A TALE OF TWO METAPHORS: A NARRATIVE TAKE ON THE CANADIAN CONSTITUTION

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

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

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

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

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Introduction

“Man is the storytelling animal.”
—Salman Rushdie

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

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

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

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

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

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

8 See e.g. Greig Henderson, Creating Legal Worlds: Story and Style in a Culture of Argument (Toronto: University of Toronto Press, 2015) at 3–14.
9 See e.g. Sylvio Normand, “Quelques observations sur la poétique de la doctrine” (2017) 58:3 C de D 425.
13 These are precisely the kinds of question that, in keeping with the push towards “narrative awareness”, this article seeks to explore in the context of Canadian constitutional law. For “narrative awareness”, see Linda H Edwards, “Once Upon a Time in Law: Myth, Metaphor, and Authority” (2010) 77:4 Tenn L Rev 883 at 915.
about the Canadian Constitution. It makes the case that two competing types of metaphors—termed dynamic and static—largely fashion Canadian constitutional law. It will be shown that these two types of metaphors convey different ideas of the Canadian Constitution and, as such, influence the stories we tell about it. In more specific terms, it will be argued that these categories sustain dominant narratives that are similar in structure to “birth” and “rescue” stories. The article will then explore the implications of this finding for scholars and lawyers.

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

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

“[The human species] thinks in metaphors and learns through stories.”

—Mary Catherine Bateson

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

14 2015 SCC 4 [Saskatchewan Federation of Labour].
15 2014 SCC 32 [Senate Reform Reference].
work in our mind when we are told a story or asked to picture concepts in the form of images.

A. The Hidden Power of Metaphors

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

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

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


21 Ibid.


23 Edwards, supra note 13 at 889.

Olson, metaphors “render more tangible what has been discovered and needs to be made known.”

Steven L. Winter tells us that “these conceptual metaphors are neither arbitrary nor mere products of chance and history.” Rather, they arise from our embodied experience, from “our interaction with the social and physical environment.” An example of this is the tendency to think in terms of “orientational metaphors.” Such metaphors organize a system of concepts with respect to one another by giving them spatial orientations. The reason we think in such terms is that “we have bodies of the sort we have and that they function as they do in our physical environment.” 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 speak of the judicial control exercised by higher courts over decisions of lower courts, or even of the invalidity of a statute in regard to a higher norm. Expressions such as overriding a precedent and striking down a statute share the same structure.

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

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

25 Ibid at 30.
27 Berger, “Embedded Knowledge”, supra note 18 at 264. See Berger, “The Lady, or the Tiger?”, supra note 20 at 280; Winter, supra note 26 at 15.
28 Lakoff & Johnson, supra note 19 at 14 [emphasis in original].
29 Ibid.
30 Ibid.
32 See ibid.
cal rhetoricians: logos, pathos, and ethos. Metaphors not only simplify communication by providing the audience with a supporting analogy (logos), but they also evoke emotions that parallel the literal meaning of the metaphoric language (pathos). Moreover, the skill to formulate an effective metaphor reflects a high level of thought, thus speaking to the intelligence of the author (ethos).

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

**B. Schemas, Metaphor, and Narrative**

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

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34 See Smith, “Metaphoric Parable”, supra note 33 at 81, 83.

35 See ibid at 80, 83, 85.

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


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

39 Ibid at 14.

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

It is by generating the context in which ideas will be interpreted that these schemas help us structure and understand our new experiences. 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.” It is what allows us to make sense out of events “without having to interpret and construct a [new] diagram of inferences and relationships” each time. It is because of schemas that we manage to conserve mental energy as we discover the world.

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

42 See Edwards, supra note 13 at 890.
43 Berger, “Embedded Knowledge”, supra note 18 at 265.
44 Ibid.
45 See Sherwin, supra note 41 at 700.
48 See Sheppard, supra note 2 at 260.
49 See Edwards, supra note 13 at 890.
51 Smith, “Metaphoric Parable”, supra note 33 at 81.
52 See Smith, Advanced Legal Writing, supra note 33 at 38–39.
also helps us comprehend “people, events, objects, and their relationships to each other.”

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

Narratives also have the capacity to conjure “emotions by transporting [the audience] into their imaginary worlds.” 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.” From this point on, it is very hard to go back and see things outside of this particular narrative. When within a story, all of our “mental systems—attentive, imagistic, emotive—converge on its events, with dramatic real-world results: [our] ability to think critically about the narrative is reduced, making [us] more likely to believe that it is authentic.”

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

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54 Sheppard, supra note 2 at 259.
56 Berger, “The Lady, or the Tiger?”, supra note 20 at 281.
57 See Edwards, supra note 13 at 890.
58 Ibid.
59 Smith, “Metaphoric Parable”, supra note 33 at 83.
60 Sheppard, supra note 2 at 263.
Because the thinking of judges and jurors is dominated by these common archetypes, by the “stock narrative frames that they bring to the case,” some have claimed that advocates should shape their narratives so as to fit those frames. In other words, as lawyers are arguing for the “empirical plausibility” of their version of events, persuasive narrative will have a tendency to work best when grounded in a cultural stock of recognizable and narrative patterns.

