The Supreme Court in Canada's Constitutional Order

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The majority opinion in the Supreme Court Act Reference *tells a story about the role of the Supreme Court of Canada within the Canadian constitutional order. The story chronicles the evolution of the Court since Confederation, culminating in the conclusion that the Court and some of its key features are now essential to the Constitution of Canada. This account relies on well-established ideas in Canadian constitutionalism, in particular, that the constitutional work of the Court is captured by the metaphors of 'umpire' and 'guardian,' and that the Court is the final legal voice on matters of constitutional interpretation. This paper contests the narrative told in the* Reference*, arguing that the story tidies up Canadian constitutionalism in ways that cultivate an inaccurate account of the Supreme Court's relationship to the constitution. In particular, the account overestimates the supremacy of the Court's constitutional interpretations and understates the nature of the Court's role in constitutional disputes. Moreover, it mischaracterizes the stability of the Court's position in the constitutional architecture. That position is not enshrined at the apex of a legal pyramid, but rather shifts within the architecture of the constitution as interpretive authority is taken up by a range of decision-makers. Ultimately, the arguments offered in this paper do not target the outcome of the* Reference*. Instead the aim is to enrich the starting point for assessing the ways in which the Court might — and might not — be "constitutionally essential."*

L'opinion majoritaire dans le Renvoi relatif à la Loi sur la Cour suprême *raconte une histoire sur le rôle de la Cour suprême du Canada au sein de l'ordre constitutionnel canadien. Cette histoire fait la chronique de l'évolution de la Cour depuis la fédération, menant à la conclusion que la Cour et certaines de ses caractéristiques clés sont désormais essentielles à la Constitution du Canada. Ce compte rendu se fonde sur des idées bien établies dans le constitutionnalisme canadien, notamment que les travaux constitutionnels de la Cour sont rendus par les métaphores suivantes : « arbitre » et « gardien » et que la Cour est la voix juridique suprême en matière de questions portant sur l'interprétation constitutionnelle. L'auteure de cet article conteste le récit raconté dans le Renvoi et soutient que cette histoire range le constitutionnalisme canadien d'une façon qui cultive un compte rendu inexact du rapport de la Cour suprême à la constitution. En particulier, ce compte rendu surestime la suprématie des interprétations constitutionnelles de la Cour et sous-estime la nature du rôle de la Cour dans les litiges constitutionnels. En outre, il représente mal la stabilité de la position de la Cour dans l'architecture constitutionnelle. Cette position n'est pas consacrée au sommet de la pyramide juridique mais plutôt, comme le pouvoir d'interprétation est accaparé par divers décideurs, elle se déplace à l'intérieur de l'architecture de la constitution. En fin de compte, les arguments invoqués dans cet article ne visent pas le résultat du Renvoi. Le but est plutôt d'enrichir le point de départ d'un examen des moyens que la Cour pourrait — et ne pourrait pas — être « essentielle sur le plan constitutionnel ».*

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Introduction

The majority opinion in the *Supreme Court Act Reference*[1] ("*Reference*") tells a story about the role of the Supreme Court of Canada within the Canadian constitutional order. The story chronicles the evolution of the Court since Confederation and culminates in the conclusion that the Court and some of its key features are now essential to — and therefore entrenched within — the Constitution of Canada. This account has elements that have long been part of the dominant narrative of Canadian constitutionalism, in particular, that the constitutional work of the Court is captured by the metaphors of 'umpire' and 'guardian,' and that the Court is the final legal voice on matters of constitutional interpretation.

This paper contests the narrative recounted in the *Reference*. It does so by first pointing to aspects of Canadian constitutionalism that are absent from the majority's reasoning, drawing particular attention to the absence of the enduring character of the constitution's tensions, the horizontal dimensions of Canada's constitutional architecture, and the many interpreters of constitutional text and principle. In so doing, this paper shows that the vision of Canada's constitution captured in the *Reference* is at odds with prominent themes of Canadian public law. It then considers the consequences of this incomplete constitutional picture. It argues that the story told by the majority in the *Reference* tidies up Canadian constitutionalism in ways that are perhaps understandable given the task that was before the Court, but which cultivate an inaccurate account of the Supreme Court's relationship to the constitution. In particular, the account overestimates the supremacy of the Court's constitutional interpretations, mischaracterizes the stability of the Court's position in the constitutional architecture, and understates the nature of the Court's role in constitutional disputes.

This paper is part of larger conversations about the constitutional character of the Court and the nature of the Canadian constitutional order. Other scholars have studied the constitutional status and narratives of the Supreme Court. For example, at the time of patriation, Scott contended that the new constitutional amending procedures were not merely placeholders, but rather shielded the Supreme Court from major unilateral reform.[2] In 2000, to mark the 125th anniversary of the Court, Van Praagh looked to questions of identity

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

2 Stephen A Scott, "Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes" (1982) 20:2 UWO L Rev 247; Stephen A Scott, "The Canadian Constitutional Amendment Process" (1982) 45:4 Law and Contemporary Problems 249.

and diversity and argued that the Court is just one (albeit one active and important) participant in the shared project of determining how to live together in a multicultural society.[3] More recently, Newman reasoned that the constitution, maintenance, and organization of the Court are entrenched within the Constitution of Canada by virtue of a "purposive and progressive" interpretation of section 101 of the *Constitution Act, 1867*.[4] After the *Reference*, Mathen examined the context in which the *Reference* was decided, contending that the constitutional forces at stake amounted to a "perfect storm of law and politics."[5] And Daly argued that the autobiographical story told by the majority in the *Reference* is selective and fails to address the ways in which the Court has used its own jurisprudence to enhance its institutional significance within Canada's constitutional architecture.[6]

In this paper, I too contest the stories told in the *Reference* and explore the character of the Supreme Court's place in Canada's public life. However, unlike much of the existing scholarship that takes up these tasks, the starting point of this paper is the body of work that explores how normative diversity tests the prevailing theories and stories of Canadian constitutionalism.[7] In an example of this work, Macdonald challenges accounts that ignore or undervalue the law-making capacities of individuals.[8] His work encourages more attention to

3 Shauna Van Praagh, "Identity's Importance: Reflections of — and on — Diversity" (2001) 80 Can Bar Rev 605. Van Praagh resists the tendency of jurists to presume the "paramount importance" of law — and consequently of the Supreme Court and the *Charter* — when seeking answers to questions about identity, diversity, and belonging. Her argument is based on an understanding of law as "but one set of influences that direct our behaviour and relationships" and the accompanying claim that "the meaning of identity cannot be discovered in the judgments or in the notion of multiculturalism embodied in s. 27 of the *Charter*." Rather, Van Praagh notes, "[t]he Court finds its place in a complex web of factors — for example, family relations, workplace organization, education — that direct the shaping of diversity in Canada": *ibid* at 608.

