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

by

Étienne Cloutier

A thesis submitted in conformity with the requirements
for the degree of Master of Laws

Faculty of Law
University of Toronto

© Copyright by Étienne Cloutier (2018)

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

Étienne Cloutier

Master of Laws

Faculty of Law
University of Toronto

2018

Abstract

This essay sheds light on the fundamental role that metaphors and narratives play in shaping how we talk, think, and argue, about the Constitution. Specifically, it makes the case that Canadian constitutional law is fashioned, to a large extent, by two competing types of metaphors: *dynamic* and *static*. Each of these categories, the essay seeks to show, stands for a different conception of the Constitution and, as such, influences the types of stories we tell about it. Each sustain, as the two case studies illustrate, dominant narratives about the Constitution, narratives whose structure essentially corresponds to the archetypal *birth* and *rescue* stories. The idea behind this essay is that, insofar as narratives and metaphors influence our cognition and help us reason about ideas and concepts—a great part of our work as jurists—we would be wise to pay attention to them.

Acknowledgments

This project would not have been possible without the help of many. I am greatly indebted to my supervisor, Professor Lorraine Weinrib, for introducing me to the wonders of narrative scholarship, and for her insightful inputs, remarks, and guidance throughout the year. Her encouragement, the deep confidence and genuine interest she showed in my project, and the great care with which she read versions of this thesis, have been invaluable to me. I would like to thank my SJD advisor, Haim Abraham, whose comments during the initial stages of this process helped me clarify the goal and scope of my thesis. I am also deeply grateful to Justice Nicholas Kasirer for being a mentor, and for encouraging me to undertake graduate studies away from home. I must also thank my parents, Anne and Ronald, for having shaped my critical sense and instilled in me the love of the law. A sincere word of recognition is also due to Jean Leclair and to the late François Chevrete; all I know about constitutional law I have been lucky to learn from these outstanding teachers. Last but by no means least, I would like to express my deepest gratitude to my wonderful wife, Léa, for encouraging me to pursue graduate studies, for believing that I could do this from the start, and for being there every step of the way, always.

Table of Contents

Acknowledgments	iii
Table of Contents	iv
Introduction.....	1
1. Narrative in the Law: A Review of the Literature.....	5
1.1 Evolution and Current State of the Field in the United States and Canada	7
1.1.1 Foundational Role of Narratives and Metaphors in Law	7
1.1.2 The Role of Narrative in Traditional Legal Discourse	9
1.1.3 Narrative and Metaphors as a Tool for Lawyering	9
1.2 Where Does This Leave Us? Situating The Essay	10
2. Thinking About the Law: Cognitive Research’s Take on Narratives and Metaphors.....	11
2.1 The Hidden Power of Metaphors.....	12
2.2 Schemas, Metaphor, and Narrative.....	16
3. A Lawyer’s Guide to Narrative Theory: Key Concepts for the Study of Law.....	21
3.1 The Storyteller’s Starter Kit.....	21
3.2 Building the Plot.....	26
3.3 Common Archetypes and Stock Stories	30
3.3.1 Stories of “Birth” and “Creation”	32
3.3.2 Stories of “Rescue” and “Monsters”	36
3.4 Narrative and Metaphor in the Law: What We Have Learned So Far	39
4. Metaphors and Stories of the Canadian Constitution	40
4.1 A Tale of Two Metaphors: Of Living Trees and Architectures	40
4.1.1 The “Dynamic” Metaphors	45
4.1.2 The “Static” Metaphors	59
4.2 Stories We Tell of the Constitution: From ‘Birth’ to ‘Rescue’	71
4.2.1 Dynamic Metaphors and Birth Stories	73
4.2.2 Static Metaphors and Rescue Stories	81
Conclusion	88
BIBLIOGRAPHY	89

“[M]an is the storytelling animal...”

—Salman Rushdie, *Luka and the Fire of Life*

"Sometimes reality is too complex. Stories give it form."

—Jean-Luc Godard

***“Storytelling reveals meaning without
committing the error of defining it.”***

—Hannah Arendt

Introduction

Complex ideas are easier understood by the mind when presented in the form of stories and metaphors.¹ It is thus not surprising to see this fact illustrated in disciplines where such ideas occupy an important place, like law, philosophy or political science. The metaphor of ‘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.² This idea is at the heart of modern constitutionalism, for it shows how political authority can be linked to individual self-interest and rational consent.³ However useful it might be to our political life and our understanding of it, this idea is not to be taken literally, or as an accurate historical account.⁴ If we still hold on to it, it is rather because it helps us comprehend abstract concepts like that of ‘constitution’ or ‘society’. It serves as an interpretive framework to make sense of ideas and events. And like all conceptual frames, 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 great 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, this has been the aim of a number of legal scholars.⁶ The extensive work that has resulted from this intellectual endeavour, this commitment to looking at law not only as rules and policies but

---

¹ 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 Willamette L Rev 255, p. 261.

² Ann Cudd and Seena Eftekhari, “Contractarianism”, in *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.), (online : plato.stanford.edu/archives/spr2017/entries/contractarianism/).

³ *Ibid.*

⁴ *Ibid.*; See Felix Cohen, “Transcendental Nonsense and the Functional Approach”, (1935) 35 Colum L Rev 809, p. 836: “Hobbes never refers to the state of nature as an actual historical era, at the end of which men came together and signed a social contract. The state of nature is a stage in analysis rather than a stage of history.”; See, also, Jeremy Webber, “The Grammar of Customary Law”, (2009) 54 McGill LJ 579, at p. 613.

⁵ Sheppard, *supra* note 1, p. 260.

⁶ See, for a general bibliography of the field, Christopher Rideout, “Applied Legal Storytelling: A Bibliography”, 12 Leg Comm & Rhetoric: JALWD 247 (2015), p. 249.

also as stories⁷, is what forms the field of ‘narrative scholarship’. 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, in the United States, the creation of journals devoted mainly to such question, the publication of books and the proliferation of academic conferences on the topic, 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 argumentative weight of storytelling in judicial opinions⁸, the poetics of legal doctrine⁹, the subjective character of narration in judgments¹⁰, and the parallels between Canada’s literary and constitutional history.¹¹ Others have taken up the task, closer to the one this essay deals with, of studying the artistic dimensions of the *constitutional architecture* metaphor¹², or of showing how this overarching concept can, if employed correctly, easily coexist with the notional *living tree*.¹³ Yet, these few instances are, in the Canadian landscape, more of the exception than the rule.

It should also be noted that most of what has been written here in regard to narrative has focussed primarily on the explicit use of this device in traditional legal discourse. Much less attention has been given to such things as the cultural narratives that shape the development of the law in Canada or to the persuasive power of storytelling in legal practice. Likewise, works about metaphors in law —such as the “living tree” or the “constitutional architecture”— have mostly been doctrinal, tracing the use of particular ones through time, in the same way that we study the evolution of a legal principle in case law. Questions about why these devices have exerted such great influence on the development of the law, and why they remain, to this day, so deeply ingrained in our collective legal imagination, have usually been left unanswered, or to be

---

⁷ Paul Gewirtz’s “Narrative and Rhetoric in the Law”, in Brooks, Peter and Gewirtz, Paul (eds.), *Law’s Stories: Narrative and Rhetoric in the Law* (New Haven, CT: Yale University Press, 1996), p. 2.

⁸ Greig Henderson, *Creating Legal Worlds : Story and Style in a Culture of Argument*, (Toronto ; Buffalo ; London : University of Toronto Press, 2015).

⁹ Sylvio Normand, « Quelques observations sur la poétique de la doctrine », (2017) 58:3 C de D 425.

¹⁰ Daniel Del Gobbo, “Unreliable Narration in Law and Fiction”, (2017) 30 Can J L & Jurisprudence 311.

¹¹ Ed Morgan, “Sunshine Cases of a Little Constitution”, (2009) 43:3 Journal of Canadian Studies 146.

¹² Dave Guénette, « L’architecture constitutionnelle – Dimensions artistiques d’une construction juridique », (2017) 58 C de D 33.

¹³ Warren J. Newman, “Of Castles and Living Trees: The Metaphorical and Structural Constitution”, (2015) 9 J Parliamentary & Pol L 471.

taken up by others. This is precisely the kind of questions that, in keeping with the push towards “narrative awareness”¹⁴, this essay seeks to explore in the context of Canadian constitutional law.

The general aim of this essay is to shed light on the fact that metaphor and narrative play a central role in shaping how we talk, think, and argue about our Constitution. Specifically, it makes the case that two competing types of metaphors —termed *dynamic* and *static*— largely fashion Canadian constitutional law, and that the influential metaphors of the *living tree* and of the *constitutional architecture* represent prime examples of these central conceptual categories. These two types of metaphors, it will be shown, convey different conceptions of the Constitution and, as such, influence the kind of 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. It will then explore the implications of this finding for scholars and lawyers.

The essay is divided into four parts. The first one provides a broad picture of the field of “narrative scholarship”, with a view to situating the present endeavour within it. The second part focusses on research, in cognitive science and narrative theory, with regard to how metaphors and narratives shape our cognition. The third part reviews the basic building blocks of fiction-writing and shows how each of these elements translates into legal writing. It also offers an overview of two plot structures commonly used in law: *birth* and *rescue* stories. The fourth —and last— section is devoted to our two-pronged analysis. First, it introduces the *dynamic* and *static* metaphors of Canadian constitutional law, with a focus on the *living tree* and the *constitutional architecture*, two prime examples of these categories. Second, it explores, through a narrative study of two recent decisions of the Supreme Court of Canada, namely *Saskatchewan Federation of Labour* and the *Senate Reform Reference*, how these two types of metaphors influence the kinds of stories we tell of the Constitution. Specifically, it shows how these two core categories sustain dominant narratives about the Constitution, narratives whose structure essentially corresponds to the archetypal *birth* and *rescue* stories. Throughout this demonstration, the essay considers what this finding means for constitutional scholars, and jurists generally.

---

¹⁴ This turn of phrase is borrowed from Linda Edwards, “Once upon a Time in Law: Myth, Metaphor, and Authority”, (2010) 77 Tenn L Rev 883, at 915.

One of the general theme of this essay, and hopefully one of the lessons readers will take away from it, is that Canadian constitutional lawyers and scholars would greatly benefit from the insights offered by “narrative scholarship”. On the one hand, it could serve academics to look at recent case law in the field through this lens, as it provides a novel analytical perspective on the topic, one that calls attention to the beliefs and preconceptions that constrain the setting within which jurists argue. By uncovering the “narrative transactions” performed in legal briefs and judicial opinions, narrative analysis sheds light on what generally remains unseen and unconscious in law.¹⁵ Our case studies, which will seek to identify in two recent decisions of the Supreme Court the dominant narratives and metaphors at play, and the conceptual structure that connects them, offer a great example of the explanatory power of narrative analysis. On the other hand, constitutional lawyers could also profit from a better awareness of the narratives and metaphors that shape our thinking, for it could notably help them argue more persuasively. Storytelling is, as will be clear by the end of the essay, an important part of the practice of law.

---

¹⁵ Linda Berger, “The Lady, or the Tiger - A Field Guide to Metaphor and Narrative”, (2011) 50 Washburn LJ 275, p. 279.

Chapter 1

Narrative in the Law: A Review of the Literature

The year 1973 marks the publication, by American legal scholar and literary critic James Boyd White, of his seminal book *The Legal Imagination*¹⁶. Central to this book was the idea that law is not only the product of binding authority, as the Formalists would suggest, or the result of power and policy combined, as the Realists would claim, but rather the product of our culture.¹⁷ For many, the publication of Boyd White's book marks the inception of the scholarly movement known as 'Law and Literature'¹⁸, which focusses on the mutability of meaning in texts and the interdisciplinary connection between legal and literary discourse. Another milestone in narrative thought came ten years later, in 1983, with the publishing of Robert Cover's *Nomos and Narrative*¹⁹. One of the central lessons of this essay was that the "creation of legal meaning... takes place through an essentially cultural medium" and that no set of legal institutions, principles or rules, ever exists "apart from the narratives that locate it and give it meaning."²⁰

Two distinct trends of scholarship are embraced by the 'Law and Literature' movement: law *in* literature, and law *as* literature.²¹ The first trend is concerned with the representations of law, and legal practitioners, in fiction.²² In studying literary works —whether prose, poetry or drama— containing legal themes or practices, this trend seeks to "illuminate the legal world"²³. The idea is that literature's narrative particularity —"its focus on kinds of human understanding beyond reason alone, its capacity for provoking an empathetic understanding of others' inner

---

¹⁶ James Boyd White, *The Legal Imagination*, (Boston : Little, Brown, 1973).

¹⁷ Linda Edwards, "Speaking of Stories and Law", (2016) 13 Leg Comm & Rhetoric: JALWD 156, p. 160.

¹⁸ Christopher Rideout, "Applied Legal Storytelling: A Bibliography", 12 Leg Comm & Rhetoric: JALWD 247 (2015), p. 249.

¹⁹ Robert M. Cover, "Foreword: Nomos and Narrative", (1983) 97 Harv L Rev 4, p. 11.

²⁰ *Ibid.*, p. 4.

²¹ Binder, Guyora & Weisberg, Robert, *Literary Criticisms of Law*, (Princeton, NJ : Princeton University Press, 2000), p. 3; Gewirtz, *supra* note 7, p. 3.

²² Binder & Weisberg, *supra* note 21, p. 3.

²³ Gewirtz, *supra* note 7, p. 3.

life”²⁴— can help lawyers understand the human condition and the law's effect on it. While it can provide great insights for the study of law, this approach is not the one favoured in this essay.

The second trend, ‘law *as* literature’, also loosely referred to as ‘narrative scholarship’ or ‘legal storytelling’, analyzes law and legal writings like we would analyze literary works.²⁵ Specifically, it studies the law through the lens of literary theory, with its tools, techniques, and principles.²⁶ The trend seeks to better understand, within this particular frame, “the writing, though, and social practice” that make up legal systems.²⁷ It also attempts to explain the impact of particular literary devices, such as metaphors and narratives, on our cognition. With the deeper understanding that these tools provide, scholars can look for ways of reforming the law.²⁸ The idea behind this trend is that both law and literature “attempt to shape reality through language, use distinctive methods and forms to do so, and require interpretation”²⁹. There is, thus, much to learn from highlighting how analogous problems are treated in each discipline³⁰. The present essay shares the underlying premises and uses the methods of this second trend.

Over the last thirty years, this ‘turn to narrative’³¹ in legal scholarship has grown stronger in the United States, leading to the proliferation of conferences, books, and journals on the topic. The scholars that identify with this movement have all, in their own particular ways, set out to look at law not only as rules and policies, but also as stories.³² They have endeavoured to become more aware of how the development of the law is shaped by cultural myths and archetypes, how stories affect our cognition, our reasoning, and how narratives are powerful tools of persuasion.

The aim of the following section is to offer an overview of the state of the field of “narrative scholarship”. Focusing initially on the United States, where the field originates, it

---

²⁴ Gewirtz, *supra* note 7, p. 3. See, also, Lewis H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority*, (University Park, Pa: Pennsylvania State University Press, 1995), at p. 2.

²⁵ *Ibid.*, p. 4.

²⁶ Binder & Weisberg, *supra* note 21, p. 3.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Gewirtz, *supra* note 7, p. 4.

³⁰ *Ibid.*

³¹ This expression, which itself is metaphorical, is borrowed from Gewirtz, *supra* note 7, p. 13.

³² *Ibid.*, p. 2.

draws a map of the existing literature. This conceptual map is inspired by previous attempts, by scholars in the field, to organize the literature in a coherent manner. This exercise is useful to identify the main trends of the field and to situate the present essay within it. It also has the benefit of making explicit the aims and underlying assumptions of “narrative scholarship”. This section will, moreover, provide some examples of Canadian scholarship from these three trends.

1.1 Evolution and Current State of the Field in the United States and Canada

In *Speaking of Stories and Law*, Linda Edwards offers a conceptual map of narrative scholarship.³³ She classifies the current literature into three broad trends, based on the topics addressed and the perspective adopted. These trends are concerned with the (1.1.1) foundational role of narrative, (1.1.2) its role in traditional legal discourse, and (1.1.3) its use as a tool for lawyering.³⁴ For the purposes of this essay, these categories are understood to include the study of metaphors, something which is only implicit in Edward’s typology. To understand the uses of this approach and to situate this essay within the field, a few words about the trends are in order.

1.1.1 Foundational Role of Narratives and Metaphors in Law

The first trend is concerned with the *foundational* role of narrative, that is its role as a “universal preconstruction”³⁵. Scholars in this line of work see narrative as “step one of law creation”, as an unacknowledged frame of reference that determines, at least in part, legal outcomes.³⁶ The central idea, for these scholars, is that law is produced by “commonly shared narratives and other cultural frames that form the soil from which all legal principles grow.”³⁷

---

³³ Linda Edwards, “Speaking of Stories and Law”, (2016) 13 Leg Comm & Rhetoric: JALWD 156.

³⁴ For a somewhat different take on the subject, see Stephen Paskey, “The Law is Made of Stories; Erasing the False Dichotomy Between Stories and Legal Rules”, (2014) Leg Comm & Rhetoric: JAWLD 51.

³⁵ L. Edwards, *supra* note 33, p. 159.

³⁶ *Ibid.*, p. 163.

³⁷ *Ibid.*, p. 160.

This trend includes the work of critical theorists, like Delgado and Matsuda³⁸, which focusses on stories of “outsider” groups, particularly racial/religious minorities and women. One of the central aims of this trend was to show how storytelling, in offering a distinctively vivid representation to particular “voices, perspectives, and experiences of victimization traditionally left out of legal scholarship and ignored when shaping legal rules”, has a distinctive power “to challenge and unsettle the legal status quo”³⁹. By contrasting the narratives of power with the narratives of oppression, these scholars have sought to unearth the hidden narratives behind the law⁴⁰, to reveal the dominant cultural myths that produce it and account for it being presented as neutral and objective.⁴¹ It also encompasses recent work that draws on cognitive research to study the law’s narrative pre constructions⁴², that is the cultural myths, metaphors, and narratives that frame how people, notably those in power, see the world.⁴³ These types of work, which might seem unrelated, all explore the “narrative roots of human decision-making... in law”⁴⁴.

In Canada, Hugo Cyr’s *Conceptual Metaphors for an Unfinished Constitution*⁴⁵ provides a great example of scholarship focussed on the *foundational* role of narrative in law. Drawing on Lakoff and Johnson’s seminal work on conceptual metaphors, the author endeavours to unearth the dominant narrative in the discourse of the Supreme Court over judicial constitution-making. The conclusion reached by the author is that this dominant narrative is that of *an unfinished Constitution*, a pervasive narrative sustained by various interconnected conceptual metaphors.⁴⁶

---

³⁸ Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative”, (1989) 87 Mich L Rev 2411; Mari Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparation”, (1987) 22 Harv CR-CLL Rev 323; Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story”, (1989) 87 Mich L Rev 2320.

³⁹ Gewirtz, *supra* note 7, p. 5: “[S]tories, and the empathy they often prompt, can increase the range of understandings among listeners... [W]hen the listeners are judges or other decisionmakers who are from insider groups or have an insider’s perspective, outsider stories can add fresh and valuable knowledge.”

⁴⁰ L. Edwards, *supra* note 33, p. 161. See, also, S. Paskey, *supra* note 34, p. 55.

⁴¹ *Ibid.*

⁴² Steven Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago; London: University of Chicago Press, 2001).

⁴³ L. Edwards, *supra* note 33, p. 160.

⁴⁴ *Ibid.*, p. 162.

⁴⁵ Hugo Cyr, “Conceptual Metaphors for an Unfinished Constitution”, (2014) 19 Rev Const Stud 1.

⁴⁶ *Ibid.*, p. 5.

1.1.2 The Role of Narrative in Traditional Legal Discourse

The second trend focusses on the explicit role of narrative and metaphor in traditional legal discourse. It studies the express reasoning used by judges to justify their decisions and, more generally, the way that we, in the legal profession, write and speak about legal outcomes.⁴⁷ This kind of work, which includes, for example, legal writing textbooks, explores the explicit use of narrative and metaphors as a form of reasoning in traditional legal discourse.⁴⁸ This trend is less interested in the choices we make, and the legal outcomes we embrace, than it is in the discourse we put forward to justify these very choices. It will also be the case, sometimes, that this type of scholarship explores the hidden roles of narrative in the formation of analogies, rules, and principles, how, in other words, express forms of legal reasoning are constructed.⁴⁹

In the Canadian context, Warren Newman's article titled *Of Castles and Living Trees: The Metaphorical and Structural Constitution*⁵⁰ can be said to belong in this trend. This article examines some of the most influential metaphors at play in Canadian constitutional law. It does so with a view to defining the broad outlines of what the Supreme Court referred to, in the 2014 references, as the *architecture* of the Canadian Constitution. This particular metaphor, the author argues, can prove useful in the interpretation of the provisions of the Constitution, all the while respecting, if it is used wisely, the opposing —and “equally important”— *living tree* metaphor.⁵¹

1.1.3 Narrative and Metaphors as a Tool for Lawyering

The third trend is interested in the role of narrative in the lawyering task of persuasion⁵². It focusses, at all stages of the legal process, on the ways lawyers construct and frame the stories of their clients⁵³, of non-parties⁵⁴, and even of the law itself.⁵⁵ It is posited, by scholars of this

---

⁴⁷ L. Edwards, *supra* note 33, p. 162.

⁴⁸ *Ibid.*, p. 165.

⁴⁹ *Ibid.*

⁵⁰ W. Newman, *supra* note 13.

⁵¹ *Ibid.*, p. 473.

⁵² *Ibid.*

⁵³ 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; Ruth Anne Robbins, “Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s

trend, that the narrative choices of the parties can help account for the outcomes of cases, and that lawyers would benefit, in crafting persuasive briefs, from thinking about narrative strategies.

At the intersection of these last two trends is Greig Henderson's *Creating Legal Worlds: Story and Style in a Culture of Argument*⁵⁶. In this book, the literary theorist draws upon the insights of the lawyering trend in his study of appellate judicial discourse in Canada, the U.S., and the United Kingdom. Specifically, he undertakes an analysis in rhetoric of certain leading cases in order to illustrate how the discourse of judges is, not unlike that of lawyers, crafted to persuade. It is through their narrative choices, the author claims, that judges create normative universes – “the world of right and wrong within which they make their judgments – and fashion their own judicial self-images”⁵⁷. Storytelling carries, as such, significant argumentative weight.

1.2 Where Does This Leave Us? Situating The Essay

The present contribution can be thought of as belonging, in part at least, in the first trend, as it not only draws on cognitive research to explain the power of metaphors and narrative, but also in that it seeks to uncover how two foundational types of conceptual metaphors, which we have termed *dynamic* and *static*, influence and shape the way we think, talk, and argue, about the Canadian constitution. This essay could likewise be associated with the second trend, for it explores how courts use metaphors and narrative to communicate their reasoning and to justify legal outcomes. Lastly, the essay might also be said to belong, although to a lesser extent, to the third trend, insofar as it makes the incidental claim that, if advocates organized their facts and pleadings in light of these dominant conceptual metaphors and archetypal stories, their submissions might be more persuasive and their arguments more intelligible and cogent. With this broad picture of “narrative scholarship” in mind, let us now turn briefly to research, in cognitive science and narrative theory, on how metaphors and narratives impact our cognition.

