A Tale of Two Metaphors: A Narrative Take on the Canadian Constitution

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This article sheds light on the fundamental role that narratives and metaphors play in shaping how we think, talk, and argue about the Canadian Constitution.

More specifically, the article makes the case that two competing types of metaphors—dynamic and static—largely fashion Canadian constitutional law. The influential metaphors of the "living tree" and "constitutional architecture" represent prime examples of these central conceptual categories.

This article argues that each of these categories stands for different views of the Constitution and, as such, influences the types of stories we tell about it. The case studies undertaken here show that each metaphor sustains dominant narratives about the Constitution, narratives whose structure mostly correspond to the archetypal "birth" and "rescue" stories.

As narratives and metaphors influence our cognition and help us reason about abstract concepts and ideas (a large part of our work as jurists) we would be wise to pay closer attention to them. This article is a call, in short, for greater narrative awareness.

Cet essai met en évidence le rôle fondamental que jouent narratifs et métaphores en façonnant la manière que la Constitution canadienne est conceptualisée, discutée, et débattue.

Précisément, l'essai soutient que deux importantes catégories de métaphores, statiques et dynamiques, sont au cœur du droit constitutionnel canadien. Ces deux catégories sont exemplifiées respectivement par les métaphores de l'architecture constitutionnelle et de l'arbre vivant.

Chacune de ces catégories représente une vision différente de la Constitution et, en tant que telle, elle influence le type d'histoires que nous en racontons. Chacune soutient un narratif particulier sur la Constitution, un narratif qui renvoie, en règle générale, soit à la « naissance » ou au « sauvetage » de notre texte fondateur.

L'idée derrière cet essai est que, dans la mesure où les narratifs et les métaphores influent sur notre cognition et nous aident à raisonner dans l'abstrait, soit une grande partie du travail juridique, nous serions avisés de leur prêter une plus grande attention. C'est, en somme, un appel à une prise de conscience narrative.

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Citation: (2019) 64:3 McGill LJ 447 — Référence : (2019) 64:3 RD McGill 447

Introduction

"Man is the storytelling animal."

—Salman Rushdie[1]

Complex ideas are more easily understood by the mind when presented in the form of stories and metaphors.[2] It is thus not surprising to see this fact illustrated in disciplines where complex ideas occupy an important place, like law, philosophy, or political science. The metaphor of the "social contract" is a good example. It stands for the idea that the political obligations of individuals derive from an initial agreement among them to form the society in which they live.[3] This idea is at the heart of modern constitutionalism; it shows how political authority can be linked to individual self-interest and rational consent. However useful the idea of the social contract might be to our understanding of political life, it is not to be taken literally or as an accurate historical account.[4] If we still hold on to the social contract, we do so because it helps us to comprehend abstract concepts like *constitution* or *society*. The metaphor of the social contract thus serves as an interpretive framework to make sense of ideas and events. Like all conceptual frameworks, it unconsciously shapes our cognition and reasoning.[5]

Knowing that metaphors and stories impact our perception and help us reason about ideas and concepts—a large part of our work as jurists—we would be wise to pay attention to them in the realm of law and strive to better understand how they function. For the past thirty years or so, the study of metaphors and stories in the realm of law has been the aim of a number of legal scholars.[6] The extensive work that has resulted from this intellectual endeavor—this commitment to looking at law not only as rules and policies but also as stories—is what forms the field of "narrative

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1 *Luka and the Fire of Life* (New York: Random House, 2010) at 34.

2 See Jennifer Sheppard, "Once Upon a Time, Happily Ever After, and In a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda" (2009) 46:2 Willamette L Rev 255 at 261.

3 See JW Gough, *The Social Contract: A Critical Study of its Development*, 2nd ed (Oxford: Clarendon Press, 1957) at 2, 8–21. See also Ann Cudd & Seena Eftekhari, "Contractarianism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2017", online: <plato.stanford.edu> [perma.cc/KSM8-WD3A].

4 See Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579 at 613.

5 See Sheppard, *supra* note 2 at 260.

6 See J Christopher Rideout, "Applied Legal Storytelling: A Bibliography" (2015) 12 Leg Comm & Rhetoric: JALWD 247 at 249.

scholarship".[7] More broadly, this field is concerned with the use and role of metaphor, myth, and narrative within the realm of law.

While this field of research has prompted the publication of books and a proliferation of academic conferences on the topic in the United States, it has not enjoyed the same rapid expansion north of the border. To be sure, Canadian legal scholars have written in recent years on such various subjects as the weight of storytelling in judicial opinions,[8] the poetics of legal doctrine,[9] and the subjective character of narration in judgments.[10] Others have taken up the task of studying the artistic dimensions of the "constitutional architecture" metaphor,[11] or of showing how this concept can coexist with the "living tree".[12] Yet, in the Canadian landscape, these few instances are more of the exception than the rule.

It should also be noted that most of what has been written in Canada in this regard has focused primarily on the explicit use of metaphors and narratives in traditional legal discourse. Much less attention has been given to such things as the cultural narratives that shape the development of the law, or to the persuasive power of storytelling in legal practice. Likewise, publications about metaphors in law have been mainly doctrinal, tracing the use of particular metaphors through time, the same way that we study the evolution of a legal principle through case law. Questions about why these devices have exerted such great influence on the development of the law, and why they remain so deeply ingrained in our collective legal imagination have usually been left unanswered.[13]

The general aim of this article is to shed light on the central role that metaphor and narrative play in shaping how we talk, think, and argue

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7 See e.g. Paul Gewirtz, "Narrative and Rhetoric in the Law" in Peter Brooks & Paul Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996) 2 at 2.

8 See e.g. Greig Henderson, *Creating Legal Worlds: Story and Style in a Culture of Argument* (Toronto: University of Toronto Press, 2015) at 3–14.

9 See e.g. Sylvio Normand, "Quelques observations sur la poétique de la doctrine" (2017) 58:3 C de D 425.

10 See e.g. Daniel Del Gobbo, "Unreliable Narration in Law and Fiction" (2017) 30:2 Can JL & Jur 311.

11 See e.g. Dave Guénette, "L'architecture Constitutionnelle—dimensions artistiques d'une Construction juridique" (2017) 58:1/2 C de D 33.

12 See e.g. Warren J Newman, "Of Castles and Living Trees: The Metaphorical and Structural Constitution" (2015) 9 JPPL 471 at 471–72.

13 These are precisely the kinds of question that, in keeping with the push towards "narrative awareness", this article seeks to explore in the context of Canadian constitutional law. For "narrative awareness", see Linda H Edwards, "Once Upon a Time in Law: Myth, Metaphor, and Authority" (2010) 77:4 Tenn L Rev 883 at 915.

about the Canadian Constitution. It makes the case that two competing types of metaphors—termed *dynamic* and *static*—largely fashion Canadian constitutional law. It will be shown that these two types of metaphors convey different ideas of the Canadian Constitution and, as such, influence the stories we tell about it. In more specific terms, it will be argued that these categories sustain dominant narratives that are similar in structure to "birth" and "rescue" stories. The article will then explore the implications of this finding for scholars and lawyers.

The article is divided into three Parts. The first Part focuses on cognitive science and narrative theory research on how metaphors and narratives shape our cognition. The second Part briefly reviews the basic building blocks of fiction writing and offers an overview of two central plot structures: "birth" and "rescue" stories. The third Part introduces the *dynamic* and *static* metaphors used in relation to Canadian constitutional law, with a focus on the "living tree" and "constitutional architecture" metaphors, two prime examples of these categories. The fourth Part explores, through a narrative study of two recent Supreme Court decisions, *Saskatchewan Federation of Labour v. Saskatchewan*[14] and the *Reference Re Senate Reform*,[15] how these two types of metaphors influence the stories we tell in relation to the Canadian Constitution. The article then considers what the findings mean for constitutional scholars and jurists generally.

I. Thinking About the Law: Cognitive Research's Take on Narratives and Metaphors

> "[The human species] thinks in metaphors and learns through stories."
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> —Mary Catherine Bateson[16]

Historian Louis O. Mink once suggested that narrative is a "primary cognitive instrument—an instrument rivalled only by theory and by metaphor as irreducible ways of making the flux of experience comprehensible."[17] The following discussion builds on the idea that, for us to truly grasp the role of metaphor and narrative in law, it is useful to first understand the source and nature of their power—to look at the processes at

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14 2015 SCC 4 [*Saskatchewan Federation of Labour*].

15 2014 SCC 32 [*Senate Reform Reference*].

16 *Peripheral Visions: Learning Along the Way*, 1st ed (New York: Harper Collins, 1994) at 11.

17 "Narrative Form as a Cognitive Instrument" in Robert H Canary & Henry Kozicki, eds, *The Writing of History: Literary Form and Historical Understanding* (Madison: University of Wisconsin Press, 1978) 129 at 131.

work in our mind when we are told a story or asked to picture concepts in the form of images.

A. The Hidden Power of Metaphors

Cognitive researchers claim that the way we think about abstract ideas is, to some extent, metaphorical.[18] In this context, the meaning of the term "metaphor" extends further than a figure of speech whereas a word denoting one idea is used in place of another to suggest an analogy. It stands, broadly, for a way of "conceiving of one thing in terms of another,"[19] of "seeing one thing *as* another."[20] In other words, metaphorical thinking works by "transferring the characteristics, reasoning processes, and outcomes of one domain (the source) onto another (the target)."[21] It associates, by a partial analogy, two mutually exclusive conceptual fields.[22]

It seems worthwhile to illustrate this claim in a way that is familiar to jurists. When thinking about a legal principle, we tend to imagine it "as if it were a sentient being or a concrete thing."[23] In reference to a legal principle, we say that it was *set aside*, that it was *weighted* against other interests, or that it was *breached* or *tampered with*. In doing so, we assign to these abstract ideas characteristics and properties that are usually reserved to concrete things. As a result, we transfer inferences and reasoning processes from the concrete to the abstract world. We thus understand intangible, hard-to-comprehend things through their substitution by a "mentally more immediate object."[24] To borrow the words of Greta

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18 See Linda L Berger, "How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes" (2009) 18:2 S Cal Interdisciplinary LJ 259 at 263 [Berger, "Embedded Knowledge"]; Edwards, *supra* note 13 at 889. See also Milner S Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison: University of Wisconsin Press, 1985) at 21.

19 George Lakoff & Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 2003) at 36. See also Ball, *supra* note 18 at 22.

20 Linda L Berger, "The Lady, or the Tiger? A Field Guide to Metaphor and Narrative" (2011) 50:2 Washburn LJ 275 at 278 [Berger, "The Lady, or the Tiger?"] [emphasis in original].

21 *Ibid.*

22 See Marie-Claude Prémont, *Tropismes du droit: Logique métaphorique et logique métonymique du langage juridique* (Montreal: Liber, 2003) at 19.

23 Edwards, *supra* note 13 at 889.

24 Greta Olson, "On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Discourse" in Michael Hanne & Robert Weisberg, eds, *Narrative and Metaphor in the Law* (Cambridge: Cambridge University Press, 2018) 19 at 29 [Hanne & Weisberg, *Narrative and Metaphor*].

Olson, metaphors "render more tangible what has been discovered and needs to be made known."[25]

Steven L. Winter tells us that "these conceptual metaphors are neither arbitrary nor mere products of chance and history."[26] Rather, they arise from our embodied experience, from "our interaction with the social and physical environment."[27] An example of this is the tendency to think in terms of "*orientational metaphors*".[28] Such metaphors organize a system of concepts with respect to one another by giving them spatial orientations. The reason we think in such terms is that "we have bodies of the sort we have and that they function as they do in our physical environment."[29] Thus, from ideas such as "power is *up*" and "subjection is *down*," we derive expressions like "being *on top of* the situation" or "being *under* the control of something."[30] We do the same thing, as jurists, when we speak of the judicial *control* exercised by *higher* courts over decisions of *lower* courts, or even of the invalidity of a statute in regard to a *higher* norm. Expressions such as *overriding a precedent* and *striking down* a statute share the same structure.

In the field of law, metaphors are often employed to describe and illustrate abstract ideas and concepts. For one, the idea of justice is commonly represented, or symbolized, through the blindfold, scales, and sword.[31] On a more conventional level, metaphors are also used to convey typical concepts in legal practice, such as the *balance of interests*, the *weight* or *chain of evidence*, or the *burden of proof*.[32] Here again, metaphors are employed to communicate the substance of an idea that could otherwise be hard to convey.

Metaphors are also common in law because of their persuasive power. In fact, they serve all three persuasive processes identified by the classi-

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25 *Ibid* at 30.

26 *A Clearing in the Forest: Law, Life, and Mind* (Chicago: University of Chicago Press, 2001) at 15.

27 Berger, "Embedded Knowledge", *supra* note 18 at 264. See Berger, "The Lady, or the Tiger?", *supra* note 20 at 280; Winter, *supra* note 26 at 15.

28 Lakoff & Johnson, *supra* note 19 at 14 [emphasis in original].

29 *Ibid.*

30 *Ibid*.

31 See Michael Hanne & Robert Weisberg, "Conversation I: Conversation in Narrative, Metaphor, and Concepts of Justice and Legal Systems: Editors' Introduction" in Hanne & Weisberg, *Narrative and Metaphor*, *supra* note 24, 1 at 4 [Hanne & Weisberg, "Conversation I: Introduction"].

