## ARTICLES

# Of Castles and Living Trees: The Metaphorical and Structural Constitution

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**ABSTRACT**

Judges, jurists, political scientists, constitutional historians and other scholars and practitioners have long struggled with how to give tangible form, substance and coherence to the broad, organic abstraction known as the Constitution of Canada: that congeries of statutory provisions, prerogative powers, unwritten principles and values, common-law rules, and conventions of political behaviour that make up or inform the structure and operation of the supreme law of the country. One means by which this is done is through resort to constitutional metaphors. The use of this literary device tells us much about the perspective one favours when looking at the Constitution. It also permits lawyers to overcome, if only for a fleeting moment, Wilkins Micawber's lament about the prosaic character of legal study and the limits of legal expression.[1]

Competing metaphors of stable structures (castles, edifices), motive force (ships, operating machinery) and dynamic, organic growth (living trees, lifeblood, animating principles) have long punctuated the development of the jurisprudence of constitutional interpretation. These metaphors bear witness to the good-faith efforts — often eloquent, occasionally awkward — of judges and commentators to ensure that not just the letter but also the spirit of the Constitution is adhered to in construing the provisions of Canada's constitutional laws.

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1 "How do you like the law, Mr. Micawber?" "My dear Copperfield," he replied. "To a man possessed of the higher imaginative powers, the objection to legal studies is the amount of detail which they involve. Even in our professional correspondence," said Mr. Micawber, glancing at some letters he was writing, "the mind is not at liberty to soar to any exalted form of expression. Still, it is a great pursuit! A great pursuit!" — Charles Dickens, *David Copperfield*, 1850, from the Folio Society edition, London, 2004, p. 559.

What, then, to make of the "architecture" of the Constitution, the outlines of which were so prominent in the *Senate Reform Reference*? It is this article's contention that this metaphor is a useful, overarching concept in that it embraces not only the basic and emerging structural principles of the Constitution, but also, to an important extent, the fundamental institutions and systemic arrangements and relationships associated with a federal parliamentary democracy governed by the rule of law. Employed appropriately, it should not stifle the progressive interpretation of the written Constitution nor supplant the notional living tree.

## 1. INTRODUCTION

In the aftermath of the Supreme Court of Canada's important rulings in the *Senate Reform Reference* and the *Supreme Court Act Reference*, much attention was given to the Court's insistence upon the normative character and significance of the underlying "architecture" of the Constitution of Canada. Since that time, the potential legal scope to be given henceforth to the "constitutional architecture" behind the textual provisions of the Constitution has preoccupied jurists, practitioners and constitutional scholars of every discipline, and has been a prominent concern at several academic conferences, including this one.[2]

In taking a longer view, I shall suggest in this article that the "architecture" of the Constitution, albeit a term that was employed frequently and with evident care and design by the Supreme Court in the two recent references, is in no way a recent invention of the Court, which acknowledged its provenance, in the *Senate Reform Reference*, as that of the Court's own opinion in the *Quebec Secession Reference* 16 years earlier. Indeed, the use of the term, "constitutional architecture", is simply the latest manifestation in a series of judicial metaphors that have been employed, since at least the 1930s, to highlight and to outline the framework undergirding the Constitution of Canada. They are often, although not exclusively, associated with an approach to constitutional interpretation that sometimes borders on originalism. These metaphors 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. Let us call them, for the purposes of this article, the *structural metaphors* of constitutionalism.

These metaphors compete with another conceptual typology that also dates from at least the 1930s, which we shall call, for convenience as much as accuracy, the *animating metaphors* of constitutionalism. These metaphors speak mainly to the living, organic aspects of the Constitution and tend to be about flexibility, suppleness and growth. The most famous of these, the Constitution as a "living tree", permeates our recent constitutional jurisprudence, not only in relation to the inter-

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2 For example, besides this conference at the University of Ottawa (Emerging Trends in Canadian Public Law, May 22, 2015), the Common Law Section of the Faculty of Law also sponsored a conference on Senate reform on January 27, 2015, McGill University's Faculty of Law held a symposium on the *Senate Reform Reference* on January 29, 2015, and the Reference was considered for a second year in a row (this time, examining the Court's opinion and its aftermath) at the Osgoode Constitutional Cases conference on 10 April 2015. At the latter conference, Professor Richard Haigh of Osgoode spoke on "Constitutional Metaphors and the Senate Reference".

pretation of the *Canadian Charter of Rights and Freedoms* and other constitutional guarantees of rights, but also the federal-provincial distribution of legislative powers. However, in the *Supreme Court Act Reference* and the *Senate Reform Reference*, the Supreme Court eschewed the "living tree" metaphor in favour of a repeated invocation of the more fixed and determinate "constitutional architecture" metaphor.

The alternating *structural* and *animating metaphors* of constitutionalism, I shall contend in this article, are basic to an understanding of how our Canadian Supreme Court embraces constitutional analysis, and go hand in hand with the essentially pedagogical character of the Court's resort to unwritten and underlying constitutional principles, especially in the context of reference opinions.

This article will examine some of these metaphors with a view, ultimately, to defining the broad outlines of the "architecture" of the Constitution. I will argue that, employed wisely, the metaphor of "constitutional architecture" can assist in construing the provisions of the Constitution without supplanting the competing — and equally important — metaphor of the "living tree".

## 2. WHY METAPHORS? DO I HAVE TO DRAW YOU A PICTURE?

The Dominion of Canada, the union which gave expression in 1867 to the desire of the original provinces to be federally united under the Crown of the United Kingdom, was to have "a Constitution similar in Principle to that of the United Kingdom", as the preamble to the *British North America Act* emphasized. It is not surprising, then, that judges faced with the not inconsiderable task of expounding the meaning of the provisions of the new constitutional text, should have at least occasionally sought to extrapolate both principle and analogy from the long tradition of British constitutionalism, both in its legal and its political manifestations. Professor A.V. Dicey, writing contemporaneously with the development of judicial review under the *British North America Act*, observed, in an early edition of his influential treatise, *The Law of the Constitution*, that the recital in the preamble to the Act that Canada was to have a constitution similar in principle to that of the United Kingdom was an assertion of "official mendacity", and that "if preambles were intended to express the truth", then the word "States" ought to have been substituted for "Kingdom", since the Constitution of Canada — in its federal design, its written form and its potential for judicial enforcement — was clearly modelled on the Constitution of the United States.[3] In this, of course, Dicey was far from wrong, but nonetheless he had clearly overshot the mark. Toning down his language from "official mendacity" to "diplomatic inaccuracy" in later editions of his work,[4] Dicey bowed to Canadian scholars, who had pointed out that the impugned phraseology in the preamble was designed to infuse the provisions of the *British North America Act* on executive and legislative institutions and power with

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3 A.V. (Albert Venn) Dicey, *Introduction to the Study of the Law of the Constitution*, 3rd ed. (London: Macmillan & Co., 1889) at 155–157.

