CONSTITUTIONAL STRUCTURE AND ORIGINAL INTENT: A CANADIAN PERSPECTIVE

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Canadian legal culture prefers to interpret constitutional-rights and division-of-powers provisions using a progressive or purposive approach rather than varieties of originalism. The progressive approach understands constitutional provisions according to their purposes or goals and often compares those provisions to a "living tree capable of growth and expansion within its natural limits." This Article analyzes how progressive interpretation is, and should be, applied to the functions of legislative and judicial institutions that are integral to Canada's constitutional structure. Part I addresses cases where the Supreme Court of Canada identified the constitutional purposes of four institutions: elected legislative bodies; provincial courts; the Supreme Court of Canada; and the Canadian Senate. In each case, the Court determined whether institutions are part of the constitutional structure and then what actions would hinder their proper function and thus be unconstitutional. Part II addresses how the history of an institution's function contributes to the Court's constitutional interpretations about an institution. In many cases, the Court considers the institutions' evolving roles when determining their constitutional structures and functions; in some cases, however, the Court favors originalist interpretations with appeals to the Founders of the Confederation or their British predecessors. No clear-cut rule distinguishes one use of history from the other. Part III presents four normative reasons why institutions' evolutions should contribute to progressive interpretation. Canadian courts are not bound by the Founders' intentions because the Canadian people have given the judiciary a mandate under the Constitution Act, 1982 to interpret the constitutional text; neither revolution nor democratic ratification established the Canadian Constitution from the Founders to the Constitution Act, 1982; and apart from courts, the Constitution would be too difficult to amend. To these commonly invoked reasons for progressive constitutional in-

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terpretation, this Article presents a fourth reason, drawing on the work of Hans-Georg Gadamer's Truth and Method. The understanding of legal and constitutional concepts, like other areas of inquiry, involves a hermeneutic circle comprising both historical knowledge and present circumstances, not one apart from the other.

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I. INTRODUCTION: THE LIVING-TREE METAPHOR IN THE CANADIAN SOIL

In Canadian constitutional law, there is no doubt that a broad, purposive, and progressive approach is preferred when it comes to the interpretation of the constitutional text, whether it be the Canadian Charter of Rights and Freedoms, enacted in 1982, or the Constitution Act, 1867, which codifies the division of powers in the Canadian federation.[1] The "living tree capable of growth and expansion within its natural limits"[2] was planted into the Canadian constitutional landscape nearly a century ago.

In Canadian legal culture, the living-tree metaphor is often positively contrasted with originalism, with no real effort to distinguish whether it seeks to uncover the will of the Constitution's fathers, or the meaning a constitutional provision had at the time it was enacted, or the effects the provision was intended to have, or even the understanding the ratifiers had at the time it was enacted.[3] The living-tree metaphor has been en-

1. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (UK); Constitution Act, 1867, 30 & 31 Vict., c 3 (UK), reprinted in R.S.C. 1985, app II, no 5 (Can.).

2. Edwards v. AG of Canada, [1930] AC 124 (PC) 136 (appeal taken from Can.) (UK).

3. On the distinction among original *meaning,* original *intent,* original *understanding*, and original *effects*, see Ian Binnie, *Constitutional Interpretation and Original Intent*, 23 SUP. CT. L. REV. 2D 345, 348–49 (2004) (Can.); *see also* Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 379–82 (2013).

dorsed by Supreme Court justices[4] (as former Justice John Major recently pointed out, when interviewed following Justice Scalia's passing, "horses used to have the right of way in Canada")[5] and constitutional-law scholars.[6]

The living-tree metaphor has been endorsed multiple times by the Supreme Court of Canada when analyzing constitutional rights and is often associated not only with a progressive, but also a purposive construction of specific Charter provisions. This latter approach consists of identifying the purposes or goals of the rights protected by a constitutional provision in order to provide it with meaning.[7] As such, a judge using a purposive approach to interpret a constitutional guarantee must "construe Charter guarantees according to their goals" even though he may have no guidance as to "the nature or the meaning of the protected interest."[8] Of course, if the purposes identified are "original purposes," then one may say that purposive interpretation and originalism go hand in hand. But often Canadian courts do not look for original purposes or "purposes the drafters of the constitution had in mind when the text was written down."[9] Rather, they try to identify the interest in need of protection in a contemporaneous, not historical, light so that this type of interpretation can lead to finding purposes that "may have nothing, or very little, to do with what the elected representatives of the Canadian people consented to as a matter of psychological and historical fact."[10]

4. *See, e.g.*, Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization, the Rehnquist Court, and Human Rights*, *in* THE REHNQUIST COURT: A RETROSPECTIVE 234, 242 (Martin H. Belsky ed., 2002); Binnie, *supra* note 3, at 345.

5. Sean Fine, *Retired Canadian Jurists Respectfully Dissent from Scalia's Approach, Style*, GLOBE & MAIL (Feb. 15, 2016, 8:30 PM), http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/retired-canadian-jurists-respectfully-dissent-from-scalias-approach-style/article28762762/.

6. *See* PETER HOGG, CONSTITUTIONAL LAW OF CANADA, 15–49 (student ed. 2011) ("[O]riginalism has never enjoyed significant support in Canada, either in the courts or the academy."); Luc B. Tremblay, *Two Models of Constitutionalism and the Legitimacy of Law: Dicey or Marshall?*, 6 OXFORD U. COMMONWEALTH L.J. 77, 85 (2006) ("The practice of constitutional adjudication in Canada has been radically inconsistent with originalism."); *see also* Hugo Cyr, *Conceptual Metaphors for an Unfinished Constitution*, 19 REV. CONST. STUD. 1, 18–32 (2014); Jean Leclair, *Judicial Review in Canadian Constitutional Law: A Brief Overview*, 36 GEO. WASH. INT'L L. REV. 543, 545–46 (2004).

7. This analytical method was employed notably in several cases. *See, e.g.*, Mounted Police Ass'n of Ont. v. AG of Canada, 2015 SCC 1, [2015] 1 S.C.R. 3, 39 (Can.) (interpreting section 2(d) of the Charter); Figueroa v. AG for Canada, 2003 SCC 37, [2003] 1 S.C.R. 912, 917–18 (Can.) (interpreting section 3 of the Charter); H.M. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 344 (Can.); Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 146 (Can.).

8. Luc B. Tremblay, *L'Interprétation Téléologique des Droits Constitutionnels* [*Purposive Interpretation of Constitutional Rights*], 29 REVUE JURIDIQUE THÉMIS [R.J.T.] 459, 473 (1995) (Can.) (translated). Obviously, as can be seen from *Figueroa*, the interests protected by a constitutional guarantee can be subject to debate. [2003] 1 S.C.R. 912. For the majority in that case, the main purpose of Section 3 of the Charter, which codifies the right to vote, is effective political representation; for the concurring justices, the goal is meaningful participation in the electoral process.

9. Tremblay, *supra* note 6, at 86.

10. *Id.*

The living-tree metaphor is also, today, the Supreme Court's preferred method of constitutional interpretation when it comes to division of powers provisions;[11] although, here again, broad statements ought to be nuanced.[12] Capacity to enter into marriage, for instance, probably did not include same-sex couples in 1867 when Section 91(26) of the Constitution Act, 1867 was enacted. It now does.[13] Unemployment insurance, a competence transferred to the federal parliament in 1940, probably did not include maternity leave at that time; but, in 2005, with women out of the household and occupying the workplace, it did.[14] Interpreting the division-of-powers provisions (Sections 91 and 92 of the Constitution Act, 1867) according to the meaning they had in 1867 simply does not reflect judicial practice because "the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society."[15]

That being said, it would be inaccurate to describe the living-tree metaphor as the sole interpretive method used by the Supreme Court of Canada. The Supreme Court, rather, tends to use the whole spectrum of

11. *See* Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 S.C.R. 698, paras. 22–30 (Can.). For examples of progressive interpretation of division of powers provisions, see HOGG, *supra* note 6, at 15–48.