32 See *ibid.*

cal rhetoricians: logos, pathos, and ethos.[33] Metaphors not only simplify communication by providing the audience with a supporting analogy (logos), but they also evoke emotions that parallel the literal meaning of the metaphoric language (pathos).[34] Moreover, the skill to formulate an effective metaphor reflects a high level of thought, thus speaking to the intelligence of the author (ethos).[35]

But there is more. The persuasive power of metaphors lies in the fact that while they "are ways of seeing or highlighting some aspects of a concept, they also are ways of not seeing others."[36] Thus, advocates may use metaphors in a strategic manner, to highlight or obscure certain aspects of an issue.[37] In allowing the audience to focus its attention on one aspect of an issue, metaphors can keep the same audience from focusing on other aspects that are inconsistent with it.[38] In this respect, they may well be employed to frame a debate or legal dispute in a particular light.

B. Schemas, Metaphor, and Narrative

We make sense of our experiences by placing them into "schemas"—cognitive frames and categories that derive from our past experiences and knowledge.[39] Schemas contain "general expectations and knowledge of the world"[40] and are based on "simplified models of experi-

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33 See Michael R Smith, "Metaphoric Parable: The Nexus of Metaphor and Narrative in Persuasive Legal Writing" in Hanne & Weisberg, *Narrative and Metaphor, supra* note 24 [Smith, "Metaphoric Parable"] ("[l]ogos refers to efforts to persuade based on appeals to logic and rational thinking. Pathos refers to efforts to persuade based on appeals to emotion. Ethos refers to the process of persuading by establishing credibility in the eyes of one's audience" at 80); Michael R Smith, "The Power of Metaphor and Simile in Persuasive Writing", in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*, 1st ed (New York: Aspen Law & Business, 2002) at 204–06 [Smith, "The Power of Metaphor"]. See also Michael R Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*, 3rd ed (New York: Wolters Kluwer Law and Business, 2013) at 231–32 [Smith, *Advanced Legal Writing*].

34 See Smith, "Metaphoric Parable", *supra* note 33 at 81, 83.

35 See *ibid* at 80, 83, 85.

36 Berger, "The Lady, or the Tiger?", *supra* note 20 at 278. See Ball, *supra* note 18 at 22; Prémont, *supra* note 22 at 32–33.

37 See Hanne & Weisberg, "Conversation I: Introduction", *supra* note 31 at 4.

38 See Lakoff & Johnson, *supra* note 19 at 10.

39 *Ibid* at 14.

40 Ronald Chen & Jon Hanson, "Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory" (2004) 77 S Cal L Rev 1103 at 1133, citing Martha Augoustinos & Iain Walker, *Social Cognition: An Integrated Introduction* (London: SAGE Publications, 1995) at 32.

ences"[41] gathered since birth. These mental categories emerge from past experiences. We construct and amass them unconsciously as we go about our lives.

It is by generating the context in which ideas will be interpreted that these schemas help us structure and understand our new experiences.[42] In other words, they provide us with a mental frame of reference that makes it possible for us to "sort and organize our experiences and acquired knowledge of the world."[43] It is what allows us to make sense out of events "without having to interpret and construct a [new] diagram of inferences and relationships" each time.[44] It is because of schemas that we manage to conserve mental energy as we discover the world.[45]

According to psychologist Jerome Bruner, humans have a "predisposition to organize experience into a narrative form."[46] Narratives are, in this sense, "innate" frames of reference for structuring and interpreting new information.[47] They are complex cognitive models, made up of numerous schemas operating at once,[48] which provide the context in which we interpret events.[49] In keeping with this, research has shown that information is better understood when expressed in terms of stories than of abstract principles.[50] This, it is said, is because "narrative structure more closely resembles the way the human mind makes sense of the world."[51] We learn through story the same way we learn through experience—by placing ourselves in the role of the protagonist.[52] Thus, narrative helps us find some semblance of coherence in a series of chronological events.[53] It

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41 Richard K Sherwin, "The Narrative Construction of Legal Reality" (1994) 18:3 Vt L Rev 681 at 700.

42 See Edwards, *supra* note 13 at 890.

43 Berger, "Embedded Knowledge", *supra* note 18 at 265.

44 *Ibid.*

45 See Sherwin, *supra* note 41 at 700.

46 *Acts of Meaning* (Cambridge, Mass: Harvard University Press, 1990) at 45.

47 Robert P Burns, *A Theory of the Trial* (Princeton: Princeton University Press, 1999) at 159.

48 See Sheppard, *supra* note 2 at 260.

49 See Edwards, *supra* note 13 at 890.

50 See Smith, "The Power of Metaphor", *supra* note 33 at 259.

51 Smith, "Metaphoric Parable", *supra* note 33 at 81.

52 See Smith, *Advanced Legal Writing*, *supra* note 33 at 38–39.

53 See Anthony G Amsterdam & Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Ways We Understand the Law—and Ourselves* (Cambridge, Mass: Harvard University Press, 2000) at 28–31.

also helps us comprehend "people, events, objects, and their relationships to each other."[54]

Narratives follow patterns. There are basic structures to which virtually every story conforms. In literary theory, these basic structures are called "stock stories". A stock story is a common story type, composed of only the essential details of a story.[55] When these stock stories are embedded in culture, they become "common archetypes", or "myths".[56] Myths exert a profound influence on our thinking; they shape, often unconsciously, our perception of events. They provide a particular perspective, a narrative lens or view, on the events we encounter, thus producing the context in which they will be understood.[57] Because narratives function beneath the surface of our consciousness, their effects are hard to overcome. Linda Edwards writes that "by the time we are old enough to think about law, myths [that is, common narratives] have become part of us, and they are ready to orchestrate our understanding of the world, including the world of law."[58]

Narratives also have the capacity to conjure "emotions by transporting [the audience] into their imaginary worlds."[59] When thinking of an event through the lens of a certain narrative structure, our judgment is affected by "the social knowledge embedded in the story rather than [by] the unique characteristics of the current situation."[60] From this point on, it is very hard to go back and see things outside of this particular narrative. When within a story, all of our "mental systems—attentive, imagistic, emotive—converge on its events, with dramatic real-world results: [our] ability to think critically about the narrative is reduced, making [us] more likely to believe that it is authentic."[61]

In light of these findings, scholars of law and narrative have argued that, to be more persuasive, lawyers "should make their stories seem ge-

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54 Sheppard, *supra* note 2 at 259.

55 See Stephen Paskey, "The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules" (2014) 11 Leg Comm & Rhetoric: JAWLD 51 at 70.

56 Berger, "The Lady, or the Tiger?", *supra* note 20 at 281.

57 See Edwards, *supra* note 13 at 890.

58 *Ibid.*

59 Smith, "Metaphoric Parable", *supra* note 33 at 83.

60 Sheppard, *supra* note 2 at 263.

61 Kevin Jon Heller, "The Cognitive Psychology of Circumstantial Evidence" (2006) 105:2 Mich L Rev 241 at 287.

neric rather than unique."[62] Because the thinking of judges and jurors is dominated by these common archetypes, by the "stock narrative frames that they bring to the case," some have claimed that advocates should shape their narratives so as to fit those frames.[63] In other words, as lawyers are arguing for the "empirical plausibility" of their version of events, persuasive narrative will have a tendency to work best when grounded in a cultural stock of recognizable and narrative patterns.[64]

Not unlike metaphors, narratives persuade by appealing to the three essential persuasive processes identified by the classical rhetoricians. Firstly, narratives have a logos function—they communicate information in a more effective manner than through general pronouncements.[65] Secondly, in terms of the pathos function of narratives, they both enliven the text and evoke substantive emotional responses in audiences.[66] Thirdly, narratives appeal to ethos, insofar as they demonstrate that the advocate using them has a "mental storehouse of illustrative stories at the ready" and the skill to "deploy these stories to support an argument."[67]

In sum, narrative and metaphor play an important role in human cognition. They help us understand new events and make sense of the world. They influence the way we reason about ideas and events. The importance of this will be obvious in later Parts of this article where we shed light on our Constitution's own set of myths, stories, and metaphors, and how they impact the way we think, talk, and argue about it. This knowledge should, for one, make us more attentive to the possibility that the *static* and *dynamic* metaphors of Canadian constitutional law play a role, not only as proxies for legal principles, but also in the way they influence our perception of our founding document and the types of stories that jurists tell about it.

II. A Lawyer's Guide to Narrative Theory: Key Concepts for the Study of Law

If we are to study the stories of law, we first need to understand the vocabulary and master the tools to do so. For this reason, this Part de-

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62 Michael Hanne & Robert Weisberg, "Conversation II: Narrative and Metaphor in Legal Persuasion: Editors' Introduction" in Hanne & Weisberg, *Narrative and Metaphor, supra* note 24, 57 at 60 [Hanne & Weisberg, "Conversation II: Editors' Introduction"].

63 *Ibid.*

64 *Ibid* at 62, 64.

65 See Smith, "Metaphoric Parable", *supra* note 33 at 81.

66 See *ibid* at 83.

67 *Ibid* at 85.

fines what a "story" is, identifies its basic building blocks, and offers an overview of two plot structures commonly used in law: "birth" and "rescue" stories. The main goal of this Part is to allow the reader to recognize these elements in legal materials, and to show how many of us already use, albeit unconsciously, some of these insights and tools in our writing. In short, it calls for "narrative awareness"[68] on the part of jurists.

A. The Storyteller's Starter Kit

> "[The] dynamic beneath [a] story is plot: the attempt to fulfill [a] yearning and the world's attempt to thwart that [yearning]."
>
> —Robert Olen Butler[69]

Kendall Haven defines a story as a "character-based narration of a character's struggles to overcome obstacles and reach an important goal."[70] In other words, it is the account of a character facing a conflict and resolving it for better or worse.[71] The central component of a story is the plot. The plot structures the story;[72] it is not only the events that take place, but also the order in which they occur.[73] The plot is what links cause and effect.[74] In sum, it connects all the elements of a story.

Narrative theory commonly recognizes five stages to a plot: introduction, rising action, climax, falling action, and resolution.[75] The first stage, the "introduction", offers background information for the reader to understand the characters, the events, and the time and place of the story.[76] The second stage, the "rising action", is where the complicating event gives rise to the "conflict" of the story. This stage culminates with the "climax" of the story, where the main character, faced with great danger,

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68 Edwards, *supra* note 13 at 915.

69 *From Where You Dream: The Process of Writing Fiction* (New York: Grove Press, 2005) at 42.

70 *Story Proof: The Science Behind the Startling Power of Story* (Westport: Libraries Unlimited, 2007) at 79.

71 See Brian J Foley & Ruth Anne Robbins, "Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections" (2001) 32 Rutgers LJ 459 at 466.

72 See Kenneth D Chestek, "The Plot Thickens: The Appellate Brief as Story" (2008) 14 Legal Writing 127 at 147.

73 See Sheppard, *supra* note 2 at 280.

74 See *ibid*.

75 See *ibid* at 280–81. For a more exhaustive overview of these notions, see Étienne Cloutier, "*Daniels v. Canada*: The Métis' Journey to the Supreme Court of Canada" (2018) 77 R du B 1 at 9–14.

76 See Chestek, *supra* note 72 at 148.

accomplishes a heroic act that will resolve the story's main conflict.[77] The "falling action" ensues, resolving the other minor plot threads, followed by the "resolution", where the story ends in a "new equilibrium" that presents similarities, but is not identical, to the initial steady state.[78] These are the elemental stages through which a plot progresses. With these basic elements of plot construction in mind, let us now turn to some of the elementary forms a plot can take; the fundamental structures to which most stories conform.

B. Common Archetypes and Stock Stories

The basic plot structures are commonly known, in narrative theory, as "stock" stories. A stock story is a "recurring story template or 'story skeleton', a model for similar stories that will be told with differing events, entities, and details."[79] These common narratives—these basic story structures—shape our thinking by helping us understand new events.[80] Since audiences tend to be more easily convinced by narratives they can readily imagine, some authors argue that the most persuasive stories a lawyer can tell are those that fit a common narrative.[81] Thus, a jurist aware of these basic story structures will be able to choose the one that best advances a favoured legal outcome.[82] When, for example, a lawyer has to deal with bad facts and the conventional plot seems unfavorable to their client, it can be useful to consider whether there might exist other possible narratives to choose from.[83]

For our purposes, it is useful to consider in more detail two of these basic story archetypes: "birth" and "rescue".[84] As suggested in the previous Part, the analysis to come will show how two competing types of metaphors used in Canadian law—*dynamic* and *static* metaphors—shape the way we think, talk, and argue about the Constitution. The case will be made that these two types of metaphors contain the seed of particular archetypal narrative structures. The following sub-Parts will be devoted to these very stories, as a basic knowledge of "birth" and "rescue" stories is necessary to understand this claim.

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77 See *ibid* at 149. See also Sheppard, *supra* note 2 at 281.

78 Sheppard, *supra* note 2 at 282; Chestek *supra* note 72 at 149–50.

79 Paskey, *supra* note 55, at 70.

80 See Hanne & Weisberg, "Conversation II: Editors' Introduction", *supra* note 62 at 60.

81 See *ibid* at 59.

82 See Sheppard, *supra* note 2 at 282–83.

83 See Edwards, *supra* note 13 at 891.

84 See *ibid* at 908.

1. Stories of "Birth" and "Creation"

One of the most elementary human needs fulfilled by our ability to imagine stories, Christopher Booker argues, is our "desire for an explanatory and descriptive picture of how the world began and how we came to be in it."[85] Every culture and religion has at least one such story; one story that makes sense of how the world came to be. Even more fascinating is the fact that although all such stories inevitably differ to some degree, they all share certain characteristics and key features, irrespective of the cultural or linguistic traditions from which they originate.[86]

A common version of this story, the one that is relevant for our purposes, is centered around the impression of an "infinitely ... laborious, mysterious and long drawn-out" process.[87] It posits that the "emergence of our recognizable world takes place by what we would call an 'evolutionary' process," a process in which "each new component develops out of what came before."[88] Such stories feature in Greek mythology, in religious texts, and in oral traditions still observed today.[89] In a like manner, our telling of the "big bang" creation story still mostly conforms to this plot structure.[90] Jeremy Webber also identified one such narrative in the Canadian context, captured by the phrase "'from colony to nation,' which emphasized the progressive development of Canada toward a more perfect nationhood."[91]

The narrative structure characteristic of these myths is known, in narrative theory, as that of a "birth" or "creation" story. In its most basic form, it is a story that demands a change in the world,[92] which change is presented as the normal "culmination of a natural and inevitable process

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85 *The Seven Basic Plots: Why We Tell Stories* (London: Continuum, 2004) at 544.

