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You Don't Need a Metaphor to Know Which Way the Case Goes: The *Senate Reference* and Constitutional Metaphors

Richard Haigh*

I. INTRODUCTION

As regards metaphors, Shakespeare, as always, is the master:

> The flame o' the taper
> Bows toward her; and would under-peep her lids,
> To see the enclosed lights, now canopied
> Under these windows, white and azure, lac'd
> With blue of heaven's own tinct.[1]

The description of Cytherea is that of a beautiful apparition. The flame, personified, bows towards her; her eyes are lights that are "canopied" while sleeping. Hidden by eyelids, in other words. Their blueness is no less compelling than the unworldly blue of heaven. Her eyes are, in effect, like windows and like heaven.

At least that's one possible reading. Literature scholars disagree on exactly what the extended metaphor is. Is Shakespeare referring to Cytherea's eyes ("lights", white cornea laced with blue iris), her eyelids ("enclosed lights, now canopied"), both eyes and eyelids (white skin, blue

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Many would know that my title is a play on Bob Dylan's lyric "You don't need a weatherman to know which way the wind blows", from Subterranean Homesick Blues on *Bringing it all Back Home* (1965, Columbia Records). Many may not know that it is one of the most quoted song lyrics in the law, and Dylan is the most quoted songwriter by quite a margin: see Alex B. Long, "[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing" (2007) 64 Wash. & Lee L. Rev. 531.

[1] William Shakespeare, *Cymbeline*, Act II, 2.13-23.

eyes), or something else? Since the mysteries of Shakespeare's metaphors have confounded many literary critics, we lesser mortals likely will never know. At any rate, there does seem to be some suggestion of a person resembling built materials like windows and canopies, shaded and painted ("tinctured") in white, azure and blue.[2] One might, hesitatingly, call it an example of an architecture motif in Shakespeare.

Somewhat surprisingly, architecture also forms a metaphorical backdrop to the recent Supreme Court of Canada decision on Senate reform, *Reference re Senate Reform*.[3] This article argues Shakespeare's literary metaphors are appropriate, while the Supreme Court's constitutional ones are not.

II. THE *SENATE REFERENCE*

Reforming the Senate has been a part-time constitutional obsession almost from the day Canada was formed.[4] And yet, the only serious institutional changes that have taken place are the increase in members (to 105[5]) and the introduction of mandatory retirement at age 75.[6]

Throughout much of his adult political life, former Prime Minister Stephen Harper has believed strongly in Senate reform. He quotes from Robert Mackay's 1926 book *The Unreformed Senate*,[7] detailing a number of criticisms of the Canadian Senate, and promoting its transformation.[8] Harper favours a Senate that is equal, elected and effective — the well-known Triple-E formulation, although he rarely uses the acronym.[9] It is no surprise, therefore, that Harper's reform agenda has dominated since he became Prime Minister. Beginning in

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[2] For examples of the debate surrounding a small passage of a relatively obscure Shakespeare play, see Werner Habicht, D.J. Palmer & Roger Pringle, ed., *Images of Shakespeare: Proceedings of the Third Congress of the International Shakespeare Association, 1986* (Cranberry, NJ: Associated University Presses, Cranbury, 1988), at 85-86.

[3] [2014] S.C.J. No. 32, [2014] 1 S.C.R. 704 (S.C.C.) [hereinafter the "*Reference*"].

[4] See *Reference*, *id*., at para. 1.

[5] *Constitution Act, 1867*, s. 21. The original number was 72; the number 105 was reached with Nunavut's creation: see *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Pt. 2. The maximum number of Senators has also changed — see *Constitution Act, 1867*, s. 28.

[6] *Constitution Act, 1867*, s. 29(2). This was changed from life tenure in 1965: *Constitution Act, 1965*, S.C. 1965, c. 4.

[7] New York: Oxford University Press, 1926.

[8] Alexander Wilkinson notes Harper's frequent reference to Mackay's book in "Constitutional Constraints: A Case Against Senate Reform in Canada" (2011) Institute for Research on Public Policy, *Policy Options* blog, accessed July 13, 2015, online: <http://policyoptions.irpp.org/issues/continuity-and-change-in-the-provinces/constitutional-constraints-a-case-against-senate-reform-in-canada/>.

[9] *Id*.

2006, in his first minority government, he tabled Bill S-4 limiting term limits to eight years without renewal. The Bill died on recommendation of the Standing Senate Committee on Legal and Constitutional Affairs. Bills S-7 and C-19 reintroduced the main thrust of S-7; a year later, Bill C-20, known as the *Senate Appointment Consultations Act* established a procedure for electing senators based on a voter preference system. Bill C-20 also died on the Order Paper in September 2008 when Parliament dissolved.[10]

Finally, Bill C-7, given first reading in June of 2011, became the focal point for the current reform proposals. It made its way to the Supreme Court of Canada as a reference case, known as *Reference re Senate Reform*. The Court was asked to decide four main questions, all of which engaged the amending provisions of Part V of the *Constitution Act, 1982*: (i) can Parliament unilaterally implement a framework for consultative elections to the Senate, whether involving the provinces or not?; (ii) can Parliament unilaterally fix term limits for Senators?; (iii) can the Senate be abolished with less than unanimous consent of the provinces?; and (iv) can Parliament unilaterally remove the landholding requirements for Senators?[11]

In February 2014, the full eight-judge panel[12] rendered a decision *en banc* that put at least a few more nails in the coffin of Senate reform in general, and Harper's vision for it in particular.

Considering the importance and gravity of the decision, the Court was fairly brief in dispensing with all the government's proposals (the landholding requirement being the only exception as the Court accepted that Parliament alone could remove the requirement for all provinces except Quebec). In fewer than 100 substantive paragraphs, all four of the main proposals are summarily rejected. Paragraph 111 says it all:

> The majority of the changes to the Senate which are contemplated in the Reference can only be achieved through amendments to the Constitution, with substantial federal-provincial consensus.

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[10] The history surrounding the various Bills dealing with Senate reform is detailed in the *Reference*, at paras. 6-9; see also University of Alberta, Centre for Constitutional Studies, *Democratic Governance: Senate Reform Update*, online: <http://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-issues/democratic-governance/849-senate-reform-update>, accessed July 13, 2015.