12. Original intent was notably invoked in the years following Confederation, during "the great fight" or what Justice Ian Binnie calls the "great debate over centralization versus decentralization of powers." Binnie, *supra* note 3, at 360. Commentators and judges disagreed as to the nature of the initial political bargain, especially when it came to interpreting the trade and commerce and the Peace, Order and Good Government provisions of the British North America Act, 1867 (B.N.A. Act). Constitution Act 1867, 30 & 31 Vict., c 3, *reprinted in* R.S.C. 1985, app II, no 5 para. 91 (Can.). The Judicial Committee of the Privy Council, until 1949 the highest Court of Appeal for Canada, issued a number of judgments which sought to protect provincial autonomy by resorting to the notion that the B.N.A. Act embodied a binding compact among federal and provincial governments based on the idea that those entities were co-ordinate and not subordinate to one another. *See* HUGO CYR, CANADIAN FEDERALISM AND TREATY POWERS: ORGANIC CONSTITUTIONALISM AT WORK 96 (2009). In the *Labour Conventions Case,* for example, the Privy Council overturned the Supreme Court of Canada decision which granted the federal Parliament power over the implementation of treaties, based, among others, on the intention of the B.N.A. Act's framers. AG of Canada v. AG of Ontario (Labour Conventions Case), [1937] AC 326 (PC) (appeal taken from Can.) (UK). On the other hand, in the case below, the dissenting Canadian justice believed that "[t]he opinion of the framers of the Constitution . . . deny to the Federal Parliament the authority whereby every provision and every fair implication from the B.N.A. Act may be subverted, the autonomy of the provinces obliterated and the Dominion of Canada converted into a central government . . . ." Reference re Legislative Jurisdiction of Parliament of Canada to Enact the Minimum Wages Act (1935, c 44) (Labour Conventions Case), [1936] S.C.R. 461, 514 (Can.). *See generally* CYR, *supra* (providing an in-depth examination of Canadian federalism and constitutional law as it relates to treaty powers).

13. The Supreme Court, reading the word "marriage" expansively, was unable to conclude that it excludes same-sex marriage. Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 S.C.R. 698 para 29. For a critique of the Court's reasons' shortcomings, see Grant Huscroft, *Vagueness, Finiteness, and the Limits of Interpretation and Construction*, *in* THE CHALLENGE OF ORIGINALISM 203, 209–11 (Grant Huscroft & Barry W. Miller eds., 2011).

14. Reference re Employment Insurance Act (Can.), §§ 22 & 23, 2005 SCC 56, [2005] 2 S.C.R. 669, 677–78 (Can.) (criticizing the Quebec Court of Appeal's originalist take on the division of powers question "rather than the progressive approach," expressed in the "'living tree' metaphor," that the Supreme Court of Canada "has taken for a number of years").

15. Canadian W. Bank v. Alberta, 2007 SCC 22, [2007] 2 S.C.R. 3, para. 23 (Can.).

interpretive methods—sometimes even in a single decision—but the description of this heterogeneous use of interpretive methods is far beyond the scope of this Article.

My objective is narrower: to look at whether progressive interpretation or originalism characterize the judicial interpretation of the constitutional *structure*. Indeed, constitutional interpretation—whether textualist, intentionalist, originalist, progressive, or teleological—which tends to focus on *text* will not be the focus of this Article. Recently, Canadian courts have been more concerned with *institutions* and their functions within the constitutional structure or architecture.[16] Interpretation, as it applies to Charter or division-of-powers provisions, will therefore not be looked at any more deeply in this Article, except in order to buttress the general tendency towards progressive interpretation, to which the last part of this Article returns.

In the past, Supreme Court of Canada decisions have resorted to the notion of constitutional structure in order to derive implicit constitutional principles and insufflate them with normative authority.[17] The current use is different: the Court is now moving away from unwritten constitutional principles and further in the direction of *institutions* playing a fundamental role in the Canadian constitutional structure.[18] Below, I will turn to what this analysis precisely entails; but for now, it is relevant to note that progressive interpretation does not seem to be limited to the two areas (Charter and division of powers) discussed above. In the past, the Supreme Court held that *every* part of the Constitution ought to be interpreted according to the living-tree doctrine.[19] It also found, in *Reference re Senate Reform,* that *all* "constitutional documents" should be subject to purposive interpretation[20] and, in the *Reference re Supreme Court Act*, that purposive interpretation is the preferred method when it comes to interpreting the structural provisions of the Constitution, *i.e.*, those provisions which set out the institutions that play a fundamental role within the structure.[21]

This Article addresses the ways in which progressive and purposive interpretation is, or should be, applied in cases involving the role of institutions that form part of the Canadian constitutional structure. Several

16. Reference re Senate Reform, 2014 SCC 32, [2014] 1 S.C.R. 704, paras. 76, 79 (Can.); Reference re Supreme Court Act, §§ 5 & 6, 2014 SCC 21, [2014] 1 S.C.R. 433, paras. 49, 55, 59, 76, 85.

17. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 34 (Can.), provides a telling example of such use. *See infra* text accompanying note 52; *see also* CHARLES L. BLACK JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 6–8 (1969) (contrasting the "case method" of legal reasoning with the "method" of deriving unwritten principles "from the structures and relationships created by the constitution").

18. *See* Noura Karazivan, *De la Structure Constitutionnelle dans le Renvoi Relatif au Sénat: Vers une Gestalt Constitutionnelle?*, 60 MCGILL L.J. 793 (2015) (distinguishing principled-based and function-based structural analysis).

19. *Canadian W. Bank*, [2007] 2 S.C.R. at para. 23.

20. *Reference re Senate Reform*, [2014] 1 S.R.C. at para. 25.

21. *See Reference re Supreme Court Act*, [2014] 1 S.C.R. at para. 19.

questions must be looked at. First, how does one determine the purpose of a structural provision of the Constitution? Second, is the evolution of the role played by an institution over time relevant in the interpretative process? Third, if it is not, should it be?

In order to answer these questions, Part II will address four case studies of recent structural analysis as it relates to institutions. Part III will focus in more detail on the role of history in the interpretation of the functions these institutions perform in the constitutional structure. Part IV will propose four normative justifications in support of a progressive analysis of constitutional structure. But before we begin our journey, let us return, briefly, to the basics of constitutional interpretation in Canada, as expounded by the Court itself in the *Reference re Senate Reform,* one of the most recent cases building on the notion of constitutional structure.

Canadian constitutional interpretation, in the Court's view, should "be informed by the foundational principles of the Constitution," like the ones identified in the *Reference re Secession of Quebec* (mainly, but not exclusively, "federalism, democracy, the protection of minorities, . . . constitutionalism and the rule of law").[22] The interpreter must consider the text and historical context and be respectful of precedent. He must also, however, construe constitutional documents in a "broad and purposive" manner and place those documents "in their proper linguistic, philosophic, and historical contexts."[23] Finally, the constitutional interpreter must also take into account the structure of the Canadian Constitution. The Constitution "ha[s] an internal architecture[] or basic constitutional structure";[24] it "implements a structure of government."[25] This architecture requires that each element of the Constitution be "linked to the others" and interpreted "by reference to the Constitution as a whole."[26] Constitutional interpretation must make the "structure of government that it seeks to implement" "discern[able]."[27]

As this short summary shows, there is more than one method of interpretation involved at the Supreme Court of Canada, which makes the task of uncovering the role of history in the interpretation of constitutional structure all the more challenging.

22. *Reference re Senate Reform*, [2014] 1 S.R.C. at para. 25.
23. *Id.*
24. *Id.* at para. 26 (internal quotation marks and citations omitted).
25. *Id.* at para. 25.
26. *Id.* at para. 26 (internal quotation marks and citation omitted).
27. *Id.*

II. CASE STUDIES OF STRUCTURAL ANALYSIS

The following Part identifies four case studies which illustrate how the notion of constitutional structure came to be interpreted by the Supreme Court of Canada.

There can be several ways to mobilize the idea of "constitutional structure" and "basic structure of the Constitution."[28] In this Part, I am interested in cases where structural analysis is employed to identify the parts (institutions) that make up the whole (the constitutional structure) to protect the features essential to the proper functioning of those institutions. These cases not only define the parts *from* the whole, but also the relationship of the parts *to* the whole. The result of this structural interpretation, as I will demonstrate, is to shelter the essential features to the proper functioning of the parts from unilateral legislative intervention; hence, to constitutionalize these features.

