Conceptual Metaphors for an Unfinished Constitution

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This paper argues that Canadian constitutional culture relies on a general narrative, that the Canadian Constitution is unfinished; a series of conceptual metaphors instantiate this narrative. Each conceptual metaphor frames different conditions — which may or may not be consistent — to justify constitutional practices. Understanding the justifying logic at play gives us the key to a more meaningful comparison between Canadian judicial constitution-making and other forms of constitution-making, both within Canada or in other constitutional orders.

L'auteur de cet article soutient que la culture constitutionnelle canadienne repose sur un récit général (« la constitution canadienne est inachevée ») et une série de métaphores conceptuelles qui instancient ce récit. Chaque métaphore conceptuelle définit et formule les différentes conditions permettant de considérer comme justifiées les pratiques constitutionnelles. Ces conditions peuvent parfois — même souvent — être cohérentes mais elles peuvent également ne pas l'être. Une compréhension des logiques justificatrices qui entrent en jeu nous fournira la clé d'une comparaison plus significative de l'élaboration d'une constitution judiciaire canadienne et d'autres formes d'élaboration d'une constitution, soit à l'intérieur du Canada, soit dans d'autres ordres constitutionnels.

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In a constitutional democracy, we acknowledge that the people — constituting the political self — govern themselves. The paradox of constitutional self-government arises from the double character of the political self as both source and object of regulation. Either the political self is entirely free to bind itself for the future — in which case the future self will no longer be free — or it cannot bind itself for the future — in which case it is no longer free to govern itself.

While French scholars have directly reflected upon the paradox of constitutional self-government with regard to "originary constituent powers," "derived constituent powers," and "constituted powers,"[1] American scholars have, for the most part, chosen to address this paradox only incidentally in the context of debates over the legitimacy of judicial review and appropriate methods of constitutional interpretation.[2] Similarly, in Canada, the paradox of constitutional self-government has mostly been discussed within the context of debates about the legitimacy of constitutional judicial review.[3] Scholars

1 See for example Olivier Beaud, *La Puissance de l'État* (Paris: Presses Universitaires de France. 1994); Georges Burdeau, *Essai d'une théorie de la révision des lois constitutionnelles en droit français* (doctoral thesis, Faculté de Droit de Paris, 1930), (Paris: Macon J Buguet-Comptour, 1930); Georges Burdeau, *Droit Constitutionnel et Institutions Politiques*, 14th ed (Paris: Les Cours de Droit, 1968); Bernard Chantebout, *Droit Constitutionnel*, 30th ed (Paris: Dalloz-Sirey, 2013); Olivier Duhamel & Guillaume Tusseau, *Droit Constitutionnel et Institutions Politiques,* 3rd ed (Paris: Seuil, 2013); Jean Gicquel & Jean-Éric Gicquel, *Droit Constitutionnel et Institutions Politiques,* 27th ed (Paris: LGDJ, 2013); Dmitri Georges Lavroff, *Le Droit Constitutionnel de la Ve République*, 3rd ed (Paris: Dalloz-Sirey, 1999); Michel Troper & Francis Hamon, *Droit Constitutionnel,* 34th ed (Paris: LGDJ, 2013); Michel Troper & Lucien Jaume, eds, *1789 et l'invention de la Constitution* (Paris: LGDJ, 1994); Georges Vedel, *Manuel Élémentaire de Droit Constitutionnel* (Paris: Sirey, 1959).

2 See for example Bruce Ackerman, *We the People, Vol. 1: Foundations* (Cambridge, Mass: Harvard University Press, 1991); Bruce Ackerman, *We the People, Vol. 2: Transformations* (Cambridge, Mass: Harvard University Press, 1998); Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) [Bickel, *The Least Dangerous Branch*]; Robert Bork, *Slouching Toward Gomorrah: Modern Liberalism And American Decline* (New York: Regan Books, 1996); Ronald Dworkin, *Law's Empire* (Boston: Belknap Press of Harvard University Press, 1986); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Boston: Harvard University Press, 1980); Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001); Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (New Haven: Yale University Press, 2001); David A Strauss, "Common Law Constitutional Interpretation" (1996) 63 U Chicago L Rev 877.

3 See for example Peter Hogg & Allison Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75; Christopher Manfredi & James Kelly, "Six Degrees of Dialogue" (1999) 37 Osgoode Hall LJ 513; Christopher Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998–2003" (2004) 23 Sup Ct L Rev 105; Peter Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited - Or 'Much Ado about Metaphors'" (2007) 45 Osgoode Hall LJ 1; Wil J Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge, UK: Cambridge University Press, 2006).

in the United Kingdom[4] and Canada[5] have also incidentally examined constitutional self-government in the context of debates on the limits of "parliamentary supremacy." Yet, except in rare instances,[6] most scholars who deal with the paradox of constitutional self-government assume that a logical solution to this paradox exists. They attempt to provide access to this solution by analysing legal notions that are specific to their respective legal systems. However, these scholars usually fail to address the crucial question of whether it is actually possible to resolve the paradox.

Indeed, there may be irreducible conceptual tensions within the idea of constitutional self-government. A primary difficulty is in identifying what constitutes the "self," but deeper difficulties relate to the problem of how the "self" can be both free to govern itself and be bound by constitutional ties. Such tension is the product of the intertemporal conflict between the will of the past, the will of the present and the will of the future. The problem is logically insoluble if we accept the assumptions that the constitution is the temporal product of acts of will. From that perspective, we can only decide to privilege one *moment* over another on the basis of certain normative arguments.

However, to the extent that constitutions are also imagined as intemporal abstract objects made of normative propositions, the problem becomes even more complex. Indeed, rules, principles, or any form of normative propositions are all abstract objects. As such, they do not possess an inherent temporality.

4 See for example Paul P Craig, "Sovereignty of the United Kingdom Parliament after Factortame" (1991) 11 YB Eur L 221; Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 2001); Hamish R Gray, "The Sovereignty of Parliament and the Entrenchment of Legislative Process" (1964) 27 Mod L Rev 705; Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford: Oxford University Press, 1957); Geofrrey Marshall, "Parliamentary Sovereignty: A Recent Development" (1966-67) 12 McGill LJ 523; H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) Cambridge LJ 172; George Winterton, "The British Grundnorm: Parliamentary Supremacy Re-Examined" (1976) 92 Law Quarterly Rev 591.

5 See for example Robin Elliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" (1991) 29 Osgoode Hall LJ 215; Kenneth Martin Lysyk, "Constitutional Law — Parliamentary Sovereignty — Can Parliament Bind its Successors?", Case Comment on [1964] 2 All ER 785, (1965) 4 Alta L Rev 154; Edward McWhinney, "The Union Parliament, the Supreme Court, and the 'Entrenched Clauses' of the South Africa Act" (1952) 30 Can Bar Rev 692; Stephen A Scott, "Constituent Authority and the Canadian Provinces" (1966-67) 12 McGill LJ 528; Claude A Sheppard "Is Parliament Still Sovereign?" (1964) 7 Can Bar J 39.

6 See for example Bickel, *The Least Dangerous Branch*, *supra* note 2; Alexander Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978); Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000); Paul W Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (New Haven: Yale University Press, 1992) [Kahn, *Legitimacy and History*]; Paul W Kahn, *The Reign of Law: Madbury v Madison and the Construction of America* (New Haven: Yale University Press, 1997).

While they may be adopted, enacted, abrogated, etc., these are all things done *to* the normative propositions *at one moment or another.* A normative proposition may, in principle, be eternal even if it may only enter into force at one moment or another. In other words, the temporal structure upon which the concept of rules and principles is constructed is not the "moment" — as is the case with acts of will — but rather the "extension."

Acts of will are conceived as happening in *moments*, while normative propositions are understood as temporally extended objects. To the extent that we think of a law or a constitution *only* as the product of an act of will, the event of positing a rule will only count in the future as a memory or in the present as a prophecy, since it will not have a temporally extended existence. In other words, the *fact* that a rule may have been adopted at one moment would have no normative import at a later time. However, moments may come close to temporal extension through the process of iteration. Thus, the adoption of a rule may be thought of as being iterated at every successive moment following its original adoption. But this brings us back to the intertemporal problem discussed earlier: why should the initial act of will trump the current or future act of will if both do not coincide? Indeed, the idea of iterative adoptions always leaves the possibility that the current will may not want to adopt the same normative propositions as the ones adopted in the past. At first sight, the way out of this problem may be to recast the issue in the two-dimensional world of temporal extension. Thus, a rule that exists at a certain moment may extend to any other moment since it should be understood as a temporally extended object. Yet this is only an apparent solution. Indeed, if normative propositions are, in principle, capable of being eternal, they are not all imagined as being of all eternity *known, identified*, and *applicable.* If all normative propositions of a constitution were to exist within a constitutional system without any intervention of the political self — e.g. to identify, to adopt, to apply, etc. — we could no longer make sense of the self-government part of the conundrum raised by the ideal of constitutional self-government. Everything would already have been decided without the participation of the political self. Simply put, there is a deep tension within our modern concepts of law and constitution.