4 See Warren J Newman, "The Constitutional Status of the Supreme Court of Canada" [2009] 47 SCLR (2d) 429.

5 Carissima Mathen, "The Shadow of Absurdity and the Challenge of Easy Cases: Looking Back on the *Supreme Court Act Reference*" (2015) 71 SCLR (2d) 161 at 162.

6 Paul Daly, "A Supreme Court's Place in the Constitutional Order — Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41:1 Queen's LJ 1.

7 For a general account of how a legal pluralist understanding of law can inform the study of the Supreme Court and its work, see e.g. Kate Glover, "The Supreme Court in a Pluralistic World: Four Readings of a Reference" (2015) 60:4 McGill LJ 839. For examples that focus on the Court in more specific contexts, see Van Praagh, *supra* note 3; Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39:1 Queen's LJ 175; and Roderick A Macdonald, "Was Duplessis Right?" (2010) 55:3 McGill LJ 401.

8 Generally, see e.g. Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25. In the constitutional context, see e.g. Roderick A Macdonald, "Kaleidoscopic Federalism" in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds, *Le federalism dans tous ses états: gouvernance, identité et méthodologie* (Cowansville, QC: Éditions Yvon Blais, 2005) at 261.

institutional forms and processes that engage citizens in the project of just law-making, interpretation, judgment, and reform.[9] Similarly, Webber contests narratives that pay too little attention to the role of disagreement as an abiding feature of the constitution.[10] In contrast to constitutional accounts that seek to alleviate the tension between competing values, Webber's analysis describes the Canadian constitutional order as agonistic. For Webber, this means that Canada's constitution is animated by contending, often irreconcilable, positions, and that these positions "are not neatly contained within a comprehensive, overarching theory," but rather persist in tension in Canadian public life.[11]

More of these constitutional counterclaims are found in the work of Borrows, Berger, and MacDonnell. Borrows draws on the lived experience and institutional frameworks of indigenous legal traditions to establish that law's dominant narratives do not speak to the multijuridical character of Canadian constitutionalism, but that they should.[12] Berger disrupts conventional accounts of constitutionalism, revealing the hubris of the constitutional rule of law's claims of independence from culture, and destabilizing entrenched accounts of law's relationship to religious difference in Canadian constitutional life.[13] In so doing, Berger establishes the promise and limits of more nuanced appreciations of cultural and normative encounter in modern constitutionalism. And MacDonnell contests the prevailing judicialized lens of understanding the constitution by establishing that political actors and civil servants are constitutional agents, in particular in the realm of interpreting and implementing *Charter* rights.[14]

9 See e.g. Roderick A Macdonald, "Law Reform for Dummies (3rd Edition)" (2014) 51:3 Osgoode Hall LJ, and Roderick A Macdonald, "The Integrity of Institutions: Role and Relationship in Constitutional Design" in Law Commission of Canada, *Setting Judicial Compensation: Multidisciplinary Perspectives* (Ottawa: Law Commission of Canada, 1999). See also Hoi Kong, "The Unbounded Public Law Imagination of Roderick A Macdonald" in Richard Janda, Rosalie Jukier & Daniel Jutras, eds, *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (Montreal: McGill-Queen's University Press, 2015) 73.

10 Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 [Webber, "Legal Pluralism"].

11 Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 8 [Webber, "Contextual Constitution"].

12 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*]; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

13 See e.g. Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

14 Vanessa MacDonnell, "The Constitution as Framework for Governance" (2013) 63:4 UTLJ 624 ["Framework"]; Vanessa MacDonnell, "The Civil Servant's Role in the Implementation of Constitutional Rights" (2015) 13:2 Intl J Constitutional L 383.

This paper draws on the insights of these and other scholars, as well as examples from public law jurisprudence, to argue that Canada's constitutional imagination — including its understanding of the constitutional character of the Supreme Court — is richer than the account offered in the majority opinion in the *Reference*. That said, in pointing to the absences and shortcomings in the majority's narrative, the goal of this paper is not to challenge the outcome of the *Reference*; instead, the aim is to enrich the starting point for assessing the ways in which the Court might — and might not — be "constitutionally essential."

The remainder of this paper proceeds in three parts. Part I sets out the facts and reasoning of the majority in the *Reference*. Part II recounts the story that the majority opinion tells about Canada's constitutional order and the place of the Supreme Court within it. Part III considers what is missing from this story and the effects of these omissions. It shows that the constitutional account provided in the *Reference* neglects important tensions and structural features of Canada's constitution. It then begins to outline how the narrative about the Supreme Court's constitutional roles shifts when these dimensions of Canadian constitutionalism are accounted for. In particular, it suggests that the Supreme Court's constitutional position is not enshrined at the apex of a judicial pyramid, but rather shifts within the architecture of the constitution as interpretive authority is taken up by a range of decision-makers. Relatedly, it points out that the Court's role includes a dispute maintenance function in addition to a dispute resolution function. As is discussed in Part III and in the conclusion to this paper, these observations contest and add nuance to the majority's conclusion that the Supreme Court and some of its characteristics are essential within Canada's constitutional order.

I. The *Supreme Court Act Reference*

In October 2013, Justice Marc Nadon was sworn in as the newest member of the Supreme Court of Canada. His appointment was swiftly challenged; a reference ensued. The issue driving the *Reference* was whether Justice Nadon met the statutory eligibility criteria for appointment.

