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Résumé de l'article

Au Canada, le pouvoir de renvoi confère au gouvernement fédéral et aux gouvernements des provinces la possibilité de se tourner vers une cour d'appel pour obtenir un avis consultatif sur n'importe quelle question ou presque, y compris sur les politiques d'autres gouvernements. En raison de la grande latitude dont disposent les gouvernements pour exercer leur pouvoir de renvoi, nombreux sont ceux qui l'ont fait de manière stratégique. Bien que le pouvoir de renvoi ait d'abord été créé pour permettre au gouvernement fédéral de superviser les provinces, ces dernières ont invoqué leur propre pouvoir de renvoi pour contester les mesures du gouvernement fédéral et y résister de façon efficace. Elles ont donc, essentiellement, détourné l'objectif initial du pouvoir de renvoi. La présente étude se fonde sur une analyse systématique des dossiers de renvoi lancés par les provinces, y compris les litiges récents portant sur la Loi sur la tarification de la pollution causée par les gaz à effet de serre *(taxe sur le carbone) pour démontrer que le pouvoir de renvoi peut être un outil politique et stratégique aux mains des administrations infranationales, ce qui n'est pas le cas pour le gouvernement fédéral. Les renvois représentent, pour les gouvernements des provinces, une façon de protéger et d'énoncer clairement leurs intérêts, de manifester leur opposition quant aux mesures prises par d'autres gouvernements et, dans certains cas, de renforcer les négociations avec leurs partenaires fédéraux. Le présent article démontre aussi les limites du pouvoir de renvoi et de son utilisation à des fins politiques. Les dossiers de renvoi étudiés permettent de constater que le recours aux tribunaux ne peut, à lui seul, forcer la collaboration.*

What We've Got Here Is Failure to Cooperate: Provincial Governments and the Canadian Reference Power

Kate Puddister*

ABSTRACT

The Canadian reference power provides provincial and federal governments with the ability to seek an advisory opinion from an appellate court on virtually any matter, including the policies of other governments. Because of the great latitude in which governments can wield the reference power, many governments have done so strategically. While the federal reference power was initially created to allow the federal government to oversee the provinces, provincial governments have deployed their own reference power to effectively challenge and resist the actions of the federal government and as a result, have essentially co-opted the original purpose of the reference power. Relying on a systematic analysis of provincially initiated reference cases, including the recent disputes over the Greenhouse Gas Pollution Pricing Act *(carbon tax) references, this study demonstrates how the reference power can be a political and strategic tool for subnational governments in a manner that is distinct from the federal government. References can provide provincial governments a means to protect and articulate provincial interests, to voice opposition to the actions of other governments and in some instances, to encourage or reinvigorate negotiation with federal partners. However, this article also demonstrates the limits of the reference power and the use of litigation as a political tool. The reference cases examined here demonstrate that litigation alone cannot force cooperative outcomes.*

KEYWORDS:

Canadian reference power, provincial reference cases, federalism, strategic litigation, cooperative federalism.

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RÉSUMÉ

Au Canada, le pouvoir de renvoi confère au gouvernement fédéral et aux gouvernements des provinces la possibilité de se tourner vers une cour d'appel pour obtenir un avis consultatif sur n'importe quelle question ou presque, y compris sur les politiques d'autres gouvernements. En raison de la grande latitude dont disposent les gouvernements pour exercer leur pouvoir de renvoi, nombreux sont ceux qui l'ont fait de manière stratégique. Bien que le pouvoir de renvoi ait d'abord été créé pour permettre au gouvernement fédéral de superviser les provinces, ces dernières ont invoqué leur propre pouvoir de renvoi pour contester les mesures du gouvernement fédéral et y résister de façon efficace. Elles ont donc, essentiellement, détourné l'objectif initial du pouvoir de renvoi. La présente étude se fonde sur une analyse systématique des dossiers de renvoi lancés par les provinces, y compris les litiges récents portant sur la Loi sur la tarification de la pollution causée par les gaz à effet de serre *(taxe sur le carbone) pour démontrer que le pouvoir de renvoi peut être un outil politique et stratégique aux mains des administrations infranationales, ce qui n'est pas le cas pour le gouvernement fédéral. Les renvois représentent, pour les gouvernements des provinces, une façon de protéger et d'énoncer clairement leurs intérêts, de manifester leur opposition quant aux mesures prises par d'autres gouvernements et, dans certains cas, de renforcer les négociations avec leurs partenaires fédéraux. Le présent article démontre aussi les limites du pouvoir de renvoi et de son utilisation à des fins politiques. Les dossiers de renvoi étudiés permettent de constater que le recours aux tribunaux ne peut, à lui seul, forcer la collaboration.*

MOTS-CLÉS :

Pouvoir de renvoi du Canada, dossiers de renvoi par les provinces, fédéralisme, litige stratégique, fédéralisme coopératif.

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INTRODUCTION

Following the election of Doug Ford in 2018 in Ontario and the ascension of former federal Cabinet Minister Jason Kenney to the leadership of the United Conservative Party in Alberta, *Maclean's* magazine published a cover story that pictured the newly elected men with the leaders of other conservative-oriented parties, titled "The Resistance."[1] In the cover story, journalist Paul Wells explained that the federal government led by Liberal Prime Minister Justin Trudeau was now facing a future of inhospitable federal-provincial relations, citing the provincial reference challenges to the federal carbon tax plan as a case in point. This is not the first time provincial governments have used their reference power to obtain advice regarding the constitutionality of federal government action, nor is it the first time the use of the reference power has been influenced by political strategy and partisan politics. On the contrary, the provincial use of the reference power to oppose the legislative agenda of the federal government reflects one of the reasons why provincial governments first created a reference power—and as this paper will demonstrate—, why references are a recurring tool used by governments to navigate Canadian federalism.

Leveraging the insights from a comprehensive dataset of Canadian reference cases, this paper examines the origins and original purposes of the provincial reference power and explains how provincial governments have used references over time. While the analysis keeps the legal issues of the reference cases in the foreground, the discussion focuses more on the broader political and policy context, highlighting several themes in provincial government use of the reference power, including the relationship between references and intergovernmental relations, cooperative federalism, and the safeguarding of provincial interests in a strategic manner. These themes are applied to a study of

1. Issue of *Maclean's* (December 2018).

the *Greenhouse Gas Pollution Pricing Act (GGPPA)*[2] (carbon tax) references, which not only concern one of the most pressing public policy issues of present-day (that is climate change), but also highlights how provincial governments can rely on their reference power as a form of legal and political resistance to the actions of the federal government.[3] The *GGPPA* references demonstrate how provincial governments, aligned in their partisan opposition to the federal government, can invoke their reference power as a method to protect provincial interests with the potential for legal and strategic-political benefits, thus making it an ideal case to examine the provincial reference power and its place in Canadian federalism.

With a focus on the provincial reference power and reference cases, this article makes a valuable contribution to the study of the Canadian reference power and the use of litigation to address intergovernmental conflicts within a federation. Importantly, relying on a systematic analysis of all provincial-initiated reference cases from 1949 to 2020, this study demonstrates how the reference power can be a political and strategic tool for subnational governments in a manner that is distinct from that of the federal government. This study provides original empirical analysis of all provincially initiated references, detailing the trends associated with provincial reference cases, including when provinces use a reference to challenge the actions of another government. Although the provincial reference power largely mirrors that of the federal government, it provides provincial governments a unique source of defence against the actions of the federal government. Considering one of the motivating factors for the creation of the federal reference power was to monitor the legislative actions of provincial governments, it is significant that provinces have essentially co-opted the purpose of the reference power by effectively deploying it to challenge the federal government. References can provide provincial governments a means to protect and articulate provincial interests, to voice opposition to the actions of other governments and in some instances, to encourage or reinvigorate negotiation with federal partners. However, this article also demonstrates the limits of the reference power and the use of litigation as a political tool. While occasionally references have been an important instrument for governments when

2. *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

3. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan Reference*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario Reference*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 [*Alberta Reference*].

there has been a failure to cooperate between orders of government, the reference cases examined here demonstrate that litigation alone cannot force cooperative outcomes, there must be political will and ability to compromise. Indeed, as demonstrated by some of the reference cases examined in this article, litigation can sometimes be counterproductive to intergovernmental strategy. Finally, by focusing on the provincial reference power as distinct from the federal reference power, this article draws attention to the unique nature of the provincial power and the role of provincial reference cases as a key element of governance for provinces in managing relations with other governments in the federation.

I. ORIGINS OF THE PROVINCIAL REFERENCE POWER

The federal reference power originated with the enactment of the *Supreme Court and Exchequer Court Act*[4] in 1875. Section 52, which mirrored provisions found in *An Act for the better Administration of Justice in His Majesty's Privy Council 1833*[5] (United Kingdom), provided the Governor in Council (effectively the federal Cabinet) the ability to request an advisory opinion from the Supreme Court of Canada regarding "any matters whatsoever as [it] may think fit."[6] Although the Canadian reference power is rooted in the English tradition, it was adopted in part as a federalism tool, similar to the powers of reservation and disallowance.[7] Using the reference power, Parliament could submit provincially enacted laws to the Supreme Court of Canada for review, which could result in a finding that the provincial law was *ultra vires* provincial jurisdiction. A reference opinion from the Supreme Court could be used instead of reserving provincial legislation[8] or as a first step prior to

4. *Supreme Court and Exchequer Court Act*, SC 1875, c 11, s 4.

5. *An Act for the better Administration of Justice in His Majesty's Privy Council*, 1833, c 41, s 4. Section 4 provides; "It shall be lawful for his Majesty to refer to the said judicial committee for hearing or consideration any such other matters whatsoever as his Majesty shall think fit; and such committee shall […] advise his Majesty thereon in manner aforesaid."

6. *Supreme Court and Exchequer Court Act*, *supra* note 4, s 52.

7. Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960) 6:3 McGill LJ 168. Reservation is the authority of the lieutenant governor general (exercised on the advice of Cabinet) to withhold assent on a provincial law to allow Cabinet to review. Disallowance is the authority of the Federal Cabinet to deny assent to provincially enacted legislation, ss 55–6 of the *Constitution Act, 1867* (UK), 30 & 31 Vic, c 3.

8. Jennifer Smith, "The Origins of Judicial Review in Canada" (1983) 16:1 Can J Political Science 115, at 121.

disallowing provincial legislation.[9] As a result, the reference power made it possible for Canadian courts to play an influential and potentially determinative role in policy conflicts between provinces and the federal government.[10]

The early reference process did not involve arguments from involved parties, nor did it require the Supreme Court to provide reasons. The absence of these features did not prove particularly problematic until the 1885 *McCarthy Act Reference*[11] where the Supreme Court found federal regulation of liquor traffic invalid without reasons explaining why. In 1891, displeased with the result of the *McCarthy Act Reference*, the Macdonald government amended the reference power in two important ways. First, it required the Supreme Court to provide reasons for its decisions, and second, it provided provincial governments the right to participate in proceedings when a reference implicated provincial law.[12] The final substantive reform to the federal reference power was in 1922 which provided provincial governments the right to appeal to the Supreme Court from references heard in provincial courts of appeal.[13]

Following the adoption of the federal reference power in 1875, several provinces sought to create a provincial reference power by amending provincial judicature statutes. In 1890, relying on provincial constitutional authority over the administration of justice,[14] Manitoba, Nova Scotia, and Ontario created a provincial reference power that allowed the lieutenant governor in council to request an advisory opinion from the provincial court of appeal. These first provincial reference statutes essentially copied the wording of the federal reference

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9. Rubin, *supra* note 7, notes, Minister of Justice Sir John Thompson argued that if disallowance was exercised after a finding of invalidity by the Supreme Court, the decision to disallow the provincial law would be perceived as more legitimate.

10. Smith, *supra* note 8; William R Lederman, "Democratic Parliaments, Independent Courts, and the *Canadian Charter of Rights and Freedoms*" (1985) 11:1 Queen's LJ 1.

11. *In re Liquor License Act, 1888, and Act Amending* (known as the *McCarthy Act Reference*) (which was given without written), [1885] Sess Papers No 85a (Can).

12. For more on the debates surrounding amending the reference power, see Kate Puddister, *Seeking the Court's Advice: The Politics of the Canadian Reference Power* (Vancouver: University of British Columbia Press, 2019) at 23–4 [Puddister, *Seeking the Court's Advice*]; Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart Publishing, 2019) at 48–50 [Mathen].

13. *Supreme Court Act*, RSC 1985, c S-26, s 36.

14. *Constitution Act, 1867*, *supra* note7, s 92(14).

provision.[15] The provincial reference power has political and strategic roots because it was created to protect provincial autonomy against centralizing actions of the federal (Macdonald) government.[16] Between 1891 and 1953 the remaining provinces adopted similar legislation.[17] Armed with their own reference power, provincial governments could obtain judicial advice on the validity of provincial and federal statutes from their appellate court, with the goal of ensuring that neither order of government enacted laws that exceeded their constitutional authority. While provinces had to wait for the 1922 amendments[18] to the *Supreme Court Act* to appeal as of right to the Supreme Court of Canada, provincial governments did occasionally bypass the Supreme Court and appeal directly to the Judicial Committee of the Privy Council (JCPC).[19] According to Barry Strayer, the provincial reference statutes improved upon federal legislation because they ensured the right of parties to participate, required courts to provide written reasons, and clarified that a reference opinion could be appealed.[20]

The wording and structure of the present-day provincial reference powers vary slightly, and many provide a broad scope to use the reference power. Several provincial reference statutes provide the lieutenant governor in council the ability to refer "any matter" or "any question" to the court of appeal.[21] The Québec *Court of Appeal Reference Act* provides

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15. Manitoba, *An Act for Expediting the Decision of Constitutional and other Provincial Questions*, SM 1890, c 16; Nova Scotia, *An act for expediting the decision of Constitutional and other Provincial Questions*, SNS 1890, c 9; Ontario, *An Act for expediting the decision of Constitution and other Provincial Questions*, SO 1890, c 13.

16. Barry L Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (Toronto: Butterworths, 1983) at 317.

17. British Columbia, *An Act for expediting the decision of Constitutional and other Provincial Questions*, SBC 1891, c 5; Québec, *An Act to authorize the reference, by the Lieutenant-Governor in Council, of certain questions to the Court of the Queen's Bench*, SQ 1898, c 11; Alberta & Saskatchewan, *An Ordinance for expediting the decision of Constitutional and other Legal Questions*, Ord NWT 1901, c 11; New Brunswick, *Act to provide for references by the Governor-in-Council to Appeal Division of the Supreme Court*, SNB 1928, c 47; PEI, *An Act to Amend the Judicature Act*, SPEI 1941, c 16; Newfoundland, *Judicature (Amendment) Act*, SN 1953.

18. *An Act to amend the Supreme Court Act*, SC 1922, c 48, s 1.

19. Strayer, *supra* note 16 at 317. Strayer notes the following direct appeals to the JCPC: *AG (Ontario) v AG (Canada)*, [1894] AC 189; *AG (Ontario) v Hamilton Street Railway*, [1903] AC 524; *AG (Canada) v AG (Québec)*, [1921] 1 AC 413.

20. Strayer, *supra* note 16 at 316.

21. Newfoundland & Labrador, *Court of Appeal Act*, SNL 2017 c-37.002, s 24; Saskatchewan, *The Constitutional Questions Act, 2012*, c C-29.01, s 2(1); Alberta, *Judicature Act*, RSA 2000, c J-2, s 26(1); British Columbia, *Constitutional Questions Act*, RSBC 1996, c 68, s 1; Manitoba, *Constitutional Questions Act*, 1986 CCSM, c C180, s 2(1).

that "the Government" may refer "any question," but that question must be deemed "expedient."[22] The New Brunswick *Judicature Act* requires that the question be "important." Though importance is not defined, it is associated with:

> (a) the interpretation of the *Constitution Acts*, (b) the constitutionality or interpretation of any Canadian or Provincial legislation, (c) the powers of the Legislature of the Province or the Government thereof […] (d) any other matter […] to which the Lieutenant Governor in Council sees fit […].[23]

Taken together, the provincial reference provisions provide governments the power to request an advisory opinion from its provincial court of appeal on virtually any issue, including policies of other governments, with a right to appeal to the Supreme Court.

II. USE OF THE REFERENCE POWER BY PROVINCIAL GOVERNMENTS

With provinces equipped with a reference power, the tide has turned—provincial governments regularly initiate reference cases in their courts of appeal and routinely challenge the policies of the federal government (and occasionally other provinces) through references. From 1875 to 2020, there have been 216 reference cases, with 89 (41%) initiated by the federal government and 127 (59%) initiated by provincial governments.[24] Focusing exclusively on the post-1949 (after appeals to the JCPC were abolished), there have been 105 references. Table 1 provides the frequency of reference cases per each jurisdiction. Overall, 84 (80%) of references are initiated by provincial governments and 21 (20%) are initiated by the federal government.

22. Québec, *Court of Appeal Reference Act*, RSQ 1975, c R-23, s 1.

23. New Brunswick, *Judicature Act*, RSNB 1973, c J-2, s 23.

24. Data are generated from an original dataset of all appellate court reference cases in Canada, current to June 1, 2020. Where provincial appellate reference decisions were subject to appeal only the final decision is included. This selection criterion means that when multiple provincial references are combined upon appeal at the Supreme Court they are counted as one case.

Table 1: Reference Cases 1949 to 2020[25] by Jurisdiction

	Frequency	Percent
Federal	21	20
Alberta	12	11.4
British Columbia	12	11.4
Manitoba	8	7.6
New Brunswick	5	4.8
Newfoundland and Labrador	5	4.8
Nova Scotia	3	2.9
Ontario	12	11.4
Prince Edward Island	7	6.7
Québec	11	10.5
Saskatchewan	9	8.6
Total	105	100

Table 1 illustrates the frequency with which each government submits reference questions to the appellate court within its jurisdiction; however, Table 1 does not tell us how each government has used the reference power. Because governments can submit their own legislation or the legislative actions of other governments to courts for review in a reference, there is value in understanding the frequency in which provinces challenge the federal government (and the reverse) through a reference case. When a government submits the legislation of another partner in the federation to a court for review through a reference, also known as a cross-government reference, it can provide insight into the nature of intergovernmental relations.[26] Indeed, if governments rely on courts to sort out jurisdictional disputes, rather than addressing matters through more political channels, such as an intergovernmental negotiation or agreement, it could demonstrate a more adversarial relationship between members of the federation because governments are either unable or unwilling to resolve disputes themselves. Using the reference power in this manner can position the

25. Current to June 1, 2020.

26. Kate Puddister, "The Canadian Reference Power: Delegation to the Courts and the Navigation of Federalism" (2018) 49:4 Publius: The J of Federalism 561 [Puddister, "The Canadian Reference Power"].

courts to serve as a mediator between governments, offering the possibility of legal and political conflict resolution. Indeed, governments might use the reference power with the goal of obtaining a favourable court ruling as leverage in intergovernmental disputes, among many other reasons.[27]

Table 2: Cross-Government Use of the Reference Power 1949 to 2020

		Reference Initiating Government		
		Federal	**Provincial**	**Total**
Statute	**Provincial**	4	50	54
	Federal	12	26	38
	Other[28]	5	6	11
	Both[29]	0	2	2
	Total	21	84	105

Table 2 indicates that of the 105 references during this period, 30 (approximately 29%) are cross-government uses of the reference power.[30] Considering that the federal government enacted the reference power as a means to police the boundaries of provincial jurisdiction, it is quite interesting that the federal government has only used its power to ask the Supreme Court for advice regarding provincial legislation four times since 1949. Comparatively, provincial governments have used the reference power for an advisory opinion regarding federal government legislative action 26 times since 1949. The move away

27. *Ibid*; Puddister, *Seeking the Court's Advice*, *supra* note 12 at 123–48.