86 See *ibid* at 544–45.

87 *Ibid* at 544.

88 *Ibid.*

89 See e.g. Ovid, *Metamorphoses*, translated by Charles Martin (New York: WW Norton & Co, 2005) at 15; Markham J Geller & Mineke Schipper, eds, *Imagining Creation* (Leiden: Brill, 2008); "Myths of creation and destruction", in Eva M Thury & Margaret K Devinney, eds, *Introduction to Mythology: Contemporary Approaches to Classical and World Myths* (Oxford: Oxford University Press, 2009). For a discussion of oral traditions, see Law Commission of Canada, *Indigenous Legal Traditions in Canada*, by John Borrows, Catalogue No JL2-29/2006 (Ottawa: Law Commission of Canada, 2006) at 18–19, 41; John C Mohawk, *Iroquois Creation Story* (Buffalo, NY: Mohawk Publications, 2005).

90 See Booker, *supra* note 85 at 545.

91 S*upra* note 4 at 612. See e.g. *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at 246, 161 DLR (4th) 385.

92 See Edwards*, supra* note 13 at 908.

in which the [world] has been engaged for a long time."[93] The result is a "path toward establishing an anticipated steady state," one that does not yet exist but which the audience is made to expect.[94] It is a story that underplays the inconvenient current state of the world, and makes it vanish by way of a narrative move from the distant past to a predetermined future.[95]

In sum, the "birth" story is one of evolution, of growth, of the fulfilment of one's destiny. The metaphorical structure of this archetypal narrative is one of an irresistible movement toward a future that has been preordained all along, of a development towards self-realization.[96] As such, this typical plot structure can often prove useful for advocates seeking the recognition of new legal rights. As will be argued, this plot structure may also be among the stock stories that conceptually have the most in common with what we have termed below the *dynamic* metaphors of Canadian constitutional law, of which the "living tree" is a prime example. This commonality, it will be shown, stems from the fact that "birth" stories perfectly convey the idea of growth and evolution for which the *dynamic* metaphors of Canadian constitutional law stand for. Before we get there, one last basic plot structure merits our attention.

2. Stories of "Rescue" and "Monsters"

The other common narrative structure that is of interest for our purposes is that of the "rescue" story. This story often begins in a state of stability and normality.[97] However, this initial state is quickly disrupted by "evil forces bent on domination or destruction."[98] In this context, the goal of the protagonists, traditionally an "outnumbered and outgunned" band of the faithful, is to save a character "in danger, vulnerable to harm,

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93 *Ibid* at 909.

94 *Ibid.*

95 See *ibid.* One reason why such stories seem so persuasive to us might lie in the fact that they mirror, to some extent, the initial stages in the cycle of life. Our innate familiarity with our own evolution from foetus, to infant, to adult may well make it easier for us to imagine a story that would follow the same pattern. One other possible explanation for why such a story appears so convincing to us, and why this could particularly be the case for jurists, might have to do with how liberal legal thought conceives of historical change and its relation to law: see Robert W Gordon, "Critical Legal Histories" (1984) 36:1/2 Stan L Rev 57 on what he describes as the "master process of social evolution" at the heart of liberal legal thought (at 61–63).

96 See Edwards, *supra* note 13 at 909. Edwards argues that, for this reason, this typical plot structure, that of beginnings, can prove useful for advocates seeking the recognition of new legal rights.

97 See *ibid* at 887.

98 *Ibid* at 899.

or already captured."[99] The object of the rescue may also be, as Edwards tells us, a valuable thing, "such as a talisman or an amulet worn for protection or power."[100] If the protagonists are not able to retrieve or protect said item, the danger is that the antagonists might destroy it, thus annihilating its power for good, or even misuse it, employing it to further their evil ends. The ultimate goal in such stories is, by way of the rescue, to go back to the initial status quo.[101]

This rescue narrative displays certain similarities with another highly common plot structure, that of "overcoming the monster."[102] Like the "rescue" story, this plot begins in a peaceful and quiet setting. The disruption of the equilibrium will usually come in the shape of some superhuman personification of evil.[103] This "monster", Booker tells us, "is always deadly, threatening destruction to those who cross its path or fall into its clutches."[104] Generally, it is a whole community or kingdom, even humankind and the world in general, that is threatened by this evil creature. As is the case in the "rescue" story, some great prize, a treasure, or even a loved one, will often be stuck in the monster's clutches. The story eventually leads to a confrontation between the hero and the monster, one that the former seemingly cannot win. As the story reaches its climax and the defeat of the hero appears just about certain, a dramatic reversal occurs, and the monster is ultimately killed. By a courageous feat, a selfless deed, the protagonist will have "liberated the world ... from the shadow of this threat to its survival."[105]

The structural element common to these stories is that they both begin in a stable world. As the action unfolds, the stable world either is at risk of being disrupted, or has been disrupted, by evil forces.[106] From this initial state, both stories describe the struggle of the hero or heroine to "resolve the disequilibrium and return to some version of legitimate stability."[107] In both stories, a major part is played by the wicked antagonist, by the evil creature whose only aim is to wreak havoc on the world. Booker explains that "[s]o powerful is the presence of this figure, so great the sense of threat which emanates from it, that the only thing which matters

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99 *Ibid.*

100 *Ibid.*

101 See *ibid* at 908.

102 Booker, *supra* note 85 at 23.

103 See *ibid*.

104 *Ibid.*

105 *Ibid.*

106 See Edwards, *supra* note 13 at 887.

107 *Ibid.*

to [the audience] as we follow the story is that it should be killed and its dark power overthrown."[108] In sum, both the "rescue" and "overcoming the monster" stories are, in terms of their narrative structure, essentially about preservation.

As will be demonstrated in a later Section of the present article, these archetypal narratives appear to be the stock stories that share the most, in conceptual terms, with what we have called the *static* metaphors of Canadian constitutional law, of which the "constitutional architecture" metaphor is a prime example. This reality, it will further be argued, follows from the fact that, like all *static* metaphors, these particular stock stories call for reaffirming an existing state of affairs, for "a return to normal, legitimate, ordinary life."[109]

This Part has sought to provide readers with an overview of the essential building blocks of storytelling, and of two archetypal plot structures: "birth" and "rescue" stories. With these tools in hand, our journey into the world of narrative scholarship can finally begin.

III. Metaphors of the Canadian Constitution

Canadian constitutional law is largely shaped by two main types of metaphors: *dynamic* and *static*. Each conveys a distinct conception of the Constitution and, as such, influences the kinds of stories we tell about it. The next Part will make the case that these two categories, exemplified by the "living tree" and "constitutional architecture" metaphors, sustain dominant narratives about the Constitution—narratives whose structures in essence correspond, respectively, to the "birth" and "rescue" stories.

The following demonstration is divided into two main sub-Parts. The first sub-Part introduces the *dynamic* and *static* metaphors of Canadian constitutional law. The second sub-Part emphasizes how these types of metaphors influence the kind of stories we tell about the Constitution. It seeks to show, by looking at two recent Supreme Court of Canada decisions from a narrative perspective, how these two types of metaphors sustain archetypal narratives of "birth" and "rescue" about the Constitution. It also explores what this means for constitutional scholars and lawyers.

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[108] *Supra* note 85 at 23.

[109] Edwards, *supra* note 13 at 908.

A. A Tale of Two Metaphors: Of Living Trees and Architectures

Our Constitution is a heterogeneous aggregation of statutory provisions, common law rules, unwritten principles, conventions and royal prerogatives. As such, it is no simple thing to conceptualize.[110] This complexity might account for why Canadian jurists have tended to resort to conceptual metaphors to better grasp the working of the supreme law of the country.[111] As we have seen, it is not uncommon in law for metaphors to be used to communicate the substance of ideas or concepts that could otherwise have been difficult to convey.[112] Constitutional metaphors, Warren Newman tells us, can be "powerful means of describing and illuminating otherwise abstract, obscure or intangible aspects of constitutional arrangements and institutional relationships."[113] In short, they provide us with a stock of mental images of the Constitution and simplified models for reasoning about it.

In addition to serving as devices for the imagination, metaphors also play a vital function in constitutional adjudication. They do so by providing a frame of reference through which norms can be interpreted and applied. Because the meaning of legal texts is never wholly clear, nor entirely determined,[114] reasoned judgment is needed to interpret and apply them. This judgment depends on a good comprehension of the underlying aims of the rules, of each case's practical considerations, of the relation between these aims and considerations, and of the hierarchy between competing rules.[115] This is where metaphors come into play. They offer us tools for reasoning about rules and principles. They provide examples of the norms in action. They record a "wide swath of the experience of social interaction … against which possible formulations of norms can be tested and refined."[116] They also give "a memorable quality to certain norms, so that those norms are retained [and] internalized"[117].

Constitutional metaphors have further come to play an important role in both the lawyer's task of persuasion and the justificatory discourse of

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110 See Newman, *supra* note 12 at 472.

111 On metaphors in American constitutional law, see Ball, *supra* note 19 at 17–19.

112 See Hugo Cyr, "Conceptual Metaphors for an Unfinished Constitution" (2014) 19:1 Rev Const Stud 1 at 5.

113 *Supra* note 12 at 475.

114 On the relative indeterminacy of law, see Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv L Rev 457; Felix Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35:6 Colum L Rev 809.

115 See Webber, *supra* note 4 at 614.

116 *Ibid.*

117 *Ibid* at 615.

Canadian courts. They are often used, as will be illustrated below, to frame jurisprudential debates and legal disputes in a particular light by selectively highlighting and hiding certain key aspects of contested issues.[118] In focusing the audience's attention on one aspect of a debate—say, the need for the Constitution to keep evolving to respond to new realities—a conceptual metaphor like that of the "living tree" can keep the same audience from focusing on other, likely inconsistent aspects of the debate, for example considerations of legal stability and predictability.[119] Used in this manner, the metaphor can intensify or increase the persuasiveness of legal arguments, in legal brief and judicial opinions alike. In this particular sense, a choice of metaphor is rarely an innocent one.[120]

Many such metaphors have been formulated over the years, each referring to different aspects of the functioning of the Constitution. One can think, for instance, of Peter Hogg's famous "dialogue" metaphor,[121] of the idea of the Constitution as an "original compact" between Canada's "founding peoples,"[122] or of the metaphors representing the Supreme Court as the "guardian" of the Constitution,[123] or as an impartial "arbiter" of disputes concerning the division of powers.[124]

While many different metaphors have "punctuated the development" of Canadian constitutional law, with themes ranging from the nautical to the organic to the mechanical,[125] two main conceptual categories emerge: *dynamic* and *static* metaphors. This is not to say that all metaphors about the Canadian Constitution fit into these two categories. This line of demarcation is, however, the one that seemed most meaningful, not only because the categories encompass the greatest number of constitutional metaphors, and the most influential ones for that matter, but also be-

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118 See Berger, "The Lady, or the Tiger?", *supra* note 20 at 278; Ball, *supra* note 18 at 22; Prémont, *supra* note 22 at 32–33.

119 See Lakoff & Johnson, *supra* note 19 at 10.

120 See Berger, "Embedded Knowledge", *supra* note 18 at 265.

121 See Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1.

122 See e.g. *In Re Regulation and Control of Aeronautics in Canada*, [1932] 1 DLR 58 at 65, [1931] UKPC 93 [*Aeronautics Reference*]; *MacDonald v City of Montréal*, [1986] 1 SCR 460 at 496, 500, 27 DLR (4th) 321 [*MacDonald*]; Sébastien Grammond, "Compact is Back: The Supreme Court of Canada's Revival of the Compact Theory of Confederation" (2016) 53:3 Osgoode Hall LJ 799.

123 See e.g. *Reference Re* Supreme Court Act*, ss 5 and 6*, 2014 SCC 21 at para 89 [*Supreme Court Act Reference*], citing *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155, 11 DLR (4th) 641.

124 See e.g. *Reference Re* Securities Act, 2011 SCC 66 at paras 55–57 [*Securities Reference*].

125 Newman, *supra* note 12 at 471. It should be noted that Newman recognized a similar dichotomy between "animating" and "structural" metaphors (*ibid* at 472).

cause these categories go to the very heart of these metaphors and what they stand for. These categories represent the most significant of the common denominators we have found between the dominant metaphors of Canadian constitutional law.

1. The Dynamic or "Animating" Metaphors

The present Part will be devoted to what we have termed the *dynamic* metaphors of Canadian constitutional law. The first sub-Part offers a general overview of what we mean when we talk of *dynamic* constitutional metaphors in Canadian law. The following sub-Parts are concerned with a prime example of this category, the famous "living tree" metaphor from *Edwards v. Canada (AG)*,[126] as well as its various extensions. The inquiry will focus, more specifically, on the broad conceptual field associated with these metaphors, and the language these metaphors prompt judges, lawyers, and scholars to use. The main interest in identifying the central theme and ideas conveyed by each type of metaphor is that it will help us later in the analysis to recognize the narratives the metaphors sustain about the Constitution. The same exercise will be conducted in the next Part in regard to the "constitutional architecture" metaphor.

