federal authority] be subordinated to provincial assent. Nor does the Statute of Westminster, 1931 interpose any requirement of such assent. If anything, it leaves the position as it was before its enactment. Developments subsequent thereto do not affect the legal position."[95] Such statements make clear the Court's position as a protector of the structure of the constitution, and the structure of the constitution, itself, as protecting, rather than undermining federalism.

The second area where the majority applied the Guardian narrative was in its response to the issue of whether convention dictated that the provinces must consent to the amendment of the constitution and therefore the proposed *Constitution Act*. Again, the Chief Justice relied on the reinforcement of the constitutional order using the text of the *BNA* itself to justify limitations placed on the use of convention in the legal order. After canvassing the material presented to the bench by provincial counsel that argued the presence of applicability of a provincial consent convention, the Chief Justice used several short statements that evoked the Guardian narrative. The majority concluded that counsel for the appeal had not produced evidence of "explicit recognition of a convention as having matured into a rule of law"[96] and that the "attempted assimilation of the growth of a convention to the growth of the common law is misconceived."[97] In taking a more textual tone to the constitution, the Chief Justice further placed strong bounds around the (then-) present constitutional order by rejecting the argument that the case law presented to the Court had given legal force to conventions – an argument, that the Chief Justice called "an over-drawn proposition."[98] These forceful statements and their collocutors would contribute to a narrative that would ultimately contribute to a (albeit complex) constitutional order that valued the many unwritten aspects of common law, including the

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[95] *Ibid* at 808.

[96] *Ibid* at 774.

[97] *Ibid* at 775.

[98] *Ibid* at 775.

convention, but placed firm bounds around the applicability of conventions to override formalistic, written constitutional text.

While the Guardian discourse of protecting the integrity of the Constitution is evident in the majority opinions, as noted above, it plays out to a greater degree in the dissents. In a powerful dissent by Martland and Ritchie JJ, rejecting interpretations of the federal government's authority to amend the constitution without the consent of the provinces, we see one of the Court's few clear statements of its role as it related to constitutional protection. The dissent expressly invoked the Court's duty to uphold the structure of the Constitution.[99] In writing about the ability for the federal government to unilaterally limit the powers of its provincial counterpart, the justices not only delineate that the powers held by the federal government "excluded the power to do anything inconsistent with the *B.N.A. Act*" and that the "exercise of such a power has no support in constitutional convention."[100] Indeed, in their dissent, Martland and Ritchie made a rare declarative statement of the Court's Guardian role stating that: "it is the proper function of this Court, in its role of protecting and preserving the Canadian constitution, to declare that no such power exists."[101] Such clear articulation of the Guardian role makes a case for why the Guardian narrative overpowers the others in volume and consistency across the two eras of the Court under study here.

Similarly, in their dissent on the convention question, the Chief Justice, writing for himself, Estey and McIntyre JJ, took a different approach to applying the Guardian narrative. Holding that there was no legal impediment to constitutional amendment by the federal government, the dissent also noted that there was no convention requiring provincial consent to constitutional amendment. Despite the difference in outcome, the judges employed a similar discourse. In defending the absence of a convention, the Chief Justice and his colleagues positioned the Court as the arbiter and protector of the

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[99] See Mathen, *supra* note 9 at 159.

[100] *Patriation Reference*, *supra* note 11 at 848.

[101] *Ibid* at 848.

constitutional order through another rare explicit statement about the Court's role. Courts, they argued, are empowered to "recognize the existence of conventions", particularly when asked to do so through the reference mechanism.[102] They may also strike down the strength or legitimacy of that convention as it relates to the practice of federalism as the Chief Justice argued later in the decision.[103] Framing his reasoning as the preservation of the constitution ("We are concerned solely with their constitutionality"), the Chief Justice noted that the insupportability of the convention stems from the inability to bind governments according to a particular degree of consent that nobody, including the Court, was willing to define.[104]

That the Supreme Court emerged as "a critical agent of constitutional change"[105] in their complex response to the questions posed in the *Patriation Reference* was, in part, their own doing. In applying the Guardian narrative throughout their decision – both majority and dissenting opinions – the Court not only produced the basis upon which much subsequent legal analysis would be drawn (i.e. the emergent discussion around the value and justiciability of conventions), but they also reiterated, regardless of their division, the discourse of the Court as the Guardian of the Constitution – often in explicit terms. Mathen notes the challenges associated with rendering such a divided opinion (the stigma from which may have encouraged the later Court to issue controversial decisions per curiam)[106], however, the Court, from the *Patriation Reference* onward, has appeared to wear that mantle formidably.

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[102] *Ibid* at 853.

[103] *Ibid* at 872.

[104] *Ibid* at 871.

[105] See Mathen, *supra* note 9 at 164.

[106] *Ibid*.