[11] *Reference*, *supra*, note 3, at para. 2.

[12] The Court was only eight judges strong for much of 2014, as the October 2013 appointment of Marc Nadon was challenged (and the subject of another significant constitutional decision by the Supreme Court: see *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, [2014] 1 S.C.R. 433, 2014 SCC 21 (S.C.C.)).

> The implementation of consultative elections and senatorial term limits requires consent of the Senate, the House of Commons, and the legislative assemblies of at least seven provinces representing, in the aggregate, half of the population of all the provinces (s. 38 and s. 42(1)(*b*), *Constitution Act, 1982*). A full repeal of the property qualifications requires the consent of the legislative assembly of Quebec (s. 43, *Constitution Act, 1982*). As for Senate abolition, it requires the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces (s. 41(*e*), *Constitution Act, 1982*).[13]

The *Senate Reference* has prompted a host of eloquent commentary — on the effect of this decision on matters such as constitutional reform,[14] the need for a more democratic process,[15] the approach the Supreme Court takes to constitutional interpretation and its effect that has on amending the Constitution,[16] the importance of constitutional metaphors in general and the *Reference* in particular,[17] and more.

This article does not aim to contribute substantively to those discussions; rather, my interest in the *Reference* is more literary. As I read

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[13] *Reference*, *supra*, note 3, at para. 111.

[14] On how the decision will have limited effect on reform, see Linda Trimble, "Status Quo Unacceptable; Senate Reform Possible; Abolition by Stealth Anti-Democratic" (2015) 24(2) *Constitutional Forum.* For a contrary viewpoint, see Ted Morton, "No Statecraft, Questionable Jurisprudence: How the Supreme Court Tried to Kill Senate Reform" (2015) SPP Research Paper No. 8-21.

[15] See Allan Hutchinson & Joel I. Colon-Rios, "Constitutionalising the Senate: A Modest Democratic Proposal", paper presented at the McGill Symposium on the Senate Reference, January 22, 2015 (copy on file with author).

[16] Richard Albert, "Constructive Unamendability in Canada and the United States" in J. Cameron, B.L. Berger & S. Lawrence, eds., *Constitutional Cases 2013* (2014) 67 S.C.L.R. (2d) 181 and his follow up article, "Constitutional Amendment by Stealth" (2015) 60 McGill L.J. (forthcoming, available at SSRN online: <http://ssrn.com/abstract=2589255>); Douglas Sarro, "Breaking the Bargain: A Comment on the Constitutionality of Bill C-7, the Proposed Senate Reform Act" (2012) 70 U.T. Fac. L. Rev. 115; Peter Hogg, "Senate Reform and the Constitution" (2015) 68 S.C.L.R. (2d) 591. Kate Glover's forceful defence of the metaphor, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*" in J. Cameron, B.L. Berger & S. Lawrence, eds. (2014) 67 S.C.L.R. (2d) 221 is really an argument for the idea of structural interpretation — using underlying principles, notions of a document's framework and codes to assist in interpreting text. I do not take issue with this "holistic" approach to interpretation; my concern is with the use of metaphors to do so. Moving the physical location of the Senate from Ottawa to Toronto would surely be an "architectural" change (presumably a new building would be required) but would it be a "structural" one?!

[17] Warren Newman, "Of Castles and Living Trees: The Metaphorical and Structural Constitution", unpublished paper presented at the *2015 Conference on Emerging Issues in Canadian Public Law*, University of Ottawa, May 22, 2015 (copy on file with author) [hereinafter "Newman"]; Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*" in J. Cameron, B.L. Berger & S. Lawrence, eds. (2014) 67 S.C.L.R. (2d) 221.

the decision, what struck me most, after the shock of the forcefulness of the rejection, was the frequent allusion to our constitutional architecture.

In the *Reference* decision the Court relies on the metaphor of architecture an extravagant 10 times (11 if a subheading is counted). Here are all 10 in order:

- **1 and 2**. Paragraph 26: "These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an 'internal *architecture*', or 'basic constitutional structure': *Secession Reference*, at para. 50; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57; see also *Supreme Court Act Reference*, at para. 82. The notion of *architecture* expresses the principle that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole'."
- **3 and 4**: Paragraph 27: "As discussed, the Constitution should not be viewed as a mere collection of discrete textual provisions. 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*."
- **5**. Paragraph 53: "We conclude that each of the proposed consultative elections would constitute an amendment to the Constitution of Canada and require substantial provincial consent under the general amending procedure, without the provincial right to 'opt out' of the amendment (s. 42). We reach this conclusion for three reasons: (1) the proposed consultative elections would fundamentally alter the *architecture* of the Constitution…"
- **6.** Paragraph 54: "The implementation of consultative elections would amend the Constitution of Canada by fundamentally altering its *architecture*. It would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought."
- **7**. Paragraph 59: "The appointed status of Senators, with its attendant assumption that appointment would prevent Senators from overstepping their role as a complementary legislative body, shapes the *architecture* of the *Constitution Act, 1867*. It explains why the framers did not deem it necessary to textually specify how the powers of the Senate relate to those of the House of Commons or how to resolve a deadlock between the two chambers...."

- **8**. Paragraph 60: "The proposed consultative elections would fundamentally modify the constitutional *architecture* we have just described and, by extension, would constitute an amendment to the Constitution. They would weaken the Senate's role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design."

- **9**. Paragraph 70: "We conclude that introducing a process of consultative elections for the nomination of Senators would change our Constitution's *architecture*, by endowing Senators with a popular mandate which is inconsistent with the Senate's role as a complementary legislative chamber of sober second thought…"

- **10**. Paragraph 97: "We cannot accept the Attorney General's arguments. Abolition of the Senate is not merely a matter of 'powers' or 'members' under s. 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*. Rather, abolition of the Senate would fundamentally alter our constitutional *architecture* — by removing the bicameral form of government that gives shape to the *Constitution Act, 1867* — and would amend Part V, which requires the unanimous consent of Parliament and the provinces (s. 41(*e*), *Constitution Act, 1982*)."[18]

A few things about this list are immediately apparent. First is that the initial two uses of the metaphor in paragraphs 26 and 27 come with a further explanation: an architecture implies that there is some connection between elements of the Constitution; that there is a *basic structure*. The additional phrases are telling. Either the Court is uncomfortable with the metaphor standing on its own, or is trying to ensure that the meaning of the metaphor is made clear to everyone. Moreover, the early reference includes an actual attempt to define the term: "the notion of architecture expresses the principle that individual elements…".