4 *Ibid.*, 8th ed., 1931, at 162.

the principles of a constitutional monarchy and a parliamentary democracy: a responsible, not a republican, form of representative government.[5]

One particularly fecund source for those principles, and one which was to influence profoundly the understanding of monarchical and parliamentary government both in the United Kingdom and in Canada, was Walter Bagehot's *The English Constitution*,[6] first published in 1867, the year the Canadian Constitution, as set out in the *British North America Act*, came into being. Bagehot's witty and incisive style, coupled with his journalistic talents as an observer of politics for *The Economist*, assisted him in producing a work of remarkable clarity and lucidity on the inner workings of British government and institutions. Many of his observations on the monarchy and on Cabinet government (like those of Dicey's in respect of parliamentary sovereignty, the rule of law and the role of constitutional conventions) have become precepts accepted with little question by Canadian political scientists and jurists alike, at least until quite recently. Bagehot (the "great Bagehot", as the late Professor J.R. Mallory used to refer to him reverentially in J.R.'s political science classes at McGill in the early 1970s), brought the dry, abstract and desiccated elements of constitutional practice alive and made them tangible and accessible with his prose; and he did so with the use, amongst other literary and rhetorical techniques, of analogy and metaphors. Indeed, one of his most evocative metaphors — "A cabinet is a combining committee, a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state"[7] — probably did more to hinder the development of the still-emerging principle of the separation of powers in British and Canadian constitutionalism than any other single factor. For it was that metaphor that drove home Bagehot's trenchant observation that the "efficient secret of the English Constitution" was the "close union, the nearly complete fusion, of the executive and legislative powers."[8]

The metaphor remains arresting enough that the Supreme Court of Canada, in a unanimous opinion authored by Justice John Sopinka, invoked it expressly in *Canada Assistance Plan Reference* to buttress the Court's findings respecting parliamentary government and "the essential role of the executive in the legislative

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5 *Ibid.*, footnote 1. The difference between his perspective, he wrote, and that of "competent and friendly Canadian critics", was that he had viewed the Canadian Constitution in terms of its federal character, which was "a copy, though by no means a servile copy", of the Constitution of the United States. "If, on the other hand, we compare the Canadian Executive with the American Executive, we perceive at once that Canadian government is modelled on the system of Parliamentary cabinet government as it exists in England, and does not in any wise imitate the Presidential government of America. This, it has been suggested to me by a friend well acquainted with Canadian institutions, is the point of view from which they are looked upon by my Canadian critics, and is the justification for the description of the Constitution of the Dominion given in the preamble to the *British North America Act, 1867*."

6 Walter Bagehot, *The English Constitution*, 1867; references in this article are to the World Classics edition published by Oxford University Press, 1929.

7 *Ibid.*, at 12; emphasis in original.

8 *Ibid.*, at 9.

process of which it is an integral part".[9] It may also be behind some of the peculiarities of the discussion of the principle of the separation of powers in a system of responsible government that characterized Chief Justice Antonio Lamer's opinion for the majority of the Court in the *Provincial Court Judges Reference*.[10]

Be that as it may, it was not a huge leap for British and Canadian judges, like commentators before them, to begin creating and applying their own metaphors to aspects of the Canadian constitutional framework, or in some cases, as the interpretation of the Canadian Constitution evolved, to borrow and adapt metaphors invoked previously by American judges in relation to analogous aspects of the American Constitution.

Constitutional metaphors can be a powerful means of describing and illuminating otherwise abstract, obscure or intangible aspects of constitutional arrangements and institutional relationships. Employed judiciously, they can perform an important normative function in respect of the fluid political dynamics often associated with the exercise of constitutional powers, by asserting a restraining or channelling influence and encouraging actions or behaviour consistent with constitutional principles. Thus, like constitutional conventions, constitutional metaphors tend to be value-driven.

The word of caution that needs to be added in relation to constitutional metaphors is that they paint pictures, and if in popular parlance a picture is worth a thousand words, in constitutional analysis, pictures and the symbolism they embody may over-simplify complex situations and realities.

A brief return to Bagehot may assist in illustrating this latter point. "The nature of a constitution, the action of an assembly, the play of parties, the unseen formation of a guiding opinion, are complex facts, difficult to know, and easy to mistake." Monarchy, he wrote, was a strong government because it was an intelligible form of government. "It is often said that men are ruled by their imaginations, but it would truer to say that they are governed by the weakness of their imaginations." The mass of the population would have difficulty comprehending, certainly more than superficially, the intricate workings of a balanced constitution, he posited. "When you put before the mass of mankind the question, 'Will you be governed by a king, or will you be governed by a constitution?' the inquiry comes out thus — 'Will you be governed in a way you understand, or will you be governed in a way you do not understand?'"[11]

There were, affirmed Bagehot, "whole classes unable to comprehend the idea of a constitution — unable to feel the least attachment to impersonal laws", but although they did indeed "vaguely know that there are some other institutions be-

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9 *Reference re Canada Assistance Plan (B.C.)*, 83 D.L.R. (4th) 297, 2 S.C.R. 525 at p. 559 (quoting Bagehot).

10 *Reference re Provincial Court Judges*, 1997 CarswellNat 3038, 1997 CarswellNat 3039, [1997] 3 S.C.R. 3; see particularly paras. 128 to 146.

11 Anyone who doubts the veracity of that proposition, even today, need only put it to the empirical test of teaching a first-year constitutional law class and then submitting to the humbling exercise of grading the examination answers.

sides the Queen", preferred to let their minds "dwell more upon her than upon anything else, and therefore she is inestimable."

> A Republic has only difficult ideas in government; a Constitutional Monarchy has an easy idea too; it has a comprehensible element for the vacant many, as well as complex laws and notions for the inquiring few.[12]

Of course, in 1867, monarchies, both constitutional and absolute, were still largely the norm in Europe; all of that was to change by the end, and in the aftermath, of the First World War. As well, Bagehot's somewhat sardonic elitism did not anticipate the great leveller of the extended franchise and modern communications in promoting the democratic principle and an educated and informed electorate. Still, the point Bagehot was making is that a King or Queen at the head of a constitutional monarchy is only at the head of the "dignified" or "comely" parts of the constitution, while the Prime Minister is at the head of the "efficient" parts. It was natural that "the most useful parts of the structure of government should by no means be those which excite the most reverence."[13]

Constitutional metaphors, like constitutional symbols — the Crown and the regalia, the Throne, and in some formal respects, the Queen herself; the coat of arms, the flag, bronze statuary; indeed, a constitutional text or Charter engrossed on vellum parchment — are pictures that are designed to excite the imagination. The trick is to recognize and remember that these are never the complete portrait.

## 3. THE CONSTITUTIONAL TAPESTRY

"I like constitutions. Every constitution is at once a political instrument, a legal architecture, a historic moment and a literary work. Upon reading the most beautiful of them — and I employ this term purposefully — I experience the same pleasure that Stendhal did in reading the *Civil Code*."[14] It is not surprising, perhaps, to find a French statesman admitting frankly to the aesthetic qualities of a constitutional text. Robert Badinter was speaking of the great declarations of principle that coiffed the French constitution of 1791 — "which resonates like Mozart's overture to *Don Juan*"[15] — and the American constitution of 1787, with its opening words, "We the People . . .". Who, indeed, upon hearing them read aloud, could fail to be moved by the grandeur and eloquence of the preambles to those instruments and their inspirational antecedents, the *Declaration of the Rights of Man and the Citizen* of 1789, and the *Declaration of Independence* of 1776?

Nor is it surprising that constitutional instruments should be taken, at some levels, as cultural works of art. There is the visual impact of a Bill of Rights or Great Charter as embellished by the calligrapher's pen on parchment. There is the

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12 *Ibid.*, at 34.

13 *Ibid.*, at 7.

14 Robert Badinter, *Une Constitution européenne* (Paris: Fayard, 2002) at 9: "J'aime les constitutions. Toute constitution est à la fois un instrument politique, une architecture juridique, un moment historique et une œuvre littéraire. A lire les plus belles — c'est à dessein que j'emploie ce terme — , j'éprouve les mêmes plaisirs que Stendhal à la lecture du *Code civil*.

15 *Ibid.*, "[. . .] qui résonne comme l'ouverture de *Don Juan* de Mozart."

distinguished style, rhetorical flourish and syntax of the words chosen by the drafters, which are also part of the "constitutional decorative arts".[16] There is the solemn form and legal substance of the rules and provisions themselves, which ought, in a constitutional document, to be "an outstanding example of the lawyer's art".[17] And there is the subtle art of politics behind the broad ideals expressed on paper: — the art of the possible, the art of compromise, reflected not only in the words themselves but also in the careful pauses, meaningful silences and studied ambiguity of certain passages of the constitutional text.