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

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

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

If we are to study the stories of law, we first need to understand the vocabulary and master the tools to do so. For this reason, this Part de-
fines what a “story” is, identifies its basic building blocks, and offers an overview of two plot structures commonly used in law: “birth” and “rescue” stories. The main goal of this Part is to allow the reader to recognize these elements in legal materials, and to show how many of us already use, albeit unconsciously, some of these insights and tools in our writing. In short, it calls for “narrative awareness”\(^{68}\) on the part of jurists.

**A. The Storyteller’s Starter Kit**

> “[The] dynamic beneath [a] story is plot: the attempt to fulfill [a] yearning and the world’s attempt to thwart that [yearning].”

—Robert Olen Butler\(^{69}\)

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

Narrative theory commonly recognizes five stages to a plot: introduction, rising action, climax, falling action, and resolution.\(^{75}\) The first stage, the “introduction”, offers background information for the reader to understand the characters, the events, and the time and place of the story.\(^{76}\) The second stage, the “rising action”, is where the complicating event gives rise to the “conflict” of the story. This stage culminates with the “climax” of the story, where the main character, faced with great danger,
accomplishes a heroic act that will resolve the story’s main conflict. The “falling action” ensues, resolving the other minor plot threads, followed by the “resolution”, where the story ends in a “new equilibrium” that presents similarities, but is not identical, to the initial steady state. These are the elemental stages through which a plot progresses. With these basic elements of plot construction in mind, let us now turn to some of the elementary forms a plot can take; the fundamental structures to which most stories conform.

**B. Common Archetypes and Stock Stories**

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

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

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77 See *ibid* at 149. See also Sheppard, *supra* note 2 at 281.
78 Sheppard, *supra* note 2 at 282; Chestek *supra* note 72 at 149–50.
79 Paskey, *supra* note 55, at 70.
80 See Hanne & Weisberg, “Conversation II: Editors’ Introduction”, *supra* note 62 at 60.
81 See *ibid* at 59.
83 See Edwards, *supra* note 13 at 891.
84 See *ibid* at 908.
1. Stories of “Birth” and “Creation”

One of the most elementary human needs fulfilled by our ability to imagine stories, Christopher Booker argues, is our “desire for an explanatory and descriptive picture of how the world began and how we came to be in it.”

Every culture and religion has at least one such story; one story that makes sense of how the world came to be. Even more fascinating is the fact that although all such stories inevitably differ to some degree, they all share certain characteristics and key features, irrespective of the cultural or linguistic traditions from which they originate.

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. 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.” Such stories feature in Greek mythology, in religious texts, and in oral traditions still observed today. In a like manner, our telling of the “big bang” creation story still mostly conforms to this plot structure. Jeremy Webber also identified one such narrative in the Canadian context, captured by the phrase “from colony to nation,” which emphasized the progressive development of Canada toward a more perfect nationhood.

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

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85 The Seven Basic Plots: Why We Tell Stories (London: Continuum, 2004) at 544.
86 See ibid at 544–45.
87 Ibid at 544.
88 Ibid.
90 See Booker, supra note 85 at 545.
91 Supra note 4 at 612. See e.g. Reference Re Secession of Quebec, [1998] 2 SCR 217 at 246, 161 DLR (4th) 385.
92 See Edwards, supra note 13 at 908.
in which the [world] has been engaged for a long time.”\textsuperscript{93} The result is a “path toward establishing an anticipated steady state,” one that does not yet exist but which the audience is made to expect.\textsuperscript{94} It is a story that underplays the inconvenient current state of the world, and makes it vanish by way of a narrative move from the distant past to a predetermined future.\textsuperscript{95}

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

2. Stories of “Rescue” and “Monsters”

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

\textsuperscript{93} Ibid at 909.
\textsuperscript{94} Ibid.
\textsuperscript{95} See ibid. One reason why such stories seem so persuasive to us might lie in the fact that they mirror, to some extent, the initial stages in the cycle of life. Our innate familiarity with our own evolution from foetus, to infant, to adult may well make it easier for us to imagine a story that would follow the same pattern. One other possible explanation for why such a story appears so convincing to us, and why this could particularly be the case for jurists, might have to do with how liberal legal thought conceives of historical change and its relation to law: see Robert W Gordon, “Critical Legal Histories” (1984) 36:1/2 Stan L Rev 57 on what he describes as the “master process of social evolution” at the heart of liberal legal thought (at 61–63).
\textsuperscript{96} See Edwards, supra note 13 at 909. Edwards argues that, for this reason, this typical plot structure, that of beginnings, can prove useful for advocates seeking the recognition of new legal rights.
\textsuperscript{97} See ibid at 887.
\textsuperscript{98} Ibid at 899.
or already captured.” The object of the rescue may also be, as Edwards tells us, a valuable thing, “such as a talisman or an amulet worn for protection or power.” If the protagonists are not able to retrieve or protect said item, the danger is that the antagonists might destroy it, thus annihilating its power for good, or even misuse it, employing it to further their evil ends. The ultimate goal in such stories is, by way of the rescue, to go back to the initial status quo.