Second, "architecture" is set up as something different from the constitutional "text". This is clear from the passage "amendments are not confined to the text [but] can include the architecture".[19] Perhaps the "architecture" of our Constitution is the design or structure, while "text" is the bricks that get us there. But that is just speculation on my part.

Third, it is not clear whether "architecture", "structure" and "design" all refer to exactly the same idea, or slightly different ones. The Court uses all of them, sometimes interchangeably (para. 27: "an architecture,

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[18] The italicizing of "architecture" throughout these quotations is mine.

[19] *Reference*, *supra*, note 3, at para. 27.

basic structure") but not always (para. 60: "fundamentally modify the constitutional architecture … contrary to its constitutional design"). And finally, architecture sometimes seems to refer to a fixed concept (para. 27: a "basic structure") and is at other times more fluid (para. 59: "appoint[ing]… Senators … shapes the architecture").

Despite the multiple references, the Court leaves unanswered questions about what the architecture metaphor is doing. Does the metaphor function independently of the Court's opinion? Does it require further elaboration? Is it the same or different from the text itself? Is it the same or different from "structure"? Is the metaphor itself capable of multiple meanings?

As I have stated in a different context, legal metaphors are very often inappropriate, and should be avoided in judicial decisions, particularly constitutional ones. In contemplating the "dialogue" metaphor in constitutional adjudication, Michael Sobkin and I expressed our concern as follows:

> Our hope is that all courts, including the Supreme Court, recognize, at a minimum, that it is wrong to use the dialogue metaphor prescriptively; better yet, they should see this as a good time to move on from discussing the metaphor at all. … Judges should strive to…keep all metaphors to a minimum, as these are literary devices not necessarily useful for, and possibly detrimental to, resolving legal disputes.[20]

As I discuss next, the uncertainty highlights the main reason why relying on metaphors for normative decision making is inappropriate in judicial opinions. In fact, I am inclined to go further and suggest that many of those involved in the law — lawyers, legal academics, judges and others — should be more careful when relying on metaphors to illuminate complex concepts and problems.

III. METAPHORS AND THEIR PROBLEMS

I am all in favour of judges, and legal writers in general, being more poetic, more attuned to the elegance of language. All students love Lord Denning. Every year I am made aware of their appreciation for opening lines like "It happened on 19 April, 1964. It was bluebell time in Kent….

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[20] Richard Haigh & Michael Sobkin, "Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts" (2007) 45(1) Osgoode Hall L.J. 67, at 90.

On this day [the Hinz family] drove out in a Bedford Dormobile van from Tonbridge to Canvey Island…. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea"[21] or "Old Herbert Bundy was a farmer there. His home was at Yew Tree Farm. It went back for 300 years.… It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt."[22]

They are perfect factual vignettes and I agree that more judgments should be written like this. Not only are they more enjoyable to read and more accessible to the average person, but they also tend to be more persuasive. Thus, rhetorical flourishes have their place in law, as in other forms of literature.[23]

Nevertheless, I wonder if relying on substantive constitutional metaphors, that have some measure of normative and interpretive force, is potentially risky. Metaphors are figuratively true but literally false. To say that a law may chill speech is obviously not physically true — laws have no effect on the temperature of speech (which is unmeasurable anyway!). What we mean when we say that a law may chill speech is that it may deter certain kinds or forms of speech, which would, absent such law, otherwise be spoken. As Eugene Volokh puts it, terms such as "chilling speech" in legal language have some truth to them but only to the extent that they describe *concrete mechanisms* and not just abstract metaphors.[24]

Metaphors are literary devices; they make writing come alive. They may offer alternate explanations of ideas and concepts that can illuminate, for some, those very concepts and ideas in ways that were not easily comprehensible in their original form. But when we use them to describe in law how good expression may be unnecessarily curtailed, for example, it is usually much more crucial to continue the exploration. Saying something "chills speech" may be just the beginning. What forms of expression would be curtailed? Why? Would it curtail everyone's

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[21] *Hinz v. Berry*, [1970] 2 Q.B. 40, [1970] 1 All E.R. 1074, at paras. 1-2 (C.A.).

[22] *Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, [1975] Q.B. 326, at para. 1 (C.A.). For a balanced critique of Denning's career, see Charles Stephens, *The Jurisprudence of Lord Denning: A Study in Legal History, in Three Volumes* (London: Cambridge Scholars Publishing, 2009). Stephens quotes from Sir Stephen Sedley, who notes that Denning's literary style is one of his great achievements, by speaking directly to the people in lucid prose (at 5).

[23] See Chad M. Oldfather, "The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions" (1994) 27 Conn. L. Rev. 17, at 21; Richard A. Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990), at 136.

[24] Eugene Volokh, *Academic Legal Writing*, 4th ed. (New York: Foundation Press, 2010) [hereinafter "Volokh"], at 114-115.

speech or only some people's? Is it wrong that such speech should be curtailed? Will harm result to those held back from expressing themselves? Will harm occur to others if the restraint does not take place? What kinds of harm? And so on. If the metaphor is left unexplained, the argument is incomplete. And if it is further explained, then it begs the question of why have it in the first place.