The general idea behind this Part and the one after is, in the words of George Lakoff and Mark Johnson, that insofar as "communication is based on the same conceptual system that we use in thinking and acting, language is an important source of evidence for what that system is like."[127] This means, for instance, that we do not just *talk* about the Constitution in terms of a tree. We *picture it*, in our mind, as a growing, organic entity. We think of it as rooted in the bonds of the past, in tradition. We also feel compelled to allow space for its natural evolution. Put another way, the words we choose to communicate our thoughts about the Constitution are not arbitrary; rather, they reflect more fundamentally how we *think* about it and how we *conceptualize* it. Communication is based on our conceptual system, which also generates thinking and acting. In keeping with this, it is our contention that by focusing on the language that judges, lawyers, and scholars use in *talking* about the Constitution, choosing the semantic and conceptual field of one metaphor over that of another, we could have a better idea of what these people *think* about it.

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[126] [1930] AC 124 at 136, [1929] UKPC 86 [*Edwards*].

[127] *Supra* note 19 at 3.

a. General Overview

As their name indicates, *dynamic* metaphors speak to the growth and development of the Constitution. They are about "flexibility, suppleness, and growth."[128] Implied in these metaphors are ideas of traction, evolution, and "motive force".[129] Many of them are concerned with "the living, organic aspects of the Constitution."[130] In Canada, the most famous of these metaphors is, without a doubt, that of the "living tree".[131] A lesser-known example of a *dynamic* constitutional metaphor in Canada is that of the mille-feuille.[132] The idea expressed by this metaphor is that of a stratified legal order shaped by the accumulation, over time, of successive layers of constitutional norms. It is intended to reflect the historical continuity of the Canadian constitutional order.[133] It pictures the Constitution not as an immutable entity, but rather as the result of years of growth.[134]

The *dynamic* metaphors are, in practice, largely used to support an evolving interpretation of both the provisions and unwritten principles of the Constitution. They broadly stand for the idea that constitutional interpretation should be large and evolutive, because such instruments deal in few words with subjects of great importance, with respect to which new developments and changed understandings are bound to arise over time.[135] They support the idea that, for the Constitution to be exhaustive and remain relevant, it must be read so as to accommodate the realities of modern life[136] and to leave space for growth. This growth, however, need not—nor should it—necessarily be unconstrained. In fact, as we will see in more detail below, the "living tree" metaphor in Canadian law is one of the best illustrations of a *dynamic* constitutional metaphor that, while contemplating evolution, nonetheless seeks to remain rooted in tradition.

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128 Newman, *supra* note 12 at 472.

129 *Ibid* at 471.

130 *Ibid* at 472.

131 See Vicki C Jackson, "Constitutions as 'Living Trees'? Comparative Constitutional Law and Interpretive Metaphors" (2006) 75:2 Fordham L Rev 921 at 934, 941–42. Other jurisdictions employ similar metaphors, such as the "living constitution" in the United States and the "living force" metaphor in Australia

132 See Guénette, *supra* note 11 at 58.

133 See Patrick Taillon & Amélie Binette, "Le Fédéralisme Canadien: Sources, Pratiques et Dysfonctionnements" [2018]:1 Civitas Europa 237 at 244.

134 See Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec : du Régime français à nos jours*, t 1, 2nd ed (Montreal: Thémis, 1994) at 133.

135 See Jackson, *supra* note 131 at 926, 948.

136 See *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para 22 [*Same-Sex Marriage Reference*].

b. The "Living Tree": Tracing Back its Roots

The metaphor of the Canadian Constitution as a "living tree" has its origin in the decision of the Judicial Committee of the Privy Council in *Edwards*. At issue was the question of whether women could serve in the Senate of Canada. In 1928, the Supreme Court held that they could not, as they were excluded from the phrase "qualified Persons" in section 24 of the *Constitution Act, 1867*.[137] This holding was overturned by the Judicial Committee of the Privy Council, the court of last resort in the Canadian legal order prior to 1949.[138] The Privy Council took issue with the interpretive approach favoured by the Supreme Court when expounding the meaning of the *Constitution Act, 1867*, one that focused deeply on history. In holding that the Canadian Constitution must be read liberally so as to adapt to changing circumstances, Lord Sankey famously declared that: "[t]he ... Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada."[139] The use by Lord Sankey of this conceptual metaphor foreshadowed the analysis to come, and the Privy Council's ultimate conclusion, that the word "persons" in section 24 of the *Constitution Act, 1867* did include women.

Since its inception in 1930, this *dynamic* metaphor has been used to exemplify the idea that courts should adjust their interpretation of the Constitution in light of the evolution of Canadian society and not only look for the original meaning of the words employed or the original intent of the framers.[140] This is, as we have seen above, how conceptual metaphors give shape to abstract principles;[141] part of their power lies in expressing the essence of ideas—or, in this case, principles of constitutional interpretation—that would otherwise be difficult to convey.[142]

The "living tree" stands for ideas of growth and evolution, and these ideas affect the way we think, talk, and argue about the Constitution. To see this, we can retrace the various instances where the metaphor has

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137 See *Reference Re Meaning of the Word "Persons" in s 24 of British North America Act*, [1928] SCR 276 at 276, 4 DLR 98 interpreting *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 24, reprinted in RSC 1985, Appendix II, No 5.

138 See *Edwards*, *supra* note 126 at 127; *Supreme Court Act Reference*, *supra* note 123 at para 82.

139 *Edwards*, *supra* note 126 at 106–07.

140 See Cyr, *supra* note 112 at 18; Guénette, *supra* note 11 at 54–55; Jackson, *supra* note 131 at 946.

141 See Cyr, *supra* note 112 at 5.

142 See Hanne & Weisberg, "Conversation I: Introduction", *supra* note 31 at 4; Berger, "Embedded Knowledge", *supra* note 18 at 279; Michael R Smith, "Levels of Metaphor in Persuasive Legal Writing" (2007) 58:3 Mercer L Rev 919 at 923.

been employed in our legal discourse. In addition to identifying explicit references to this metaphor, the following sub-Part will also expose the more subtle ways the metaphor colours the language of judicial opinions. Specifically, it will identify the broad conceptual domain that is associated, by way of the metaphor, to the Constitution. In short, it will uncover the central themes and ideas that the metaphor conveys.

c. The "Living Tree": Following the Branches

The "living tree" metaphor is built upon a twofold idea: that of an entity engaged in a process of natural evolution, but whose evolution remains constrained by its origins. "Trees, after all, are rooted," Vicki C. Jackson notes.[143] To further borrow the vocabulary of forestry, the constitutional tree is understood in the Canadian legal consciousness to have roots and a trunk—structural elements which form the foundation of our society and legal system.[144] While the tree must have its roots preserved in order to keep on living, it nonetheless keeps on growing through its branches and leaves, which are symbols of the evolutive interpretation of the constitutional text.[145]

Still, the main idea conveyed by this metaphor remains that of a natural evolution,[146] of *growth*. As mentioned above, the idea of growth translates in a principle of evolutive interpretation of the Constitution, one that paints a dynamic and creative vision of it.[147] This principle has played a central role in Canadian law since the 1930s, and is often used to discard claims that the words of the Constitution should be read in light of their original meaning or the intent of the framers.[148]

The Supreme Court's decision in *Re B.C. Motor Vehicle Act* is a case in point.[149] The Court was asked to determine the meaning of the term "principles of fundamental justice" in section 7 of the *Canadian Charter of Rights and Freedoms*.[150] One of the parties relied in this regard on the *Minutes of the Proceedings and Evidence of the Special Joint*

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143 *Supra* note 131 at 943.

144 See Jackson, *supra* note 131 at 943; Guénette, *supra* note 11 at 54–55; Prémont, *supra* note 22 at 26–28.

145 See Prémont, *supra* note 22 at 26–28.

146 See *ibid* at 29–30.

147 See Guénette, *supra* note 11 at 54–55.

148 See Cyr, *supra* note 112 at 18.

149 [1985] 2 SCR 486 at 509, 24 DLR (4th) 536 [*BC Motor Vehicle*].

150 S 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

Committee on the Constitution.[151] This evidence, which included testimonies of federal civil servants involved in the drafting of the Charter, seemed to suggest that the principles of fundamental justice in section 7 were intended to be limited to procedural matters.[152] However, the Court refused to give anything but minimal weight to this evidence. In his reasons, Justice Lamer wrote of the dangers inherent in an original intent analysis,[153] the approach according to which constitutional interpretation should only seek to discern "the original meaning of the words being construed as that meaning is revealed in the intentions" of those who wrote and ratified that constitutional provision.[154] The danger in this approach, he wrote, is that:

> [T]he rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs ... If the newly planted "living tree" which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials ... do not stunt its growth.[155]

The *dynamic* "living tree" metaphor has thus been used to reject interpretations that go against the natural evolution not only of the Constitution, but also of the society that make up its environment.

As was discussed above, metaphorical thinking works by transferring the "characteristics, reasoning processes, and outcomes" of a "source" domain onto a "target" domain.[156] Here, the characteristics of the tree, or more broadly the plant, have been transferred onto the Constitution. By drawing on our prior knowledge of the "source domain"—here, the tree—metaphors allow us to make inferences about what should happen, or will likely happen, to the "target domain"—here, the Constitution.[157] They thus influence our assessment of what we ought to see and feel. Here, it is precisely because we expect the tree to grow, and because it is tightly as-

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151 Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 20 (5 December 1980).

152 See *BC Motor Vehicle*, *supra* note 149 at 509.

153 See *ibid* at 509.

154 Congressional Research Service, *The Constitution of the United States of America: analysis and interpretation: interim edition, analysis of cases decided by the Supreme Court of the United States to June 26, 2013* (Washington: US Government Printing Office, 2013) at 787 [Congressional Research Service].

155 *BC Motor Vehicle*, *supra* note 149 at 509.

156 Berger, "The Lady, or the Tiger?", *supra* note 20 at 278.

157 On metaphorical thinking, see Clive Baldwin, "Who Needs Fact When You've Got Narrative? The Case of *P,C&S vs United Kingdom*" (2005) 18:3/4 Int'l J Sem L 217 at 236.

sociated in our mind with the Constitution, that we also expect the latter to grow. Thus, the "living tree" metaphor might account (at least in part) for what makes the continuing evolution of the Constitution—and by extension, the outcome of cases—appear so natural and inevitable to us. In fact, it should come as no surprise that within this particular frame of reference, the "living tree" has allowed progressive constitutional development without any constitutional amendment.

The process of transferring inferences from one concept to the other is also strikingly exemplified in the more recent *Same-Sex Marriage Reference*. In that case, the Court had to decide whether the federal parliament could adopt a law allowing same-sex marriage under its power over marriage and divorce in paragraph 91(26) of the *Constitution Act, 1867*. It was argued before the Court that the word "marriage" in that provision entrenched common law definitions that only encompassed the union of a man and a woman. In rejecting the claim, the Supreme Court of Canada famously held that "[t]he 'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[158] By picturing the originalist approach—according to which the meaning of a constitutional text is fixed at the time it is proposed and ratified[159]—as unduly limiting the natural evolution of the Constitution, the "living tree" metaphor again serves to justify an evolutive interpretation of the text. In this respect, it holds normative implications. It tells us, implicitly, which outcome should be chosen—which interpretation should naturally prevail. By presenting the choice as between allowing the growth of the Constitution or impeding it, the Court frames the discussion in a particular way.[160]

Another related notion which follows from this analogy is that the living tree needs to adapt in order to survive, and that its growth thus should not be stunted.[161] This idea of a slow "evolution towards betterment"[162] is prevalent in our legal discourse. Through it, the "engine of evolution" is presented by the courts as an "internal desire of the Constitution to survive in its environment."[163] Courts, as "guardians" of the Constitution, thus present themselves as only bringing about adjustments re-

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158 *Same-Sex Marriage Reference*, *supra* note 136 at para 22.

159 See Congressional Research Service, *supra* note 154 at xiv.

160 On the process of framing, see Berger, "The Lady, or the Tiger?", *supra* note 20 at 283.

161 See e.g. *Canada (AG) v Hislop*, 2007 SCC 10 at para 94 [*Hislop*], citing *Same-Sex Marriage Reference*, *supra* note 136 at para 22.

162 Cyr, *supra* note 112 at 31.

163 *Ibid* at 32. See also Prémont, *supra* note 22 at 30.

quired to preserve the relevance of our founding document today.[164] In other words, these changes are what guarantee its very "survival".[165] This idea has played a key role in the "justificatory discourse of the courts."[166]

If this sylvan analogy is to be pushed even further, the tree also requires sap to flourish. This particular extension of the metaphor was employed by the dissenting justices in the recent case of *Quebec (AG) v. Canada (AG),* which considered whether the federal legislation abolishing the long-gun registry respected the constitutional division of power.[167] In their reasons for striking down the impugned provision, the dissenting justices stressed the importance of the unwritten principles of the Constitution, like that of federalism. These principles, they wrote, "reflect our Constitution's historical context and have facilitated its application throughout its history; thus, they are to the Constitution what *sap* is to a tree."[168]

In addition to sap, branches, and leaves, the Constitution as a living tree is also thought to have (as was mentioned) roots and a trunk. These extensions of the metaphor represent the structural elements on which Canada is said to be built, that is the parts of the tree which must be preserved for it to keep on growing. The original metaphor also made clear that the growth of the tree is constrained by its natural limits. In imposing constraints on the growth of the living tree, these extensions add a different, although not necessarily contradictory, conceptual dimension to the metaphor. They do not stunt the growth; they constrain it. They seek to ensure that, while the Constitution keeps evolving, it does so in keeping with the past. In this respect, they have a certain conceptual commonality with *static* metaphors. Let us briefly consider what these extensions of the metaphor have meant in legal discourse for the growth of the living tree.

d. The "Living Tree": Acknowledging its Natural Limits

In living-tree constitutionalism, the idea of "natural limits" usually stands for the constraints that exist on the development of constitutional law, for the limits "imposed by the core of the concepts used in the entrenched texts of the Constitution."[169] These limits are most frequently

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164 Cyr, *supra* note 112 at 32

165 *Ibid*.