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 personification of evil. This “monster”, Booker tells us, “is always deadly, threatening destruction to those who cross its path or fall into its clutches.” Generally, it is a whole community or kingdom, even humankind and the world in general, that is threatened by this evil creature. As is the case in the “rescue” story, some great prize, a treasure, or even a loved one, will often be stuck in the monster’s clutches. The story eventually leads to a confrontation between the hero and the monster, one that the former seemingly cannot win. As the story reaches its climax and the defeat of the hero appears just about certain, a dramatic reversal occurs, and the monster is ultimately killed. By a courageous feat, a selfless deed, the protagonist will have “liberated the world ... from the shadow of this threat to its survival.”

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

99 Ibid.
100 Ibid.
101 See ibid at 908.
102 Booker, supra note 85 at 23.
103 See ibid.
104 Ibid.
105 Ibid.
106 See Edwards, supra note 13 at 887.
107 Ibid.
to [the audience] as we follow the story is that it should be killed and its dark power overthrown.”108 In sum, both the “rescue” and “overcoming the monster” stories are, in terms of their narrative structure, essentially about preservation.

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

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

III. Metaphors of the Canadian Constitution

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

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

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108 Supra note 85 at 23.
109 Edwards, supra note 13 at 908.
A. *A Tale of Two Metaphors: Of Living Trees and Architectures*

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

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

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

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


113 *Supra* note 12 at 475.


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

116 *Ibid*.

117 *Ibid* at 615.
Canadian courts. They are often used, as will be illustrated below, to frame jurisprudential debates and legal disputes in a particular light by selectively highlighting and hiding certain key aspects of contested issues. In focusing the audience’s attention on one aspect of a debate—say, the need for the Constitution to keep evolving to respond to new realities—a conceptual metaphor like that of the “living tree” can keep the same audience from focusing on other, likely inconsistent aspects of the debate, for example considerations of legal stability and predictability. Used in this manner, the metaphor can intensify or increase the persuasiveness of legal arguments, in legal brief and judicial opinions alike. In this particular sense, a choice of metaphor is rarely an innocent one.

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

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

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

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

120 See Berger, “Embedded Knowledge”, supra note 18 at 265.


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

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

125 Newman, supra note 12 at 471. It should be noted that Newman recognized a similar dichotomy between “animating” and “structural” metaphors (ibid at 472).
cause these categories go to the very heart of these metaphors and what they stand for. These categories represent the most significant of the common denominators we have found between the dominant metaphors of Canadian constitutional law.

1. The Dynamic or “Animating” Metaphors

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

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

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127 Supra note 19 at 3.
a. General Overview

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

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

128 Newman, supra note 12 at 472.
129 Ibid at 471.
130 Ibid at 472.
131 See Vicki C Jackson, “Constitutions as ‘Living Trees’? Comparative Constitutional Law and Interpretive Metaphors” (2006) 75:2 Fordham L Rev 921 at 934, 941–42. Other jurisdictions employ similar metaphors, such as the “living constitution” in the United States and the “living force” metaphor in Australia.
132 See Guénette, supra note 11 at 58.
133 See Patrick Taillon & Amélie Binette, “Le Fédéralisme Canadien: Sources, Pratiques et Dysfonctionnements” [2018]:1 Civitas Europa 237 at 244.
134 See Jacques-Yvan Morin & José Woehrling, Les constitutions du Canada et du Québec : du Régime français à nos jours, t 1, 2nd ed (Montreal: Thémis, 1994) at 133.
135 See Jackson, supra note 131 at 926, 948.
136 See Reference Re Same-Sex Marriage, 2004 SCC 79 at para 22 [Same-Sex Marriage Reference].
b. The “Living Tree”: Tracing Back its Roots

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

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

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

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

139 Edwards, supra note 126 at 106–07.

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

141 See Cyr, supra note 112 at 5.

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

c. The “Living Tree”: Following the Branches

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

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

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

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143 Supra note 131 at 943.
144 See Jackson, supra note 131 at 943; Guénette, supra note 11 at 54–55; Prémont, supra note 22 at 26–28.
145 See Prémont, supra note 22 at 26–28.
146 See *ibid* at 29–30.
147 See Guénette, supra note 11 at 54–55.
148 See Cyr, supra note 112 at 18.
149 [1985] 2 SCR 486 at 509, 24 DLR (4th) 536 [*BC Motor Vehicle*].
150 S 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
This evidence, which included testimonies of federal civil servants involved in the drafting of the Charter, seemed to suggest that the principles of fundamental justice in section 7 were intended to be limited to procedural matters. However, the Court refused to give anything but minimal weight to this evidence. In his reasons, Justice Lamer wrote of the dangers inherent in an original intent analysis, the approach according to which constitutional interpretation should only seek to discern “the original meaning of the words being construed as that meaning is revealed in the intentions” of those who wrote and ratified that constitutional provision. The danger in this approach, he wrote, is that:

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

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

As was discussed above, metaphorical thinking works by transferring the “characteristics, reasoning processes, and outcomes” of a “source” domain onto a “target” domain. 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. They thus influence our assessment of what we ought to see and feel. Here, it is precisely because we expect the tree to grow, and because it is tightly as-

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152 See BC Motor Vehicle, supra note 149 at 509.
153 See ibid at 509.
155 BC Motor Vehicle, supra note 149 at 509.
156 Berger, “The Lady, or the Tiger?”, supra note 20 at 278.
sociated in our mind with the Constitution, that we also expect the latter to grow. Thus, the “living tree” metaphor might account (at least in part) for what makes the continuing evolution of the Constitution—and by extension, the outcome of cases—appear so natural and inevitable to us. In fact, it should come as no surprise that within this particular frame of reference, the “living tree” has allowed progressive constitutional development without any constitutional amendment.

The process of transferring inferences from one concept to the other is also strikingly exemplified in the more recent Same-Sex Marriage Reference. In that case, the Court had to decide whether the federal parliament could adopt a law allowing same-sex marriage under its power over marriage and divorce in paragraph 91(26) of the Constitution Act, 1867. It was argued before the Court that the word “marriage” in that provision entrenched common law definitions that only encompassed the union of a man and a woman. In rejecting the claim, the Supreme Court of Canada famously held that “[t]he ‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”

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 be chosen—which interpretation should naturally prevail. By presenting the choice as between allowing the growth of the Constitution or impeding it, the Court frames the discussion in a particular way.

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 idea of a slow “evolution towards betterment” is prevalent in our legal discourse. Through it, the “engine of evolution” is presented by the courts as an “internal desire of the Constitution to survive in its environment.” Courts, as “guardians” of the Constitution, thus present themselves as only bringing about adjustments re-

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158 Same-Sex Marriage Reference, supra note 136 at para 22.
159 See Congressional Research Service, supra note 154 at xiv.
160 On the process of framing, see Berger, “The Lady, or the Tiger?”, supra note 20 at 283.
161 See e.g. Canada (AG) v Hislop, 2007 SCC 10 at para 94 [Hislop], citing Same-Sex Marriage Reference, supra note 136 at para 22.
162 Cyr, supra note 112 at 31.
163 Ibid at 32. See also Prémont, supra note 22 at 30.
quired to preserve the relevance of our founding document today. In other words, these changes are what guarantee its very “survival”. This idea has played a key role in the “justificatory discourse of the courts.”

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

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

**d. The “Living Tree”: Acknowledging its Natural Limits**

In living-tree constitutionalism, the idea of “natural limits” usually stands for the constraints that exist on the development of constitutional law, for the limits “imposed by the core of the concepts used in the entrenched texts of the Constitution.” These limits are most frequently
invoked, although not exclusively, in disputes about the division of powers between provincial legislatures and the federal parliament under sections 91 through 95 of the Constitution Act, 1867.\footnote{See \textit{ibid}. See \textit{e.g.} \textit{Same-Sex Marriage Reference}, \textit{supra} note 136 at paras 24, 26–28, 36–39.}

As for the tree's roots, they are meant to convey the idea that constitutional interpretation should not start with the idiosyncratic preferences of the judges, but rather rely on “solid and well-established bases.”\footnote{\textit{Ibid}.} 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.”\footnote{Cyr, \textit{supra} note 112 at 19.} This means, in legal discourse, that constitutional interpretation should not be conducted in a way that disregards the past.\footnote{\textit{Ibid}.} It should use the past as its starting point, and be mindful of it in explaining every novel development.\footnote{See \textit{ibid}. A good example of the use of this metaphor can be found in Justice Lebel's concurring reasons in \textit{R. v. N.S.} (2012 SCC 72). He writes, at paragraph 72 of his reasons: \begin{quote} [t]he “living tree” keeps growing, but always from its roots. […] [T]he recognition of multiculturalism [in the Charter] takes place in the environment of the Constitution itself, and is rooted in its political and legal traditions. The Constitution requires an openness to new differences that appear within Canada, but also an acceptance of the principle that it remains connected with the roots of our contemporary democratic society. \end{quote}} In this respect, the roots metaphor captures the role of text, original understanding, and precedents in constitutional adjudication.\footnote{\textit{Ibid}.}