The Constitution of Canada, to the extent it is embodied in the *Constitution Act, 1867*, has, at first glance, little of the rhetorical majesty of its American counterpart. The Constitution of the United States commences with this ringing philosophical statement:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The *British North America Act* — now styled the *Constitution Act, 1867* — begins somewhat more prosaically with the following preamble:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom;
>
> And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire;
>
> And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government be declared:
>
> And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America;

Despite the pedestrian style presaged by these recitals, there is a quiet elegance to the drafting of the preamble and many of the provisions of the *British North America Act*. Unlike their American counterparts, the framers of the Canadian constitutional text were not proclaiming a new and independent state and consolidating a revolutionary break with the old order. Rather, they were engaged in the pragmatic task of uniting as many of the remaining British colonies and territories in North America as might be encouraged to join a union described as conducive to their own welfare and promoting the interests of the Empire. The Canadian constitutional arrangements reflected an overriding concern with maintaining the

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16 Stephen A. Scott, "Bill C-60: Or, How Not to Draft a Constitution", (1979) 57 Canadian Bar Review 587 at 607.

17 *Ibid.*, at 608, commenting upon a draft constitutional statute that was not such an example, but rather, one "clumsily-constructed, verbose, tortured, often obscure, and much given to clichés . . . semi-literate in its law and in its language" (at 606–608).

forms of British parliamentary governance within a context of political stability and legal continuity.

Several of the principal narrative themes of the Act of 1867 are captured succinctly in the opening words of s. 91: "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces . . ." *Lawfulness in the conduct of the affairs of State; a constitutional monarchy; representative institutions; peace, order and good government*; *general and residuary federal legislative power; autonomous provincial legislative power*: these are amongst the salient features of the Canadian constitutional system.

When the United Kingdom Parliament enacted the *British North America Act* in 1867, it bestowed upon Canada a constitution that was patterned both upon the British tradition of parliamentary government in accordance with unwritten principles and conventions, and the American experiment with a written constitution and a federal system. The "Pattern of the Constitution", as Mallory entitled the first chapter of *The Structure of Canadian Government*,[18] is woven into a fabric the threads of which have extended to combine the principle of parliamentary sovereignty with the principle of federalism, and to harmonize the principle of the equality of the provinces with a recognition of the distinctiveness of Canada's regions, linguistic communities, history, interests and peoples. It is not a structure that has been free of the centripetal and centrifugal tensions that characterise most federations, but it is one that has dealt remarkably well with the challenges those tensions have presented, notably through resort to adjudication before the courts in accordance with the rule of law.

The Act of 1867, like its American predecessor, was also concerned with nation-building. The preamble speaks to the desire of the original provinces "to be federally united into One Dominion" and the first substantive rubric of the Act is entitled "Union". Section 3 of the Act empowered the Queen to make a "Declaration of Union" proclaiming that the uniting provinces "shall form and be One Dominion under the name of Canada". All this and more make up the fabric of the Constitution; the constitutional tapestry. As Professor John Whyte, then the Deputy Attorney General for Saskatchewan, put it lyrically in his oral argument in the *Quebec Secession Reference*,

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation.[19]

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18 J. R. (James Russell) Mallory, *The Structure of Canadian Government*, rev. ed. (Toronto: Gage Publishing Ltd., 1984).

19 *Reference re Secession of Quebec* (1998), 161 D.L.R. (4th) 385, [1998] 2 S.C.R. 217 at para. 96.

## 4. THE ORGANIC IMPERIAL STATUTE

Prior to 1930, the Judicial Committee of the Privy Council had already shown itself to be alive to the dynamic principle of federalism underlying the division of legislative powers that was reflected principally in ss. 91 to 95 of the *British North America Act*.[20] The opinion of the Judicial Committee was also grounded in its understanding of that Act as a statute of the Imperial Parliament enacted to set out the framework of the statutory Constitution of Canada.[21] "Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies and at the same time provides for the federated provinces a carefully balanced constitution," stated Lord Hobhouse in *Bank of Toronto v. Lambe*.[22]

The Hon. W.H.P. Clement, an early Canadian commentator — and by the third edition of his treatise, a judge of the Supreme Court of British Columbia — , aptly put it thus:

> The Privy Council, indeed, has laid down that the Courts of law must treat the provisions of the *British North America Act* by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony.[23]

"Indeed," as Lord Sankey affirmed in *British Coal Corporation v. The King*,[24] "in interpreting a constituent or organic statute such as the Act, the construction most beneficial to the widest possible amplitude of its powers must be adopted." Similarly, Lord Jowitt observed in the *Privy Council Appeals Reference*[25] that the *British North America Act* is a statute "of transcendent constitutional importance"[26] and "[t]o such an organic statute the flexible interpretation must be given which changing circumstances require".[27]

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20 This is demonstrated by the position adopted by Lords Watson and Haldane in the early federalism cases.

21 See *In re The Initiative and Referendum Act* (1919), 48 D.L.R. 18, [1919] A.C. 935 at p. 941.

22 [1887] 12 A.C. 575 at 587, rejecting, in this instance, the application to the B.N.A. Act of principles laid down by Chief Justice Marshall in construing the division of powers under the Constitution of the United States.

23 W.H.P. Clement, *The Law of the Canadian Constitution*, 3d ed (Toronto: Carswell, 1916) at 347.

24 [1935] A.C. 500 at 518.

25 *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] 1 D.L.R. 801, [1947] A.C. 127.

26 *Ibid.*, at 148.

27 At 154.

## 5. THE LIVING TREE

The earlier extract from *Clement's Canadian Constitution*, set out above, was cited by Lord Sankey in the *Edwards* case[28] in support of what has become by far the dominant constitutional metaphor in a long line of decided cases and invariably, in advocacy before the courts: the Constitution of Canada as a "living tree". *Edwards* turned on the construction of the word, "persons", within the context of s. 24 of the *Constitution Act, 1867* and the power of appointment to the Senate. The Supreme Court of Canada, upon a close reading of the section and with reference to the legal incapacity of women under the common law in earlier days to hold public office, had concluded that only male persons could be summoned by the Governor General to the Senate. That had been the state of affairs in 1867, and the Canadian Senate was modelled on the House of Lords, which even in 1930, when their Lordships were considering the question in relation to the Senate, did not admit women to sit as peers. However, in an interesting twist on the interpretative doctrine of originalism, their Lordships took note that "in its original meaning" the word "persons" would "undoubtedly embrace members of either sex", and thus references to the history of the common law and customary practices and traditions were inconclusive.[29]

The Privy Council, through the Lord Chancellor, chose to adopt a purposive approach to the provisions of the Act of 1867, which ought not to be "cut down" by a "narrow and technical construction", but instead should be given "a large and liberal interpretation"[30]:

> The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits.[31]

This metaphor, powerful in its simplicity, has roots as far back as biblical antiquity. Lord Sankey, as a jurist of his times and culture, would not have been unfamiliar with the psalmist of the Old Testament, who wrote that "the man that walketh not in the counsel of the ungodly" but whose "delight is in the law of the Lord", shall "be like a tree planted by the rivers of water".[32] A contemporary (and more inclusive) expression of that psalm runs thus:

> Strong as living trees,
> Let our roots sink deep and hidden,
> Strong as living trees,
> Beside flowing streams.[33]

An early proponent of the living-tree metaphor in the constitutional context, John Reeves, author of the *History of English Law*, invoked it at his peril, given the

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28 *Henrietta Muir Edwards v. Attorney-General for Canada*, [1930] 1 D.L.R. 98, [1930] A.C. 124.

29 *Ibid.*, at 134.

30 *Ibid.*, at 136.

31 *Ibid.*

32 Psalm 1, King James Authorized Version; consider too the account in Genesis 1:9 of the "tree of life" and the "tree of knowledge of good and evil".