The noted literary critic Northrop Frye recognized that metaphors may be both unnecessary and confusing to professionals trained in other than purely literary disciplines:

> It is projected metaphor to say that a flower "knows" when it is time for it to bloom, and of course to say that "nature knows" is merely to import a faded mother-goddess cult into biology. I can well understand that in their own field biologists would find such teleological metaphors both unnecessary and confusing, a fallacy of misplaced concreteness.[25]

Moreover, a metaphor turns its back on ordinary descriptive meaning, and presents a linguistic structure which literally is ironic and paradoxical. As Frye states, in ordinary descriptive meaning, if A is B then B is A, and all we have really said is that A is itself. In a metaphor two things are identified while each retains its own form.[26]

If, for example, we say that the Constitution has an architecture, then we identify the Constitution with the ordinary understanding of architecture as building, while at the same time both the Constitution and architecture are identified as themselves. The analogy is hypothetical — the Constitution is like architecture (descriptive) or the Constitution is as architecture (formalist) — in other words, the Constitution is to governance/internal logic/concepts of organizing society as architecture is to organized built elements. But the problem is that it is not always clear which of those analogies the Supreme Court intends. The common factor between the two could be organization but it could be aesthetic, pragmatic, or something different entirely.[27]

All of us engaged in using language professionally need to be aware of both the power and limits of metaphor. I once used a metaphor to explain to students how assessing whether the *Canadian Charter of*

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[25] *Anatomy of Criticism: Four Essays* (Princeton: Princeton University Press, 1957), 89.
[26] *Id.*, at 123.
[27] *Id.*, at 124.

Rights and Freedoms[28] applies to a given situation depends on myriad factors, which can point in opposite directions. The factors help fill in the gap that exists between the endpoints of the Charter clearly applying and the Charter clearly not applying. My metaphor related to the raising of children, who mature from a point at which they have no autonomy to another point where they have full autonomy. In between, a child's autonomy grows; it is very difficult to find the specific time when one can say that suddenly a child is autonomous.

I hoped my metaphor would help explain when the Charter applies. Then I began to think that perhaps some students have had very different relationships with their parents, and are not able to think of the relationship in terms of autonomy vs. dependence at all. Maybe their parents abused them, abandoned them, were unloving; or they could be so-called helicopter parents who still have not granted them much autonomy, or conversely, were never there for them at all. Instead of clarifying, the metaphor may only have confused or complicated the matter. Rather than act as a device to assess whether the Charter could apply to a given situation, the metaphor caused them to associate Charter application problems with private matters at home: unhelpful at best, detrimental and counterproductive to understanding at worst.

So, while metaphors provide colour and interest, and make writing more vivid, they can also obfuscate and cast doubt on meaning. Metaphors can illuminate ideas that are very difficult to convey in language; but they can also be imprecise, lead to logical error and therefore, incompleteness. They may also distract the reader from the ultimate point that is being sought. For this reason, metaphors are never used in statutory texts or in contracts, where clarity, certainty and consistency are paramount qualities. Volokh states it succinctly: "remember that the heart of [an] argument should be the real, not the figurative".[29]

To me, this is just as true for the architecture metaphor as it is for any other metaphor that a legal writer may use. In the constitutional law realm, our Supreme Court has developed a number of metaphors in an attempt to elucidate the Constitution: from "living tree" to "ships" to

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[28] *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[29] Volokh, *supra*, note 24, at 115. See also Lon Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967) who recognized that metaphors should never be more than "servants to be discharged as soon as they have fulfilled their function" (at 121).

"operating machinery" to "lifeblood",[30] all are useful, but only in a limited sense. Relying too heavily on metaphors is a slippery slope (another metaphor!). It is too easy to let figurative usage do the heavy lifting of rigour and persuasion. Using constitutional metaphors may cause more problems than it seeks to resolve and should never be a substitute for argumentation, elucidation and clarity.[31]

My concern with metaphors in general becomes more specific in the *Reference*. Although the Supreme Court tries to explain its architecture metaphor, it isn't always perfectly transparent what it means by the term.[32] For example, the Court uses the architecture metaphor to neatly avoid what is plain from the text of the Constitution itself. Section 42 of the *Constitution Act, 1982* requires that the seven-fifty amending procedure be applied as the "method of selecting Senators". As the government argued, this "method" has always been one whereby the Prime Minister recommends a candidate who is then appointed by the Governor-General. According to the Court, however, implementing non-binding or consultative elections would "change our Constitution's architecture" and thus require the seven-fifty amending formula. The words "method of selecting Senators" are only to be used as a "[*guide*] to identifying the aspects of our system of government…".[33] The metaphor, in other words, says more about our Constitution than the text itself.

Whereas my larger worries are with using metaphors in legal writing generally, the *Reference* has given me an excuse to examine further the

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[30] As further proof of the confounding nature of judicial metaphors, see Hugo Cyr, "Conceptual Metaphors for an Unfinished Constitution" (2014) 19 Rev. Const. Studies 1. Cyr takes approximately 14 pages (from 18-32) to discuss the "living tree" metaphor in Canadian constitutional jurisprudence. He examines the "roots of the tree", the "natural limits of the growth and expansion of the tree" and the "principle of the living tree's expansion and growth", in an attempt to explain what the metaphor means and how it works. It's a masterly dissection, but it certainly fuels my argument that any metaphor requiring this much analysis is not likely all that helpful to understanding a judicial decision.

[31] For a good summary on the debate about metaphors in legal writing, see Robert L. Tsai, "Fire, Metaphor and Constitutional Myth-Making" (2004) 93 Georgetown L.J. 181, citing a number of legal scholars and judges who disdained overuse of metaphor, such as Jeremy Bentham, Benjamin Cardozo and Lon Fuller.

[32] Leading, possibly, to what Justice Cardozo referred to as enslaving, rather than illuminating or liberating the thought process: *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84, at 94, 155 N.E. 58 (N.Y. 1926). As will be argued below, metaphors are much less effective when readers have incomplete or nonexistent understandings of them — my point is that architecture is a very complex amalgam of art, science, sociology, history and other human endeavours that does not reduce well to a specific idea about our Constitution.

[33] *Reference*, *supra*, note 3, at para. 64 (emphasis added).

particularities of constitutional architecture as metaphor. As a structural engineer before studying law, I have long been interested in architecture. With its multiple meanings, inherent indeterminacy and illusory nature, however, "architecture" seems a peculiar choice for the Supreme Court to rely on in coming to terms with Canada's Constitution and institutions.

IV. ARCHITECTURE

The metaphor of architecture attempts to offer a physical form to mere words, to reinforce the stability of our Constitution. However, the main difficulty with using architecture as a metaphor for our Constitution is that architecture itself is full of uncertainty — to such an extent that, as seen in the quote of world famous architect Daniel Liebeskind, it needs a constitutional metaphor to provide an explanation of what it can do!