28. Reference questions that do not concern federal or provincial legislation are coded as "other." An example is *Reference Re Secession of Québec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC), because the Supreme Court was asked for its opinion regarding the unilateral secession of a province in the abstract. The Court was not asked to review Bill 1, *An Act Respecting the Future of Québec* or any other legislation that provided for unilateral secession.

29. Cases coded as "both" are cases where a government submitted serious questions to the court that concerned actions of both a federal and provincial government, as was the case in *Reference Re Agricultural Products Marketing Act*, [1978] 2 SCR 1198, CanLII 10 (SCC), where the court was asked a series of questions concerning the *Ontario Egg Order and Egg Marketing Levies*, SOR 72-743, and the *Agricultural Products Marketing Act*, RSC 1970, c A-7.

30. Because the provinces are grouped together in Table 2, this does not indicate how often provinces used the reference power regarding the legislative action of another provincial government.

from using the reference power to challenge provinces by the federal government is even more striking when considering that the last time the federal government initiated a cross-government reference was in a 1993 case regarding amendments to the provincial sales tax in Québec, in *Reference Re Québec Sales Tax*.[31] Provincial governments are quite active in using the reference power in a cross-government manner. At the time of writing, the Supreme Court of Canada is set to decide on a trilogy of references[32] initiated by Saskatchewan, Ontario, and Alberta regarding the federal carbon tax. These references will be examined in detail in Section VI.

Figure 1 (below) plots the use of the reference power by provinces and the federal government over time, further demonstrating the limited use of the reference power by the federal government compared to the provinces. Figure 1 also highlights the significant reference activity by provincial governments between 1980 and 2000. When considering the contemporaneous events in Canadian politics during the 1980s through 2000, it follows that provinces would more frequently rely on the reference power compared to other periods. Between 1980 and 2000 it was one of the most tumultuous periods in the Canadian federation with the patriation of the *Constitution Act, 1982*, the failure of constitutional negotiations in the Meech Lake (1987) and Charlottetown (1992) Accords, two referendums on Québec's independence and sovereignty (1980 and 1995), growth in regionalism with the electoral success of the Reform Party and the Bloc Québécois in the 1993 federal election,[33] and invigoration of calls for Indigenous self-government and rights. Canadian political scientists define this time as a period of mega-constitutional politics[34]—a period in which government relationships within the federation are contested

31. *Reference Re Québec Sales Tax*, [1994] 2 SCR 715, CanLII 48 (SCC). Other instances of federal government submitting provincial legislative action to the Supreme Court include *Reference Re Manitoba Language Rights*, [1992] 1 SCR 212, CanLII 115 (SCC); *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, CanLII 33 (SCC); *Reference Re Farm Products Marketing Act SO*, [1957] SCR 198, CanLII 1 (SCC).

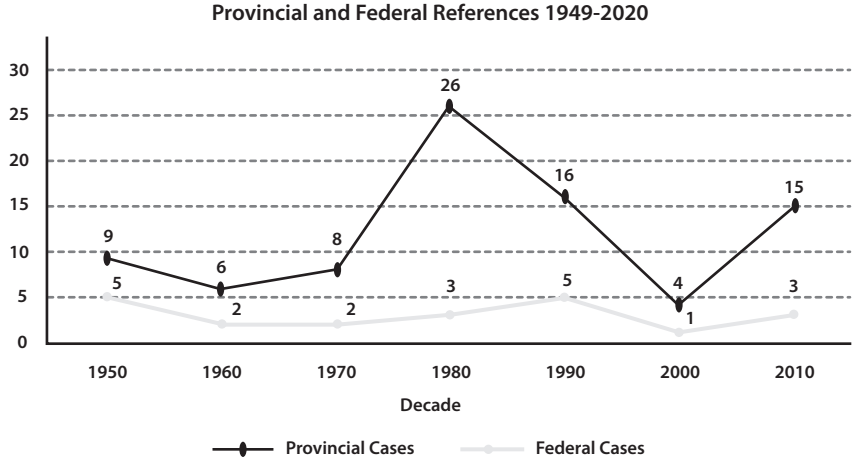
32. *Saskatchewan (AG) et al v Canada (AG)*, SCC Files N^{os}38663, 38781.

33. The 1993 election saw the electoral breakthrough of the Reform Party and the Bloc Québécois achieve status as Official Opposition.

34. Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed (Toronto: University of Toronto Press, 2004) at 75; Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail" (1994) 27:4 Can J of Political Science 747; Christopher P Manfredi & Michael Lusztig, "Why Do Formal Amendments Fail? An Institutional Design Analysis" (1998) 50:3 World Politics 377; Puddister, *Seeking the Court's Advice*, *supra* note 12 at 62–3.

and the stability of the nation-state is challenged. During the period of mega-constitutional politics, many of the disputes between provinces and the federal government, directly and indirectly, resulted in reference cases, with a total of 50 references taking place between 1980 and 1999.

Figure 1: Canadian Reference Cases 1949 to 2020



III. CONSTITUTIONAL REFORM

The fact that the greatest use of the reference power maps on to the era of mega-constitutional politics highlights the important role reference opinions can play in constitutional reform. Reference opinions can explain legislative jurisdiction, especially vis-à-vis other governments in the federation, providing clarity regarding the constitutionality of a legislative project, even before it is enacted. During the era of mega-constitutional politics, the federal government initiated several references that sought constitutional clarification concerning matters with important legal and political implications. References during this era include the *Reference Re Authority of Parliament in relation to the Upper House*,[35] which concerned a slate of institutional changes, including Senate reform, and the *Secession Reference*, which considered

35. *Reference Re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, CanLII 169 (SCC).

the unilateral secession of a province, and both were initiated by the federal government in response to provincial opposition and secessionist sentiments in Québec.[36] However, the *Patriation Reference*[37] and the *Québec Veto Reference*[38] are the most representative examples of provinces using the reference power to respond to or to push back against constitutional reform efforts.

The *Patriation Reference* is a classic example of a province using a reference to empower itself in a conflict regarding constitutional reform and to push back against the actions of the federal government. Newfoundland, Manitoba, and Québec[39] submitted reference questions to their provincial appellate courts in response to the Trudeau government's promise to pursue unilateral patriation and constitutional reform, which was opposed by eight provinces at the time.[40] Trudeau's declaration of unilateralism preyed on a long-standing concern held by provinces that their power and autonomy were reliant upon a benevolent federal government.[41] Thus a reference opinion that recognized provincial interests was a viable political strategy for provincial governments to confront the federal government. Furthermore, when considering the core issues at stake in the *Patriation Reference*, the strategic motivations of the provinces are even more apparent. Each of the provincial references contained a variety of questions,[42] but all were principally concerned with two issues: if the proposed amendments impacted provincial powers, and the validity (legally and conventionally) of the federal government's declaration of unilateral constitutional reform. From a political strategy point of view, these questions are noteworthy because it was commonly accepted that the federal government's proposed amendments impacted provincial jurisdiction and required provincial consent, and

36. For a good discussion on the legal aspects of these references, see Mathen, *supra* note 12 at 115–6, 158–67.

37. *Reference Re Resolution to Amend the Constitution (Patriation Reference)*, [1981] 1 SCR 753, CanLII 25 (SCC) [*Patriation Reference*].

38. *Reference Re Objection by Québec to a Resolution to amend the Constitution (Québec Veto Reference)*, [1982] 2 SCR 793, CanLII 219 (SCC) [*Québec Veto Reference*].

39. *Patriation Reference*, *supra* note 37; Newfoundland: (1981) 118 DLR (3d) 1; Manitoba: (1981) 117 DLR (3d) 1; Québec: (1981) 120 DLR (3d) 385.

40. *Patriation Reference*, *supra* note 37 at 765.

41. Mathen, *supra* note 12 at 119.

42. For a review of the reference questions submitted to the courts of Newfoundland, Manitoba and Québec, see *supra* note 39 at 762–3.

thus the provinces were essentially seeking the court's support rather than obtaining legal clarity.[43]

Responding to the reference questions, the Supreme Court made clear that provincial powers were impacted by the federal government's constitutional reform proposals, though it did not address the specific ways in which provincial powers would be implicated. The Court held that a "substantial degree of provincial consent" is required, but left it to political actors to define what constitutes a "substantial" amount of consensus.[44] A majority of the Court found that Parliament has the authority to adopt resolutions to initiate constitutional reform with Westminster, though, the ability to amend the *British North America Act* resided with the United Kingdom. The Court concluded that pursuing reform with the participation of provinces was not legally required, however, it would offend conventional practice. Much has been written about the *Patriation Reference*, and much of this writing is critical of the opacity of the court's reasoning and the willingness to address questions that many perceived as too political.[45] Regardless of the criticism, from the perspective of most of the provinces, the Court's opinion provided the necessary leverage to force the federal government back to intergovernmental negotiations which resulted in an outcome accepted by all provinces except Québec.[46] The *Patriation Reference* highlights how provinces can use a reference to assert their power in negotiations with federal partners, which could stop another government from pursuing an objective against its wishes or

43. Peter Hogg, "Formal Amendment of the Constitution of Canada" (1992) 55:1 L & Contemporary Problems 253; Michael Mandel, *The Chapter of Rights and the Legalization of Politics in Canada, rev. edition (Toronto: Thompson Educational Publishing, 1994)*. Not to mention the fact the questions considered a constitutional convention, which is generally accepted to beyond the purview of courts.

44. *Patriation Reference*, *supra* note 37 at 773.

