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Courts Without Cases: The Law and Politics of Advisory Opinions by Carissima Mathen and Seeking the Court's Advice: The Politics of the Canadian Reference Power by Kate Puddister

Jennah Khaled
Osgoode Hall Law School

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Book Review

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Abstract

THE REFERENCE POWER HAS, suddenly, become the fascination of the legal academic community in Canada. Two books on the subject were published in 2019 from different and complementary perspectives. Together, they represent a novel inquiry into a power that is exercised differently in Canada than it is in any other country.

Book Review

***Courts Without Cases: The Law and Politics of Advisory Opinions* by Carissima Mathen and *Seeking the Court's Advice: The Politics of the Canadian Reference Power* by Kate Puddister¹**

JENNAH KHALED²

THE REFERENCE POWER HAS, suddenly, become the fascination of the legal academic community in Canada. Two books on the subject were published in 2019 from different and complementary perspectives. Together, they represent a novel inquiry into a power that is exercised differently in Canada than it is in any other country. The reference, wherein courts consider questions put to them directly instead of in the context of appeals of cases, is a power that has been deployed to great effect on a variety of landmark issues, from appellate courts up to the Supreme Court of Canada. But this power is not well understood. Published within several months of each other, these two books fill a gap in our understanding of the power that “engage[s] a declaratory function in perhaps its purest sense—not in the service of mediation of a particular dispute, but with the intention of clarifying a point of uncertainty so that everyone knows how the law may be applied to their future projects and decisions.”³ These words

1. Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Hart Publishing, 2019); Kate Puddister, *Seeking the Court's Advice: The Politics of the Canadian Reference Power* (UBC Press, 2019).
2. J.D. Candidate (2021), Osgoode Hall Law School.
3. Mathen, *supra* note 1 at 235-36.

are attributable to Carissima Mathen, Professor in the University of Ottawa's common law program, and they appear in *Courts Without Cases: The Law and Politics of Advisory Opinions*.

Mathen's book focuses on how "advisory opinions draw courts into the complex relationship between law and politics."⁴ Of the two monographs, this is the one that provides the more traditional legal analysis and offers a strong narrative-driven qualitative assessment of the reference power. Mathen is a seasoned law professor whose agility and breadth of knowledge is on full display in this work. The volume is short, but it is packed with historical background and analysis. No sentence is wasted, and Mathen's writing is as engaging as it is informative.

Part of what makes Mathen's work essential is that she digs deep into some of the most important questions about references: what are they, how did they develop, and what status do they have in relation to traditional cases at common law? In chapter ten, *The Advisory Court*, Mathen argues that references, while technically advisory opinions and not decisions, have evolved for several reasons, both "cultural" and "pragmatic," and have the same status as regular common law cases.⁵ Mathen writes:

[I]n important ways, a Canadian advisory opinion and a judicial decision are substantively indistinguishable. It makes little difference, to a party's future legal position, whether a judicial resolution has emerged from one proceeding and not the other. That is because courts themselves do not draw such distinctions. The advisory opinion about the nature of Charter rights in, say, the *Motor Vehicle Reference* receives no less regard than rulings in ordinary 'live' cases such as *R v Oakes* or *R v Therens*. Courts treat the former reference as an authoritative statement of law.⁶

This conclusion may be accepted by many legal practitioners and academics, but often, it is hard for many to explain why and how references came to have binding force. Mathen tracks the evolution and process by which references have come to bind governments. In a series of chapters, Mathen treads the long historical trail that informs our modern conception of the reference. Her fascinating account looks at the Norman-era *Magnum Concilium*, a council of advisors that was composed to offer advisory opinions to the English King,⁷ through the creation of the Judicial Committee of the Privy Council in 1833, whose enabling statute

4. "About: Courts Without Cases: The Law and Politics of Advisory Opinions," *Hart Publishing*, online: *Bloomsbury* <www.bloomsburyprofessional.com/uk/courts-without-cases-9781509922499>.

5. Mathen, *supra* note 1 at 205.

6. *Ibid.*

7. *Ibid* at 208.

laid out a mechanism to provide advice,⁸ all the way through early Canadian references, such as the *Manitoba Education Reference* of 1894.⁹ Mathen gathers this history to provide strong support for the conclusion that advisory opinions have developed a binding character and “occupy the same procedural space as cases.”¹⁰ By the time she delves into analysis of modern cases, the reader has a solid understanding of the historic forces that give the reference power its status in Canadian law.