> The foundations [of the old World Trade Centre slurry walls] withstood the unimaginable trauma of the destruction and stand as eloquent as the Constitution itself asserting the durability of Democracy and the value of individual life.[34]

Architecture is not simply about the design of buildings nor about their stability. Buildings are not ends in themselves; they are as much about the ideas we bring within them as the physical structure itself. As the critic Rowan Moore says, architecture is the interpretation, in three-dimensions, of both inside and outside spaces.[35] Space is something for the imagination to inhabit. Such things as material, scale, light and ornament give space a climate, which prompts associations, harbours memories and provokes thoughts.

Classical architecture is characterized by symmetry, order, harmony, the precedence of exterior over interior, day over night, fixed over mobile, volume over surface, form over ornament.[36] Surprisingly, some of these

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[34] Daniel Liebeskind, quoted in Ekaterina V. Haskins and Justin P. DeRose, "Memory, Visibility and Public Space: Reflections on Commemoration(s) of 9/11" (2003) 6 *Space and Culture* 377, at 390.

[35] Rowan Moore, *Why We Build* (Picador, 2012) [hereinafter "Moore"], at 20-21. It should be noted that architects themselves would have difficulty agreeing on a definition of what "architecture" is. For purposes of this article, I rely heavily on Moore's important contribution, but I recognize that he has a certain vision of architecture that may not be shared. There is much more that has been and could be discussed, debated and argued about architecture; I make no claims to understanding its complexity. My main argument regarding the complexity of architecture as metaphor, however, is bolstered by its contestability — a deep understanding of the debates within the field of architecture is not necessary, I believe, to the points I raise.

[36] *Id.*, at 151.

attributes give architecture a "gender", at least for a large part of its history. Geometry and order were both considered male characteristics, whereas ornament, mobility and surface were considered female. Large, important public buildings were male, the home female.[37] Obviously, these are based on prejudices or stereotypes about sex and gender that are no longer widely accepted. The important point is that it is not inevitable, as Moore puts it, that "order, division, propriety, fixity and daylight [are architecture's] dominant qualities and values. They are not immutable or eternal, but made by certain attitudes by certain people at certain times and places".[38]

If we accept that architecture is more than simply a building, the use of it as a metaphor for our Constitution might be a source of some consternation. While there may be others, my concerns fall into two main areas: architecture as illusion and its dynamic nature.

1. Architecture as Illusion, Not Simply Physical Reality

We think of architecture as a solid, fixed and permanent thing. That it is about the creation of single and singular objects. That it is visual.

For many architects, values and aspirations such as hope, the wish for power or money, an idea of home, and a sense of mortality are fixed, definite and realizable in matter. The assumption is that there is a close alignment of form and content: an orderly design will lead to orderly people within it. A happy, carefree design will liberate whereas a stern, brutalist structure will repress. To some extent, Daniel Liebeskind exemplifies this kind of architect. He imagines buildings can carry fixed meanings. For example, in his proposal for rebuilding the World Trade Center after the devastating collapse of the Twin Towers, the "Freedom Tower" would be 1,776 feet tall, representing the creation, on July 4 of that year, of the United States of America.[39]

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[37] *Id*. For accounts of gender in architecture, see: Iain Borden, Barbara Penner and Jane Rendell eds., *Gender Space Architecture: An Interdisciplinary Introduction* (London: Routledge, 2000); Joseph Rykwert, *The Dancing Column: On Order in Architecture* (Cambridge: MIT Press, 1996); and Helen Hills, ed., *Architecture and the Politics of Gender in Early Modern Europe* (London: Ashgate, 2003).

[38] Moore, *supra*, note 35, at 154.

[39] The "Freedom Tower" moniker was actually coined by Governor George Pataki in 2002. Libeskind's original vision for the entire development was ultimately abandoned. The tower that was eventually built has retained a height of 1,776 feet, but is now called One World Trade Center. See Elizabeth Greenspan, "Daniel Libeskind's World Trade Center Change of Heart," *New Yorker*,

This is fine, as far as it goes. However, architecture does not always respond to this kind of direct symbolism; buildings do not always listen to their makers. Buildings can be powerful instruments, but that is the point, they are instruments rather than ends in themselves. In truth, as Moore argues, such symbols may be seen as rhetorical devices that assume buildings function as something similar to speech: we should avoid buildings that "try to behave too much like words".[40] The moment that one attempts to translate a building's message into words ("1776 feet tall represents the founding of America"), the building's potential might be narrowed. The nature of construction only allows for clumsy and ponderous "sentences", compared to the thoughtfulness, nuance and sophistication of writing and speaking. If the vast expense and labour put into most building projects is just a banal attempt at stating something that could have been written, it may not be worth the trouble.[41] Moreover, symbolism is itself highly contingent.

Buildings are powerful objects for creating illusions; they are not always what they seem. Often the role of architecture is to suggest one thing — such as propriety — in order that the opposite — passion, danger, transgression — can happen. Even the most respectable buildings are shaped, at some level, by instincts or ideas about desire. The feelings a building emits or contains, however, are often contradictory, or at least apprehended in a very subjective fashion.[42]

Take, as an example, the original World Trade Center. When developing the buildings in 1964, the architect Minoru Yamasaki based his concept on the then nascent belief that world trade would be a unifying force for all humanity. World trade would mean world peace; it represented humans' belief in humanity; it highlighted our need for individual dignity but also cooperation, and through that cooperation would come greatness. The World Trade Center would embody this ideal: "[the towers] are intended to give man a soaring feeling, imparting pride and a sense of nobility in his environment."[43] Of course, these ideals were quickly ridiculed. Once built, critics derided the towers as

August 28, 2013, online: <http://www.newyorker.com/business/currency/daniel-libeskinds-world-trade-center-change-of-heart>.

40 Moore, *supra*, note 35, at 92.

41 *Id.*, at 88.

42 *Id.*, at 20.