Journey”, (2006) 29 Seattle U L Rev 767; Kenneth D. Chestek, “Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions”, (2012) 9 Leg Comm & Rhetoric: JALWD 99.

⁵⁴ Linda Edwards, “Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy”, 2015 Mich St L Rev 1327.

⁵⁵ L. Edwards, “Once upon a Time in Law: Myth, Metaphor, and Authority”, (2010) 77 Tenn L Rev 883, p. 884.

⁵⁶ G. Henderson, *supra* note 8.

⁵⁷ *Ibid.*, back cover.

Chapter 2

Thinking About the Law:

Cognitive Research's Take on Narratives and Metaphors

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

Historian Louis O. Mink once suggested that narrative is a “primary cognitive instrument – an instrument rivalled only by theory and metaphor as irreducible ways of making the flux of experience comprehensible.”⁵⁸ This quote provides a good entry point for the present discussion. This discussion is premised on the idea that, for us to truly grasp the role of these devices in law, it is useful to first understand the source and nature of their power, to look at the processes at work in our mind when we are told a story or asked to picture concepts in the form of images. In keeping with this, the present section reviews cognitive research about narrative and metaphor.

Our thinking is, for the most part, unconscious.⁵⁹ Much of our knowledge, furthermore, is said to be implicit.⁶⁰ “[B]oth information and understanding float beneath the surface, neither consciously acquired nor examined.”⁶¹ Our conceptual system operates like a “hidden hand” that structures how we think and how we act. It shapes, without us noticing, how we conceptualize the many elements of our experience.⁶² The fact that our implicit knowledge always informs how we perceive new events, and that, in the process, such knowledge usually remains “unexamined and... uncontested”, might well be part of the reason why it has such a “powerful pull” on us.⁶³ It might explain why narratives and metaphors which tap into this knowledge seem so persuasive.

---

⁵⁸ Louis O. Mink, “Narrative form as a cognitive instrument” in Robert H. Canary and Henry Kosicki (eds.), *The Writing of History: Literary Form and Historical Understanding* (Madison, WI: University of Wisconsin Press, 1978), pp. 129–149, 131.

⁵⁹ Linda Berger, “Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes”, (2008) 18 So Cal Interdisc LJ 259, p. 263.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*; Linda Berger, “The Lady, or the Tiger - A Field Guide to Metaphor and Narrative”, (2011) 50 Washburn LJ 275, p. 279.

⁶² *Ibid.*

⁶³ *Ibid.*

2.1 The Hidden Power of Metaphors

“[T]o be a master of metaphor... is the one thing
that cannot be learnt from others; and it is also a sign
of genius, since a good metaphor implies an intuitive
perception of the similarities in dissimilars.”
—Aristotle, *Poetics*

Cognitive researchers claim that the way we think about abstract ideas is, to some extent, metaphorical.⁶⁴ In this context, the meaning of the term ‘metaphor’ extends further than that of the figure of speech by which a word denoting one idea is used in place of another to suggest an analogy.⁶⁵ It stands, broadly, for a way of “conceiving of one thing in terms of another”⁶⁶, of “seeing one thing *as* another.”⁶⁷ In other words, metaphorical thinking works by “transferring the characteristics, reasoning processes, and outcomes of one domain (the source) onto another (the target).”⁶⁸ It associates, by way of a partial analogy, two mutually exclusive conceptual fields.⁶⁹

It seems worthwhile to illustrate this claim —that our thought processes function in terms of metaphors⁷⁰— in a way that will be familiar to jurists. When thinking about a legal principle, or rule, we tend to imagine it as if it were a concrete thing, an object, or even a sentient being, with some form of agency.⁷¹ We say of a legal principle, or rule, that it was *set aside*, that it was *weighted* against other interests, and 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 and, 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

---

⁶⁴ *Ibid.*; L. Edwards, *supra* note 55, p. 889; L. Berger, *supra* note 61, p. 280; See, also, Milner S. Ball, *Lying down Together : Law, Metaphor, and Theology*, (Madison, Wis. : University of Wisconsin Press, c1985), p. 21.

⁶⁵ Inspiration for this definition comes from the Merriam-Webster Online Dictionary’s entry for “metaphor”. See, also, Theodore Brown, *Making Truth : Metaphor in Science*, (Urbana : University of Illinois Press, c2003), p. 15.

⁶⁶ George Lakoff and Mark Johnson, *Metaphors We Live By*, (Chicago : University of Chicago Press, 2003), p. 36; M. Ball, *supra* note 64, p. 22; T. Brown, *supra* note 65, p. 29, 33.

⁶⁷ L. Berger, *supra* note 61, p. 278.

⁶⁸ *Ibid.*

⁶⁹ Marie-Claude Prémont, *Tropismes du droit : Logique métaphorique et logique métonymique du langage juridique*, (Montréal : Liber, 2003), p. 19.

⁷⁰ L. Edwards, *supra* note 55, p. 889; L. Berger, *supra* note 61, p. 280.

⁷¹ L. Edwards, *supra* note 55, p. 889.

substitution by a “mentally more immediate object”⁷². To borrow the words of Greta Olson, metaphors “render more tangible what has been discovered and needs to be made known.”⁷³

These conceptual metaphors are, Winter tells us, “neither arbitrary nor mere products of chance and history”⁷⁴. Rather, they arise from our embodied experience.⁷⁵ He explains:

As embodied organisms, we achieve upright posture and balance in the world. We experience our bodies as structured wholes with identifiable parts. We individuate objects outside ourselves. We propel ourselves through space to obtain desired objects. Sometimes, our way is blocked by an obstacle and we must exert additional force to overcome or avoid it. Some objects (like our bodies) are so configured as to contain other objects (our *in-sides*). Each of these quite basic interactions with the world is generalizable, and each is in fact generalized across a series of other domains. Each of these generalizations is a “recurring structure” or “repeated pattern” by which we are able to understand the world as a “unified place that we can make sense of.”⁷⁶

Thus, the very structures that govern our thoughts, the “metaphors we live by”, to borrow the title of Lakoff and Johnson’s book, are “derived from our bodily experience”⁷⁷. They are formed through “our interaction with the social and physical environment”⁷⁸. They provide organization to human thinking and a degree of harmony and determinacy in our interaction with the world.

Based on the above, it would be erroneous to think of metaphor as merely a “device of the poetic imagination and the rhetorical flourish”⁷⁹. Indeed, far from being characteristic of language alone, metaphor is pervasive in everyday life, both in our thoughts and actions.⁸⁰ As we have seen, our conceptual system, in terms of which we think and act, is metaphorical.⁸¹ If this

⁷² Greta Olson, “On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Discourse”, in Michael Hanne and Robert Weisberg (eds.), in *Narrative and Metaphor in the Law*, (New York : Cambridge University Press, 2018), p. 29.

⁷³ *Ibid.*, p. 30.

⁷⁴ S. Winter, *supra* note 42, p. 15.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ L. Berger, *supra* note 59, p. 264; L. Berger, *supra* note 61, p. 280.

⁷⁸ *Ibid.*

⁷⁹ G. Lakoff and M. Johnson, *supra* note 66, p. 3.

⁸⁰ *Ibid.*

⁸¹ *Ibid.* “The concepts that govern our thought are not just matters of the intellect. They also govern our everyday functioning, down to the most mundane details. Our concepts structure what we perceive, how we get around in the world, and how we relate to other people. Our conceptual system thus plays a central role in defining our everyday realities.”

were not the case, metaphors as linguistic expressions would not even be possible.⁸² This is to say that we perceive and understand concepts just like we “learn about the world through the senses of sight and touch” –that is by “transferring inferences from one domain to another”⁸³.

An example of this is the tendency of humans to think in terms of what Lakoff and Johnson call *orientational metaphors*.⁸⁴ Such metaphors organize a “system of concepts with respect to one another”⁸⁵ by giving them spatial orientations. Again, 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.”⁸⁶ 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”. We do the same thing, as jurists, when we talk 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 to illustrate, abstract ideas and concepts. For one, the idea of *justice* is commonly represented, or symbolized, through the figures of the *blindfold*, *scales*, and *sword*.⁸⁷ On a more conventional level, metaphors are also used in order to convey typical concepts in legal practice, such as the *balance of interests*, the *weight* —or *chain*— of *evidence*, or the *burden of proof*.⁸⁸ Here again, metaphors are employed so as 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 classical rhetoricians⁸⁹: *logos*, *pathos*, and *ethos*.⁹⁰

---

⁸² G. Lakoff and M. Johnson, *supra* note 66, p. 6.

⁸³ L. Berger, *supra* note 59, p. 264; L. Berger, *supra* note 61, p. 280.

⁸⁴ G. Lakoff and M. Johnson, *supra* note 66, p. 14; T. Brown, *supra* note 65, p. 38.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Michael Hanne and Robert Weisberg (eds.), “Introduction”, in *Narrative and Metaphor in the Law*, (New York : Cambridge University Press, 2018), p. 4.

⁸⁸ *Ibid.*

⁸⁹ Michael R. Smith, “Metaphoric Parable: The Nexus of Metaphor and Narrative in Persuasive Legal Writing”, in *Narrative and Metaphor in the Law*, *supra* note 87, p. 80.

On the first two fronts, not only can they simplify communication by providing the audience with a supporting analogy (*logos*)⁹¹, but also evoke emotions that parallel the literal meaning of the metaphoric language (*pathos*).⁹² On the last of these fronts, the skill to formulate an effective metaphor reflects a high level of thought, thus speaking to the intelligence of the author (*ethos*).⁹³

But there is more. This persuasive power also lies in the fact that, as metaphors “are ways of seeing or highlighting some aspects of a concept, they also are ways of not seeing others.”⁹⁴ They may be used by advocates in a strategic manner, to highlight or hide certain aspects of a concept.⁹⁵ In allowing the audience to focus its attention on one aspect of a concept, metaphors can keep the same audience from focusing on other aspects that are inconsistent with them.⁹⁶ In this respect, they may well be employed to frame a debate, or legal dispute, in a particular light.

In light of the above, it must be concluded that metaphor is an unavoidable part of human discourse and thought, and that it plays a fundamental role in structuring and making sense of human experience. As we have seen, cognitive research suggests that our thought processes function in terms of metaphors, that these metaphors are not entirely arbitrary or irrational, but rather systematic and recurring, in that they arise from our most basic embodied experience. The role of metaphor in human thought having been recognized, let us move to the role of narrative.

---

⁹⁰ *Ibid.*; As Michael R. Smith explains: “Logos 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.”

⁹¹ *Ibid.*

⁹² *Ibid.*, p. 83.

⁹³ *Ibid.*, p. 85.

⁹⁴ L. Berger, *supra* note 61, p. 278; T. Brown, *supra* note 65, p. 29; M. Ball, *supra* note 64, p. 22; M.-C. Prémont, *supra* note 69, pp. 32-33.

⁹⁵ M. Hanne & R. Weisberg, *supra* note 87, p. 4.

⁹⁶ G. Lakoff and M. Johnson, *supra* note 66, p. 10.

2.2 Schemas, Metaphor, and Narrative

"You're never going to kill storytelling, because it's built into the human plan. We come with it."

— Margaret Atwood

We all make sense of our experiences by placing them into “schemas” —that is cognitive frames and categories that derive from our past experiences and knowledge.⁹⁷ Schemas contain “general expectations and knowledge of the world”⁹⁸, and are based on “simplified models of experiences”⁹⁹ gathered since birth. The very concept of category, Linda Berger tells us, is only:

... understandable... because we have encountered containers in our interactions with the environment. Because of that experience, we transfer our perceptions and inferences, and we are able to see categories “as” containers, with an interior, an exterior, and a boundary. But for the metaphor of the container, which allows us to gather them up, group them together, and “contain” them, ideas would be marbles thrown at random on the ground...¹⁰⁰

Hence, our mental categories are not to be found in nature; they emerge from prior knowledge and past experiences. We construct and amass them, unconsciously, as we go about our lives. These categories are not “clearly delineated boxes”, but rather “radial structures radiating outward from a prototype at the center.”¹⁰¹ The closer an experience seems to the core of this radial structure, to the “center” of the category, the more we see it as fitting our mental category.

It is by generating the context in which ideas will be interpreted¹⁰² that these schemas help us structure and understand our new experiences.¹⁰³ 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”¹⁰⁴. It is what allows us to make sense out of events “without

---

⁹⁷ G. Lakoff and M. Johnson, *supra* note 66, p. 14.

⁹⁸ Ronald Chen & Jon Hanson, “Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory”, (2004) 77 S Cal L Rev 1103, p. 1133.

⁹⁹ Richard K. Sherwin, “The Narrative Construction of Legal Reality”, (1994) 18 Vt L Rev 681, p. 700.

¹⁰⁰ L. Berger, *supra* note 59, p. 264; L. Berger, *supra* note 61, p. 280.

¹⁰¹ *Ibid.*, pp. 264-265.

¹⁰² L. Edwards, *supra* note 55, p. 890.

¹⁰³ J. Sheppard, *supra* note 1, p. 257.

¹⁰⁴ L. Berger, *supra* note 59, p. 265.

having to interpret and construct a [new] diagram of inferences and relationships” each time.¹⁰⁵ It is because of schemas that we manage to conserve mental energy as we discover the world.¹⁰⁶

These interpretive frameworks also allow us to “construct meaning and reality”¹⁰⁷. One needs, when trying to understand a new situation, to go beyond the information that it supplies.¹⁰⁸ Schemas are what makes that possible. Drawing on our past knowledge of the world, schemas allow us to “fill in the gaps”¹⁰⁹, to make inferences about what will likely happen in the future.¹¹⁰ In doing so, they help us assess, at each new turn, what we ought to be seeing and feeling.¹¹¹

Humans have, according to psychologist Jerome Bruner, a “predisposition to organize experience into a narrative form.”¹¹² Narratives are, in this sense, “innate” frames of reference for structuring and interpreting new information.¹¹³ They are complex cognitive models, made up of numerous schemas operating at once¹¹⁴, which provide the context in which we interpret events.¹¹⁵ In keeping with this, research has shown that information is better understood when expressed in terms of stories than of abstract principles.¹¹⁶ This, it is said, is because “narrative structure more closely resembles the way the human mind makes sense of the world.”¹¹⁷ As Michael R. Smith explains, we learn through story in the same way we learn through experience:

...Just as life involves experiencing the chronological passing of related events, stories too, by definition, involve a chronological telling of related events. When we hear a story, we

---

¹⁰⁵ L. Berger, *supra* note 59, p. 265.

¹⁰⁶ J. Sheppard, *supra* note 1, p. 259.

¹⁰⁷ J. Sheppard, *supra* note 1, p. 259.

¹⁰⁸ J. Sheppard, *supra* note 1, p. 260.

¹⁰⁹ *Ibid.*

¹¹⁰ Clive Baldwin, “Who Needs Facts When You've Got Narrative? The Case of *P, C & S v. United Kingdom*”, (2005) 18 Int'l J Sem L 217, p. 236.

¹¹¹ J. Sheppard, *supra* note 1, p. 260.

¹¹² Jerome Bruner, *Acts of Meaning*, (Cambridge, Mass. : Harvard University Press, c1990.), quoted in Christopher Rideout, “Storytelling, Narrative Rationality, and Legal Persuasion”, 14 Legal Writing: J Legal Writing Inst 53 (2008), at p. 57.

¹¹³ Robert P. Burns, *A Theory of the Trial*, (Princeton, NJ : Princeton University Press, 1999), at p. 159, cited in C. Rideout, *supra* note 112, p. 58.

¹¹⁴ J. Sheppard, *supra* note 1, p. 260.

¹¹⁵ L. Edwards, *supra* note 55, p. 890.

¹¹⁶ J. Sheppard, *supra* note 1, p. 261.

¹¹⁷ M. Smith, *supra* note 89, p. 81.

place ourselves in the role of the protagonist... And we learn from this experience in the same way we learn from our participation in our own lives...

The most fundamental way that we learn and process information is through living the experience. Stories communicate in the same way and thus take advantage of the most fundamental way in which humans process and understand information...¹¹⁸

Thus, narrative helps us find some semblance of coherence in a series of chronological events.¹¹⁹

It also helps us comprehend “people, events, objects, and their relationships to each other”¹²⁰.

Narratives follow patterns. There are, in other words, basic structures to which virtually every story conforms.¹²¹ These basic structures, which we will discuss further in the next section, are referred to, in literary theory, as ‘stock stories’ or ‘master stories’. In more explicit terms, a ‘stock story’ is a common story type, composed of only the essential details of a story.¹²² When these stock stories are embedded in culture, they become “common archetypes”, or “myths”¹²³. These myths play an important role in the creation, and shaping, of social and cultural norms. They support particular ways of interpreting experiences¹²⁴, and carry with them values and beliefs. In drawing upon the past, they “reinforce traditional cultural and societal values.”¹²⁵

These myths influence us greatly for they shape, often unconsciously, our perception of events. They provide a particular perspective, a narrative lens or view, on the events of a story, thus producing the context in which they will be understood.¹²⁶ Because narratives function beneath the surface of our consciousness, their effects are hard to overcome. “By the time we are old enough to think about law,” Linda Edwards writes, they “have become part of us, and they are ready to orchestrate our understanding of the world, including the world of law.”¹²⁷

---

¹¹⁸ Michael R. Smith, “Illustrative narratives in rule-based analysis” in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*, 3rd ed. (New York, NY: Wolters Kluwer Law & Business, 2013), pp. 38-39.

¹¹⁹ J. Sheppard, *supra* note 1, p. 259.

¹²⁰ J. Sheppard, *supra* note 1, p. 261.

¹²¹ J. Sheppard, *supra* note 1, p. 282.

¹²² S. Paskey, *supra* note 34, p. 70.

¹²³ L. Berger, *supra* note 61, p. 281.

¹²⁴ L. Berger, *supra* note 61, p. 281.

¹²⁵ J. Sheppard, *supra* note 1, p. 262.

¹²⁶ L. Edwards, *supra* note 55, p. 890.

¹²⁷ L. Edwards, *supra* note 55, p. 890.

Narratives also have the capacity to conjure emotions by transporting the audience into their imaginary worlds.¹²⁸ 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.”¹²⁹ From this point on, it is very hard to go back and see things differently, that is outside of this particular narrative. As noted by Kevin Heller, when a person is “transported by a narrative, all of her mental systems –attentive, imagistic, emotive – converge on its events, with dramatic real-world results: her ability to think critically about the narrative is reduced, making her more likely to believe that it is authentic”.¹³⁰

Several scholars of *law-and-narrative* have argued, in light of these findings, that the lawyer’s goal should thus be, in order to be more persuasive, to make her story seem generic rather than unique.¹³¹ 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 argued that advocates should, in order to be more persuasive, shape their narratives so as to fit one of those frames.¹³² Legal audiences, in other words, will be more convinced by narratives they can easily imagine. As Hanne and Weisberg put it, the recounting of events at trial and in briefs “will win the credit of the... audience more if it comfortably fits within the accepted patterns of behaviour, causation, and motive”¹³³, if it conforms with shared cultural archetypes. Because 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 narrative patterns.¹³⁴

---

¹²⁸ M. Smith, *supra* note 117, p. 83.

¹²⁹ J. Sheppard, *supra* note 1, p. 263.

¹³⁰ Kevin Heller, “The Cognitive Psychology of Circumstantial Evidence,” (2006) 105 Mich L Rev 1, p. 54.

¹³¹ Michael Hanne and Robert Weisberg (eds.), “Editor’s Introduction to Conversation II”, in *Narrative and Metaphor in the Law*, *supra* note 87, p. 60.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*, p. 62. See, also, at p. 64: “We organize fresh data into chunks and seek to fit them into frameworks we have developed over time from the historical, cultural, and personal contexts in which we have lived. Juries and judges are therefore constantly trying to fit material presented in court into the frameworks they have in their minds and the persuasive advocate will frequently be seeking to employ narratives and metaphors which either fit or productively disturb those already held by their audience.”

Not unlike metaphors, narratives persuade by appealing to the three essential persuasive processes identified by the classical rhetoricians. Firstly, narratives have a *logos* function for, as discussed above, they communicate information in a more effective manner than through general pronouncements.¹³⁵ Secondly, in terms of the *pathos* function of narratives, they both enliven the text and evoke substantive emotional responses in audiences.¹³⁶ 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”¹³⁷.

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. They provide frames of reference to interpret unfamiliar information¹³⁸ and carry with them values and beliefs.¹³⁹ They also play an important role in persuasive legal writing. They facilitate communication by illustrating the substance of abstract legal claims.¹⁴⁰ They conjure emotions in the audience and make arguments more memorable. They increase, in the eyes of the audience, the perceived intelligence and credibility of the advocate.¹⁴¹ Because reasoning, persuasion, comprehension, and decision-making are central to our work as jurists, a better understanding of how they are influenced and shaped by these devices is warranted.

The importance of this will be particularly obvious in later parts of this essay, where we shed light on the fact that our Constitution has its own set of myths, stories, and metaphors, and that these 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 play a role in Canadian constitutional law not only as legal principles but also in the way that they influence our perception of our founding document and the types of stories that jurists tell about it.

---

¹³⁵ M. Smith, *supra* note 117, p. 81.

¹³⁶ *Ibid.*, p. 83.

¹³⁷ *Ibid.*, p. 85.

¹³⁸ J. Sheppard, *supra* note 1, p. 257.

¹³⁹ L. Berger, *supra* note 61, p. 278.

¹⁴⁰ M. Smith, *supra* note 117, p. 86.

¹⁴¹ *Ibid.*

Chapter 3

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

Before moving on to narrative theory, let us briefly recap what has been said so far. The first two sections have sought to provide the reader with an overview of the scholarly literature in regard to the role of narrative and metaphor in law, and of the cognitive research with regard to how they shape our cognition and reasoning. As mentioned above, this overview will prove useful in the last part of the essay, where we will study two foundational types of metaphors in Canadian law, and how they shape the way we think, talk, and argue about the Constitution.

Yet, for us to be able to demonstrate the main claim of this essay —that these metaphors influence the types of stories we tell about the Constitution— one last stop is in order. 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 section reviews principles of narrative theory that will be useful for our analysis. Specifically, it will define what a ‘story’ is and identify its basic building blocks. It will also show how these literary elements translate into legal writing. Thus, the main goal of this section is to allow us to recognize these elements in both legal briefs and judicial opinions. It is also, more broadly, 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” on the part of jurists.