45. Peter Russell, "The Supreme Court Decision: Bold Statescraft Based on Questionable Jurisprudence" in Peter Russell, Robert Décary et al, *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment* (Kingston: Queen's University Institute of Intergovernmental Relations, 1982) at 1; Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference" (2011) 54 SCLR 117; Carissima Mathen, "The Question Calls for an Answer and I Propose to Answer it: The Patriation Reference as Constitutional Method" (2011) 54 SCLR 143; Mandel, *supra* note 43; Philip Girard, "Law, Politics and the Patriation Reference of 1981" in Steve Patten & Lois Harder, eds, *Patriation and Its Consequences: Constitution Making in Canada* (Vancouver: University of British Columbia Press, 2015) at 115; Mathen, *supra* note 12 at 123–6.

46. *Ibid* at 126–7.

force that government to respond to provincial demands. This reference also demonstrates how a reference opinion from the Supreme Court can encourage, but not guarantee, cooperative agreements between governments.

The outcome in the *Patriation Reference* and ultimately the adoption of the *Constitution Act, 1982* was not considered a success from the perspective of Québec, which did not support the final constitutional agreement. Relying on its reference power, Québec sought clarity regarding its role in constitutional negotiations, if unanimous provincial consent is required and if "[…] the consent of the Province of Québec [is] constitutionally required, by convention for the adoption by the Senate and the House of Commons of a resolution the purpose of which is to cause the Canadian Constitution to be amended."[47] Both the Québec Court of Appeal and the Supreme Court of Canada found that Québec's consent is not required for a constitutional amendment and that the province does not hold a veto in this regard. While Québec did not receive its desired outcome in the *Québec Veto Reference*, the fact that the province believed a reference was a suitable response to challenge the federal government and the nine provinces that agreed to the final constitutional package further demonstrates the utility of the reference power as a political and strategic tool in navigating constitutional negotiations. The *Québec Veto Reference* empowered Québec to launch an objection to the 1982 constitutional reforms in a formal manner in a national forum. Along with obtaining legal clarity, references can be a powerful tool for provincial governments to stake out a position on a controversy, which can send a message to voters and the other partners in the federation.[48]

IV. COOPERATIVE FEDERALISM AND THE LIMITS OF LITIGATION

The reference power can give provinces a means to try to enforce intergovernmental agreements in court when cooperative federalism[49] breaks down outside court. Thus it is quite telling that the agreement

47. *Québec Veto Reference*, *supra* note 38 at 798.

48. Puddister, *Seeking the Court's Advice, supra* note 12 at 125–7.

49. The term cooperative federalism here refers to the period of provincial-federal relations where governments worked together to create a variety of social and welfare programs; David Cameron & Richard Simeon, "Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism" (2002) 32:3 Publius: The J of Federalism 49.

once referred to as "perhaps the most harmonious product of the cooperative federalism period,"[50] was the subject of a reference concerning its enforcement in *Reference Re Canada Assistance Plan*.[51] Created in 1966, the Canada Assistance Plan[52] (CAP) was a cost-sharing financial agreement that relies on cooperative arrangements between the federal government and the provinces, where the federal government would contribute half of the province's expenditures. However, the CAP cooperation between the federal government and the provinces waned when the Mulroney government placed a cap on the growth of federal payments to British Columbia (BC), Ontario, and Alberta in 1990. BC responded to the federal government's actions by submitting a reference to the BC Court of Appeal regarding the federal government's authority to unilaterally limit its contributions to CAP.[53] The Court of Appeal[54] sided with the province, finding that the federal government did not have the authority to limit its contributions to CAP and that BC has a legitimate expectation that the federal government would fulfill its proportion of the funding agreement. The Supreme Court disagreed, finding that the government has the authority to introduce legislation to administer government spending.[55] Writing for a unanimous court, Justice Sopinka also rejected the application of the doctrine of legitimate expectations.

The CAP reference demonstrates how references can provide a powerful and formal way for provinces to launch their objections to federal activity. While these objections are articulated within the context of a legal dispute, the political nature of the reference procedure suggests that provinces can cultivate strategic benefits in challenging a more powerful federal government.[56] More specifically, the provincial reference power can even the "playing field" and force the federal government to defend its actions in court. Additionally, the CAP Reference demonstrates the limits of relying on courts to enforce cooperative federalism. When the CAP agreement was initially adopted it was lauded as an exemplar of cooperative federalism in the political

50. Rand Dyck, "The Canada Assistance Plan: The Ultimate in Cooperative Federalism" (1976) 19:4 Can Pub Administration 587 at 589.

51. *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, CanLII 74 (SCC).

52. *Canada Assistance Plan*, RSC 1985, c C-1.

53. *Reference Re Canada Assistance*, *supra* note 51 at para 6.

54. *Reference re Constitutional Questions Act*, [1990] 46 BCLR (2d) 273, CanLII 766 (BC CA).

55. *Reference Re Canada Assistance Plan*, *supra* note 51 at paras 48–9.

56. Puddister, *Seeking the Court's Advice*, *supra* note 12 at 127–31.

sense,[57] however, the Supreme Court's decision in the CAP Reference highlights the limits of reference litigation. In the reference, BC urged the Court to direct the federal government's actions on its spending power, and the Court was appropriately hesitant to intervene in the federal government's policy decisions that underlie the intergovernmental agreement. Governments can freely pursue collaborative endeavours, but when the cooperation that facilitated the collective action dissipates, courts' efforts to bring the parties back together can be limited.

The limits of relying on litigation to foster or enforce cooperative federalism are also evidenced in the offshore resource disputes between Newfoundland and the federal government, a reference episode that is part of a trend of provincial governments relying on the reference power to address various environmental and natural resource disputes.[58] While present-day federal-provincial clashes centre on government responses to climate change, the1980s conflicts over natural resources, in particular oil and gas, grew out of the Organization of the Petroleum Exporting Countries (OPEC) oil crisis in the early 1970s.[59] During this period, provincial governments relied on the reference power when negotiations with the federal government either stalled or were unsatisfactory. Indeed, as Cairns et al note, a reference case could be an essential "bargaining chip" with the federal government in resource-related disputes.[60] Compared to other federations, like the United States and Australia which provide the national government large scope over natural resources, the Canadian approach lacks a comprehensive strategy, and the division of powers creates a decentralized

57. As opposed to the legal approach to constitutional interpretation, see Julien Boudreault, "Flexible and Cooperative Federalism: Distinguishing the Two Approaches in the Interpretation and Application of the Division of Powers" (2020) 40 NJCL 1.

58. *Reference Re Mining and Mineral Rights Tax Act*, [1982] 2 SCR 260, CanLII 2663 (NL CA); *Reference Re Natural Gas and Gas Liquids Tax*, [1982] 1 SCR 1004, CanLII 189 (SCC); *Reference re Mineral and Other Natural Resources of the Continental Shelf*, (1983) 145 DLR (3d) 9, 41 Nfld and PEIR 271; *Reference Re Newfoundland Continental Shelf*, [1984] 1 SCR 86, CanLII 132 (SCC); *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388, CanLII 138; *Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297, CanLII 17 (SCC); *Reference Constitution Act, 1867, s 92(10)(a)*, [1988] 64 OR (2d) 393, 49 DLR (4th) 566.

59. Robert D Cairns, "Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution" (1992) 22:1 Publius J of Federalism 55.

60. Robert Cairns, Marsha Chandler & William Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23:2 Osgoode Hall JL 253.

approach that empowers provincial governments.[61] Provinces have sought to protect this decentralization with varying degrees of success through references, and the reference power served to empower some coastal jurisdictions which might otherwise be at a disadvantage in terms of economic and political capital.

A key example of the role a reference can play in responding to stalled negotiations is in the offshore resource dispute between Newfoundland and the federal government in the1980s. When negotiations became unsuccessful, both governments relied on the reference power to address questions of jurisdiction over the continental shelf and territorial sea. With the goal of economic development, Newfoundland (supported by BC and Alberta) asserted ownership over the land and asked the Newfoundland Court of Appeal to confirm jurisdiction in response to a challenge by the federal government.[62] After reviewing Newfoundland's jurisdiction and constitutional status before and after it entered Confederation, the Court of Appeal found that the bed and subsoil of the territorial waters that were vested in Newfoundland before Confederation persist post-Confederation. However, the Court found that Newfoundland does not hold legislative jurisdiction over the continental shelf.[63] In response to the provincially initiated reference, the federal government submitted its own reference questions to the Supreme Court, which found that even though Newfoundland may have held control of the area under dispute prior to Confederation, these rights were transferred to Canada by the terms of Union and nothing in section 92 of the *Constitution Act, 1867* provided Newfoundland jurisdiction.[64]

While Newfoundland was unsuccessful in the *Continental Shelf Reference*, following a change in government in Ottawa, the province and the federal government agreed to the *Canada-Newfoundland Atlantic Accord* in 1985. This accord is a good example of cooperative federalism, as both parties were able to reach an agreement that provided

61. Cairns, *supra* note 59 at 55; Richard Hildreth, "Managing Ocean Resources: Canada" (1991) 6:3 Int J of Estuarine and Costal L 199.

62. *Reference re Mineral and Other Natural Resources of the Continental Shelf*, *supra* note 58; *Reference Re Newfoundland Continental Shelf*, *supra* note 58.

63. *Ibid* at para 110.

64. *Ibid*.

for shared revenue and administration of offshore resources in a mutually beneficial manner.[65] The offshore resources dispute between Newfoundland and the government of Canada demonstrates the limits of relying on the reference power alone to reach cooperative federalism outcomes. Indeed, one of the criticisms of relying on litigation rather than other more political routes, such as intergovernmental negotiations, is the fact that litigation ultimately creates winners and losers, regardless if a court's decision actually provides clear evidence of a winning party.[66] Though legal rulings may provide a sense of finality to a dispute, legal outcomes can preclude cooperation and compromise between governments. Writing about the offshore dispute between BC and the federal government in the 1960s, Taylor explains that relying on the reference process can cause governments to harden in their positions and that using courts to address political disputes may do "more harm than good by adding" salt to an open constitutional wound.[67] Fortunately, for Newfoundland (and to a lesser extent for Ottawa) both parties were able to move beyond the decisions of the Newfoundland Court of Appeal and the Supreme Court to a mutually beneficial cooperative political agreement.