166 *Ibid* at 30–31.

167 2015 SCC 14 at para 144, LeBel, Gascon, and Wagner JJ, dissenting [*Quebec v Canada*].

168 *Ibid* [emphasis added].

169 Cyr, *supra* note 112 at 21.

invoked, although not exclusively, in disputes about the division of powers between provincial legislatures and the federal parliament under sections 91 through 95 of the *Constitution Act, 1867*.[170]

As for the tree's roots, they are meant to convey the idea that constitutional interpretation should not start with the idiosyncratic preferences of the judges, but rather rely on "solid and well-established bases."[171] As Hugo Cyr imaginatively puts it, a "tree without roots cannot stand nor live. The roots nourish the tree and ensure a connection with the relatively immobile part of the world, the ground, and thus guarantee the stability of the tree throughout its development."[172] This means, in legal discourse, that constitutional interpretation should not be conducted in a way that disregards the past.[173] It should use the past as its starting point, and be mindful of it in explaining every novel development.[174] In this respect, the roots metaphor captures the role of text, original understanding, and precedents in constitutional adjudication.[175]

In keeping with the roots metaphor, judges must be able, in their reasons, to fit all new changes "into a narrative of natural growth," one that suggests a degree of continuity.[176] It is in this way that the roots metaphor imposes constraints on the creative power of judges.[177] However, these limits are, as Cyr notes, "counter-balanced by the fact that the metaphor of natural growth does not impose strict conceptual restrictions to the direction of that growth."[178]

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170 See *ibid*. See e.g. *Same-Sex Marriage Reference*, *supra* note 136 at paras 24, 26–28, 36–39.

171 Cyr, *supra* note 112 at 19.

172 *Ibid*.

173 See *ibid*. A good example of the use of this metaphor can be found in Justice Lebel's concurring reasons in *R. v. N.S.* (2012 SCC 72). He writes, at paragraph 72 of his reasons:

> [t]he "living tree" keeps growing, but always from its roots. […] [T]he recognition of multiculturalism [in the Charter] takes place in the environment of the Constitution itself, and is rooted in its political and legal traditions. The Constitution requires an openness to new differences that appear within Canada, but also an acceptance of the principle that it remains connected with the roots of our contemporary democratic society.

174 See *ibid*; Prémont, *supra* note 22 at 30–31.

175 See Jackson, *supra* note 131 at 926.

176 Cyr, *supra* note 112 at 19.

177 See *ibid*.

178 *Ibid*.

One last observation is in order at this point: like all metaphors, the "living tree" metaphor "can obscure as much as [it can] illuminate."[179] This is the case because, as we have seen above, metaphors "are ways of seeing or highlighting some aspects of a concept," but are also "ways of not seeing others."[180] In allowing us to concentrate on one aspect of a concept, they can keep us from noticing other aspects that are inconsistent with it.[181] The "living tree" metaphor, for example, might be said by some to "[understate] the effects of major constitutional change and the role of human agency in that process."[182] In Jackson's words:

> A tree's branches will grow in directions influenced by the availability of sun and water, responsive to a natural environment, but the environment of a constitution is made up of human beings, acting individually, in groups, and in institutions. There is a choicefulness in constitutional development that natural, organic metaphors obscure.[183]

Some also argue that the metaphor hides what proponents of a more originalist approach see as the dangers of letting constitutional evolution be driven by the vagaries of social change or, more precisely, by what unelected officials (judges) see as the new mores of society.[184]

In sum, the "living tree" is emblematic of one of the two central categories of Canadian constitutional metaphors: *dynamic* metaphors. This is true insofar as it speaks to the growth and development of the Constitution and supports an evolving interpretation of its express provisions and unwritten principles. It presents the Constitution not as an immutable entity, but rather as the result of years of growth. It stands for the idea that, for it to remain relevant, its text must be read so as to accommodate the realities of modern life. While the origins of the "living tree" date as far back as the 1930 *Edwards* case, it nonetheless remains one of the dominant metaphors in Canadian law today. By way of its roots, trunk, and natural limits imagery, it also warns that the evolution of the Constitution must nonetheless be mindful of the past and that, for this reason, constitutional text and precedents continue to play a role in adjudication. As will be evident in the next Part, while this last idea of the importance of the past is only incidentally expressed by the "living tree", it is at the

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179 Jackson, *supra* note 131 at 926; Cyr, *supra* note 112 at 6.

180 Berger, "The Lady, or the Tiger?", *supra* note 20 at 278.

181 See Lakoff & Johnson, *supra* note 19 at 10.

182 Jackson, *supra* note 131 at 926. See also Guénette, *supra* note 11 at 57.

183 *Supra* note 131 at 959–60. See also Prémont, *supra* note 22 at 30.

184 See FL Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont: Broadview Press, 2000) at 47.

very heart of the second central category of Canadian constitutional metaphors identified here: *static* metaphors.

2. The Static or "Structural" Metaphors

a. General Overview

The *static* metaphors of Canadian constitutional law broadly represent the immovable foundations upon which Canada was built, the bedrock on which the country stands, the basic infrastructure that, if not continually preserved, is at risk of eroding. In the words of Newman, they tend to evoke "images or impressions of ancient or classical structure, strength, durability, permanence, and to some degree, solidity and firmness of form, if not outright rigidity."[185] In this respect, *static* metaphors are often associated with strict, or literal, constitutional interpretation. These metaphors tend to focus our attention on the text of the Constitution, its original meaning and *raison d'être*, as well as on the jurisprudence of the Court that has endured over time.[186] They draw on ideas of legal continuity and stability, ideas that have a strong normative pull. As such, they are often associated with a narrow reading of the Constitution and a form of originalism.[187]

Static metaphors have occupied an important place in the Canadian legal landscape since at least the 1930s. Early manifestations include the "original contract" between Canada's "founding peoples", the "watertight compartments" metaphor, and the idea of the Court as the "guardian" of the Constitution. More recent iterations of the *static* metaphor can be found in the ideas of the constitutional "structure" and "architecture", to which the next sub-Part will be devoted.

Before moving on to this discussion, it seems useful to consider briefly the early metaphors in the *static* category. Not only should that help us better understand the ideas they stand for, it should also provide insight as to how courts have used them, and to what ends. The oldest of these metaphors, that of the original contract, or compact between the country's constitutive parts, was referred to by Lord Sankey within two years of his decision in *Edwards* in the *Aeronautics Reference*. In this 1931 case, the Privy Council dealt with the question of who, between the federal and provincial parliaments, had the power to regulate aeronautics, a matter

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185 *Supra* note 12 at 472.

186 See *ibid* at 472, 486–87, 494.

187 This is not to say that stability is always synonymous with immobility, simply that it sometimes is.

which for obvious reasons had not been contemplated in 1867. In his reasons, Lord Sankey acknowledged that the Constitution "embodies a compromise" between the original provinces, an "original contract" centred on the "preservation of the rights of minorities."[188] Still, the ultimate object of that contract was, in his view, to give the central government the powers "by which uniformity of legislation might be secured" on questions of national concern.[189] It is in keeping with this idea that Lord Sankey ultimately found that aeronautics was a matter for the federal parliament.

The metaphor of the Constitution as a political compromise between Canada's constitutive parts has normative implications. It is often used to support the legitimacy of the Constitution or part thereof—to offer a justification as to why one should adhere to its terms and to help understand the rationale behind some of its parts.[190] By drawing on the intuitive moral assumption that a promise must be kept, the metaphor provides a compelling reason for demanding that all parties to the compact abide by its terms.[191] It has notably been deployed in support of the idea that certain provisions should be left untouched because of "how foundational they were to historically contingent agreements to federate," no matter if they might now appear inconsistent with other constitutional values.[192] The analysis it supports prioritizes the original intent of the parties to the compact; in this sense, it will often lead to an originalist interpretation.[193] This focus on original intent is predicated upon the assumption, summarized by Newman, that "rights flowing from the historic Confederation bargain," are "less legitimately the subject of judicial development and enhancement" than other, more "universal" rights.[194] Because these parts

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188 *Aeronautics Reference*, *supra* note 122 at 65.

189 *Ibid*.

190 See Grammond, *supra* note 122 at 801. The compact is generally understood to involve Canada's two historic language groups (French and English), or the colonies (or provinces) that joined to form Canada. Being of the view that this narrative recognizes too small a role for Indigenous peoples in the foundation of Canada, some scholars have argued for it to be extended so as to convey the tripartite nature of the relationship: see *ibid* at 805.

191 See *ibid* at 801–02.

192 Jackson, *supra* note 131 at 958. This metaphor has notably been used with respect to language rights: see *MacDonald*, *supra* note 122; *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education*, [1986] 1 SCR 549, 27 DLR (4th) 406. In these cases, the majority of the Court held that section 133 of the *Constitution Act, 1867*, which imposes a form of legislative and judicial bilingualism in Québec and at the federal level, guarantees rights resulting from a political compromise, and that it should thus be interpreted with "restraint".

193 See Grammond, *supra* note 122 at 820–22.

194 Newman, *supra* note 12 at 486.

of the Constitution were born out of a compromise, they are seen as more deserving of protection.

The other early manifestation of *static* metaphors deserving of our attention is that of the "watertight compartments". It was first employed in the *Labour Conventions Reference,* where the Privy Council dealt with whether the federal parliament had the power to pass into law conventions from the International Labour Organization.[195] The Privy Council ultimately held that, to the extent that the impugned statutes were concerned with matters of exclusive provincial competence (here, property and civil rights), they were ultra vires of the federal parliament's jurisdiction. In his reasons, Lord Atkin stressed that while Canada had gained its independence from the United Kingdom through the *Statute of Westminster, 1931*,[196] its internal federal structure was nonetheless to be preserved. In his words: "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure."[197]

This metaphor is built upon the idea that if the structure of a boat is divided into such sealed compartments, any flooding resulting from a breach of the hull is prevented from spreading. It imagines the heads of power at sections 91 and 92 as separate containers, sealed to ensure the functioning and safety of the boat that is Canada. By illustrating the sealed compartments as essential to the structure of the ship, this metaphor expresses the need to constrain constitutional evolution concerning the division of powers, and to prevent any overlap or interplay between the legislative actions of the two orders of governments.[198] It stresses that, on this particular topic, the written Constitution is paramount. As Bruce Ryder writes, the "judicial task is to find, in the text or precedent, the clearly demarcated boundaries of the mutually exclusive spheres of activity of both levels of government."[199]

Like the "living tree", the "watertight compartments" metaphor provides a great illustration of how "image schemas" function—by "map[ping] the inferences" from "concrete visual images" onto "abstract concepts."[200] In this conceptual mapping, the notion of "heads of power"

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195 *Canada (AG) v Ontario (AG)*, [1937] 1 DLR 673 at 684, [1937] AC 326 [*Labour Conventions Reference*].

196 (UK), 22 & 23 Geo V, c 4.

197 *Labour Conventions Reference*, *supra* note 195 at 684.

198 See Newman, *supra* note 12 at 488. See also Cyr, *supra* note 112 at 21.

199 "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and the First Nations" (1991) 36:2 McGill LJ 308 at 322.

200 Berger, "The Lady, or the Tiger?", *supra* note 21 at 290.

(itself metaphorical) is understood as a container or receptacle, one that holds certain things (legislative powers), things it protects by way of its clear, hermetic, boundaries.

The "watertight compartments" metaphor embodies what scholars refer to as the "classical paradigm" of Canadian federalism.[201] This paradigm leaves little room for legislation from one order of government to have incidental effects on the other's jurisdiction.[202] It also calls for a broad use of constitutional doctrines such as federal paramountcy and interjurisdictional immunity.[203] The "watertight compartments" metaphor, and the conception of federalism it embodies, have greatly influenced how division of powers disputes were decided until 1949, when the Supreme Court replaced the Privy Council as the final arbiter of Canada's Constitution.[204] The repeated rejections by the Privy Council of federal attempts to regulate the insurance industry provides an example of this paradigm at play.[205]

The classical paradigm was, however, gradually set aside throughout the second half of the last century. Its most striking repudiation came in *OPSEU v. Ontario (AG)*.[206] At issue was whether the Ontario legislature could impose restrictions on the political activities of civil servants in federal elections. In finding that the impugned provisions were intra vires of the province's jurisdiction, Chief Justice Dickson explained in his concurring reasons that:

> [C]oncepts like "watertight compartments" ... have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.[207]

It is therefore with his very own nautical metaphor, that of the "tide", that Chief Justice Dickson signalled this important change of course in Canadian constitutional thinking on the division of powers. The "watertight compartments" metaphor has thus been discounted by the Court, engulfed, so to speak, by the "dominant tide" of modern federalism, a con-

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201 Ryder, *supra* note 199 at 322–23.