In fewer than 250 pages, Mathen tackles the reference power from every angle. She provides sophisticated, plain-language explanations of foundational constitutional law concepts that the courts have explored through the use of references: the separation of powers,¹¹ federalism (*Re Marriage*),¹² minority rights (*Re Bill 30*),¹³ the rule of law (*Re Manitoba Language Rights*),¹⁴ statutory interpretation (*the Persons case*),¹⁵ and questions of fundamental justice and the criminal law (*Motor Vehicle*).¹⁶ This sweeping review makes clear that advisory opinions have been sought on many significant questions of public law and civic life. By the time you finish reading this work, it is evident how central reference cases have been in the development of Canadian law. Even those who have been “notably suspicious of judicial power” have accepted that the reference is the mechanism by which government actors can seek “guidance” and “finality” on questions of fundamental import.¹⁷

In contrast, Kate Puddister’s monograph, *Seeking the Court’s Advice: The Politics of the Canadian Reference Power*, offers a more technical political scientist’s view on the matter.¹⁸ As Assistant Professor in the Department of Political Science at the University of Guelph, Puddister brings quantitative research methods to bear on the subject. It is refreshing to have a perspective on a major legal issue from outside

8. *Ibid* at 32.

9. *Ibid* at 210; *In re Certain Statutes of the Province of Manitoba relating to Education*, (1894) 22 SCR 577 [*Manitoba Education Reference*].

10. Mathen, *supra* note 1 at 206.

11. *Ibid* at 20.

12. *Ibid* at 87. *In re Marriage Laws*, [1912] SCR 132 [*In re Marriage* (SCC)].

13. Mathen, *supra* note 1 at 148; *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148 [*Re Bill 30*].

14. Mathen, *supra* note 1 at 144; *Manitoba Act, 1870*, RSC 1970, App II.

15. Mathen, *supra* note 1 at 132; *Edwards v Attorney General (Canada)* [1930] AC 124, 1929 UKPC 86 [*Persons Case*].

16. Mathen, *supra* note 1 at 140; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 [*Re Motor Vehicle*].

17. Mathen, *supra* note 1 at 179; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 [*Supreme Court Act Reference*].

18. Puddister, *supra* note 1.

the epistemic community of lawyers and legal academics. As this community often jokingly laments its own lack of mathematical expertise, it is helpful to have a number-cruncher from another discipline provide a quantitative analysis of a legal phenomenon, so that our understanding of references can be enhanced by conclusions drawn from statistical analysis. This is where Puddister's work shines and serves as worthwhile complement to Mathen's book.

Seeking the Court's Advice opens with an anecdote about how constitutional questions can rear their head in "unexpected or unusual" places.¹⁹ Puddister tells the story of the "chicken or egg" war between Ontario, Québec, and Manitoba in the 1960s that culminated in the *Reference re Manitoba (AG) v. Manitoba Egg and Poultry Association*, or the *Egg Reference*.²⁰ However, this case is not so odd or quirky when framed by Professor Puddister—it is not "puzzling" that inter-provincial agricultural disputes would be fertile ground for a reference case. This well-chosen example illustrates how reference questions can be brought by governments strategically and cleverly in pursuit of their political objectives.

Puddister deploys this methodology to explain the reference power, not just at the Supreme Court of Canada, but in Canada's appellate courts, making it the more comprehensive quantitative review of the subject. Puddister's book is a worthwhile read for legal academics and practitioners who participate in references on behalf of interveners, and government officials who seek to understand how their predecessors have used the reference power as a tool to advance their political objectives.

Puddister's thesis is that "governments ask reference questions to benefit strategically from the unique characteristics of the reference power and to draw on some of the advantages inherent in judicial review."²¹ Here, our two books have some overlapping content. Each author offers a list of distinct reasons that governments have historically chosen to put an issue to reference as an alternative to other methods of changing the law. Their lists are similar, and complementary without being contradictory.

In chapter nine, *Actors, Advice, and Law*, Mathen examines why advisory opinions have been sought by stakeholders. Her list includes: doctrinal guidance; co-ordination of social aims and projects; strategy (including pre-emption, e.g., of anticipated legislation, and displacement, to deflect pressure between competing power sites); and imprimatur, which Mathen says, is where "actors can trade on

19. *Ibid* at 3.

20. *Ibid* at 3-5; [1971] SCR 689.