Once we acknowledge that constitutional self-government is built on deep conceptual tensions but that it is nevertheless a dominant political model in many societies, we open up a large field of inquiry that can be summarised in the following questions: What are the coping mechanisms used within a specific group to deal with the conceptual tensions at the heart of the ideal of constitutional self-government? What kinds of narratives and what kinds

of worldviews are employed to make sense of this political model in a specific group? From this perspective, constitutional self-government is no longer seen as an objective standard to be used to evaluate different regimes, but rather as a regulative ideal that contributes to shaping the self-understanding and political organisation of a group. The specific narratives that frame each instantiation of the ideal of constitutional self-government over time thus become worthy objects of study for (comparative) constitutional scholars.

This article presents the dominant temporal narrative in the Supreme Court of Canada's discourse over judicial constitution-making. We will first present the theoretical framework that informs our analysis, and then present our hypothesis that the dominant narrative at play here is that the Canadian Constitution is unfinished. The last section of this article will demonstrate how this pervasive narrative is sustained by a series of interconnected conceptual metaphors.

1. The theoretical framework: Narratives and conceptual metaphors

Cognitive linguistics suggests that we give abstract concepts shape through "conceptual metaphors."[7] A conceptual metaphor allows for the "understanding [of] one conceptual domain in terms of another conceptual domain."[8] Conceptual metaphors are *not* mere figures of speech; that is, they organise and give unity to a concept by borrowing another concept's constituent apparatus: concept A is thought through the categories of concept B and the consequent expectations. To borrow an example from Lakoff and Johnson,[9] we can understand the target concept A ("ARGUMENT") through the constituent conceptual elements of the domain of source concept B ("WAR"). Many compositional elements of the concept WAR will thus be attributed to the concept ARGUMENT, leading us to expect language about "defeating the opponent," "holding onto positions," "attacking views," etc. The concept ARGUMENT will then be taken to mean a violent confrontation between opposing parties. When ARGUMENT is conceived through the WAR metaphor, it implies, at

7 Georges Lakoff & Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980) [Lakoff & Johnson, *Metaphors We Live By*]; Mark Johnson, "Mind, Metaphor, Law" (2007) 58 Mercer L Rev 845; Mark Johnson, "Philosophy's Debt to Metaphor" in Raymond W Gibbs, Jr, ed, *The Cambridge Handbook of Metaphor and Thought* (Cambridge: Cambridge University Press, 2008) 39.

8 Zoltán Kövecses, *Metaphor: A Practical Introduction*, 2nd ed (Oxford: Oxford University Press, 2010) at 4.

9 Lakoff & Johnson, *Metaphors We Live By*, *supra* note 7 at 4 and ff.

a meta-conceptual level, a world made of certain types of characters, engaged in particular actions, in some spatio-temporal configuration: there are *allies* and *enemies fighting* one another in order to *vanquish* their *opponents* on some *battlefields*. The narrative implied here is that an ARGUMENT is transitory; it is not an end in itself but rather the antecedent condition to some other endpoint. Furthermore, this conception leaves no space for expecting *collaboration* and *cooperation* between *participants* — after all, collaboration in wars is a treacherous act. As this ARGUMENT is WAR example shows, conceptual metaphors can highlight certain aspects of the target concept by bringing them into focus. Yet at the same time they hide others through excision or by constraining the type of narratives in which they can fit.

This paper examines a series of metaphors that frame our concept of "Constitution" and that are informed by the dominant narrative of a Constitution that is yet unfinished. Such conceptual metaphors are some of the different forms in which this dominant narrative is articulated. Each conceptual metaphor is built on its own set of concepts and forms its own unit of meaning, but they all fit within the overall narrative that the Constitution is an object that has not reached completion. Such conceptual metaphors are thus particular avatars of the general narrative at play. As avatars can, in principle, come in an infinite number, a selection was necessary. The selection of the particular conceptual metaphors explored here is not the result of a theoretical argument as to what conceptual metaphors the dominant narrative of Canadian constitutionalism necessarily entails. Also, our selection was not oriented towards identifying the conceptual metaphors that put the dominant narrative in its best (moral) light. Rather, our selection is the result of observations: what are, *in fact*, the conceptual metaphors used in the Canadian constitutional discourse that are sustained by the dominant narrative? Identifying and interpreting those conceptual metaphors is therefore not primarily a speculative endeavour, but rather an attempt at giving an account of an actual practice.

In this survey, I have focused on the discourse of the Supreme Court of Canada on judicial constitution-making. This is obviously a very small subset of the constitutional discourse in Canada; moreover, the judicial discourse itself only represents a small part of the overall constitutional discourse in Canada. A complete survey of the constitutional discourse in Canada would necessarily have to cover what the actors of the different branches of government, the media, the general public, etc. say about the Constitution. However, as the Supreme Court is a key actor in setting the terms of the discussion, a survey of its discursive practices remains instructive even if only representing

a small part of the overall constitutional discourse. It is also useful to focus on the discourse of a single institution like the Supreme Court to facilitate interjurisdictional comparisons.

2. The hypothesis: The Canadian Constitution is imagined as "unfinished"

The dominant narrative that underlies Canadian constitutionalism is that the Constitution is *unfinished.* It does not assume that the Constitution is *completed* nor in a state of *decline*; those two temporal frames have only marginal importance in the current constitutional discourse. The dominant Canadian constitutional narrative is that the Constitution is an *object* that *exists* but is *incomplete, not yet perfect,* at an *intermediary stage* as well as *moving towards* more completeness. To be more precise, then, we should say that Canadians have a Constitution that is unfinished *yet.* The Canadian Constitution is not a finished artifact but something like the periodic report of an ongoing process. The title of a famous book by Peter H Russell, a highly respected Canadian constitutional scholar, illustrates the pervasiveness of this narrative very well: "Constitutional Odyssey: Can Canadians Become a Sovereign People?"[10] Thus, Canadian officials may still look at their Constitution for guidance as others do in other constitutional systems, but in Canada the existing norms will not necessarily be taken as the definitive word. The current Constitution may tell officials and citizens what the *current* rules and principles are but it is not the end of the story; the present Constitution may also be taken as an indication of the future direction towards which such rules and principles will be developed.

The final words on the Constitution have not been pronounced. This does not necessarily mean that judges asked to review the constitutionality of certain governmental actions will refuse to issue a judgment in cases where the imagined unfinished Constitution appears to be lacunal — quite the contrary. The narrative of unfinishedness is taken to mean that some agents must be involved in the *making* of the Constitution. The Constitution is thus not only *found,* it is not a mere object of knowledge, it is also *made* — it is the *product of some ongoing process.* Respecting the Constitution thus implies not only following it, but may also imply helping it move towards its destination.

Canadian judges will often see it as part of their duty to ensure that the Constitution develops to offer answers where it may initially appear silent.

10 Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed (Toronto: University of Toronto Press, 2004).

Obviously, there will always be questions as to what extent can judges contribute in the development of the unfinished Constitution. Yet the fact remains that a judge who would adhere to a certain form of "frozen in time" originalist view[11] on *all* constitutional matters would be profoundly at odds with the expectations of other Canadian jurists[12]; she would be seen as not fulfilling

11 Originalist arguments are not excluded outright from the Canadian constitutional discourse. However, when such arguments are accepted, they usually refer to original *functions* or *general purposes* sought to be achieved, and are not used to limit the possibility of attributing contemporary meaning to the original wording of a specific section (further discussion in section 3.D.1. of this paper). Thus, an interpretation that appears to be too closely associated with a time-bound specific original intent may invite criticisms from other judges. See for example, *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407 at para 89. The forms of originalism that are accepted seek to combine the desire not to frustrate the general intentions of the framers with the need to adapt the constitution to contemporary needs. For example, the meaning of entrenched Aboriginal and treaty rights (*Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) are not "frozen" in time, such rights may interpreted in ways that make them meaningful in the modern world. See *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 53 at para 49; *R v Van der Peet*, [1996] 2 SCR 507; *R v Sundown*, [1999] 1 SCR 393 at para 32.

12 There are subfields of Canadian constitutional law where specific original intent has been taken more seriously. This has tended to happen when the constitutional rules in question were perceived as being the product of an essential initial compromise without which the Federation would not have been born, such as those involving the composition and functions of the Senate: *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54; *Reference re Senate Reform*, 2014 SCC 32 [*Reference re Senate Reform*]; or certain religion and education rights: *Adler v Ontario*, [1996] 3 SCR 609; *Reference re Education Act (Que.)*, [1993] 2 SCR 511 [*Reference re Education Act (Que.)*]; *Greater Montreal Protestant School Board v Quebec (Attorney General)*, [1989] 1 SCR 377; *Reference Re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 SCR 1148; *Reference re Adoption Act*, [1938] SCR 398 at 402. In such cases, the Court has tended to avoid that the "evolving" constitutional trope upsets the initial bargain: *British Columbia (Attorney General) v Canada (Attorney General); An Act respecting the Vancouver Island Railway* (Re), [1994] 2 SCR 41 at 88. This used to be the case also with language rights: *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education**, [1986] 1 SCR 549 at 578. But recent caselaw seems open to a more generous and purposive approach: *R v Beaulac*, [1999] 1 SCR 768 at paras 24-25. Recently, a majority of the Court in *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at para 100 [*Reference re Supreme Court Act*] stated that "[b]y setting out in Part V how changes were to be made to the Supreme Court and its composition, the clear intention was to freeze the status quo in relation to the Court's constitutional role, pending future changes," and this decision was made "in the context of ongoing constitutional negotiations that anticipated future amendments relating to the Supreme Court." However, exactly when and exactly how the sections of the *Supreme Court Act* — a mere statute — have been entrenched appears to remain a mystery; they appear to have been subjected to an implied constitutional entrenchment incidental to the entrenchment of the Supreme Court's existence and constitutional role. To make things ever more complicated, the originalist argument actually relies on an evolutionist narrative (*ibid* at para 76):

> The Supreme Court's constitutional status initially arose from the Court's historical evolution into an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces. The Court's status was then confirmed by the Constitution Act, 1982, which reflected the understanding that the Court's essential features formed part of the Constitution of Canada.

her duty to allow the Constitution to reach its destination. In effect, judges do not necessarily claim that they are only expounding what was already in the text; they readily admit that in many areas, they are acting creatively to *perfect* the work of the drafters.