202 See *ibid*.

203 See *ibid*.

204 See *Supreme Court Act Reference*, *supra* note 123 at para 82.

205 See *The Citizens Insurance Company of Canada and The Queen Insurance Company v Parsons (Canada)*, [1881] UKPC 49, [1881] 7 AC 96; *In re* The Insurance Act of Canada, [1942] AC 41. See also Ryder, *supra* note 199 at 328–29.

206 [1987] 2 SCR 2 [*OPSEU*].

207 *Ibid* at 18.

ception of the division of powers that favours "overlapping jurisdiction" and that encourages "intergovernmental cooperation".[208]

This new paradigm, known as the "modern view of federalism,"[209] gained traction in the constitutional jurisprudence of the last half-century. But recent decisions of the Supreme Court[210] seem to indicate that the classical paradigm of federalism, which "maximises the unilateral power of each order" and discourages overlap,[211] still strongly influences the way we think of the Constitution. Nowhere has that been made clearer than in the 2011 *Securities Reference*,[212] where, building upon Dickson's metaphor in *OPSEU*, the Court wrote that "the 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state." The "constitutional balance" mentioned in this excerpt is another example of a *static* metaphor.

The latest manifestations of *static* metaphors are those of the structure and architecture of the Canadian Constitution. The next sub-Part is devoted to these metaphors, not only because of their paradigmatic character, but also because the latter is playing an increasingly important role in judicial reasoning today.

b. "Structure" and "Architecture" of the Canadian Constitution

If the *static* metaphor of "constitutional architecture" only resurfaced at the forefront of Canadian legal discourse in the 2014 references,[213] its underlying idea, that of an immovable internal structure at the heart of our Constitution, had actually existed for quite some time. In fact, a version of it was expressed as far back as 1959 in the landmark decision *Roncarelli v. Duplessis*,[214] where the Court held that Quebec's Premier had overstepped his authority by ordering, for political motives, the revo-

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208 *Securities Reference*, *supra* note 124 at para 57.

209 Jean-François Gaudreault-DesBiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism", in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 400–02. See also *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 31 [*Canadian Western Bank*].

210 See e.g. *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at 58; *Quebec v Canada*, *supra* note 168 at para 19; *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at 39, 62–72.

211 Gaudreault-DesBiens & Poirier, *supra* note 209 at 411.

212 *Supra* note 124.

213 See *Supreme Court Act Reference*, *supra* note 123 at paras 82, 87, 88, 100; *Senate Reform Reference*, *supra* note 15 at para 26.

214 [1959] SCR 121, 16 DLR (2d) 689.

cation of the liquor licence of a restaurant owner because of his affiliation with Jehovah's Witnesses. In his reasons, Justice Rand famously observed that if such conduct was to be allowed, and if the decisions of the administration were to be driven by "the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty," it would mean nothing less than "the beginning of disintegration of the rule of law as a *fundamental postulate of our constitutional structure*."[215] The idea of a constitutional structure, of which the rule of law is a pillar, was already starting to take shape.

The Supreme Court again referred to the idea of the internal structure of the Constitution in *OPSEU*.[216] In his reasons for the majority, Justice Beetz wrote that the "*basic structure of our Constitution* … contemplates the existence of certain political institutions," such as freely elected legislative bodies at all levels of the federation.[217] This, he wrote, meant that neither the provincial legislatures nor the federal parliament could enact laws that "substantially interfere with the operation of this *basic constitutional structure*."[218] In other words, the federal and provincial legislative bodies must "conform to … *basic structural imperatives* and can in no way override them."[219] Justice Beetz nevertheless came to the conclusion that the impugned provisions only incidentally affected the fundamental right to participate in certain political activities.[220]

It was ultimately in the *Reference re Secession of Quebec,* rendered almost ten years after *OPSEU*, that the Supreme Court first referred to the notion of constitutional "architecture".[221] The Court had to consider the legality of a possible unilateral secession of Quebec from Canada. In doing so, the Court famously held that unwritten principles, like those of democracy and federalism, complement the provisions of the constitutional texts, and that "it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[222] This goes back to the idea first mentioned in the landmark *Reference Re Manitoba Language Rights,* that the Court, when adjudicating a constitutional

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215 *Ibid* at 142 [emphasis added].

216 *Supra* note 206 at 57. See also Newman, *supra* note 12 at 490.

217 *OPSEU*, *supra* note 206 at 57 [emphasis added].

218 *Ibid* [emphasis added].

219 *Ibid* [emphasis added].

220 See *ibid*.

221 *Supra* note 91 at 248.

222 *Ibid*.

matter, may well have to consider "unwritten postulates which form the very foundation of the Constitution of Canada."[223]

The idea of constitutional structure and architecture resurfaced, fifteen years later, in the *Supreme Court Act Reference*.[224] This reference sought to clarify the eligibility requirements for an appointment to one of the three seats reserved for Quebec on the Court, and the procedure for amending these requirements. It was held that, because the status of the Court was constitutionally entrenched by the *Constitution Act, 1982*, its composition could only be modified by way of a constitutional amendment.[225] To illustrate the importance, for Quebec, of the eligibility requirements at issue, the majority referred to the *static* metaphor of the original compact. The purpose of requirements, it wrote, was "to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats."[226]

In emphasizing the Court's role in the Canadian legal system, the majority also resorted to another *static* metaphor: the "constitutional architecture". It noted that the abolition of all appeals to the Privy Council in 1949 "had a profound effect on the constitutional architecture of Canada,"[227] for it meant that its authority under the Constitution was now bestowed on the Court. Future reforms, the Supreme Court said, would thus "have to recognize [its] position within the architecture of the Constitution."[228] This fundamental role in the "Canadian constitutional structure,"[229] this essential position in "Canada's constitutional architecture,"[230] was precisely why, the Court added, its essential features came to be constitutionally protected. Here, the "constitutional architecture" metaphor conveys images of strong and durable structures, of the foundation on which Canada is built. One thing that protects this edifice, the majority tells us, is the Court's constitutionally entrenched status.

In the *Senate Reform Reference,* rendered only weeks later, the Court pushed the "constitutional architecture" metaphor further.[231] The central question before the Court was whether various changes contemplated in

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223 [1985] 1 SCR 721, 19 DLR (4th) 1 at 752.

224 *Supra* note 123 at paras 82, 87, 88, 94, 100–01.

225 See *ibid* at paras 5, 74.

226 *Ibid* at para 59.

227 *Ibid* at para 82.

228 *Ibid* at para 87.

229 *Ibid* at para 94.

230 *Ibid* at para 100.

231 *Supra* note 15.

regard to the Senate constituted amendments to the Constitution, and if so, what procedure should apply.[232] The focus of the Court was therefore on the nature and content of the Constitution, and on the role of the Senate within the Canadian political system. The Constitution is not, the Court wrote, a "mere collection of discrete textual provisions"; rather, it has "an architecture, a basic structure."[233] This notion of architecture:

> [E]xpresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole" ... In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.[234]

In the Court's view, it follows that amendments to the Constitution are not limited to textual changes, but rather include every change that might affect the constitutional architecture.[235]

In its subsequent discussion of the amending procedure, the Court once again resorted, in a manner reminiscent of the *Supreme Court Act Reference*, to the *static* metaphor of the original compact. This procedure, the Court said, reflects "the political consensus that the provinces must have a say in constitutional changes that engage their interests."[236] It seeks to foster "dialogue" between the orders of government on matters of constitutional change, and to "protect Canada's constitutional *status quo* until ... reforms are agreed upon."[237] As for the unanimity rule of section 41, which requires the consent of the Senate, the House of Commons, and all the provincial legislative assemblies for constitutional amendments concerning certain matters (notably the office of the Queen, the amending procedures themselves, and the composition of the Court), it is said to be justified by the need "to give each of the partners of Canada's federal

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232 See *ibid* at para 2.

233 *Ibid* at 27.

234 *Ibid* at para 26.

235 See *ibid* at paras 27, 107. The reasoning of the majority in the *Supreme Court Act Reference* is interesting in that, while it has the effect, in a sense, of broadening the scope of what, according to section 52 of the *Constitution Act, 1982*, forms part of the Constitution, it does so on the account of the "historical evolution" of the Court and what the framers of the amending procedure are thought to have intended (*supra* note 123 at paras 76, 77–80).

236 *Ibid* at para 31.

237 *Ibid*.

compromise a veto on those topics that are considered the most essential to the survival of the state."[238]

Ultimately, the Court came to the conclusion, as will be discussed in our case study, that the federal parliament could not unilaterally impose most of its proposed reforms to the Senate because they affected the very architecture of the Constitution. The Court also found that, because it would fundamentally alter "Canada's constitutional structure", the abolition of the Senate would require the unanimous consent of the Senate, the House, and the legislative assemblies of all ten provinces.[239]

The metaphors of the "constitutional architecture" and "structure" thus played an important role in the Court's reasoning in the two 2014 references. They convey, better than any other *static* metaphor, the idea of a "judicial quest to preserve those foundational institutions' [the Senate's and the Court's] essential characteristics from precipitous or unilateral change."[240] Because these institutions have external architectures that convey intrinsic meaning, the reference to their internal architecture is, in a sense, not surprising. The characteristics of the former—described by Newman as "massive, imposing stone edifices that convey and symbolize status, design, coherence, tradition, permanence, stability and continuity"[241]—are simply transferred to the latter. Thus, if constitutional change is to come on this particular front, it will come slowly, and incrementally. Until that time, the essential features of these institutions shall remain untouched.

IV. Stories of the Constitution

A. Stories We Tell of the Constitution: From Birth to Rescue

Having demonstrated that Canadian constitutional law is deeply influenced by two competing types of metaphors, *dynamic* and *static*, we can now turn to the last part of our demonstration—that of uncovering how these metaphors shape the types of stories jurists tell about the Constitution. Specifically, it will be argued that the *dynamic* and *static* metaphors of Canadian constitutional law sustain dominant narratives—narratives whose structure essentially correspond to "birth" and "rescue" stories. The case will further be made that jurists already tend, while

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[238] *Ibid* at para 41, citing Benoît Pelletier, *La modification constitutionnelle au Canada* (Scarborough: Carswell, 1996) at 208.

[239] See *Senate Reform Reference*, *supra* note 15 at para 3.

[240] Newman, *supra* note 12 at 494.

[241] *Ibid*.

perhaps unconsciously, to adapt the stories they tell of the Constitution in light of the underlying ideas conveyed by these two types of metaphors. By applying the tools of literary analysis to two recent decisions where such metaphors are used, we will uncover the narrative paths taken by the judges and illustrate the extent to which they correspond to the metaphors.

One of the aims of this Part is to show that metaphor and narrative often play complementary roles in the realm of law. This sub-Part speaks to what Greta Olson has described as the "intrinsically interrelated nature of metaphor and narrative in law and legal discourse."[242] As we have sought to demonstrate in previous Parts, both narrative and metaphor help us make sense of the world around us. They provide context, allow us to find coherence in a series of events, and reassure us that things hold together.[243] They offer frames of reference to interpret new events, and they do so in a complementary fashion.[244]

More specifically, this sub-Part seeks to emphasize that each conceptual metaphor, including the "living tree" and the "constitutional architecture", embodies a different implied narrative.[245] Metaphors provide, to quote Olson, "a visual basis for a larger model that is narrativized," and that subsequently can be applied in constitutional jurisprudence.[246] In other words, these metaphors contain the seed of stories; they sustain particular narratives.

The nexus between metaphor and narrative has important implications for legal persuasion. Because each of these devices is, in and of itself, a powerful persuasive tool, their concomitant use can be very potent.[247] It can amplify their framing power. Remember that narrative and metaphor fashion, to some extent, the way we look at a legal problem and how we perceive the setting in which it arises.[248] To put it another way,

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242 *Supra* note 25 at 20.

243 See Berger, "The Lady, or the Tiger?" *supra* note 20 at 275.

244 See Hanne & Weisberg, "Conversation I: Introduction", *supra* note 32 at 8, citing DN McCloskey, "Storytelling in Economics" in Cristopher Nash, ed, *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy, and Literature* (London, UK: Routledge, 1990) 5 at 5–22.

245 See Hanne & Weisberg, "Conversation I: Introduction", *supra* note 31 at 18.

246 *Supra* note 24 at 33. This joined use of metaphor and narrative is unsurprising, Olson interestingly points out, insofar as "narrativization is intrinsic to verbal expression, and metaphor is part of this expression" (*ibid*).

247 See Smith, "Metaphoric Parable", *supra* note 33 at 65–66.

248 See Edwards, *supra* note 14 at 911.

these devices "provide characters, give those characters motives, and identify the 'right ending' for the story of the law."[249]

Because metaphor and narrative shape how we think about the law, we would be wise, as jurists, to pay attention to them. This is where the explanatory power of narrative analysis come into play. It helps us recognize the narrative devices at play in a brief or a judicial opinion and, in doing so, to unearth what would otherwise remain hidden or unnoticed.[250] It sheds light on the preconceptions and experiences—derived from our culture[251]—that constrain the setting within which lawyers argue and judges decide. It is "a tool for uncovering and discovering."[252]

1. Dynamic Metaphors and "Birth" Stories

a. Uncovering the Narrative: The "Unfinished Constitution"

Dynamic metaphors tell the story of the evolution and organic growth of the Canadian Constitution. They convey a sense of motion. The most common of these metaphors, that of the "living tree", has become so ingrained in the Canadian legal imagination, so profoundly entrenched in our collective legal consciousness, that quite often in recent years courts have tended not to bother mentioning it explicitly.[253] Rather, courts will implicitly refer to it by using notions of constitutional evolution and development, for example. In these cases, the conceptual field stands in for a metaphor so pervasive that it needs not even mentioning.