A. The Case of Elected Legislative Bodies

The first example I consider is *Ontario (AG) v. OPSEU*.[29] In this case, the constitutional validity of provisions in a provincial act that forbade public servants from being candidates in federal elections without obtaining leave to that end was put in question.[30] Justice Beetz, joined by a majority of his colleagues, held that the impugned legislation fell within the province's power to amend its own Constitution, pursuant to Section 92(1) of the Constitution Act, 1867,[31] as well as within its power to regulate provincial public servants.[32] As a result, they were *intra vires* the province.

During oral pleadings, the appellants relied on what they argued was implicit protection of the fundamental right to participate in certain political activities. It is during the assessment of this argument that the majority resorted to structural analysis in order to define the role of certain political institutions within the Canadian constitutional structure.

According to the majority, elected legislative bodies are a part of the "basic structure of the Constitution."[33] Their effectiveness depends

28. *See, e.g.*, Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52, [2001] 2 S.C.R. 781, paras. 31–32 (Can.) (discussing the "tripartite constitutional structure"); AG of Ontario v. Pembina Exploration Can. Ltd., [1989] 1 S.C.R. 206, 217 (Can.) (discussing the "essentially unitary nature of the Canadian court system"); *see* R. v. S.(S.), [1990] 2 S.C.R. 252, 290. (Can.) (stating that the Canadian "constitutional structure . . . both permits and encourages federal-provincial cooperation").

29. AG of Ontario v. OPSEU, [1987] 2 S.C.R. 2 (Can.).

30. Public Serv. Act, R.S.O. 1990, c P.47, § 12(1)(a) (Can.); Public Serv. Act, R.S.O. 1970, c 386, § 12(1)(a) (Can.).

31. *OPSEU*, [1987] 2 S.C.R. at 45–46 (Beetz, J., majority opinion); *see* Constitution Act, 1867, 30 & 31 Vict., c 3, § 92(1) (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

32. *OPSEU*, [1987] 2 S.C.R. at 49, 57.

33. *Id.* at 57.

on free public discussion, or, in other words, on the right of discussion and debate. As such, "neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure."[34] Justice Beetz, however, thought that this "right of discussion and debate" was not infringed upon in the case at bar.[35] Indeed, the act dealt only accessorily with federal elections.[36] Since they did not hinder the proper functioning of a key institution within the Canadian constitutional structure, the provisions of the act in question were not unconstitutional.

Structural analysis led Justice Beetz through a three-step analytical framework, where he 1) identified the institution part of the Canadian constitutional structure; and 2) singled out the features essential to its proper functioning. Since there was no adverse effect on the institution's proper functioning, he concluded that 3) the impugned legislation was *intra vires* the adopting province. But the opposite result could have been reached, as the next case illustrates.

In *New Brunswick Broadcasting,*[37] the majority of the Supreme Court of Canada ruled that unwritten legislative privileges have constitutional status, even though there is no textual constitutional protection. It found, first, that "[t]he legislative chamber is at the core of the system of representative government."[38] To function properly, the chamber must be a place where debates are conducted without any interference. Strangers are able to "interfere with the proper discharge of that business."[39] It thus follows that the legislature must have the right, "if it is to function effectively," to exclude strangers.[40] In other words, the elected legislative bodies are presumed to "possess such constitutional powers as are necessary for their proper functioning."[41]

Thus, the majority of the Court found that privileges are elements essential to the proper functioning of the legislative assembly, an institution that is an integral part of the Canadian constitutional structure. As such, they are shielded from unilateral ordinary legislation, which makes

34. *Id.*

35. *Id.* (internal quotation marks and citation omitted). In the case at bar, the Court was of the opinion that the "impugned provision[]," whose purpose is to guarantee a politically independent public service, ensures the proper functioning of a "responsible government." *Id.* at 48.

36. *Id.* at 57.

37. N.B. Broad. Co. v. Speaker of the House of Assembly of Nova Scotia, [1993] 1 S.C.R. 319, 319.

38. *Id.* at 387. This was the view of Justices L'Heureux-Dubé, Gonthier, McLachlin and Iacobucci, with whom Justice LaForest concurred in a separate opinion.

39. *Id.*

40. *Id.*

41. *Id.* at 374–75. Justices Sopinka and Cory, writing separate opinions, did not fail to mention the paradox that constitutionalizing legislative privileges created: the taking away of the control legislative assemblies previously exercised on the privileges and their evolution. According to Justice Sopinka, "one would expect something more than a general reference to a 'Constitution similar in Principle' in a Preamble in order to have this effect." *Id.* at 396 (citation omitted).

this structural analysis fit squarely within the three-step analytical framework introduced above.

B. The Case of Provincial Courts

In the *Reference re Provincial Court Judges*, structural analysis is used both to discern an unwritten principle of the Constitution[42] and to identify the role of an institution (provincial courts) within the constitutional structure. *OPSEU* is considered with approval and applied by analogy.[43]

In this case, the Supreme Court had to determine whether a province could, through its legislature, unilaterally reduce the salaries of provincial-court judges. According to Chief Justice Lamer, and supported by a majority of his colleagues, provincial courts are a part of the Canadian constitutional structure.[44] The constitutional similarity with the United Kingdom, enshrined in the preamble of the Constitution Act, 1867, requires that the "legal and institutional structure"[45] of the Canadian Constitution be similar to that from which it emerged. Judicial independence is crucial to the proper functioning of Canadian judicial institutions. Chief Justice Lamer relied, in this regard, on a statement made by Justice Le Dain in a previous case: "Without that confidence, the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial and that the test for independence should include that perception."[46]

Notwithstanding the fact that neither the Constitution Act, 1867, nor the Canadian Charter of Rights and Freedoms made explicit provincial court's constitutional guarantee of judicial independence, the majority found that those courts ought to be bound by such duty. Structural analysis was used here to: 1) recall that, because of the Canadian Constitution's similarity to the United Kingdom's, courts in general are an integral part of the Canadian constitutional structure; 2) establish the importance of judicial independence for the proper functioning of the courts, including provincial courts; and 3) conclude that provincial legis-

42. Reference re Provincial Judges, [1997] 3 S.C.R. 3, para. 95 (Can.) (discussing the use of unwritten constitutional principles to "fill out gaps in the express terms of the constitutional scheme").

43. *Id.* at para. 108 (Lamer, C.J.) ("It follows that the same constitutional imperative—the preservation of the basic structure—which led Beetz J. [in AG of Ontario v. OPSEU, [1987] 2 S.C.R. 2 (Can.)] to limit the power of legislatures to affect the operation of political institutions of our constitutional system, also extends protection to the judicial institutions of our constitutional system.").

44. *Id.* (citations omitted) ("However, political institutions are only one part of the basic structure of the Canadian Constitution. As this Court has said before, there are three branches of government—the legislature, the executive, and the judiciary."). In other words, the courts are equally "definitional to the Canadian understanding of constitutionalism as are political institutions." *Id.* (internal quotation marks and citation omitted).

45. *Id.* at para. 96.

46. *Id.* at para. 112 (quoting Valente v. The Queen, [1985] 2 S.C.R. 673, 689 (Can.)).

latures cannot violate judicial independence by unilaterally reducing the salaries of provincial judges.[47] This final conclusion provides an implicit limit on the provincial head of power relating to the administration of justice pursuant to Section 92(14) of the Constitution Act, 1867.[48]

47. *Id.* at paras. 105–06, 115, 197.

48. *Id.* at paras. 296–97 (LaForest, J., dissenting) (italics omitted) (disagreeing with the way the majority set aside the written text of Sections "92(4) and 92(14) of the *Constitution Act, 1867*"). Justice LaForest notes that Sections 96–100 Constitution Act, 1867 and Section 11 Canadian Charter of Rights and Freedoms are two explicit sources of constitutional law. *Id.* at paras. 297–98, 303. He contends they are sufficient to guide judicial interpretation of the judiciary's independence. *Id.* The court's commentary that goes far above and beyond the parties' submissions to the Court is not a part of judicial responsibilities, according to Justice LaForest. *Id.* at paras. 297–302.