Umpire of Federalism

Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837

Like the *Patriation Reference,* the *Securities Act Reference* also originated with the concerns of the provinces. While the questions posed to the Court came from the Governor in Council, the case addressed certain provincial governments' concerns about the Harper Government's proposed *Securities Act*. Securities, at the time of the proposal (and still now), were regulated at the provincial level; the intent of the federal legislation was to create a new, national securities regulator. The Act, which never received Royal Assent, was positioned by the provinces as falling outside the legislative authority of the Canadian Parliament under section 91(2), the trade and commerce power. Interveners for Alberta, Manitoba, Quebec and New Brunswick argued that the subject matter of the Act trenched on provincial jurisdiction, namely their right to regulate securities under the property and civil rights powers in section 92(13), and the ability to regulate matters of a merely local nature under section 92(16).[107]

The per curiam decision delivered by the Court vindicated provincial concerns. The Court held that the Act was *ultra vires* the federal government's trade and commerce power, even though it also recognized the need for and encouraged further collaboration among the federal government and provinces to create a securities regulator at the national level. Their reasoning for striking the legislation down was jurisdictional, but the Court explained their decision by way of stating that the Act was counter to the "dominant tide of modern federalism" whose hallmarks were its cooperative and flexible nature. The decision emphasized one of the defining dimensions of the Umpire of Federalism motivation – namely, that competing understandings of federalism might give way to different interpretations of individual pieces of legislation or powers held by the two levels of government. Further, how the Court viewed the federal arrangement could

[107] The Alberta and Quebec provincial Courts of Appeal both ruled the legislation unconstitutional. Interestingly, Ontario was not among its provincial peers in this case, as they supported the creation of a national securities regulator, presumably because it would be housed in TO.

very much influence the outcome of jurisdictional debates, which were anything but forgone conclusions.

In striking down the legislation that would establish a national securities regulator, the Court engaged in a pith and substance analysis of the legislation. Even though securities regulation did have aspects that legitimately fell within the bounds of trade and commerce, the Court articulated the need to circumscribe the scope of the trade and commerce clause to recognize "the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction".[108] Drawing on *General Motors of Canada Ltd. v. City National Leasing*[109], the Court noted that, under the general branch of s. 91(2), "legislation must engage the national interest in a manner that is qualitatively different from provincial concerns"[110], and the Act, which appeared to simply amalgamate provincial power failed to do so. Yet, the Court stopped short of truncating the trade and commerce power, moments later balancing its statements with a declaration that, "At the same time, failure to give meaningful scope to the general trade and commerce power would violate the notion of balance between the federal and provincial orders of government inherent in the division of powers and impermissibly amend the Constitution."[111] This sort of balancing statement provided for national commercial regulation with out "endangering 'the very idea of the local' in provincial commercial regulation".[112]

This reinforcement of a message of balance is at the core of the Umpire of Federalism narrative. It identifies the Court as a neutral arbiter of jurisdictional matters without presupposing an answer to a specific question. While the Act clearly engaged matters of national importance, the Court framed its decision in the language of differentiating –

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[108] *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at 73.

[109] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641

[110] *Reference*, *supra* note 108.

[111] *Reference*, *supra* note 108 at para 74.

[112] *Reference*, *supra* note 108 at para 85.

with precision – matters that fall clearly into one jurisdiction without taking liberties that would derogate from the powers of the other jurisdiction. Thus, the main thrust of the Act does not address a matter of such national importance that it could not successfully be kept to its current provincial status is suggestive of the Court making a technical "call" on the legislation in question to not only preserve, but balance, jurisdictional authority in a manner that is reflective of the contemporary federation.

Here, it becomes important to differentiate between a Guardian motivation or discourse and an Umpire of Federalism narrative. Surely, to some degree, there is overlap as the subject matter of jurisdiction relates both to the constitutional arrangement and to federalism. However, the distinction between the two is an important one: while the Guardian discourse is protective of the constitutional arrangement as a whole, it values the text and spirit of the document that created federalism. The Umpire discourse, by contrast, is one that protects the *outcome* of that arrangement and, in doing so, preserves the balance between the levels of government. Federalism, the Court notes, is created through the "constitutional balance envisaged by ss. 91 and 92" and a failure to preserve that balance would have an outcome of "undermin[ing] the federalism principle".[113] This motivation is further evident in the Court's statement:

It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres. Accepting Canada' interpretation of the general trade and commerce power would disrupt rather than maintain that balance. Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension.[114]

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[113] *Ibid* at para 70.

[114] *Ibid* at para 7.

Such a statement is a clear indictment of government action outside of the bounds of the federal arrangement, even if such action is viewed as normatively desirable by other provinces, the federal government or the Court itself.

Yet, one cannot blindly state that, in using the Umpire narrative, the Court pursues a strict delineation of powers to stifle government activity. Rather, the Court used the Umpire narrative to encourage the levels of government to enhance federalism by continuing to operate in a manner that allowed both to flourish. Much like the analogy of the umpire, the Court used its position to articulate for a fair and cooperative approach to resolving a policy dispute, alluding to "the spirit of cooperative federalism"[115], cooperation as an "animating force" of federalism[116], and "a restrained approach to doctrines like federal paramountcy"[117]. Of course, this discourse is reflective of a contemporary version of federalism that stems from the cooperative federalism that emerged in the post-war era and re-emerged in the form of collaborative federalism in the late 1990s.[118] This discourse of cooperation was further evident in the Court's encouragement of the provincial and federal government to continue to work on a coordinated scheme for securities regulation. Speaking to the subject matter of the case, the Court went as far as to note that the "experience of other federations in the field of securities regulation, while a function of their own constitutional requirements, suggests that a cooperative approach might usefully be explored".[119]

Another way in which the Court pronounces its umpire role is through its rejection of rigidity and strict textual interpretations of the constitution. Unlike the Guardian motivation, which might more readily adhere to textual principles, the Umpire discourse

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[115] *Ibid* at para 9.

[116] *Ibid* at para 133.

[117] *Ibid* at para 60.

[118] David Cameron and Richard Simeon, "Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism" (2008) 32 *Publius: The Journal of Federalism* 2: 42.