The federal government's attempt to create a national securities regulator is a recent example of the relationship between the reference power and cooperative federalism. The division of constitutional jurisdiction makes security regulation a particularly complex policy area. Federal government authority lies in the trade and commerce clause found in section 91(2) of the *Constitution Act, 1867*, which courts have recognized as authority to regulate trade in a general sense.[68] Provincial jurisdiction over property and civil rights in section 92(13) and matters of a local or private nature under section 92(16) of the *Constitution Act, 1867* is also engaged by securities and financial regulation. Because of the overlapping interests of federal and provincial governments, courts have recognized security regulation as an area of double aspect, which allows for legislative schemes of both orders of government

65. Edward A Fitzgerald, "The Newfoundland Offshore Reference: Federal-Provincial Conflict Over Offshore Energy Resources" (1991) 23:1 Case W Res J Int L 1, at 56–8; Cairns, *supra* note 59 at 68.

66. Frederick L Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview, 2000).

67. John L Taylor, "Settlement of Disputes Between Federal and States Concerning Offshore Petroleum Resources: Accommodation or Adjudication" (1970) 11:2 Harvard Int LJ 358 at 392.

68. *Citizens Insurance Company of Canada v Parsons*, [1881] 7 AC 96 (PC).

to operate concurrently but does not create shared jurisdiction over the matter.[69] While the double aspect doctrine can help facilitate intergovernmental endeavours that are cooperative in nature, there has long been a concern that the federal power over trade and commerce, if interpreted in a broad manner, could erode provincial jurisdiction.[70]

The Supreme Court addressed these issues in the *Securities Reference*, a reference concerning a federal proposal to create a national securities regulator, which was opposed by all provinces aside from Ontario. In a unanimous opinion, the Supreme Court found the proposed securities policy was *ultra vires* the authority of the federal government. The Court was concerned with the expansion of federal jurisdiction at the expense of the provinces and noted that "[…] 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."[71] In its decision, the Court encouraged the federal government and provinces to find a solution by "seeking cooperative solutions," while advising governments that "notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected."[72]

The *Securities Reference* encouraged governments to revisit national securities regulation policy in a more cooperative and collaborative manner. The outcome of this cooperative effort was put to the Supreme Court in *Reference Re Pan-Canadian Securities Regulation*, which concerned a new securities regulation scheme that was supported by Ontario, BC, Saskatchewan, New Brunswick, Prince Edward Island (PEI) and Yukon.[73] The legislative scheme or "Cooperative System" is comprised of two parts: a *Capital Markets Stability Act* (model federal legislation) and a *Capital Markets Act* (model provincial legislation), the former aimed at managing systemic risk, while the latter concerns the day-to-day aspects of securities trade. Québec (supported by Alberta) argued that the federal aspect of the securities regulation was beyond

69. *Reference Re Securities Act*, [2011] 3 SCR 837, CanLII 66 (SCC) at para 66.

70. Andrew Leach & Eric M Adams, "Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction" (2020) 29:1 Const Forum Const 1 at 9; Mathen, *supra* note 12 at 102.

71. *Reference Re Securities Act*, *supra* note 69 at para 7.

72. *Ibid* at paras 132, 62.

73. *Reference Re Pan-Canadian Securities Regulation*, 2018 SCC 48.

the scope of the trade and commerce power because "the management of systemic risk is a purpose that animates the regulation of securities generally," therefore the boundaries between federal and provincial jurisdiction are not clear, and there is no indication that provinces are incapable of carrying out this responsibility themselves.[74] Québec also claimed that the Cooperative System was unconstitutional and a violation of parliamentary sovereignty because it required provincial governments to adopt and abstain from amending the *Capital Markets Act*.[75]

In *Pan-Canadian Securities Regulation*, the Supreme Court of Canada disagreed with Québec's challenges to the proposed Cooperative System, finding the legislative proposal valid. The Court disagreed with Québec's argument that the model provincial legislation would undermine provincial legislative authority because the Act does not require that provinces implement it, nor does it prevent provinces from adopting amendments.[76] After reviewing the principle of parliamentary sovereignty, the Court explained that it is incorrect to conclude that executive agreement to the Cooperative System could bind legislatures of participating provinces.[77] The Court found the *Capital Markets Stability Act* an appropriate exercise of the federal trade and commerce power. Unlike the proposed securities regulation at issue in the *Securities Reference*, the Court explained that the purpose of the model federal act is confined to the regulation of national systemic risk and leaves the management of day-to-day securities trade to provinces, which remedies the deficiencies of the legislation in the 2011 reference.[78] After determining the purpose of the model federal act, the Court considered the classification of its regulatory[79] aspects. Although provinces have the capacity to regulate systemic risk in their jurisdiction, this regulation is local in nature, and the double aspect doctrine provides that the federal government can also engage in regulation to address national concerns because "the preservation of

74. *Ibid* at para 42.

75. *Ibid* at para 40.

76. *Ibid* at para 50.

77. *Ibid* at para 61.

78. *Ibid* at para 87.

79. *Ibid* at para 98. Other portions of the model federal act relate to the control of criminal activity in capital markets, of which the Court explains "there is no dispute regarding Parliament's authority."

the integrity and stability of the Canadian economy is quite clearly a matter with a national dimension and one which lies beyond provincial competence."[80]

The *Pan-Canadian Securities Reference* provides a clear statement of the Court's view of cooperative federalism and the role of courts in reviewing legislative schemes that engage both provincial and federal interests. The Court makes clear that as long as the legislation at issue does not offend the division of powers, courts should be restrained when reviewing cooperative intergovernmental agreements. However, it warns that cooperative federalism cannot be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers.[81] Because the proposed securities regulation addresses an issue that one order of government could not effectively address on its own, the implementation of national securities regulation requires a truly intergovernmental approach. The outcome in the *Pan-Canadian Securities Reference* was largely anticipated.[82] In the *Securities Reference*, the Supreme Court essentially laid out a path for the federal government to achieve its goal of securities regulation in a manner that respects the Court's interpretation of the division of powers.[83]

V. POLITICAL STRATEGY AND SAFEGUARDING PROVINCIAL INTERESTS

Canadian federalism can breed competitive relations between governments divided on provincial or regional lines, and provincial governments have a political incentive to define and defend their interests against other governments.[84] A province can use a reference to formally and publicly articulate its opposition to the actions of another

80. *Ibid* at para 116.

81. *Ibid* at para 18.

82. Paul Daly, "Parliamentary Sovereignty and Intergovernmental Agreements: Reference re Pan-Canadian Securities Regulation", 2018 SCC 48, (2019) 32:1 CJALP 57 at 58.

83. *Reference Re Securities Act*, *supra* note 69 at paras 130–3.

84. Richard Simeon & Luc Turgeon, "Federalism, Nationalism and Regionalism in Canada" (2006) 3 Revista d'Estudis Autonomics I Federals 11 at 12; Loleen Berdahl & Roger Gibbins, *Looking West: Regional Transformation and the Future of Canada* (Toronto: University of Toronto Press, 2014) at 92–3.

government, forcing the government to pause its actions or the implementation of its policy until a court has rendered its advice. Using a reference this way can provide a province a means to insert itself into a policymaking process of which it had been previously excluded.[85] Beyond obtaining legal clarity from the courts, using a reference in this manner fosters provincialism and allows provinces to safeguard their interests and constitutional jurisdiction, both of which can increase popular support with voters. BC's use of a reference to respond to the Mulroney government's attempt to introduce a good and service tax (GST) demonstrates the utility of using the reference power to promote and attempt to safeguard provincial interests.

Faced with significant financial challenges, the Progressive Conservative Mulroney government sought to introduce a GST with Bill C-62 in 1990. Although the government's plan to adopt a GST was quite unpopular, C-62 passed in the House of Commons and was sent to the Liberal-dominated Senate.[86] The Liberal majority tapped into public opposition and set out to act as a roadblock to the Mulroney government's GST policy.[87] In response to the Senate's opposition, the Mulroney government filled all remaining Senate seats, however, it still did not have enough support to secure the bill's passing. Not willing to concede the defeat of the GST, the Mulroney government relied upon section 26[88] of the *Constitution Act, 1867*, and increased the size of the Senate by appointing eight additional senators to give it the advantage for the Senate's vote on the GST. Like many Canadians, provincial governments were opposed to the federal government's move to enact a GST,[89] and following the federal government's appointment of additional senators, BC referred a series of questions to its Court of Appeal regarding the validity of section 26.[90] BC argued that section 26

85. Puddister, "The Canadian Reference Power", *supra* note 26.

86. David C Docherty, "The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About" (2002) 8:3 J of Legislative Studies 27 at 36.

87. *Ibid*.

88. *Constitution Act, 1867*, *supra* note 7, s 26: "If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Division of Canada, add to the Senate accordingly."

89. Indeed, after the GST was implemented by the federal government the provinces challenged its constitutionality in *Reference Re Goods and Services Tax*, [1992] 2 SCR 445, CanLII 69 (SCC).