The *Supreme Court Act* provides that any current or former judge of a provincial superior court is eligible for appointment to the Court. Anyone with ten years of membership in a provincial bar is also eligible.[15] Yet three seats on the Court's bench are reserved for judges of Quebec. These seats are the subject

15 *Supreme Court Act*, RSC 1985, c S-26, s 5 [*Supreme Court Act*].

of section 6 of the *Act*. Section 6 provides that "at least three" judges must be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec" or "from among the advocates" of Quebec. Therein lies the problem. At the time of his appointment, Justice Nadon was a judge of the Federal Court of Appeal. He had spent his judicial career in the Federal Court system, not in the courts of Quebec. That said, before being appointed to the bench, Justice Nadon had been a member of the Barreau du Québec for more than ten years. The legal question, therefore, was whether former membership status satisfied the statutory eligibility criteria for appointment to a Supreme Court seat reserved for judges of Quebec.

A majority of the Court held that it did not; current membership was required. According to the majority opinion, section 6 was intended to ensure sufficient civil law expertise on the Court, as well as sufficient representation of Quebec's legal traditions and social values. Section 6 was also intended to cultivate and enhance the Court's legitimacy by inspiring confidence among the people of Quebec.[16] While Parliament could have pursued these aims differently, it chose to do so by requiring current bar membership for appointees from Quebec. The practical consequence of the Court's conclusions was that judges of the Federal Court and the Federal Court of Appeal, including Justice Nadon, are ineligible for appointment to the seats on the Court reserved for judges of Quebec.

The *Reference* dealt with a second issue, this one a constitutional question. The issue was whether Parliament could unilaterally add provisions to the *Supreme Court Act*. The sections proposed by the government declared that former members of provincial bars were eligible for appointment, including former members of the Quebec bar.[17] By the time the *Reference* was heard, such sections — sections 5.1 and 6.1 — had been enacted and received royal assent.[18]

16 *Reference*, *supra* note 1 at paras 56, 59.

17 The second reference question asked: "Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No 2*?"

18 Section 5.1 provided, "For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province." Section 6.1 provided, "For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province."

On its face, the constitutional issue appears straightforward. Section 101 of the *Constitution Act, 1867* authorizes Parliament to create, maintain and organize a general court of appeal for the country and to establish additional courts for the better administration of the laws of Canada.[19] This constitutional authority empowers Parliament to create and configure the Supreme Court however it pleases. But the simplicity of this argument is confounded by the constitutional amending procedures, set out in Part V of the *Constitution Act, 1982*. The procedures provide that amendments to the Constitution of Canada in relation to the "composition of the Supreme Court" require unanimous consent of both houses of Parliament and the provinces, and that amendments in relation to the "Supreme Court of Canada" trigger the 7/50 rule.[20] The question then was whether sections 5.1 and 6.1 amend the Constitution of Canada such that they cannot be enacted by Parliament alone.

A majority of the Court concluded that Parliament had the constitutional authority to enact section 5.1, as it was truly declaratory and within the scope of Parliament's jurisdiction under section 101. Section 6.1, however, was of a different character. The majority concluded that section 6.1 changed the *Act* such that a new group of people — former members of the Barreau du Québec — would be eligible for appointment to the Supreme Court. For reasons discussed in greater detail in Part II, this amounted to a constitutional amendment in relation to the composition of the Supreme Court. It could therefore be implemented only with the unanimous consent of the houses of Parliament and the provincial legislatures.

II. The story about the Court in the *Reference*

In order to answer the constitutional question at stake in the *Reference*, the Court had to determine the constitutional status of the Supreme Court and some aspects of its design. If the eligibility criteria codified in section 6 were entrenched within the Constitution of Canada, then section 6.1 would constitute a constitutional amendment and, as a result, be beyond Parliament's unilateral authority.[21] It was here, in assessing the Court's current constitutional status,

19 *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, s 101, reprinted in RSC 1985, App II, No 5.

20 *Constitution Act, 1982*, ss 41(d), 42(1)(d), being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

21 Justice Moldaver did not address the second reference question; it was unnecessary given his conclusion on the first. In *obiter*, Moldaver J agreed that Quebec's entitlement to three Supreme Court judges was constitutionally entrenched and protected from unilateral change by section 41(d) of the *Constitution Act, 1982*. That said, Moldaver would not agree that the eligibility requirements are similarly entrenched. "Put simply," he said, "I am not convinced that any and all changes to

that the judges told a story about the Supreme Court's evolution within the constitutional order of Canada.

The story told in the *Reference* repeats a narrative that is well-established in Canadian legal culture.[22] It is a retrospective in which the Court sheds its reputation as a "quiet court" and rises to prominence as an institution of national importance. According to the story, the modern significance of the Court emerged incrementally. The first moment in the Court's evolution was its creation in the late nineteenth century after several years of opposition from Quebec. Agreement was reached only with "the guarantee that a significant proportion of the [Court's] judges would be drawn from institutions linked to Quebec civil law and culture."[23] This agreement reflected the bijural character of Canada's constitution, aiming to ensure that the Supreme Court would represent both the common and civil law traditions.

An early turning point in the Court's institutional life is said to be the abolition of appeals to the Judicial Committee of the Privy Council (JCPC) in the mid-twentieth century. With abolition, the Supreme Court inherited the Council's role as the "ultimate judicial authority over all legal disputes in Canada,"[24] rendering the Court "a key matter of interest to both Parliament and the provinces."[25] As the story goes, the abolition of appeals to the Privy Council elevated the Supreme Court's position within the Canadian legal system:

> With the abolition of appeals to the Judicial Committee of the Privy Council... [t]he Court assumed a vital role as an institution forming part of the federal system. It became the final arbiter of division of powers disputes and became the final word on matters of public law and provincial civil law. Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly to the development of a unified and coherent legal system.[26]

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the eligibility requirements will necessarily come within 'the composition of the Supreme Court of Canada' in s. 41(*d*)" (*Reference*, *supra* note 1 at para 115).