33 Lynn C. Bauman, "Strong as Living Trees"; *Ancient Songs Sung Anew — The Psalms as Poetry*, Praxis, 2000; setting by Linnea Good. 2003.

vagaries of parliamentary privilege. As Professor Dicey told the tale, in 1791 the House of Commons of the United Kingdom compelled the government of the day to put Mr. Reeves on trial "for the expression of opinions meant to exalt the prerogative of the Crown at the expense of the authority of the House of Commons." Dicey continued:

> Among other statements for the publication of which he was indicted, was a lengthy comparison of the Crown to the trunk and the other parts of the constitution to the branches and leaves of a great tree. This comparison was made with the object of drawing from it the conclusion that the Crown was the source of all legal power, and that while to destroy the authority of the Crown was to cut down the noble oak under the cover of which Englishmen sought refuge from the storms of Jacobinism, the House of Commons and other institutions were but branches and leaves which might be lopped off without serious damage to the tree.[34]

Another candidly political use of the metaphor may be found in Thomas Paine's doggerel ode to the coming American Revolution, "Liberty Tree":

> In a chariot of light from the regions of day,
> The Goddess of Liberty came; . . .
> A fair budding branch from the gardens above
> Where millions with millions agree
> She brought in her hand as a pledge of her love,
> And the plant she named Liberty Tree.
> The celestial stock stuck deep in the ground
> Like a native it flourished and bore;
> The fame of its fruit drew the nations around,
> To seek out this peaceable shore.
>
> . . . . .
>
> But hear, O ye swains, 'tis a tale most profane,
> How all the tyrannical powers,
> Kings, Commons, and Lords, are uniting amain,
> To cut down this guardian of ours;
> From the east to the west blow the trumpet to arms,
> Through the land let the sound of it flee,
> Let the far and the near, all unite with a cheer,
> In defence of our Liberty Tree.[35]

The American revolutionary and statesman, Thomas Jefferson, borrowed this metaphor in his sanguinary observation:

> The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure.[36]

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34 Dicey, *op. cit.*, 8th ed, 1931, at 420-421. Dicey observed: "The publication of Mr. Reeves' theories during a period of popular excitement may have been injudicious. But a jury, one is happy to know, found that it was not seditious; for his views undoubtedly rested on a sound basis of historical fact."

35 Thomas Paine, 1775, the author of *Common Sense*.

36 Thomas Jefferson, letter to William Stephens Smith, 13 November 1787, in Julian P. Boyd, ed., *The Letters of Thomas Jefferson*, 1955, vol. 12, at 356.

In Canada, the "living tree" metaphor has denoted slow but steady constitutional growth, emphasizing legal continuity, not revolution. It has been invoked in countless cases, not only in regard to historic constitutional protections such as that afforded by s. 133 of the *Constitution Act, 1867* (in the *Blaikie* case, discussed infra) but also in respect of the dynamic interpretation of the federal-provincial distribution of powers, and in support of a purposive construction of guarantees entrenched in the *Canadian Charter of Rights and Freedoms* in 1982. Writing in the first of the Charter cases, Justice Willard Estey stated:

> The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The *Charter* is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.[37]

The Constitution as evergreen, an organism infused with vitality and the potential for growth and expansion, its "lifeblood" nourished by dynamic constitutional interpretation,[38] rather than simply a series of dead letters on dry parchment, conveys a sense of suppleness and progression in the judicial development of the constitutional text. Affirmed Chief Justice Brian Dickson in 1986: "In my view, strict construction is rarely controlling in constitutional interpretation".[39]

> *The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing* to keep pace with the growth of the country and its people.[40]

In the context of the division of powers, the "living tree" metaphor (described normatively therein as "the 'living tree' principle")[41] was invoked in the opinion of the Court in the *Same Sex Marriage Reference* in 2004, in aid of a "large and liberal, or progressive, interpretation" of ss. 91 and 92 of the *Constitution Act, 1867*: "By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the power of the organs of the state in times vastly different from those in which it was crafted."[42] The Court took the view that in deciding whether or not legislation comes within the purview of a particular head

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37 *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481, [1984] 1 S.C.R. 357 at 366.

38 *Supra* note 19 at paras. 51, 32,

39 *The Queen v. Beauregard* (1986), 30 D.L.R. (4th) 481, [1986] 2 S.C.R. 56, *per* Dickson C.J., speaking for himself and Estey and Lamer JJ., at 83. In this case, Dickson C.J. recognized the power of Parliament to enact legislation pursuant to s. 100 of the *Constitution Act, 1867* that would, as part of a larger package of improved salaries and benefits, require judges to contribute a portion of their salaries to their own judicial pensions; the term "pensions" in s. 100 "is not limited to the type of pensions known and in existence for the judiciary in 1867" (at 83), that is, non-contributory pensions.

40 *Ibid.*, at 81; emphasis added.

41 *Reference re Same Sex Marriage* (2004), 246 D.L.R. (4th) 193, [2004] 3 S.C.R. 698, at para. 24.

42 *Ibid.*, at para. 23.

of legislative power — in this case, Parliament's legislative authority in relation to "marriage" under s. 91(26) — a "progressive interpretation of the head of power must be adopted."[43] In so doing, the Court rejected the contention that in determining the scope of ss. 91 and 92 of the *Constitution Act, 1867*, "the intention of the framers should be determinative". The Court's decision in *R. v. Blais*, dealing with whether the Métis were "Indians" under the hunting rights provisions of the Manitoba *Natural Resources Transfer Agreement* scheduled to the *Constitution Act, 1930*, was distinguishable in that the latter case "considered the interpretative question in relation to a particular constitutional agreement", in contrast to the heads of legislative power, "which must continually adapt to cover new realities."[44]

A year later, in the *Employment Insurance Act Reference*, Justice Marie Deschamps, writing for a unanimous Court, followed a similar path in concluding that it was within Parliament's legislative authority pursuant to s. 91(2A) of the *Constitution Act, 1867* to provide maternity and parental benefits to persons who take leave from work to give birth or to care for a child. Parliament's legislative jurisdiction was not curtailed to the strict meaning of "unemployment insurance" as that term might have been understood by the framers of the constitutional amendment that was enacted in 1940. Deschamps J. noted that the Court had "on numerous occasions cited the 'living tree' metaphor" and observed that legislative competence is "essentially dynamic". The political debates and correspondence relating to the amendment, while relevant to the context, were not conclusive "as to the precise scope of the legislative competence" and did not preclude "the progressive approach the Court has taken for a number of years".[45] The objectives of the framers were the starting point, not the final destination. Legislative authority in relation to unemployment insurance "must be interpreted progressively and generously".[46]

That said, the opinion of Justice Deschamps also evinced concern for maintaining the federal-provincial balance at the heart of the division of powers. "A progressive interpretation cannot, however, be used to justify Parliament in encroaching on a field of provincial jurisdiction."[47] "On the one hand, no constitu-

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43 *Ibid.*, at para. 29.

44 *Ibid.*, at para. 30; and see *R. v. Blais* (2003), 56 C.C.C. (3d) 200, [2003] 2 S.C.R. 30 at paras. 39 to 41: "We decline the appellant's invitation to expand the historical purpose of para. 13 on the basis of the 'living tree' doctrine [. . .] This Court has continuously endorsed the living tree principle as a fundamental tenet of constitutional interpretation. [. . .] We conclude that the term 'Indians' in para. 13 of the *NRTA* does not include the Métis, and we find no basis for modifying this intended meaning. This in no way precludes a more liberal interpretation of other constitutional provisions, depending on their particular linguistic, philosophical and historical contexts."

45 *Reference re Employment Insurance Act* (2005), 258 D.L.R. (4th) 243, [2005] 2 S.C.R. 669, at para. 9. The Quebec Court of Appeal had given "predominant weight" to the debates and in so doing, had adopted an "original intent approach" to constitutional interpretation, rather than the progressive approach. (Para. 9)

46 *Ibid.*, para. 47.