90. *Reference Re Constitutional Question Act (ss 26–8)*, (1991) 78 DLR (4th) 245, 53 BCLR (2nd) 335, CanLII 405 (BC CA) at para 2.

did not align with present-day federal relations because it was based on the Queen being advised by the Privy Council in London, rather than the federal Cabinet, and thus reflected an outdated structure of internal and external Canadian affairs.[91] For its part, the Attorney General of Canada argued that section 26 was still fully operational and that with the evolution of Canadian political and constitutional norms, the proper interpretation is that the Queen would act on the advice of the Canadian Cabinet rather than the Imperial Privy Council.[92] The BC Court of Appeal dismissed the province's challenge to section 26, finding that the provision clearly provides an express procedure for increasing the number of senators and that the Mulroney government could use this provision to increase the size of the Senate.[93]

While BC was ultimately not successful in its challenge to the GST and the Mulroney Senate appointments, it was able to make its opposition clear in a public manner. BC's use of the reference power proved to be a prudent decision in terms of political strategy because as Docherty explains, Canadians were not only opposed to the GST, "[t]his angst was only surpassed by the ire directed towards the Prime Minister for stacking an unelected chamber with more members than it had ever had."[94] The opposition held by Canadians to both the GST and the Mulroney government's methods, translated into a resounding electoral loss for the Progressive Conservative Party in the 1993 federal election. Thus, while BC was unsuccessful in the legal forum, its ability to initiate a reference against the federal government's action put it clearly on the side of public opinion and likely garnered political and strategic capital with the public.

BC used the reference power to cultivate public support and to push back against a federal government project more recently in *Reference re Environmental Management Act*. In this 2019 reference, BC asked its Court of Appeal, and ultimately the Supreme Court, to consider the limits of a provincially enacted law aimed at regulating interprovincial pipelines. The core issue of the *Environmental Management Act* (*EMA*) Reference was whether BC's proposed pipeline regulations were a valid regulation of a federal undertaking. BC's amendments to the *EMA* were an effort to oppose the Trans Mountain Expansion (TMX), a project

91. *Ibid* at paras 22, 27.

92. *Ibid* at para 42.

93. *Ibid* at para 54.

94. Docherty, *supra* note 86 at 36.

supported by Alberta and the federal government, that would carry crude oil from Alberta to the BC coast, which the province argued would have a disproportionate impact on BC residents[95]. The proposed amendments required the director under the *EMA* to issue a hazardous substance permit to authorize the presence of heavy oil in BC. In reviewing the permit, the director could impose conditions on applicants or refuse to issue the permit, thereby prohibiting the activities altogether. While environmental protection is not explicitly in the jurisdiction of either order of government,[96] BC argued its amendments to the *EMA* are in the interests of environmental regulation, which it relates to provincial jurisdiction over property and civil rights.[97] Furthermore, BC argued that its residents would be most impacted by a pipeline spill and thus, the principle of subsidiarity, the notion that "certain functions are best carried out by the level of government closest to the citizens affected," provides additional authorization for the provincial legislation.[98] Canada argued that BC's amendments to the *EMA* specifically targeted the TMX project, and the purpose of the law was to regulate interprovincial undertakings, an act *ultra vires* the province.[99]

In answering the questions put to the Court in the *EMA Reference*, the BC Court of Appeal found that because the dominant characteristic of the amendments was to regulate an interprovincial pipeline, the amendments are *ultra vires* BC. The Court stated that the *EMA* amendments are not general environmental protection, and instead, they veer into the regulation of federal undertakings and target one pipeline project, which has the "potential to affect (and indeed 'stop in its tracks') the entire operation of the Trans Mountain as an interprovincial carrier and exporter of oil."[100] The Court noted that although there is some merit to the application of subsidiarity, the project is not solely a provincial endeavour, and regulation must focus on nationwide concerns.[101] In rejecting the subsidiarity argument and potentially a cooperative federalism interpretation, the Court gives federal jurisdiction broad scope and reasons that federal regulation may be the only

95. *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para 52.

96. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 2 SRC 3 at 64, CanLII 110 (SCC).

97. *Reference re Environmental Management Act (British Columbia)*, *supra* note 95 at para 58.

98. *Ibid* at para 2.

99. *Ibid* at paras 55, 57.

100. *Ibid* at paras 101–2.

101. *Ibid* at paras 101, 104.

method of regulating projects that exist beyond a single province.[102] The Supreme Court unanimously dismissed the BC's appeal for the reasons of the Court of Appeal.

While BC was not successful in its attempt to impede the TMX project, its efforts including the proposed *EMA* amendments and reference allowed the provincial government to fulfill an election promise, ultimately serving political and strategic ends. BC initially supported the TMX project under the Liberal Christy Clark government, however, the Clark government was replaced by John Horgan and the New Democratic Party (NDP) following the 2017 election. The NDP campaigned on a promise to stop the TMX project, vowing to "use every tool in the toolbox," which included the creation of a new permit process for hazardous substances in the *EMA* and an advisory opinion regarding its constitutionality.[103] Although BC did not win the constitutional challenge in the *EMA Reference*, the reference allowed the province to formally articulate its opposition to the TMX project, a move that allows it to claim credit and appease voters who were also opposed to TMX. Importantly, it allows the BC government to answer criticism of its failure to stop the project, by allowing it to claim that it had exhausted all its options to resist the actions of the federal government.

The *EMA Reference* was not the first time a reference was used to oppose federal energy policy. Indeed, the regulation of oil and gas has proven to be a challenge for the constitutional division of powers and a matter that can stoke provincialism and regionalism elements of some provinces. These themes of the provincial reference power are all present in the Alberta Gas Tax dispute. In the 1980s, the Trudeau government sought greater control of oil and gas pricing and entered into negotiation with Alberta for a National Energy Program (NEP). Alberta (supported by the other provinces) was ardently opposed to a federally imposed export tax on natural gas, which it viewed as an affront to provincial jurisdiction.[104] When negotiations between Alberta and the federal government reached an impasse, Trudeau unilaterally moved forward with the NEP, which included a natural gas and gas liquids tax which would apply to all gas sales, including

102. *Ibid* at para 101.

103. Nick Eagland, "BC NDP Out of Tools to Stop Trans Mountain Pipeline Expansion" (17 January 2020), online: *Vancouver Sun* <vancouversun.com/news/local-news/ndp-out-of-tools-to-stop-tmx>.

104. Troy Riddell & Frederick L Morton, "Government Use of Strategic Litigation: The Alberta Exported Gas Tax Reference" (2004) 43:3 Am Rev of Can Studies 485 at 488.

exports.[105] In response to the NEP, among other efforts,[106] Alberta launched a constitutional reference to its Court of Appeal, which was later appealed to the Supreme Court. The legal questions put to the Court of Appeal asked if the export tax as part of the NEP was *ultra vires* the authority of the federal government given section 125 of the *British North America Act, 1867*[107]. In *Reference re Proposed Federal Tax*[108] the Alberta Court of Appeal unanimously found that the proposed federal tax was *ultra vires* because its purpose was for revenue purposes, and therefore could not be considered a valid exercise of the federal trade and commerce power. In a divided decision, the Supreme Court also disagreed with Canada's characterization of the legislation, finding that the tax would not be levied by the federal government "as a regulatory device or to reduce or eliminate the export of natural gas."[109] In agreement with the Alberta Court of Appeal, the Court stated that the proposed tax is in pith and substance taxation, which engages section 125 and is therefore outside the jurisdiction of the federal government.

Buoyed by its success in court, Alberta returned to negotiations with the federal government in a stronger position, while the federal government was forced to take a more accommodating approach to the province's interests. In the end, the parties emerged with an agreement that respected Alberta's position—the agreement did not contain an export tax on gas, it confirmed provincial authority over resources and included higher prices on fuel.[110] Using the reference power, Alberta was able to take its conflict with the federal government to court and then use its legal victory to force a cooperative agreement. The ultimate indication of Alberta's success is found in the adoption of section 92A of the *Constitution Act, 1867*, which provides that authority over exploration and development of natural resources is within provincial jurisdiction.[111]

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105. *Ibid*.

106. *Ibid* at 489. Riddell and Morton discuss Alberta's "three-prong retaliation to the NEP," which included a reduction in oil production, withholding of approval for two large oil production projects, and a constitutional reference.

107. *Reference Re Exported Natural Gas Tax*, [1982] 1 SCR 1004, 136 DLR (3d) 385 at 1048; *Constitution Act, 1867*, *supra* note 7, s 125: "No lands or property belonging to Canada or any province shall be liable to taxation."

108. *Reference re Proposed Federal Tax*, [1981] ABCA 92.

109. *Reference re Exported Natural Gas Tax*, *supra* note 107 at 1073.

110. Riddell & Morton, *supra* note 104 at 502

111. *Ibid*.

Of course, any discussion of the use of the reference power to protect provincial interests must consider Québec's consistent use of references in this manner. Québec is the most frequent initiator of cross-government references and Québec has played a key role in many of the references examined here, such as *Patriation Reference*, *Québec Veto*, and most recently in the *Pan-Canadian Securities Reference*. The *Pan-Canadian Securities Reference* originated from a challenge launched by Québec, which was motivated by the goal of protecting provincial rights, including promoting a more decentralized approach to federalism.[112] While Québec's position on the securities scheme was not adopted by the Supreme Court, Québec's use of the reference power in this instance demonstrates the advantage of the reference power for provinces. The reference provided Québec a means to launch a formal objection to the policy initiatives of other governments in the federation. Regardless if other routine political channels of negotiation remain open or have been successful, with a reference, Québec can insert itself into a national debate as a final measure to oppose the actions of other governments.[113] Importantly, Québec can wield its reference power in this manner without having to wait for the proposed policy scheme to be enacted nor does it need to wait for a live dispute, highlighting the flexibility by which governments can initiate references. Québec's use of the reference power in this manner is further demonstrated in the carbon tax references discussed below.