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.\footnote{See \textit{ibid}; \textit{Prémont}, \textit{supra} note 22 at 30–31.} It is in this way that the roots metaphor imposes constraints on the creative power of judges.\footnote{\textit{Ibid}.} However, these limits are, as Cyr notes, “counter-balanced by the fact that the metaphor of natural growth does not impose strict conceptual restrictions to the direction of that growth.”\footnote{\textit{Ibid}.}
One last observation is in order at this point: like all metaphors, the “living tree” metaphor “can obscure as much as [it can] illuminate.”\(^{179}\) This is the case because, as we have seen above, metaphors “are ways of seeing or highlighting some aspects of a concept,” but are also “ways of not seeing others.”\(^{180}\) In allowing us to concentrate on one aspect of a concept, they can keep us from noticing other aspects that are inconsistent with it.\(^{181}\) The “living tree” metaphor, for example, might be said by some to “[understate] the effects of major constitutional change and the role of human agency in that process.”\(^{182}\) In Jackson’s words:

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

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

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

\(^{179}\) Jackson, *supra* note 131 at 926; Cyr, *supra* note 112 at 6.

\(^{180}\) Berger, “The Lady, or the Tiger?”, *supra* note 20 at 278.

\(^{181}\) See Lakoff & Johnson, *supra* note 19 at 10.

\(^{182}\) Jackson, *supra* note 131 at 926. See also Guénette, *supra* note 11 at 57.

\(^{183}\) *Supra* note 131 at 959–60. See also Prémont, *supra* note 22 at 30.

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

2. The Static or “Structural” Metaphors

a. General Overview

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

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

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

185 Supra note 12 at 472.
186 See ibid at 472, 486–87, 494.
187 This is not to say that stability is always synonymous with immobility, simply that it sometimes is.
which for obvious reasons had not been contemplated in 1867. In his reasons, Lord Sankey acknowledged that the Constitution “embodies a compromise” between the original provinces, an “original contract” centred on the “preservation of the rights of minorities.” Still, the ultimate object of that contract was, in his view, to give the central government the powers “by which uniformity of legislation might be secured” on questions of national concern. It is in keeping with this idea that Lord Sankey ultimately found that aeronautics was a matter for the federal parliament.

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

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188 Aeronautics Reference, supra note 122 at 65.

189 Ibid.

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

191 See ibid at 801–02.

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

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

194 Newman, supra note 12 at 486.
of the Constitution were born out of a compromise, they are seen as more deserving of protection.

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

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

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

196 (UK), 22 & 23 Geo V, c 4.
197 Labour Conventions Reference, supra note 195 at 684.
198 See Newman, supra note 12 at 488. See also Cyr, supra note 112 at 21.
200 Berger, “The Lady, or the Tiger?”, supra note 21 at 290.
(itself metaphorical) is understood as a container or receptacle, one that holds certain things (legislative powers), things it protects by way of its clear, hermetic, boundaries.

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

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

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

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

201 Ryder, supra note 199 at 322–23.
202 See ibid.
203 See ibid.
204 See Supreme Court Act Reference, supra note 123 at para 82.
206 [1987] 2 SCR 2 [OPSEU].
207 Ibid at 18.
ception of the division of powers that favours “overlapping jurisdiction” and that encourages “intergovernmental cooperation”.208

This new paradigm, known as the “modern view of federalism,”209 gained traction in the constitutional jurisprudence of the last half-century. But recent decisions of the Supreme Court210 seem to indicate that the classical paradigm of federalism, which “maximises the unilateral power of each order” and discourages overlap,211 still strongly influences the way we think of the Constitution. Nowhere has that been made clearer than in the 2011 Securities Reference,212 where, building upon Dickson’s metaphor in OPSEU, the Court wrote that “the ‘dominant tide’ of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.” The “constitutional balance” mentioned in this excerpt is another example of a static metaphor.

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

b. “Structure” and “Architecture” of the Canadian Constitution

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

208 Securities Reference, supra note 124 at para 57.
210 See e.g. Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39 at 58; Quebec v Canada, supra note 168 at para 19; Rogers Communications Inc v Châteauguay (City), 2016 SCC 23 at 39, 62–72.
211 Gaudreault-DesBiens & Poirier, supra note 209 at 411.
212 Supra note 124.
213 See Supreme Court Act Reference, supra note 123 at paras 82, 87, 88, 100; Senate Reform Reference, supra note 15 at para 26.
214 [1959] SCR 121, 16 DLR (2d) 689.
cation of the liquor licence of a restaurant owner because of his affiliation with Jehovah’s Witnesses. In his reasons, Justice Rand famously observed that if such conduct was to be allowed, and if the decisions of the administration were to be driven by “the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty,” it would mean nothing less than “the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.”

The idea of a constitutional structure, of which the rule of law is a pillar, was already starting to take shape.

The Supreme Court again referred to the idea of the internal structure of the Constitution in *OPSEU.* In his reasons for the majority, Justice Beetz wrote that the “basic structure of our Constitution … contemplates the existence of certain political institutions,” such as freely elected legislative bodies at all levels of the federation. This, he wrote, meant that neither the provincial legislatures nor the federal parliament could enact laws that “substantially interfere with the operation of this basic constitutional structure.”