C. The Case of the Supreme Court of Canada

In the *Reference re Supreme Court Act*, the Supreme Court was asked to revisit the meaning of the expression "Constitution of Canada" found in Part V of the Constitution Act, 1982, which contains the five amending formulas.[49] In answering the second question, the Court sought to determine whether modifying certain provisions of the Supreme Court Act[50] dealing with the composition of the Supreme Court qualifies as an amendment to the "Constitution of Canada." If it did, the unilateral modification proposed by Parliament would have been unconstitutional.[51]

This was not the first time the Court was asked to consider the meaning of the words "Constitution of Canada." In the *Reference re Secession of Quebec*, the meaning of the expression was fleshed out: the Court held that it certainly includes the documents mentioned in Section 52(2) of the Constitution Act, 1982, but it also includes constitutional principles and conventions.[52] A question was raised as to whether the documents listed in Section 52(2) of the Constitution Act, 1982 are the only texts with constitutional status, or could the nonexhaustive list be supplemented with *quasi*-constitutional statutes or, at the very least, with certain legislative provisions from those statutes?

In the *Reference re Supreme Court Act*, instead of dealing with the thorny issue of the constitutional status of the Supreme Court Act—which is an ordinary law that does not appear in the list of constitutional texts in Section 52(2) of the Constitution Act, 1982—the Court used structural analysis as a means of buttressing the constitutional status of the Court itself. Structural analysis led to reading the expression "amendment [made] to the Constitution of Canada," found in Part V of the Constitution Act, 1982, as including any modification to the features essential to the proper functioning of the Supreme Court of Canada.[53]

So, in the case at bar, what were those features essential to the proper functioning of the Court? In order to fulfill its role as impartial arbiter within the Canadian federation, the Supreme Court must include,

49. Reference re Supreme Court Act, §§ 5 & 6, 2014 SCC 21, [2014] 1 S.C.R. 433 (Can.); *see* Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (UK).

50. Supreme Court Act, R.S.C. 1985, c S-26 (Can.).

51. The first question formulated by the Attorney General of Canada, with which we will not deal here, focused on the interpretation of Sections 5 and 6 of the Supreme Court Act. *Reference re Supreme Court Act*, [2014] 1 S.C.R. at para. 2. The Court concluded that the three Supreme Court appointments reserved for Quebec judges were only available to judges of the Quebec Court of Appeal, the Quebec Superior Court, and to *current* members of the Quebec Bar, thereby excluding judges of the Federal Court and Federal Court of Appeal. *Id.* at paras. 3–4. We remind the reader that it was the nomination of Judge Nadon, supernumerary judge of the Federal Court, to a Quebec position that triggered this reference. *Id.* at para. 3.

52. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 32 (Can.).

53. *See* Procedure for Amending Constitution of Canada, Part V of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (UK).

amongst others, an adequate delegation of judges from the province of Quebec. This means that a modification of the "composition of the Supreme Court" cannot be done unilaterally. On the contrary, it requires the unanimous consent of Parliament and the provincial legislatures.[54]

More broadly, this also means that none of the legislative levels can enact laws that hinder the Supreme Court's "proper functioning." This is where the Court bridged structural analysis and the text of Part V. Indeed, the Court emphasized that "Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the *Supreme Court Act.*"[55]

According to the Court, two other essential features ought to be recognized: "the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence."[56] This conclusion is supported by the requirements of a federal system: the existence of a constitutional arbiter is indeed a prerequisite to the very notion of federalism.[57] As such, the very existence of the Court, along with its jurisdiction and its independence, are essential to its proper functioning—and to that of the Canadian federation—and are thus constitutionally protected. Consequently, the power formally attributed by Section 101 of the Constitution Act, 1867, was modified since Parliament must preserve the essential features to the proper functioning of the Court and cannot abolish it.[58]

Once again, the relational and functional aspect of structural analysis led the Court to: 1) identify an institution within the Canadian constitutional structure; 2) isolate essential features to its proper functioning; and 3) conclude that it is impossible to enact unilateral legislative changes that would hinder these essential features.

54. *See* Constitution Act, 1982, § 41(d) (specifying that the composition of the Supreme Court of Canada is a matter for which "unanimous consent" is necessary to amend the Constitution of Canada). In the case at bar, the proposed amendments would have changed the eligibility criteria for appointments to the Supreme Court. The Court found that substantive changes to eligibility requirements affect the "composition of the Supreme Court." *Reference re Supreme Court Act*, [2014] 1 S.C.R. at para 105. As such, the unanimous consent of Parliament and all ten provinces would be required.

55. *Reference re Supreme Court Act*, [2014] 1 S.C.R. at para. 94. The Supreme Court finally put an end to the long debate over the "empty vessels" theory all the while avoiding elevating the Supreme Court Act to the rank of constitutional document. *Id.* at paras. 97–101.

56. *Id.*

57. *See* KENNETH CLINTON WHEARE, FEDERAL GOVERNMENT 64 (Oxford Univ. Press 4th ed. 1963).

58. *See Reference re Supreme Court Act*, [2014] 1 S.C.R. at para. 101 (italics omitted) ("The unilateral power found in section 101 of the Constitution Act, 1867 has been overtaken by the Court's evolution in the structure of the Constitution as recognized in Part V of the Constitution Act, 1982. As a result, what section 101 now requires is that Parliament maintain—and protect—the essence of what enables the Supreme Court to perform its current role.").

D. The Case of the Canadian Senate

Canada is the only federation of the world where the federated entities (the provinces) do not formally participate in the selection of the senators that are deemed to represent them.[59] The Governor General of Canada appoints all senators pursuant to Section 24 of the Constitution Act, 1867. In 2014, the Governor in council submitted, among others, the following questions to the Supreme Court of Canada:

> Is it within the legislative authority of the Parliament of Canada, acting pursuant to Section 91 of the Constitution Act, 1867, or Section 44 of the Constitution Act, 1982, to enact legislation that provides a means of consulting the population of each province and territory as to its preferences for potential nominees for appointment to the Senate . . . ?
>
> Is it within the legislative authority of the Parliament of Canada, acting pursuant to Section 91 of the Constitution Act, 1867, or Section 44 of the Constitution Act, 1982, to establish a framework setting out a basis for provincial and territorial legislatures to enact legislation to consult their population as to their preferences for potential nominees for appointment to the Senate . . . ?[60]

The Court chose to determine whether, *a priori*, the proposed legislative provisions amended the Constitution of Canada before making a decision on the proper procedure for amending the Constitution.[61] A different approach could have been to identify the pith and substance of the act[62] in order to consider one of the Attorney General of Canada's arguments—according to which the act was a valid exercise of Parliament's general power to "make laws for the Peace, Order, and good Government of Canada," pursuant to the opening paragraph of Section 91 of the Constitution Act, 1867.[63] The Court, however, preferred to proceed by

59. Ronald L. Watts, *Federal Second Chambers Compared*, *in* THE DEMOCRATIC DILEMMA: REFORMING THE CANADIAN SENATE 35, 38 (Jennifer Smith ed., 2009).

60. Reference re Senate Reform, 2014 SCC 32, [2014] 1 S.C.R. 704, para. 5 (Can.) (italics omitted).

61. *Id.* at para. 21.

62. This approach was favored, notably, by Charles-Emmanuel Côté, *Modifier la Constitution du Canada sans la Modifier? Les Limites de la Compétence Unilatérale Fédérale sur le Sénat* [*Amending the Constitution Without Amendment? The Limits of the Unilateral Federal Power Over the Senate*] 5 REVUE QUÉBÉCOISE DE DROIT CONSTITUTIONNEL [R.Q.D.C.] 83, 89 (2013) (Can.); Catherine Mathieu & Patrick Taillon, *Aux Frontières de la Modification Constitutionnelle: le Caractère Para-constitutionnel de la Réforme du Sénat Canadien* [*On the Fringe of Constitutional Amendment: the Para-Constitutional Nature of Senate Reform in Canada*], 5 R.Q.D.C. 7, 24 (2013). According to this author, "to be constitutionally valid, the statute's 'pith' must fall within the substance of a head of power assigned to the adopting level of government. . . . The pith and substance doctrine applies indubitably to unilateral amendments to the Constitution." Still according to Mathieu and Taillon, the pith of the proposed legislation "is to amend the Constitution of Canada with regard to the process by which Senators are selected without changing the Governor General's formal power to appoint Senators." Mathieu & Taillon, *supra*, at 91 (translated).