3.1 The Storyteller's Starter Kit

"Story is a yearning meeting an obstacle."
—Robert Olen Butler

Definitions of what constitutes a story abound in narrative theory.¹⁴² For our present purposes, the one offered by Kendall Haven, which many in ‘narrative scholarship’ have relied upon over the years, should suffice. In his view, a story is a “character-based and descriptive

---

¹⁴² For more on this topic, see B. Foley & R. Robbins, *supra* note 53, and S. Paskey, *supra* note 34.

telling of a character's efforts, over time, to overcome obstacles and achieve a goal."¹⁴³ Put another way, a story is the account of a character facing a conflict, and resolving it, for good or bad.¹⁴⁴ Broken down into its essential parts, this definition leaves us with three things: character, conflict, and plot. Add setting and theme and you have some of the basic elements of a story. It is on these five elements that the following section will focus.¹⁴⁵ As for style, voice, and point of view, other basics of fiction-writing, they are mainly determined by legal writing etiquette.¹⁴⁶

3.1.1 Setting

Stories minimally take place in some identifiable space and time.¹⁴⁷ This is referred to, in narrative theory, as the 'setting' of the story.¹⁴⁸ More specifically, the setting is concerned with the characteristics of the time (the "historical" or "social" setting) and place (the "physical" setting) of the story.¹⁴⁹ Each must be described with adequate detail to the audience for it to be able to imagine and understand the action in the right context.¹⁵⁰ The 'setting', in legal writing, can also be seen in this manner. The "factual" setting, in a brief or a judicial opinion, is "the background information about the factual dispute between the parties"¹⁵¹. In this sense, it can be linked to the "physical" setting of a work of fiction.¹⁵² As for "legal" setting of the case, the governing rules and precedents, it is comparable to the historical or social setting in fiction.¹⁵³

In legal writing, the setting is to a large extent immutable, in that it "consists of hard, external facts that the writer cannot change."¹⁵⁴ This is true not only for the factual setting, which

---

¹⁴³ This iteration of Haven's definition comes from Ruth Anne Robbins, Steve Johansen and Ken Chestek, *Your Client's Story: Persuasive Legal Writing*, (Aspen Publishers, 2012). It is also cited in K. Chestek, *supra* note 53, p. 102.

¹⁴⁴ Foley & Robbins, *supra* note 142, p. 466.

¹⁴⁵ Some of these concepts have already been touched upon in a previous essay, albeit in a very cursory fashion.

¹⁴⁶ J. Sheppard, *supra* note 1, p. 269.

¹⁴⁷ G. Olson, *supra* note 72, p. 23.

¹⁴⁸ Kenneth Chestek, "The Plot Thickens: The Appellate Brief as Story", (2008) 14 Leg Writing 127, p. 139.

¹⁴⁹ *Ibid.*; J. Sheppard, *supra* note 1, p. 278.

¹⁵⁰ *Ibid.*; J. Sheppard, *supra* note 1, p. 278.

¹⁵¹ *Ibid.*; J. Sheppard, *supra* note 1, p. 279.

¹⁵² *Ibid.*; J. Sheppard, *supra* note 1, p. 279.

¹⁵³ *Ibid.*; J. Sheppard, *supra* note 1, p. 279.

¹⁵⁴ *Ibid.*; J. Sheppard, *supra* note 1, p. 279.

is constrained by the proven facts, but also for the legal setting, as it is, at least partly, “bound by the case law, statutes, regulations, [and] legal doctrines”¹⁵⁵. As both parties try to tell contradictory stories based on this unique setting, each must carefully choose which details to mention, and determine how to best arrange them so as to elicit the expected response from the audience.¹⁵⁶ The immutability of the setting also entails that parties cannot ignore aspects of the case that impede the development of their story.¹⁵⁷ For lawyers, this means confronting adverse authority, distinguishing it, casting it as irrelevant or providing contradicting authority.¹⁵⁸

3.1.2 Conflict

Every good story also requires its share of uncertainty, of “conflict”. In fiction writing, the conflict is what moves the story forward. It is also what drives the interest of the audience in the story.¹⁵⁹ Not only will the audience want to know how the conflict started, and why it occurred¹⁶⁰, but it will also want to know how it could, or should, be resolved. The resolution of the conflict —the return to a “satisfying state of tranquility by the end of the story”¹⁶¹— is what it longs for. And in cases where conflicts are multiple, the audience will want them all resolved.¹⁶²

Unsurprisingly, conflict also plays a significant role in legal writing. Two types of conflict can usually be found in this context: a *factual* one, which consists in the actual dispute between the litigants, and a *legal* one, concerned with the legal issue that arises from the facts of the case.¹⁶³ Finding a conflict is usually not hard for jurists. It is generally the reason why the parties are before the courts in the first place.¹⁶⁴ Defining that conflict is where the difficulty lies. Indeed, it is how the jurist defines the conflict that matters, for this governs how the audience

---

¹⁵⁵ K. Chestek, *supra* note 148, p. 139; J. Sheppard, *supra* note 1, p. 279.

¹⁵⁶ *Ibid.*, p. 140.

¹⁵⁷ *Ibid.*; J. Sheppard, *supra* note 1, p. 280.

¹⁵⁸ *Ibid.*; J. Sheppard, *supra* note 1, p. 280.

¹⁵⁹ *Ibid.*; J. Sheppard, *supra* note 1, p. 270.

¹⁶⁰ *Ibid.*, p. 141; J. Sheppard, *supra* note 1, p. 270.

¹⁶¹ *Ibid.*; J. Sheppard, *supra* note 1, p. 270.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*; Simon Stern, “Narrative in the Legal Text: Judicial Opinions and Their Narratives”, in *Narrative and Metaphor in Law*, *supra* note 72, p. 122.

¹⁶⁴ J. Sheppard, *supra* note 1, p. 270.

will want the conflict resolved and, most importantly, in favour of whom.¹⁶⁵ Conflicts are usually described in terms of broad categories, such as “person vs. person,” “person vs. nature,” “person vs. society”¹⁶⁶. Such categorizations have implications, to which jurists should be attuned.¹⁶⁷

3.1.3 Characters

A story also requires characters. They are the ones involved in the conflict, the ones driving the action. Among them is a main character, or ‘protagonist’, with whom the audience will generally identify. The goal of the main character, which should be clearly set out, is what lies on the other side of the conflict.¹⁶⁸ As a general rule, the audience should like the protagonist and agree with, or at least understand, his or her goal.¹⁶⁹ There are also opposing characters, villains and nemesis, as well as minor characters, helping the protagonists one way or another.¹⁷⁰

In describing the characters, one will usually seek to create sympathies for protagonists and against antagonists.¹⁷¹ This process, however, must not be too obvious, for the audience might feel manipulated if it sees it. A character’s true nature must rather be sketched through objective details, and these must be “arranged carefully to evoke the emotional response in the reader that the writer wants to create.”¹⁷² This goes to their believability.¹⁷³ It is thus usually by how they respond to trouble, to obstacles, that the audience will understand the characters.¹⁷⁴ How they deal with hardship, and whether they will prevail or not, is what keeps it interested.¹⁷⁵

---

¹⁶⁵ J. Sheppard, *supra* note 1, p. 270; Foley & Robbins, *supra* note 142, p. 470.

¹⁶⁶ *Ibid.*; K. Chestek, *supra* note 148, p. 141; Foley & Robbins, *supra* note 142, p. 469.

¹⁶⁷ For instance, Jennifer Sheppard notes that “person vs. person” conflicts are hard to present “because no person is entirely good or entirely evil.” On the contrary, she writes, it might be helpful, when dealing with a government or company, to frame the conflict as “person vs. society”, as readers tend to “want the underdog to succeed.” See J. Sheppard, *supra* note 1, pp. 271-272.

¹⁶⁸ Foley & Robbins, *supra* note 142, p. 468.

¹⁶⁹ *Ibid.*, p. 470.

¹⁷⁰ *Ibid.*, p. 468.

¹⁷¹ K. Chestek, *supra* note 148, p. 142; J. Sheppard, *supra* note 1, p. 275.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Foley & Robbins, *supra* note 142, p. 470.

¹⁷⁵ *Ibid.*, p. 468.

In legal writing, the characters of the story will, in most cases, be played by the parties. When this is the case, lawyers will most often than not try to cast their clients in archetypal hero roles, in order to get the sympathy of the court. One common strategy, identified by Foley and Robbins, is to picture the client as a person who needs the assistance of the court.¹⁷⁶ Then, the role of the court can be that of a “mentor”, serving as the “sage advice-giver” to the new hero.¹⁷⁷

That being said, characters could also be played —and they often are— by institutions, abstract concepts, and reified ideas.¹⁷⁸ Specifically, one could easily cast, as a character in the story, such things as a constitutional doctrine, a right, a freedom, a precedent, or even a contract.¹⁷⁹ This goes back to the fact, discussed above, that we think in terms of metaphor¹⁸⁰, that we reason about legal principles as if they were sentient beings or objects.¹⁸¹ This strategy could be used, for instance, to shift the focus from an unlikable client to a fundamental right.¹⁸²

3.1.4 Theme

The theme, in fiction-writing, refers to what the story is about, its moral.¹⁸³ It is the central point that the story is trying to make, the lesson that the audience should take away from it.¹⁸⁴ It is, in the words of Linda Berger, “the overarching, seemingly universal plight that a story is about: human jealousy, authority and obedience, thwarted ambition.”¹⁸⁵ If an account has no point, if it does not go anywhere, we rarely think of it as a story.¹⁸⁶ Insofar as we understand the narrative to be asking us to follow the story to its end, we, as the audience, expect it to have a

---

¹⁷⁶ K. Chestek, *supra* note 148, p. 142; R. Robbins, *supra* note 53, pp. 775–782.

¹⁷⁷ R. Robbins, *supra* note 176, p. 782, cited in K. Chestek, *supra* note 148, p. 143.

¹⁷⁸ L. Edwards, *supra* note 55, p. 890; J. Sheppard, *supra* note 1, pp. 275–276.

¹⁷⁹ *Ibid.*, p. 905; J. Sheppard, *supra* note 1, pp. 275–276.

¹⁸⁰ L. Edwards, *supra* note 55, p. 890; J. Sheppard, *supra* note 1, pp. 275–276.

¹⁸¹ L. Edwards, *supra* note 55, p. 889; J. Sheppard, *supra* note 1, pp. 275–276.

¹⁸² J. Sheppard, *supra* note 1, p. 276.

¹⁸³ K. Chestek, *supra* note 148, p. 146; J. Sheppard, *supra* note 1, p. 273; L. Berger, *supra* note 59, p. 267.

¹⁸⁴ J. Sheppard, *supra* note 1, p. 273.

¹⁸⁵ L. Berger, *supra* note 59, p. 267, quoting Jerome Bruner, “Life as Narrative”, (2004) 71 Soc Res 691, at p. 696.

¹⁸⁶ S. Winter, *supra* note 42, p. 108.

point.¹⁸⁷ “Because the act of narration is understood as a communicative act”, Steven Winter tells us, we cannot help but expect “that the narrator intends that point as the moral” of the story.¹⁸⁸

In legal writing, the theme of the story can be thought of as the “bottom line” of the dispute, what is commonly referred to as the “theory of the case”¹⁸⁹. It is, to put it another way, the decisive reason why the client should be victorious.¹⁹⁰ In the context of a legal brief or of a pleading, a good theme will present the client in a favorable light, align with the facts of the case, account for the unfavorable ones, and have a basis in law.¹⁹¹ It will, also, have to be believable.¹⁹²

3.2 Building the Plot

Having painted this broad overview of the basic elements of a story that are character, conflict, setting, and theme, the last stop in our brief journey through narrative theory brings us to the fundamental notion of ‘plot’. The plot of a story is its structure.¹⁹³ It is the link that connects all of its elements¹⁹⁴, that holds character, conflict, and theme together.¹⁹⁵ It is not only the events that occur, but also the order in which they do.¹⁹⁶ It is what links cause and effect.¹⁹⁷ Narrative theory commonly recognizes five stages to a plot, that is: (i) introduction, (ii) rising action, (iii) climax, (iv) resolution, and (v) denouement.¹⁹⁸ Let us consider these stages in turn.

---

¹⁸⁷ S. Winter, *supra* note 42, p. 108.

¹⁸⁸ *Ibid.*

¹⁸⁹ K. Chestek, *supra* note 148, p. 146; J. Sheppard, *supra* note 1, p. 273

¹⁹⁰ Kristen Robbins-Tiscione, *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* 101 (West, 2009), p. 180, cited in J. Sheppard, *supra* note 1, p. 273.

¹⁹¹ J. Sheppard, *supra* note 1, p. 274.

¹⁹² *Ibid.*

¹⁹³ J. Sheppard, *supra* note 1, p. 280.

¹⁹⁴ K. Chestek, *supra* note 148, p. 147.

¹⁹⁵ K. Chestek, *supra* note 148, p. 147.

¹⁹⁶ J. Sheppard, *supra* note 1, p. 280

¹⁹⁷ *Ibid.*

¹⁹⁸ J. Sheppard, *supra* note 1, p. 281.

3.2.1 Introduction

The introduction of a story, also known in narrative theory as the ‘exposition’, is where the context, the relevant background information, is shared with the audience. This is essential for it allows the audience to understand who the characters are, and the time and place of the story.¹⁹⁹ It sets the table, in a sense, by giving context —and a starting point— to the story.²⁰⁰ This is, in other words, the ‘Once upon a time’ moment. As Christopher Booker rightly points out, the purpose of this age-old formula, and of this section more broadly, “is to take us out of our present place and time into that imaginary realm where the story is to unfold, and to introduce us to the central figure with whom we are to identify.”²⁰¹ A story will conventionally begin in a narrative “steady state”, or “status quo”²⁰², that is a state “in which life is in harmonious balance.”²⁰³ Calm is generally what characterizes this initial stage of the story. In legal writing, the fact section of a brief or opinion also starts with an introduction.²⁰⁴ This is where the factual setting of the story is first exposed, and where valuable details about the characters are included.²⁰⁵ Likewise, the legal narrative will require some general background.

3.2.2 Rising Action

Only after all the background pieces are assembled, and the story is ready to begin, do the complicating events —the *trouble*, as they are commonly referred to— come into play.²⁰⁶ These events upset the harmony of the initial state.²⁰⁷ They precipitate the action of the story and give it a focus.²⁰⁸ It is these complicating events, which together form the “rising action” stage of the

---

¹⁹⁹ J. Sheppard, *supra* note 1, p. 281.

²⁰⁰ *Ibid.*; K. Chestek, *supra* note 148, p. 148.

²⁰¹ Christopher Booker, *The Seven Basic Plots : Why We Tell Stories*, (London : Continuum, 2004), p. 17.

²⁰² J. Sheppard, *supra* note 1, p. 281; K. Chestek, *supra* note 148, p. 148.

²⁰³ S. Winter, *supra* note 42, p. 109. That being said, it might sometimes be the case that the author introduces the reader at a later stage in the story, like in the midst of the conflict. This is not to say, however, that there is no “steady state” in such stories, only that this state precedes the beginning of the narration. In other words, the start of the narration, that is the telling of the story, should not be confused with the start of the story itself.

²⁰⁴ K. Chestek, *supra* note 148, p. 148.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*; J. Sheppard, *supra* note 1, p. 281.

²⁰⁷ *Ibid.*; *Ibid.*

²⁰⁸ C. Booker, *supra* note 201, p. 17.

plot, that give rise to the “conflict” of the story.²⁰⁹ In the words of Christopher Booker, these events provide the “Call” which “lead the hero or heroine out of their initial state into a series of adventures or experiences which, to a greater or lesser extent, will transform their lives.”²¹⁰

In legal writing, the fact section of a brief or opinion will usually, after having introduced the main characters, define the factual “conflict” that fuels the litigation.²¹¹ It will show how the initial harmony between the parties was disrupted, identify the moment when the dispute began, as well as the various obstacles faced by the protagonist. But this is as far as the plot can go in the fact section as, in Ken Chestek’s view, the audience is not “ready for the climax”.²¹² In fact, no conflict can be resolved at this point. This is the case because the conflict necessarily is, at this point, a legal one. It will thus require, for it to be resolved, the clearing of a pathway towards its legal solution. This is why the “rising action” stage will need, in all cases, to be completed in the argument section, by way of describing the legal principles required to resolve the conflict.²¹³

3.2.3 Climax

The climax of the story is the culmination of the “rising action” stage. Every story must, Booker tells us, “work up to a climax, where conflict and uncertainty are usually at their most extreme.”²¹⁴ The climax thus marks the stage of plot development where the main character is “at the height of peril”²¹⁵, and when the audience hopes, with mounting impatience and anxiety, for a return to a steady state, or at least to an outcome that is beneficial to the protagonist.²¹⁶ It is often the case that, at this stage in the plot, the protagonist achieves a feat²¹⁷ that will resolve the main conflict of the story. Hence, the climax inevitably occurs near the conclusion of the story.²¹⁸

---

²⁰⁹ K. Chestek, *supra* note 148, p. 148; J. Sheppard, *supra* note 1, p. 281.

²¹⁰ C. Booker, *supra* note 201, p. 17.

²¹¹ K. Chestek, *supra* note 148, p. 148

²¹² *Ibid.*

²¹³ *Ibid.*, p. 149.

²¹⁴ C. Booker, *supra* note 201, p. 18.

²¹⁵ K. Chestek, *supra* note 148, p. 149.

²¹⁶ J. Sheppard, *supra* note 1, p. 282.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*; K. Chestek, *supra* note 148, p. 149.

In legal writing, the climax can only happen when the audience knows the characters, that is the parties, and understands both the factual and legal disputes.²¹⁹ It is at this moment, and at this moment only, that the interest of the audience —the judge or jury who, it bears recalling, gets to decide in due course how the story ends— will be at its highest.²²⁰ For the reasons set out above, the climax of the story that lawyers tell should not be resolved in the legal brief.²²¹ The story finds itself, at this stage, in a moment of great tension, one that triggers the audience's desire to see it resolved.²²² This “gap” is what wills the audience to act. The goal, for the lawyer, is thus to show the way forward, and leave the judge or jury with a “narrative impetus to act”²²³.

3.2.4 Falling Action/Resolution

In fiction writing, the “resolution” of a story occurs when all the conflicts and problems are worked out for good.²²⁴ For the audience to be persuaded by the story, these conflicts must be resolved in a believable, reasonable, fashion. As for the other, minor, plot threads that may have been left unresolved until this point²²⁵, it is also at the “resolution” stage that they unfold.²²⁶

3.2.5 Denouement

The “denouement” of the story is the last stage of plot development. It is when the story returns to a *status quo*, whether it be the initial steady state or a “new, yet tranquil and satisfying, condition.”²²⁷ It is also a moment for the characters to look back on the lessons of the story and to make them explicit.²²⁸ It is here that we see, in the words of Booker, “how every story, however

---

²¹⁹ K. Chestek, *supra* note 148, p. 149.

²²⁰ *Ibid.*

²²¹ L. Edwards, *supra* note 55, p. 898.

²²² Peter Brooks, “Storytelling Without Fear? Confession in Law and Literature”, in Peter Brooks & Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law*, (New Haven, CT: Yale University Press, 1996), p. 117, cited in L. Edwards, *supra* note 55, pp. 894 and 898.

²²³ L. Edwards, *supra* note 55, pp. 898.

²²⁴ J. Sheppard, *supra* note 1, p. 282.

²²⁵ J. Sheppard, *supra* note 1, p. 282.

²²⁶ *Ibid.*; K. Chestek, *supra* note 148, p. 149.

²²⁷ K. Chestek, *supra* note 148, p. 150, cited in J. Sheppard, *supra* note 1, p. 282.

²²⁸ J. Sheppard, *supra* note 1, p. 282.

mildly or emphatically, has in fact been leading its central figure or figures in one of two directions.”²²⁹ Here, the audience will be left with either a happy, or unhappy, ending. With these basic elements of plot construction in mind, let us now turn to some of the elementary forms a plot can take, fundamental structures to which the vast majority of stories conform.²³⁰

3.3 Common Archetypes and Stock Stories

The basic structures followed by plots are commonly known, in narrative theory, as ‘stock’ or ‘master’ stories. In more specific terms, a ‘stock story’ is a “conventional story type, a story stripped of all but essential details”²³¹. It is a “recurring story template or ‘story skeleton’, a model for similar stories that will be told with differing events, entities, and details.”²³² Hence, in a ‘stock story’, the essential elements discussed above —plot stages, setting, theme, characters— are “reduced to stock structures”, or what narrative theorists call “idealized cognitive” models.²³³

In his book on the topic, Christopher Booker has identified seven such basic plots. These basic plot structures include ‘overcoming the monster’, ‘rags to riches’, ‘quest’, ‘voyage and return’, ‘comedy’, ‘tragedy’, and ‘rebirth’.²³⁴ These ‘stock stories’ are, as Booker puts it, “so fundamental to the way we tell stories that it is virtually impossible for any storyteller ever entirely to break away from them.”²³⁵ In other words, they form “a nucleus of situation and figures which are the very stuff from which stories are made.”²³⁶ On her part, Linda Edwards recognizes, drawing notably on the seminal work of Amsterdam and Bruner, that among the most common plot structures are ones of ‘birth’, ‘rescue’, ‘quest’, ‘slayer’, ‘journey’, ‘trickster’, and ‘betrayal’.²³⁷ Although the authors disagree on how many such plots exist, where exactly

---

²²⁹ C. Booker, *supra* note 201, p. 18.

²³⁰ *Ibid.*

²³¹ S. Paskey, *supra* note 34, p. 70.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ C. Booker, *supra* note 201.

²³⁵ *Ibid.*, p. 6.

²³⁶ *Ibid.*

²³⁷ L. Edwards, *supra* note 55, p. 891.

should the lines be drawn between them, and what name each should be given, the ones mentioned by Booker and Edwards mostly overlap, and are largely agreed upon in the literature.

Because our thinking is largely shaped by these common archetypes, these basic story structures, it has been argued, as mentioned in the previous section of this essay, that the most persuasive stories a lawyer can tell are the ones that fit one of those frames.²³⁸ This is the case because audiences, be they composed of judges, jury, or even moviegoers, tend to be more easily convinced by narratives they can readily imagine.²³⁹ It follows from these findings that for a jurist to be aware of these basic plots means being able to choose the one that best promotes the favoured legal outcome.²⁴⁰ When, for example, a lawyer has to deal with *bad facts*, and when the usual plot seems unfavorable to his or her client, it can be useful to consider whether there might exist other possible narratives and whether those might present the situation in a better light.²⁴¹

For our purposes, it is useful to consider in more details two of these basic archetypes: that of “birth” and “rescue”. Beginning with these two archetypes is particularly helpful, as Edwards points out, because they display resolutely different plot structures.²⁴² On the one hand, the “birth” story —also known as “creation story”— begins, in its essential form, in narrative motion. It is dynamic, and evolutive. It seeks to effect change in the world, to make it more complete.²⁴³ On the other hand, the “rescue story” —which rather resembles the ‘overcoming the monster’ plot identified by Booker— often begins with a steady state, one that is either *in danger of being disrupted* by evil forces, and which the story seeks to protect, or that *has been disrupted*, and to which the story seeks to return.²⁴⁴ It is rather about preservation, than transformation.

Yet, the main reason why the present essay will focus on these two particular archetypes, while very much related to this dichotomy, is slightly more complicated. In fact, it goes to the

---

²³⁸ Michael Hanne and Robert Weisberg (eds.), “Editor’s Introduction to Conversation II”, in *Narrative and Metaphor in the Law*, *supra* note 87, p. 60.

²³⁹ *Ibid.*

²⁴⁰ J. Sheppard, *supra* note 1, pp. 282-283.

²⁴¹ L. Edwards, *supra* note 55, p. 891.

²⁴² *Ibid.*

²⁴³ *Ibid.*, p. 908.

²⁴⁴ *Ibid.*, p. 891 and 899.

very heart of the thesis presented here. As suggested in the introduction, and at various points in the previous sections, the analysis to come will seek to show how two competing types of metaphors of Canadian law —what we have termed *dynamic* and *static* metaphors— shape the way we think, talk, and argue, about the Constitution. The case will be made that, and this is where the following discussion becomes relevant, these two types of metaphors influence the kinds of stories we tell about, and of, the Constitution. Specifically, it will be argued that the two competing conceptual categories identified here contain the seed of particular archetypal narrative structures, namely the very stories —“birth” and “rescue”— to which the following subsections will be devoted. Thus, for this claim —and its implications for lawyers and scholars— to be understood, a basic knowledge of “birth” and “rescue” stories is in order.