In other words, the federal and provincial legislative bodies must “conform to … basic structural imperatives and can in no way override them.” Justice Beetz nevertheless came to the conclusion that the impugned provisions only incidentally affected the fundamental right to participate in certain political activities.

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

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215 *Ibid* at 142 [emphasis added].

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

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

218 *Ibid* [emphasis added].

219 *Ibid* [emphasis added].

220 See *ibid*.

221 *Supra* note 91 at 248.

222 *Ibid*.
matter, may well have to consider “unwritten postulates which form the very foundation of the Constitution of Canada.”223

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

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

In the Senate Reform Reference, rendered only weeks later, the Court pushed the “constitutional architecture” metaphor further.231 The central question before the Court was whether various changes contemplated in
regard to the Senate constituted amendments to the Constitution, and if so, what procedure should apply. The focus of the Court was therefore on the nature and content of the Constitution, and on the role of the Senate within the Canadian political system. The Constitution is not, the Court wrote, a “mere collection of discrete textual provisions”; rather, it has “an architecture, a basic structure.” This notion of architecture:

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

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

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.” 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.” As for the unanimity rule of section 41, which requires the consent of the Senate, the House of Commons, and all the provincial legislative assemblies for constitutional amendments concerning certain matters (notably the office of the Queen, the amending procedures themselves, and the composition of the Court), it is said to be justified by the need “to give each of the partners of Canada’s federal

232 See ibid at para 2.
233 Ibid at 27.
235 See ibid at paras 27, 107. The reasoning of the majority in the Supreme Court Act Reference is interesting in that, while it has the effect, in a sense, of broadening the scope of what, according to section 52 of the Constitution Act, 1982, forms part of the Constitution, it does so on the account of the “historical evolution” of the Court and what the framers of the amending procedure are thought to have intended (supra note 123 at paras 76, 77–80).
236 Ibid at para 31.
237 Ibid.
compromise a veto on those topics that are considered the most essential to the survival of the state.”

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

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

IV. Stories of the Constitution

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

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

238 Ibid at para 41, citing Benoît Pelletier, La modification constitutionnelle au Canada (Scarborough: Carswell, 1996) at 208.
239 See Senate Reform Reference, supra note 15 at para 3.
240 Newman, supra note 12 at 494.
241 Ibid.
perhaps unconsciously, to adapt the stories they tell of the Constitution in
light of the underlying ideas conveyed by these two types of metaphors.
By applying the tools of literary analysis to two recent decisions where
such metaphors are used, we will uncover the narrative paths taken by
the judges and illustrate the extent to which they correspond to the meta-
aphors.

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

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

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

242 Supra note 25 at 20.
243 See Berger, “The Lady, or the Tiger?” supra note 20 at 275.
244 See Hanne & Weisberg, “Conversation I: Introduction”, supra note 32 at 8, citing DN
McCloskey, “Storytelling in Economics” in Cristopher Nash, ed, Narrative in Culture:
The Uses of Storytelling in the Sciences, Philosophy, and Literature (London, UK:
246 Supra note 24 at 33. This joined use of metaphor and narrative is unsurprising, Olson
interestingly points out, insofar as “narrativization is intrinsic to verbal expression,
and metaphor is part of this expression” (ibid).
248 See Edwards, supra note 14 at 911.
these devices “provide characters, give those characters motives, and identify the ‘right ending’ for the story of the law.”

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

1. Dynamic Metaphors and “Birth” Stories

   a. Uncovering the Narrative: The “Unfinished Constitution”

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

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

249 Ibid at 912.
250 See Berger, “The Lady, or the Tiger?”, supra note 20 at 282.
251 See ibid at 283.
252 Ibid at 282.
253 I have only been able to identify five cases, since 2010, where the living tree metaphor was explicitly mentioned by the Supreme Court: see R v Jarvis, 2019 SCC 10 at para 98 (Rowe J concurring); R v Comeau, 2018 SCC 15 at paras 33, 39, 83; R v NS, supra note 174 at 72; Quebec v Canada, supra note 167 at para 144; Securities Reference, supra note 124 at para 56. In comparison, I was able to identify at least seven such mentions from the years 2000 to 2010: see Canadian Western Bank, supra note 209 at para 23; Hislop, supra note 161 at paras 94, 144, 146; Same-Sex Marriage Reference, supra note 136 at paras 22, 24, 28; R v Demers, 2004 SCC 46 at para 78; R v Blais, 2003 SCC 44 at para 40; Figueroa v Canada (Attorney General), 2003 SCC 37 at para 152; Gosselin v Québec (Attorney General), 2002 SCC 84 at para 317.
254 Supra note 112 at 7.
completeness.”255 In this perspective, the current state of constitutional law is thought of not as the end of the story, but rather as a Polaroid of one particular moment in time, perhaps even indicative of the future direction towards which the norms will develop.256 This brings to mind the metaphor of the “living tree”, of the small plant slowly turning into a tree, and growing through its branches and leaves.