43 Minoru Yamasaki, *A Life in Architecture* (New York: Weatherhill, 1979), at 114.

representing "giant cigarette cartons",[44] "tombstone-like monoliths"[45] or "a standing monument to architectural boredom".[46]

Almost 30 years after they were built, another student of architecture, Mohammed Atta, who flew a plane into one of the towers, had a completely different view from Yamasaki. In Atta's mind they were extravagant citadels of imperial arrogance that must be destroyed — or at least they could be perceived that way by others. Where Yamasaki saw inclusion, the 9/11 terrorists saw exclusion; where the terrorists saw two hostile projections signifying everything that was wrong with the West, the architect saw a welcome to the world.[47]

All these beliefs are true; yet, at the same time, none of them are. Architectural meanings are by nature inherently slippery. They are prone to tricks of perception and inversions of value. Their effects are unstable, and their meanings elusive.

Another illusion of architecture is that it is benign. Instead, the disturbing truth is that architecture is very often intimate with power. To complete an architectural project requires authority, money and ownership. To build itself requires an exertion of power: power over materials, over construction workers, over land, over neighbours and future inhabitants. Dictators and architects have enjoyed a long relationship. They both are driven by the desire to dominate and shape the world:

> Some of the most admired tourist destinations in the world have as a large part of their agenda the placing of some people over others. Domination is confirmed in the language attached to architecture…part of the thrill or impressiveness of architecture lies in its exercise of power, and sometimes, cruelty.[48]

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[44] Thomas Meehan, "Does Mega-Architecture Work?" (accessed on March 29, 2015), online: <https://horizonhardcover.wordpress.com/tag/world-trade-center/>.

[45] Philip Nobel, *Sixteen Acres: Architecture and the Outrageous Struggle for the Future of Ground Zero* (New York: Metropolitan Books, 2005), at 36.

[46] *Id*.

[47] See Moore, *supra*, note 35, at 249. Of course, what the World Trade Center Towers actually stood for is based on the Towers' own evolution, history and perception generated by human users (and would therefore include earlier tragic events such as the 1993 car bombing by Ramzi Ahmed Yousef — for more on this incident, see Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11* (New York: Knopf Doubleday Publishing Group, 2006)). This aspect, that buildings evolve in unforeseen and unknown ways because of human interaction with them, is discussed in the next section.

[48] *Id*., at 169, 171.

Of course, the power that is at the heart of architecture can be exercised fairly or unfairly. It can be generous and collaborative, or selfish; it can be made in pursuit of the public good or as an exercise of some personal obsession. Often, a building is a contradictory combination of all these impulses. When it is done well, the use of architectural power is not simply a matter of domination or exploitation but includes reciprocity between users, owners and designers, or some transmutation of individual might into shared freedoms. The question, therefore, is how the power is utilized — by whom, for whom, to whom.[49]

A final illusion commonly associated with architecture is that it aspires to immortality. Classical architecture is very often about death: cenotaphs, pyramids and sarcophagi were the initial forms of classical architecture. Made of stone, concrete or masonry, they were intended to last millennia. A timeless building is thus often equated with a good building. But this call to eternity is sometimes overrated. The cult of timelessness overlooks the sometimes beneficial aspects of mobility and transience, and distorts our idea of what architecture is and should be. As an example, Moore relies on the Parthenon, commonly cited as an argument to timeless architecture against which all other buildings can be measured. For him, the current form of the Parthenon is grossly idealized. It ignores many of its past realities: that it was originally painted, that it had an interior resembling an Italian renaissance church in its extravagance, that it might have been "dressed" for ceremonies and theatre. In sum, it has, over centuries, dramatically changed itself physically and emotionally. What we see now is a manifestation of a structure that has been partly rebuilt, taken apart, had some of its stones replaced, lost its painted colouring and is no longer used in the same way it was originally.[50]

Some of these illusions may work for a constitution. We may, for example, want to recognize that a constitution is about power. But my intuition tells me that we lawyers and judges don't really know enough about architecture to know whether our constitutional illusions map accurately onto the illusions that buildings contain. And more likely, we lack the knowledge of architecture to realize the extent to which illusion plays a part in it.

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[49] One of the reviewers of an earlier draft of this article noted that not all building requires the services of architects. Much of human habitation is created out of necessity, ingenuity and availability; it is never finished, always changing. This is true, but it is peripheral to my, and the Court's, use of "architecture" as a constitutional metaphor. In addition, the "power" that I allude to above (humans exercising dominion over materials and land, for example) is necessary in any construction that demarcates a place of living, whether or not an architect is involved and whether or not it is permanent or transient.

[50] Moore, *supra*, note 35, at 310.

2. Architecture as Dynamic and Human, Not Static and Inanimate

Architecture is not a thing of pure reason or function, but is shaped by human emotions and desires. In turn, those human desires and emotions are shaped by architecture. In many cases, architecture starts with a desire on the part of its makers, which might be a need for greater security, for a sense of grandeur, for rootedness to place, or simply for the rudiments of shelter, all of which can then be transformed into built reality. Once a building is built, it influences the emotions of those who experience and use it, while those initial desires continue to shape and change it.[51]

Yet to say that there is emotion in architecture is only a bare beginning, for that raises many more questions about built matter. What forms do these emotions take? How is it that cold and insensate materials absorb and emit feeling? Whose feelings should matter: the architects, the architect's clients', the builders', the users', those of a commissioning government or corporation, or simply the casual passersby, local residents or tourists? Or, to take a different series of questions: if a building is beautiful, what is meant by that? Beautiful to whom? In what way? All such questions reflect a simple but relevant fact that architecture is nothing without humans. As the noted Brazilian architect Lina Bo Bardi puts it, "[u]ntil man enters a building, climbs its steps, and takes possession of the space in a 'human adventure' which develops over time, architecture does not exist."[52]

As I noted in the above section, an architect's hope that form and content are always aligned is somewhat mistaken. Thanks to the many people and accidents that shape it, a building that is supposed to produce one effect often ends up producing very different effects.[53] There are, in other words, many ways in which human impulses are played out in buildings. It is why definitions of architecture need to be broad: they need to encompass not just the design of buildings, but of the spaces inside and out which might be formed and changed by their construction *and* the emotions and chance encounters of humans engaged with them.