3.3.1 Stories of “Birth” and “Creation”

*My mind leads me to speak now of forms changed
into new bodies: O gods above, inspire
this undertaking (which you've changed as well)
and guide my poem in its epic sweep
from the world's beginning to the present day.
- Ovid, Metamorphoses²⁴⁵*

One of the most basic human needs fulfilled by our ability to imagine stories, Booker argues, is our “desire for an explanatory and descriptive picture of how the world began and how we came to be in it.”²⁴⁶ Every culture, every religion, has at least one such story; one story that makes sense of how the world came to be.²⁴⁷ Even more fascinating is the fact that, although all such stories inevitably differ to some degree, they all, irrespective of the cultural or linguistic traditions from which they originate, share certain characteristics, certain key features.²⁴⁸

---

²⁴⁵ Ovid, *Metamorphoses*, translated by Charles Martin, (New York : W.W. Norton & Co., 2005), p. 15.

²⁴⁶ C. Booker, *supra* note 201, p. 544.

²⁴⁷ *Ibid.*

²⁴⁸ C. Booker, *supra* note 201, p. 544.

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.²⁴⁹ 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.”²⁵⁰ This, the idea that each element of the world evolved from what came before it²⁵¹, is what sets this version apart from Judeo-Christian Creation myths, where an almighty God, alone at the world’s beginning, masterminds the entire process in a methodical and orderly fashion.²⁵²

The prevalence of such stories can notably be observed in Greek mythology²⁵³, as well as in ancient religious texts²⁵⁴ and oral traditions²⁵⁵ still observed today. In a like manner, our telling of the ‘Big Bang’ creation story still, to this day, mostly conforms to this plot structure.²⁵⁶ In Canada, one such narrative was captured, as Jeremy Webber rightly points out, “in the phrase ‘from colony to nation,’ which emphasized the progressive development of Canada toward a more perfect nationhood.”²⁵⁷ While he recognizes that the phrase might now appear archaic in modern eyes, he nonetheless emphasizes that “its underlying story has real staying power.”²⁵⁸

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 world²⁵⁹, which change is presented as the normal conclusion of a natural and unavoidable

---

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*, p. 545.

²⁵² *Ibid.*, p. 544.

²⁵³ See, for e.g., Ovid, *Metamorphoses*, *supra* note 245.

²⁵⁴ See, for e.g., Markham J. Geller and Mineke Schipper (eds.), *Imagining Creation*, (Leiden ; Boston : Brill, 2008, c2007); “Myths of creation and destruction”, in Eva M. Thury and Margaret K. Devinney (eds.), *Introduction to mythology : contemporary approaches to classical and world myths*, (New York : Oxford University Press, 2009).

²⁵⁵ See, for e.g., John Borrows, “Indigenous Legal Traditions in Canada”, *Report for the Law Commission of Canada*, January 2006, pp. 18-19, 41; John C. Mohawk, *Iroquois Creation Story*, (Buffalo : Mohawk Publications, 2005.)

²⁵⁶ C. Booker, *supra* note 201, p. 545.

²⁵⁷ Jeremy Webber, *supra* note 4, p. 612. See, for e.g., *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 46: “Canada’s evolution from colony to fully independent state was gradual... Canada’s independence... was achieved through legal and political evolution with an adherence to the rule of law and stability.”

²⁵⁸ *Ibid.*

²⁵⁹ L. Edwards, *supra* note 55, p. 908.

process in which the world has been engaged for some time.²⁶⁰ 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.²⁶¹ 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.²⁶²

In *Once Upon a Time in Law*, Linda Edwards has argued that this typical plot structure, that of beginnings, can prove useful for advocates seeking the recognition of new legal rights.²⁶³ More specifically, in analyzing the briefs in the case of *Miranda v. Arizona*²⁶⁴, she has shown how the story told by the petitioner's brief is actually that of the *birth* of the right to counsel.²⁶⁵ “Rather than setting up current law as the legitimate steady state”, Edwards writes, the story “treats current law by omission and therefore... as merely one of many interim stages in the ongoing growth of constitutional doctrine and thus, not worthy of any particular importance.”²⁶⁶ This way, the brief makes its plea for a change in the law seem conservative, as simply a given.

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. Being familiar with such narrative, having ourselves “evolved” from fetuses to infants to adults, it might well make it easier for us to imagine a story that would follow the same pattern. One other possible explanation for why such 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.

As Robert Gordon has brilliantly shown us, at the heart of liberal legal thought —and liberal legal histories— lies the notion that the “natural and proper evolution of a society... is

---

²⁶⁰ *Ibid.*, p. 909.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*, p. 908.

²⁶⁴ 384 US 436 (1966). At issue in this case was the admissibility at trial of inculpatory and exculpatory statements by a defendant made in response to interrogation in police custody. The Court decided, in a 5-4 ruling, that both statements would only be admissible if the prosecution showed that the defendant was informed of the right to consult with an attorney, and of the right against self-incrimination. The prosecution must also show, the Court further held, that the defendant not only understood these rights, but voluntarily waived them.

²⁶⁵ L. Edwards, *supra* note 55, p. 892.

²⁶⁶ *Ibid.*, p. 893.

towards the type of liberal capitalism” of the West, and that “the natural and proper function of a legal system is to facilitate such an evolution.”²⁶⁷ Coupled with this is the idea that “the causal responsibility for change lies with impersonal forces of historical ‘becoming.’”²⁶⁸ It should be apparent by now that the inherently deterministic character of this narrative, that of a “*master process* of social evolution”²⁶⁹, accords pretty well with some dimensions of the *birth* story discussed above. Insofar as we think of law through this lens, which most Western jurists do, we are bound to be convinced by, or at least find cogent, any story that conforms with this frame.

Some other classical plot structures display similarities with the *birth* story, in that they also begin in the midst of a “struggle toward a specific goal”, in a world that “needs fixing or [that] lacks something important.”²⁷⁰ *Journey* stories, for one, share this metaphorical structure. These stories follow a hero or heroine’s endeavour to make the world right²⁷¹, and the many forces bent on preventing him or her from doing so, forces which must be overcome.²⁷² Likewise, the *Rags-to-Riches* stories, as described by Booker, follow a somewhat similar pattern. The plots of such stories revolve around a protagonist who, although initially “dismissed by everyone as of little account”, as “insignificant”²⁷³, is “dramatically shown to have been hiding the potential for a second, much more exceptional, self within.”²⁷⁴ It is in this notion, that of a hero or heroine becoming who they really are²⁷⁵, in other words, their best selves, that lies the commonality.

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.²⁷⁶ As will be argued below, this particular narrative structure might well be among the *stock stories* that

²⁶⁷ Robert W. Gordon, “Critical Legal Histories”, (1984) 36 Stan L Rev 57, p. 59; See, also, M.-C. Prémont, *supra* note 69, pp. 29-30.

²⁶⁸ *Ibid.*, p. 61.

²⁶⁹ *Ibid.*, p. 63.

²⁷⁰ L. Edwards, *supra* note 55, p. 886.

²⁷¹ *Ibid.*, pp. 886-887. Examples of this plot can be found, for e.g., in *Lord of the Rings* and the *Odyssey*.

²⁷² J. Sheppard, *supra* note 1, p. 286.

²⁷³ C. Booker, *supra* note 201, p. 51.

²⁷⁴ *Ibid.*, p. 52.

²⁷⁵ *Ibid.*, p. 56.

²⁷⁶ L. Edwards, *supra* note 55, p. 909.

have the most in common, conceptually speaking, with what we have termed the *dynamic* metaphors of Canadian constitutional law, of which the “living tree” is a prime example. This, it will be shown, stems from the fact that *birth stories* perfectly convey the ideas of growth and evolution for which the *dynamic* metaphors of Canadian constitutional law stand for. But, let us not get ahead of ourselves. Before we get there, one last basic plot structure merits our attention.

3.3.2 Stories of “Rescue” and “Monsters”

The other common narrative structure that is of interest for our present purposes is that of the *rescue story*. This story often begins in a state of stability and normality.²⁷⁷ However, this initial state is quickly disrupted by “evil forces bent on domination and destruction.”²⁷⁸ 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, or already captured.”²⁷⁹ The object of the rescue may also be, as Edwards tells us, a valuable thing, like a talisman or an “amulet worn for protection or power.”²⁸⁰ 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.²⁸¹ The ultimate goal in such stories is, by way of the rescue, to go back to a “normal, legitimate, ordinary life”, to the initial *status quo*.²⁸²

In her aforementioned essay, Edwards makes the case that the *rescue* story might also prove useful, if used appropriately, in constitutional litigation. Specifically, she argues that this particular narrative structure is one of the most effective when it comes to reaffirming existing law or policy.²⁸³ She illustrates her claim by reviewing the respondent’s brief in *Bowers v.*

---

²⁷⁷ *Ibid.*, p. 887.

²⁷⁸ *Ibid.*, p. 899.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*, p. 908.

²⁸³ L. Edwards, *supra* note 55, p. 908.

*Hardwick*²⁸⁴. This brief tells the story of the right to privacy facing attacks by the antagonist (the State of Georgia), and asks the protagonist, the Supreme Court of the United States, to come to its rescue.²⁸⁵ In doing so, Edwards tells us, the lawyers for the respondent were able to bolster the holding of the trial judge, which recognized a right to privacy, and present it as “vital to society’s shared enterprise and to the welfare of many.”²⁸⁶ By positioning the right to privacy as the story’s steady state²⁸⁷, and by telling us of the very serious dangers looming over it, the brief prompts in the audience an impulse to protect the vulnerable character in this symbolic battle.²⁸⁸

This *rescue* narrative displays certain similarities with another highly common plot structure, that of ‘Overcoming the Monster’. 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 embodiment of evil power.”²⁸⁹ This “monster”, Booker tells us, “is always deadly, threatening destruction to those who cross its path or fall into its clutches.”²⁹⁰ Generally, it is a whole community or kingdom, “even [hu]mankind and the world in general”, that is threatened by this evil creature.²⁹¹ As is the case in the *rescue* story, some great prize, a treasure, or even a beloved one, will often be stuck in the monster’s clutches.²⁹² The story eventually leads to a confrontation between the hero and the monster, one that the former seemingly cannot win.²⁹³ 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.²⁹⁴ By his courageous feat, his selfless deed, the protagonist will have “liberated the world... from the shadow of this threat to its survival.”²⁹⁵

---

²⁸⁴ 384 US 436 (1966). At issue in this case was the constitutionality of a “sodomy law”, adopted by the State of Georgia, that criminalized oral and anal sex in private between consenting adults. The law was found, in a 5-4 ruling, to be valid. This decision was nonetheless overturned in 2003, in *Lawrence v. Texas*, 539 US 558 (2003).

²⁸⁵ L. Edwards, *supra* note 55, p. 907.

²⁸⁶ *Id.*, p. 909.

²⁸⁷ *Ibid.*, p. 900.

²⁸⁸ *Ibid.*, p. 911.

²⁸⁹ C. Booker, *supra* note 201, p. 23.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ C. Booker, *supra* note 201, p. 23.

²⁹⁵ *Ibid.*

The structural element common to these stories is that they both begin in a stable world, one that, as the action unfolds, is either at risk of being disrupted, or has been disrupted, by evil forces.²⁹⁶ From this initial state, both stories describe the struggle of the hero or heroine to “resolve the disequilibrium” and to “return to some version of legitimate stability”²⁹⁷. In both stories, a major part is played by the wicked antagonist, by the evil creature whose only aim is to wage destruction on the world. “So powerful is the presence of this figure, so great the sense of threat which emanates from it,” Booker explains, “that the only thing which matters to us”, the audience, “as we follow the story is that it should be killed and its dark power overthrown.”²⁹⁸ Famous examples of this archetypal plot structure in literature come from the Greek myth of Perseus, the Dark Ages epic poem of Beowulf, as well as from Mary Shelley’s *Frankenstein* and Bram Stoker’s *Dracula*, to name just a few.²⁹⁹ Closer to us in time, Ian Fleming’s *James Bond* stories and George Lucas’s first *Star Wars* illustrate the timeless character of this story pattern.³⁰⁰

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 later sections of the present essay, these archetypal narratives appear to be the *stock stories* that share the most, in conceptual terms, with what we have termed the *static* metaphors of Canadian constitutional law, of which the “constitutional architecture” metaphor is a prime example. This, 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”³⁰¹.

---

²⁹⁶ L. Edwards, *supra* note 55, p. 887.

²⁹⁷ *Ibid.*

²⁹⁸ C. Booker, *supra* note 201, p. 23.

²⁹⁹ *Ibid.*, pp. 23-28.

³⁰⁰ *Ibid.*, p. 38, 42.

³⁰¹ L. Edwards, *supra* note 55, p. 908.

3.4 Narrative and Metaphor in the Law: What We Have Learned So Far

The aims and takeaways of the previous sections were many and varied. It is thus worth, before moving on to our analysis, to briefly recap what they were. The first part has sought to introduce the reader to “narrative scholarship”, a field concerned with the use of metaphor and narrative in law. It told of how three main topics, all considered here, have interested scholars so far: the foundational role of narrative in law, its place in traditional legal discourse, and its use as a tool for lawyering. The second part has provided the reader with an overview of the cognitive research on how narrative and metaphor shape our thinking. It has shown how these help us make sense of the world and reason about abstract concepts and ideas. It has also illustrated the important role that they play in persuasive legal writing. As for the third section, its aim was to provide readers with the basic tools necessary to conduct a narrative analysis on any one legal text. It discussed the essential building blocks of storytelling —setting, conflict, character, and theme— and offered an overview of two common plot structures: *birth* and *rescue* stories. With these tools in hand, our journey into the world of narrative scholarship can finally... begin!

Chapter 4

Metaphors and Stories of the Canadian Constitution

Canadian constitutional law is largely shaped by two main types of metaphors —*dynamic* and *static*— that each conveys a distinct conception of the Constitution and, as such, influence the kinds of stories we tell about it. This is, in a few words, the general hypothesis put forward by this essay, and which the next section seeks, in keeping with the above, to demonstrate. The case will be made, more specifically, 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 sections. The first section (4.1) introduces the *dynamic* and *static* metaphors of Canadian constitutional law, with a focus on the *living tree* and the *constitutional architecture*. The second section (4.2) emphasizes how these types of metaphors influence the kind of stories we tell of the Constitution. Specifically, it seeks to demonstrate, by looking at recent opinions from the Supreme Court of Canada in a narrative perspective, how these two types of metaphors, and the broader conceptual fields that they support, sustain archetypal narratives of *birth* and *rescue* about the Constitution. This second section also explores what this particular finding means for constitutional scholars and lawyers.

4.1 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. It is, as such, no simple thing to conceptualize.³⁰² The very idea of constitutionalism, in fact, has seemingly always proven to be a challenging one for the imagination, even in more fully formalized, comprehensive constitutional

---

³⁰² W. Newman, *supra* note 13, p. 472.

systems.³⁰³ This lasting difficulty might account, as was suggested in the introduction, for why we still hold on to stories like that of the ‘social contract’. It might also account, in light notably of the cognitive research outlined above, for why Canadian jurists, be they judges, lawyers or scholars, have tended to resort to conceptual metaphors in order to better grasp, and get a clearer sense of, the working of the supreme law of the country.³⁰⁴ 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.³⁰⁵ It is through the use of conceptual metaphors that we give shape to abstract concepts.³⁰⁶ 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.”³⁰⁷ In short, they provide us with a stock of ready mental images of the Constitution and simplified models for reasoning about it.

In addition to serving as devices for the imagination, lasting 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. In other words, they help shape the “sensibility of those involved in applying and obeying the law.”³⁰⁸ Because the meaning of legal texts is never wholly clear, nor entirely determined³⁰⁹, reasoned judgment is needed to interpret and apply them. This judgment depends, as Webber reminds us, 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.³¹⁰ This is where metaphors come into play. They offer us tools for reasoning about rules and principles. Indeed:

---

³⁰³ One interesting question left unanswered by the present essay, one which, in our view, deserves more attention, is that of whether conceptual metaphors might come to play different roles, have distinct functions and purposes, depending on the level of formalization of the constitutional system in which they arise.

³⁰⁴ On the pervasiveness of metaphors in American constitutional law, see M. Ball, *supra* note 64, pp. 17-19.

³⁰⁵ M. Hanne & R. Weisberg, *supra* note 87, p. 4.

³⁰⁶ H. Cyr, *supra* note 45, p. 5.

³⁰⁷ W. Newman, *supra* note 13, p. 475.

³⁰⁸ J. Webber, *supra* note 4, p. 614.

³⁰⁹ See, on the relative indeterminacy of law, Oliver Wendell Holmes, “The Path of the Law”, (1897) 10 Harv L Rev 457; F. Cohen, *supra* note 4.

³¹⁰ J. Webber, *supra* note 4, p. 614.

[t]hey can supply a range of examples of the norms in action, furnishing models for how the norms should be applied. They often record a wide swath of the experience of social interaction, weighed, assigned value, and ordered, against which possible formulations of norms can be tested and refined. And they give salience and a memorable quality to certain norms, so that those norms are retained, internalized, and sometimes made a focus of identification and allegiance.³¹¹

In short, it is by “providing an overarching framework to guide interpretation and by suggesting the relative importance of norms” that metaphors —and narratives— assist this judgment.³¹² As such, dominant metaphors and narratives might be said, to some extent, to *drive* legal reasoning.

Constitutional metaphors have also come to play an important role in both the lawyering task of persuasion, and the justificatory discourse of 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 issue.³¹³ In focusing the audience’s attention on one aspect of a debate, say the *need* for the Constitution to keep *evolving* in order 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, say considerations of legal stability and predictability.³¹⁴ Used in this manner, the metaphor can intensify or increase the persuasiveness of legal arguments, in legal briefs and judicial opinions alike. Hence, the choice of the metaphor is, in this particular sense, never an innocent one.

Many such metaphors have been formulated over the years, not only by judges, but also by lawyers and scholars, each referring to different aspects of the functioning of the Constitution. One can think, for instance, of Peter Hogg’s famous *dialogue* metaphor, which stands for the idea that *Charter* decisions striking down laws are not the end, but rather the beginning of a “dialogue” between legislative bodies and courts.³¹⁵ The Constitution as an “original compact”,

---

³¹¹ J. Webber, *supra* note 4, p. 615.

³¹² *Ibid.*, pp. 614-615.

³¹³ L. Berger, *supra* note 61, p. 278; T. Brown, *supra* note 65, p. 29; M. Ball, *supra* note 64, p. 22; M.-C. Prémont, *supra* note 69, pp. 32-33.

³¹⁴ G. Lakoff and M. Johnson, *supra* note 66, p. 10.

³¹⁵ Peter Hogg, Allison Bushell Thornton & Wade Wright, “Charter Dialogue Revisited - or Much Ado about Metaphors”, (2007) 45:1 Osgoode Hall LJ 1, p. 1. See, generally, vol. 45 of the *Osgoode Hall Law Journal*. See,

as a “compromise” between the federal and provincial entities, or even between “founding peoples”, is another powerful metaphor in Canadian law, one often used in support of minority rights and extended provincial powers.³¹⁶ Likewise, metaphors representing the Supreme Court as the *guardian* of the Constitution³¹⁷, and of the *Charter* in particular, or as an *impartial arbiter* of disputes on the division of powers³¹⁸, have also shaped our legal imagination in many ways.

While many different such metaphors have punctuated the development of Canadian constitutional law, with themes ranging from the nautical to the organic, to the mechanical³¹⁹, two core groups can nonetheless be identified among them. Indeed, if one takes a closer look at it, two main conceptual categories quickly emerge: *dynamic* and *static* metaphors.³²⁰ This is not to say, obviously, that all metaphors about the Canadian Constitution can be fitted into these two categories. In fact, some of the ones we have come upon in our research, like that of the constitutional *dialogue*, *tapestry*, and *machinery*, would arguably be hard to classify in one of these two groups. This line of demarcation —between *dynamic* and *static*— is, however, the one that seemed most meaningful to us, not only because the resulting categories encompass, among themselves, the greatest number of constitutional metaphors, and the most influential ones for that matter, but also because it goes, conceptually, to the very heart of these metaphors, and what they stand for.³²¹ These categories represent, in other words, the most telling of the common denominators we have found among the dominant metaphors of Canadian constitutional law.

In his essay on the topic, to which the following section owes a great deal, Warren Newman has recognized a similar dichotomy, between what he himself terms “animating” and

also, Peter Hogg & Allison Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn’t Such A Bad Thing After All)”, (1997) 35 Osgoode Hall LJ 75.

³¹⁶ W. Newman, *supra* note 13, p. 484. See, for the original quote from Lord Sankey, *In re the Regulation and Control of Aeronautics in Canada*, [1932] 1 D.L.R. 58, [1932] A.C. 54. See also, for further reference, *Attorney General of Quebec v. Blaikie*, [1979] 2 SCR 1016.

³¹⁷ See, for e.g., *Hunter v. Southam Inc.*, [1984] 2 SCR 145, at p. 155; *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 SCR 433, 2014 SCC 21, para. 89. See also H. Cyr, *supra* note 45, p. 32; D. Guénette, *supra* note 12, p. 58.

³¹⁸ See, for e.g., *Reference re Securities Act*, [2011] 3 SCR 837, 2011 SCC 66, para. 55-57.

³¹⁹ W. Newman, *supra* note 13, p. 471.

³²⁰ Special thanks to Jean-Christophe Bédard-Rubin for the discussion that led to this choice of terminology.

³²¹ For thoughts on a similar dichotomy in American constitutional law, see M. Ball, *supra* note 64, pp. 92, 121.

“structural” constitutional metaphors.³²² The alternating *animating* and *structural* metaphors of constitutionalism, he writes, “are basic to an understanding of how our Canadian Supreme Court embraces constitutional analysis”³²³. In his view, while the former mainly speak to the “living, organic” aspects of the Constitution, and tend to be associated with an evolutive reading of its text³²⁴, the latter are rather employed to “highlight... the framework undergirding the Constitution”, and are often linked with a reading of its text that “borders on originalism.”³²⁵

On a terminological note, the *static/dynamic* typology will be preferred, for the remainder of this essay, to the *animating/structural* one. In our view, the former of the two typologies is the one that better conveys what we see as the “conceptual common denominator” between the metaphors that make up each group. It better communicates, in other words, the ideas of movement and stability that characterizes each category respectively. The *static/dynamic* typology also appears, in our view, somewhat more clearly dichotomic than does the other. The natural opposition between *animation* and *structure* seems to us more tenuous. The choice of this particular typology also serves to avoid the unnecessary confusion —and apparent tautology— that could arise when speaking of the constitutional *structure* as being a *structural* metaphor. That being said, in terms of their conceptual content, the two typologies are essentially the same.