[119] *Reference*, *supra* note 108 at para 9.

eschews "rigid formalism in favour of accommodating cooperative intergovernmental efforts".[120] Citing its earlier decision in *OPSEU*, the Court downplayed watertight compartments, stating that there were not "the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues".[121]

Yet, one does not have to be satisfied with a reading of the Court's ratio alone to accept the Umpire narrative. Similar to statements made in the *Patriation Reference*, the Court formally articulated its role as an Umpire. Referencing the distinction between jurisdictional powers made within sections 91 and 92, the Court identifies itself as the logical "impartial arbiter of jurisdictional disputes". Referencing its earlier decisions in the *Reference re Remuneration of Judges* and *Northern Telecom Canada*[122], the Court repeats its unique position as the arbiter who is able to "control the limits of the respective sovereignties".[123] Such a clear statement of the Umpire motivation, not only as a discourse upon which the Court could rely to articulate its rulings, but also as a broader *raison d'être*, is telling of the depth of the Umpire discourse in the Court's view of its place among the branches of government.

While the Court did note their inability to condone legislation that was ultimately *ultra vires*, they concluded their analysis on a reconciling note. Reiterating their message of cooperative and flexible federalism, the Court suggested that a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available. In suggesting this path forward, they emphasized that, while flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. In a statement that truly reflects the

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[120] *Ibid* at para 58.

[121] *OPSEU*, supra note 44 at 18.

[122] *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 SCR 733.

[123] *Ibid* at 741.

umpire motivation, the Court stopped short of cooperation at any cost and reiterated that balance between the two levels of government would only come with "the respect that each level of government has for each other's own sphere of jurisdiction".[124] "The federalism principle upon which Canada' constitutional framework rests," they argued demands nothing less."[125]

Institutional

Reference re Anti-Inflation Act, [1976] 2 SCR 373

The *Reference re the Anti-Inflation Act* was the first reference case of the Laskin era. The decision, which featured a majority opinion written by the Chief Justice, a concurrence penned by Ritchie J, and a dissent by Beetz J (joined by de Grandpré J) was one of the few that featured an Institutional narrative. The decision deviated from almost all other Supreme Court references in that it takes a very strong opinion in favour of the federal government's right to legislate in economic matters that have serious implications for the provinces, but it also uses, to great effect, the vocabulary of protecting the federal government's emergency powers (outside of wartime) in matters of national concern.

The case is derived from the federal government's enactment of the *Anti-Inflation Act*[126] in 1975, and its subsequent questions posed through the Governor-in-Council to the Court with respect to whether the law was *ultra vires* the federal government's power to legislate to combat inflation. Inflation is not a specifically enumerated area of policy jurisdiction under section 91 or 92, nor are the circumstances around the Act simple enough to house under the federal trade and commerce power; however, Parliament was basing the legislation of price and wage controls to combat inflation on the "peace, order and good government" (POGG) clause, more specifically, the idea of a national

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[124] *Reference*, *supra* note 108 at para 133.

[125] *Reference*, *supra* note 108 at para 133.

[126] *Anti-Inflation Act*, SC 1975, c. 75.

emergency that required the federal government to step into an area that had both national and provincial implications. Though the Act in question did not specifically mention emergency conditions, the Court ruled that the "highly exceptional economic conditions in time of peace"[127] (as outlined in a White Paper that preceded the Act – discussed below) provided sufficient cause for the Court to recognize the national concern dimension that motivated the implementation of the Act.

The locus of the Institutional motivation in this case comes from the majority reasoning and Ritchie, Martland and Pigeon JJ's concurrence. Writing for the majority, the Chief Justice situates his answer in a broader understanding of the importance of federalism, a recognition of the power of the provinces to regulate their own civil services, as well as the trend toward cooperative federalism that led up to the 1976 decision, but denies that an inarticulation of the federal power is required to maintain it.[128] He goes so far as to say that an attempt to engage the provinces on the matter is not required; rather, even though a cooperative agreement "might have been attempted, […] it does not follow that the federal policy that was adopted is vulnerable because a co-operative scheme on a legislative power basis was not tried first".[129] In doing so, the Chief Justice dislocates this case from what might be perceived as a traditional Umpire of Federalism narrative. Rather than encouraging inter-government cooperation (as was done in the aforementioned *Securities Act Reference*), the Court specifically states that this type of cooperation was possible, but not required. In doing so, the Court articulated a different narrative in dealing with a matter related to federalism: namely, that there are times where umpiring the federal arrangement might be superseded by a clear statement of federal authority.

Located within that understanding of the desirability, but lack of requirement, of a federal arrangement, the Chief Justice notes the strength of the federal government's position to

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[127] *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 at 376.

[128] *Ibid* at 421.

[129] *Ibid*.

enact such legislation under the POGG clause. Referencing the preamble to the Act, he notes that the text was "sufficiently indicative that Parliament was introducing a far-reaching programme prompted by what in its view was a serious national condition".[130] He contradicts the submissions of the provinces noting that their interpretation of the Act as trenching on their control of their own public services "misconceive[s] the paramount authority of federal legislative power when exercised, and the all-embracing legislative authority of the Parliament of Canada when validly exercised for the peace, order and good government of Canada".[131] Therein lies the Chief Justice's Institutional narrative. By positioning the Act as a clear manifestation of the "all-embracing legislative authority" of the federal government, he distinguishes the unique motivation of the Court to preserve federal authority under an interpretive clause that could have just as easily been narrowed through the Court's ruling.