That being said, I believe that the "unfinished" Constitution narrative is not only found in the discourse of judges who attend to the needs of an organically growing Constitution,[13] but is also found in the political discourse of many Canadians. The Constitution is not finished for those Canadians because many issues stemming from their constitutional history have not yet found political closure. While it is beyond the scope of this paper to discuss that issue in depth, I will say a few words on these narratives in the conclusion.

3. The demonstration: Narrative and conceptual metaphors at play in the Supreme Court's discourse over judicial constitution-making

In this part of the paper, I will first demonstrate that the Supreme Court rather explicitly recognizes that it engages in constitution-making (3.A.), but that it tends to frame this creation as mere "developments" of the Constitution (3.B.). In fact, the Supreme Court presents itself not simply as having a duty to identify existing rules and apply them, but it portrays itself as having the duty to "develop" such rules (3.C.) The last section of this paper examines how the issue of "constitutional development" is framed by a series of conceptual metaphors sustained by the dominant unfinishedness narrative. In particular, this section explores the different ways in which the Constitution as "a living tree" is conceptualized (3.D.).

A. Explicit judicial constitution-making

In the context of analyzing the conditions under which prospective remedies would be appropriate when there has been a judge-made change in the law, LeBel and Rothstein JJ wrote for a majority of the Supreme Court in *Canada (Attorney General) v Hislop* that:

> Change in the law occurs in many ways. "Clear break with the past" catches some of its diversity. It can be best identified with those situations where, in Canadian law, the Supreme Court departs from its own jurisprudence by expressly overrul-

13 For a general discussion of organic metaphors in constitutional law, see Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels: PIE Peter Lang, 2009) at 33-51 [Cyr, *Canadian Federalism and Treaty Powers*].

> ing or implicitly repudiating a prior decision. Such clear situations would justify recourse to prospective remedies in a proper context. But other forms of substantial change may be as relevant, especially in constitutional adjudication, where courts must give content to broad, but previously undefined, rights, principles or norms. The definition of a yet undetermined standard or the recognition that a situation is now covered by a constitutional guarantee also often expresses a substantial change in the law.[14]

This is an explicit recognition of the role assumed by courts in making the *as-of-yet-unfinished* Constitution.

Less than a decade ago, in *R v Henry*, Justice Binnie, writing for a unanimous Supreme Court, discussed how the classic statement to the effect that "a case is only an authority for what it actually decides" ought to be read when dealing with judicial precedents on matters related to the entrenched *Canadian Charter of Rights and Freedoms*:

> Even in the time of the Earl of Halsbury L.C., however, the challenge was to know how broadly or how narrowly to draw "what it actually decides" ... In Canada in the 1970s, the challenge became more acute when this Court's mandate became oriented less to error correction and more to development of the jurisprudence (or, as it is put in s. 40(1) of the *Supreme Court Act* ... to deal with questions of "public importance"). The amendments to the *Supreme Court Act* had two effects relevant to this question. Firstly, the Court took fewer appeals, thus accepting fewer opportunities to discuss a particular area of the law, and some judges felt that "we should make the most of the opportunity by adopting a more expansive approach to our decision-making role" ... Secondly, and more importantly, much of the Court's work (particularly under the *Charter*) required the development of a general analytical framework which necessarily went beyond what was essential for the disposition of the particular case. In those circumstances, the Court nevertheless intended that effect be given to the broader analysis. In *R v Oakes* ... for example, Dickson C.J. laid out a broad purposive analysis of s. 1 of the *Charter*, but the dispositive point was his conclusion that there was no rational connection between the basic fact of possession of narcotics and the legislated presumption that the possession was for the purpose of trafficking. Yet the entire approach to s. 1 was intended to be, and has been regarded as, binding on other Canadian courts. It would be a foolhardy advocate who dismissed Dickson C.J.'s classic formulation of proportionality in *Oakes* as mere *obiter*. Thus if we were to ask "what *Oakes* actually decides", we would likely offer a more

14 *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429 at para 99 [*Hislop*] [emphasis added]. Bastarache J wrote a minority opinion in *Hislop*, in which he profoundly disagreed with this interpretation of judicial powers. He wrote: "[i]nterpretations of what the Constitution requires may change, but the underlying rights and freedoms endure. *Charter* rights are not created every time a court expressly overrules or implicitly repudiates a prior decision or gives "content to broad, but previously undefined, rights, principles or norms" (*ibid* at para 142).

> expansive definition in the post-*Charter* period than the Earl of Halsbury L.C. would have recognized a century ago. [15]

Again, this is a candid yet important recognition that the Court's work is not limited to *finding what is already in* the Constitution.

R v Oakes[16] is certainly an exemplary case. In this decision, the Supreme Court developed an analytical framework to decide cases involving claims that the State has violated rights guaranteed by the *Canadian Charter of Rights and Freedom*. It established that the person who challenges the constitutionality of an act of the State must first demonstrate that such an act constitutes an infringement upon her guaranteed rights. Once the infringement has been proven, the burden then shifts to the party who claims that the infringement is *justified* under s. 1 of the *Charter*. That provision states that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[17] How can one demonstrate that specific limits imposed on constitutionalized rights are "justified in a free and democratic society"? The Supreme Court devised its own set of criteria for such justification without any attempt at showing how these criteria were already present in the Constitution and where entailed by the expression "free and democratic society."

One may object that while the *Oakes* test may be one of the most cited cases in Canada and that it may be at the very heart of *Charter* analysis, it should be taken as a special case. One may suspect that the role that the Supreme Court assumes in that decision could simply be explained by to the relative novelty of the *Charter* — after all, the *Oakes* case was decided only four years after the adoption of the *Charter* — and the clear need to determine legally operative criteria to put abstract wording into practice. Other provisions of the Constitution may not be as abstract and may not need to be transformed to become operationalized by courts. However, the pragmatic need to adjust general principles to a format that judicial institutions can use is not limited to the *Charter,* nor is it something that is particular to the Canadian Constitution; this problem is shared by all jurisdictions that use *general standards* as constitutional norms while reviewing judges are expected to apply a deductive method of reasoning to reach conclusions. However, not

15 *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609 at para 53 [*Henry*] [references omitted].

16 [1986] 1 SCR 103 [*Oakes*].

17 *Canadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] [emphasis added].

all constitutional systems allow their judges to bluntly state a new set of criteria for the application of one of the most important provisions of their newly adopted Constitution!

Thus, in *Oakes,* the Supreme Court openly presented new criteria for justifying limits to *Charter* rights for the purpose of ensuring that s.1 could be applied in a judicial manner, i.e., by following established rules. Once the Court produced its new criteria, it straightforwardly stated that, "[h]aving outlined the general principles of a s. 1 inquiry, we must apply them to s. 8 of the *Narcotic Control Act.*"[18] In other words, after acknowledging its constitution-making efforts, it proceeded to claim that it now needed to *apply* those new criteria to the situation at hand, thus maintaining a clear distinction between those two roles.

In order to be able to pull that off so easily, the Court must have found itself in a constitutional culture where such judicial constitution-making is welcome. The *Henry*[19] decision clearly implies that there was nothing wrong with such constitution-making in *Oakes.* It goes to great lengths to ensure that the rule of precedents will not be interpreted too narrowly so as to exclude certain criteria of the *Oakes* analytical framework that the Court did not need to apply because the infringement had failed to satisfy one of the first criteria of justification.[20] *Henry* could thus see nothing wrong with *Oakes* creating new criteria for the application of a constitutional provision.

It is quite telling of a constitutional culture that judges may feel free to recognize, to a certain extent, their constitution-making powers. While most statements about constitution-making by the judiciary are not as blunt as these ones, they are nonetheless found throughout the jurisprudence in various forms. It is these forms that we need to examine to understand what kind conceptual metaphors are used to instantiate the unfinishedness narrative and legitimize the practice of judge-made constitutional changes.

18 *Oakes, supra* note 16.

19 *Henry, supra* note 15.

20 On common law reasoning in *Charter* cases, see Jula Hughes, Vanessa MacDonnell & Karen Pearlston, "Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases after Bedford (ONCA)" (2013) 44 Ottawa L Rev [forthcoming in 2014].