Before moving on to consider the *static* and *dynamic* categories in turn, as well as their manifestations in legal discourse, one last comment is in order. As was astutely pointed out to us, the above discussion raises the very interesting —and equally complicated— question of which comes first: the *metaphor*, or the *reasoning*. In other words, do jurists reason and write *on the basis of* a particular metaphor, or does the metaphor —the *choice of*, in most cases— only arises later in the process, in order to justify the reasoning? There is not sufficient space in the present essay, unfortunately, for us to settle this question for good, nor, for that matter, is there a need to. Let us only say, at this point, that both statements might be said, in our view, to contain some truth. On the one hand, it seems the case can convincingly be made that dominant, enduring

---

³²² W. Newman, *supra* note 13, p. 472.

³²³ *Ibid.*, p. 473.

³²⁴ *Ibid.*, pp. 472-473.

³²⁵ *Ibid.*, p. 472.

metaphors, like that of the *living tree*, are so ingrained in our juridical imagination, so entrenched in our legal consciousness, that they do, sometimes, partly *drive* the legal reasoning they accompany; that they well might, in some situations, provide the starting point of a legal analysis. On the other hand, the case could also plausibly be made that the choice of a metaphor, and the way it is used, is only function of the outcome sought by the person using it; that the metaphor not *precedes*, but rather *follows* from the legal reasoning, that it *obeys* it. In a sense, this goes back to the long-standing debate on the nature of legal adjudication, a debate on which people far more learned than the undersigned have already reflected and written extensively.

4.1.1 The “Dynamic” Metaphors

The present section will be devoted to what we have termed the *dynamic* metaphors of Canadian constitutional law. It is divided into two parts. The first part offers a general overview of what we mean when we talk of *dynamic* constitutional metaphors in Canadian law. As for the second part, it is concerned with a prime example of this category, the famous “living tree” metaphor from the *Persons* case, as well as its various extensions. The inquiry will focus, more specifically, on the broad conceptual field associated with these metaphors, and the language they prompt judges, lawyers, and scholars, to use. The main interest, for our purposes, in identifying the central theme and ideas conveyed by each type of metaphors is that it will help us, later in the analysis, to recognize the narratives they sustain about the Constitution. The same exercise will be conducted, in the next section, in regard to the “constitutional architecture”.

The general idea behind this section —and the one after— is, in the words of Lakoff and 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.”³²⁶ This means, for instance, that we do not just *talk* about the Constitution in terms of tree. We

---

³²⁶ Lakoff and Johnson, *supra* note 79, p. 3. To illustrate this claim, the authors offer the example of the conceptual metaphor “Argument is War”. This metaphor, they write, is not only “reflected in our everyday language by a wide variety of expressions”, it also structures the way we argue. “We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his positions and we defend our own... Many of the things we *do* in arguing are partially structured by the concept of war.” The metaphor “structures the actions we perform in arguing.” (p. 4)

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, how we *conceptualize* it. In other words, communication is based on our conceptual system, which also generates thinking and acting.³²⁷ 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, using the semantic and conceptual field of one metaphor or another, we could have a better idea of these very people *think* about it.

4.1.1.1 General Overview

The *dynamic* metaphors are, as their name indicates, the ones that speak to the growth, to the development, of the Constitution. They are about “flexibility, suppleness, and growth.”³²⁸ Implied in these metaphors are ideas of traction, of evolution, of “motive force”³²⁹. Many of them are concerned with “the living, organic aspects of the Constitution”³³⁰. In Canada, the most famous of these metaphors is, without a doubt, the one of the “living tree”. Similar ones can be found in other jurisdictions, such as the “living constitution” metaphor in the United States, and the “living force” metaphor in Australia.³³¹ A lesser-known example of a dynamic constitutional metaphor in Canada is that of the *mille-feuille*.³³² Built upon the idea of the historical continuity of the Canadian federation, this metaphor captures the idea of a stratified legal order formed by

---

³²⁷ I am grateful to Prof. Lorraine Weinrib for this illuminating formulation of Lakoff and Johnson’s quotation.

³²⁸ W. Newman, *supra* note 13, p. 472.

³²⁹ *Ibid.*, p. 471.

³³⁰ *Ibid.*, p. 472.

³³¹ See Vicki C. Jackson, “Constitutions as Living Trees - Comparative Constitutional Law and Interpretive Metaphors”, (2006) 75 Fordham L Rev 921, pp. 934, 942.

³³² D. Guénette, *supra* note 12, p. 58. The literal translation of this word in English is “thousand-leaves”. This French word designates, according to the Merriam-Webster Online Dictionary, a “dish composed of puff pastry layered with a filling”. It is also sometimes referred to as a “Napoleon”.

the accumulation of successive layers of constitutional norms, be they written or unwritten.³³³ It pictures the Constitution not as an immutable entity, but rather as the result of years of growth.³³⁴

The *dynamic* metaphors are, in practice, largely used to support an evolving interpretation of both the provisions and unwritten principles of the Constitution. As will become clear in our discussion of the “living tree”, these metaphors broadly stand for the idea that constitutional interpretation should be large and evolutive, for such instruments deal in very few words with subjects of great importance and for new developments and changed understandings are bound to arise over time.³³⁵ In other words, these metaphors stand for the proposition that, for the Constitution to be exhaustive, and to remain relevant, it must be read so as to accommodate the realities of modern life³³⁶, so as to leave space for growth. This growth, however, needs not, nor should not, 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.

4.1.1.2 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 v. Canada*³³⁷. At issue in this case, commonly known as the “Persons Case”, was the question of whether women could serve in the Senate of Canada. The controlling provision, s. 24 of the *Constitution Act, 1867*³³⁸, provides for

---

³³³ D. Guénette, *supra* note 12, p. 58, quoting Patrick Taillon and Amélie Binette, « Le fédéralisme canadien: sources, pratiques et dysfonctionnements », in *Le fédéralisme: du droit public au droit privé*, Journées bilatérales québéco-suisse de l’Association Henri-Capitant, Institut suisse de droit comparé, Lausanne, 2013.

³³⁴ D. Guénette, *supra* note 12, p. 58, quoting Jacques-Yvan Morin and José Woehrling, *Les constitutions du Canada et du Québec: du Régime français à nos jours*, tome 1, (Montréal; Thémis, 1994), at p. 133. To some extent, it could be argued that the metaphor of the *reconciliation* between Canada and its Indigenous peoples, dear to Canadian constitutional law, also displays this forward-looking character.

³³⁵ V. Jackson, *supra* note 331, pp. 926, 948.

³³⁶ *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698, at para. 22.

³³⁷ [1930] AC 124, 1929 CanLII 438 (UK JCPC). [*Edwards*]

³³⁸ 30 & 31 Victoria, c. 3 (UK).

the appointment of "qualified persons" to the Senate.³³⁹ As for s. 23, which defines the necessary qualifications of a senator, it requires that said person be a citizen and hold property of certain types. It also speaks in the masculine voice ("He shall be...").³⁴⁰ The precise question at issue, the one referred in 1927 by the government to the Supreme Court of Canada on the request of five women, was thus whether the words "qualified persons" in section 24 of the *Act* include women.

In 1928, the Supreme Court unanimously held that the phrase "qualified persons" in s. 24 excluded women from those eligible to sit on the Senate.³⁴¹ Four judges came to this conclusion, among them Chief Justice Anglin, primarily because of the common law disability of women to hold public office³⁴², and upon a consideration of several British cases decided under British laws as to the right of women to vote for a member of Parliament.³⁴³ The decisions in these cases all emphasized that "the legislature in dealing with the matter cannot be taken to have departed from the usage of centuries, or to have employed loose and ambiguous words to carry out a so momentous and fundamental change."³⁴⁴ Relying on these precedents, the Court held that, "as is the case with other statutes", the various provisions of the *Act* "bear today the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted."³⁴⁵ In this case, it meant that if "the phrase 'qualified persons' in s. 24 includes women today, it has so included them since 1867."³⁴⁶ If this "striking constitutional departure" from the common law was intended, the Court further held, it would have been made express.³⁴⁷

It should be noted that the Supreme Court was not, prior to 1949, the court of last resort in Canada.³⁴⁸ This function was bestowed, until that time, on the Privy Council, in London. It is

---

³³⁹ *Ibid.*, s. 24: "The Governor General shall from Time to Time, in the Queen's Name, ...summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator."

³⁴⁰ *Ibid.*, s. 23.

³⁴¹ *Reference re meaning of the word "Persons" in s. 24 of British North America Act*, [1928] SCR 276.

³⁴² *Ibid.*, p. 284.

³⁴³ *Edwards v. Canada*, [1930] AC 124, p. 99.

³⁴⁴ *Ibid.*, p. 102.

³⁴⁵ *Reference re meaning of the word "Persons"*, [1928] SCR 276, p. 282.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*, p. 285. While Duff J. disagreed with the majority on this point, he reached the same conclusion (p. 294).

³⁴⁸ See *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 SCR 433, 2014 SCC 21, para. 82.

in this context that the Privy Council reviewed, in 1929, the opinion of the Supreme Court regarding the meaning of s. 24. In a unanimous decision penned by Lord Chancellor Sankey, the Privy Council overturned the Court's holding, and found that the word "persons" in s. 24 "does include women, and that women are eligible to... become members of the Senate of Canada."³⁴⁹

The Privy Council's disagreement with the decision had to do, most of all, with the interpretive approach favoured by the Supreme Court when expounding the meaning of the *Act*. In regard, first, to the common law disability of women to hold office, Lord Sankey held that:

[c]ustoms are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history therefore in this particular matter is not conclusive.

[...]

Over and above that, their Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development...³⁵⁰

While history is to be the starting point of constitutional adjudication, it is not, in all cases, to be its ending point.³⁵¹ In other words, the inferences to be drawn from it are "exceedingly slight".³⁵² This is not to mention, the opinion stresses, that legislation "meant to apply to one community" should not be interpreted "by a rigid adherence to the customs and traditions of another"³⁵³.

---

³⁴⁹ *Edwards v. Canada*, [1930] AC 124, p. 99.

³⁵⁰ *Ibid.*, p. 105. This is somewhat reminiscent something Oliver Wendell Holmes Jr. said in "The Path of the Law", (1897) 10 Harv L Rev 457, p. 469. In this essay, Holmes argued it was "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past..."

³⁵¹ The same sentiment was expressed by Justice Anthony Kennedy, of the United States Supreme Court, in *Lawrence v. Texas*, 539 US 558 (2003), the decision striking down Texas's sodomy laws. "History and tradition" he recognized, quoting his concurring opinion in *County of Sacramento v. Lewis*, 523 US 833, 857 (1998), are "the starting point but not in all cases the ending point" of a constitutional inquiry. See *Lawrence*, p. 572.

³⁵² *Edwards v. Canada*, [1930] AC 124, p. 105, citing *Rex v. West Riding of Yorkshire County*, [1906] 2 KB 676.

³⁵³ *Ibid.*, p. 106.

Leaving these considerations aside, the opinion then moved on to the analysis of the *Act* itself. It is then, following a brief review of the circumstances leading up to the adoption of the *Act*³⁵⁴, and at the very outset of his textual analysis, that 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.³⁵⁵

The use of this conceptual metaphor, which stands for the idea that the Constitution must be read liberally so as to adapt to changing circumstances, foreshadowed the analysis to come, and the Privy Council's ultimate conclusion, that the word "persons" in s. 24 did include women. This metaphor also remains, almost ninety years later, the dominant one in our constitutional law.

This common understanding of the metaphor, as supporting an evolutive interpretation of the Constitution, is confirmed by the explanations given by Lord Sankey to the effect that, like all written constitutions, the *Act* was "subject to development through usage and convention."³⁵⁶

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.³⁵⁷

This passage signalled a reversal of the prior Privy Council position, according to which the *Act* was to be read "by the same methods of construction and exposition" applied to other statutes.³⁵⁸ "[T]here are statutes and statutes"³⁵⁹, Lord Sankey wrote. One creating a constitution for a new country must, at all times, be interpreted "in a large, liberal, and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words."³⁶⁰

---

³⁵⁴ *Edwards v. Canada*, [1930] AC 124, p. 106.

³⁵⁵ *Ibid.*, pp. 106-107; For thoughts on the origins of this metaphor, see W. Newman, *supra* note 13, pp. 480-482.

³⁵⁶ *Ibid.*, p. 107, quoting Sir Robert Borden, *Canadian Constitutional Studies*, 1922, at p. 55.

³⁵⁷ *Ibid.*, p. 107.

³⁵⁸ *Ibid.*; See, also, V. Jackson, *supra* note 331, p. 945.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*, quoting from *St. Catherine's Milling & Lbr. Co. v. The Queen* (1888), 14 App. Cas. 46, at p. 50.

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 the Canadian society, and not only look for the original meaning of the words employed.³⁶¹ This is where part of the power of metaphor lies: in expressing the essence of ideas —or, in this case, principles of constitutional interpretation— that would otherwise be difficult to convey.³⁶² It is, as we have seen above, how these conceptual metaphors give shape to abstract principles.³⁶³

In order to better understand how these ideas of growth and evolution, for which the “living tree” stands for, affect the way we think, talk, and argue about the Constitution, it seems worthwhile to retrace the various instances where the metaphor has been employed in our legal discourse and the ends for which it was used. In addition to identifying explicit references to this metaphor, the following section will also seek to look for the more subtle ways in which it colours the language of judicial opinions and scholarly articles. Specifically, the next section will identify the broad conceptual domain which is associated, by way of the metaphor, to the Constitution. In short, it will uncover the central themes and ideas that the metaphor conveys.

4.1.1.3 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 which evolution remains constrained by its origins. “Trees, after all, are rooted”, Vicky C. Jackson notes.³⁶⁴ To further borrow the vocabulary of forestry, the Constitutional *tree* is understood in the Canadian legal consciousness to have *roots* and a *trunk*, that is structural elements which form the foundation of our society and legal system. While the *tree* must, in order to keep on living, have its *roots* preserved, it nonetheless keeps on *growing*, through its *branches* and *leaves*, which are symbols of the evolutive interpretation of the text.³⁶⁵

---

³⁶¹ H. Cyr, *supra* note 45, p. 18; D. Guénette, *supra* note 12, pp. 54-55; V. Jackson, *supra* note 331, p. 946.

³⁶² M. Hanne & R. Weisberg, *supra* note 87, p. 4.

³⁶³ H. Cyr, *supra* note 45, p. 5.

³⁶⁴ V. Jackson, *supra* note 331, p. 943; D. Guénette, *supra* note 12, pp. 54-55.

³⁶⁵ *Ibid.*; *Ibid.*; M.-C. Prémont, *supra* note 69, pp. 26-28.

This availability of the "living tree" metaphor to describe a method of constitutional interpretation which contemplates "both constraint and growth" is, Jackson argues, part of its strength.³⁶⁶ It is, for instance, what sets it apart from the related metaphors of the "living constitution" or "living document" in the United States, and of the "living force" in Australia. Compared to the "living tree", both these metaphors appear "oddly disembodied".³⁶⁷ They bring to mind, as Jackson rightly points out, "an amorphous mass, with possibilities that constitutional law is untethered to anything but current judges' preferences."³⁶⁸ They do not convey the fact that constitutional text and precedents continue to play a role in adjudication.³⁶⁹ In contrast, the tree:

...metaphor is one that draws attention to origins, to roots, as well as to the possibility of growth. It implies a connection with interpretation in older decisions and a more constrained view of the choices open to later generations —unlike animals that can migrate at will, plants (including trees), must grow from where they begin, and maintain contact with their roots for nourishment and health...³⁷⁰

In other words, it is by embracing the "mixed elements of rootedness and change"³⁷¹, elements central to Canadian constitutional adjudication, that the "living tree" metaphor differs from others. Seen in this light, constitutional interpretation is limited, but not immobilized, by the past.

Still, the main idea conveyed by this metaphor remains that of a natural evolution³⁷², of a *growth*. This idea translates, as was already mentioned, in a principle of evolutive interpretation of the Constitution, one that paints a dynamic and creative vision of it.³⁷³ This principle, which

---

³⁶⁶ V. Jackson, *supra* note 331, p. 954.

³⁶⁷ *Ibid.*, p. 942.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*, p. 954.

³⁷¹ *Ibid.*; See, also, p. 926: "The U.S. metaphor-a "living constitution"- does not necessarily capture the actual methodologies of our own constitutional interpretation, which remain grounded in constitutional text and whose sources include original understandings as well as later history and precedent. In Canada, a widely used metaphor is of their constitution as a "living tree." The idea of a "living tree" may better embrace the multiple modalities —text, original intentions, structure and purpose, precedent and doctrine, values and ethos, prudential or consequentialist concerns— of contemporary constitutional interpretation....". While it may well be true that the idea of a "living tree" could, conceptually, better embrace the modalities of constitutional interpretation listed by Jackson than does the idea of a "living document" —thanks mostly to the "rootedness" element lacking in its American counterpart— it is not clear that it does embrace *all* of them in Canadian law.

³⁷² M.-C. Prémont, *supra* note 69, p. 30.

³⁷³ D. Guénette, *supra* note 12, p. 54.

has played a central role in Canadian law since the 1930s, is often used to discard claims that the words of the Constitution should be read in light of their original meaning.³⁷⁴ An illustration of this comes from the *Re B.C. Motor Vehicle Act*³⁷⁵, where the Court deemed provisions of the impugned statute unconstitutional because contrary to the right to life, liberty and security under s. 7 of the *Charter*. In his reasons, Lamer J. wrote that the danger of relying on original intent:

...is that, in so doing, the 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.³⁷⁶

This *dynamic* 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 makes 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.³⁷⁷ 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*.³⁷⁸ They thus influence our assessment of what we ought to be seeing and feeling.³⁷⁹ Here, it is precisely because we expect *the tree* to grow, and because it is tightly associated, in our mind, with the *Constitution*, that we also expect the latter to grow. Thus, the “living tree” metaphor might account, 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.

---

³⁷⁴ H. Cyr, *supra* note 45, p. 18.

³⁷⁵ [1985] 2 SCR 486.

³⁷⁶ *Ibid.*, para. 53.

³⁷⁷ L. Berger, *supra* note 61, p. 278.

³⁷⁸ C. Baldwin, *supra* note 110, p. 236.

³⁷⁹ J. Sheppard, *supra* note 1, p. 260.

This process of “inference mapping” also is strikingly exemplified in the more recent *Reference re Same-Sex Marriage*³⁸⁰. In rejecting claims to the effect that the concept of “marriage” in s. 91(26) of the Constitution entrenched common law definitions that only encompassed the union of a man and a woman, the Supreme Court 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.³⁸¹

By picturing the originalist approach 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 ultimately be preferred, 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. This is what we refer to when speaking of the *framing* power of metaphors.³⁸²

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*. This notion was expressed, notably, in the 2007 case of *Canada v. Hislop*³⁸³, in which the Supreme Court struck down provisions of the *Canada Pension Plan* on the ground that it discriminated against same-sex couples. In their reasons, LeBel and Rothstein JJ. said this about the “living tree” metaphor:

...From the time Lord Sankey... used these words to characterize the nature of the Canadian Constitution, courts have relied on this expression to emphasize the ability of the Constitution to develop with our country... This Court has often stated that the Canadian Constitution should not be viewed as a static document but as an instrument capable of adapting with the times by way of a process of evolutionary interpretation, within the natural limits of the text, which “accommodates and addresses the realities of modern life”...³⁸⁴ [Our emphasis.]

---

³⁸⁰ 2004 SCC 79, [2004] 3 SCR 698.

³⁸¹ *Ibid.*, para. 22.

³⁸² See, also, L. Berger, *supra* note 61, p. 283.

³⁸³ 2007 SCC 10, [2007] 1 SCR 429.

³⁸⁴ *Ibid.*, para. 94, quoting *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698, at para. 22.

This idea of the need for the “living tree” to adjust in order to survive, of a slow “evolution towards betterment”³⁸⁵, is prevalent in our legal discourse. Through this idea, the “engine of evolution” is presented by the courts as an “internal desire of the Constitution to survive in its environment.”³⁸⁶ Courts, as “guardians” of the Constitution, thus present themselves as only effecting the changes and adaptations necessary to ensure the contemporary relevance of our founding document, to guarantee, in other words, its very “survival”.³⁸⁷ For this reason, Hugo Cyr tells us, this idea has occupied a “central place in the justificatory discourse of the courts”³⁸⁸.

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 v. Canada*³⁸⁹, which case dealt with the constitutionality of the federal legislation abolishing the long-gun registry. In their reasons for striking down the impugned provision, the dissenting Justices stressed the importance of the unwritten principles of the Constitution. 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.”³⁹⁰

4.1.1.4 The “Living Tree”: Acknowledging its Natural Limits

In addition to *sap*, *branches* and *leaves*, the Constitution as a *living tree* is also thought to have, as was mentioned above, *roots* and a *trunk*.³⁹¹ 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* in order for it to keep on *growing*. The original metaphor also made clear that

---

³⁸⁵ H. Cyr, *supra* note 45, p. 31.

³⁸⁶ *Ibid.*, p. 32; M.-C. Prémont, *supra* note 69, p. 30.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*, pp. 30-31.

³⁸⁹ [2015] 1 SCR 693, 2015 SCC 14.

³⁹⁰ *Ibid.*, para. 144 (LeBel J., Gascon J., and Wagner J. (as he then was), dissenting).

³⁹¹ Other less prevalent extensions of the living tree metaphor include, but are not limited to, talks of the necessity to “prune the living tree”, or of the presence of a “burl on the living tree”. Another author has reminded us, in a like manner, that the *Charter* is a “living tree and not a weed to be stunted.” See, for e.g., Natalia Rodriguez, “Section 93: Why Canada Needs to Prune the Living Tree”, (2017) 11 J Parliamentary & Pol L 155; Richard Haigh, “A burl on the living tree : freedom of conscience in Section 2(A) of the Canadian Charter of Rights and Freedoms”, Thesis (S.J.D.)-University of Toronto, 2012; Don Stuart, “The Charter is a Vital Living Tree and Not a Weed to be Stunted: Justice Moldaver Has Overstated”, (2006) 21 NJCL 245.

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 the *static* metaphors discussed below. Let us briefly consider what this has meant, in legal discourse, for the *growth* of the *living tree*.

In general terms, the idea of *natural limits* usually stands, in *living-tree* constitutionalism, 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.”³⁹² It is most frequently, although not exclusively, in disputes about the division of legislative powers between the federal Parliament and provincial legislatures, under s. 91-95 of the *Constitution Act, 1867*, that these limits are invoked.³⁹³ The *Reference re Same-Sex Marriage*³⁹⁴ provides a good illustration of this. While the Court relied on the “living tree” doctrine to discard an originalist reading of the word “marriage” in s. 91(26), it nonetheless held that this doctrine did not trump the express constitutional division of power. Specifically, it found that section 2 of the statute, which dealt with the question of who would perform such marriages, was not within exclusive federal legislative competence, as the provinces have power over the solemnization of marriages.³⁹⁵

One of the most striking discussions of the *limits* inherent in the “living tree” metaphor is found in *R. v. Prosper*³⁹⁶, where the Court refused to read s. 10(b) of the *Charter*, on the right to counsel, in a way that would require the government to provide publicly funded “duty” counsel. While dissenting on another issue, L’Heureux-Dubé J. wrote, against such an interpretation, that:

the “living tree” theory has its limits and has never been used to transform completely a document or add a provision which was specifically rejected at the outset. It would be strange, and even dangerous, if courts could so alter the constitution of a country.”³⁹⁷

---

³⁹² H. Cyr, *supra* note 45, p. 21.

³⁹³ *Ibid.*

³⁹⁴ 2004 SCC 79, [2004] 3 SCR 698.