Buildings act not alone or in isolation, but reciprocally with the people and things around them. What buildings can do, depending on of what and of how they are made, is change the physical and social

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[51] *Id.*, at 18.
[52] *Id.*, at 23.
[53] *Id.*, at 92.

experience of things they serve. A good building has to be open to chance encounters, the passage of time and life in general. Many architects despair over the fact that a building is not always inhabited physically and psychically in the way they predict. But buildings are also "built" by their users, in the way in which the imaginations and experiences of people in them affect them.[54] Regardless of what an architect may design, lives will be lived in and around a building, exploiting, subverting, misusing and ignoring the forms that have been provided.[55] As a result, architecture can be both an agent of change and a reflection of it.

A constitution does not act in isolation, either. Nor would it be much to speak of a constitution without us. A good constitution will be open to time and to the human lives that live under it. And like many architects, the framers of a constitution don't always like the way a constitution takes shape (an oft-referred to example in Canada is with the substantive conception of section 7, as the Supreme Court found in *Reference re Motor Vehicle Act (British Columbia)*).[56]

There are limits to this, however. To ask of a constitution that it be open to chance or randomness, that it reflect the daily lives of its "users" is pushing things a little too far, in my view. Unlike a building, a constitution's users are everywhere in time and place; they may not have the same direct interaction with the "words on parchment" that a building's users have.[57] The boundary of a constitution is therefore somewhat different from the boundary of a building.

All of this is to say that I wonder whether the Supreme Court is aware that its architectural metaphor might be overly simplistic or taken too far. At a minimum, it seems to me, when relying on such a metaphor there is a need to understand the complex nature of architecture itself (without necessarily understanding the substance of the complexities), and the possibility that the metaphor may be interpreted in these complex ways (without necessarily understanding exactly how). While architecture and constitutions do share some common traits, as often as not, some may be led astray by thinking of the constitution in architectural terms. A metaphor based on architecture may do an

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[54] *Id.*, at 381.

[55] *Id.*, at 56.

[56] [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[57] Walton H. Hamilton's original words, cited in Richard S. Kay, "American Constitutionalism" in *Constitutionalism: Philosophical Foundations*, Larry Alexander, ed. (Cambridge: Cambridge University Press, 1998), at 16.

injustice to our understanding of constitutions; as a result, we should be very cautious in relying on it.

V. "ARCHITECTURE" AND INTERPRETING A CONSTITUTION

So what is useful and what is not in contemplating the metaphor of the architecture of our Constitution? An enduring metaphor in architecture, Rowan claims, is of the building as a microcosm of the world.[58] We want buildings to stimulate, give cues, propose and provoke responses in its citizenry. To engage, give evidence of human presence, reveal what could not have been imagined, and at the same time offer places for our own imagination to inhabit. This is what we would want in a constitution.

Constitutions are also similar to architecture in that they are constrained in ways that other forms of artistic and practical human endeavour are not. While writers and visual artists, especially in the 20th century, could travel deep into the psychology of nihilism and despair, it is not something architects can easily do. An architect cannot realistically ask his or her clients to invest in darkness or alienation simply to satisfy a creative urge.

The constitution as architecture is a bit like this too. Constitutions cannot nor should not be full of despair. The words need to rise, to inspire and aspire. Architecture requires the cooperation of many people, machines and materials, coming together to create a solid, useable object. As Moore puts it, merely to build is hopeful; in my view, having an effective working constitution is equally so.[59]

The assumed power of architecture to last for generations is also something we might typically hope for with a constitution. But, as shown, a deeper understanding of architecture forces us to realize this is not the reality. Architecture changes from the very first day a building opens. That kind of transience is not necessarily what is wanted in a

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[58] Moore, *supra*, note 35, at 46.

[59] I recognize that sometimes buildings may be dark and lacking hope — prisons would be a good example. Constitutions can be instruments of dehumanization as well — the Weimar Constitution an oft-cited example of such: see William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (New York: Simon & Schuster, 2011) ("on paper, the most liberal and democratic document of its kind the twentieth century had seen … guarantee[ing] the working of an almost flawless democracy" (at 56)). My argument is that both, in their idealized forms, should strive for a vision of civilization that is aspirational. Even prisons can be places of humanity.

constitution. To be effective, a constitution needs to be "practically certain". It is, in my view, not necessarily a bad thing that a constitution be somewhat elusive or unstable. However, there are limits: no constitution should ever deliberately intend to be an illusion. We want constitutions to represent the purpose that is contained therein — it is, after all, a constitution, which makes it different from other forms of written text. It is not meant to read like a play, a work of literature or a memoir or a contract; it is not even a statute or other law. Legal texts require, in my view, a degree of certainty and predictability that is unnecessary in plays or works of fiction. Any elusiveness we find in a constitution is likely intended, and moreover, will be reduced over time. We want constitutions to become more understood, more attuned to the society we live in as they mature. With a building, that may not be desirable (sometimes transience is useful) or even possible (humans may shape a building in unknown ways).

Finally, the expanded definition of architecture as the manipulation of space causes concerns for the concept of the architecture of a constitution. A space cannot be equally available to all possible uses and people, not at the same time, and not over the course of time. It will always belong to some more than others, mean more and have greater purpose to some users over others. This is not how we want to portray a Constitution nor is it how a constitution operates. It, in contrast, is a reflection of a broader constituency; particularly in Canada, where the constitution exists for a geographic land mass that is vastly different from the space occupied by a building.

What are we left with? The *Reference* relied on the architectural metaphor 11 times. Based on appearances alone, it is hard to ignore it. Despite this, it is possible that my concern is overblown. Maybe the metaphor, at its heart, simply means the basic organizing structure of our Constitution. That, for example, the Senate forms one part of the structure of what we call the governing institutions of Canada (as the heading between sections 20 and 21 of the *Constitution Act, 1867* titled "The Senate" confirms) and nothing more than that.