B. Judge-made constitutional changes portrayed as developments of the Constitution

The key to understanding the how the Supreme Court explains its constitution-making power is that it claims to participate in the *development* of the *Charter*. Thus, the *Charter* is an object that *develops* or *that is developed*. Development implies a certain form of unfinishedness. The Oxford English Dictionary defines the verb "to develop" as to "grow or cause to grow and become more mature, advanced, elaborate." While an ambiguity exists as to who or what the agent of growth is — can the principle of growth be immanent to the object and/or is growth the result of external forces? — there is clearly an implied sense of direction of the object towards its end. To develop is not to effect simple changes; it is to operate changes in a particular direction. Thus, judges are not simply changing the law at their whim, they are engaged in a process of bringing the law to a "more mature, advanced, elaborate" stage.

Thus, if we broaden our gaze and look beyond the few cases already mentioned to see the entire *Charter* case law, we will observe that the Supreme Court always portrayed itself, from the earliest moments after the adoption of the *Constitution Act, 1982*, as being engaged in the *development* of a jurisprudence. See, for example, four classic statements by the Supreme Court to that effect:

- 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. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*). With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.[21]

- A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.[22]

- In my opinion the premise that the framers of the *Charter* must be presumed to have intended) that the words used by it should be given the meaning which

21 *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 366-67, Estey J [*Skapinker*].
22 *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155, Dickson J [*Hunter*] [emphasis added],

> had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.[23]
>
> - Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the *Charter* debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the *Charter*, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. 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, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.[24]

This development aims at achieving the goals that the drafters of the *Charter* identified as well as the values that Courts have derived from such stated goals.[25] All *Charter* provisions "comman[d] a broad and purposive interpretation" and s 24 (1), a provision granting Courts the power to order "such remedy" as they "conside[r] appropriate and just in the circumstances" when one's *Charter* rights or freedoms have been infringed or denied, "must be construed generously, in a manner that best ensures the attainment of its objects."[26] Therefore, the Supreme Court and all inferior courts have claimed that their jurisprudential developments were not mere changes, but that they were guided by the values and purposes of the *Charter*.

This reasoning is still used today. Take, for example, the recent Court's statement in *Globe and Mail v Canada*:

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23 *R v Therens*, [1985] 1 SCR 613 at 638 [emphasis added], where Le Dain J dissented, although not on this point.

24 *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at para 53, Lamer J [emphasis added].

25 For example, see *Oakes*, *supra* note 16 at para 64: "The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."

26 *R v 974649 Ontario Inc*, 2001 SCC 81, [2001] 3 SCR 575 at para 18 [emphasis added], where McLachlin CJC, writing for the Court, referred to *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344; *Hunter*, *supra* note 22 at 155; *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1134.

> [C]onstitutional rights under the *Canadian Charter* and quasi-constitutional rights under the *Quebec Charter* are engaged by a claim of journalist-source privilege. Some form of legal protection for the confidential relationship between journalists and their anonymous sources is required. Conflicting rights and interests arise under the *Quebec Charter* and must be addressed and reconciled. This case also raises important questions related to the development of human rights in Quebec. The creation of a framework to address these issues represents a legitimate and necessary exercise of the power of the court to interpret and develop the law.[27]

A cursory look at other decisions that the Supreme Court delivered during the same term (2010–2011) also confirms the currency of the practice of presenting judge-made constitutional law changes — be they in the form of the adoption of a new interpretation, a new set of standards, a new analytical framework, etc. — as "developments."[28]

In short, "adaptations" appear once in a while, "changes" are rarely seen, "corrections" are almost never made, but "developments" happen all the time.

A skeptic might want to argue that the *Charter* is a special case in the Canadian constitutional arena. If courts present themselves as being involved in a work-in-progress when dealing with *Charter* issues, it does not necessarily mean that they see themselves the same way when they are considering other subjects of constitutional law. After all, *Charter* challenges are just one part of the life of the Constitution.

It is true that one ought to be careful not to infer general conclusions from studying only parts of a phenomenon. However, we can safely state that the trope of "development" — of an unfinished object that is in the process

27 *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41, [2010] 2 SCR 592 at para 48, LeBel J [emphasis added].

28 See *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21, [2010] 1 SCR 721 at para 18, Deschamps J; *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765; *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 at paras 21, 33, McLachlin CJC; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815 at para 32, McLachlin CJC and Abella J; *R v Cornell*, 2010 SCC 31, [2010] 2 SCR 142 at para 136, Fish, Binnie and LeBel JJ, dissenting; *R v Sinclair*, 2010 SCC 35, [2010] 2 SCR 310 at para 49, McLachlin CJC, Charron, Deschamps, Rothstein and Cromwell JJ concurring and at para 107, Binnie J, dissenting; *R v Gomboc*, 2010 SCC 55, [2010] 3 SCR 211 at paras 78-79, Abella, Binnie and LeBel JJ, concurring; *Gavrila v Canada (Justice)*, 2010 SCC 57, [2010] 3 SCR 342 at para 1, Cromwell J; *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19 at paras 22, 38, 40, 57, 64, Deschamps J; *Canadian Broadcasting Corp v The Queen*, 2011 SCC 3, [2011] 1 SCR 65 at paras 13-14, Deschamps J; *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para 66, McLachlin CJC and Abella J; *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 at paras 4, 18, 26, McLachlin CJC and LeBel J; *R v Côté*, 2011 SCC 46, [2011] 3 SCR 215 at para 62.

of getting closer to its end — is pervasive in Canadian constitutional law.[29] When we look beyond the *Charter*, we see that the same narrative underscores the judiciary's constitutional discourse. Take, for example, the majority of the Supreme Court in the *most cited* case in Canadian jurisprudence[30]: *Dunsmuir v New Brunswick*.[31] In that case, the Supreme Court re-examined the level of scrutiny that judges should apply to actions taken by the executive and administrative branches in order to ensure that the rule of law is respected and that those branches remained within their sphere of legal attributions:

> Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.[32]

This judicial statement is analogous to a parent's answer to a child's "Are we there yet?" during a long car trip. What is striking here is that Justice Binnie wrote a concurring opinion, not to suggest that it is not the role of the Court to devise rules relating to its proper role in reviewing administrative action, but rather to criticize the majority opinion for not going far enough in their endeavour to offer a more mature and robustly principled framework:

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29 The same could also be said about most areas of law since the trope of "development" permeates the entire body of law. To illustrate this, let us take, for example, the fact that the Quebec Bar publishes a collection of books that are all entitled "Développements en droit ..." followed by the name of a field of law and a year. (e.g. Service de la formation continue du Barreau du Québec, ed, *Développements récents en droit médico-légal et responsabilité des chirurgiens 2011*, vol 343 (Cowansville, QC: Yvon Blais, 2011)).

30 See online: CanLII <https://www.canlii.org/en/search/search.do?type=decision&sort=citationCount>. According to CanLII, the case has already been cited in 8209 other cases as of July 21, 2014: <http://www.canlii.org/en/ca/scc/#search/origin1=%2Fen%2Fca%2Fscc%2Fdoc%2F2008%2F2008scc9%2F2008scc9.html>. The second most-cited case — *R v W(D)*, [1991] 1 SCR 742 — is far behind with 6068 citations in other decisions: <http://www.canlii.org/en/ca/scc/#search/origin1=%2Fen%2Fca%2Fscc%2Fdoc%2F1991%2F1991canlii93%2F1991canlii93.html>. Despite being the cornerstone of our *Charter* jurisprudence, *Oakes, supra* note 16 only ranks 41st among most-cited Supreme Court cases with 1406 cites: <http://www.canlii.org/en/ca/scc/#search/type=decision&ccId=csc-scc&sort=citationCount&page=2>. This should not be entirely surprising as there are more challenges to administrative decisions than there are *Charter* challenges, and not all *Charter* cases reach the justificatory stage of s 1 of the *Charter*.

31 2008 SCC 9, [2008] 1 SCR 190, Bastarache and Lebel JJ [*Dunsmuir*].

32 *Ibid* at para 32 [emphasis added]. Deschamps, Charron and Rothstein JJ's first sentence of their concurring opinion is: "[t]he law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes" (*ibid* at para 158).

> The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called the "standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:
>
> > What's in a name? that which we call a rose
> > By any other name would smell as sweet;
> > (*Romeo and Juliet*, Act II, Scene ii)[33]

Binnie J thus criticized his colleagues for more or less offering merely cosmetic changes to the fundamental system that governs how and to what extent the judicial branch may review executive actions. The *advances* offered were not substantial enough.

C. A judicial duty to "develop" the Constitution

Implicit in Justice Binnie's criticism in *Dunsmuir v New Brunswick*[34] is the idea that not only are judges allowed and expected to operate certain *changes to the law* when the latter is behind its time, but that they may have a *duty* do so. When the Constitution is lagging behind in its movement towards an always more perfect adaptation to the needs of society, judges are expected to bring it closer to its destination. For example, in *Canada (Attorney General) v Hislop*, we see that the Court goes even further than claiming that it *can* change the law to stating that it *must*:

> The inviolability of the Constitution ensures that our nation's most cherished values are preserved, while the role of the courts in applying the Constitution ensures that the law is sufficiently flexible to change over time to reflect advances in human understanding. But it also means that the Constitution, at any snapshot in time, is only as robust as the court interpreting it. If the judiciary errs or is slow to recognize that previous interpretations of the Constitution no longer correspond to social realities, it must change the law.[35]

Thus, judges are taken to be agents of development of the Canadian Constitution and not only identifiers of norms.