³⁹⁵ *Ibid.*, para. 36-39.

³⁹⁶ [1994] 3 SCR 236.

³⁹⁷ *Ibid.*, p. 287.

This excerpt expresses the idea that, while evolutive, the interpretative approach linked with the *living tree* should not go against the clear “historical intentions of the *Charter* in a period soon after its enactment, nor to legitimate such judicial “alterations” of the [C]onstitution.”³⁹⁸ As for which aspect of the Constitution is outside these very *limits*, it does, however, remain unclear.

One possible line of demarcation might be whether or not the dispute bears on so-called “historic compromises”³⁹⁹. Take, for instance, the case of *R. v. Blais*⁴⁰⁰. In this case, the Court found that the Métis were not covered by the word “Indians” under the hunting rights provisions of the *Manitoba Natural Resources Transfer Act*⁴⁰¹ scheduled to the *Constitution Act*, 1930. While acknowledging that the “living tree” remains a “fundamental tenet” of constitutional interpretation, the Court held that it was “not free to invent new obligations foreign to the original purpose of the provision at issue”⁴⁰². The purpose of the provision was, to put it another way, constrained by the historical relationships Canada had with different aboriginal peoples.⁴⁰³

As for the living 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.”⁴⁰⁴ 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.”⁴⁰⁵ This means, in legal discourse, that constitutional interpretation should not be conducted in a way that disregards the past.⁴⁰⁶ It should use the past as its starting point, and be

---

³⁹⁸ V. Jackson, *supra* note 331, p. 953.

³⁹⁹ *Ibid.*, p. 951.

⁴⁰⁰ [2003] 2 SCR 236, 2003 SCC 44.

⁴⁰¹ R.S.C. 1930, c. 29.

⁴⁰² 2003 SCC 44, para. 40, quoted in V. Jackson, *supra* note 331, p. 951.

⁴⁰³ *Ibid.*, para. 33; In a like manner, the Court found, in *Adler v. Ontario*, [1996] 3 SCR 609, that the provincial government’s decision to fund Roman Catholic separate schools, as required by s. 93 of the *Constitution Act*, 1867, but not other religious schools, did not contravene the equality provisions of s. 15(1) of the *Charter*. This was the case because, the majority of the Court wrote, s. 93 “is the product of an historical compromise which was a crucial step along the road leading to Confederation.” (para. [29]); V. Jackson, *supra* note 331, p. 951.

⁴⁰⁴ H. Cyr, *supra* note 45, p. 19.

⁴⁰⁵ H. Cyr, *supra* note 45, p. 19.

⁴⁰⁶ *Ibid.*

mindful of it in explaining every novel development.⁴⁰⁷ In this respect, the *roots* metaphor captures the role of text, original understanding and precedents in constitutional adjudication.⁴⁰⁸

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.⁴⁰⁹ It is in this way that the *roots* metaphor imposes constraints on the creative power of judges.⁴¹⁰ However, these limits are, as Hugo 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.”⁴¹¹

One last observation is in order at this point. It has to do with the fact that, like all metaphors, the one of the *living tree* can obscure as much as it can illuminate.⁴¹² This is the case because, as we have seen above, metaphors “are ways of seeing or highlighting some aspects of a concept”, and thus “ways of not seeing others.”⁴¹³ In allowing us to concentrate on one aspect of a concept, they can keep us from noticing other aspects that are inconsistent with them.⁴¹⁴ 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.”⁴¹⁵ 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.⁴¹⁶

---

⁴⁰⁷ *Ibid.*; M.-C. Prémont, *supra* note 69, pp. 30-31.

⁴⁰⁸ V. Jackson, *supra* note 331, p. 926.

⁴⁰⁹ H. Cyr, *supra* note 45, p. 19.

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² V. Jackson, *supra* note 331, p. 926; H. Cyr, *supra* note 45, p. 4.

⁴¹³ L. Berger, *supra* note 61, p. 278.

⁴¹⁴ G. Lakoff and M. Johnson, *supra* note 66, p. 10.

⁴¹⁵ V. Jackson, *supra* note 331, pp. 926; D. Guénette, *supra* note 12, p. 57.

⁴¹⁶ *Ibid.*, pp. 959-960; See, also, M.-C. Prémont, *supra* note 69, p. 30.

Some could 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 —the judges— see as the new mores of society.⁴¹⁷

4.1.1.4 “Living Tree”: Stepping Back for a Moment

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, to the 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, and 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 *living tree* date as far back as the 1930 case of *Edwards*, it nonetheless remains one of the dominant metaphors in Canadian law today. By way of its *roots*, *trunk* and *natural limits*, it also conveys the idea 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 section, while this last idea —on the importance of the past— is only expressed by the *living tree* in a somewhat incidental manner, it is at the very heart of the second central category of Canadian constitutional metaphors identified here: *static* metaphors.

4.1.2 The “Static” Metaphors

This section follows a similar pattern as the previous one. The first subsection provides an overview of what characterizes the category of *static* constitutional metaphors. The second subsection, for its part, focuses on one leading example of this category: the “constitutional architecture” metaphor from the *Quebec Secession Reference*. Like in the previous section, the inquiry will look for the language that the metaphor prompts judges and scholars to employ.

---

⁴¹⁷ See D. Guénette, *supra* note 12, p. 55.

4.1.2.1 General Overview

The *static* metaphors of Canadian constitutional law⁴¹⁸ 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. They tend to evoke, in the words of Newman, “images or impressions of ancient and classical structure, strength, durability, permanence, and to some degree, solidity and firmness of form, if not outright rigidity.”⁴¹⁹ 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 past decisions of the Court that have endured over time.⁴²⁰ 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, with a form of *originalism*. This is not to say that stability is always synonym with immobility, simply that it sometimes is.

These *static* metaphors have occupied an important place in the Canadian legal landscape since at least the 1930s, with such manifestations as the *watertight compartments*, the *original contract* between Canada’s “founding peoples”, and the idea of the Court as the *guardian* of the Constitution. Its latest iterations can be found in the metaphors of the constitutional *structure* and *architecture*, to which the next subsection will be devoted. However, before moving on to this discussion, it seems useful to briefly consider these earlier versions of the *static* category. Not only should that help us better understand what characterizes this particular type of metaphor, it should also provide great insights in regard to the conceptual roots of its modern manifestations.

The oldest of these metaphors, the one of the *original contract*, or *compact*, was first formulated by the same Lord Sankey, within only two years of his decision in *Edwards*. It was coined in the context of the *Aeronautics Reference*⁴²¹, where the Privy Council dealt with the question of who, between Parliament and the provinces, had the power to regulate aeronautics, a matter which, for obvious reasons, had not been contemplated in 1867. In considering the scope

---

⁴¹⁸ On the pervasiveness of *static* metaphors in American constitutional law, see M. Ball, *supra* note 64, pp. 23-25.

⁴¹⁹ W. Newman, *supra* note 13, p. 472.

⁴²⁰ *Ibid.*, p. 486.

⁴²¹ *Canada (Attorney-General) v. Ontario (Attorney-General)*, [1932] AC 54, [\[1932\] 1 DLR 58](#).

of ss. 91 and 92 of the *Constitution Act, 1867*, which largely set out the distribution of legislative powers, Lord Sankey noted that precedents, while useful in interpreting the Constitution, should not be read so as to extend, or divert our attention from, what has been enacted.⁴²² “Useful as decided cases are”, he wrote, “it is always advisable to get back to the words of the *Act* itself and to remember the object with which it was passed.”⁴²³ It is with this advice in mind that he added:

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.⁴²⁴ [Our emphasis.]

This idea, of the Constitution as a pact symbolizing a political compromise, may support a conservative interpretative approach. It conveys the notion 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 normative constitutional values.⁴²⁵ This form of *originalism* is predicated upon the assumption, summarized as follows by Newman, that “rights flowing from the historic Confederation bargain”, like that of equal access to the law in their language for Anglophones and Francophones as provided by s. 133 of the *Constitution Act, 1867*, are less legitimately the subject of judicial development and enhancement” than other, more “universal”, rights.⁴²⁶ This view of the Constitution, as a *political*

---

⁴²² *Ibid.*, p. 64: “Under our system, decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.”

⁴²³ *Ibid.*, p. 65: “Great care must... be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the B.N.A. Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles...”

⁴²⁴ *Ibid.*

⁴²⁵ V. Jackson, *supra* note 331, p. 958.

⁴²⁶ W. Newman, *supra* note 13, p. 486. This metaphor was since used, as Newman points out, in *MacDonald v. City of Montreal*, [1986] 1 SCR 460, at para. 104, where Beetz J. wrote that the “scheme” of s. 133 of the *Constitution Act, 1867*, is “a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union... [I]t is a scheme which can of course be

compact between French and English, or between the colonies of Canada⁴²⁷, has been used to support minority rights —mostly ‘official’ minorities, that is— and broader provincial powers.⁴²⁸

The other early manifestation of *static* metaphors that deserves our attention here is that of the “watertight compartments”. This metaphor was first employed in the *Labour Conventions Reference*⁴²⁹, where the Privy Council dealt with the question of whether the federal Parliament had the power to pass into law several conventions from the International Labour Organization. The Privy Council ultimately held that, to the extent that the impugned statutes were concerned with property and civil rights, that is quintessentially provincial matters, they were *ultra vires* of Parliament’s jurisdiction. In his reasons for the Council, Lord Atkin expressed the view that while Canada had gained its independence from the United Kingdom through the *Statute of Westminster, 1931*⁴³⁰, its internal federal structure was nonetheless to be preserved. In his words:

...While 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...⁴³¹

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 hull⁴³² is prevented from spreading.⁴³³ By imagining the heads of power at ss. 91-92 as separate *containers, sealed* to ensure the functioning and safety of the *boat* that is Canada, and by picturing it as *essential* to its structure,

---

modified by way of constitutional amendment. But it is not open to the courts under the guise of interpretation, to improve upon, supplement or amend this historical compromise.”

⁴²⁷ J. Webber, *supra* note 4, p. 612.

⁴²⁸ *Ibid.*; W. Newman, *supra* note 13, p. 485. The metaphor generally stands for the idea that Canada has “two founding peoples” (French and English) and that, to this day, these two linguistic cultures remain of roughly equal stature. Being of the view —and, if we may add, rightfully so— 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, for e.g., John Borrows, “Canada’s indigenous constitution”, (Toronto : University of Toronto Press, 2010.)

⁴²⁹ *Canada (A.G.) v. Ontario (A.G.)*, [1937] 1 DLR 673, [1937] A.C. 326 (UK JCPC).

⁴³⁰ (UK), 22 & 23 Geo. 5, c. 4.

⁴³¹ *Canada (A.G.) v. Ontario (A.G.)*, [1937] 1 DLR 673, p. 684.

⁴³² The Merriam-Webster Online Dictionary defines “hull” as the “frame or body of a ship or boat exclusive of masts, yards, sails, and rigging.” (See: <https://www.merriam-webster.com/dictionary/hull>.)

⁴³³ On how hydraulic metaphors are often used to support ideas of stability, see M. Ball, *supra* note 64, pp. 28, 30.

this metaphor expressed the need to constrain constitutional growth⁴³⁴ in regard to the division of powers.⁴³⁵ It stressed the fact that, on this particular topic, the written Constitution is paramount.

Like the one of the *living tree*, the *watertight compartments* metaphor provides a great illustration of how “image schemas” function, that is by mapping inferences from “concrete visual images” onto “abstract concepts”.⁴³⁶ In this conceptual mapping, the notion of *heads of power* (itself metaphorical!) is understood as a *container*, or a *receptacle*, one that holds certain things (legislative powers), things it protects by way of its *clear, hermetic, boundaries*. One of the leading metaphors of American constitutional law, namely Thomas Jefferson's "wall of separation between Church & State", is also predicated upon a similar conceptual mapping. Indeed, if Church and State are separated by a wall, their working together sure is forbidden.⁴³⁷

The *watertight compartments* metaphor, and the conception of federalism it embodies, have, at least until 1949 when the Supreme Court replaced the Privy Council as the final arbiter of Canada's Constitution⁴³⁸, greatly influenced the way disputes on the division of powers were decided. It has, however, gradually been set aside throughout the second half of the last century. The most striking repudiation of the metaphor came in the 1987 case of *OPSEU v. Ontario*⁴³⁹. At issue was whether Ontario had the authority to impose restrictions on the political activity of civil servants in federal elections. In finding that the impugned provisions were *intra vires* of the province's jurisdiction, Dickson C.J. sought to limit the scope of the interjurisdictional immunity doctrine, which holds that laws of one order of government should not interfere with, or have an impact on, matters under the jurisdiction of the other order. He then further explained that:

---

⁴³⁴ W. Newman, *supra* note 13, p. 488; H. Cyr, *supra* note 45, p. 21. Newman notes that, although this metaphor is no longer much in vogue, it once captured the imagination of constitutional scholars, such as Maurice Ollivier, who wrote in 1945 that: “[t]he ship of state is run and governed by a most difficult mechanism of rules, principles, precedents and administrative wheels.” See M. Ollivier, *Problems of Canadian Sovereignty*, 1945.

⁴³⁵ In regard to the “safety” component, it was James Madison's idea, in the *Federalist Paper no. 10*, that a federation works to prevent factions insofar as more representatives guard against the attempts of the few, and because its extended sphere makes it less probable that a faction could become a majority of the whole.

⁴³⁶ L. Berger, *supra* note 61, p. 290.

⁴³⁷ *Ibid.*

⁴³⁸ See *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 SCR 433, 2014 SCC 21, para. 82.

⁴³⁹ [1987] 2 SCR 2.

...doctrines like interjurisdictional and Crown immunity and concepts 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...⁴⁴⁰

It is therefore with his very own nautical metaphor, that of the *tide*⁴⁴¹, that Dickson C.J. 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 conception of the division of powers that favours “overlapping jurisdiction” and that encourages “intergovernmental cooperation”⁴⁴². Although this new paradigm, known as “cooperative federalism”, has gained a lot of traction in the last decades, recent decisions of the Court⁴⁴³ seem to indicate that the traditional dualist vision of federalism, which “maximises the unilateral power of each order” when at least one does not wish to cooperate⁴⁴⁴, still, to this day, influences the way it thinks of the Constitution.

The latest manifestations of this particular category are found, as was suggested above, in the related metaphors of the *structure* and *architecture* of the Canadian Constitution. The next subsection 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.

---

⁴⁴⁰ *Ibid.*, p. 27.

⁴⁴¹ For Hugo Cyr, the *tide* metaphor “expresses the back-and-forth movement of the law related to the degree of exclusiveness of the legislative powers granted to each legislature and the “dominant tide” is attributed to legal doctrines favouring the largest possible legislative jurisdiction for all legislatures. Thus, to the watertight-compartment metaphor, Chief Justice Dickson opposed the dominant tide metaphor to suggest that the former, included within the latter, is subordinated to it and, more explicitly, that constitutional doctrines relying on the watertight-compartment metaphor are suspect.” See H. Cyr, *supra* note 45, p. 22.

⁴⁴² *Reference re Securities Act*, [2011] 3 SCR 837, 2011 SCC 66, para. 57.

⁴⁴³ See, for e.g., *Quebec v. Canada*, 2015 SCC 14, [2015] 1 SCR 693; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 SCR 467.

⁴⁴⁴ Jean-François Gaudreault-DesBiens and Johanne Poirier, “From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism”, in Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution*, (New York, NY : Oxford University Press, 2017), at p. 411; See also, on the same topic, Johanne Poirier, “Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?” (2015) 45 RDUS 47.

4.1.2.2 “Structure” and “Architecture” of the Canadian Constitution

If the *static* metaphor of the *constitutional architecture* only resurfaced at the forefront of Canadian legal discourse in the 2014 references⁴⁴⁵, its underlying idea, that of an immovable internal structure at the heart of our Constitution, had actually been floating around for quite some time. In fact, a version of it was expressed as far back as the landmark 1959 case of *Roncarelli v. Duplessis*⁴⁴⁶, where the Court held that Quebec’s Premier at the time had overstepped his authority by ordering, for political motives, the revocation of the liquor licence of a restaurant owner and member of Jehovah’s Witness. In his reasons, Rand J. 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*.”⁴⁴⁷ This goes to show that the idea of a constitutional *structure*, of which the *rule of law* is a pillar, was already starting to take shape.

This idea, of the internal *structure* of the Constitution, was again referred to in the case of *OPSEU v. Ontario*⁴⁴⁸, which we discussed above. In his reasons, Beetz J. 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.⁴⁴⁹ This, he wrote, meant that neither the provincial legislatures nor Parliament could enact laws that “substantially interfere with the operation of this *basic constitutional structure*.”⁴⁵⁰ Both legislative bodies must, in other words, “conform to these *basic structural imperatives* and can in no way override them.”⁴⁵¹ In

---

⁴⁴⁵ *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 SCR 433, 2014 SCC 21; *Reference re Senate Reform*, [2014] 1 SCR 704, 2014 SCC 32.

⁴⁴⁶ [1959] SCR 121.

⁴⁴⁷ *Ibid.*, p. 142. [Our emphasis.] A similar imagery was used by Lamer C.J., in the *Provincial Court Judges Reference*, [1997] 3 SCR 3, when he spoke of the preamble of the Constitution Act, 1867, as “the grand entrance hall to the castle” (para. [109]).

⁴⁴⁸ [1987] 2 SCR 2. See also, on this topic, W. Newman, *supra* note 13, p. 490.

⁴⁴⁹ *Ibid.*, p. 151. [Our emphasis.]

⁴⁵⁰ *Ibid.* [Our emphasis.]

⁴⁵¹ *Ibid.*, p. 152. Beetz J. also suggested that the *Charter*, which was not at issue in this case, afforded “broader protection to these rights and freedoms than is called for by the structural demands of the Constitution.”

this particular case, Beetz J. nevertheless came to the conclusion that the impugned provisions only incidentally affected the fundamental right to participate in certain political activities.⁴⁵²

It was ultimately in the *Reference re Secession of Quebec*⁴⁵³, rendered almost ten years after *OPSEU*, that the Supreme Court first referred to the notion of constitutional *architecture*. In considering the legality, under both Canadian and international law, of a possible unilateral secession of Quebec from Canada, the Court famously set out to delineate the role and scope of unwritten principles in Canadian constitutional law. The reasoning of the Court went as follows:

Our Constitution has an internal architecture, or what... this Court in *OPSEU* ... called a "basic constitutional structure". The 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... [C]ertain underlying principles infuse our Constitution and breathe life into it.

Although these underlying principles are not explicitly made part of the Constitution by any written provision, ...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.

The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of... political institutions...⁴⁵⁴

Unwritten principles thus inform and complement the provisions of the constitutional texts. This goes back to the idea, first mentioned in the landmark *Manitoba Language Rights Reference*⁴⁵⁵, according to which the Court, while adjudicating a constitutional matter, may well have to consider "unwritten postulates which form the very foundation of the Constitution of Canada".⁴⁵⁶

The Court then went on to link these unwritten principles, and, by extension, the idea of *constitutional architecture*, with the metaphor of the *living tree*. Specifically, it held that the "observance of and respect for these principles is essential to the ongoing process of

---

⁴⁵² *Ibid.*, p. 151. In the *Reference re Alberta Public Service Employee Relations Act*, [1987] 1 SCR 313, rendered the same year, McIntyre J. held that the interpretation of the *Charter*, "as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society." (p. 394); W. Newman, *supra* note 13, p. 489.

⁴⁵³ [1998] 2 SCR 217.

⁴⁵⁴ *Ibid.*, para. 50-52.

⁴⁵⁵ [1985] 1 SCR 721.

⁴⁵⁶ *Ibid.*, p. 752.

constitutional development and evolution of our Constitution as a ‘living tree’⁴⁵⁷. The association, in these passages, of the *living tree* and *constitutional structure* metaphors, under the more general *constitutional architecture*, seems to draw attention, as Newman points out, to the “pivotal role of foundational constitutional principles in supporting the structural framework behind the provisions”⁴⁵⁸. While the Constitution has evolved to reflect changes in social and political values, it has usually done so in a way that ensured continuity, stability, and legal order. There is, here, a clear conceptual interrelation between the *architecture* and the *roots* of the *tree*.

The centrality of these unwritten principles within the *internal architecture* of the Constitution is apparent throughout the reasons of the Court. The federalism principle, for instance, is said to be “inherent” in the very “structure of our constitutional arrangements”, and to have been, “from the beginning”, the “lodestar by which the courts have been guided.”⁴⁵⁹ Likewise, the democracy principle is said to always inform “the design of our constitutional structure”⁴⁶⁰, and to have served as a “baseline against which the framers of our Constitution, and... our elected representatives... have always operated.”⁴⁶¹ The Court also held the protection of minorities to be “an essential consideration in the design of our constitutional structure”.⁴⁶²

The idea of the *constitutional architecture* only resurfaced, more than fifteen years later, in the *Supreme Court Act Reference*⁴⁶³. In this 2014 reference, the Court was called upon to clarify the scope of the eligibility requirements for an appointment to one of its three seats reserved for Quebec, and to set out the applicable procedure for amending them.⁴⁶⁴ It was held that, because the status of the Court was constitutionally entrenched by the *Constitution Act*,

---

⁴⁵⁷ *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 52.

⁴⁵⁸ W. Newman, *supra* note 13, p. 493.

⁴⁵⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 56. See, also, W. Newman, *supra* note 13, p. 493.

⁴⁶⁰ *Ibid.*, para. 62.

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*, para. 81.

⁴⁶³ *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 SCR 433, 2014 SCC 21.

⁴⁶⁴ The controlling provision, s. 6 of the *Supreme Court Act*, holds that at least three of the nine judges appointed to the Court “shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province”. The appointee in this case, Nadon J., was a judge of the Federal Court of Appeal and formerly a member of the Quebec bar for more than 10 years. The first question was whether Nadon J. could be appointed to one of these seats. The second was whether Parliament could enact a law establishing that a former member of the Quebec bar is eligible for appointment.

1982, its composition could only be amended by a unanimous constitutional amendment.⁴⁶⁵ To illustrate the importance, for Quebec, of the eligibility requirements contained at s. 6 of the *Supreme Court Act*⁴⁶⁶, the majority referred to the *static* metaphor of the *original compact*. The purpose of this particular provision, the Court wrote, was “to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats.”⁴⁶⁷

In emphasizing its role in the Canadian legal system, the majority also resorted to another *static* metaphor, that of the *constitutional architecture*. It noted, for example, that the abolition of all appeals to the Privy Council in 1949 “had a profound effect on the constitutional architecture of Canada”⁴⁶⁸, 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.”⁴⁶⁹ This fundamental role in the “Canadian constitutional structure”⁴⁷⁰, this essential position in “Canada’s constitutional architecture”⁴⁷¹, was precisely why, the Court added, its essential features came to be constitutionally protected. What is conveyed here by the *constitutional architecture* metaphor are thus images of strong and durable structures, of the foundation on which Canada is built, of the bedrock on which it stands. One thing that protects this edifice, the majority tells us, is its constitutionally entrenched status.

In the *Reference re Senate Reform*⁴⁷², rendered only weeks later, the Court pushed even farther the *constitutional architecture* metaphor. The central question before the Court was whether various changes contemplated in regard to the Senate (term length, nomination process, abolition, etc.) constituted amendments to the Constitution, and, if so, what procedure should

---

⁴⁶⁵ *Reference re Supreme Court Act*, supra note 463, para. 5 and 74.