22 See e.g. Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008); Sopinka, J "The Supreme Court of Canada" (speech delivered on 10 April 1997 in Toronto), published in Brian A Crane & Harry S Browne, *Supreme Court of Canada Practice 2012* (Toronto: Carswell, 2012) at 521; Peter McCormick, *Supreme At Last: The Evolution of the Supreme Court of Canada* (Toronto: Lorimer, 2000); James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press & The Osgoode Society, 1985).

23 *Reference*, *supra* note 1 at para 93.

24 *Ibid* at para 82.

25 *Ibid* at para 85.

26 *Ibid* at para 85.

According to the narrative, the second turning point came in 1975 when the *Supreme Court Act* was amended. The Court gained control over much of its docket and a threshold for granting leave to appeal of "matters of public importance" was adopted for most cases.[27] In this moment, the Court's role is said to have shifted from a court of correction to that of a true supreme court, responsible for the sound and just evolution of Canada's legal doctrine. These legislative amendments "further enhanced" the Court's status within the constitutional order, rendering it "essential under the Constitution's architecture" as the "final, independent judicial arbiter of disputes over federal-provincial jurisdiction" and the "exclusive ultimate" word on public and provincial civil law in the country.[28]

The final pivotal moment in the Court's history occurred with the patriation of Canada's constitution. As the majority recounts in the *Reference,* patriation confirmed the Court's status as a constitutionally essential institution. The judiciary became the interpreter and remedial hand of the newly-adopted *Charter*, as well as Canada's constitutional guardian.[29] Within this institutional matrix, the Supreme Court became a "foundational premise of the Constitution."[30] In addition, the newly adopted amending procedures provided that reform of the Supreme Court and its composition was possible only with federal and provincial consent, thereby protecting the Court's functioning and legitimacy from incursions by either Parliament or the provinces acting alone.[31]

The moral of this historical account is that the Supreme Court of Canada is now a "constitutionally essential institution."[32] According to the majority in the *Reference*, the Canadian constitution necessarily contemplates a supreme court that is independent, bijural, and serves as the country's final general court of appeal, including in matters of constitutional interpretation.[33] It follows, as the majority notes, that Parliament is no longer simply *authorized* to establish a supreme court under section 101, a power that would arguably allow Parliament to dismantle the Court if it so chose. Rather, given the trajectory of constitutional history in Canada, Parliament is now *obligated* to "maintain — and protect — the essence of what enables the Supreme Court to perform

27 *Ibid* at para 86.
28 *Ibid* at paras 83-84, 86, 88.
29 *Ibid* at paras 88-89.
30 *Ibid* at paras 88-89.
31 *Ibid* at paras 90-94.
32 *Ibid* at para 87.
33 *Ibid* at para 94.

its current role."[34] This means that while Parliament alone can legislate for the purposes of "routine" maintenance of the Court under section 101, it cannot unilaterally alter the Court's configuration or its "fundamental nature and role."[35] Any "substantive change" to the Court's existence or key features requires the consent of Parliament and either a substantial segment or all of the provincial legislatures.[36]

III. The Supreme Court and the Constitution

This story about the Court's evolution in Canada's constitutional order, from quiet and contingent to prominent and entrenched, is familiar. It has gained traction as the explanation for how the Court became one of the country's most powerful institutions,[37] now one whose existence and essence are guaranteed by the constitution and shielded from unilateral change by virtue of the constitutional amending procedures. These conclusions reflect ideas about the Court that are widely repeated in Canadian constitutionalism. One idea provides that the traditional metaphors of constitutional "guardian" and "umpire" or "referee" of the division of powers capture much of the Court's role in constitutional disputes.[38] A second points to the position of the Supreme Court as the final court of appeal for Canada, and thus the final legal voice in matters "concerning all the laws of Canada and the provinces."[39]

This narrative reflects certain choices about what themes and values to privilege over others. This section explores some of those choices and considers implications of choosing differently. It focuses on the vision of Canadian constitutionalism that underlies the narrative and the implications of this vision as a starting point for assessing the Court's constitutional significance. This exploration shows that the narrative presupposes a constitutional vision that favours institutional and interpretive hierarchies, political roles and actors, and bijurality, over elements of the constitution that point towards pluralism,

34 *Ibid* at para 101.

35 *Reference re Senate Reform*, 2014 SCC 32 at para 48, [2014] 1 SCR 704 [*Senate Reference*].

36 *Reference, supra* note 1 at paras 90-106; *Constitution Act, 1982*, *supra* note 20, ss 41(d), 42(1)(d). Unanimous consent is required for all reform in relation to the "composition of the Supreme Court" pursuant to section 41(d) of the *Constitution Act, 1982*. Constitutional reform in relation to all other matters dealing with the Supreme Court are subject to the 7/50 rule under section 42(1)(d).

37 See *Reference, supra* note 1 and the sources cited *supra* note 22.

38 For references to these metaphors in the case law, see e.g. *Re Anti-Inflation Act*, [1976] 2 SCR 373 at 405 (guardian), *United States v Burns*, 2001 SCC 7 at paras 35, 38, 71, [2001] 1 SCR 283 (guardian); *R v Lippé*, [1991] 2 SCR 114 at 137 (umpire); *Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66 at paras 105, 116, [2004] 3 SCR 381 (referee).

39 *Reference, supra* note 1 at para 95.

agonism, deference, and horizontal institutional relationships. Further, it suggests that accounting for these latter elements reveals that the Court's role in constitutional and administrative law disputes includes maintaining tension, as well as offering final answers. The Court's position within the architecture of Canadian constitutionalism is thus fluid rather than fixed.