33 *Ibid* at para 121 [emphasis added].

34 *Ibid.*

35 *Hislop*, *supra* note 14 at para 114 [emphasis added].

Once in that mindset, "fidelity to the Constitution" does not necessarily mean staying as close as possible to what the original framers had in mind when writing the Constitution; it means doing what is necessary to adapt the Constitution to both present and future circumstances. Fidelity to the Constitution thus means working to achieve its purposes. The Supreme Court takes Paul Freund's advice "not to read the provisions of the Constitution like a last will and testament lest it become one."[36] The Constitution is not yet finished because future circumstances have not yet arrived. It is permanently in a temporary stage.

In order to show a form of continuity through changes, the conceptual metaphor of development is specified through the explicit use of an organic metaphor — the living tree — that structures the meaning and expectations of judge-made constitutional changes.

D. The constitutional developments and the "living tree capable of growth and expansion within its natural limits"

In 1929, Lord Sankey produced one of the most famous metaphors in Canadian constitutional law: "[t]he *British North America Act* [*Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits."[37] The Courts have taken this metaphor to illustrate the principle according to which they should adapt their interpretation to changes in the Canadian society. The Supreme Court has explicitly acknowledged that this "principle has permitted progressive constitutional development in the face of immense changes, without constitutional amendment."[38] Thus, words and concepts found in the *Constitution Act, 1867, Constitution Act, 1982*, or other written documents ought not to be read in light of their original meaning:

> The "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.[39]

The metaphor of the living tree invites discussions of (1) the roots of the tree, (2) the natural limits of its expansion and growth, and (3) the principle of

36 *Hunter, supra* note 22 at 155.

37 *Edwards v Attorney General for Canada*, [1930] AC 124 at 136 [emphasis added].

38 *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929 at para 145, La Forest and L'Heureux-Dubé JJ, Gonthier and McLachlin JJ, concurring [emphasis added].

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

its growth. All of these elements are imaginative constraints on the type of developments that can occur through the "natural growth" of the Constitution.

1. The roots of the tree

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. The image of the roots thus provides the idea that constitutional interpretation does not begin with the personal preferences of the judges but rather relies on solid and well-established bases. Living-tree constitutionalism thus cannot ignore the past. In addition to using the past as its starting point, living-tree constitutionalism remains careful of the past in explaining every new development, since judges must be able to fit changes into a narrative of natural growth, implying a certain degree of continuity. However, even if the roots metaphor imposes certain conceptual constraints on the imagined power of the judges, these limits are counter-balanced by the fact that the metaphor of natural growth does not impose strict conceptual restrictions to the direction of that growth.

For example, when the Supreme Court has recourse to the past — to a form of original intent for the purpose of interpreting the rules governing the division of powers between the federal Parliament and the provincial legislatures — the view of the drafters are not only non-determinative, but they are also used mainly to define the broad objectives the drafters sought for the purpose of orienting dynamic interpretations of the text. The past is thus used not to *determine future decisions* but rather to *orient future developments.* For example, Justice Deschamps, speaking for a unanimous Supreme Court *in Reference re Employment Insurance Act (Can.), ss 22 and 23*, approvingly cited two authors[40] who summarized the role of original intent in Canadian constitutionalism in the following way: "[Translation] Ultimately, however, there is no inconsistency between dynamic interpretation and adherence to the original intent of the framers: in order for something to evolve, it must have a starting point."[41] In Canadian living-tree constitutionalism, the roots

40 Henri Brun & Guy Tremblay, *Droit Constitutionnel*, 4th ed (Cowansville, QC: Yvon Blais, 2002) at 207-08.

41 *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 SCR 669 [*Re Employment Insurance Act*] at para 45, where Deschamps J also wrote:

> At the first stage of the analysis, in order to identify the head of power, the Court takes a progressive approach to ensure that Confederation can be adapted to new social realities. The Court has on numerous occasions cited the "living tree" metaphor, and we need not revisit it here.... While the debates or correspondence relating

are rather shallow... And some new roots might even take hold along the way.[42]

Another way in which the Court tends to diminish the influence of the roots in the decision-making process is by taking for granted that if we are to give too much importance to the past, we may no longer be able to speak in terms of *living*-tree constitutionalism and would require another metaphor. Thus, for example, in *Reference re Prov Electoral Boundaries (Sask.),* the Supreme Court, struggling with the meaning of the right to vote guaranteed in the *Charter*, was able to free itself from the past meanings of that right by suggesting that an overemphasis on the roots metaphor would amount to accepting the discredited frozen-Constitution metaphor:

> The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed (...). It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*. The tree is rooted in past and present institutions, but must be capable of growth to meet the future... The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy underlying the historical development of the right to vote — a philosophy which is capable of explaining the past and animating the future.[43]

> to the constitutional amendment are relevant to the analysis as regards the context, they are not conclusive as to the precise scope of the legislative competence. They reflect, to a large extent, the society of the day, whereas the competence is essentially dynamic.

42 *Quebec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 at para 41, McLachlin CJC [emphasis added], on the transformations of the criterion of validity according to the 'ancillary powers doctrine': "As a more flexible conception of division of powers *took hold*, the necessity test gave way to a rational, functional connection test." The French version is less evocative: "s'est ... imposée".

43 *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 [references omitted]. There are, however, a few exceptions to the almost complete discredit suffered by the "frozen" constitution approach. Those exceptions are to be found in very specific domains. For example, s 93(3) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*], provides that: "[w]here in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education." Justice Beetz, discussing the meaning of that section wrote for the majority in *Greater Montreal Protestant School Board v Quebec (Attorney General)*, [1989] 1 SCR 377 at 402 that "[i]t is true that the rights or privileges under ordinary law to which s. 93(1) refers have been frozen at Confederation." However, immediately after having stated that position, Beetz J nuanced it by adding that "[b]ut just like the basic provincial power..., the exception to that power has also matured over time through judicial interpretation. The approach courts have taken ... demonstrates that the law in force 'at the Union' cannot on its own set the content of the constitutional right in s. 93(1)" (*ibid*).

Thus, the living-tree Constitution has roots, but it is not entirely constrained by them in its growth.

2. The natural limits of the growth and expansion of the tree

The natural limits of the growth and expansion of the tree are conceptual constraints on the possible developments of the Constitution.

The natural-limits aspect of the living-tree metaphor suggests limits to the development of constitutional law imposed by the core of the concepts used in the entrenched texts of the Constitution. These limits are most commonly invoked within the context of debates over the meaning of s 91-95 of the *Constitution Act, 1867* that provide for the division of legislative powers between the federal Parliament and provincial legislatures. To understand how this aspect of the living-tree metaphor might come into play, we may compare it to another famous Canadian constitutional metaphor.

In 1937, Lord Atkin argued for the Privy Council that although the Canadian federation was gaining its independence from the United Kingdom, it ought not to change the internal federal structure of the country: "[w]hile 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."[44] The nautical aspect of the metaphor has most often been lost on those who focus mainly on the description of the division of powers as "watertight compartments." However, the depiction of federal and provincial jurisdictions as being "watertight compartments" has been criticized in the last few decades to favour a more co-operative form of federalism.

This challenge has been illustrated through another nautical metaphor, often repeated since it was offered by Chief Justice Dickson:

> 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 and, in recent years, a very restrained approach to concurrency and paramountcy issues.[45]

44 *Canada (AG) v Ontario (AG)*, [1937] AC 326 at 354 (PC)

45 *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 18, Dickson CJC, cited with approval by a unanimous Court in *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 669.

The tide metaphor expresses the back-and-forth movement of the law related to the degree of exclusiveness of the legislative powers granted to each legislature and the "dominant tide" is attributed to legal doctrines favouring the largest possible legislative jurisdiction for all legislatures. Thus, to the watertight-compartment metaphor, Chief Justice Dickson opposed the dominant-tide metaphor to suggest that the former, included within the latter, is subordinated to it and, more explicitly, that constitutional doctrines relying on the watertight-compartment metaphor are suspect.

Recently, the watertight-compartments metaphor was directly confronted to the living-tree metaphor. In a collage of mixed metaphors, the Supreme Court of Canada wrote:

> The Judicial Committee of the Privy Council, which was the final arbiter of Canada's constitution until 1949, tended to favour an exclusive powers approach. Thus Lord Atkin in 1937 famously described the respective powers of Parliament and the provincial legislatures as "watertight compartments" .... However, the Judicial Committee recognized that particular matters might have both federal and provincial aspects and overlap (*Hodge v The Queen* (1883), 9 App. Cas. 117). Privy Council jurisprudence also recognized that the Constitution must be viewed as a "living tree capable of growth and expansion within its natural limits" .... This metaphor has endured as the preferred approach in constitutional interpretation, ensuring "that Confederation can be adapted to new social realities.[46]

The two metaphors are in tension because the watertight-compartments metaphor supposes that (A) each compartment must have a rather clear exclusive content and that (B) this content must be relatively fixed.