The dominant narrative implied in the *dynamic* metaphors is, in the words of Hugo Cyr, that of an "unfinished Constitution".[254] This narrative pictures the Constitution as an "*object* that *exists* but is *incomplete*, *not yet perfect*, at an *intermediary stage* as well as *moving towards* more

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[249] *Ibid* at 912.

[250] See Berger, "The Lady, or the Tiger?", *supra* note 20 at 282.

[251] See *ibid* at 283.

[252] *Ibid* at 282.

[253] I have only been able to identify five cases, since 2010, where the living tree metaphor was explicitly mentioned by the Supreme Court: see *R v Jarvis*, 2019 SCC 10 at para 98 (Rowe J concurring); *R v Comeau*, 2018 SCC 15 at paras 33, 39, 83; *R v NS*, *supra* note 174 at 72; *Quebec v Canada*, *supra* note 167 at para 144; *Securities Reference*, *supra* note 124 at para 56. In comparison, I was able to identify at least seven such mentions from the years 2000 to 2010: see *Canadian Western Bank*, *supra* note 209 at para 23; Hislop, *supra* note 161 at paras 94, 144, 146; *Same-Sex Marriage Reference*, *supra* note 136 at paras 22, 24, 26; *R v Demers*, 2004 SCC 46 at para 78; *R v Blais*, 2003 SCC 44 at para 40; *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 152; *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 317.

[254] *Supra* note 112 at 7.

completeness."[255] In this perspective, the current state of constitutional law is thought of not as the end of the story, but rather as a Polaroid of one particular moment in time, perhaps even indicative of the future direction towards which the norms will develop.[256] This brings to mind the metaphor of the "living tree", of the small plant slowly turning into a tree, and growing through its branches and leaves.

Like the *dynamic* metaphors, the unfinishedness narrative posits the Constitution as the "product of some ongoing process."[257] This narrative also suggests that the development of the Constitution must be safeguarded, even set in motion, by some particular agent. Not only must this agent abide by the Constitution, he or she may also be called upon to assist it advancing towards its target.[258] For this reason, it is not rare to see Canadian judges claim it as their duty to make sure that the Constitution "develops to offer answers where it may initially appear silent."[259] Their role, in this respect, is only to "*perfect* the work of the drafters."[260] It is to ensure that the Constitution ultimately reaches completion, that is, to ensure a "more perfect" Constitution.[261] The process of constitution-making is thus portrayed as nothing more than natural development. This is reminiscent of the idea, discussed above, that the "living tree" needs to adapt in order to survive, and that one should not stunt its growth.

This unfinishedness narrative is essentially a manifestation of the "birth story". Both narratives speak of a need for change, all the while picturing this change as the normal ending point of a "natural and inescapable process" that has been going on in the world for some time.[262] They both move toward a steady state which, while it does not yet exist, we are still made to expect. In the unfinishedness narrative, this anticipated steady state is that of the completion of the Constitution, the attainment of its most perfect self. As for the current state of the law, it is but a step in this long, drawn-out process. And as for each new reading of the Constitution, each new right, they develop out of what came before.

Because of the deep conceptual interrelation between *dynamic* constitutional metaphors and "birth" stories, it seems that jurists, be they law-

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255 *Ibid* [emphasis in original].

256 See *ibid.*

257 *Ibid* at 7.

258 See *ibid.*

259 *Ibid.*

260 *Ibid* at 9 [emphasis in original].

261 *Ibid* at 31.

262 Edwards, *supra* note 13 at 908–09.

yers, scholars, or judges, have tended to use them conjointly. In other words, it appears they are inclined to adapt, probably unconsciously, the story they tell of the Constitution in light of their accompanying metaphors or, more generally, in light of the broad semantic fields they support. This linkage is evident, for instance, in the recent decision of the Supreme Court in *Saskatchewan Federation of Labour*.

b. Case Study: Saskatchewan Federation of Labour and the Birth of the Right to Strike

The core question in this case was whether a prohibition on strikes for essential services employees constituted a violation of the right to freedom of association guaranteed by section 2(d) of the *Charter*; in other words, whether it substantially interfered with a meaningful process of collective bargaining.[263] This case required the Court to interpret the Constitution—to illuminate the exact meaning and content of section 2(d). It also required that the Court consider whether its decision in the *Alberta Reference,*[264] according to which neither the right to collective bargaining nor the right to strike was protected, still withstood principled scrutiny. The majority of the Court, per Justice Abella, ultimately found that the right to strike is indeed constitutionally protected in Canada.

The story told by Justice Abella in support of this interpretation is that of the birth of the right to strike, and she makes this clear from the outset of her opinion. After a cursory statement about the *Alberta Reference*, she immediately moves on to discuss contemporaneous decisions of the Court, which had since recognized the constitutional right to collective bargaining. She concludes this brief overview of the case law by asserting, in an evocative manner, that clearly "the arc bends increasingly towards workplace justice."[265]

These first few lines of the opinion are indicative of the theme of the story we are about to be told. It is the story of the steady development, over centuries and across continents, of the right to strike. It is the story of the gradual recognition in law of the crucial importance of the right to strike as a means of protecting the interests of working people. It speaks of the inevitable, but nevertheless laborious, march towards constitutional entrenchment of the right to strike—towards the very decision we are reading. It is essentially a story of birth.

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[263] See *Saskatchewan Federation of Labour*, *supra* note 14 at para 2.

[264] *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161 [*Alberta Reference*].

[265] *Saskatchewan Federation of Labour*, *supra* note 14 at para 1.

This narrative has the effect of underemphasizing the inconvenient current state of the law by picturing it as nothing but a step in the course of a centuries-long developmental process. In positing the formal recognition of the right to strike as the narrative's anticipated—even legitimate—steady state, it downplays the importance of the present state of affairs. The right to strike is "an indispensable component" of the right to collective bargaining, the Court tells us—"[i]t seems ... to be the time to give this conclusion constitutional benediction."[266] We thus find ourselves, from the very start of the story, in narrative motion.

The reference by Justice Abela to the bending arc of constitutional law only strengthens this sense of motion. This image is a *dynamic* metaphor, one which is to a large extent conceptually related to the "living tree" metaphor. Like the "living tree" metaphor—which is itself cited by SEIU-West, one of the interveners in the case[267]—the bending arc conveys a sense of growth and unavoidable evolution towards progress. The metaphor and the narrative thus complement each other.

Leaving this panoramic introductory view behind, the majority opinion begins telling the story of the creation of the right to strike. It brings the readers back all the way to England at the end of the Middle Ages. At that time, the opinion tells us, workers were starting to come together to improve their conditions of employment.[268] Having petitioned the English Parliament for better wages and working conditions, the workers, we are told, quickly resorted to strikes.[269] At this point, the story seems to be going in the right direction. The right to strike, while still in its infancy, does not appear to be threatened. This is where the story enters the nineteenth century.

We learn that in nineteenth century England, strikes were eventually criminalized under the common law doctrine of criminal conspiracy.[270] They remained criminalized even as Parliament sanctioned certain forms of trade unionism in 1825.[271] The same is true, we gather, in Canada at that time.[272]

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266 *Ibid* at para 3.

267 See *Saskatchewan Federation of Labour*, *supra* note 14 (Factum of intervener SEIU-West at para 9).

268 See *Saskatchewan Federation of Labour*, *supra* note 14 at para 35.

269 See *ibid*.

270 See *ibid* at para 36.

271 See *ibid*.

272 See *ibid* at para 39.

The birth process has slowed down. Its path toward the story's anticipated steady state has been obstructed, at least momentarily, by an obstacle: the criminalization of the right to strike. At this stage, we (the audience for the decision) might feel disappointed. There is a great chance, indeed, that as we heard the story of the struggle unfold we have found ourselves rooting for the right to strike. As Linda Edwards writes, "when we watch someone [or, in this case, an idea] attempt something difficult, we almost automatically want them to succeed."[273]

This obstacle, however, was not enough to halt the birth entirely. The Court informs the readers, reassuringly, that the "legislative settlement" of the 1870s marked, in England, the end of the threat of criminal sanctions for all behaviours associated with industrial actions, to the exception of violent ones.[274] Likewise, back in Canada, the "acceptance of the crucial role of strike activity led to its eventual decriminalization."[275] Canada's removing of the criminal prohibition against collective action began in 1872, the Court tells us, as the federal parliament enacted the Canadian *Trade Unions Act*.[276] By 1892, "the taint of criminal liability" had finally been lifted from all trade unions by way of legislative reforms.[277] The birth process can finally resume.

The pace of the story now quickens; in a single sweep, the readers are transported thirty years later in time, to the United States of the Great Depression, where we witness the adoption of the *Wagner Act*.[278] The model of labour relations it introduced, we learn, eventually came to inspire legislative reforms across Canada. Finally recognizing the essential need for workers to have a say in the regulation of their workplaces, both the federal and provincial parliaments offered the labour movement what it "had been fighting for over centuries" and what it so far had access to only through the use of strikes—"the right to collective bargaining with employers."[279] With this, the right to strike is seemingly entering a brand new era. It has, so to speak, reached adolescence. Limits imposed on the right to strike during this period simply sought to postpone the use of

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[273] Edwards, *supra* note 13 at 898.

[274] See *Saskatchewan Federation of Labour*, *supra* note 14 at para 36.

[275] *Ibid* at para 39.

[276] SC 1872, c 30.

[277] *Saskatchewan Federation of Labour*, *supra* note 14 at para 39, citing George W Adams, *Canadian Labour Law*, 2nd ed (Aurora: Canada Law Book, 1993) (loose-leaf updated 2014, release 50) at para 1.80.

[278] See *ibid* at para 42, discussing 29 USC §§ 151–69 (1935).

[279] *Saskatchewan Federation of Labour*, *supra* note 14 at para 42.

strikes until the exhaustion of all other settlement mechanisms.[280] They only made the right to strike more mature, less unpredictable.[281] They did not pose a threat to its very existence.

It is worthwhile, at this point of the story, to take a closer look at the language employed by the Court, for it offers a window into its thinking. The Court writes, for instance, that "it has long been recognized that the ability ... to strike ... is an essential component of the process through which workers pursue collective workplace goals."[282] It also speaks, some paragraphs later, of the "inevitability of the need for the ability of employees to withdraw services collectively."[283] This leads the Court to conclude, ultimately, that while striking "has variously been the subject of legal protections and prohibitions, [this] ability of employees ... has long been essential to meaningful collective bargaining."[284] What transpires, from these few lines, is a sense of inevitability and inescapable progress, in sum, of evolution.

The story then moves, in a somewhat less linear fashion, nearer to the present day. This period begins, in a stark contrast with the optimism of what came just before, with the disappointment of the *Alberta Reference.*[285] The majority of the Court decided, in this 1987 case, that freedom of association, guaranteed under the *Charter,* protected neither the right to collective bargaining nor the right to strike. In an instant, everything that has been done so far seems doomed.

One lone, dissonant voice can nevertheless be heard through the fog. It is that of Chief Justice Dickson, who, in a manner reminiscent of Juror 8 in Reginald Rose's teleplay *Twelve Angry Men*, courageously stands his ground in the face of adversity and defends tooth and nail the right to strike.[286] His dissenting reasons in this case, we are told, "were influential in the *development* of the more 'generous approach' [to section 2(d)] in the recent jurisprudence."[287] By this turn of phrase, the opinion posits Chief Justice Dickson as the voice of reason, as an oracle of things to come and things as they should be, at least within this particular birth story narra-

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280 See *ibid* at para 45.

281 See *ibid* at paras 43–44.

282 *Ibid* at para 46.

283 *Ibid* at para 50.

284 *Ibid* at para 51.

285 *Supra* note 264.

286 See Reginald Rose, *Twelve Angry Men* (New York: Penguin Books, 2006).

287 *Saskatchewan Federation of Labour*, *supra* note 14 at para 33 [emphasis added]. It should be noted that Justice Wilson concurred with the reasons of Chief Justice Dickson.

tive. By naming the dissenting Justice and recalling his struggle,[288] the opinion allows us to empathize with a main character in the story, to "understand [his] goals, and share some of [his] frustration."[289] Just as we were meant to root for the right to strike, we are now likely hoping for the dissenter's vindication.

The story then continues down into its last stretch. The narrative pace at this point is steady. Beginning with *Dunmore v. Ontario*,[290] we witness the growth of the right to collective bargaining, decision after decision.[291] In *Health Services and Support v. BC,* the Court finds that the guarantee of freedom of association includes "the right of employees to associate in a process of collective action to achieve workplace goals."[292] In *Ontario (AG) v. Fraser,* the Court further defines the right to collective bargaining as requiring a "process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith."[293] Then, in *Mounted Police Association of Ontario v. Canada (AG)*, the Court holds that employees must, in this process, be provided with "a degree of choice and independence sufficient to enable them to determine and pursue their collective interests."[294] As the story unfolds, the readers can almost see the Court shaping each new facet of the right.

The story ultimately brings us to the case at hand. So far, each part of the guarantee of freedom of association has been added except one: the formal recognition of the constitutional status of the right to strike. However, this last part does not call for the invention of an entirely new right.[295] To listen to a "birth" story is in a sense "to have already imagined the fully developed [right] the characters are creating."[296] In this perspective, the right to strike already exists; "[i]t remains only to bring it out of our minds and onto the pages of an opinion."[297] The constitutional recognition of this right is presented here as nothing but the normal conclusion of the unavoidable process in which the law has been engaged for centu-

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288 See *ibid* at paras 33, 55, 59–60, 62, 84, 94.