VI. FEDERALISM REFERENCE DISPUTES ON DISPLAY: THE CARBON TAX REFERENCES

The provincial reference cases discussed above provide insight into the relationship between references, intergovernmental relations, and efforts at cooperative federalism. All of these themes come to the fore in the clashes over *An act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to*

112. Puddister, "*The Canadian Reference Power*", *supra* note 26 at 571.

113. Richard Courtner, "Strategies and Tactics of Litigants in Constitutional Cases" (1968) 17 J of Pub L 287. Political disadvantage theory similarly explains that parties will turn to legal action when other routine political channels have been unsuccessful or closed off.

another Act (*Greenhouse Gas Pollution Pricing Act* [*GGPPA*]),[114] often referred to as the federal carbon tax, which have clear political and partisan underpinnings. Not only is addressing climate change considered one of the most pressing policy problems of the modern era, when paired with the diverse provincial interests and the division of powers, it is also truly one of the greatest challenges for Canadian federalism. The legal and intergovernmental challenges related to this policy area are undoubtedly heightened by the public attention and concern paid to climate change and significant political divisions among provincial governments on how to respond. Importantly, the provinces that oppose the federal carbon pricing scheme relied on their respective reference powers to challenge the policy's constitutionality, and as will be discussed below, these legal challenges demonstrate the political and strategic use of the reference power in an intergovernmental conflict. Indeed, the provincial opposition to the federal carbon policy is the uniting and principal conflict of the so-called "resistance"[115] to the federal Liberal government by provincial conservatives. This combination of provincial interests and opposition, and ambiguity in constitutional jurisdiction, demonstrates the political strategic benefits of the provincial reference power, making it a compelling case for analysis.

One part of the federal government's efforts to address climate change is to place a limit on the greenhouse gas (GHG) emissions, with the goal of reducing emissions, as part of its commitment to the Paris Agreement.[116] Following the Paris Agreement, the federal government released the *Pan-Canadian Approach to Pricing Carbon Pollution*, which suggested that a nationwide carbon pricing scheme would be the most effective method to reduce GHG emissions.[117] The *Pan-Canadian Approach* includes a benchmark and a backstop approach. Essentially, the benchmark sets a standard (which will increase in terms of stringency) on carbon pricing across Canada.[118] Jurisdictions that

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114. *An act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to another Act* (*Greenhouse Pollution Pricing Act* [*GGPPA*]), SC 2018, c 12, s 186.

115. "The Resistance" is in the December 2018 *McLean's* cover story; Paul Wells, "A Carbon Tax? Just Try Them" (7 November 2018), online: *MacLean's* <macleans.ca/politics/ottawa/a-carbon-tax-just-try-them/>.

116. *Paris Agreement to the United Nations Framework Convention on Climate Change*, (12 December 2015), online: *TIAS No 16-1104* <state.gov/16-1104/>.

117. *Saskatchewan Reference*, *supra* note 3 at para 29.

118. *Ontario Reference*, *supra* note 3 at para 27.

do not meet the standards set in the benchmark will be subject to a backstop of carbon pricing. The backstop scheme has two parts: it creates a cap-and-trade[119] system for industrial GHG emitters and implements a charge on carbon-based fuels.[120] The details of this legislative framework were further specified in the *Pan-Canadian Framework on Clean Growth and Climate Change* (*Pan-Canadian Framework*) and were later enacted into law by the *GGPPA*. All provinces and territories except Saskatchewan agreed to the *Pan-Canadian Framework* in February 2018.[121] After provincial elections in Alberta and Ontario brought conservative-oriented parties into government, both provinces revoked their support for the *Pan-Canadian Framework* and by extension, the *GGPPA*.

With respect to constitutional jurisdiction, the division of powers in the *Constitution Act, 1867* does not provide clear guidance as to which order of government holds authority over GHGs nor, as mentioned above, environmental protection. Based on this lack of legal clarity, Saskatchewan, Ontario, and Alberta submitted references to their courts of appeal regarding the constitutionality of the *GGPPA*. New Brunswick, Manitoba, and Québec intervened to support the reference-initiating provinces.[122] To be sure, the motivation behind the provincial carbon tax references also serves political ends. In particular, Québec's participation once again demonstrates its reliance on the reference power as a manner to advance and to protect provincial interests.[123] Importantly, Québec has participated in a cap-and-trade system with California since 2013 and its position in the *GGPPA* references that efforts to address climate change, including a tax on carbon, should be a matter of provincial jurisdiction.[124]

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119. *Ibid* at para 34. This system creates a limit on emissions and imposes a charge on those that exceed the limit and provides a credit to emitters below the limit; see the *Ontario Reference*, *supra* note 3 at para 34.

120. *Saskatchewan Reference*, *supra* note 3 at para 29; *Alberta Reference*, *supra* note 3 at paras 81–3.

121. Initially Manitoba withheld support to the *Pan-Canadian Framework*, but later agreed in February 2018.

122. Sujit Choudhry, "Constitutional Law and the Politics of Carbon Pricing in Canada" (November 2019) Montréal: Institute for Research on Public Policy (IRRP), Study No 74 [Choudhry].

123. "Quebec Joins Carbon Tax Fight to 'Protect Provincial Jurisdiction'" (9 July 2019), online: *CBC News Montréal* <cbc.ca/news/canada/montreal/quebec-joins-carbon-tax-fight-1.5204883>.

124. See "A Brief Look at the Quebec Cap-and-Trade System for Emission Allowances" (nd), online: *Government of Québec* <environnement.gouv.qc.ca/changements/carbone/documents-spede/in-brief.pdf>.

Like many of the reference episodes examined above, the *GGPPA* references provide each provincial government leverage in an intergovernmental dispute. The references allow the provincial governments to formally launch their objection to the federal carbon pricing plan, and for the governments of Alberta and Ontario, it provides a means to fulfill an election promise. Sujit Choudhry suggests that the alliance between Saskatchewan, Alberta, Ontario, New Brunswick, and Manitoba is part of a "carbon economy coalition," comprised of provinces that are united in support for the development and export of domestic fossil fuel.[125] Choudhry warns that this alliance is unstable because it pairs carbon-dependent economies like Saskatchewan and Alberta with provinces whose economies are less reliant on carbon, like Ontario, Manitoba, and New Brunswick.[126] While these observations hold merit, they do not fully appreciate the partisan elements of the provincial alliance. All of the provinces challenging the federal government's plan on carbon are governed by conservative-oriented parties;[127] Ontario and Alberta initially supported the federal plan under Liberal and NDP governments and did not join the opposition until the provincial elections brought conservative-oriented parties to government. In the recent provincial elections, both Jason Kenney in Alberta and Doug Ford in Ontario actively campaigned against the federal government in general and its carbon pricing plan in particular, as part of their successful election strategies.[128] This political alliance has also meant shared legal strategy, with provincial attorneys general from Saskatchewan, Ontario, Alberta, and New Brunswick meeting to share arguments and stratagem in advance of the Supreme Court hearing on the provincial challenges to the federal carbon tax.[129]

Saskatchewan, Ontario, and Alberta have challenged the federal carbon tax in their courts of appeal using the same reference question—is the *GGPPA* unconstitutional in whole or in part?[130] To answer this question courts have to address two issues. First, is the *GGPPA*

125. Choudhry, *supra* note 122 at 9.

126. *Ibid*.

127. Progressive Conservative in Ontario, New Brunswick, and Manitoba, United Conservative in Alberta, and Saskatchewan Party in Saskatchewan.

128. Wells, *supra* note 115.

129. "Provincial Legal Teams Huddle in Saskatoon to Discuss Upcoming Carbon Tax Challenge" (29 July 2019), online: *CBC News* <cbc.ca/news/canada/saskatoon/carbon-tax-legal-challenge-saskatchewan-1.5229091>.

130. *Saskatchewan Reference*, *supra* note 3 at para 1; *Ontario Reference*, *supra* note 3 at para 1; *Alberta Reference*, *supra* note 3 at para 1.

within the jurisdiction of the federal government? And two, are the charges on emissions imposed by the *GGPPA* a tax or part of a regulatory scheme? How the courts address these questions could mean that the regulation of GHGs is a proper exercise of federal authority or one that invades provincial jurisdiction.[131] In all three provincial references, the Attorney General of Canada's defence of the *GGPPA* has relied on the national concern branch of the peace, order, and good government (POGG) power, meaning the law is justified on the grounds that it addresses a policy problem that is beyond the capacity of individual provinces.[132] For a matter to fall under federal jurisdiction using the national concern branch the issue must have

> […] a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power.[133]

Canada has argued that the national concern is "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions,"[134] and that it holds jurisdiction over "the cumulative dimensions of GHG emissions."[135] The provinces argue that because the Governor in Council (Cabinet) decides where the *GGPPA* applies, it runs afoul of section 53, *Constitution Act, 1867,* which provides that taxes must originate in the House of Commons.[136] Furthermore, the Attorney General of Saskatchewan argues that because the *GGPPA* only applies to some provinces based on how they have decided to legislate (i.e. to meet the benchmark or not), it offends the principle of federalism.[137] In response to Canada's argument under the national

131. Leach & Adams, *supra* note 70 at 2.

132. *Ibid* at 6; *Saskatchewan Reference*, *supra* note 3 at paras 10–2; *Ontario Reference*, *supra* note 3 at para 3; *Alberta Reference*, *supra* note 3 at para 27.

133. *R v Crown Zellerbach*, [1988] 1 SCR 401, CanLII 63 (SCC) at paras 33–4. In *Crown Zellerbach*, the Supreme Court clarifies that the national concern doctrine is separate from the national emergency doctrine of POGG because the latter concerns legislation that is temporary in nature. The national concern doctrine applies to matters that did not exist at Confederation or matters that originally were considered a local or private matter (for the purposes of provincial jurisdiction) and have evolved into matters of a national concern. And finally, in assessing the national concern doctrine, courts must consider "provincial inability" or the extra-provincial effects if a province failed to address the intra-provincial elements of the issue.

134. *Alberta Reference*, *supra* note 3 at para 27.

135. *Saskatchewan Reference*, *supra* note 3 at para 10.

136. *Constitution Act, 1867*, *supra* note 7, s 53: "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax, or Impost, shall originate in the House of Commons."