Concurring with the Chief Justice, Ritchie J, notes the critical nature of the Act and the location of Parliament's authority to deal with it in the POGG clause. While Ritchie J varies slightly from the Chief Justice's reasoning, he notes the need for the Act to be interpreted in conjunction with a White Paper on the state of the concern that preceded the Act. This is an essential element of the Institutionalist discourse. While the federal government did not use the vocabulary of "emergency" or "peace, order and good government" in the Act, the Supreme Court appeared to read into the legislation an element of "serious national concern" that could give force to the use of the POGG power. According to Ritchie J, when the Act is "read against the background of these excerpts from the White Paper it becomes apparent that they were employed by Parliament in recognition of the existence of a national Emergency".[132] The Court, of course, did not have to articulate this depth of the national dimension for the federal government and could have, just as easily, rebuked the legislative efforts of that

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[130] *Ibid* at 422.

[131] *Ibid* at 430.

[132] *Ibid* at 438.

government for failing to motivate its case. However, the Court instead protected and upheld federal authority (with limitations) and enabled the legislation to stand.

The dissent authored by Beetz J took a different view and is a useful exemplar of a case wherein the majority and dissent use competing narratives to frame their reasoning. In writing for Grandpré J and himself, Beetz J gave weight to the implications of globalisation and the fluctuations of the international market on federalism. The accompanying narrative evoked a strong Guardian of the Constitution narrative with Beetz noting that the growth of certain sectors – particularly those in economic policy – were susceptible to being, *pro tanto*, a national matter simply because of the rapidly globalizing nature of the domestic economies. The effect, he argued, was that, when taken to its logical conclusion, all matters would be rendered federal powers under the national concern dimension resulting in "a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly."[133] Contradicting federal counsel's submission that the Act is what Beetz J calls an "an erroneous characterization of the *Anti-Inflation Act*" and argues that the Act itself and federal counsel's articulation of its purpose are "quite distinguishable and they do not, in my view, stand for what they are said to stand".[134] In doing so, Beetz J gives rise to an interpretation of the Act as disrupting the constitutional order and needing to be limited to prevent jurisdictional creep.

The conflict between the majority and the dissent notwithstanding, as noted above, it is essential that we think of the Institutional motivation not as wholly contradictory to the Guardian or Umpire motivation, but as a sort of version or outcome of these that emphasizes the Court's relationship in upholding federal authority. The *Anti-Inflation Act Reference* is noted as much for the Court's decision to allow the legislation to stand as it is for the limits placed on the mandate given to the federal government by making that

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[133] *Ibid* at 445.

[134] *Ibid* at 445.

legislation temporary. Among the more important observations about the Court's Institutional narrative is that, in its reasoning, the Court limited the possibility that the POGG power was to be dramatically expanded, but opened up the possibility of fairly easy access to the emergency use of the power in peacetime.[135] It also gave rise to the observation that the Court is able to rule in the favour of the federal government while still upholding the balance of power and preventing further centralization of policy-making authority.[136]

The Court's decision in the *Anti-Inflation Act Reference* went on to have implications for a host of future SCC decisions. In particular, the Court's ruling on emergency economic conditions would come up again in the *Provincial Judges Reference* twenty years later. While the outcome of that decision is often contested because of the Court's own perceived strategic ruling[137], it is also a case wherein the Court used its considerable authority to weigh into complex economic matters.

Public Will

Reference re Employment Insurance Act (Can.), ss. 22 and 23, [2005] 2 SCR 669, 2005 SCC 56

The final narrative captured in this study, like the Institutional narrative before it, is one that receives considerably less attention than its Guardian and Umpire collocutors. The *Employment Insurance Act Reference* came up on an appeal, by right, from the Quebec Court of Appeal in 2005. The case referred to the Court sections 22 and 23 of the federal *Employment Insurance Act*, which were contested by the government of Quebec as *ultra vires* the federal government's power in social policy issues. The Government of Quebec,

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[135] Peter H. Russell, "The Anti-Inflation case: the anatomy of a constitutional decision" (1977) 20 *Canadian Public Administration* 4: 632.

[136] *Ibid*.

[137] Randal N. M. Graham, "What Judges Want: Judicial Self-Interest and Statutory Interpretation" (2009) 30 *Statute Law Review* 1: 38.

desiring to establish its own set of policies governing maternity and parental leave, asked the federal government to reduce Quebecker's contributions to the federal scheme to fund the Quebec plan. In their unanimous decision, the Court upheld the legislation, overturning the Quebec Court of Appeal's earlier decision, and holding that the legislation deadline with maternity and parental leave benefits is a valid exercise of the federal jurisdiction over unemployment insurance. While the case is largely about jurisdictional authority, the Court's framing of its ratio brings to light a particular emphasis on the changing social conditions that indicate a need for clarity and, indeed, generosity in matters of income replacement for women.

The *Employment Insurance Act Reference* is unique in that few others contain any aspect of the Public Will narrative. The next closest to characterising the Public Will narrative is the *Same-Sex Marriage Reference* [2004], handed down by the Court in the previous year. Perhaps in some ways, these two decisions should be considered alongside one another, as they were both instances wherein the Court used its considerable influence to direct public policy in line with public opinion. Though the Canadian public was perhaps more galvanized over the issue of same-sex marriage than it was about extending maternity and paternity benefits, both decisions reflect the Court's willingness to enter into the political fray on issues that have a very tangible application to the lives of many Canadians. Of course, the Court's decision on EI benefits is likely lesser known than its same-sex marriage counterpart, even though maternity and paternity benefits directly affect a greater number of Canadians. However, given that the nature of the question posed was jurisdictional, rather than whether benefits would be assigned (they would have, by one government or another, regardless of the outcome), it is likely that fewer Canadians felt that the decision would have an effect on their work lives.