⁴⁶⁶ R.S.C. 1985, c. S-26.

⁴⁶⁷ *Reference re Supreme Court Act*, supra note 463, para. 59.

⁴⁶⁸ *Ibid.*, para. 82.

⁴⁶⁹ *Ibid.*, para. 87. See, also, para. 88: “We have seen that the Supreme Court was already essential under the Constitution’s architecture as the final arbiter of division of powers disputes and as the final general court of appeal for Canada. The *Constitution Act, 1982* enhanced the Court’s role under the Constitution and confirmed its status as a constitutionally protected institution.”

⁴⁷⁰ *Ibid.*, para. 94.

⁴⁷¹ *Ibid.*, para. 100.

⁴⁷² [2014] 1 SCR 704, 2014 SCC 32.

apply.⁴⁷³ The focus of the Court, throughout its reasoning, 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.”⁴⁷⁴ Rather, it has “an architecture, a basic structure.”⁴⁷⁵ This notion of *architecture*, the Court added:

...expresses 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.⁴⁷⁶

This entails, by way of extension, that amendments to the Constitution are not limited to textual changes, but rather include every change that might affect the *constitutional architecture*.⁴⁷⁷

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.”⁴⁷⁸ 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.”⁴⁷⁹ As for the unanimity rule of s. 41, it is said to be justified by the need “to give each of the partners of Canada’s federal compromise a veto on those topics that are considered the most essential to the survival of the state.”⁴⁸⁰

Ultimately, the Court came to the conclusion, as will be discussed further in a later section, that most of the proposed reforms to the Senate could not be imposed unilaterally by Parliament, for they affected the very *architecture* of the Constitution. Rather, the consent of the

---

⁴⁷³ *Reference re Senate Reform*, para. 27.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*, para. 26.

⁴⁷⁷ *Ibid.*, para. 27. See, also, para. 107: “[T]he notion of an amendment to the Constitution of Canada is not limited to textual modifications — it also embraces significant structural modifications of the Constitution.”

⁴⁷⁸ *Ibid.*, para. 31.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Benoit Pelletier, *La modification constitutionnelle au Canada* (Scarborough, Ont.: Carswell, 1996), p. 208, quoted in *Reference re Senate Reform*, para. 41 [TRANSLATION].

Senate, the House, and at least seven provinces representing 50% or more of the population, was required, in accordance with s. 38 and 42(1) of the Constitution.⁴⁸¹ 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 all ten provinces.⁴⁸²

The metaphor of the constitutional *architecture / structure* thus played an important role in the Court’s reasoning in the two 2014 references. It conveys, 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”⁴⁸³. Because these institutions have *external architectures*, which themselves carry 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, permeance, stability and continuity”⁴⁸⁴— are simply transferred on 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.

4.1.2.3 Recap: Seeing the Architecture from Afar

The *constitutional architecture / structure* is thus typical of the other core category of Canadian constitutional metaphors identified here, that of *static metaphors*. Like other such metaphors, it is intended to express the idea of a steady structure, one that has withstood the test of time, and that endures, to this day, so that our most cherished ideals may continue to prevail. However strong it may be, the structure always remains at risk of erosion in the face of changes. From *Roncarelli* to *OPSEU*, to the various references discussed above, this metaphor has always been employed by courts in order to illustrate the importance of legal continuity and stability. As such, it is often used, although not always, to support a static interpretation of the Constitution.

---

⁴⁸¹ *Reference re Senate Reform*, para. 3.

⁴⁸² *Ibid.*

⁴⁸³ W. Newman, *supra* note 13, p. 494.

⁴⁸⁴ *Ibid.*

4.2 Stories We Tell of the Constitution: From ‘Birth’ to ‘Rescue’

So far, we have demonstrated that Canadian constitutional law is deeply influenced by two competing types of metaphor, *dynamic* and *static*, of which the *living tree* and *constitutional architecture* are prime examples. We have also illustrated how each of these categories conveys a particular view of our founding document, a lens through which to look at it. We can now turn to the last part of our demonstration, the one concerned with uncovering how these metaphors shape the types of stories jurists, be they scholars, lawyers or judges, tell about the Constitution.

Specifically, it will be argued that *dynamic* and *static* metaphors of Canadian constitutional law sustain dominant narratives, narratives whose structure essentially corresponds to “birth” and “rescue” stories. The case will further be made that jurists already tend, while 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 Supreme Court opinions where such metaphors are used, we will uncover the narrative paths taken by the judges and illustrate the extent to which they correspond with the metaphors.

One of the aims of this section is to highlight the fact that metaphor and narrative often play complementary roles in the realm of law. It speaks of what Greta Olson has described as the “intrinsically interrelated nature of metaphor and narrative in law and legal discourse.”⁴⁸⁵ As we have sought to demonstrate in previous sections, both narrative and metaphor help us make sense of the world around us. They reassure us that things hold together. They provide a “sense of coherence to the patterns and paths we employ for perception and expression”⁴⁸⁶. They offer frame of references to interpret new events. And they do so in a complementary fashion.⁴⁸⁷

---

⁴⁸⁵ G. Olson, *supra* note 72, p. 20.

⁴⁸⁶ L. Berger, *supra* note 61, p. 275.

⁴⁸⁷ Hanne & Weisberg, *supra* note 87, p. 8. See, also, Donald McCloskey, “Storytelling in economics” in Cristopher Nash (ed.), *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature* (London; New York, NY: Routledge, 1990), pp. 5–22.

What this section seeks to emphasize, more specifically, is the fact that each conceptual metaphor, such as the ones of the *living tree* and *constitutional architecture*, embodies a different implied narrative.⁴⁸⁸ These metaphors provide, to quote Olson, “a visual basis for a larger model that is narrativized”, and that can subsequently be applied in constitutional jurisprudence.⁴⁸⁹ In other words, these metaphors *contain the seed* of stories; they sustain particular narratives. This conjoined 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.”⁴⁹⁰

This *nexus* between metaphor and narrative has important implications for legal persuasion. Because each of these devices is, in and of themselves, a powerful persuasive tool, their concomitant use can prove to be very potent.⁴⁹¹ This is particularly true of the *framing power* of these devices. Dominant narratives and their “accompanying metaphors”, Edwards tells us, are what “create the lens through which we view a legal issue and the context within which we imagine it operating.”⁴⁹² To put it another way, narrative and metaphor “provide characters, give those characters motives, and identify the “right ending” for the story of the law.”⁴⁹³

It is for this very reason that jurists ought to develop their narrative awareness. Because metaphor and narrative shape how we think about the law, because they “play a significant role in persuasion, and thus, in the development of the law”⁴⁹⁴, we would be wise to pay attention to them. This is where narrative analysis, and its explanatory power, come into play. “By calling attention to the ‘narrative transactions performed within the law’,” Berger tells us, narrative analysis uncovers what was “unseen and unconscious in a judicial opinion.”⁴⁹⁵ It sheds light on

---

⁴⁸⁸ M. Hanne and R. Weisberg (eds.), “Editor’s Introduction to Conversation I”, in *Narrative and Metaphor in the Law*, *supra* note 87, p. 18.

⁴⁸⁹ G. Olson, *supra* note 72, p. 33.

⁴⁹⁰ *Ibid.*

⁴⁹¹ M. Smith, *supra* note 89, p. 66.

⁴⁹² E. Edwards, *supra* note 55, p. 911.

⁴⁹³ *Ibid.*, p. 912.

⁴⁹⁴ *Ibid.*, p. 911.

⁴⁹⁵ L. Berger, *supra* note 61, p. 282.

the preconceptions and experience —derived from our culture⁴⁹⁶— that constrain the setting within which lawyers argue and judges decide. It is a tool “for uncovering and discovering.”⁴⁹⁷

4.2.1 Dynamic Metaphors and Birth Stories

a) Uncovering the Narrative: The *Unfinished* Constitution

Dynamic metaphors tell the story of the evolution, the organic growth, of the Canadian Constitution. The dominant narrative implied in these metaphors, the one they sustain, is that, in the words of Hugo Cyr, of an *unfinished Constitution*. It is one in which the Constitution is pictured as an “object that exists but is incomplete, not yet perfect, at an intermediary stage as well as moving towards more completeness.”⁴⁹⁸ It is, to put it another way, “something like the periodic report of an ongoing process.”⁴⁹⁹ 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.⁵⁰⁰

The most common of the *dynamic* 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 to not even bother mentioning it explicitly anymore.⁵⁰¹ Rather, courts implicitly build upon this deep-rooted conceptualization, that of a “slow but steady constitutional growth”⁵⁰², and try to make use, whenever possible, of its broader semantic field, to notions of evolution and development. The conceptual field thus stands in for the metaphor. Here are a few illustrations, taken from the case law, of this practice:

---

⁴⁹⁶ L. Berger, *supra* note 61, p. 283.

⁴⁹⁷ *Ibid.*, p. 282.

⁴⁹⁸ H. Cyr, *supra* note 45, p. 7.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ We have only been able to identify five cases, from 2009 to 2018, where the *living tree* metaphor is explicitly mentioned. In comparison, we were able to identify at least nine such mentions from the year 2000 to 2008.

⁵⁰² W. Newman, *supra* note 13, p. 482.

- ...The *Charter* is designed... to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.⁵⁰³
- A constitution... is drafted with an eye to the future... Once enacted, its provisions cannot easily be... amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.⁵⁰⁴
- ... The [Constitution] is not locked forever in a 119-year-old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people.⁵⁰⁵
- Such an approach... can stultify the growth of the Charter by freezing it in time...⁵⁰⁶
- ...A “frozen rights” theory has been rejected by the courts as incompatible with the purpose of s. 35(1) [of the *Charter*]... Aboriginal rights are capable of growth and evolution...⁵⁰⁷

While it is not mentioned in these excerpts, the *living tree* metaphor does appear to be in the back of the court’s mind. The metaphor is now so pervasive that it needs not even mention.

Implicit in the underlying *unfinishedness* narrative is the idea that the development of the Constitution must be safeguarded, even set in motion, by some particular agent. The Constitution is seen, through this lens, as the “product of some ongoing process.”⁵⁰⁸ This means, Cyr argues, that respecting the Constitution “implies not only following it, but may also imply helping it move towards its destination.”⁵⁰⁹ 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.”⁵¹⁰ Their role, in this respect, is only to “perfect the work of the drafters”⁵¹¹. It is to ensure that the Constitution ultimately reaches completion, that is a “more perfect” Constitution. The process of constitution-making is thus portrayed as nothing more than natural development.

This *unfinishedness* narrative is, on many levels, strikingly similar to the one known in narrative theory as the *birth story*. As we have seen above, this particular *stock story* speaks of a

---

⁵⁰³ *Law Society of Upper Canada v. Skapinker*, [1984] 1 SCR 357, para. 11.

⁵⁰⁴ *Hunter v Southam Inc.*, [1984] 2 SCR 145, p. 155.

⁵⁰⁵ *The Queen v. Beauregard*, [1986] 2 SCR 56, para. 46.

⁵⁰⁶ *R. v. S. (R.J.)*, [1995] 1 SCR 451, p. 607.

⁵⁰⁷ *Mitchell v. M.N.R.*, [2001] 1 SCR 911, 2001 SCC 33, para. 95.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*, p. 9.

need for change⁵¹², 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.⁵¹³ Here, the anticipated *steady state* toward which we are moving is that of the completion of the Constitution, the attainment of its most perfect self. It is a state that does not exist, at least not yet, but which we still expect. As for the current state of the law, it is but a step in this long drawn-out process. As for each new reading of the Constitution, each new right, it develops out of what came before.

Because of this deep conceptual interrelation between *dynamic* constitutional metaphors and *birth stories*, it seems that jurists, be they lawyers, scholars, or judges, have tended to use them conjointly. In other words, it appears they tend to adapt, and probably unconsciously so, 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 is evident, for instance, in the recent decision of the Supreme Court in *Saskatchewan Federation of Labour v. Saskatchewan*⁵¹⁴.

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 strike for essential services employees constitutes a violation of the right to freedom of association guaranteed by s. 2(d) of the *Charter*⁵¹⁵, in other words, whether it substantially interferes with a meaningful process of collective bargaining. This case required for the Court to interpret the Constitution, to illuminate the exact meaning and content of s. 2(d). It also required that it considers whether its decision in the *Alberta Reference*⁵¹⁶, 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 Abella J., ultimately found that the right to strike is, indeed, constitutionally protected in Canada.

The story told by Abella J. in support of this interpretation is that of the *birth* of the right to strike. This, she makes clear right from the outset of her opinion. After a cursory statement

---

⁵¹² L. Edwards, *supra* note 55, p. 908.

⁵¹³ *Ibid.*, p. 909.

⁵¹⁴ 2015 SCC 4, [2015] 1 SCR 245. [*Saskatchewan Federation of Labour*]

⁵¹⁵ *Ibid.*, para. 2.

⁵¹⁶ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313.

about the *Alberta Reference*, she immediately moves on to discuss contemporaneous decisions of the Court⁵¹⁷, 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.”⁵¹⁸ This *dynamic* metaphor, that of the *bending arc* of constitutional law, is, to a large extent, conceptually related to the one of the *living tree* —which, it should be noted, is itself cited by SEIU-West, one of the interveners in the case— insofar as it conveys a sense of growth, of unavoidable evolution towards progress.

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, by the powers that be, 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*.

This narrative has the effect of underemphasizing the inconvenient current state of the law, by picturing it as nothing but a step, an erroneous one for that matter, in the course of this long drawn-out 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 at this point. “It seems... to be the time to give this conclusion constitutional benediction.”⁵¹⁹ We thus find ourselves, from the very start of the story, in *narrative motion*.

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 where, the opinion tells us, workers were starting to come together to

---

⁵¹⁷ *Health Services and Support v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3.

⁵¹⁸ *Saskatchewan Federation of Labour*, para. 1.

⁵¹⁹ *Ibid.*, para. 3.

improve their conditions of employment.⁵²⁰ Having petitioned Parliament for better wages and working conditions, the workers, we are told, quickly resorted to strikes.⁵²¹ At this point, the story seems to be going in the *right* direction. The right to strike, while still in its infancy at this very early stage, does not appear to be threatened. This is when the story enters the 19th century.

In England of the 19th century, the Court tells us, strikes were eventually criminalized under the common law doctrine of criminal conspiracy.⁵²² It remained so even as certain forms of trade unionism were being allowed in 1825.⁵²³ The same is true, we gather, in Canada of that time.⁵²⁴ The *birth* process has slowed down. Its path toward the story's anticipated *steady state* has been obstructed, at least momentarily, by an obstacle. At this stage, we, the readers, might feel disappointed. There is a great chance, indeed, that we have found ourselves, as we heard the story of the struggle unfold, rooting for the right to strike. "For when we watch someone [or something] attempt something difficult, we almost automatically want them to succeed."⁵²⁵

This obstacle, however, was not enough to halt the birth labor 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.⁵²⁶ Likewise, back in Canada, the "acceptance of the crucial role of strike activity led to its eventual decriminalization."⁵²⁷ Canada's removing of the criminal prohibition against collective action began in 1872, the Court tells us, as Parliament enacted the *Canadian Trade Unions Act*.⁵²⁸ By 1892, "the taint of criminal liability" had finally been lifted, by way of legislative reforms, from all trade unions.⁵²⁹ The *birth* process could finally resume.

---

⁵²⁰ *Saskatchewan Federation of Labour*, para. 35, quoting *Health Services*, at para. 45.

⁵²¹ *Ibid.*

⁵²² *Ibid.*, para. 36.

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*, para. 39.

⁵²⁵ L. Edwards, *supra* note 55, p. 898.

⁵²⁶ *Saskatchewan Federation of Labour*, para. 36.

⁵²⁷ *Ibid.*, para. 39.

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.*, para. 39.

The pace of the story now fastens. In a single sweep, the readers are transported thirty years later in time, in the United States of the Great Depression, to witness the adoption of the *Wagner Act*.⁵³⁰ The model of labour relations it introduced, the Court tells us, eventually came to inspire legislative reforms across Canada.⁵³¹ Finally recognizing the essential need for workers to have a say in the regulation of their workplaces, both the federal and provincial governments 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”.⁵³² 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 strikes until the exhaustion of all other settlement mechanisms.⁵³³ They only made the right to strike more mature, less unpredictable.⁵³⁴ They did not pose a threat to its very existence.

Let us pause here for a second. It is worthwhile, at this point of the story, to take a closer look at the language employed by the Court, for it offers an incredible 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.”⁵³⁵ It also speaks, some paragraphs later, of the “inevitability of the need for the ability of employees to withdraw services collectively”⁵³⁶. This leads it to conclude, ultimately, that while strike “has variously been the subject of legal protections and prohibitions, [this] ability of employees... has long been essential to meaningful collective bargaining.”⁵³⁷ What transpires, from these few lines, is a sense of inevitability, of inescapable progress, in sum, of evolution.

The story then moves on, in a somewhat less linear fashion, to the present day. This last period begins, in a stark contrast with the exhilaration of what came just before, with the disappointment of the *Alberta Reference*. The majority of the Court decided, in this 1987 case,

---

⁵³⁰ *Saskatchewan Federation of Labour*, para. 42.

⁵³¹ *Ibid.*

⁵³² *Ibid.*

⁵³³ *Ibid.*, para. 45.

⁵³⁴ *Ibid.*, para. 43-44.

⁵³⁵ *Ibid.*, para. 46.

⁵³⁶ *Ibid.*, para. 50.

⁵³⁷ *Ibid.*, para. 51.

that the freedom of association guaranteed under the *Charter* protected neither the right to collective bargaining nor the right to strike. Everything that has been done so far seems doomed.

One lone, opposing voice, can nevertheless be heard through the fog. It is that of Dickson C.J., 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. His dissenting reasons in this case, the Court tells us, "were influential in the *development* of the more "generous approach" [to s. 2(d)] in the recent jurisprudence."⁵³⁸ This way, the opinion posits Dickson C.J. as the voice of reason, as an oracle of things to come. By naming the dissenting Justice, and recalling his struggle throughout the narration⁵³⁹, the opinion allows us to identify with the characters, to "understand their goals, and share some of their frustration."⁵⁴⁰

The story then continues down into its last stretch. The narrative pace, at this point, is steady. Beginning with *Dunmore v. Ontario*⁵⁴¹, we witness the right to collective bargaining grow, decision after decision. "One after the other come the cases the Court has decided"⁵⁴². In *Health Services*⁵⁴³, 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."⁵⁴⁴ In *Fraser*⁵⁴⁵, 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."⁵⁴⁶ Then, in *Mounted Police Association*⁵⁴⁷, the Court holds that employees must, in this process, be provided with a "degree of choice and

---

⁵³⁸ *Saskatchewan Federation of Labour*, para. 33.

⁵³⁹ *Ibid.*, para. 33, 55, 59-60, 62, 84, 94.

⁵⁴⁰ L. Edwards, *supra* note 55, p. 894.

⁵⁴¹ 2001 SCC 94, [2001] 3 SCR 1016.

⁵⁴² L. Edwards, *supra* note 55, p. 893.

⁵⁴³ [2007] 2 SCR 391.

⁵⁴⁴ *Ibid.*, para. 19.

⁵⁴⁵ 2011 SCC 20.

⁵⁴⁶ *Ibid.*, para. 2. (McLachlin C.J. and LeBel J.)

⁵⁴⁷ 2015 SCC 1, [2015] 1 SCR 3.

independence sufficient to enable them to determine and pursue their collective interests.”⁵⁴⁸ 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 right has been added except one: the formal recognition of the constitutional status of the right to strike. But, as Edwards points out, “that last part... need not be created from whole cloth”⁵⁴⁹. To listen to a *birth* story is, in a sense, “to have already imagined the fully developed doctrine the characters are creating.”⁵⁵⁰ In this perspective, the right to strike already exists. “It remains only to bring it out of our minds and onto the pages of an opinion.”⁵⁵¹ The story we have been told is that of the normal culmination of the inevitable process in which the law has been engaged for centuries.⁵⁵² 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”⁵⁵³. The historical and jurisprudential landscape compellingly suggests, the Court tells us, that s.2(d):

...has 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...⁵⁵⁴

With this, the story has reached its anticipated *steady state*. The readers can now relax. The right to strike has —at last!— been constitutionally protected, *and it lived happily ever after. The end.*

c) Looking Back on Dynamic Metaphors and Birth Stories

The central aim of this section was to demonstrate the conceptual interrelation that exists between *dynamic* metaphors of Canadian constitutional law and the plot structure of *birth*.

---

⁵⁴⁸ *Ibid.*, para. 5. (McLachlin C.J. and LeBel J.)

⁵⁴⁹ L. Edwards, *supra* note 55, p. 896.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*, p. 909.

⁵⁵³ *Saskatchewan Federation of Labour*, para. 61.

⁵⁵⁴ *Ibid.*, para. 75.

Specifically, it was to show that the influential narrative implied in these *dynamic* metaphors, the one they sustain, is that of the evolution, the organic growth, of our *unfinished Constitution*. This influential narrative is, as we have further shown, strikingly similar, in terms of structure, to the *birth story*. This section has ultimately tried to illustrate, through a narrative study of the Court's decision in *Saskatchewan Federation of Labour*, how, because of this conceptual interrelation between them, judges might have tended to use *dynamic* metaphors and *birth* stories conjointly. Let us now turn to *static* metaphors and their underlying narrative structure: the *rescue* story.

4.2.2 Static Metaphors and Rescue Stories

a) Uncovering the Narrative: The *Endangered* Constitution

Static metaphors, and the one of 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 metaphors, the one it embodies, is that of an *endangered Constitution*. It is one in which the 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, the custodian, the *guardian* of the Constitution.⁵⁵⁵ It is the last defense against the evil forces of change. It is the ultimate bastion against the erosion of Canada's fundamental law.

Implied in this narrative is the notion that certain portions of the Constitution should remain untouched, unmoved by the tide of social attitudes fluctuating over time. This need for preservation—and, by extension, for legislative and judicial restraint—might stem, as we have seen earlier, from the provision embodying a historical compromise, one that is still regarded as essential to the nation's existence, from the provision's textual clarity, or from the perceived importance it had in the eyes of the framers.⁵⁵⁶ There is also, implicit in this story, an idea that

---

⁵⁵⁵ See, for e.g., D. Guénette, *supra* note 12, p. 60; Kate Glover, "The Supreme Court in a Pluralistic World: Four Readings of a Reference", (2015) 60 McGill LJ 839, p. 849.

⁵⁵⁶ See, for e.g., V. Jackson, *supra* note 331, p. 958; W. Newman, *supra* note 13, p. 486, 494.

constitutional growth should 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.

This influential 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 stability⁵⁵⁷, one that, as the action unfolds, is either fundamentally altered by evil forces seeking domination and chaos, or at the very least at risk of being so disturbed.⁵⁵⁸ In this scenario, we follow the hero 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 only thing that matters, in telling this story, is that the Constitution be saved from this demise.

Here again, the conceptual interrelation between the *static* constitutional metaphors and the *rescue story* seemingly translates in a tendency, on the part of jurists, to employ them in a complementary fashion. To illustrate how it is that judges, like advocates, adapt, perhaps to a large extent unconsciously, the story they tell of the Constitution in light of their accompanying metaphors, we will look at the opinion of the Supreme Court in the *Senate Reform Reference*⁵⁵⁹.