289 Edwards, *supra* note 13 at 894.

290 2001 SCC 94.

291 Edwards, *supra* note 13 at 893.

292 2007 SCC 27 at para 19.

293 2011 SCC 20 at para 2, McLachlin CJ and LeBel J.

294 2015 SCC 1 at para 5, McLachlin CJ and LeBel J.

295 See Edwards, *supra* note 13 at 896.

296 *Ibid.*

297 *Ibid.*

ries.[298] But, for this process to be complete, the Court must act. It must not stand in the way of growth.

Then comes the conclusion of the story. The ability to strike "is ... and has historically been, the 'irreducible minimum' of the freedom to associate in Canadian labour relations."[299] In the Court's view, the historical and jurisprudential landscape compellingly suggests that section 2(d):

> [H]as arrived at the destination sought by Dickson C.J. in the *Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement.[300]

With this, the story has reached its anticipated steady state. The readers can now relax. The right to strike has at last been constitutionally recognized. By invoking the bending arc of constitutional law, and recounting step by step the laborious evolution of the right to strike over the years, the Court made its entrenchment appear natural, even inevitable. Both the dynamic metaphor and the birth story employed in the opinion support the evolutive interpretation ultimately adopted by the Court. This is a perfect illustration of the framing power of metaphors and narratives in law.

2. Static Metaphors and "Rescue" Stories

a. Uncovering the Narrative: The Endangered *Constitution*

Static metaphors, like the "constitutional architecture" in particular, speak to the immovable foundation, the elementary infrastructure, of the Canadian Constitution. The narrative implied in this particular type of constitutional metaphor is that of an *endangered* Constitution. The *endangered* Constitution is pictured as an object vulnerable to damage, as an edifice in danger of erosion, one that urgently requires protection from looming harm. However strong its footing may seem, it is in constant need of defense in the face of imminent dangers. In this particular scenario, the Court is more often than not portrayed as the keeper, custodian, and guardian of the Constitution.[301] It is the last defense against the evil

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298 See *ibid* at 909.

299 *Saskatchewan Federation of Labour*, *supra* note 14 at para 61.

300 *Ibid* at para 75.

301 See e.g. Guénette, *supra* note 11 at 60; Kate Glover, "The Supreme Court in a Pluralistic World: Four Readings of a *Reference*" (2015) 60:4 McGill LJ 839 at 849.

forces of change; the ultimate bastion against the erosion of Canada's fundamental law.

This narrative of endangerment suggests that certain portions of the Constitution should remain untouched, unmoved by the tide of social attitudes fluctuating over time. The need for preservation—and by extension for legislative and judicial restraint—might arise when the portion of the Constitution at issue embodies a historical compromise, one that is still regarded as essential to the nation's existence. It may also stem from the textual clarity of a provision or from the perceived importance that the provision held in the eyes of the framers.[302] The narrative of endangerment thus requires that constitutional evolution be constrained, and that it must always be anchored in the past. As such, it might well be the most effective when it comes to upholding the current state of the law.

The narrative of the *endangered* Constitution is strongly reminiscent of the archetypal plot structure known in narrative theory as the "rescue" story or "overcoming the monster." As was explained earlier, this common narrative structure often begins in an initial state of stability.[303] As the action unfolds, the initial stability is either fundamentally altered by evil forces seeking domination and chaos, or it is at risk of being so disturbed.[304] In this scenario, we follow the hero's struggle to prevent or resolve the disequilibrium. Here, the danger comes from the possible erosion of fundamental features of the Constitution, a weakening of our country's foundations that the protagonist—generally the Court—will do everything to avert. The thing that matters most in telling this story is that the Constitution be saved from demise.

Here again, the conceptual interrelation between the *static* constitutional metaphors and the "rescue" story translates to a tendency on the part of jurists to employ them in a complementary fashion. We will look at the opinion of the Supreme Court of Canada in the *Senate Reform Reference* to illustrate how judges, like advocates, adapt the story they tell of the Constitution in light of their accompanying metaphors.[305]

b. Case Study: Senate Reform and the Rescue of Canada's Architecture

In this landmark 2014 reference, the Court was called upon to examine the validity, under the Canadian Constitution, of proposals on the part of the federal government to either reform the Senate (limits on ten-

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302 See e.g. Jackson, *supra* note 131 at 958; Newman, *supra* note 12 at 486, 494.

303 See Edwards, *supra* note 13 at 887.

304 See *ibid* at 899.

305 *Supra* note 15.

ure, changes to the nomination process, and so forth) or to abolish it. The beginning of the opinion presents Canada's current political structure as the narrative's steady state. As the opinion tells us at the outset, "[t]he Senate is one of Canada's foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation."[306] Reading these first few lines, the readers cannot help but feel an overall sense of stability, order, and harmony.

Rapidly, however, the readers are told that danger is looming over this stable state of affairs. "[F]rom its first sittings," the opinion reads, "voices have called for reform of the Senate and even, on occasion, for its outright abolition."[307] While born out of consensus, the Senate

> [R]apidly attracted criticism and reform proposals. Some felt that it failed to provide "sober second thought" and reflected the same partisan spirit as the House of Commons. Others criticized it for failing to provide meaningful representation of the interests of the provinces as originally intended, and contended that it lacked democratic legitimacy.[308]

Thus, the call for reforms, even for the Senate's outright abolition, constitutes the complicating event of the story; its challenge to the established order gives rise to the narrative's conflict.

With its introduction, the Court also informs the readers of the theme of the story it is about to tell: a story of the survival of one of Canada's foundational political institutions, of its enduring existence in the face of repeated assaults. The abolition of the Senate would, the Court warns us, "fundamentally change Canada's constitutional structure."[309] The stakes, as the readers begin to understand, are high. It should be noted at this point that the danger of which the Court speaks seems, contrary to what one may think, not to be the reform itself, but rather the way it is conducted. In other words, the danger feared by the Court lies not so much in change itself, as it does in unilateral and unconsidered change.

While the characters of the story are often played by the parties to litigation, they may also include institutions and concepts.[310] In this narrative, the Senate is the character—or thing—that needs protection from these attacks. In a "rescue" story, the thing or character to be protected is generally of great value and importance to maintaining the steady state. It often holds a hidden power, one which, if safeguarded from harm,

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306 *Ibid* at para 1.

307 *Ibid* at para 1.

308 *Ibid* at para 17.

309 *Ibid* at para 3.

310 See Edwards, *supra* note 13 at 890.

might save or transform us all.[311] What is actually at stake, in Edwards's words, is "much bigger than the safety of one small character"[312]—it is the safety of each and every one of us. Here, the Court reminds us in turn of the place the Senate occupies in the architecture of our Constitution,[313] of its role as a legislative body of "sober second thought,"[314] and of the fact that it provides representation both to the provinces and to groups that remain under-represented in the House.[315]

The hero and antagonist of the story, however, appear to remain in the shadows at this point. On the one hand, who are these nameless, faceless "voices" calling for the abolition of the Senate? Who are they that are questioning the status quo? On the other hand, who is the hero that could save this "foundational" institution from the peril in which it finds itself? As the story moves on from this hypothetical peril to the first actual encounter with danger, the identity of the main characters is gradually revealed to the readers:

> In 1978, the federal government tabled a bill to comprehensively reform the Senate by readjusting the distribution of seats between the regions; removing the Senate's absolute veto over most legislation and replacing it with an ability to delay the adoption of legislation; and giving the House of Commons and the provincial legislatures the power to select Senators.[316]

The tension at this point of the story is high. Core elements of the Senate's structure are at risk of being profoundly altered by a unilateral action on the part of the federal government. The federal government—the agent responsible for this one-sided assault on the integrity of the Senate—is the antagonist in this story. Because of its role in our legal order and in contrast to the role of an advocate, the Court cannot cast the federal government—the antagonist—as a monster. Here, the sense of danger thus comes not from the antagonist's appearance, but rather from its behaviour.

Fortunately, as the action unfolds, it becomes clear to the readers that all is not lost. Help, as they say, is on the way: "[t]he bill was not adopted and, in 1980, this Court concluded that [the federal parliament] did not

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311 See *ibid* at 902.

312 *Ibid.*

313 See *Senate Reform Reference*, *supra* note 15 at paras 54, 59–60, 70, 77, 97.

314 See *ibid* at paras 15, 52, 54, 56, 60, 63, 70, 79.

315 See *ibid* at paras 15–16.

316 *Ibid* at para 19.

have the power under the Constitution as it then stood to unilaterally modify the fundamental features of the Senate or to abolish it."[317]

The worst has been avoided, at least for now. The hero, which we now understand to be either the Constitution or the Court, has prevailed in its first encounter with danger, ensuring that the vulnerable character, the Senate, was left unharmed. This, however, is not the end of the story. It would have been too easy. Such events, where the hero appears to "intervene and superficially and momentarily still the trouble," are referred to in narrative theory as *false* or *premature endings*.[318] They are, in the words of Philip N. Meyer, "merely preparatory interlineations, biding time, allowing for the tension to build" before returning to the "true" confrontation.[319]

The true confrontation—and the ensuing resolution of the conflict—happens at the climax stage. In legal writing, one should generally set the climax in the present day, for it is at this point (the litigation) that the tension is at its highest and that something remains to be done in the pursuit of the story's goal. It is at this particular stage that the main characters are at the "height of peril"[320] and the readers hope, with a sense of mounting impatience and anxiety, for a return to a steady state. Will the hero(es) be able once again to protect the Senate's integrity?

Moreover, the climax of the story can only occur in the legal analysis. Indeed, no conflict can be resolved in the fact section of either a factum or a judicial opinion, for the conflict necessarily is, in this particular context, a legal one.[321] There is thus a need, if the conflict is to be resolved, to clear a pathway towards its legal solution; in other words, to set out the relevant legal principles. The Court in fact does clear a pathway in the rest of the opinion, illuminating the way with what seems a magic amulet: "constitutional architecture".

In the final act of this story, the Court finds that most of the proposed changes could not be imposed unilaterally by the federal parliament; rather, they would require the consent of the Senate, the House, and the legislative assembly of at least seven provinces representing fifty per cent or more of the population.[322] The Court takes great pains to explain that this requirement stems from the fact that the proposed reforms would af-

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317 *Ibid*.

318 *Storytelling for Lawyers* (Oxford: Oxford University Press, 2014) at 24.

319 *Ibid* at 24, 149.

320 Chestek, *supra* note 72 at 149.

321 See *ibid* at 148–49.

322 See *Senate Reform Reference*, *supra* note 15 at para 3.

fect the very architecture of the Constitution. The Court holds, first, that the implementation of senatorial elections would fundamentally alter the Constitution's architecture, as it would modify the "specific structure"[323] of the federal parliament. Further, insofar as senatorial elections would give the Senate the necessary democratic legitimacy to systematically block the House, they would also go against its very "constitutional design."[324] In this perspective, the fact that Senators are appointed and not elected itself "shapes th[is] architecture."[325] Thus, no changes affecting the fundamental nature and role of the Senate could ever be achieved by the federal parliament acting alone, for the Senate is a "core component of the Canadian federal structure of government."[326]

Likewise, the Court finds that the abolition of the Senate would "fundamentally alter our constitutional architecture," in that it would eliminate the bicameral form of legislature giving "shape" to our Constitution.[327] While the framers might have considered future reforms for the Senate, they nonetheless assumed that the evolution of our political system would be "characterized by a degree of continuity," that change would remain "incremental", and that "core institutions would remain firmly anchored in our constitutional order."[328] Thus, much to the relief of the readers, the Court has ensured once again the defence of our legal order. Here again, the outcome reached by the Court appears unavoidable in light of the story we have been told: that of the Senate's rescue.

Conclusion

This article has sought to shed light on the fundamental role that metaphors and stories play in shaping how we talk, think, and argue about our Constitution. It has argued that Canadian constitutional law is fashioned, to a large extent, by two competing types of metaphors: *dynamic* and *static*. Prime examples of these can be found, as this article has sought to show, in the influential metaphors of the "living tree" and "constitutional architecture". Each of these categories of metaphor stands for a different view of the Constitution and, as such, influences the types of stories we tell about it. Each contains, as this article has endeavoured to show through its case studies, the seed of common plot structures, those of "birth" and "rescue".

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[323] *Ibid* at para 55.

[324] *Ibid* at para 60. See also *ibid* at paras 63, 70.

[325] *Ibid* at para 59.

[326] *Ibid* at para 77.

[327] *Ibid* at para 97.

[328] *Ibid* at para 101.

One of the central lessons this article has sought to convey is that Canadian jurists could benefit significantly from the insights of "narrative scholarship". These insights could provide a very different analytical perspective for academics when studying constitutional case law. Narrative analysis allows us, as these case studies have illustrated, to uncover the common beliefs and preconceptions at play in the law—things that otherwise tend to remain unseen and unconscious. It serves to unearth, in other words, the "narrative transactions" in legal discourse. Lawyers could also benefit from an increased awareness of how narratives and metaphors shape our thinking. It might well be the case that, if advocates organized their facta and oral pleadings in light of the foundational metaphors and accompanying archetypal stories discussed here, their submissions might prove more persuasive and their arguments more cogent. As jurists, we would be wise to pay closer attention to metaphor and narrative, for they deeply influence not only how we think, speak, and argue, but also how we make decisions about the law.