The question in the *EI Act Reference* case was whether the Act fell within federal jurisdiction over unemployment insurance. While the Court's response maintained the necessary pith and substance analysis required of a jurisdictional case, the Court chose not to limit its analysis solely to the technicalities of the constitutional assignment of policy authority. Citing its own examination of the "living tree" metaphor in the Same-Sex Marriage Reference, the Court noted that it "takes a progressive approach to ensure

that Confederation can be adapted to new social realities".[138] They note that legislative competence is dynamic and that jurisdiction over unemployment insurance must be interpreted "progressively and generously" [139], signalling the Court's willingness to engage in policy change to reflect contemporary social norms.

Following their introductory statements about interpretive doctrines, the Court examines the purpose of maternity benefits and the context in which unemployment insurance and maternity benefits, more specifically, were adopted. It is here that the Public Will narrative takes shape, but in a passive way. In their examination of context, the Court notes the evolving nature of the workforce and the entry *en masse* of women into the labour force, citing the government's own *Report of the Study for Updating the Unemployment Insurance Programme* (1968) (the Cousineau Report)[140] and White Paper, entitled *Unemployment Insurance in the 70's* (1970)[141], as examples of texts where the government itself has justified the expansion of EI benefits across potentially vulnerable groups.

Yet, it is in the section of the Court's decision that described maternity benefits as a type of employment insurance that the Court's ratio truly manifests the Public Will narrative. This takes two different forms: first, a discussion of how the evolution of the workforce has moved to incorporate women, and second, how the evolution of family structures have moved toward equal or shared parenting responsibility between both spouses. In the first aspect of the Public Will narrative, the Court frames its understanding of maternity benefits as falling with general employment benefits by emphasizing the "extent of the protection required by Canadian society changes with the needs of the labour force", the

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[138] *Reference re Employment Insurance Act* (Can.), ss. 22 and 23, [2005] 2 SCR 669, 2005 SCC 56 at para 9.

[139] *Ibid* at para 47.

[140] Canada. *Report of the Study for Updating the Unemployment Insurance Programme*. Ottawa: Queen's Printer, 1968.

[141] Canada. Department of Labour. *Unemployment insurance in the 70's*. Ottawa: Employment and Immigration Canada, 1970.

growing portion of the labour force that is made up of women, and that "particular needs [of women in the labour force] that are of concern to society as a whole."[142] Further, the Court signals the need for change in the way that maternity benefits are viewed by both government and by society at large. They argue that "[a]n interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility" and that "[t]o limit a public unemployment insurance plan […] would amount to denying its social function".[143] The Court then concludes this analysis with a strong statement of the Public Will narrative in noting that the "social nature of unemployment insurance requires that Parliament be able to adapt the plan to the new realities of the workplace."[144] Taken together, these statements correspond with an interpretation of the development of labour and insurance practices that must retain the essence of the times and should progress with the direction of society's understanding of the role of labour.

The second aspect of the Court's Public Will narrative takes on a more personal tone. In their subsequent analysis of parental benefits more broadly, the Court again takes a progressive stance corresponding to public opinion. In dealing with the issue of whether adoptive parents or fathers taking paternity leave in lieu of or alongside their partner's maternity leave, the Court argues, "[a]t a time when society is stressing the responsibility of both parents, they cannot be treated unequally. Such an approach would be anachronistic".[145] They further note that two features – "the evolution of the role of women in the labour market and of the role of fathers in child care"[146] – have had undeniable consequences for the structure of the labour market and family structures. Here, the Court clearly eschews a reactionary approach to analyzing parental leave benefits, commensurate with the prevailing view that both parents have parental

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[142] *Reference*, *supra* note 138 at para 66.

[143] *Ibid*.

[144] *Ibid*.

[145] *Ibid* at para 73.

[146] *Ibid* at para 77.

responsibilities for infants. Taking their progressive approach further, the Court makes another, subsequent bold statement in line with the Public Will narrative that is generalizable to future social policy dilemmas. In stating that "[a] generous interpretation of the provisions of the Constitution permits social change to be taken into account"[147], the Court is effectively noting that it will, when appropriate, use its ruling as a venue to reinforce the prevailing opinions about the evolution of social norms.

One final note about the *Employment Insurance Act Reference* bears stating with specific reference to the Court's use of interpretive doctrines to pull out the Public Will narrative. Inherent within the Public Will narrative is an understanding that the public will is different from (usually cast as more progressive than) government policy and that the Court will be the balancing or, indeed, rectifying force that will correct any imbalance between the two. This, almost certainly, indicates a progressive interpretivist approach. The Court begins its written decision with a declaration of the appropriateness of the application of the living tree doctrine (see above). Of course, as is the case with other interpretative decisions by the Court (including the above *Anti-Inflation Act Reference*), the Court does not justify societal changes as *carte blanche* permission to change jurisdictional boundaries: "A progressive interpretation cannot, however," the Court argues, "be used to justify Parliament in encroaching on a field of provincial jurisdiction."[148] However, what is interesting about the Court's ruling in the *EI Reference* is that the Court puzzlingly evokes both interpretive and textualist interpretations in the same breadth. Shortly after acknowledging the living tree doctrine, the Court noted, "If an issue comes before a court, the court must refer to the framers' description of the power in order to identify its essential components", but then carry on to acknowledge that meaning "may be adapted to modern-day realities".[149] This type of reliance on both a declaration of interpretivist and textualist modes is not necessarily as antithetical to one

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[147] *Ibid*.

[148] *Ibid* at para 10.

[149] *Ibid*.

another as they might appear.[150] However, it is suggestive of the fact that the Court is willing to use the available jurisprudential tools to arrive at an outcome which it believes is reflective of the law, and at times, social progress.