A. The majority's constitutional vision

The majority opinion in the *Reference* sends mixed signals about Canada's constitutional order. On the one hand, the reasoning tells of a constitution that expresses evolving historical attitudes, values, and institutional arrangements. On this reading, the constitution is less a text than it is a collection of practices, principles, and experiences. We see this understanding reflected in the majority's story about the Court's evolution within Canada's constitutional architecture, growing incrementally as compromises were made between English and French officials, as access to the Privy Council eroded, and as statutory and constitutional configurations were transformed. We also see this in the Court's conclusion that section 101 of the *Constitution Act, 1867* has evolved from a permissive provision to a mandatory one. "The unilateral power found in s. 101 of the *Constitution Act, 1867* has been overtaken," the majority writes, "by the Court's evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*."[40] This is a constitution of context, inheritance, and practice.

Yet the majority's reasoning also contemplates a constitution that is static and hierarchical. We see this side of the constitution in descriptions of the Court as the "final word" on matters of law,[41] the "final arbiter" of division of powers disputes,[42] and the "apex" of the legal system.[43] We see it further in the majority's descriptions and invocations of the constitutional amending procedures. For instance, the majority explains that the amending formulas protect the essential features of the Court, not as they evolve over time, but as they were understood in 1982.[44] On this reading of the *Reference*, the constitution offers authoritative final answers, contemplates normative and institutional hierarchies, and is frozen by the intent of its framers.

40 *Ibid* at para 101.
41 *Ibid* at para 85.
42 *Ibid* at para 85.
43 *Ibid* at para 84.
44 *Ibid* at paras 92-94.

These messages may be mixed, but they are not irreconcilable. No constitution is static or acontextual and every constitution provides guidance and some measure of predictability to the people it is intended to govern. These contending features of evolution and stasis, flexibility and consistency, can sit together within one constitutional order;[45] Canadian constitutionalism is no exception. Yet noticing the competing messages described above sets the stage for noticing other gaps found in the *Reference* opinion, namely those gaps between the constitutional landscape painted by the majority and a more expansive constitutional vision contemplated in other cases and experiences of Canadian constitutionalism. As is outlined in the following few paragraphs, each chasm cleaves along the boundary between dimensions that tend to make constitutional life bigger and messier (pluralism, agonism, horizontal architecture) and those that render that life smaller and tidier (bijuralism, political divisions, vertical hierarchies). The gaps are often difficult to notice because the narrative told in the *Reference* is a familiar one based on well-established assumptions about law and the constitution.

First, the narrative presupposes a constitutional order in which the key constitutional participants and actors are defined by political roles and borders. These participants and actors emerge from the perceived realities of Canadian federalism and include the federal and provincial orders of government, Quebec and the rest of Canada, and Parliament and the Court. In the *Reference,* these constituencies are particularly noticeable when the majority interprets the constitutional amending procedures and analyzes legislative proposals to reform the Supreme Court. "Requiring unanimity for changes to the composition of the Court," the majority reasoned, "gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent."[46] That is, "[p]rotecting the composition of the Court under s. 41(*d*) [the unanimity formula] was necessary because leaving its protection to s. 42(1)(*d*) would have left open the possibility that Quebec's seats on the Court could have been reduced or altogether removed without Quebec's agreement."[47] The majority in the *Reference* further highlighted the relevance of political roles and divisions in its constitutional outlook when it concluded that the existence of the Supreme Court is entrenched in the constitution. To find otherwise, "would mean that Parliament could unilaterally and fundamentally change

45 Roderick A Macdonald, "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity: the Canadian Experiment" in K Kulcsar & D Szabo, eds, *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada - Hungary Academy of Sciences, 1996) 52 at 53-61.

46 *Reference*, *supra* note 1 at para 93.

47 *Ibid.*

the Court, including Quebec's historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces."[48]

Consider also the majority's description of Canada's federal structure and the role of the Court in the configuration of federalism. Disputes over federalism are, according to the majority, disputes over the boundaries between Canada's two orders of government — the federal and the provincial. The majority opinion in the *Reference* highlights the dualist, political nature of Canadian federalism when describing what the Court gained when appeals to the Privy Council were abolished. In short, the Court gained the authority to decide, with finality and authority, disputes over the division of powers:[49]

> The need for a final, independent judicial arbiter of disputes over federal-provincial jurisdiction is implicit in a federal system:
>
> > Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers.... That impartial arbiter is the judiciary, charged with "control[ling] the limits of the respective sovereignties."[50]

The Court went on to say that when appeals to the Privy Council were abolished, the "continued existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces" and the "Court assumed a vital role as an institution forming part of the federal system" as the "final arbiter of division of powers disputes, and ... the final word on matters of public law and provincial civil law."[51]

Second, the majority's reasoning rests on an understanding of the constitutional architecture in which there is a stable hierarchy of authoritative interpreters. On this understanding, judges are authoritative and the Supreme Court — the highest court — is the ultimate interpretive authority. As the majority explains in the *Reference*, at the time of patriation, "the Supreme Court was already essential under the Constitution's architecture as the final arbiter of di-

48 *Ibid* at para 99.

49 *Ibid* at para 83.

50 *Ibid*, citing to cases spanning thirty years of constitutional jurisprudence: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 124; *Northern Telecom Canada Ltd v Communication Workers of Canada*, [1983] 1 SCR 733; *Reference re Securities Act*, 2011 SCC 66 at para 55 [*Securities Reference*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53 [*Secession Reference*].

51 *Reference*, *supra* note 1 at para 85.

vision of powers disputes and as the final general court of appeal for Canada,"[52] yet patriation enhanced its position with the adoption of the *Charter* and the principle of constitutional supremacy:

> Patriation of the Constitution was accompanied by the adoption of the *Canadian Charter of Rights and Freedoms*, which gave the courts the responsibility for interpreting and remedying breaches of the *Charter*. Patriation also brought an explicit acknowledgement that the Constitution is the "supreme law of Canada." ... The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the "guardian of the constitution." ... As such, the Supreme Court of Canada is a foundational premise of the Constitution.