The need for each compartment to have its own exclusive content means that, in principle, one should be able to determine if an object or an aspect of an object falls exclusively in one or the other compartment. In turn, this compartmentalization requires not only that the world be divided according to the legal categories of s 91-95 of the *Constitution Act, 1867*, but also — and more importantly — that each category have determinate boundaries. In other words, it invites a reflection on the essence of things and forces judges to define prematurely what will be in and out of each category.

For example, the federal Parliament has exclusive power over "banking, incorporation of banks, and the issue of paper money"[47] while provincial leg-

46 *Re Employment Insurance Act*, *supra* note 41 at para 9.

47 *Constitution Act, 1867*, *supra* note 43 at s 91(15).

islatures have power over "property and civil rights in [their] Province."[48] It has been clearly established for over 125 years that insurance regulation falls under the provincial legislative jurisdiction.[49] Banking has evolved over the years; in Canada, banks have gained the ability to promote certain lines of insurance. The question that flows from a watertight-compartment reasoning is this: is the regulation of the sale of insurance policies by banks a matter exclusively falling in the federal banking compartment or should it fall in the insurance compartment of provinces? Should the fact that banks were historically not allowed to sell insurance policies count in this debate? A majority of the Court examining a case raising these concerns wrote:

> Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope — difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time: *Citizens Insurance*, at p. 109; *John Deere Plow*, at p. 339. For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to "trade and commerce" would have led to an altogether different and more rigid and centralized form of federalism. It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.[50]

In other words, the interjurisdictional immunity doctrine associated with the watertight compartment invites Courts to define a core of meaning — or

48 *Ibid* at s 92(13).

49 *Citizens Insurance Co of Canada v Parsons* (1881), 7 App Cas 96 (PC); *Canadian Indemnity Co v Attorney-General of British Columbia*, [1977] 2 SCR 504; *Canadian Pioneer Management Ltd v Labour Relations Board of Saskatchewan*, [1980] 1 SCR 433.

50 *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at para 43, Binnie and LeBel JJ [*Canadian Western Bank*].

boundary conditions — for each head of legislative power abstractly, before specific problems arise.

The second reason why the living-tree metaphor might be in tension with the watertight-compartments metaphor is similar to the first, but the emphasis is not on the primary need to establish the content of the head of power. Rather, the question becomes to what extent a head of legislative power can develop. The issue arose, for example, when the federal government sought the opinion of the Supreme Court on the validity of its proposed bill on the recognition of same-sex marriage. The question of the possible development of the meaning of a head of legislative power arose because, while provinces have legislative powers over "property and civil rights in [their] province"[51] and over the "solemnization of marriage in [their] province,"[52] the federal Parliament has exclusive legislative powers over "marriage and divorce."[53] Many opponents to the bill were arguing that the essential meaning of "marriage" refers to the "voluntary union for life of one man and one woman, to the exclusion of all others."[54] From this position, no matter how much "development," "growth" or "expansion" courts can do, Parliament and the courts are bound by the core meaning of the terms of the *Constitution Act, 1867*. Therefore, Parliament cannot change the definition of the word "marriage" without modifying its own jurisdiction, which it could not do without going through the appropriate constitutional amendment process. The Supreme Court rejected the argument and recognized that Parliament has jurisdiction to define "marriage" as being "the lawful union of two persons to the exclusion of all others." In doing so, it stated:

> The natural limits argument can succeed only if its proponents can identify an objective core of meaning which defines what is "natural" in relation to marriage. Absent this, the argument is merely tautological. The only objective core which the interveners before us agree is "natural" to marriage is that it is the voluntary union of two people to the exclusion of all others. Beyond this, views diverge. We are faced with competing opinions on what the natural limits of marriage may be.

51 *Constitution Act, 1867*, *supra* note 43 at s 92(13).

52 *Ibid* at s 92(12).

53 *Ibid* at s 91(26).

54 *Hyde v Hyde* (1866), LR 1 P & D 130 at 133. For a defence of the essentialist thesis, see Christopher Gray, "'The Essence of Marriage': The Very Idea; Reflection on H Cyr" (2004) 34 RGD 493. For a 'living tree' consitutionalism perspective, see Hugo Cyr, "La Conjugalité Dans Tous Ses t États: la Validité Constitutionnelle de 'L'union Civile' Sous L'angle Du Partage des Compétences Legislatives" in Pierre-Claude Lafond & Brigitte Lefebvre, eds, *L'union Civile: Nouveaux Modèles de Conjugalité et de Parentalité au 21e Siècle, Actes du Colloque du Groupe de Réflexion en Droit Privé* (Cowansville: Yvon Blais, 2003) 193 [Cyr, "La conjugalité dans tous ses états"].

> 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. Consequently, it is not for the Court to determine, in the abstract, what the natural limits of marriage must be. Rather, the Court's role is to determine whether marriage as defined in the *Proposed Act* falls within the subject matter of s. 91(26).[55]

This incremental way of developing the Constitution was, in the end, in tension with the theory of the natural limits imposed on expansion and growth. However, the natural limits with the rest of the living-tree metaphor helps to frame the debates and might be used convincingly in future litigation to justify limiting the growth of one constitutional doctrine or another, when the tide moves in the other direction.

3. The principle of the living tree's expansion and growth

What explains the movement of the tree towards its expansion? What makes it grow? What is the principle behind its development? In this section, we will briefly examine three *popular* ways of understanding organic growth, keeping in mind that the truth value of each of these ways of understanding growth is not directly relevant for a cultural analysis of the Constitution. What matters is the content of such understandings and how they shape the cultural participants' imagination — the forms of the possible.

a. The living tree's development as an unfolding Physis

Physis is often translated into English as "nature." However, this translation might tend to obscure more than it reveals because of the various connotations that "nature" has historically carried in the English language. As Raymond Williams noted, the word "nature" is "perhaps the most complex word in the English language."[56] The conceptual metaphor that I discuss here refers more specifically to the old Greek idea that "natural things" have their own immanent force that moves or puts them to rest. Such an imminent force moves the object towards its *telos*. It provides for its emergence, its development, its growth. Things can change while conserving their identity throughout their growth because they are merely turning their potential into actuality.

The classic illustration of this conception of growth is the image of the acorn realizing its full potential in becoming an oak tree. If the acorn is planted in good soil, gets all its nutrients, and is protected from external attacks, it may grow to become a great oak tree. A young tree may need assistance to

55 *Re Same-Sex Marriage*, *supra* note 39 at paras 27-28.

56 Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (London: Fontana, 1976) at 219.

grow in the right direction, but no one can actually pull the plant to make it grow faster. The tree grows at its own pace, as does the living tree of Canadian constitutionalism, growing gradually, fulfilling its internal logic.

The use of this conceptual metaphor is widespread. Every time the Supreme Court implies that a newly identified rule or principle is merely implied by, merely a natural extension of, or latent in an already recognized one, this metaphor is at play. Take, for example, constitutional principles that "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[57] The *Manitoba Language Rights Reference* declared that the "[rule of law] principle is clearly implicit in the very nature of the Constitution."[58] This implicit presence of principles is not taken as a sign of their impotence. Quite the contrary. Constitutional principles thus identified are taken as being "foundational principles"[59] that "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[60] Such principles are taken to "infuse our Constitution and breathe life into it,"[61] which is why "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.'"[62] Constitutional principles are thus treated as final causes in Aristotelian terms of the Canadian Constitution. To summarize, constitutional principles have been found by what they have produced (constitutional texts and judicial interpretation), they orient further developments, and they legitimize such developments by suggesting that the decision-maker merely recovers what is latent within the principle in question.[63]

The living-tree metaphor and this manner of understanding changes are not only complementary but one wonders if the former is not simply derived from the latter. Certainly, this framework is one of the dominant forms of ex-

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

58 *Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 64.

59 *Reference re Secession, supra* note 57 at paras 34, 49.

60 *Ibid* at para 51.

61 *Ibid* at para 50.

62 *Ibid* at para 52.

63 The less incremental the change is, the less plausible this narrative may appear. For example, when the Supreme Court in *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 [*Reference re Remuneration of Judges*], ordered the creation of "independent, objective and effective" commissions to issue recommendations on judges' remuneration — recommendations upon which Parliament and Legislatures must, in principle, act — the claim that this novel institutional arrangement was implied in the otherwise also implied principle of judicial independence may have appeared as a stretch to some.

planation that is found implicitly in the courts' justification for constitutional developments.

b. The living tree as the product of intelligent design

Understanding the changes to the living-tree Constitution through the conceptual metaphor of intelligent design entails, among other things, that the changes have their source *outside* of the object in question (i.e. that the designer is distinct from the design), that the object is the product of a wilful creation, and that there is a design. This understanding introduces the possibility that changes are the result of an act of will, raising the question of whose will.

Judges do not pretend that it is their will. Rather, they state that when developing the Constitution, they are fulfilling the designers' intent that certain purposes be achieved or values protected. Constitutional development is thus presented as respect for the initial plan of the drafters. Yet who are the designers, the Constituent Power, to whom judges show reverence by expanding the Constitution in new directions, as they initially intended? In a context where democracy and self-government are at the heart of political legitimacy, there are immense pressures to find ways to justify constitutions as being the product of popular will. And in Canada, this is a complicated question.