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

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

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

255 Ibid [emphasis in original].
256 See ibid.
257 Ibid at 7.
258 See ibid.
259 Ibid.
260 Ibid at 9 [emphasis in original].
261 Ibid at 31.
262 Edwards, supra note 13 at 908–09.
yers, scholars, or judges, have tended to use them conjointly. In other words, it appears they are inclined to adapt, probably unconsciously, the story they tell of the Constitution in light of their accompanying metaphors or, more generally, in light of the broad semantic fields they support. This linkage is evident, for instance, in the recent decision of the Supreme Court in *Saskatchewan Federation of Labour*.

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

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

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

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

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


265 *Saskatchewan Federation of Labour*, supra note 14 at para 1.
This narrative has the effect of underemphasizing the inconvenient current state of the law by picturing it as nothing but a step in the course of a centuries-long developmental process. In positing the formal recognition of the right to strike as the narrative’s anticipated—even legitimate—steady state, it downplays the importance of the present state of affairs. The right to strike is “an indispensable component” of the right to collective bargaining, the Court tells us—“[i]t seems ... to be the time to give this conclusion constitutional benediction.”266 We thus find ourselves, from the very start of the story, in narrative motion.

The reference by Justice Abela to the bending arc of constitutional law only strengthens this sense of motion. This image is a dynamic metaphor, one which is to a large extent conceptually related to the “living tree” metaphor. Like the “living tree” metaphor—which is itself cited by SEIU-West, one of the interveners in the case267—the bending arc conveys a sense of growth and unavoidable evolution towards progress. The metaphor and the narrative thus complement each other.

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

We learn that in nineteenth century England, strikes were eventually criminalized under the common law doctrine of criminal conspiracy.270 They remained criminalized even as Parliament sanctioned certain forms of trade unionism in 1825.271 The same is true, we gather, in Canada at that time.272

266 Ibid at para 3.
267 See Saskatchewan Federation of Labour, supra note 14 (Factum of intervener SEIU-West at para 9).
268 See Saskatchewan Federation of Labour, supra note 14 at para 35.
269 See ibid.
270 See ibid at para 36.
271 See ibid.
272 See ibid at para 39.
The birth process has slowed down. Its path toward the story’s anticipated steady state has been obstructed, at least momentarily, by an obstacle: the criminalization of the right to strike. At this stage, we (the audience for the decision) might feel disappointed. There is a great chance, indeed, that as we heard the story of the struggle unfold we have found ourselves rooting for the right to strike. As Linda Edwards writes, “when we watch someone [or, in this case, an idea] attempt something difficult, we almost automatically want them to succeed.”

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

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

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273 Edwards, supra note 13 at 898.
274 See Saskatchewan Federation of Labour, supra note 14 at para 36.
275 Ibid at para 39.
276 SC 1872, c 30.
278 See ibid at para 42, discussing 29 USC §§ 151–69 (1935).
279 Saskatchewan Federation of Labour, supra note 14 at para 42.
strikes until the exhaustion of all other settlement mechanisms.\textsuperscript{280} They only made the right to strike more mature, less unpredictable.\textsuperscript{281} They did not pose a threat to its very existence.

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

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

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

\begin{itemize}
\item \textsuperscript{280} See \textit{ibid} at para 45.
\item \textsuperscript{281} See \textit{ibid} at paras 43–44.
\item \textsuperscript{282} \textit{Ibid} at para 46.
\item \textsuperscript{283} \textit{Ibid} at para 50.
\item \textsuperscript{284} \textit{Ibid} at para 51.
\item \textsuperscript{285} \textit{Supra} note 264.
\item \textsuperscript{286} See Reginald Rose, \textit{Twelve Angry Men} (New York: Penguin Books, 2006).
\item \textsuperscript{287} \textit{Saskatchewan Federation of Labour, supra} note 14 at para 33 [emphasis added]. It should be noted that Justice Wilson concurred with the reasons of Chief Justice Dickson.
\end{itemize}
tive. By naming the dissenting Justice and recalling his struggle, the opinion allows us to empathize with a main character in the story, to “understand [his] goals, and share some of [his] frustration.” Just as we were meant to root for the right to strike, we are now likely hoping for the dissenter’s vindication.

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

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

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288 See *ibid* at paras 33, 55, 59–60, 62, 84, 94.
289 Edwards, *supra* note 13 at 894.
290 2001 SCC 94.
293 2011 SCC 20 at para 2, McLachlin CJ and LeBel J.
294 2015 SCC 1 at para 5, McLachlin CJ and LeBel J.
295 See Edwards, *supra* note 13 at 896.
296 *Ibid*.
297 *Ibid*. 
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.” In the Court’s view, the historical and jurisprudential landscape compellingly suggests that section 2(d):

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

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

2. Static Metaphors and “Rescue” Stories

a. Uncovering the Narrative: The Endangered Constitution

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

298 See ibid at 909.
299 Saskatchewan Federation of Labour, supra note 14 at para 61.
300 Ibid at para 75.
301 See e.g. Guénette, supra note 11 at 60; Kate Glover, “The Supreme Court in a Pluralistic World: Four Readings of a Reference” (2015) 60:4 McGill LJ 839 at 849.
forces of change; the ultimate bastion against the erosion of Canada’s fundamental law.