Third, the majority's account in the *Reference* presupposes a bijural constitutional order. Reading the *Reference* opinion gives the impression that only two legal traditions — the common law and civil law — shape the Canadian constitution. On this account, the Court, through guarantees of civil law representation on the bench and its role as the "'court of last resort for *all* Canadians,'"[53] both acquires legitimacy as an institutional manifestation of Canada's bijuralism and exercises a constitutional role in supervising the evolution of both the common law and civil law. The majority explains:

> Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system.[54]

B. Accounting for other constitutional values

The above account suggests that three elements are particularly prominent in the vision of the constitution that is reflected in the *Reference:* political authorities and federalism, institutional and interpretive hierarchy, and bijuralism. As is always true in any judgment or narrative, by prioritizing particular values, the majority downplays others. This raises the question of which elements were excluded from the majority's vision of the constitution. Or, more precisely, does the majority's vision exclude elements of the constitution that ought to have been included? The considerations introduced in this section establish that the answer to this last question is *yes*.

52 *Ibid* at para 88.

53 *Ibid* at para 84 [emphasis added].

54 *Ibid* at para 85.

First, the majority's reasoning in the *Reference* reflects a dualist understanding of both Canadian federalism and of the legal traditions that comprise the constitution of Canada. This commitment to dualism, tethered to the workings of the political state, is consistent with long-standing understandings of Canadian federalism and the history of Canada's constitution as founded on the common and civil law traditions.[55] Yet the choice to privilege these accounts of federalism and Canada's constitutional traditions neglects the multijural character of Canadian constitutionalism and the multiple normative forces that bear on constitutional life. For example, it neglects the plural character of Canada's constitutional order as "civil law, common law, and Indigenous legal traditions organize dispute resolution in our country in different ways."[56] Indeed, Canadian constitutionalism cannot be properly understood without attending to Indigenous legal traditions,[57] which enrich, legitimize, and make sense of the rule of law in Canada.[58] Similarly, the constitutional vision presupposed in the *Reference* neglects the complexities that flow from the many normative forces, both formal and informal, that inform everyday life. We are all touched and shaped by various "meaning-giving frameworks" when we "come before the bar of law."[59] These frameworks interact in deep ways as people and communities live out their lives, ensuring that "the constitutional rule of law is always in competition with other cultures, other compelling and rich ways of generating meaning and giving structure to experience."[60]

The multifaceted character of claims of identity and meaning with constitutional significance is also embedded in conceptions of Canadian federalism. Long established in the jurisprudence as the answer to the question of how to reconcile diversity and unity within a state, federalism in Canada is most often presented as a matter of managing the political boundaries of federal-provincial relations. Of course, there are many ways to categorize individual and community identities other than in relation to the political state and its borders. As Macdonald argues, "[t]he federal conception of identity — whether national identities, subnational identities, or particular relational identities — peremptorily denies to legal subjects the possibility of negotiating the contours,

55 See e.g. *Secession Reference*, *supra* note 50 at paras 33-47, 55-60.

56 Borrows, *Canada's Indigenous Constitution*, *supra* note 12 at 8.

57 See e.g. the arguments in Borrows, *Indigenous Constitution*, *supra* note 12; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*]; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

58 Borrows, *Indigenous Constitution*, *supra* note 12.

59 Berger, *supra* note 13 at 172.

60 *Ibid.*

contents, and cardinality of their multiple identities."[61] By virtue of presenting Canada's constitution in terms of two legal traditions rather than multiple cultures and communities that speak to identity and belonging, the constitutional vision that underpins the Court's story in the *Reference* risks inaccuracy, failing to capture the experiential character of that which Canadian constitutionalism aspires to and allows for.

Second, the majority's reliance on institutional hierarchies to explain the constitutional supremacy and necessity of the Court obscures the horizontal dimensions of constitutional architecture, well-established in modern Canadian administrative law, through which public authorities operate and interact. As the Court explained in the *Senate Reform Reference*, the "notion of [constitutional] architecture expresses the principle that the 'individual elements of the Constitution are linked to the others.'"[62] In Canada's constitutional architecture, each institutional actor works in relation to, and in interaction with, the other such actors, all in service — and as a manifestation — of the structure of government that the constitution is intended to implement.[63] This description reflects an understanding of the courts as engaged in horizontal relationships with other public institutions that shift across time and circumstance, rather than in static hierarchical arrangements.

A more expansive understanding of constitutional structure resists the strict court-centric models of constitutionalism, which cultivate beliefs in judicial monopolies on constitutional interpretation. That said, an expansive vision does not (and should not) fully dismantle the traditional judicial pyramid to which the majority refers in the *Reference*. It does not undermine the Supreme Court's official position as the final general court of appeal for Canada.[64] However, when we examine the context of Canadian public law more broadly, we see that the judicial pyramid exists and operates within a constitutional framework that is built out as much as it is built up. When the horizontal dimensions of Canada's constitutional architecture are accounted for, the links between institutions flatten and peak depending on the issue, requisite expertise, and attitude of those who are, by operation of constitutional law, authorized to assume a hierarchical position. The relationships between institutions shift, as do the influence and authority that they exert over each other in any particular case.

61 Macdonald, "Kaleidoscopic Federalism", *supra* note 8.

62 *Senate Reference*, *supra* note 35 at para 26, citing *Secession Reference*, *supra* note 50 at para 50.

63 *Senate Reference*, *ibid* at para 26; *Secession Reference*, *supra* note 50.

64 *Supreme Court Act*, *supra* note 15; *Reference*, *supra* note 1.

Such a constitutional outlook bears witness to the range of actors that interpret, implement and enforce the constitution through their actions and interactions. This theme, largely absent from the *Reference*, permeates Canadian public law. Contemporary administrative law in Canada, for example, respects the interpretive authority of statutory decision-makers by virtue of deference in the exercise of judicial review of administrative decision-making.[65] While courts retain authority as reviewing bodies, statutory decision-makers operate within a realm of deference that is "justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state."[66] The actors that bring the administrative state to life — ranging from ministers to the civil service — exercise discretion and decision-making authority simply by virtue of carrying out their statutory mandates. This authority extends to interpreting and applying the constitution, in the formal ways imagined by *Martin* and *Conway*,[67] in the inherent ways contemplated in the work of MacDonnell,[68] and in the necessary but sometimes implicit ways required by *Slaight Communications, Doré v Barreau du Quebec,* and *Loyola*.[69]

The stability of institutional, interpretive hierarchies is further nuanced by approaches to precedent. *Stare decisis* has undergone shifts in ways that encourage lower courts to rethink binding law when circumstances call for it.[70] The Supreme Court held in *Carter v Canada (AG)* that "*stare decisis* is not a straitjacket that condemns the law to stasis."[71] Rather, lower courts should "reconsider settled rulings of higher courts when a new legal issue is raised and when there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate.'"[72]

An appreciation of a more horizontal understanding of Canadian constitutionalism can also be found in dialogue theory and jurisprudence that has embraced it.[73] In these cases, principles of constitutional supremacy and legislative

65 See *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

66 *Doré v Barreau du Québec*, 2012 SCC 12 at para 30 [*Doré*], citing *Dunsmuir, ibid* at para 49.