Because Canada was not the result of a revolutionary movement that united "the People," one may be tempted to claim that the Compact Theory may play a similar role as "We, the People" as a plausible intelligent designer. The Canadian Compact Theory comes in different versions. In effect, there are at least four important narratives concerning the identity of the relevant collective agents who took part in the pact to form a new political entity. These narratives may be in tension with one another. The first one sees the *Constitution Act, 1867* as a pact between *Canadiens* and English-speaking subjects of the British Crown. A similar narrative has taken hold among many Aboriginal Peoples who see the treaties signed with the British Crown and "recognized and affirmed" by the *Constitution Act*, 1982, s 35, as a pact between themselves and the British Crown. The second narrative regards a pact between self-governing *colonial legislatures* (the former Province of Canada, Province of Nova Scotia, and Province of New Brunswick) and the British government to form a local federation or confederation that would be a subpart of the larger imperial system. Thus, the first type of narrative identifies collective agents through "pre-political" attributes — that is, attributes not entirely produced by existing state institutions — while the second type starts from the perspective that existing state institutions already incarnate the rel-

evant collective agents.[64] A third narrative, a complementary variant of the first two, sees territorially defined regions (Ontario, Québec, the Maritime provinces, Western provinces) as the relevant collective agents. Equal representation of regions in the Senate is an outcome of this sensibility. A fourth narrative combines parts of the previous ones to portray the *Constitution Act, 1867* as a pact between the "French-speaking Canadians, centered in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec."[65] The Province of Québec — one of the two *de facto* segments of the former Province of Canada and the only province where French-speakers form a majority — is thus taken to have a special role in representing *le fait français* in Canada, entitling the province to claim to incarnate the Francophone partners in the bi-national deal with the Anglophones. Thus, this fourth narrative operates a shift from the pre-political conception of the *Canadiens* to the Province of Québec as its institutional incarnation on the basis that the latter is the only institution fully dominated by the former. It should be evident to any observers that these narratives often collide with one another since they assume the equality of incompletely overlapping collective identities. This conflict may help to explain why the majority of the Supreme Court of Canada declared in the *Patriation Reference*[66] that the Compact Theory "might have some peripheral relevance to actual provisions of the *British North America Act* and its interpretation and application" but that, ultimately, it was merely a political doctrine that did not "engage the law."[67]

Thus, this Compact Theory does not substitute for "We, the People" as an intelligent designer that would justify courts' expansion of the Constitution. While this voluntarist narrative may provide legitimacy to certain constitutional enactments, it also logically tends to impose constraints on judge-made

64 See Paul Romney, "Provincial Equality, Special Status and the Compact Theory of Canadian Confederation" (1999) 32 Canadian Journal of Political Science 21.

65 See the *Meech Lake Accord* that failed to be adopted: *1987 Constitutional Accord*, s 2(1)(a), amending *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

66 *Reference re Amendment of the Constitution of Canada*, [1981] 1 SCR 753 at 803 [*Patriation Reference*].

67 The Compact Theory has nonetheless been used by the minority judges in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Beckman*]. After reviewing the four constitutional principles evoked in *Reference re Secession*, *supra* note 57, Dechamps and LeBel JJ wrote at para 97 that such principles are "interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a 'federal' between the provinces." Also, see the originalist case law as referenced in *supra* notes 11 and 12 for a discussion of various forms of constitutional compacts.

changes. To the extent that a constitutional enactment is considered a compact, it means that it cannot be changed without the prior approval of the representatives of the collective agents that formed it or — depending on the interpretation given to the meaning of the compact — the new collective agents that they have agreed to form. Therefore, the idea of the compact may entail, to a certain degree, that the rules and principles adopted *as a* compact are meant to be the object of the status quo until the relevant members of the compact accept to change them.

This idea of the compact explains why the Supreme Court rarely talks about the "People." The Court previously referred to the "Fathers of Confederation"[68]

68 The expression is either used by the Court or some of its judges in their written opinions, or in quotes that they cite, see: *Figueroa v Canada (Attorney General)*, 2003 SCC 37, [2003] 1 SCR 912 at para 165 [*Figueroa*]; *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325 at para 195; *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 89; *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 63; *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929 at paras 36, 135; *Reference re Amendments to the Residential Tenancies Act (NS)*, [1996] 1 SCR 186 at para 83; *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at para 11; *Hunt v T&N plc*, [1993] 4 SCR 289 at 330; *Reference re Education Act (Que), supra* note 12 at 545; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 61; *Whitbread v Walley*, [1990] 3 SCR 1273 at 1295; *McKinney v University of Guelph*, [1990] 3 SCR 229 at 377; *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 658; *Black v Law Society of Alberta*, [1989] 1 SCR 591 at 609; *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 SCR 238 at 264; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at paras 28, 69; *R v Mercure*, [1988] 1 SCR 234 at 308; *Scowby v Glendinning*, [1986] 2 SCR 226 at para 34; *MacDonald v City of Montreal*, [1986] 1 SCR 460 at para 94, 95; *R v Wetmore*, [1983] 2 SCR 284 at 306; *Attorney General of Canada v St Hubert Base Teachers' Association*, [1983] 1 SCR 498 at 509; *Newfoundland and Labrador Corporation Ltd et al v Attorney General of Newfoundland*, [1982] 2 SCR 260 at 270; *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714 at 728 [*Re Residential Tenancies Act, 1979*]; *Attorney General of Alberta et al v Putnam et al*, [1981] 2 SCR 267 at 281; *Attorney General of Quebec v Blaikie et al*, [1981] 1 SCR 312 at 322, 324; *R v Hauser*, [1979] 1 SCR 984 at 1032; *Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan et al*, [1978] 2 SCR 545 at 581-82; *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 458; *Di Iorio v Warden of the Montreal Jail*, [1978] 1 SCR 152 at 197; *Attorney General of Nova Scotia v Attorney General of Canada*, [1951] SCR 31 at 56; *Reference whether "Indians" includes "Eskimo"*, [1939] SCR 104 at 119; *Reference re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, [1938] SCR 71 at 91; *Reference re legislative jurisdiction of Parliament of Canada to enact the Minimum Wages Act (1935, c. 44)*, [1936] SCR 461 at 524 [*Minimum Wages Act Reference*], rev'd *Canada (AG) v Ontario (AG)*, [1937] AC 326, [1937] 1 DLR 673 (PC); *Reference re Legislative Powers as to Regulation and Control of Aeronautics in Canada*, [1930] SCR 663 at 719, rev'd *re Regulation and Control of Aeronautics in Canada*, [1932] AC 54 (PC); *In re Board of Commerce*, [1920] SCR 456 at 520, where the Supreme Court was equally divided and therefore, the reference was not conclusive; however, the statutes in question were declared *ultra vires* on appeal to the Privy Council in *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 AC 191; *In Re Companies*, (1913) 48 SCR 331 at 463; *In re Insurance Act, 1910*, [1913] SCR 260 at 316, aff'd *Attorney-General for Canada v Attorney-General for Alberta (Insurance Reference)*, [1916] 1 AC 588 (PC). See also Cyr, *Canadian Federalism and Treaty Powers, supra* note 13, chapter 1.

— often in order to highlight decisions and compromises made in the course of the coming-together of different parts of Canada into a Federation[69] — but this discursive practice is currently being replaced by the gender-neutral and anonymising reference to the "framers of the Constitution"[70] (without capitalizing the first letter of "framers"). The very texts of the Canadian Constitution are thus typically not portrayed as being the products of the will of a specific political entity.

c. The living tree as the result of evolution

The Supreme Court "has often stated that the Canadian Constitution should not be viewed as a static document but as an instrument capable of adapting with the times by way of a process of evolutionary interpretation, within the natural limits of the text, which 'accommodates and addresses the realities of modern life.'"[71] This conceptual metaphor occupies a central place in the

69 See, for example *Figueroa, ibid* at para 165; *Re Residential Tenancies Act, 1979, ibid* at 728.

70 The expression is either used by the Court or some of its judges in their written opinions, or in quotes that they cite, see: *Reference re Senate Reform*, 2014 SCC 32 at paras 11, 14-15, 32, 36, 38, 56-57, 59, 65, 90, 101; *Reference re Supreme Court Act supra* note 12 at paras 98-99; *Beckman, supra* note 67 at para 98; *Quebec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 at para 110; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 83; *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at para 63; *Re Employment Insurance Act, supra* note 41 at para 47; *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at para 37; *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 SCR 201 at para 21; *Beals v Saldanha*, 2003 SCC 72, [2003] 3 SCR 416 at para 163; R v Powley, 2003 SCC 43, [2003] 2 SCR 207 at para 17; *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 114; *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 at para 62; *Public School Boards' Assn of Alberta v Alberta (Attorney General)*, [2000] 2 SCR 409 at para 35; *R v Marshall*, [1999] 3 SCR 533 at paras 6, 45; *Reference re Secession, supra* note 57 at para 82; *Reference re Remuneration of Judges, supra* note 63 at paras 311, 315; *R v Hydro-Québec*, [1997] 3 SCR 213 at para 59; *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929 at paras 70, 94, 95, 97, 124, 127, 129, 137; *R v Van der Peet*, [1996] 2 SCR 507 at para 308; *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 333, 365; *R v Prosper*, [1994] 3 SCR 236 at 266-67, 298 where the precise expression used is "framers of the *Charter*"; *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 409, dissenting reasons of Sopinka, Cory and Iacobucci JJ, but not on this point: "[t]his Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution"; *Reference re Education Act (Que), supra* note 12 at 539, 542, 545, 576; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 396; *R v Zundel*, [1992] 2 SCR 731 at 755; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123 at 1163; *Mahe v Alberta*, [1990] 1 SCR 342 at 363; *R v Morgentaler*, [1988] 1 SCR 30 at 166; *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at paras 179-80; *R v Jones*, [1986] 2 SCR 284 at para 76; *Attorney General of Quebec v Quebec Association of Protestant School Boards et al*, [1984] 2 SCR 66 at 79, 82, 84; *R v Wetmore*, [1983] 2 SCR 284 at 307; *Minimum Wages Act Reference, supra* note 68 at 514.