[150] See Randal N. M. Graham, "The Myth of Originalism" in *Interpretatio non cessat: Mélanges en l'honneur de Pierre-André Côté*, Stéphane Beaulac, Mathieu Devinat (eds) (Montreal: Éditions Yvon Blais, 2011).

Chapter 4

Discussion and Conclusion

At the outset of this study, I hypothesized that the reference power held more than just a set of strategic tools for the provincial and federal executives to mobilize against one another. I argued that one could also learn a significant amount about how the Court viewed its role in handling complex issues of policy, federalism and jurisdiction that were directly appealed using the tool of the reference question and that the Court may have chosen to communicate their opinions and their understanding of their own role using overarching narratives – namely, the guardian of the Constitution, the Umpire of Federalism, the Institutional and the Public Will narratives. I also hypothesized that the Court might change its evaluation framework over time, particularly when Chief Justices change.

Through this analysis of 21 advisory opinions, issued across two Courts, I found interesting corroborating evidence of some of these hypothesized trends, but also some limitations as to how effectively my four-part narrative framework could be applied to the Court's decisions in references. Through an empirical, manual coding analysis of the 21 decisions, it was evident that all four narratives were present to some degree, but that two of these narratives – the Guardian and Umpire narratives were predominant. While the Public Will and Institutional narratives were present, they were sufficiently limited enough to say that they were, at best, secondary narratives, rather than guiding frameworks for the Court. At the same time, when these two narratives were present – as was the case in the *Anti-Inflation Act Reference* and the *Employment Insurance Act Reference*, they spoke to important constitutional issues that had a tremendous impact on the economic and social policy realities of Canadians.

Further to my hypotheses on the presence of these narratives, I suggested that pivotal moments, such as the implementation of the *Charter*, might elucidate notable trends or deviations from existing trends. Importantly, there appeared to be no differentiation between pre/post-*Charter* applications of the four narratives. By contrast, both the Laskin

and the McLachlin Courts appeared to use all four to roughly the same degree. There is some evidence that the later Court was more likely to use a narrative that conveyed the Public Will, and that the earlier Court provided the only real instance of a Institutional narrative that positioned the interests of the federal government above those of the provinces, however, these observations warrant caution because there were too few cases of the application of these narratives to truly support the outlined hypothesis.

Thus, the overarching observation to arise from this detailed analysis is that more may unite the two Courts than separates them. The importance of the narratives that imply the Court's role as guarding the constitution and umpiring federalism cannot be overstated. These appear to be the Court's main frameworks for explaining their decision-making process. Of course, to some extent the questions posed by the Governor-in-Council or that are appealed to the Court from provincial courts of appeal are as much responsible for the outcomes as the Court's choice of narrative. While the Court can (to an extent) choose to answer specific questions or decline, it remains that the Court has control over its docket, but it does not have control over the reference questions asked of it. Therefore, the Court's narrative frameworks are inevitably structured in part by the fact that it is a venue for inter-governmental disputes and jurisdictional resolution. Still, the Court is free to answer the questions in almost whatever manner it chooses; therefore, the observations about a lack of diversity in the narratives applied by the Court still hold value. They illustrate that the Court adheres to some of its more traditionally-known roles, but will, when the situation requires it, adopt some narratives that particularly advance political or social ends.

What also comes out of this analysis, though is not referenced in any detail in the results of the deductive search for the four established narratives is the presence of any other "undetected" or "unexpected" narratives. During the process of coding the 21 advisory opinions provided by the Court, it was not the case that new or persistent trends emerged from a critical reading. That is to say, the narratives that emerge from the literature appear to capture the gamut of discourses employed by the Court in dealing with reference matters. This is an important observation if we consider that the study of advisory opinions as a subset of the Court's jurisprudence may yield alternative findings

from the mainstream literature. A thorough read of that body across two eras of the Court suggest that this is not the case, though counter-arguments could be made by further analyses of other eras of the Supreme Court.

Finally, true "trends" in analysis appear to be difficult to extract even with a single Court's body of jurisprudence. Rather, it might be the case that the Courts just take reference cases one by one and try not to use this type of case as a mode to advance one narrative or another. It may even be the case that the Court is somewhat "freed" in answering an advisory opinion as it deviates from its routine case load and provides the Court, just as it does the government, an opportunity to venture into deliberations that are difficult to draw into its standard case load.

5.1 Implications of Research

The goal of this research was to examine in detail advisory opinions as a set of judicial writings. Though complementary to, this study ultimately deviated from single case studies of individual advisory opinions. In doing so, there are several implications for the substantive study of the Court's writings, but also for the methodology of examining large volumes of case law around several areas of jurisprudence. Unlike a comprehensive, comparative study of several criminal or property law cases, the unifying thread in this analysis was the legal venue, not the subject matter. The advisory opinion, for reasons set out in the earlier portion of this paper, is a unique opportunity for governments at both levels to engage the Court in matters of policy, constitutional or jurisdictional conflict. Of course, it is almost always the case that the Court is dealing with more than one of these matters, as the subject matter of each reference question was often complex and politically-loaded. Thus, studying advisory opinions gives rise to some important observations about the case type itself.

The primary implication drawn from this study is that the Court uses two predominant narratives when deliberating and communicating its opinions on reference questions. This has implications for government and implications for those studying the law. For governments with an interest in (and the option to) refer questions to the Court, this study

shows that the Court is somewhat conservative in the application of narratives other than the Guardian and Umpire narratives. This may be reassuring for governments who fear that the Court will take liberties in areas of social policy or economic policy that may deviate from the government's own agenda. Second, with respect to the more strategic uses of reference questions, this analysis shows that the Court will err on the side of marshalling the relationship between levels of government rather than redefining it. While critics of the Court may agonize over its "liberal" nature, it appears, at least in the case of advisory opinions, that the Court takes a fairly conservative tone in applying the tenets of the constitution and federalism.