67 *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504; *R v Conway,* 2010 SCC 22, 1 SCR 765 [*Conway*].

68 See the work of MacDonnell, *supra* note 14.

69 *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038; *Doré, supra* note 66; *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613.

70 *Canada (AG) v Bedford,* 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*]; *Carter v Canada,* 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

71 *Carter, ibid* at para 40.

72 *Ibid*; *Bedford, supra* note 70.

73 See e.g. *R v Mills*, [1999] 3 SCR 668 [*Mills*]; *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309 [*Hall*].

supremacy are moderated by the movement of issues back and forth between the courts and Parliament, with neither institution having a definitive claim to the "final word." On this understanding of institutional relationships, the notion of "supremacy" amongst institutions is situational rather than certain, and integrated rather than hierarchical.

A third set of examples that contest the constitutional outlook that is reflected in the majority's reasoning in the *Reference* is captured by the "agonistic" dimensions of Canadian constitutionalism, described above. In an agonistic constitutional order, there may be circumstances in which the courts — usually thought to resolve disputes — instead acknowledge the contending constitutional tensions without offering a way out. In these circumstances, the courts provide guidance on how the parties can conceive of the tensions in dispute rather than offering a substantive resolution of the issue. The parties are then left to negotiate, devise their own ways to navigate the competing values, and resolve their differences accordingly. Webber points to the *Secession Reference* as an example of this approach. It is a case in which the Court recognizes the agonistic dimensions of the constitution and aims to sustain rather than suppress the contending positions in play.[74] As Webber explains, the Court opted not to determine Quebec's claim to the power to secede merely under the text (and absence of text) setting out the amending procedure. Instead, the Court looked to constitutional history and practice to identify several underlying and unwritten principles of the constitution — democracy, federalism, constitutionalism, and minority rights. Invoking these principles, the Court held that all parties had a duty to negotiate secession in the event of a clear expression of public support. In doing so, the Court provided guidance on the content of the constitutional principles at stake without relieving the tension between them.

The Court has played a similar role in other cases of constitutional amendment. In the *Senate Reform Reference*, for example, the Court provided an interpretation of the constitutional amending procedures that maintained the tensions between democracy, federalism, and the rule of law on issues of Senate reform, while providing guidance on the procedural framework governing the implementation of reform.[75] In other words, the Court's approach was to set the procedural parameters that bind political actors engaged in constitutional reform efforts, while empowering those actors to maintain and reconcile competing tensions at stake in their negotiations. A similar judicial approach can

74 Webber, "Contextual Constitution", *supra* note 11 at 261.

75 *Senate Reference*, *supra* note 35.

be found in cases dealing with the duty to consult in the context of aboriginal rights, and with cooperative federalism.[76]

Each of these examples — dealing with constitutional amendment, the duty to consult, and cooperative federalism — represent ways in which the constitution was understood as providing space for navigating difference, diversity, and disagreement, and revealed how the Court can respect that space.

C. The supremacy and significance of the Court

Looking to the choices and omissions discussed above, we cannot avoid the question of why the majority told the story in the *Reference* the way it did. Why does it privilege dualism over pluralism and hierarchy over integration, when these values are also prominent in Canadian constitutionalism? A legal realist might speculate that the Court's choices were politically motivated, strategically placed in order to justify what was, in effect, an exercise of self-entrenchment. A constitutional minimalist might contend that the Court's choices were designed to avoid difficult issues, such as Indigenous representation on the Court, and bilingualism as a matter of eligibility, in relation to the "composition of the court" question. This account would assume that the Court's constitutional vision in the *Reference* was a manifestation of constitutional humility and restraint, limited to what was necessary to answer the reference questions and what was put forward by the parties.

But of greater moment for this paper is a consideration of the implications of telling the story in this way. Does the telling of this restrained, arguably "tidy" constitutional story matter?

One implication of the majority's choices is that they convey the message that the courts are the primary site for establishing constitutional meaning and resolving constitutional disputes. Above, this paper notes that this kind of court-centricity gives the impression that constitutional meaning, legitimacy, authority, and implementation are grounded in judicial interpretation rather than in the effective action of government, the lived experience of citizens, or the inheritances of tradition. This does not accord with the full picture of Canadian constitutionalism. In addition, by writing non-judicial actors out of the story, the majority's narrative gives the misleading impression that the

76 See e.g. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Tsilhqot'in*, *supra* note 57; *Securities Reference*, *supra* note 50. In contrast, see cases in which agonism does not prevail, for instance, in the religious freedom context, e.g. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567; *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551.

Court's status as both essential and expert is absolute. It locks the Court in a self-fulfilling prophecy. In essence, the majority's argument is that the Court is constitutionally significant because courts are the guardians of the rule of law. But by positing itself as the guardian of the rule of law, the Court guarantees its own constitutional significance.[77] This fuels well-established concerns about the legitimacy of judicial review and the power of the courts.

This section turns the corner on these implications in order to consider whether a more expansive constitutional outlook adds to our understanding of the Court's constitutional character and significance. In other words, it begins to outline a response to the question: when we account for pluralism, horizontal architecture, and the ways in which disagreement and tension animate Canadian constitutional life, what effect does this have on the expectations that we should have of our national supreme court?