63. Distribution of Legislative Powers, Part VI of the Constitution Act, 1867, *being* Schedule B to the Canada Act, 1982, c 11 (UK).

addressing the issue of "constitutional amendment[s] in Canada generally."[64]

In a manner similar to the approach taken in the *Reference re the Supreme Court Act* that preceded this case by a few months, the Supreme Court used structural analysis to define the expression "Constitution of Canada." This expression is not limited to the documents listed in Section 52(2) of the Constitution Act, 1982.[65] As it had stated in the *Reference re the Secession of Quebec* and later in the *Reference re the Supreme Court Act*, Section 52(2) does not offer a comprehensive definition of the Constitution of Canada.[66] It has "an architecture, a basic structure. *By extension*, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture."[67]

Thus, according to this view of the Constitution of Canada, one ought to examine the nature of this "extension" on a case-by-case basis. In other words, the judge tasked with determining the constitutional validity of an act must decide beforehand whether the impugned provision modifies the Constitution's architecture or structure—an extraordinary power if there ever was one.

In the case at bar, the Court was of the opinion that the Senate, as an institution inherited from British bicameralism, was a part of the Canadian constitutional structure—a structure set out in the Constitution Act, 1867, the preamble of which states that it should be "similar in Principle to that of the United Kingdom."[68]

What was the role that the Senate fulfilled? The Senate fulfills two roles in Canada,[69] but it is the role of a complementary legislative body tasked with casting a second, more watchful eye on proposed legislation which principally occupied the Court. Indeed, the Court reiterated the intent of the drafters of the Constitution Act, 1867, to create an independent and impartial Upper Chamber, sheltered from a "partisan political arena that required unremitting consideration of short-term political objectives,"[70] whose principal role would consist in providing "sober second thought"[71] without setting itself "in opposition against the deliberate

64. *Reference re Senate Reform*, [2014] 1 S.C.R. at para. 22.

65. *See* Constitution Act, 1982, § 52(2), *being* Schedule B to the Canada Act, 1982, c 11 (UK) (italics omitted) ("The Constitution of Canada includes (a) the *Canada Act 1982*, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b).").

66. *See, e.g.*, Reference re Supreme Court Act, §§ 5 & 6, 2014 SCC 21, [2014] 1 S.C.R. 433, paras. 97–98 (Can.); Reference re the Secession of Quebec, [1998] 2 S.C.R. 217, para. 34 (Can.).

67. *Reference re Senate Reform*, [2014] 1 S.C.R. at para. 27 (emphasis added).

68. *Id.* at para. 14 (citation omitted).

69. The role of a federal chamber, in charge of representing the interests of the federated entities, and the role of a chamber of sober second thought. *Id.* at paras. 55–59.

70. *Reference re Senate Reform*, [2014] 1 S.C.R. at para. 57.

71. *See id.* at paras. 15, 17, 52, 54, 56, 60, 63, 70, 79, 81–82, 88 (emphasizing the importance of this role).

and understood wishes of the people,"[72] expressed through their elected representatives in the Lower House.

What are the essential elements that allow the Senate to fulfill this role? Relying again on the intent of the 1867 framers, if the senators were to succeed in fulfilling this delicate task—*i.e.*, being both detached enough to evaluate proposed legislation and sufficiently restrained to abstain from formally opposing it (except in extreme cases)—they had to be appointed and not elected.

Looking at the proposed consultative election reforms, the Court found that the federal act, if enacted, "would fundamentally modify the Constitution's architecture"[73] since the senators could—and would have to—campaign in their respective provinces, affiliate themselves to provincial political parties, or announce electoral platforms. Even though they would still be named by the Governor General on the advice of the Prime Minister, thus leaving unchanged Section 24 of the Constitution Act, 1867, their selection would be fundamentally different. In the end, the senators would enjoy greater legitimacy, having been chosen by popular vote (which seems, strangely, to be problematic).

As a result, on the issue of consultative elections, constitutional structure was resorted to in order to: 1) identify the Senate as a part of the constitutional structure; 2a) single out its role as a chamber of sober second thought; 2b) extract the elements essential to the proper functioning of the Senate in fulfilling this role; and 3) place the "independence" of the Senate outside of unilateral legislative reach.

According to the Court, the consultative elections "would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought."[74]

In order to fulfill this role, the Senate must be (or, more accurately, it was initially expected that the Senate would be) independent from the "partisan political arena,"[75] and, in order to accomplish this, it seems that it is essential that its members be appointed by the federal executive branch.[76] As such, the nonelection and nonselection of senators by the provinces they represent becomes constitutionally entrenched, since it is an essential feature to the proper functioning of the Senate as a chamber of sober second thought.

Since the proposed legislation would modify the Canadian constitutional structure, there would be, "by extension," a modification of the Constitution of Canada which results, as we saw in the examples above, in the sheltering of the essential features to its proper functioning from

72. *Id.* at para. 58 (internal quotation marks and citation omitted).
73. *Id.* at para. 60.
74. *Id.* at para. 54.
75. *Id.* at para. 57.
76. *Id.* at para. 59.

unilateral legislative action by any level of government, thus invalidating this aspect of the proposed legislation.[77]

E. Conclusion

As we have seen in this overview, interpretation that focuses on the constitutional structure commits the interpreter to a three-part line of inquiry. The first step consists of determining what the institutions are that make up Canada's constitutional structure. The second step leads the interpreter to identify the fundamental roles these institutions play within the constitutional structure and their relationships with the other structural institutions. The third step allows the interpreter to shield from unilateral changes those features that are essential to the fulfillment of the fundamental role played by the institution. As a result of this analysis, actions that would hinder the institution's proper functioning become unconstitutional, while features essential to the proper functioning of these institutions become constitutionally protected from unilateral legislative modification. In other words, no legislative body can unilaterally modify the structure of the Canadian Constitution. This type of structural analysis allows for a relational and functional understanding of the Constitution (the "whole"), the identification of its "parts," and an examination of the parts in light of the Constitution's objectives of efficiency and functionality.

A few months after the Senate referenda, the Supreme Court again made use of this new analytical framework in a case involving a province's court-hearing fees. The majority of the Supreme Court of Canada assessed the constitutional validity of a British Columbia statute that levied court hearing fees that were so high as to prevent a couple undergoing divorce proceedings to have their day in court.[78] The Supreme Court of Canada concluded that: 1) the superior courts of inherent jurisdiction are an institution within the Canadian constitutional structure pursuant to Section 96 of the Constitution Act, 1867; 2) their fundamental function is to resolve disputes between individuals and to ensure a certain "book of business"; and 3) any legislative provision that prevents this business from being done or that restricts access to the courts is unconstitutional.[79] The Court thereby recognized a certain right of access to the Canadian superior courts and limited the provinces' power concerning the administration of justice pursuant to Section 92(14) of the Constitution Act, 1867. In doing so, it skilfully avoided buttressing its conclusions regarding

77. The precise feature of this architecture that would be modified, the choice of role that the Supreme Court made and the impact on the amending formula, have been considered in earlier work. *See* Karazivan, *supra* note 18.

78. Trial Lawyers Ass'n of B.C. v. AG of British Columbia, [2014] 3 S.C.R. 31 (Can.).

79. *Id.* at para. 32.

the constitutional validity of the provincial act solely on the rule of law, an unwritten principle.[80]

III. HISTORY AND STRUCTURAL ANALYSIS

In the following Part, I will dwell upon the role of history in each of the structural-interpretation cases analyzed above. When the Supreme Court of Canada determines the features essential to the proper functioning of an institution within the constitutional structure, does it do so by considering the institution's evolving role over time? In other words, does the relational and functional aspect of structural analysis require, or attract, a progressive interpretation of the role of an institution within the Canadian constitutional structure? Or does it call for an investigation into the intentions of the framers of either the 1867 B.N.A. Act or the 1982 Constitution Act?

The role of history in the interpretation of the Senate reference was one of the contentious issues between the interveners. More specifically, Quebec and Canada's Attorneys General did not agree on the question of whether *institutions* should be interpreted according to the living-tree doctrine. According to the Attorney General of Quebec, the intention of the 1867 framers regarding the role of the Senate ought to be respected, for the interpretation of an institution's role should be static:

> However, progressive constitutional interpretation is not relevant when justifying changes to institutions at the heart of Canadian federalism; when justifying their modernization. This interpretative approach is better suited to the text of the Constitution and is not a method that permits to pass value judgment on an institution.[81]

Conversely, the Attorney General of Canada favored a progressive interpretative approach to the role of the Senate:

> [T]here is no compelling reason to read that clause as demanding an inquiry into what the 1867 framers thought that term meant in respect of the Senate, and then treating any deviation from the 1867 vision as requiring a more exacting amending procedure. In 1867, Sir John A. Macdonald foresaw an Upper Chamber of prosperous gentlemen of substance in the Upper House; he did not want an Upper House of landed nobility as found in Great Britain. But nei-

80. Indeed, it is only after having concluded that the provision is unconstitutional that the Court added that the rule of law further supported its conclusion. *Id.* at para. 38. This arguably reinforces the distinction between principles-based structural analysis and function-based structural analysis. *See* Karazivan, *supra* note 18.