47 *Ibid.*, at para. 10. She continued: "To derive the evolution of constitutional powers from the structure of Canada is delicate, as what the structure is will often depend on a given court's view of what federalism is. What are regarded as the characteristic fea-

tional head of power is static. On the other hand, the evolution of society cannot justify changing the nature of a power assigned by the Constitution to either level of government."[48]

Justice Ian Binnie, in his dissenting opinion (joined by McLachlin C.J. and Fish J.) in *Consolidated Fastfrate*, explained "the ascendancy of the living tree approach" as ensuring that the interpretation of legislative powers is tailored to the changing political and cultural (and in this case, business) realities of modern-day Canada. "This is not to say that the passage of time alters the division of powers. It is to say that the arrangement of legislative and executive powers entrenched in the *Constitution Act, 1867* must be applied" in a way that recognizes those realities, and not "frozen in 1867".[49]

Thus, as we have already seen, the Constitution of Canada is a hybrid plant if ever there was one, deeply rooted in the soil of the British tradition of unwritten principles and conventions, but with most of its prominent offshoots — a written document, a federal-provincial distribution of powers, an entrenched Charter, legal amending procedures, judicial review — grafted from the American genus and species. And the growth of the living tree, it must be borne in mind, ought to be restrained by "its natural limits".[50] As Sherlock Holmes once remarked:

> There are some trees, Watson, which grow to a certain height and then suddenly develop some unsightly eccentricity.[51]

## 6. THE ORIGINAL CONTRACT

Within two years of his living tree metaphor, Lord Sankey coined another evocative phrase that seemed, in some respects, to take constitutional interpretation in the other direction. In the *Aeronautics Reference*,[52] it fell to the Judicial Committee of the Privy Council to determine whether the Parliament of Canada or the provincial legislatures had the power to regulate the field of aeronautics, a matter that of course was not contemplated by the framers of the Constitution in 1867. Lord Sankey, in examining the ambit of ss. 91 and 92 of the *Constitution Act, 1867*, the key provisions governing the distribution of powers between Parliament and the

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tures of federalism may vary from one judge to another, and will be based on political rather than legal notions. The task of maintaining the balance between federal and provincial powers falls primarily to governments."

48 *Ibid.*, at para. 45.

49 *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters* (2009), 313 D.L.R. (4th) 285, [2009] 3 S.C.R. 407, at para. 89.

50 However, the Supreme Court underlined in the *Same Sex Marriage Reference*, *supra*, that "Lord Sankey L.C.'s reference to 'natural limits' did not impose an obligation to determine, in the abstract and absolutely, the core meaning of constitutional terms." (Para. 28.)

51 Holmes to Dr. John H. Watson, speaking in 1894 of Colonel Sebastian Moran, the confederate of the late Professor Moriarty, in "The Empty House"; Sir Arthur Conan Doyle, *The Return of Sherlock Holmes*, 1903.

52 *In re the Regulation and Control of Aeronautics in Canada*, [1932] 1 D.L.R. 58, [1932] A.C. 54.

legislatures, wrote that whilst judicial decisions "effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted," there was "always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention diverted from what has been enacted to what has been judicially said about the enactment."[53] The Act of 1867 was "a great constitutional charter," the underlying objective of which was "to establish a system of government upon essentially federal principles". As useful as previous judicial decisions might be, they can sometimes tend to obscure as well as illuminate; "it is always advisable," Lord Sankey counselled, "to get back to the words of the Act itself and to remember the object with which it was passed."[54]

Those preliminary observations led to a remarkable passage that has been taken, somewhat out of context, as the peroration of Lord Sankey's proposition, and what has itself become a classic statement on constitutionalism, federalism and the rights of minorities:

> Inasmuch as *the Act embodies a compromise* under which the original Provinces agreed to federate, it is important to keep in mind that *the preservation of the rights of minorities* was a condition on which such minorities entered into the federation, and *the foundation upon which the whole structure was subsequently erected. The process of interpretation* as the years go on *ought not to be allowed* to dim or *to whittle down the provisions of the original contract* upon which the federation was founded, *nor is it legitimate that any judicial construction* of the provisions of ss. 91 and 92 *should impose a new and different contract* upon the federating bodies.[55]

It is instructive to note that Lord Sankey's remarks did not end with the oft-cited passage above. Indeed, in the next paragraph he balanced his views on the protection of provincial autonomy with the following robust affirmation of the role of the central authority in the federation:

> But while the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that *the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions* which were *of common concern to* all the Provinces as members of *a constituent whole*.[56]

The first of those two passages has been cited many times in support of minority rights and provincial powers (which are far from identical); but the conception

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53 *Ibid.*, at 70.

54 *Ibid.*

55 *Ibid.*; emphasis added.

56 *Ibid.*, at 770-71; emphasis added. In the result the Judicial Committee found for the Dominion, but essentially on the basis of the power of the Parliament of Canada to implement British Empire treaties, as set out in s. 132 of the *Constitution Act, 1867*. Parliament's power to regulate aeronautics is now understood to flow from its general or residuary power to make laws for the peace, order and good government of Canada: see *Johannesson v. Rural Municipality of West St. Paul*, [1951] 4 D.L.R. 609, [1952] 1 S.C.R. 292.

of the Constitution as a pact embodying a political compromise also led, for a time, to a stultified construction of some fundamental constitutional guarantees, particularly in the area of language rights and denominational schools protections, in the name of judicial restraint. It is a form of originalism, rather than progressive interpretation, predicated on the assumption that rights flowing from the historic Confederation bargain and specific to the Canadian context are less legitimately the subject of judicial development and enhancement than other rights of a more universal character.

The principal architect of this theoretical construct on the Supreme Court was Justice Jean Beetz, who wrote the reasons for the majority of the Court in two key language rights decisions rendered in 1986, *MacDonald*[57] and *Société des Acadiens*.[58] In *Blaikie's Case*,[59] the Supreme Court had cited Lord Sankey's "living tree" *dictum* in support of an expansive construction of the terms of s. 133 of the *Constitution Act, 1867*,[60] so that the use of both English and French were accorded equal status not only in the promulgation but also in the enactment of the Acts of Parliament and of the legislature of Quebec;[61] the "Acts" included subordinate legislation,[62] and the "proper approach to an entrenched provision" like s. 133, which also protected the use of either language before the "Courts" of Canada and Quebec, was "to make it effective through the range of institutions which exercise judicial power, be they called courts or adjudicative agencies."[63] However, in *MacDonald's Case*, a majority of the Court imposed a strict construction on the terms of s. 133, and refused thereby to read into it a guarantee that the use of either language in the courts meant in proceedings between the State and the citizen, the use by the State of the language chosen by the citizen. "Section 133", wrote Beetz J., "has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism" in parliamentary debates and judicial proceedings". To Madam Justice Wilson's stinging criticism in dissent that this interpretation made "a mockery of the individual's lan-

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57 *MacDonald v. City of Montreal* (1986), 25 C.C.C. (3d) 481, [1986] 1 S.C.R. 460.

58 *Société des Acadiens v. Association of Parents* (1986), 27 D.L.R. (4th) 406, [1986] 1 S.C.R. 549.

59 *Attorney General of Quebec v. Blaikie* (1979), 49 C.C.C. (2d) 359, [1979] 2 S.C.R. 1016, *per curiam*.

60 *Ibid.*, at 1029.

61 At 1022.

62 At 1027; "it would truncate the requirement of s. 133 if account were not taken of the growth of delegated legislation." See also (1981), 60 C.C.C. (2d) 524, [1981] 1 S.C.R. 312 (*Blaikie No. 2*), a further ruling on this latter issue.

63 At 1030. "Dealing, as this Court is here, with a constitutional guarantee, it would be overly-technical to ignore the modern development of non-curial adjudicative agencies . . ." (at 1029).

guage right",[64] Justice Beetz rejoined that to import a duty to accommodate as flowing from s. 133 "is to make a mockery of the text of the section".[65]

> *This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union*. The scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1* and *Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional amendment. *But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise*.[66]

The judicial policy that language rights ought not to be construed purposively because they were the fruit of political compromise[67] was rejected 13 years later by Justice Michel Bastarache for a majority of the Court in *R. v. Beaulac*,[68] and definitively by the whole Court in *Arsenault-Cameron*.[69]

The "original contract" view of the Constitution has not been entirely negative with respect to the judicial role in the exposition of the constitutional text in Canada. Indeed, the appeal to historic understandings and undertakings has led the Court to make some powerful statements about the centrality of these commitments to constitutionalism, the national experience, and keeping faith with our past.