21. *Ibid* at 13.

the special legitimacy and power of the court which they, largely, lack.”²² Mathen provides case examples for each. For example, the section on *imprimatur* looks at the *Same-sex Marriage Reference* and how the federal government overcame instability in its own ranks and rapidly changing social norms by deferring to the Supreme Court of Canada’s authority.²³

Puddister’s examination is slightly different. First, she suggests, governments see that the reference power can be deployed strategically, as a way to abdicate responsibility for making difficult decisions on thorny cases, saving them the “unnecessary expenditure of political capital.”²⁴ Second, they are used to clarify powers in the context of federalism. Third, they are a defensive maneuver, to “benefit from the institutional authority and protection of the courts.”²⁵ As such, references can provide “position legitimization,” as the public regards courts more highly than it does the partisan governments of the day.²⁶ Fourth, references are heard far more quickly than ordinary cases that escalate through judicial review up to the higher appellate levels.²⁷ Lastly, governments can carefully craft the language of reference questions to prod courts into providing suitable answers.²⁸ All five of these strands are well supported by Puddister’s research.

Mathen’s analysis goes further, however, as she examines actors’ motivations, not only to seek advisory opinions, but their decisions on whether to comply. In chapter nine, having already concluded that stakeholders see reference outcomes as binding, she draws on legal theory to deepen her explanation of why stakeholders are motivated to treat these outcomes as rules. She looks at Joseph Raz (“advice” vs. “order”),²⁹ and John Austin’s command theory,³⁰ as well as H.L.A. Hart and Ronald Dworkin on rules and principles, to support her analysis of what constitutes legal authority and from where advisory opinions draw their normative force.³¹ This section of the book would be useful for law students who want to link their study of jurisprudence with a salient issue in Canadian law, and to understand why the binding character of references is such a thorny issue in the first place.

22. Mathen, *supra* note 1 at 190.

23. *Ibid* at 191; *Reference re Same-Sex Marriage*, 2004 SCC 79.

24. Puddister, *supra* note 1 at 184.

25. *Ibid* at 13.

26. *Ibid* at 121.

27. *Ibid*.

28. *Ibid*.

29. Mathen, *supra* note 1 at 193.

30. *Ibid* at 197.

31. *Ibid* at 189-204.

Puddister's book differs most from Mathen's in its methodology and scope. Though Mathen's book analyses language from cases like *Reference Re Secession of Québec* to explore how the highest Court conceptualises its own reference jurisdiction,³² Puddister takes a different approach. She does not engage in line-by-line analysis of judicial reasoning in cases where the Supreme Court of Canada reflects on the justiciability of abstract reference questions. Instead, the data-driven portion of her study focuses on quantitative review. She also interviews participants in the reference process, and only briefly offers a historical analysis of select illustrative case examples.

In her first few chapters, Puddister engages in a quantitative analysis of data taken from all 209 reference cases that have come before the courts from 1875 to 2017.³³ She uses graphs and tables to great effect in outlining trends across references over time, drawing meaningful conclusions and acknowledging the limitations of the data where necessary. A variety of metrics are used to help explain how courts respond when reference questions are put forward: the court's disposition in each case;³⁴ the instances of unanimity and division in reference decisions;³⁵ and which political parties have historically brought the most references when they have taken power federally and provincially.³⁶ She tracks which provinces have brought the most and the least reference cases.³⁷ She also explains the reasons behind the data, for example, showing that the number of federal references jumped in the 1930s,³⁸ and then providing background on how this came to pass—this particular peak, she explains, occurred because William Lyon Mackenzie King's government emphasized this form of strategic litigation to advance its goals.³⁹

Puddister also provides insight into trends in the subject matter of reference cases. From 1949 to 2017, she concludes, just over 50 per cent of references have dealt with issues pertaining to the *Constitution Act, 1867*, the majority of these on division of powers questions.⁴⁰ Following that, statutory interpretation cases constitute 26.8 per cent of cases. A surprisingly small percentage of cases

32. *Ibid* at 158.

33. Puddister, *supra* note 1, ch 2-3.

34. *Ibid* at 83.

35. *Ibid* at 84.

36. *Ibid* at 106.

37. *Ibid* at 45.

38. *Ibid* at 46.

39. *Ibid* at 59.

40. *Ibid* at 80.

are *Charter*-related, representing 17.5 per cent of the total.⁴¹ Puddister explains that, in addition to the *Charter* being a newer instrument, and therefore the subject of less judicial treatment, “many of the issues that can arise concerning the compatibility of government legislation with the *Charter* are often dealt with by courts through routine litigation.”⁴² Puddister also finds that references had a 55.7 per cent unanimity rate, which is actually lower than the unanimity rate that is found at the Supreme Court of Canada and appellate courts on typical cases.⁴³ This data buttresses our understanding of how and when issues have been pulled out of the traditional adversarial process and become the subject of reference opinions, and how the courts have handled them. Her conclusions will help future governments make informed requests for references from appellate courts.