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

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

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

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

In this landmark 2014 reference, the Court was called upon to examine the validity, under the Canadian Constitution, of proposals on the part of the federal government to either reform the Senate (limits on ten-
ure, changes to the nomination process, and so forth) or to abolish it. The beginning of the opinion presents Canada’s current political structure as the narrative’s steady state. As the opinion tells us at the outset, “[t]he Senate is one of Canada’s foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation.”

Reading these first few lines, the readers cannot help but feel an overall sense of stability, order, and harmony.

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

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.

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

With its introduction, the Court also informs the readers of the theme of the story it is about to tell: a story of the survival of one of Canada’s foundational political institutions, of its enduring existence in the face of repeated assaults. The abolition of the Senate would, the Court warns us, “fundamentally change Canada’s constitutional structure.”

The stakes, as the readers begin to understand, are high. It should be noted at this point that the danger of which the Court speaks seems, contrary to what one may think, not to be the reform itself, but rather the way it is conducted. In other words, the danger feared by the Court lies not so much in change itself, as it does in unilateral and unconsidered change.

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

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306 Ibid at para 1.
307 Ibid at para 1.
308 Ibid at para 17.
309 Ibid at para 3.
310 See Edwards, supra note 13 at 890.
might save or transform us all.\textsuperscript{311} What is actually at stake, in Edwards’s words, is “much bigger than the safety of one small character”\textsuperscript{312}—it is the safety of each and every one of us. Here, the Court reminds us in turn of the place the Senate occupies in the architecture of our Constitution,\textsuperscript{313} of its role as a legislative body of “sober second thought,”\textsuperscript{314} and of the fact that it provides representation both to the provinces and to groups that remain under-represented in the House.\textsuperscript{315}

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

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

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

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

\textsuperscript{311} See \textit{ibid} at 902.
\textsuperscript{312} \textit{Ibid}.
\textsuperscript{313} See \textit{Senate Reform Reference, supra} note 15 at paras 54, 59–60, 70, 77, 97.
\textsuperscript{314} See \textit{ibid} at paras 15, 52, 54, 56, 60, 63, 70, 79.
\textsuperscript{315} See \textit{ibid} at paras 15–16.
\textsuperscript{316} \textit{Ibid} at para 19.
have the power under the Constitution as it then stood to unilaterally modify the fundamental features of the Senate or to abolish it."\(^{317}\)

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

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

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

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

\(^{317}\) *Ibid.*


\(^{319}\) *Ibid* at 24, 149.

\(^{320}\) *Chestek*, *supra* note 72 at 149.

\(^{321}\) See *ibid* at 148–49.

\(^{322}\) See *Senate Reform Reference*, *supra* note 15 at para 3.
fect the very architecture of the Constitution. The Court holds, first, that the implementation of senatorial elections would fundamentally alter the Constitution’s architecture, as it would modify the “specific structure”\(^\text{323}\) of the federal parliament. Further, insofar as senatorial elections would give the Senate the necessary democratic legitimacy to systematically block the House, they would also go against its very “constitutional design.”\(^\text{324}\) In this perspective, the fact that Senators are appointed and not elected itself “shapes th[is] architecture.”\(^\text{325}\) Thus, no changes affecting the fundamental nature and role of the Senate could ever be achieved by the federal parliament acting alone, for the Senate is a “core component of the Canadian federal structure of government.”\(^\text{326}\)

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

Conclusion

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

\(^{323}\) Ibid at para 55.
\(^{324}\) Ibid at para 60. See also ibid at paras 63, 70.
\(^{325}\) Ibid at para 59.
\(^{326}\) Ibid at para 77.
\(^{327}\) Ibid at para 97.
\(^{328}\) Ibid at para 101.
One of the central lessons this article has sought to convey is that Canadian jurists could benefit significantly from the insights of “narrative scholarship”. These insights could provide a very different analytical perspective for academics when studying constitutional case law. Narrative analysis allows us, as these case studies have illustrated, to uncover the common beliefs and preconceptions at play in the law—things that otherwise tend to remain unseen and unconscious. It serves to unearth, in other words, the “narrative transactions” in legal discourse. Lawyers could also benefit from an increased awareness of how narratives and metaphors shape our thinking. It might well be the case that, if advocates organized their facta and oral pleadings in light of the foundational metaphors and accompanying archetypal stories discussed here, their submissions might prove more persuasive and their arguments more cogent. As jurists, we would be wise to pay closer attention to metaphor and narrative, for they deeply influence not only how we think, speak, and argue, but also how we make decisions about the law.