Another implication derived from this study related to the study of law is that the Court does, indeed, employ narrative language to communicate its decisions. While the use of such language is not necessarily the dominant type of communication in the written opinions, it does frame much of the Court's more routine exposition on past case law and legislation in terms of generalizable frameworks through which the Court draws its reasoning, and which can (and has been) observed by legal scholars. The presence of the narratives may seem like a simple implication, but it remains an important one. In the absence of these narratives, scholars would struggle to find a unifying set of themes that guide the decisions. These narratives fall outside of the structural framework of the Court's decisions (e.g. the references to past case law, the interpretation of legislation or government policy papers) and, instead, provide a set of narrative elements that communicate broader principles upon which the Court rests its legal opinions.

Turning to methodological implications of this study, one of the chief advantages of this study is that it provides an example of the application of a mixed-methodology, incorporating both an empirical and a qualitative, doctrinal approach to studying the Court's decisions. The benefit of this approach was that it allowed an in-depth analysis of a large body of case law over a significant amount of time (1976-2017) according to a comprehensive, replicable scheme. Though empirical efforts (both quantitative and text-based) are less established in the study of law (coding efforts, specifically, are particularly rare), this approach is useful in that it allows for an evaluation of the relative

strength of each narrative on a case-by-case basis, thus permitting comparison across eras of the Court.

The addition of the case study returns this study firmly into the mainstream of legal analyses, particularly those that look to engage in comparative case study. Applying the doctrinal approach to this comparative case study permitted a useful analysis, not only of the cases themselves, but it also illustrated differences between narratives that emerged from the two eras of the Court and from two origins of reference questions (Governor-in Council and appeals from the provinces). By adding this systematic comparison to the summary quantitative analysis, I am able to elucidate how I came to the observations in the quantitative analysis and assist the reader in understanding how the narratives were applied within the Court's judgments.

5.2 Future Directions

This study represents a systematic, comparative analysis of 21 advisory opinions under the guidance of two Chief Justices. Its strength lies in the breadth of decisions it covered and in the application of the framework of narrative analysis to these cases. However, much remains to be done in interpreting how the Court sees its role in issuing advisory opinions or case law more generally. As suggested above, the analysis of narratives of the 21 cases did not produce any suggestion that other narratives were excluded from this analysis and ought to be considered in future research, but it remains that this study only looked at two eras of the Court and other past (or current) Courts may contribute others.

It also remains that analysing advisory opinions for the presence of four narratives is only a narrow analysis of the broader question of how the Court sees its role in issuing advisory opinions. There are a number of other analytical techniques that could be applied to this question. Interviews with present or former Supreme Court judges are the most obvious; however, additional review of secondary sources may also yield further insights. Of course, these methods are limited by practical issues such as availability and likelihood of a judge (current or former) speaking candidly on their experience with reference questions.

The next step for this particular project is to expand the analysis to a more historical era of the Court to determine the origin point of these dominant narratives. One of the most prominent metaphorical descriptions attributed to the Court (or its predecessor the JCPC) is the "living tree" metaphor of constitutional interpretation derived from the *Persons Case*. An examination of earlier Courts' narrative construction may yield useful information on why the Guardian and Umpire narrative have become so prominent. This could also be gleaned from a comparison with non-reference cases from the same era as the current analysis.

As stated in the outset of this project, advisory opinions provide a unique opportunity for the Court to engage with the executives on questions of contemporary policy and constitutional relevance. Their importance lies not only in the outcome of the decision, but also in the opportunity for two branches of government, who pride themselves on their independence, to engage with one another directly. The possibility of the politicization of these decisions will always make them attractive for constitutional law scholars to study, but they also have the potential to yield an abundance of insights about the role of the Court and the vision that the Court has for its position within constitutional order.

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Appendices

Appendix 1. Advisory Opinions by Court

Chief Justice Bora Laskin (1973-1984)
1. *Anti-Inflation Act* [1976] 2 SCR 373 2. *Agricultural Products Marketing* [1978] 2 SCR 1198 (*Egg Reference II*) 3. *Authority of Parliament in Relation to the Upper House* [1980] 1 SCR 54 4. *Residential Tenancies Act* [1981] 1 SCR 714 5. *Resolution to Amend the Constitution* [1981] 1 SCR 753 (*Patriation Reference*) 6. *Mining and Mineral Rights Tax Act* [1982] 2 SCR 260; 138 DLR (3d) 577 7. *Constitution of Canada* [1982] 2 SCR 793 (*QC Veto*) 8. *Exported Natural Gas and Gas Liquids Tax* [1982] 1 SCR 1004 9. *McEvoy vs. Attorney General (NB) Court of Unified Criminal Jurisdiction* [1983] 1 SCR 704; 148 DLR (3d) 25 10. *Newfoundland Continental Shelf* [1984] 1 SCR 86 11. *Upper Churchill Water Rights Reversion Act* [1984] 1 SCR 297 12. *Ownership of the Bed of the Strait of Georgia and Related Areas* [1984] 1 SCR 388 13. *Wiretap Reference* [1984] 2 SCR 697

Chief Justice Beverly McLachlin (2000-2017)
1. *Firearms Act (Can)* [2000] 1 SCR 783 2. *Same Sex Marriage* [2004] 3 SCR 698 3. *Employment Insurance Act (Can) ss22 and 23* [2005] 2 SCR 669 4. *Assisted Human Reproduction Act* [2010] 3 SCR 457 5. *Broome v Prince Edward Island* [2010] 1 SCR 360 6. *Securities Act* [2011] 3 SCR 837 7. *Senate Reform* [2014] SCJ No 32 8. *Supreme Court Act, ss. 5 and 6 (Nadon)* [2014] SCJ No 21

Appendix 2 Coding Guide

What text is coded? Only the text of the full decision of the Supreme Court reference is coded. Headnotes, citations and footnotes are not coded. Code both majority rulings and dissents.