81. Factum on Appeal of Intervenant AG of Quebec at para. 72, Reference re Senate Reform, 2014 SCC 32, [2014] 1 S.R.C. 704 (translated), http://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=35203.

> ther vision accords with contemporary expectations of who should sit in the Senate.[82]

On this point, the Supreme Court of Canada seemed to agree with the Attorney General of Quebec. Indeed, the Court greatly relied on the intent of the 1867 framers and, in particular, on the fact that they "deliberately"[83] wanted the senators to be named rather than elected in order to serve their role as a chamber of sober second thought detached from political considerations. The Court insisted on the fact that this choice was not happenstance. The Court wrote that, according to the drafters of the Constitution Act, 1867, the senators did not have the "legitimacy that stem[s] from popular election."[84] The Court relied, in particular, on a declaration made by Sir John A. Macdonald, according to which appointments to the Legislative Council, what is now the Senate, ought not be left in the hands of the electorate in order to avoid conflicts between the two Chambers, or, worse still, that the Senate oversteps its role of "calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill considered legislation which may come from that body" without being "in opposition against the deliberate and understood wishes of the people."[85]

Had the Court taken a progressive view on the role of the Senate as a chamber of sober second thought, it could have considered the fact that, far from the ideal conceived by the Fathers of Confederation, the vast majority of senators are nominated on a partisan basis.[86] The Court indeed overlooked the important discrepancy between the ideal conceived by the Fathers of Confederation of an independent Senate free from political pressures and modern times, where the Senate's lack of democratic legitimacy (and political neutrality) calls for a restraint which only the most naive would describe as sobriety. According to some, their nomination, perceived as a political reward, consists of "the choicest plums in the patronage basket."[87] The nomination of senators by unilateral, federal executive decision has not, in other words, provided the Senate with the great legitimacy that was intended.[88] To be sure, the proposed consultative elections (whether the product of federal or provin-

82. Factum on Appeal of Appellant AG of Canada at para. 85, Reference re Senate Reform, [2014] 1 S.R.C. 704 (translated), http://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=35203.

83. Reference re Senate Reform, [2014] 1 S.C.R. at para. 56 (Can.).

84. *Id.* at para. 58.

85. *Id.*

86. *See Appointments to the Senate by Prime Minister*, PARLIAMENT OF CAN., http://www.lop.parl.gc.ca/parlinfo/compilations/senate/Senate_NominationByPM.aspx (last visited Jan. 16, 2017) (listing Senate appointments by the Prime Minister from 1867 to 2014).

87. Mark D. Walters, *The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7*, 7 J. PARLIAMENTARY & POL. L. 37, 43 (2013) (quoting ROBERT MACGREGOR DAWSON, THE GOVERNMENT OF CANADA 207 (Univ. of Toronto Press 4th ed. 1963)).

88. From 1994 to 2008, for instance, senators rejected only two Bills out of 465 and amended only 9%. Andrew Heard, *Constitutional Doubts about Bill C-20 and Senatorial Elections*, *in* THE DEMOCRATIC DILEMMA: REFORMING THE CANADIAN SENATE 81, 95 (Jennifer Smith ed., 2009).

cial legislation) would not have increased the level of independence of Senators; but the other fundamental role of the Senate, that of representing the interests of the federated entities (the provinces) on an equal basis, would have been fostered.

Moreover, the Supreme Court of Canada gives little consideration to the impact of the enactment of the Constitution Act, 1982, on the role of the Canadian Senate.[89] The adoption of the Constitution Act, 1982—and, in particular, Section 1 of the Charter, which is the justificatory provision—effectively transferred part of the duty to act as impartial reviewers of the legislation onto the courts, at least when it comes to the review of the impacts of an act or bill on rights and freedoms. José Woehrling summarizes the situation in these words:

> The introduction of the Canadian Charter of Rights and Freedoms made the courts far more efficient at guarding minority rights than the Senate ever was. Similarly, the role played by the courts as a result of Section 1 of the Charter when examining the reasonableness of a statute enacted by Parliament forces them to provide the sober second thought that the 1867 framers attributed to the Senate.[90]

The constitutional legitimacy conferred by Sections 1 and 52(1) of the Constitution Act, 1982, and the frequent recourse to the reference jurisdiction of the Supreme Court of Canada, resulted in the courts, in general, and the Supreme Court of Canada in particular, taking on the role of chamber of sober second thought.

By contrast, most of the other cases reported in Part III proceed with a progressive interpretation of the role of institutions that are part of the constitutional structure. In the *Reference re Supreme Court Act,* the role of the Supreme Court of Canada was examined, not as it was in 1875 when it was created nor when it was the final tribunal for Canada, but as it currently is. By considering the evolving role of the Court from its creation to the enactment of the Constitution Act, 1982, the Court's analysis offered a dynamic image of the Canadian constitutional structure.

The Court pointed out that when appeals to the Privy Council were abolished in 1949, the Supreme Court became the court of last resort for matters relating to the division of powers. From then on, the Court "assumed a vital role as an institution forming part of the federal system" and "became central . . . to the development of a unified and coherent Canadian legal system."[91] In 1982, with the adoption of Section 52(1) of the Constitution Act, 1982, the Court's role was further "enhanced" and

89. Or, to borrow the expression of Justice LeBel in *R. v. Demers*, the Court failed to reassess the institution's role "in light of the evolution of our constitution since the entrenchment of the Charter." [2004] 2 S.C.R. 489, 2004 SCC 46, para. 90 (Can.) (italics omitted).

90. José Woehrling, *La Modification par Convention Constitutionnelle du Mode de Désignation des Sénateurs Canadiens*, 39 R.D.U.S. 115, 139–40 (2008–09) (Can.) (italics omitted) (translated).

91. Reference re Supreme Court Act, 2014 SCC 21, [2014] 1 S.C.R. 433, para. 85 (Can.).

its status as a "constitutionally protected institution" was confirmed.[92] Indeed, because Section 52 establishes the primacy of the Constitution of Canada, and requires, as a corollary, a neutral arbiter whose decisions are authoritative, this new role, or rather the confirmation of this role, brings consequences of the sort explored above.[93]

These historical developments have made it so the Court "emerged as a constitutionally essential institution engaging both federal and provincial interests. Increasingly, those concerned with constitutional reform accepted that future reforms would have to recognize *the Supreme Court's position within the architecture of the Constitution.*"[94] It is, thus, by actualizing the role of the Supreme Court of Canada that constitutional structure was interpreted. Had the Court simply looked at its role in 1875, the conclusion would probably have been different.

The same can be said of the majority opinion in the *Reference re Provincial Court Judges*.[95] In the United Kingdom, only the superior courts' independence benefits from constitutional protection. Despite this, Chief Justice Lamer refused to restrict the role of the courts to what is held in English law. Even though English law limits its protection to superior court judges, "our constitution," he said, "has evolved over time."[96] By updating the framers' intent, judicial independence ceases to be a principle directed solely at superior courts; it "now extends to all courts."[97] On the topic of provincial courts, he wrote:

> I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role *has grown over the last few years*, it is clear therefore that provincial courts must be granted some institutional independence.[98]

Thus, in order to justify a place for provincial courts within the Canadian constitutional structure, Chief Justice Lamer considered the evolution of their role over time, especially since the enactment of the Canadian Charter of Rights and Freedoms. The role of provincial courts—and that of tribunals generally—is perceived in an evolving, as opposed to static, manner.

Finally, the same can also be said of *New Brunswick Broadcasting,* in which Justice McLachlin, writing for the majority, inquired whether the privilege was still needed at the time of the decision in 1992:

92. *Id.* at para. 88.
93. *Id.* at para. 89.
94. *Id.* at para. 87 (emphasis added).
95. *See* Reference re Provincial Court Judges, [1997] 3 S.C.R. 3, para. 96 (Can.).
96. *Id.* at para. 106.
97. *Id.*
98. *Id.* at para. 126 (emphasis added).