137. *Ontario Reference*, *supra* note 3 at para 62; *Saskatchewan Reference*, *supra* note 3 at para 51.

concern branch, the provinces also advance the argument that the *GGPPA* invades provincial jurisdiction over property and civil rights, and matters of a local nature.[138]

The *GGPPA* challenges at the provincial courts of appeal have been heard by 15 justices, which have issued a total of 8 different opinions. A majority on both the Saskatchewan and Ontario courts of appeal upheld the *GGPPA*, while a majority on the Alberta Court of Appeal has found it *ultra vires* the authority of Parliament. The Saskatchewan and Ontario appellate courts reject arguments made regarding the charges imposed by the *GGPPA*, finding that the charges do not constitute a tax in the constitutional sense.[139] In reviewing the principle of federalism, the Saskatchewan Court of Appeal explained that federalism preserves the sovereignty and autonomy of provincial legislatures to pursue their own policy priorities; however, the Court clarifies, "federalism is not a free-standing constitutional imperative that somehow trumps the distribution of powers prescribed by the *Constitution Act, 1867*."[140] The Saskatchewan Attorney General argued that the *GGPPA* was unconstitutional because Parliament had conditioned its application on how provincial governments chose to exercise their own jurisdiction in accordance with the division of powers.[141] Because the *GGPPA* only applies to provinces that have not adopted GHG pricing policy in an appropriate manner as determined by the Governor in Council, Saskatchewan contends that it offends the principle of federalism. The Saskatchewan Court of Appeal declines the Saskatchewan Attorney General's argument for the simple reason that if an activity falls within the realm of federal jurisdiction, it is within Parliament's authority to decide to act or not, "if it can make a law applicable in a province in light of a provincial legislative inaction, that necessarily means it enjoyed the authority to make the law applicable all along."[142]

In considering if the *GGPPA* is a valid exercise of Parliament's authority, the Ontario and Saskatchewan courts of appeal reject Canada's interpretation of the Act's pith and substance, instead identifying the pith and substance of the *GGPPA* as "the establishment of

138. *Saskatchewan Reference*, *supra* note 3 at para 10.

139. *Ibid* at paras 89, 97; *Ontario Reference*, *supra* note 3 at para 163.

140. *Saskatchewan Reference*, *supra* note 3 at para 62.

141. *Ibid* at para 59.

142. *Ibid* at para 66.

minimum national standards of price stringency for GHG emissions," thereby distinguishing the Act from provincial jurisdiction.[143] While the Alberta Court of Appeal found that the purpose of the *GGPPA* is "at a minimum, regulation of GHG emissions," and addressing the effects of climate change.[144] In reaching this conclusion, all three courts reject Canada's argument that the pith and substance of the *GGPPA* are the rather broad "cumulative dimensions of GHG emissions,"[145] with the Ontario Court of Appeal specifically noting that it was "too vague and confusing."[146] Both the Ontario and Saskatchewan courts of appeal find that GHG emissions are not confined to the borders of one province and the failure to act by one province will impact (and potentially undermine) the efforts of other provinces. Additionally, the Ontario and Saskatchewan appellate courts explain that the *GGPPA* does not transfer provincial jurisdiction to Canada because the Act provides that provinces can enact their own legislation aimed at addressing GHGs, which provides the space for a cooperative federalism approach.[147]

The Alberta Court of Appeal dismissed Canada's argument that the regulation of GHGs falls within its constitutional jurisdiction, nor did it accept Canada's defence of the *GGPPA* via the national concerns branch of POGG.[148] The Court explained that the *GGPPA* is "a constitutional Trojan horse" because it provides the federal government a range of powers that would assume "almost every aspect of the provinces' development and management of their natural resources."[149] The Court found that the *GGPPA* infringes provincial jurisdiction over the management of natural resources via section 92A, and provincial authority over property and civil rights.[150] Additionally, the Alberta Court of Appeal refused the interpretation that the *GGPPA* provides space for provincial authority to regulate GHG emissions because it only allows provincial activities that are more, and not less, than federal standards.[151] The Court was concerned that recognizing Parliament's

143. *Ibid* at para 149; *Ontario Reference*, *supra* note 3 at paras 76, 115.

144. *Alberta Reference*, *supra* note 3 at para 211.

145. *Ibid* at para 192. In *Ibid* at para 196, Canada's argument changed slightly to "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions."

146. *Ontario Reference*, *supra* note 3 at para 74.

147. *Ibid* at paras 132, 135.

148. *Alberta Reference*, *supra* note 3 at para 281.

149. *Ibid* at para 22.

150. *Ibid* at paras 328, 333.

151. *Ibid* at para 282.

authority under the national concern doctrine would transfer provincial jurisdiction to the federal government in a permanent manner.[152] The Alberta Court of Appeal found the *GGPPA ultra vires* Parliament.

All three provincial appellate decisions have been appealed to the Supreme Court of Canada, which at the time of writing, has yet to render a decision on the references. Regardless if provinces challenging the *GGPPA* are successful at the Supreme Court, the provinces will still retain many of the political-strategic advantages of using the reference power to address this issue, which includes the formal notice of opposition to the federal carbon pricing plan. Furthermore, it remains to be seen if the Supreme Court upholds the rulings of the Ontario and Saskatchewan courts of appeal whether or not this drives parties back to negotiation to reach an intergovernmental agreement that most (if not all) parties agree, like the adoption of the Atlantic Accord after the *Newfoundland Continental Shelf Reference,* or one that better recognizes provincial concerns as following the *Alberta Gas Tax Reference*. Importantly, given the pressing need to address the climate crisis, it would be most beneficial if the Supreme Court's decision promotes a cooperative approach and a renewed commitment by both orders of government to this policy area, regardless of how it finds the constitutionality of the *GGPPA*. In other words, the hope is that the Supreme Court's advice on the *GGPPA* serves to reinvigorate the provincial and federal governments efforts, rather than closing the door to future intergovernmental endeavours to address climate change.

CONCLUSION

The reference power can provide governments with essential guidance on the nature and limits of constitutional jurisdiction. Yet, viewing references narrowly as means for governments to obtain judicial advice on constitutional authority ignores the highly political (and often partisan) situations that give rise to reference cases and the impact that a reference decision can have on furthering the goals of governments—whether it be to promote regional interests and provincialism, as a tactic of political strategy or as a means to navigate constitutional reform. References have been used by provinces to force and enforce cooperative federalism agreements, and references

152. This was also a concern held by Justice Huscroft in his dissent in the *Ontario Reference*, *supra* note 3; Leach & Adams, *supra* note 70 at 2.

have provided provinces a final response when all other methods of cooperative federalism have failed. The highly political nature of reference cases and how governments use the reference power position appellate courts as a mediator between governments, rather than strictly a legal adjudicator.[153] While many cases decided by appellate courts have political consequences, references are more likely to be steeped in politics because there are few restrictions on what governments can ask in reference questions and the matters put before the courts in reference cases often lack a live legal dispute. Moreover, courts do not have the formal authority to assess if reference questions are justiciable and appropriate for judicial determination.[154] When these factors are combined—abstract review and no formal restrictions on justiciability—the separation of the judiciary from the political and partisan branches of government can become strained. Indeed, if governments increasingly rely on the courts to mediate political conflicts through references, rather than relying on political mechanisms of dispute resolution, the independence of the courts can be challenged and potentially compromised. Thus, overreliance on the reference power for matters that are highly political can undermine the key benefit of obtaining judicial advice, that is the impartiality and institutional authority of the courts.

This study highlights how politics and references are intertwined, especially with respect to disputes between governments and the challenges of cooperative federalism. While litigation through references is a central tool for governments in navigating intergovernmental relations, this study has demonstrated the limits of reference litigation. Reference cases on their own have not secured cooperative outcomes nor have they enforced intergovernmental agreements when cooperation between governments falls apart.[155] However, references can foster cooperation when they are used to drive governments back to

153. G J Brandt, "Judicial Mediation of Political Disputes: The Patriation Reference" (1982) 20 University of Western Ontario LR 101.

154. Puddister, *Seeking the Court's Advice*, *supra* note 12 at 195. Courts have informally applied aspects of the justiciability doctrine to some reference questions by refusing to answer questions deemed as inappropriate or unripe. However, courts do not formally hold the power to refuse to answer reference questions; Mathen, *supra* note 12 at 63; Kate Puddister, "A Question They Can't Refuse? The Canadian Reference Power and Refusing to Answer Reference Questions" (2019) 13:1 Can Pol Sci Rev 34–71.

155. *Reference Re Canada Assistance Plan*, *supra* note 51; *Québec Veto Reference*, *supra* note 38.

negotiation[156] or by setting out a path for further government negotiation by articulating the nature of constitutional powers.[157] The reference episodes examined here demonstrate that litigation alone cannot foster cooperative federalism; instead cooperative federalism requires governments willing to negotiate and work together.

When provincial governments first created their own reference power in the late 19th century, it was in response to the actions of the federal government and its use of its reference power. Provinces soon realized that a reference could provide a means to obtain legal advice regarding the constitutionality of its legislation or the actions of another government. However, provinces have also realized that the reference power can be a valuable way to push back against the centralizing forces of the federal government, which can benefit provinces legally and politically. As the cases examined here demonstrate, the original purposes of the federal reference power have endured; however, they have been co-opted by provincial governments to further their own interests, often in opposition to the federal government. When provinces turn to the courts through the reference power, they are armed with a powerful strategic tool that allows them to defend their jurisdiction against the centralizing effects of the federal government.

156. *Reference re Mineral and Other Natural Resources of the Continental Shelf*, *supra* note 58; *Reference Re Offshore Mineral Rights*, [1967] SCR 792, CanLII 71 (SCC); *Patriation Reference*, *supra* note 37.

157. *Reference Re Securities Act*, *supra* note 69; *Reference Re Pan-Canadian Securities*, *supra* note 73.