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 tenure, changes to the nomination process, etc.) or to abolish it. The beginning of the opinion presents Canada's current political structure as the narrative's *steady state*. "The Senate is one of Canada's foundational political institutions"⁵⁶⁰, the opinion tells the reader at the

---

⁵⁵⁷ See, again, L. Edwards, *supra* note 55, p. 887; C. Booker, *supra* note 201, p. 23.

⁵⁵⁸ *Ibid.*, p. 899.

⁵⁵⁹ [2014] 1 SCR 704, 2014 SCC 32.

⁵⁶⁰ *Ibid.*, para. 1

outset. “It lies at the heart of the agreements that gave birth to the Canadian federation.”⁵⁶¹ Follows a brief overview of the inception, and *raison d’être*, of the institution.⁵⁶² 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 peaceful state of affairs. “[F]rom its first sittings,” the Court tells us, “voices have called for reform of the Senate and even, on occasion, for its outright abolition.”⁵⁶³ While born out of consensus, the Senate:

...rapidly 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.⁵⁶⁴

This call for a reform of the Senate, for its outright abolition, constitutes the complicating event of the story. It is this challenge to the established order that gives rise to the narrative’s *conflict*.

With this *introduction*, the Court also informs the readers of the *theme* of the story it is about to tell. It will be 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”.⁵⁶⁵ 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 could think, not to be the reform itself, but rather more 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, one-sided and inconsiderate change.⁵⁶⁶

---

⁵⁶¹ *Reference re Senate Reform*, para. 1.

⁵⁶² *Ibid.*, para. 14-16.

⁵⁶³ *Ibid.*, para. 1.

⁵⁶⁴ *Ibid.*, para. 17.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ This is suggested by the statement of the Court, at para. 4 of the opinion, to the effect that its role is “not to speculate on the full range of possible changes to the Senate. Rather, the proper role of this Court in the ongoing debate regarding the future of the Senate is to determine the legal framework for implementing the specific changes contemplated in the questions put to us. The desirability of these changes is not a question for the Court; it is an issue for Canadians and their legislatures.” See, also, para. 20: “The question before us now is not whether the Senate should be reformed or what reforms would be preferable, but rather how the specific changes set out in the Reference can be accomplished under the Constitution.”

In this narrative, the Senate is the character —or thing— that needs protection from these attacks. Remember that, while the characters of the story are often played by the parties, they may also —as is the case here— include institutions and concepts. The thing or character to be protected generally is, in this type of story, of great value and importance to maintaining the *steady state*. It often holds a hidden power, one which, if safeguarded from harm, might save or transform us all.⁵⁶⁷ What is actually at stake is, in Edwards’s words, “much bigger than the safety of one small character.”⁵⁶⁸ It is about the safety of each and every one of us. Here, the Court repeatedly reminds us of the place the Senate occupies in the *architecture* of our Constitution⁵⁶⁹, of its role as a legislative body of “sober second thought”⁵⁷⁰, and of the fact that it provides representation to both the provinces⁵⁷¹ and groups that remain under-represented in the House.⁵⁷²

The other characters —hero and protagonist— of the story, however, appear to remain in the shadow 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 progresses, and 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...⁵⁷³

---

⁵⁶⁷ L. Edwards, *supra* note 55, p. 902.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Reference re Senate Reform*, para. 54, 55, 59, 60, 70, 77, and 97.

⁵⁷⁰ *Ibid.*, para. 52. See, also, para. 15, 54, 56, 60, 63, 70, and 79.

⁵⁷¹ *Ibid.*, para. 15: “While representation in the House of Commons was proportional to the population of the new Canadian provinces, each region was provided equal representation in the Senate irrespective of population. This was intended to assure the regions that their voices would continue to be heard in the legislative process even though they might become minorities within the overall population of Canada”.

⁵⁷² *Ibid.*, para. 16: “It served as a forum for ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process”. See, for more on this, Benoît Pelletier, “Réponses suggérées aux questions soulevées par le renvoi à la Cour suprême du Canada concernant la réforme du Sénat”, (2013) 43 R.G.D. 445, at pp. 485-86.

⁵⁷³ *Ibid.*, para. 19.

Let us pause here for a second. The situation in which the Senate finds itself at this stage is dire. We are on the verge of witnessing core elements of its structure being profoundly altered by way of a unilateral action on the part of the federal government. This casts Parliament, the agent responsible for this one-sided assault on the integrity of the Senate, as the antagonist in this story. Obviously, because of its role in our legal order, the Court cannot picture the federal government —the antagonist— in a monster-like fashion, like an advocate would. Here, the sense of danger thus comes not from the antagonist’s appearance, but rather from its behaviour.

The tension, at this particular point of the story, is high. Fortunately, as the action unfolds, it becomes clear to the readers that all is not lost. Help, as they say, is on the way:

...The bill was not adopted and, in 1980, this Court concluded that Parliament did not have the power under the Constitution as it then stood to unilaterally modify the fundamental features of the Senate or to abolish it...⁵⁷⁴

The worst has thus 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. This would have been too easy. Such events, where the hero appears “to intervene and superficially and momentarily still the trouble”⁵⁷⁵, are referred to, in narrative theory, as *false* or *premature endings*. They are, in the words of Philip Meyer, “merely preparatory interlineations, biding time, allowing for the tension to build” before returning to the “true” confrontation.⁵⁷⁶

This true confrontation —and the ensuing resolution of the conflict— happens at the *climax* stage. In legal writing, the *climax* should generally be set 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 at the height of peril⁵⁷⁷, and that the readers hope, with a sense of mounting impatience and anxiety, for

---

⁵⁷⁴ *Reference re Senate Reform*, para 19.

⁵⁷⁵ Philip N. Meyer, *Storytelling for Lawyers* (Oxford University Press, 2013), p. 24.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ K. Chestek, *supra* note 148, p. 149.

a return to a steady state, or at least to an outcome that is beneficial to the protagonists.⁵⁷⁸ Will the hero(es) be able, once again, to protect the Senate's integrity, to save it from imminent harm?

Moreover, as we have seen previously, the *climax* of the story can only be set 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. There is thus a need, if the conflict is to be resolved, for the clearing of a pathway towards its legal solution, in other words, for the relevant legal principles to be set out. This pathway, the Court clears it in the rest of the opinion, illuminating the way with its very own magic amulet: *constitutional architecture*.

In the final act of this story, the Court found that most of the proposed changes, apart only from the —rather minor— ones concerning property qualifications, could not be imposed unilaterally by Parliament. Rather, the consent of the Senate, the House, and at least seven provinces representing 50% or more of the population, was required for most of them.⁵⁷⁹ This, the Court takes great pains to explain, stems from the fact that the proposed reforms affected the very *architecture* of the Constitution. The Court held, first, that the implementation of senatorial elections would amend the Constitution “by fundamentally altering its architecture”⁵⁸⁰, by modifying the “specific structure”⁵⁸¹ of the federal Parliament. Further, insofar as it would give the Senate the necessary democratic legitimacy to systematically block the House, this change would also go against its very “constitutional design.”⁵⁸² In this perspective, the fact that Senators are appointed, and not elected, itself “shapes th[is] architecture”⁵⁸³. Thus, no changes

---

⁵⁷⁸ J. Sheppard, *supra* note 1, p. 282.

⁵⁷⁹ *Reference re Senate Reform*, para. 3.

⁵⁸⁰ *Ibid.*, para. 54. The Court also holds, at para. 60, that the proposed consultative elections would “*fundamentally modify the constitutional architecture* and, by extension, would constitute an amendment to the Constitution.”

⁵⁸¹ *Ibid.*, para. 55. The Court also speaks, at paragraph [62], of the “broad structural change” that it would represent.

⁵⁸² *Ibid.*, para. 60. See, also, para. 63: “[T]he consultative election proposals... would amend the Constitution... *changing the Senate's role within our constitutional structure* from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy.” Likewise, see para. 70: “[I]ntroducing a process of consultative elections for the nomination of Senators would change our Constitution's architecture, by endowing Senators with a popular mandate which is inconsistent with the Senate's role as a complementary legislative chamber of sober second thought.”

⁵⁸³ *Ibid.*, para. 59.

affecting the fundamental nature and role of the Senate can never be achieved by Parliament acting alone, for it is a “core component of the Canadian federal structure of government”⁵⁸⁴,

Likewise, the Court found that the abolition of the Senate would “fundamentally alter our constitutional architecture”, in that it would remove the bicameral form of government giving “shape” to our Constitution.⁵⁸⁵ While the “framers” might have considered future reforms for the Senate, they nonetheless assumed, the Court tells us, 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.”⁵⁸⁶ This defence of our legal order, the Court has ensured once again, much to the relief of the readers.

c) Looking Back on Static Metaphors and Rescue Stories

The purpose of this section was to reveal the conceptual interrelation between *static* metaphors of Canadian constitutional law and the plot structure of *rescue*. It was to show, more specifically, that the powerful narrative sustained by these *static* metaphors is that of an *endangered Constitution*, one that continually requires protection from looming threats. This influential narrative is, as this section has shown, strongly reminiscent, structurally speaking, of the *rescue story*. Lastly, this section has sought to demonstrate, through a narrative study of the opinion of the Supreme Court in the *Senate Reform Reference*, how, in light of their conceptual interrelation, judges might have tended to use *static* metaphors and *rescue* narratives conjointly.

---

⁵⁸⁴ *Reference re Senate Reform*, para. 77.

⁵⁸⁵ *Ibid.*, para. 97.

⁵⁸⁶ *Ibid.*, para. 101.

Conclusion

This essay has sought to illuminate the fact that metaphors and narratives play a fundamental role in shaping how we talk, think, and argue, about our Constitution. It has made the case 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 essay has sought to show, in the influential metaphors of the *living tree* and the *constitutional architecture*. Each of these categories, it has been demonstrated, stands for a different view of the Constitution and, as such, influences the types of stories we tell about it. Each contains, as we have endeavored to show through our case studies, the seed of common plot structures, that of “birth” and “rescue”.

One of the central lessons this essay has sought to convey is that Canadian constitutional jurists could significantly benefit from the insights of “narrative scholarship”. For instance, it could provide a very different and innovative analytical perspective for academics and scholars when studying constitutional case law. Narrative analysis allows us, as our case studies have sought to illustrate, 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. In a like manner, lawyers and advocates in the field of constitutional law could also benefit from an increased awareness of how narratives and metaphors function, how they shape our thinking, for it could notably help them argue more persuasively. In fact, it might well be the case that, if advocates organized their facts and oral pleadings in light of these foundational metaphors and accompanying archetypal stories, their submissions might prove more persuasive and their arguments more intelligible and cogent. In light of the above, it cannot be stressed enough that, as jurists, we would be wise to pay closer attention to metaphor and narrative, for they deeply influence how we think about the law.

BIBLIOGRAPHY

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Canada Act 1982 (UK), 1982, c 11.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

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

Manitoba Natural Resources Transfer Act, RSC 1930, c 29.

Statute of Westminster, 1931 (UK), 22 & 23 Geo. V, c 4.

Supreme Court Act, RSC 1985, c S-26.

JURISPRUDENCE

Adler v. Ontario, [1996] 3 SCR 609.

Attorney General of Quebec v. Blaikie, [1979] 2 SCR 1016.

Bowers v. Hardwick, 384 US 436 (1966).

Canada v. Hislop, 2007 SCC 10, [2007] 1 SCR 429.

Canada (A.G.) v. Ontario (A.G.), [1932] AC 54, [1932] 1 DLR 58.

Canada (A.G.) v. Ontario (A.G.), [1937] 1 DLR 673, [1937] AC 326 (UK JCPC).

Dunmore v. Ontario, 2001 SCC 94, [2001] 3 SCR 1016.

Edwards v. Canada, [1930] AC 124 (UK JCPC).

Health Services and Support v. British Columbia, 2007 SCC 27, [2007] 2 SCR 391.

Hunter v. Southam Inc., [1984] 2 SCR 145.

In re the Regulation and Control of Aeronautics in Canada, [1932] 1 DLR 58, [1932] AC 54.

Lawrence v. Texas, 539 US 558 (2003).

Law Society of Upper Canada v. Skapinker, [1984] 1 SCR 357.

MacDonald v. City of Montreal, [1986] 1 SCR 460.

Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 SCR 911.

Mounted Police Association of Ontario v. Canada, 2015 SCC 1, [2015] 1 SCR 3.

Ontario (A.G.) v. Fraser, 2011 SCC 20, [2011] 2 SCR 3.

Provincial Court Judges Reference, [1997] 3 SCR 3.

Quebec v. Canada, 2015 SCC 14, [2015] 1 SCR 693.

The Queen v. Beauregard, [1986] 2 SCR 56.

Re B.C. Motor Vehicle Act, [1985] 2 SCR 486.

Re Manitoba Language Rights, [1985] 1 SCR 721.

Reference re meaning of the word "Persons" in s. 24 of B.N.A. Act, [1928] SCR 276.

Reference re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313.

Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698.

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

Reference re Senate Reform, [2014] 1 SCR 704, 2014 SCC 32.

Reference re Secession of Quebec, [1998] 2 SCR 217.

Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, [2014] 1 SCR 433.

Rex v. West Riding of Yorkshire County, [1906] 2 KB 676. (UK)

Rogers Communications Inc. v. Châteauguay (City), 2016 SCC 23, [2016] 1 SCR 467.

R. v. Prosper, [1994] 3 SCR 236.

Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, [2015] 1 SCR 245.

St. Catherine's Milling & Lbr. Co. v. The Queen, (1888) 14 App. Cas. 46.

SECONDARY MATERIAL: MONOGRAPHS

Amsterdam, Anthony & Bruner, Jerome. *Minding the Law* (Cambridge, MA: Harvard University Press, 2002).

Ball, Milner S. *Lying Down Together: Law, Metaphor, and Theology* (Madison, Wis: University of Wisconsin Press, 1985).

Binder, Guyora & Weisberg, Robert. *Literary Criticisms of Law* (Princeton, NJ: Princeton University Press, 2000).

Booker, Christopher. *The Seven Basic Plots : Why We Tell Stories* (London, UK: Continuum, 2004).

Borrows, John. *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

Boyd White, James. *The Legal Imagination* (Boston: Little, Brown, 1973).

Brooks, Peter. "Storytelling Without Fear? Confession in Law and Literature", in Peter Brooks & Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, CT: Yale University Press, 1996).

Brooks, Peter & Gewirtz, Paul (eds.). *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, CT: Yale University Press, 1996).

Brown, Theodore. *Making Truth : Metaphor in Science* (Urbana: University of Illinois Press, 2003).

Bruner, Jerome. *Acts of Meaning* (Cambridge, Mass: Harvard University Press, 1990).

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

Devinney, Margaret & Thury, Eva (eds.). *Introduction to Mythology : Contemporary Approaches to Classical and World Myths* (New York: Oxford University Press, 2009).

Geller, Markham & Schipper, Mineke (eds.), *Imagining Creation* (Leiden; Boston: Brill, 2008, 2007).

Hanne, Michael & Weisberg, Robert (eds.). *Narrative and Metaphor in the Law* (New York: Cambridge University Press, 2018).

Henderson, Greig. *Creating Legal Worlds : Story and Style in a Culture of Argument* (Toronto; Buffalo; London: University of Toronto Press, 2015).

Lakoff, George & Johnson, Mark. *Metaphors We Live By* (Chicago: University of Chicago Press, 2003).

LaRue, Lewis H. *Constitutional Law as Fiction : Narrative in the Rhetoric of Authority*, (University Park, Pa: Pennsylvania State University Press, 1995).

Meyer, Philip N. *Storytelling for Lawyers* (Oxford University Press, 2013).

Mohawk, John C. *Iroquois Creation Story* (Buffalo: Mohawk Publications, 2005).

Morin, Jacques-Yvan & Woehrling, José. *Les constitutions du Canada et du Québec: du Régime français à nos jours*, tome 1 (Montréal: Thémis, 1994).

Ovid, *Metamorphoses*, translated by Charles Martin (New York: WW Norton & Co., 2005).

Pelletier, Benoit. *La modification constitutionnelle au Canada* (Scarborough, Ont: Carswell, 1996).

Prémont, Marie-Claude. *Tropismes du droit : Logique métaphorique et logique métonymique du langage juridique* (Montréal: Liber, 2003).

Robbins, Ruth; Johansen, Steve & Chestek, Ken. *Your Client's Story: Persuasive Legal Writing* (Aspen Publishers, 2012).

Robbins-Tiscione, Kristen. *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion 101* (West, 2009).

Rushdie, Salman. *Luka and the Fire of Life* (New York: Random House, 2010).

Smith, Michael R. *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*, 3rd ed (New York, NY: Wolters Kluwer Law & Business, 2013).

Winter, Steven. *A Clearing in the Forest : Law, Life, and Mind* (Chicago; London: University of Chicago Press, 2001).

SECONDARY MATERIAL: ARTICLES

Amsterdam, Anthony & Hertz, Randy. "An Analysis of Closing Arguments to a Jury", (1992) 37 NYL Sch L Rev 55.

Baldwin, Clive. "Who Needs Facts When You've Got Narrative? The Case of *P, C & S v. United Kingdom*", (2005) 18 Int'l J Sem L 217.

Berger, Linda. "Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes" (2008–09) 18 So Cal Interdisc LJ 259.

—"The Lady, or the Tiger - A Field Guide to Metaphor and Narrative", (2011) 50 Washburn LJ 275.

Bruner, Jerome. "Life as Narrative" (2004) 71 Soc Res 691.

Chen, Ronald & Hanson, Jon. "Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory", (2004) 77 S Cal L Rev 1103.

Chestek, Kenneth. "The Plot Thickens: The Appellate Brief as Story" (2008) 14 Leg Writing 127.

—"Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions" (2012) 9 Leg Comm & Rhetoric: JALWD 99.

Cohen, Felix. "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum L Rev 809.

Cover, Robert. "Foreword: Nomos and Narrative" (1983) 97 Harv L Rev 4.

Cyr, Hugo. "Conceptual Metaphors for an Unfinished Constitution", (2014) 19 Rev Const Stud 1.

Delgado, Richard. "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 Mich L Rev 2411.

Del Gobbo, Daniel. "Unreliable Narration in Law and Fiction", (2017) 30 Can J L & Jurisprudence 311.

Edwards, Linda. "Once upon a Time in Law: Myth, Metaphor, and Authority" (2010) 77 Tenn L Rev 883.

—"Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy" 2015 Mich St L Rev 1327.

—"Speaking of Stories and Law" (2016) 13 Leg Comm & Rhetoric: JALWD 156.

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

Gaudreault-DesBiens, Jean-François & Poirier, Johanne. "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism", in Peter

Oliver, Patrick Macklem, and Nathalie Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution*, (New York, NY: Oxford University Press, 2017).

Gewirtz, Paul. "Narrative and Rhetoric in the Law", in Peter Brooks and Paul Gewirtz, eds., in *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, CT: Yale University Press, 1996).

Glover, Kate. "The Supreme Court in a Pluralistic World: Four Readings of a Reference" (2015) 60 McGill LJ 839.

Gordon, Robert W. "Critical Legal Histories", (1984) 36 Stan L Rev 57.

Guénette, Dave. « L'architecture constitutionnelle – Dimensions artistiques d'une construction juridique » (2017) 58 C de D 33.

Heller, Kevin. "The cognitive psychology of circumstantial evidence" (2006) 105 Mich L Rev 1.

Hogg, Peter; Bushell, Allison & Wright, Wade. "Charter Dialogue Revisited - or Much Ado about Metaphors", (2007) 45:1 Osgoode Hall LJ 1.

Hogg, Peter & Bushell, Allison. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75.

Holmes, Oliver Wendell. "The Path of the Law" (1897) 10 Harv L Rev 457.

Jackson, Vicki C. "Constitutions as Living Trees - Comparative Constitutional Law and Interpretive Metaphors" (2006) 75 Fordham L Rev 921.

Matsuda, Mari. "Looking to the Bottom: Critical Legal Studies and Reparation" (1987) 22 Harv CR-CLL Rev 323.

Matsuda, Mari. "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich L Rev 2320.

McCloskey, Donald. "Storytelling in Economics" in Cristopher Nash (ed.), *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature* (London; New York, NY: Routledge, 1990).

Mink, Louis O. "Narrative Form as a Cognitive Instrument" in Robert H. Canary and Henry Kosicki, eds., *The Writing of History: Literary Form and Historical Understanding* (Madison, WI: University of Wisconsin Press, 1978).

Morgan, Ed. "Sunshine Cases of a Little Constitution" (2009) 43:3 Journal of Canadian Studies 146.

Newman, Warren. "Of Castles and Living Trees: The Metaphorical and Structural Constitution" (2015) 9 J Parliamentary & Pol L 471.

Normand, Sylvio. « Quelques observations sur la poétique de la doctrine » (2017) 58:3 C de D 425.

Olson, Greta. "On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Discourse", in Michael Hanne and Robert Weisberg, eds., in *Narrative and Metaphor in the Law* (New York : Cambridge University Press, 2018).

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

Pelletier, Benoît. "Réponses suggérées aux questions soulevées par le renvoi à la Cour suprême du Canada concernant la réforme du Sénat" (2013) 43 RGD 445.

Poirier, Johanne. "Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?" (2015) 45 RDUS 47.

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

—"Storytelling, Narrative Rationality, and Legal Persuasion" (2008) 14 Legal Writing: J Legal Writing Inst 53.

Robbins, Ruth Anne. "Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey" (2006) 29 Seattle UL Rev 767.

Rodriguez, Natalia. "Section 93: Why Canada Needs to Prune the Living Tree" (2017) 11 J Parliamentary & Pol L 155.

Sheppard, Jennifer. "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 Willamette L Rev 255.

Sherwin, Richard. "The Narrative Construction of Legal Reality" (1994) 18 Vt L Rev 681.

Smith, Michael R. "Metaphoric Parable: The Nexus of Metaphor and Narrative in Persuasive Legal Writing", in Michael Hanne and Robert Weisberg, eds., *Narrative and Metaphor in Law* (Cambridge University Press, 2017).

Stern, Simon. "Narrative in the Legal Text: Judicial Opinions and Their Narratives" in Michael Hanne and Robert Weisberg, eds., *Narrative and Metaphor in Law* (Cambridge University Press, 2017).

Stuart, Don. "The Charter is a Vital Living Tree and Not a Weed to be Stunted: Justice Moldaver Has Overstated" (2006) 21 NJCL 245.

Taillon, Patrick & Binette, Amélie. « Le fédéralisme canadien: sources, pratiques et dysfonctionnements », in *Le fédéralisme: du droit public au droit privé*, Journées bilatérales québéco-suisse de l'Association Henri-Capitant, Institut suisse de droit comparé, Lausanne, 2013.

Webber, Jeremy. "The Grammar of Customary Law" (2009) 54 McGill LJ 579.

OTHER MATERIALS

Cudd, Ann & Eftekhari, Seena. "Contractarianism" in *The Stanford Encyclopedia of Philosophy* (Spring 2017), E. Zalta (online: plato.stanford.edu/archives/spr2017/entries/contractarianism/).

Haigh, Richard. *A Burl on the Living Tree: Freedom of Conscience in Section 2(A) of the Canadian Charter of Rights and Freedoms* (SJD Thesis, University of Toronto, 2012).