> The fact that this privilege [to exclude strangers from the legislative chamber (who might impede legislative business)] has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. However, it behooves us to ask anew: in the Canadian context of 1992, is the right to exclude strangers necessary to the functioning of our legislative bodies?[99]

Even if the privilege to exclude strangers was recognized as being necessary from the start of the Confederation in 1867,[100] it was essential for the Court to make sure this privilege was still necessary to the proper functioning of elected legislative bodies at the time of issuing the judgment. After considering the current situation, and also taking into consideration the impact the Charter entrenchment had on the role of governments, the Court came to the conclusion that the privilege was still necessary.[101] The power to eject strangers from the legislative assembly is a parliamentary privilege essential to the proper functioning of the legislative assembly which confers upon it constitutional protection, "even conceding that our notions of what is permitted to government actors have been significantly altered by the enactment and entrenchment of the *Charter*."[102]

On the other hand, the jurisdiction of the Superior Courts, in *Trial Lawyers Association of British Columbia*[103] was strongly influenced by the "historic task of the superior courts"[104] and the "constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*."[105] Originalism seems to better describe the Court's interpretative method in this case than any "living tree" approach, although the end result, the constitutional recognition of access to justice, is undoubtedly progressive.

This brief overview leads to the conclusion that when the role of an institution is at stake, such as elected legislative bodies, the Supreme Court or provincial courts, and structural analysis is at play, there is a tendency to favor progressive interpretation. On the other hand, the role of the Senate on the question of consultative elections, and that of the superior courts, has been interpreted with an originalist lense.[106] There

99. *See* N.B. Broad. Co. v. Nova Scotia, [1993] 1 S.C.R. 319, 387 (Can.).
100. *Id.* at 378–79 (citing the *preamble* to the Constitution Act, 1867 as authority for the privilege).
101. *Id.*
102. *Id.* at 372 (italics omitted).
103. *See* Trial Lawyers Ass'n of B.C. v. British Columbia, 2014 SCC 59, [2014] 3 S.C.R. 31, para. 32 (Can.).
104. *Id.*
105. *Id.* at para. 39 (italics omitted).
106. The same could be said about *AG of Ontario v. OPSEU.* [1987] 2 S.C.R. 2 (Can.). In determining whether a legislative provision was part of the Constitution of Canada, Justice Beetz considered whether the provision is essential to the implementation of the federal principle or, to put it dif-

seems to be no clear-cut rule as to *when* to resort to the intent originally present during the institutional-design phase. As Justice Binnie eloquently writes, references to the original intent of the framers rather appear to be "little more than rhetorical flourishes paraded to confirm a view reached by other means."[107]

In the final Part, I will attempt to identify four normative justifications for privileging an evolutionary take on, instead of an originalist reading of, the constitutional structure and institutional design.

IV: PURPOSIVE AND PROGRESSIVE INTERPRETATION AND THE CONSTITUTIONAL STRUCTURE

It seems that simply invoking the living-tree metaphor is insufficient to advocate in favor of a progressive and purposive interpretation of the role of an institution within the Canadian constitutional structure. Why should institutions be interpreted progressively and not according to the historical intent of the Fathers of Confederation? To be sure, the Supreme Court of Canada has, in the past, referred to original meaning, or original intent, or "political bargains" when interpreting the role of some key institutions in the Canadian constitution, such as the superior courts[108] and the Senate.[109] It has also done so in cases which, like those involving the meaning of "Indians," triggered the interpretation of the "compact" or original political arrangements behind the major constitutional texts.[110]

Nonetheless, four reasons may be invoked in favor of a progressive interpretation of the role played by structural institutions. First, the in-

ferently, whether it "constituted a fundamental term or condition of the union formed in 1867." *Id.* at para. 89.

107. Binnie, *supra* note 3, at 375.

108. Re Residential Tenancies Act (1979), [1981] 1 SCR 714, 734 (Can.).

109. Re: Authority of Parliament in Relation to the Upper House, [1980] 1 SCR 54, 66 (Can.).

110. On whether "Indians" in Section 91(24) of the B.N.A. Act included Eskimo inhabitants of the Province of Quebec, for instance, the Supreme Court of Canada found that the framer's original intent was to include Inuit in the definition of "Indians" in Section 91(24) Constitution Act, 1867. Reference re Eskimos, [1939] S.C.R. 104 (Can.). In 2003, the Court held that Métis were not included in the term Indians under the Natural Resources Transfer Agreement. R. v. Blais, [2003] 2 S.C.R. 236, 2003 SCC 44, para. 6, 33 (Can.) ("The stark historic fact is that the Crown viewed its obligations to Indians, whom it considered its wards, as different from its obligations to the Métis, who were its negotiating partners in the entry of Manitoba into Confederation."). While not repudiating the living-tree metaphor, the Court refused to expand the historic meaning through progressive interpretation because "this Court is not free to invent new obligations foreign to the original purpose of the provision at issue." *Id.* at para. 40. In *Daniels v. Canada*, the Supreme Court denied that *Blais* constituted a precedent and, in a landmark decision, used a purposive approach to conclude that Indians in Section 91(24) also includes Métis people. Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12, paras. 45–46 (Can.). In passing, it reiterated that when interpreting Section 91(24), that even while "a head of power . . . must continually adapt to cover new realities," the Court must not undertake the same interpretive method as when interpreting a constitutional *agreement*, such as was the case in *R. v. Blais. Id.* at para. 44 (citing R. v. Blais, [2003] 2 S.C.R. 236). For a recent example of originalist reasoning, see *Caron v Alberta*, 2015 SCC 56, para. 4 (Can.).

tention of the drafters of the Constitution, even if it can be ascertained faithfully, does not determine the meaning that ought to be given today to the same provision, and should not do so. Regarding the 1982 Constitution, Justice Lamer, in *Re Motor Vehicle Act,* made the point that the people of Canada, through their elected representatives, gave the judiciary a mandate to interpret the constitutional text, and that, in doing so, the courts are not bound by the opinion that a "few individual public servants"[111] may have had at the time of the drafting of the Charter.

Second, original intent or meaning do not, in Canada, appeal "to our democratic commitments."[112] Canada does not have a great constitutional moment: it is born of evolution and not revolution. Our Founding Fathers in 1867 were a group of white men, mostly parliamentarians, concerned with the preservation of British institutions on Canadian soil. As Justice Binnie writes: "[w]e do not have a Jefferson or a Madison or a Hamilton whose philosophic writings have entered the national psyche in the United States and whose work can be mined for nuggets of shared wisdom."[113]

The constitutional negotiations in 1982 were even less "democratic." No delegates, no people ratified the Constitution Act, 1982—the Queen did—following the executive political agreement reached by the Prime Minister of Canada, Pierre Elliott Trudeau, and nine of the ten premiers.[114] The population of Canada did not vote on the proposed text nor did the legislature of each province. Only the Parliament voted. Therefore, resorting to original intent does not necessarily appeal to democratic commitments. In fact, it would be more accurate to say that intentionalism, at least in Canada, "freezes the meaning of the text at the historic moment of its creation, a meaning that at times is no longer relevant to its meaning in a modern democratic society."[115] In so doing, it impinges on the judges' ability to solve and confront "the problems of the future."[116] Considering the role of courts in Canada, and in particular constitutionally entrenched judicial review and the well-established living-tree doctrine, being unable to confront the problems of the future is a major weakness courts will not impose on themselves.

Third, according to federal theory, one of the main characteristics of a Constitution in a federation is its rigidity. The Canadian Constitution is

111. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 508 (Can.).

112. Steven D. Smith, *What Does Constitutional Interpretation Interpret?*, *in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 21, 26 (Grant Huscroft ed., 2008).

113. Binnie, *supra* note 3, at 375.

114. Walter Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 L. & CONTEMP. PROBS. 283, 293–96 (1982).

115. AHARON BARAK, THE JUDGE IN A DEMOCRACY 148 (2006).

116. *Id.* at 149. *But see* Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109 (2008).

particularly difficult to amend.[117] The fact that it cannot be easily amended protects both sides of the constitutional compact. Conversely, it also leaves space for courts to make the "amendments" that the executive and legislative branches are (to a certain extent) incapable of making on a daily basis. The Supreme Court of Canada, in *Hunter v. Southam,* did not overlook this task by finding that, contrary to ordinary legislation, which can be easily amended, the provisions of a constitution "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. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."[118]

These three reasons are well-rehearsed and commonly invoked in support of progressive interpretation in general. I wish to spend more time on the last one.