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64 At 539-540, "I cannot read s. 133 as merely permitting the litigant to use the language he or she understands but allowing those dealing with him or her to use the language he or she does not understand. What kind of linguistic protection would that be?"

65 At 487.

66 At 496; emphasis added.

67 At 500: "[L]anguage rights such as those protected by s. 133, while constitutionally protected, remain peculiar to Canada. They are based on a political compromise rather than principle and lack the universality and fluidity of basic rights resulting from the rules of natural justice." See also *Société des Acadiens*, *supra*, at 578–580, where Beetz J. applied this reasoning to the language rights embodied in s. 19 of the *Canadian Charter of Rights and Freedoms*.

68 (1999), 134 C.C.C. (3d) 481, [1999] 1 S.C.R. 768, para. 25: "Language rights in all cases must be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada." (Underlining in original.)

69 (2000), 181 D.L.R. (4th) 1, [2000] 1 S.C.R. 3, per Major and Bastarache JJ., at para. 27: "the fact that constitutional language rights resulted from a political compromise is not unique to language rights and does not affect their scope."

## 7. THE SHIP OF STATE

In the mid-1930s, a nautical metaphor was employed in the *Labour Conventions* case by Lord Atkin to constrain the constitutional growth industry and to preserve, in his Lordship's view, the integrity of the division of powers:

> While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.[70]

This "unhappy metaphor",[71] as Professor Mallory once called it, which stifled for a long period the growth of flexible federalism, is no longer much in vogue, but at one time it captured the imagination of many constitutional lawyers: Maurice Ollivier wrote in 1945 that "The ship of state is run and governed by a most difficult mechanism of rules, principles, precedents and administrative wheels. Without a thorough knowledge of this complicated machinery, there is not much use in trying to direct its course in a proper channel and a correct way."[72]

The "watertight compartments" element of the "ship of state" metaphor has still been invoked in many recent cases, but now to make the point that this is no longer what ss. 91 and 92 of the *Constitution Act, 1867* are about. To the extent it still finds a home at all in federalism and division-of-powers analysis, it is not with respect to the issue of constitutional *validity* as it is with constitutional *applicability* and thus the more exceptional doctrine of interjurisdictional immunity.[73] Chief Justice Dickson employed his own nautical metaphors in smoothing over this sea change in constitutional thinking in the *OPSEU* case:

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts 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

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70 *A.G. Canada v. A.G. Ontario*, [1937] 1 D.L.R. 673, [1937] A.C. 326 at 354.

71 J.R. Mallory, *The Structure of Canadian Government*, *op. cit.*, at 388.

72 Maurice Ollivier, *Problems of Canadian Sovereignty*, 1945. Binnie J. invoked the metaphor of the Flying Dutchman in two cases: "Historically, the federal navigation and shipping power has been broadly construed . . . Nothing would be more futile than a ship denied the space to land or collect its cargo and condemned like the Flying Dutchman to forever travel the seas": *British Columbia (Attorney General) v. Lafarge Canada Inc.* (2007), 281 D.L.R. (4th) 54, [2007] 2 S.C.R. 86 at para. 64; "The trial of an action should not resemble a voyage on the Flying Dutchman with a crew condemned to roam the seas interminably with no set destination and no end in sight": *Lax Kw'alaams Indian Band v. Canada (Attorney General)* (2011), 338 D.L.R. (4th) 193, [2011] 3 S.C.R. 535, at para. 41.

73 *Canadian Western Bank v. Alberta* (2007), 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, at para. 34.

> and, in recent years, a very restrained approach to concurrency and paramountcy issues.[74]

Furthermore, the Constitution's provisions, whether "watertight" or porous, are not "empty vessels": in *Reference re Alberta Public Service Employee Relations Act*, McIntyre J. stated:

> It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.[75]

Recently, in the *Supreme Court Act Reference*, the Supreme Court rejected an "empty vessels" approach to the interpretation of the express mentions of the Court itself in the amending procedures of Part V of the *Constitution Act, 1982*.[76]

The general procedure for constitutional amendment prior to the advent of Part V of the *Constitution Act, 1982* was also the subject of a metaphorical observation in the *Patriation Reference*.[77] There are wheels within wheels in the engine room of a ship of state. "[W]e must," observed the majority of the Supreme Court on the legality of the process of proceeding to Westminster for legislation to amend the *British North America Act* (and paraphrasing Sir William Jowitt's remark on an earlier occasion), "operate the old machinery perhaps one more time."[78]

## 8. THE CASTLE

A competing metaphor of more recent vintage describes the Constitution rather grandiloquently as a mighty and majestic fortress. It has an "internal architecture" and is under-girded by "touchstones", "foundation stones", and "structural constitutional principles".[79] The late Chief Justice Antonio Lamer spoke of those principles in the *Provincial Court Judges Reference* as entering through the preamble to the *Constitution Act, 1867*, which he called, in an inspired burst of rhetorical imagery, "the grand entrance hall to the castle of the Constitution".[80]

It is not surprising that in a constitutional monarchy, the Constitution should be likened to a fortress. After all, in history and mythology, Kings and Queens live in castles.

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74 *Ontario (Attorney General) v. OPSEU* (1987), 41 D.L.R. (4th) 1, [1987] 2 S.C.R. 2 at p. 18; emphasis added.

75 (1987), 38 D.L.R. (4th) 161, [1987] 1 S.C.R. 313 at p. 394.

76 *Reference re Supreme Court Act, ss. 5 and 6* (2014), 368 D.L.R. (4th) 577, [2014] 1 S.C.R. 433, paras. 97–101, "The 'Empty Vessels' Theory".

77 *Reference re Resolution to amend the Constitution* (1981), 125 D.L.R. (3d) 1, [1981] 1 S.C.R. 753.

78 *Ibid.*, at 788-789.

79 *Quebec Secession Reference*, *supra*.

80 *Provincial Court Judges Reference*, [1997] 3 R.C.S. 3, at para. 109.

However, to paraphrase Clement, there are castles and castles. They may obscure, oppress and confine as often as they protect, guard and illuminate, as solicitor Jonathan Harker, still new to the legal profession, was to learn upon completing the final leg of his nocturnal journey through the Carpathian Mountains:

> Suddenly I became conscious of the fact that the driver was in the act of pulling up the horses in the courtyard of a vast ruined castle, from whose tall black windows came no ray of light, and whose broken battlements showed a jagged line against the moonlit sky.[81]

The metaphor of a powerful, but in some ways (at least prior to 1982), a medieval structure, was invoked in the *Patriation Reference*, in which the Supreme Court noted that the proposed amendment of the *British North America Act* by the addition of an entrenched Charter of Rights and written amending procedures "concerns not the amendment of a complete constitution but rather the completion of an incomplete constitution."

> *We are involved here with a finishing operation, with fitting a piece into the constitutional edifice*: it is idle to find anything in the *British North America Act* that regulates the process that has been initiated in this case.[82]

In the *OPSEU* case, Beetz J. interwove the principle of responsible government with the provisions of the Constitution respecting the establishment and tenure of provincial offices, and the office of the Lieutenant Governor. He also held that the "basic structure" of the Constitution, as determined by the *Constitution Act, 1867*, "contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels." Moreover, neither Parliament nor provincial legislatures might enact laws which substantially interfered with this "basic constitutional structure".[83]

Chief Justice Lamer alluded to the process of accretion in an important proviso in the *New Brunswick Broadcasting* case, another of the early decisions of the Court to invoke unwritten constitutional norms in the elucidation of the constitutional framework. Although he had no difficulty in viewing the preamble of the *Constitution Act, 1867* as incorporating the principles of judicial and legislative independence (that is, in the latter instance, the privileges inherent in the functioning of legislative bodies), he was "reluctant to import unexpressed concepts into the Constitution in a way that would evade scrutiny under the express guarantees" of the Charter of Rights:

> The *Charter* is a part of an evolution of our Constitution which culminated in the supremacy of a definitive written constitution.[84]

The organic statute, the living tree, the original contract, the ship of state, the constitutional machinery, the castle of the Constitution — these are all attempts to infuse a written instrument with both life and structure; but more than that, to con-

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81 Bram Stoker, *Dracula* (London: Constable, 1897); Folio Society Edition, 2008, p. 14.