I hope that this is the sole basis for the Court's invoking the metaphor. It is certainly possible. The Court has referred to the "structure of the constitution" in other instances. In fact, "structure" was also repeated 14 times in the *Reference.* As well, there are at least 30 instances where it has used "structure" in constitutional decisions in

relation to the organization of our Constitution.[60] As Warren Newman states, there is a potentially straightforward reason for using architecture as a metaphor in a case such as the *Reference*: that the Senate is actually a building — an upper house — that has an external architecture![61] His

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[60] See, for example, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at paras. 103, 108, 317, 319 (S.C.C.) ("*Provincial Judges Reference*"); *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 44, 50 ("internal architecture"), 51, 62 (S.C.C.) (note also that the *Secession Reference* also relies on the "constitutional framework", which is another building metaphor); *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, [2014] 1 S.C.R. 433, at paras. 87 and 88 (S.C.C.) (using "architecture"); *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at para. 349 (S.C.C.) (quoting "internal architecture" from *Reference re Secession of Quebec*); *Ontario Home Builders' Assn. v. York Regional Board of Education*, [1996] S.C.J. No. 80, [1996] 2 S.C.R. 929, at paras. 92, 96, 98, 99, 122, 134, 137 (S.C.C.); *Air Canada v. British Columbia (Attorney General)*, [1986] S.C.J. No. 68, [1986] 2 S.C.R. 539, at para. 14 (S.C.C.); *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489, at paras. 72, 80 (S.C.C.); *Trial Lawyers of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, [2014] 3 S.C.R. 31, at paras. 26, 93 (S.C.C.); *OPSEU v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at para. 151 (S.C.C.); *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at para. 24 (S.C.C.); *Cooper v. Canada (Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854, at paras. 29, 82 (S.C.C.); *R. v. Hydro-Quebec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at paras. 110, 116 (S.C.C.); *McLean v. British Columbia (Securities Commission)*, [2013] S.C.J. No. 67, [2013] 3 S.C.R. 895, at para. 9 (S.C.C.); *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031, at para. 7 (S.C.C.); *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, at para. 77 (S.C.C.); *Morgard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135, [1990] 3 S.C.R. 1077, at para. 39 (S.C.C.); *Reference re: Goods and Services Tax (GST)*, [1992] S.C.J. No. 62, [1992] 2 S.C.R. 445, at para. 88 (S.C.C.); *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, [2003] 2 S.C.R. 585, at para. 21 (S.C.C.) ("the general constitutional and judicial architecture of Canada"); *Ell v. Alberta*, [2003] S.C.J. No. 35, [2003] 1 S.C.R. 857, 2003 SCC 35, at para. 22 (S.C.C.); *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] S.C.J. No. 9, [1989] 1 S.C.R. 206, at para. 29 (S.C.C.); *McMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725, at paras. 1, 9 (S.C.C.); *Reference re Wartime Leasehold Regulations*, [1950] S.C.J. No. 1, [1950] S.C.R. 124, at 145 (S.C.C.); *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] S.C.J. No. 124, [1990] 3 S.C.R. 570 (S.C.C.); *Hunt v. T&N plc*, [1993] S.C.J. No. 125, [1993] 4 S.C.R. 289 (S.C.C.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, 2003 SCC 62, at para. 35 (S.C.C.); *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405, at paras. 69, 70, 72 (S.C.C.); *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at paras. 35, 49 (S.C.C.); *Canadian Egg Marketing Agency v. Richardson*, [1998] S.C.J. No. 78, [1998] 3 S.C.R. 157 at para. 123 (S.C.C.); *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at 137 (S.C.C.); and *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 (S.C.C.).

[61] See Newman, *supra*, note 17. As he puts it, "It is, in retrospect, small wonder that the Supreme Court resorted to the structural metaphor of the 'architecture of the Constitution' and its close variants in describing the outline and the protected features of central political and judicial institutions like the Senate of Canada and the Court itself. The Senate is, after all, an upper *house*. And those institutions, like the House of Commons and office of the Governor General, certainly have an *external* architecture, be it neo-classical, neo-gothic or neo-Florentine" (at 34; emphasis in original).

point, well taken, is that it may make perfect sense to rely on the metaphor of architecture when dealing with the institutions of government since there are physical buildings representing those institutions that make the metaphor easier to understand. Therefore, a more generous reading of the *Reference* is that, in effect, all that is really meant by "constitutional architecture" is that our Constitution is not devoid of structure.

It's a simple idea. That, for example, there are headings and subheadings that set out discrete components of our constitutional provisions. That there is a coherent logic — through listing bodies and institutions such as "Executive Power", the "House of Commons", "Legislative Power" and the "Judicature" as examples set out in the *1867 Act* and the "*Canadian Charter of Rights and Freedoms*", "Rights of the Aboriginal Peoples of Canada" and "General" as examples from the *1982 Act*. That this literal structuring of the text then translates into certain conceptual structuring of constitutional ideas and norms.

Mies van Der Rohe says a similar thing about architecture: "by structure we have a philosophical idea. That structure is the whole from top to bottom, to the last detail — with the same ideas. That is what we call structure."[62] If van Der Rohe were a judge on the Supreme Court of Canada, would he caution against using "architecture" instead of "structure"?

VI. CONCLUSION

If there truly is an architecture to our Constitution, let's imagine ourselves taking a walking tour inside of it. I enter, through the preamble, which isn't as grand as I was led to believe.[63] I am now inside the Constitution. Its text is formed by power plays, by gambles, by ideals, virtues, religion, scholarship, politics, realpolitik, accidents and adaptations. I can see how it was promoted by individuals, political parties, members of different groups, skeptics and optimists. Some of it was enacted at the founding of the country; other parts were amended or added later on. Its very insides have been criticized, sold, advertised, downplayed, debated and upheld. Its text is used, interpreted, cited and relied upon in ways foreseen and unforeseen by its makers.

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[62] Franz Schulze & Edward Windhorst, *Mies van der Rohe: A Critical Biography* (Chicago: University of Chicago Press, 2012), at 194.

[63] Chief Justice Lamer, in *Provincial Judges Reference*, *supra*, note 60, para. 109.

It is subject to time, taste, other laws, ideas about freedom and liberty, changes in sentiment, customs, mood, activity and fear. It will respond more or less readily to these influences, sometimes enhancing, sometimes suppressing or opposing them.

Our Constitution might command attention, or move or provoke, but it will never exist independently of us who are around it, and our events and thoughts that occur in time. I have learned that one description of bad architecture is that it ignores this inescapable circumstance. I hope that all lawyers, academics, judges and others, learn that any description of our Constitution that seeks external support from metaphors, also risks losing sight of what it ultimately signifies.