Institutions, especially when they are an integral part of the constitution, cannot be interpreted in a vacuum but must be interpreted in relation with other parts of the constitution and with other institutions. Introducing the notion of structure means recognizing that there are relational and functional aspects to interpretation. Here, Hans-Georg Gadamer's[119] hermeneutics may offer some guidance.

Legal hermeneutics propose to consider, and even reconstruct, legal practice as a whole instead of considering its parts in isolation:[120] it promotes a relational interpretation of the parts that make up the whole.[121] According to Gadamer, for instance, the meaning attributed to a concept depends on its relationship with the other elements comprising the whole and cannot be understood if isolated or divorced from it.[122] Furthermore, still according to him, historical intent must be updated in order to provide a contemporary image of the concept subject to interpretation.[123]

In his view, the interpreter derives meaning from a provision or concept in two steps. First, his prejudices, which are not necessarily ille-

117. Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 ALTA. L. REV. 85, 86 (2015).

118. Hunter v. Southam, [1984] 2 S.C.R. 145, 155 (Can.).

119. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 267 (Joel Weinsheimer & Donald G. Marshall trans., Continuum Publishing Group 2d ed. 2004).

120. *Id.* at 269–70, 291.

121. *Id.* at 291. In *Big M Drug Mart*, the purposive interpretation of the Canadian Charter of Rights and Freedoms includes a relational element, according to Justice Dickson, in that the constitutional guarantees ought to be interpreted according "to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*." R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (Can.) (italics omitted).

122. GADAMER, *supra* note 119, at 140; *see, e.g.*, William N. Eskridge Jr., *Gadamer/Statutory Interpretation*, 90 COLUMBIA L. REV. 609, 627 (1997) (describing Gadamer's concept of a hermeneutical circle).

123. GADAMER, *supra* note 119, at 291–92; *see* Eskridge, *supra* note 122, at 621–22.

gitimate,[124] give anticipatory meaning, or "fore-understanding," to the concept to be interpreted. By doing so, the interpreter takes into account particulars such as tradition and previous interpretations.[125] Second, he will go back and forth between analyzing the whole and the part, rectifying the meaning given to the latter according to the meaning of the former.[126] This will lead to what Gadamer calls "explicit understanding."[127]

Gadamer describes his method in these terms:

> We recall the hermeneutical rule that we must understand the whole in terms of the detail and the detail in terms of the whole. This principle stems from ancient rhetoric, and modern hermeneutics has transferred it to the art of understanding. It is a circular relationship in both cases. The anticipation of meaning in which the whole is envisaged becomes actual understanding when the parts that are determined by the whole themselves also determine this whole.
>
> This movement of understanding is constantly moving from the whole to the part and back to the whole. Our task is to expand the unity of the understood meaning centrifugally.[128]

In the same way an impressionist painting can only be fully appreciated after taking a step away from the details, hermeneutics asks the interpreter to "understand the whole from the parts and the parts form the whole."[129] This creates a certain harmony or "concordance," to use Gadamer's term.[130] Indeed, according to him, "[t]he harmony of all the details with the whole is the criterion of correct understanding. The failure to achieve this harmony means that understanding has failed."[131]

Legal hermeneutics, says Gadamer, requires updating, to a certain extent, the intention of the legislature (or of the framers).[132] As such, determining the content of a provision necessarily entails a "tension between the original and the present legal sense."[133] He explains this relationship in this way:

> In order to determine this content exactly, it is necessary to have historical knowledge of the original meaning, and only for this reason does the judge concern himself with the historical value that the law has through the act of legislation. But he cannot let himself be

124. GADAMER, *supra* note 119, at 273. Gadamer specifies later: "The prejudices and foremeanings that occupy the interpreter's consciousness are not at his free disposal. He cannot separate in advance the productive prejudices that enable understanding from the prejudices that hinder it and lead to misunderstanding." *Id.* at 295.

125. *Id.* at 305.

126. *Id.* at 269.

127. *Id.* at 191, 439.

128. *Id.* at 291.

129. *Id.*

130. *Id.* at 436.

131. *Id.* at 291.

132. *Id.* at 307–08.

133. *Id.* at 323 (citation omitted).

> bound by what, say an account of the parliamentary proceedings tells him about the intentions of those who first passed the law. Rather, he has to take account of the change in circumstances and hence define afresh the normative function of the law . . . . [W]hen faced with any text, we have an immediate expectation of meaning. There can be no such thing as a direct access to the historical object that would objectively reveal its historical value.[134]

This means that if the judge wants to ensure the "unbroken continuation of the law," he must undertake the practical and normative task of adapting the law to "present-day needs."[135] According to Gadamer, this does not render the interpretation arbitrary.[136] To an American audience, this may appear as a blank check to the judiciary. And yet, it is perfectly in line with Canadian constitutional culture and tradition. One may add that when, as is the case in Canada, division of powers and constitutional rights are interpreted according to the living-tree approach, it is expected that institutions, and the role they play, will follow the same progressive interpretation, even though, at first blush, "structure" and "architecture" refer to more static constructions than a "living-tree." But Newman is right to point out that institutions are made of individuals, who (hopefully) evolve over time and "are capable of dynamic, attitudinal changes, informal adjustments, conventional development and a progressive evolution in political culture and values."[137]

To briefly conclude, this Article has illustrated what structural analysis entails in Canada by looking at institutions such as the Supreme Court of Canada, the Senate, provincial and superior courts, and elected legislative bodies. In some cases, the interpretation of the structural role played by these institutions has been originalist; in others, it has been progressive. I have argued that a progressive interpretation is superior, respecting institutions that form part of the constitutional structure. This is *especially* true in the Canadian context, where jurists and scholars largely agree that interpretations of Charter and federalism provisions ought to be made in a progressive and purposive way. To be sure, in *Reference re Senate Reform* the Supreme Court of Canada assessed the changing role of an institution within the Canadian constitutional structure using an originalist lens, but it did so in an unconvincing way.[138] And as Newman suggests, this does not mean that *status quo* is permanent.[139] The Senate "is also a profoundly *human* institution, and senators, like other human beings, are motivated, inspired and driven by a myriad of

134. *Id.*
135. *Id.* at 323–24.
136. *Id.* at 324.
137. Warren J. Newman, *Of Castles and Living Trees: The Metaphorical and Structural Constitution*, 9 J. PARLIAMENTARY & POL. L. 471, 495 (2015).
138. *See supra* text accompanying notes 81–90. For additional commentary, see Newman, *supra* note 137, at 494–95.
139. Newman, *supra* note 137, at 495.

external events, life experiences, internalized values and other behavioural factors."[140] As the recent debate on assisted-dying legislation has shown, senators may now be ready to take their role more seriously, in a way that even the framers would probably have not anticipated.[141]

140. *Id.* (emphasis in original).

141. The exchange between Justice Minister Ms. Wilson-Raybould and a newly appointed independent senator exemplify this seriousness. Laura Stone, *Ministers Grilled in Senate over Assisted-Dying Bill*, GLOBE & MAIL (June 1, 2016, 9:39 PM), http://www.theglobeandmail.com/news/politics/ministers-grilled-in-senate-over-assisted-dying-bill/article30242968/ ("Ms. Wilson-Raybould defended her legislation as 'responsible,' telling senators it is the 'best solution for our country right now.' 'I am confident that Bill C-14 strikes a reasonable balance among all the competing interests,' she said. . . .Newly appointed independent Senator Frances Lankin told the minister, 'We think you've got the balance wrong.'"). Prime Minister Justin Trudeau announced that he will no longer appoint politically affiliated senators. As of November 2016, Prime Minister Trudeau has appointed twenty-one new independent (nonaffiliated) senators, thus filling vacancies in seven of the ten provinces. John Paul Tasker, *Meet the 21 New Trudeau-Appointed Senators*, CBC (Nov. 4, 2016, 5:53 PM) http://www.cbc.ca/news/politics/all-new-senators-appointment-1.3837512.