82 *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 754, per majority on legality at 99; emphasis added.

83 *Supra* note 74.

84 *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* (1993), 100 D.L.R. (4th) 212, [1993] 1 S.C.R. 319, per Lamer C.J. at 355.

vey, through the evocative imagery of metaphor, the nascent *idea* of constitutionalism and related principles such as the rule of law.

We have also learned that the Constitution of Canada is neither a "suicide pact"[85] nor a "straightjacket".[86] "[O]ne would not expect a grown man to wear a coat that fitted him as a child. The coat is of the same design, but the sleeves are longer and the chest is broader and the warp and woof of the fabric is more complex."[87]

What the more successful and enduring metaphors really represent are efforts by the courts to communicate, through striking, imposing, and occasionally overblown imagery, a broad sense of the sweep and power of the Constitution of Canada that transcends the immediate focus on the text itself. These images draw upon the historic origins of the Constitution and the centuries of tradition that have preceded its making; yet they attempt to convey more than simple reverence for the bonds and wisdom of the past but also hope and enthusiasm for the future course of constitutional development. Thus, the tree that is planted by the Act of the Imperial Parliament in 1867 to take root in the soil of the New World is a young plant capable of growth; the ship is venturing onto new waters; and the mansion house has been refurbished and expanded, with the addition of new wings, great-rooms and chambers.

This is not a new phenomenon. As I wrote some time ago, in *structural* terms (Chief Justice Lamer's "castle"), constitutional principles may be seen as the "foundational" underpinning of the "internal architecture" of the Constitution. In *dynamic* terms (Lord Sankey's "living tree") they "breathe life" into the Constitution; they are "its lifeblood." Constitutional principles perform a vital role in construing and applying the provisions of the Constitution of Canada. The challenge is to ensure that they are employed in a balanced and stable fashion so that the constitutional edifice is supported and not weakened from within, and to ensure that their

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85 *Re: Application under s. 83.28 of the Criminal Code* (2004), 184 C.C.C. (3d) 449, [2004] 2 S.C.R. 248, per Iacobucci and Arbour JJ.: "[w]hile respect for the rule of law must be maintained in response to terrorism, the Constitution is not a suicide pact, to paraphrase Jackson J.: *Terminiello v. Chicago*, 337 U.S. 1 (1949) at p. 37 (in dissent)."

86 *Supra* note 19, at para. 150: "The Constitution is not a straightjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to initiate constitutional change."

87 *Supra* note 48, at para. 90, *per* Binnie J. (dissenting on behalf of four of the nine justices against "the sort of 'originalism' implicit in my colleague's [Rothstein J. for the majority] description of the thinking in 1867" (para. 89) and "borrow[ing] an analogy from Thomas Jefferson" to buttress "a purposive approach to constitutional interpretation" respecting legislative authority under the Constitution in relation to transportation undertakings (para. 90).

growth is kept within "natural limits" so that they do not overtake and eventually strangle the constitutional organism itself.[88]

## 9. THE CONSTITUTIONAL ARCHITECTURE

In 1998, in the *Quebec Secession Reference*, the Supreme Court employed both the animating metaphor of the "living tree" and a new structural metaphor, the "architecture of the Constitution", in delineating aspects of the role, scope and application of unwritten constitutional principles — in this case, federalism, democracy, constitutionalism and the rule of law, as well as the protection of minorities — in complementing and informing the provisions of the constitutional texts. The Court brought the elements of its analysis together nicely in the following paragraphs:

> *Our Constitution has an internal architecture*, or what the majority of this Court in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, called *a "basic constitutional structure"*. The individual elements *of the Constitution* are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the *Provincial Judges Reference*, certain underlying principles *infuse our Constitution and breathe life into it*. Speaking of the rule of law principle in the *Manitoba Language Rights Reference*, *supra*, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.
>
> Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867* it would be impossible to conceive of *our constitutional structure* without them. The principles dictate major elements of *the architecture of the Constitution* itself and are as such *its lifeblood*.
>
> The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the *ongoing process of constitutional development and evolution of our Constitution as a "living tree"*, to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.[89]

It seems clear from these paragraphs of the opinion of the Court that the two references therein to the internal "architecture of the Constitution" were a means of juxtaposing and highlighting the "basic constitutional structure" already invoked in

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88 W.J. Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001) 14 Supreme Court Law Review (2d) 197 at 205-206.

89 *Supra* note 19, at paras. 51–53; emphasis added.

*OPSEU* and other cases, but here in the context of drawing attention to the pivotal role of foundational constitutional principles in supporting the structural framework behind the provisions of the constitutional text. This is a theme that runs throughout the Court's opinion in the *Quebec Secession Reference*. For example, the Court characterized the principle of federalism as "inherent in the structure of our constitutional arrangements";[90] the principle of democracy as always having "informed the design of our constitutional structure";[91] the principles of constitutionalism and the rule of law as lying "at the root of our system of government";[92] and the principle of protection of minority rights as "an essential consideration in the design of our constitutional structure".[93] Constitutional principles were still recognized as having been incorporated by reference through the preamble to the *Constitution Act, 1867*,[94] but they were also seen as emerging from a larger canvass: "an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[95]

In 2014, in the *Supreme Court Act Reference*, the "constitutional architecture of Canada",[96] the "architecture of the Constitution",[97] the "Constitution's architecture"[98] and "Canada's constitutional architecture"[99] were invoked by the Supreme Court to buttress and assert the Court's central role as the ultimate judicial institution for Canada and its status and essential features as a constitutionally-protected institution. The terms "constitutional structure" or the "structure of the Constitution" were similarly brought into service.[100]

In its opinion in the *Senate Reform Reference*,[101] rendered within weeks of the release of its opinion in the *Supreme Court Act Reference*, the "Constitution's architecture",[102] the "architecture of the Constitution"[103], the "constitutional archi-

90 *Ibid.*, at para. 56.

91 *Ibid.*, at para. 62.

92 *Ibid.*, at para. 70.

93 *Ibid.*, at para. 81.

94 *Ibid.*, at para. 53.

95 *Ibid.*, at para. 32.

96 *Reference re Supreme Court Act, ss. 5 and 6* (2014), 368 D.L.R. (4th) 577, [2014] 1 S.C.R. 433, at para. 82. See also W.J. Newman, "The Constitutional Status of the Supreme Court of Canada" (2009), 47 Supreme Court Law Review (2d) 429, at 439 (cited by the Court on this point).

97 *Ibid.*, at para. 87.

98 *Ibid.*, at para. 88.

99 *Ibid.*, at para. 100.

100 *Ibid.*, at paras. 82, 94 and 101.

101 *Reference re Senate Reform* (2014), 369 D.L.R. (4th) 577, [2014] 1 S.C.R. 704, opinion issued 25 April 2014; the opinion in the *Supreme Court Act Reference* was issued just over a month earlier, on 21 March 2014.

102 *Ibid.*, at paras. 27, 70.

103 *Ibid.*, at para. 53 and in the subsequent heading.

tecture"[104] and related variations involving "architecture"[105] were repeated at least four times in the head note and ten times in the body of the Court's opinion, essentially in relation to the fundamental nature and constitutionally-protected role of the Senate. At the same time, the Court referred to "Canada's constitutional structure",[106] "constitutional structure",[107] "structure of government",[108] "structural change",[109] and "significant structural modification",[110] as well as several other mentions of "structure"[111] throughout its opinion.