Type of Sentence	Example	Coded?
Statement of Fact	"The text of the Act specifies that…"	No
Report of or Commentary on Actions or Statements of Others	"In giving reasons for judgment for the majority of the Ontario Court of Appeal, MacKinnon J.A. summarized the main attack upon the federal and provincial legislation, and the orders and regulations thereunder…"	No
Deliberations or decisions of the Court	"…the inclusion of former advocates of at least 10 years standing at the bar is consistent with the purpose of s. 5, which is to ensure that appointees to the Court have adequate legal experience."	Yes
Deliberations or decisions of past Courts (excluding JCPC)	"Dickson C.J. explained that where the general trade and commerce power is advanced as a ground of constitutional validity, a "careful case by case analysis remains appropriate" (General Motors, at p. 663)."	Yes
Explanation of general legal doctrine	"This constitution depends then on statutes and common law rules which declare the law and have the force of law, and upon customs, usages and conventions developed in political science which, while not having the force of law in the sense that there is a legal enforcement process or sanction available for their breach, form a vital part of the constitution without which it would be incomplete and unable to serve its	No

	purpose."	
Quotes from other authors	"In his work on constitutional law, Peter Russell notes…"	No
Text of statute, other case law	"The White Paper, after reviewing the procedures followed in respect of amendments to the Act, went on to state four general principles, as follows: The first general principle that emerges..."	No

Coded statements are those that inherently express the Court's view on the legal issue at hand and embody their role as an arbiter of the issue or making a declaration about the law.

Some statements must be read in context. For example, in the *Patriation Reference* (at 848): dissenting justices Martland and Ritchie state, "There is no statutory basis for the exercise of such a power." Reading that sentence alone does not readily suggest one frame or another. However, in the context of the dissent, it is a clear statement protecting federalism.

Others may be more explicit. For example, also in the In the *Patriation Reference* (at 848): "This being so, it is the proper function of this Court, in its role of protecting and preserving the Canadian constitution, to declare that no such power exists." This is a clear statement of how the Court views its role as the guardian of the constitution.

How is it coded? The unit of measurement is the sentence, therefore coding is done on a per sentence basis. Each unit can have multiple outcomes: it can remain uncoded (if it does not represent one of the four themes; it can be coded with any single theme; it can be coded with multiple themes).

Thematic	**Description**	**Example**

Role		
Inter-Institutional	The Supreme Court defers to the executive in law/policymaking matters	Again, there is no delegation of administrative power by Parliament; if anything, there is delegation by the Government of Ontario to the federal authorities. (*Re Anti-Inflation Act,* [1976])
Public Will	The Supreme Court sees its role as limiting the authority of the executive to act unilaterally, instead promoting some conception of what the public desires	This metaphor has endured as the preferred approach in constitutional interpretation, ensuring "that Confederation can be adapted to new social realities" (*Re Securities Act*, [2011])
Guardian of the Constitution	The Supreme Court sees its role as the protector of constitutional architecture	If the power asserted is not found in the Constitution, it cannot be given by agreement. (*Re Agricultural Products Marketing Act*, [1978 at 1232)
Umpire of Federalism	The Supreme Court sees its role as one of an arbiter of intergovernmental relations	However, the proposed Act reaches beyond such matters and descends into the detailed regulation of all aspects of trading in securities, a matter that has long been viewed as provincial. (*Re Securities Act*, [2011])

Coding is performed manually by the researcher. Each reference is read in detail for the narrative elements described above. When an element is present (in the judgment of the coder), the sentence is tagged according to the appropriate theme. Once coding was complete, all coded segments were exported from QDA Miner and checked for validity. Coded segments were checked first by case to remove any false/erroneous codes, and then checked again by theme to ensure internal consistency.

A Note About Wording

It is not the case that all sentences containing the word “federalism” will be coded as “federalism”. Likewise, it’s not necessary that a sentence possess the work “federalism” to be coded as such. Coding cannot be too dependent on specific words (i.e. we cannot assume semantic independence and therefore automatically code specific words) as the Court often uses language that implies the opposite of a code: “Its function is to limit the Governor in Council’s otherwise broad discretion to appoint judges”. Coding this as “inter-institutional” would mistakenly apply a code to a sentence that conveys the opposite meaning.

Curriculum Vitae

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Post-secondary Education and Degrees:

McMaster University
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2000-2005 B.A. (Hons)

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Honours and Awards (Selected):

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Related Work Experience

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July 1, 2018 - present

Assistant Professor
Department of Political Science
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Publications:
Edited Volumes

1. Alex Marland, Thierry Giasson and **Andrea Lawlor** (eds). 2018. *Political Elites in Canada: Power and Influence in Instantaneous Times*, Vancouver: UBC Press.

Peer-Reviewed Articles

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2. **Andrea Lawlor** and Erin Crandall. 2018. "Policy versus Practice: Third Party Behaviour in Canadian Elections," *Canadian Public Administration*, 61(2): 246-265. DOI: 10.1111/capa.12266
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