The point of contesting the dominant narrative about the Court's significance is not to deny the importance of an independent high court in a federal constitutional democracy. Nor is it to diminish the symbolic and functional significance of ensuring that Canada's final appellate court has the representativeness and expertise necessary to perform its role or to contend that the Court's most significant roles are those outside the traditional metaphors, whether as an educative institution,[78] a constitutional court,[79] a scapegoat, or a "dance partner."[80] Rather, the point is to do justice to both the institutional limits and the potential of the Court within a constitutional landscape that strives to account for the people to whom and the contexts in which the constitution is supposed to speak.

Such an account starts from the contextual and limited nature of law. If a constitution is a "matter of a community governing itself" and if that governance ideally takes place through "an array of well-considered and well-coordinated institutions" that are "sustained and given life by its members,"[81] then unpacking the stories we tell about the Court is an attempt first, to discern how this particular institution can and should contribute and, second, how we as citizens can and should sustain it.

77 On the Court protecting its own constitutional significance, see Daly, *supra* note 6.

78 Christopher L Eisgruber, "Is the Supreme Court an Educative Institution?" (1992) 67:1 NYU L Rev 961.

79 This refers to the Court's advisory functions, when undertaken in constitutional cases, under section 53 of the *Supreme Court Act*. See also Jamal Greene, "The Supreme Court as a Constitutional Court" (2014) 128:1 Harv L Rev 124.

80 Van Praagh, *supra* note 3.

81 Webber, "Contextual Constitution", *supra* note 11 at 265.

Relatedly, from a constitutional outlook that appreciates the horizontal dimensions of Canada's constitutional architecture, the Court is not merely an apex institution, but rather is one institutional actor — and one constitutional voice — amongst many. At times, the Court's position at the acme of the judicial pyramid is prominent and far-reaching, such as when the Court concludes that legislative action is unconstitutional.[82] Some other times, the Court shows deference to other decision-makers, such that the Court's status as "supreme" is suspended or nuanced within the constitutional matrix.[83] At yet other times, the Court's relational status is at the fore, as in "second look" cases or when lower courts push against the boundaries of *stare decisis*.[84] Within this network of institutions and decision-makers, the Court is neither an island nor a guiding star. The actors within the network experience shifts in power and significance, depending on the dispute at stake and the decision-makers involved. The Court's position in the constitutional architecture at any particular moment is always subject to how its judgments play out in the world.[85] In this way, the normative weight ascribed to the Court's judgments — and the weight of the Court's significance based on the impact of its work — can never be assumed.

This leads to a final observation, one which speaks to the Court's adjudicative role. As an adjudicator, the Court plays an important function in offering ways to settle legal disputes. Courts provide a formal, public mechanism through which competing normative claims can be resolved, at least provisionally, and disputing parties can move forward.[86] A pluralistic and agonistic constitutional vision, however, directs our attention to the limits of this adjudicative description. It fails to capture what the Court does in all instances. As an adjudicator in an agonistic constitutional order, the Court need not always try to resolve the tensions on which a dispute rests. Rather, in such cases, the Court may choose to lean into the tension between contending considerations, going no further than to set out parameters within which disputants can navigate the interacting normative forces of public and private life. In effect, in this tension-sustaining role, the Court shows that it can be comfortable with the discomfort that often flows from unresolved conflict between competing principles.[87] It is

82 See e.g. *Reference*, *supra* note 1; *Carter*, *supra* note 70.

83 See e.g. *Conway*, *supra* note 67; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

84 See e.g. *Mills*, *supra* note 73; *Hall*, *supra* note 73; *Bedford*, *supra* note 70.

85 See the jurisprudential assessments in Kislowicz, *supra* note 7 and Van Praagh, *supra* note 3.

86 Webber, "Legal Pluralism", *supra* note 10 at 180-82. See also Robert Cover, "Nomos and Narrative" (1983) 97 Harvard L Rev 4.

87 Of course, this role is not limited to the Supreme Court. These comments apply to courts generally.

a role in which the Court respects the capacity of communities and individuals — whether office-holders or otherwise — to deliberate and exercise judgment on issues of law and governance.[88]

IV. Conclusion

The privileging of certain values within a constitutional vision is inevitable and has implications for the way that constitutional questions and answers are framed. In the *Reference,* the majority's privileging of federalism, hierarchy, and dualism shapes its analysis of the Court's significance and essential nature. This makes sense: there is a reciprocity between these issues, each reflecting and shaping the other.[89] The functions that the Court should play within the constitutional order necessarily depend on what that constitutional order is understood to entail.

Yet Canadian constitutionalism is a compilation of contending stories and counter-narratives. The Supreme Court's judgment in the *Reference* gives the impression that it is telling a definitive version of the constitutional story and the Court's significance in that narrative. In doing so, it both over- and underestimated the Court's place in the institutional framework within which the constitution of Canada lives and breathes. This paper contests that conventional narrative. By expanding the constitutional lens through which the story is told, this paper has pointed to the Court's role in sometimes maintaining constitutional tension, and thereby preserving space for office holders and citizens to negotiate their own resolutions to disputes. In this sense, the Court is only one site, albeit an influential one, to look to when governments and communities encounter constitutional discomfort. Further, the observations set out in this paper qualify the conclusion that the Court is "constitutionally essential" by calling attention to the ways in which the Court is integrated within a complex, relational architecture of public institutions. Within this architecture, the Court not only adjudicates disputes, provisionally settles norms, and acknowledges tensions, but also interacts with and defers to the expertise of other institutions, decision-makers and agents. This observation is a reminder not only that the Court's "supreme" status is tempered by the institutional matrix in which it operates, but also that constitutional meaning is made by many actors, in various sites, most of which are, quite rightly, independent of the Court.

88 On the importance of this jurisgenerative capacity of individuals, see the sources cited *supra* notes 7, 8, and 9. In the particular context of Supreme Court jurisprudence, Kislowicz, *supra* note 7.

89 On this point generally, see e.g. Lon L Fuller, "Means & Ends" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart Publishing, 2001) at 69.