It is, in retrospect, small wonder that the Supreme Court resorted to the structural metaphor of the "architecture of the Constitution" and its close variants in describing the outline and the protected features of central political and judicial institutions like the Senate of Canada and the Court itself. The Senate is, after all, an upper *house*. And those institutions, like the House of Commons and the office of the Governor General, certainly have an *external* architecture, be it neo-classical, neo-gothic or neo-Florentine. The current incumbents of those institutions — the political, judicial and constitutional actors of the day — carry out their duties and functions within the walls and precincts of massive, imposing stone edifices that convey and symbolize status, design, coherence, tradition, permanence, stability and continuity. What better metaphor to employ than "constitutional architecture", in the judicial quest to preserve those foundational institutions' essential characteristics from precipitous or unilateral change?

Of course, in the *Supreme Court Act Reference* and the *Senate Reform Reference*, the "constitutional architecture" metaphor was closely linked to protecting the framers' intentions in 1867, 1875 and 1982, and in maintaining the constitutional *status quo* (a term actually invoked by the Court in both references)[112] until the fabled reforms presaged (but not achieved) by the 1981 April Accord of eight provinces and the multilateral amendment proposals of the 1987 Meech Lake and 1992 Charlottetown Constitutional Accords might perhaps one day see fruition through some future incremental and multilateral process under Part V of the *Constitution Act, 1982*. Until then, the essential forms[113] of central institutions must, it seems, remain unaltered. It is beyond the scope of this article to address the impact of the Court's reasoning on the scope of Parliament's legislative authority to amend the

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104 *Ibid.*, at paras. 60, 97.

105 *Ibid.*, at paras. 26, 27, 54, 59.

106 *Ibid.*, at para. 3.

107 *Ibid.*, at paras. 54, 63, 107.

108 *Ibid.*, at paras. 25, 26, 77.

109 *Ibid.*, at para. 62.

110 *Ibid.*, at para. 107.

111 *Ibid.*, at paras. 14, 55, 75, 106.

112 *Ibid.*, at para. 31. See also the *Supreme Court Act Reference*, *supra*, at para. 100, 103.

113 See notably Mark D. Walters, "The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7", (2013) 7 Journal of Political and Parliamentary Law 37.

Constitution or to enact to enact "constitutional", quasi-constitutional or organic legislation short of formal constitutional amendments.[114]

Does this mean that everything constitutional in relation to central federal institutions is practically immutable, — or rigidly graven in stone, like the blocks of granite, marble and limestone that house those bodies?

Of course not. The "architecture of the Constitution" remains, at the end of the day, an interpretative technique, not a full-blown legal norm. For example, to say that a given legislative measure requires a complex constitutional amendment because it alters the Constitution's internal or underlying architecture is a succinct way of arguing that the Constitution's provisions cannot be taken completely at face value, or that they cannot be read in isolation but form part of a coherent whole, or that they may embrace deeper or more subtle purposes, meanings and connections than may appear from an initial or straightforward reading of the constitutional text. "Constitutional architecture" is not so much an imperative norm as it is a relevant factor in determining what constitutional norm derived from the constitutional text — in the case of this example, what amending procedure — applies. That is a legitimate exercise in constitutional, legal and judicial interpretation. An over-reliance on the architectural metaphor itself as a peremptory norm would threaten to short-circuit the much more careful process of ratiocination involved in construing the provisions of the Constitution in light of underlying principles and purposes.

As in the celebrated *Edwards* case, which also turned, after all, on the meaning to be given to the provisions of the Constitution in relation to the composition of the Senate, the "living tree" shall rise again and its leafy boughs will overshadow, in appropriate circumstances, the architectural buildings it neighbours. This is because the Senate and other central institutions are composed of "persons" — not artificial constructs but living, breathing human beings, and these actors are capable of dynamic, attitudinal changes, informal adjustments, conventional development and a progressive evolution in political culture and values. It is an error to assume that the *status quo (*if that is what it is) in the current constitutional arrangements will stifle indefinitely all impetus to reform, whether formal or informal, and that our institutions, in the absence of major constitutional amendments, will remain in perfect *stasis* and completely impervious to change. As recent events have reminded us, the Senate may have been designed ideally as a deliberative body of sober second thought, but it is also a profoundly *human* institution, and Senators, like other human beings, are motivated, inspired and driven by a myriad of external events, life experiences, internalized values and other behavioural factors. So too, to a greater or lesser degree, are the members of our other venerable institutions, which will also continue to progress and evolve as dictated by the modern human condition as much as by institutional imperatives and abstract constitutional norms.

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114 I have attempted to address that issue in a recent article: W.J. Newman, "Putting One's Faith in a Higher Power: Supreme Law, the *Senate Reform Reference*, Legislative Authority and the Amending Procedures", (2015) 34 National Journal of Constitutional Law 99.

Nonetheless, the metaphor of "internal architecture" (or "basic structure") employed by the Supreme Court is a useful one. Pedagogically, it assists in explaining why the Constitution is more than a series of legal provisions on paper. The notion of "architecture" reinforces a sense of internal logic and consistency (and thereby, legitimacy) attendant upon the *idea* of a constitution. A constitution that has a structure to it is a constitution that has a better claim to supremacy and to obedience by reasoning and reasonable human beings than a mere collection of *a priori* and peremptory stipulations.

We can see implied in the internal "architecture of the Constitution" of Canada a number of significant structural elements: written supreme law, complemented by unwritten, political understandings and usages encouraging constitutionally-acceptable conduct; executive, legislative and judicial branches and concomitant powers, the exercise of which is conditioned by principles of legality, judicial independence, and an emerging doctrine of separation of powers, all within the framework of a constitutional monarchy and a parliamentary democracy characterized by representative and responsible government; vibrant, stable and legitimate political and judicial institutions; a solemn commitment to federalism, regional diversity — including the distinctiveness of Quebec — and the federal balance in the distribution of powers; a profound commitment to human rights, equal opportunities, substantive equality and the protection of minorities, including the Aboriginal peoples of Canada, the official-language communities, and Canada's multicultural heritage. Orderly constitutional change in accordance with constitutional procedures and the rule of law.

In a word, an adherence to *constitutionalism*, in both its legal and political forms. The overarching metaphor of Canada's "constitutional architecture" is much better at capturing the broad outlines of our constitutional pattern and design than previous structural metaphors like the "castle" or the "ship of state".

## 10. CONCLUSION

Judges, jurists, political scientists, constitutional historians and other scholars and practitioners have long struggled with how to give tangible form, substance and coherence to the broad, organic abstraction known as the Constitution of Canada: that congeries of statutory provisions, prerogative powers, unwritten principles and values, common-law rules, and conventions of political behaviour that make up or inform the structure and operation of the supreme law of the country. In the course of this article, we have seen that one means by which this is done is through resort to constitutional metaphors.

Competing metaphors of stable structures (castles, edifices), motive force (ships, operating machinery) and dynamic, organic growth (living trees, lifeblood, animating principles) have, as we have seen, long punctuated the development of the jurisprudence of constitutional interpretation. These metaphors have borne witness to the good-faith efforts — often eloquent, occasionally awkward — of judges and commentators to ensure that not just the letter but also the spirit of the Constitution is adhered to in construing the provisions of Canada's constitutional laws.

With respect to the "architecture of the Constitution", which was invoked in the *Quebec Secession Reference* and more recently in the *Supreme Court Act Reference* and the *Senate Reform Reference*, it has been this article's contention that this metaphor is a useful, overarching concept in that it embraces not only the basic and

emerging structural principles of the Constitution, but also, to an important extent, the fundamental institutions and systemic arrangements and relationships associated with a federal parliamentary democracy governed by the rule of law. It must be acknowledged, however, that it remains a metaphor, and all metaphors are imperfect analogies for reality. "Constitutional architecture" is short-hand for a complex series of interactions between constitutional text and context, constitutional principles and provisions, and constitutionally-protected yet evolving institutions. It is not — at least not yet — in and of itself, a precise legal norm, but rather takes its colour from the circumstances in which it is invoked as an interpretative tool. Employed appropriately and with some circumspection, it should not stifle the progressive interpretation of the provisions of the Constitution, nor supplant entirely the notional living tree.