71 *Hislop, supra* note 14 at para 94 [emphasis added] where the judges cite the following cases to support their statement: *Re Same-Sex Marriage*, supra note 39 at para 22; *Attorney General of Quebec*

justificatory discourse of the courts, claiming that the living tree adapts to survive.

This conceptual metaphor can take at least two forms. First, it is an evolution towards betterment, a more perfect Constitution — in other words, in a Burkean way, what survives over the long run is deemed stronger and better. One thus hesitates to change a rule or principle that has withstood the test of time. Changes are made incrementally and only the appropriately useful ones survive. This type of thinking, combined with a concern for legal security and predictability, has been expressed in cases in which, after severely criticizing the appropriateness of a doctrine that relies on a long list of binding precedents, the Supreme Court nonetheless upholds the doctrine — albeit often in a more restricted form.[72]

That being said, the increments towards "progress" may be quite significant. Precedents may sometimes be formally preserved, but almost entirely set aside in their substance. For example, in *United States v Burns*,[73] the Supreme Court maintained that the previously established process in *Kindler*[74] and *Ng*[75] was the proper analytical approach to determine if extraditing a fugitive to a country where he may face the death penalty without first seeking the assurance that such penalty would not be applied would violate the principles of fundamental justice (s 7 of *Canadian Charter*). The Supreme Court held in *Kindler* and *Ng* that such an extradition did not violate the *Canadian Charter*. In *Burns*, the Court applied the balancing method established earlier, but considered that the weight attributed to the diverse considerations had changed over time. Canada's rejection of the death penalty domestically, its international advocacy in favour of its abolition, a similar attitude in most democracies, an international movement towards the abolitionist position, accelerating concerns about the potential of wrongful convictions and better knowledge of the death-row phenomenon were all presented as adding weight to the need

v Blaikie, [1979] 2 SCR 1016 at 1029; *Re Residential Tenancies Act, 1979*, *supra* note 68 at 723; *Skapinker*, *supra* note 21 at 365; *Hunter*, *supra* note 22 at 155.

72 For example, in *Canadian Western Bank*, *supra* note 50, after 'harshly criticizing' instead of 'criticizing in severe terms' the "interjurisdictional immunity" doctrine and declaring that "in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy" (para 78), the majority of the Supreme Court nonetheless preserved the doctrine. Not long after, the Supreme Court indeed used the "interjuridictional immunity" doctrine to declare a provincial land use planning and agriculture statute inapplicable to the building of aerodromes on designated agricultural in *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536.

73 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].

74 *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 [*Kindler*].

75 *Reference re Ng Extradition (Can.)*, [1991] 2 SCR 858 [*Ng*].

to seek assurance before extraditing. The Court thus came to the conclusion that "in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required."[76]

The second form of evolutionary thought does not take a long view of changes. It only seeks to adapt rules and principles so that they fit the present circumstance, and is probably the most prevalent view. For example, the Supreme Court recently suggested in *Reference re* Supreme Court Act that its constitutional status was the product of a necessary adaptation to changes in circumstances: the abolition of appeals to the Privy Council meant that the Supreme Court of Canada had to take on the role of the Council under the Canadian Constitution.[77]

At any rate, if we were to take both conceptual metaphors at their face value, we would have to assume that courts present the engine of evolution as an internal desire of the Constitution to survive in its environment. However, one has to combine the evolutionary metaphor with the idea that courts are the guardians of the Constitution. As such, the courts would effect the necessary changes and adaptations to ensure the survival of the Constitution. This implies that the capacity of the Constitution to survive and to adapt would depend in large part on the judges being endowed with the virtues of practical reason. However, practical reason is rarely invoked officially to justify the government's choice of candidate for a Supreme Court appointment. This situation merits further investigation.

Conclusion

None of the narratives and conceptual metaphors presented here assume that the Constitution is complete, nor that it is in a state of decline; those temporal frames are in no way dominant in the current general constitutional discourse. This, of course, is not to say that other temporal tropes are not present in the Canadian constitutional discourse of the judiciary, but that they tend to be found in discrete sectors and are largely isolated from the rest of the discourse.

However, when one hears a call for a return to the past, it is rarely for the purpose of decrying the present Constitution in itself; it is rather to lament that certain actors have moved away from the original script in a way that

76 *Burns, supra* note 73 at para 65.

77 *Reference re Supreme Court Act, supra* note 12 at para 83.

muddles our common narratives and detracts us from our proper direction. There are two important exceptions: Québec and Aboriginal communities.

Québec cannot forget that it did not consent to the so-called patriation of the Constitution in 1982. It is not that Québec is not bound by the 1982 Constitution, but rather that it is. This is where the malaise comes from. The complaint is clearly about the legitimacy of a significant part of the Canadian Constitution that binds Québec without the latter having given its consent. However, when Quebeckers invoke the 1981-82 events and what had preceded them, it is not to invoke a glorious past that had been lost through a decline of the Constitution. Rather, the constitutional narratives of that past era point to an unfinished Constitution — but in this case, not unfinished by courts but rather by elected representatives. The past is invoked to suggest that the patriation without Québec's consent represents a dramatic mistake in the development of the Constitution, not necessarily substantively, but most certainly procedurally: many Quebeckers read the non-inclusion of the Québec government in the final deal as a profound breach of trust from their other partners in the Federation.

While this aspect of the Constitution remains deeply troubling to many Quebeckers, the temporal metaphors in which it is cast are not that different from the ones used by other Canadians. However, the content differs: the 1982 events are read as a problem that has to be solved somehow at some point. Divergences appear when one asks *how* this problem should be solved: some hope for a renewed Canadian constitutional deal so that Québec could reintegrate into the Canadian family "dans l'honneur et l'enthousiasme,"[78] others dream of an independent Québec, while others believe that we should let bygones be bygones and "move forward," focusing on the new challenges that we must solve collectively. Whatever the option, the solution is conceptualized as belonging to the future.

The understanding of the Canadian Constitution as an unfinished business is not limited to Québec's place in the Federation, but also extends to Aboriginal issues. Each Aboriginal community has its own history of relations with colonizers with many reasons for grievances. The Canadian Government has broken many of its promises, including those made in treaties. Recognition of initial promises is a first step along the path of reconciliation. Yet again, the emphasis is on changes leading to a better future.

78 Brian Mulroney promised that much in his famous August 6th 1984 speech in Sept-Îles: Canada, Prime Minister's Office, *Federal Statements on the Quebec Constitutional Issue*, (Ottawa: Prime Minister's Office, 1987) at Annex 1.

Whether the Constitution is actually finished or not is obviously not the point; that is, whether or not major changes will occur to complete the document is not what is at stake. What matters is that agents imagine themselves engaged in an ongoing process. If an alternative dominant narrative were to take hold in Canadian constitutionalism — say, that the Constitution is finally complete and its accomplishment needs protection — expectations from the different actors in the system would drastically change. For example, judges would no longer be seen as legitimately allowed to extend constitutional norms but would, perhaps, be expected merely to apply the results already achieved, and maybe fill in the details.[79] This narrative would lend itself to a conservative bias as courts would be expected to protect and preserve the perfect achievements of the Constitution against changes. However, this alternative narrative would probably fire up opposition to the Constitution. Indeed, those who currently see the Constitution as unfinished may have hopes to see their desired changes in its more perfected version. After all, implicitly, the current dominant narrative suggests that any part of the currently established Constitution may or may not figure in the perfected Constitution. Yet all those hopes would vanish if the Constitution were to be seen as complete. There would be very little reason for those who oppose it to try to change it through its internal mechanisms; they would rather have a clear incentive to try to *replace* it, to break with the current constitutional order.

When discussing a previous draft of this paper, Menny Mautner made a brilliant comment that I borrow from him to close this piece: witnessing how these constitutional narratives help sustain a vibrant polity with a relatively low level of conflict allows us to see in a much more optimistic light Samuel Beckett's *Waiting for Godot.*

79 See Paul W Kahn's description of the dominant constitutional discourses in the generations that followed the founding up to the Civil War in the United States of America in Chapter 2 of his book: Kahn, *Legitimacy and History, supra* note 6.