Puddister’s chapter four, “*It’s Always A Little Bit of Politics*”: *Why Governments Ask Reference Questions*, draws on interviews with counsel, judges, and provincial Attorneys General who have been involved in bringing reference cases before the courts. This is the only section of the book that disappoints. Although quotes provided by interviewees provide worthwhile insight, Puddister’s decision to allow these contributors to remain anonymous—referring to them as “Counsel B” or “Attorney General C”—feels unnecessary. None of the quotes are provocative enough to merit non-attribution. “When a reference is referred, it’s the government deciding that this is a political hot potato,” Attorney General D explains.⁴⁴ Attorney General C discusses how the reference power can be a useful tool in the context of federalism to bring the other government to the negotiating table.⁴⁵ These remarks are hardly explosive. In her endnotes, Puddister wrote that “confidentiality was a condition to gaining access to the participants.”⁴⁶ However, one wonders if she might have pressed harder to have these sources go on the record to allow the reader to contextualise their remarks. Though this decision may spring from academic research ethics rules, it does the reader a disservice. Knowing which reference case(s) the interviewee worked on, the period in which they were operating, and their political inclinations would benefit the reader. Ultimately, however, these interviews do significant work to buttress the author’s thesis: that politics is front and centre in governmental decisions to put reference questions before the courts.

41. *Ibid.*

42. *Ibid.* at 81.

43. *Ibid.* at 84.

44. *Ibid.* at 126.

45. *Ibid.* at 129.

46. *Ibid.* at 246.

Veering away from her quantitative focus, Puddister offers chapter five, *Why Not Refer Everything? The Padlock Act and Blasphemy*. This chapter examines two significant cases where the government opted against the use of the reference power. The most intriguing of the two examples is the account of the dispute over the Québec *Padlock Act* of 1937, formally known as *An Act to Protect the Province Against Communistic Propaganda*, which “empowered the attorney general...to direct the police to lock any residence or building that was used to disseminate bolshevism or communism through any means.”⁴⁷ All students of public law relish the opportunity to explore the constitutional implications of the Duplessis government’s excesses. Professor Puddister is one. She selected this case as an example of a federal government torn over whether a reference—or another of the myriad options available to them—would be the best method to address a potential civil liberties crisis. In describing Prime Minister King’s and Attorney General Lapointe’s equivocation, Puddister explains how their government eschewed the reference power and sought to use another tool in their arsenal to address objectionable provincial legislation.⁴⁸ These two case studies are used to great effect to explain how the strengths and weaknesses of the reference power have been conceived of historically. This is the part of the book that most overlaps with Mathen’s work, which also zeroes in on important episodes of this nature.

Near the end of her book, Puddister argues that, though the reference power is technically non-binding, deference to a court’s reference opinion is almost guaranteed and can be relied upon by all stakeholders—that Canadians “often see the courts as infallible on any controversy regarding the Constitution.”⁴⁹ However, because Puddister’s research concluded in 2017, her position that the “the ineffectual status of the notwithstanding clause negates the most powerful tool legislators have for upholding a constitutional interpretation that deviates from that of the courts” must be re-examined.⁵⁰ At the time that she wrote this book, she concluded that section 33 seemed to be “de facto inoperative.”⁵¹ Professor Mathen, by contrast, recognized that section 33 can “be used to deliberately disregard a legal directive,” and though she notes that it has been used sparingly, she argues that “there is a general sense that the clause remains an available (albeit controversial) option for the various Canadian legislatures

47. *Ibid* at 151.

48. *Ibid* at 151-62.

49. *Ibid* at 207.

50. *Ibid*.

51. *Ibid*.

to consider.”⁵² In 2020, as the notwithstanding clause has come roaring back into the mainstream, one wonders if Professor Puddister would still argue that the courts’ conclusions on highly contested constitutional questions would be respected by all federal or provincial governments as the final word.⁵³

The reference power is enjoying its moment in the spotlight. *Courts Without Cases* and *Seeking the Court’s Advice* will likely affect the way the power is exercised and conceived of by governments, interveners, and courts. These two authors have brought complementary methods to bear on a subject that deserves attention from all corners of the legal world. Carissima Mathen and Kate Puddister’s work enriches our understanding of Canadian courts and how they operate.

52. Mathen, *supra* note 1 at 195-96.

53. The notwithstanding clause was invoked periodically in the period preceding the publication of this work, *e.g.*, by the Saskatchewan Legislature. See *Good Spirit School Division No 204 v Christ The Teacher Roman Catholic Separate School Division No 212*, 2017 SKQB 109. The clause has since been a significant factor in the Québec laïcité discussion. See *Hak c Procureure générale du Québec*, 2019 QCCA 2145.

