

Bobbitt's Paradise: Canadian Constitutional Interpretation and Public Meaning Originalism

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Abstract: *Bobbitt's Paradise: l'interpretazione costituzionale canadese e il Public Meaning Originalism* – In his testimony to Congress, Professor Solum has concisely set out the nature of, and justification for, his preferred method of constitutional interpretation: public meaning originalism. In this reply, the author discusses the extent to which Professor Solum's ideas have found some purchase in Canadian courts. Despite the Supreme Court of Canada's clear commitment to interpreting the constitution like a "living tree", and apparent unanimity on the proper interpretive approach, this consensus may be only skin-deep. While Canadian courts appear to agree that every possible interpretive source may be consulted, they have not provided guidance on when certain considerations (such as text and history) should outweigh others (such as pragmatic considerations and contemporary values). Instead, the courts often appear to pick and choose between various sources or methods of interpretation, in any given case, according to sensibility and conscience. Through a review of the insights contained in Professor Solum's testimony, the author proposes some areas for reflection, and attempts to encourage some principled disagreements on the issue of constitutional interpretation in Canada.

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1. Introduction

As a leading constitutional theorist and originalism's unofficial cartographer, Professor Solum has done as much as anyone to delineate, synthesize, and advance the family of theories that make up the modern originalist oeuvre. I am grateful for the opportunity to respond to his lucid articulation of the contours of and justification for public meaning originalism in his testimony to Congress. However, I am also confident that the other contributors are better equipped than I am to respond with some originality to his underlying ideas. Instead, I will discuss whether and how the ideas that Professor Solum describes translate into the context of Canadian constitutional law.

The fit is imperfect, to put it mildly. The Supreme Court of Canada has consistently endorsed the "living tree" metaphor, which represents a (rather undertheorized)¹ form of living constitutionalism.² The received wisdom has it that

¹ See especially the thoughtful discussion in K.A. Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (PhD Thesis, Queen's University Faculty of Law, 2015) [unpublished] at 34–60.

some form of constitutional dynamism has always imbued Canadian interpretive practice, at least since Lord Sankey planted the “living tree” into our lexicon in the famous *Persons Case*.³ This commitment to ‘progressive’ interpretation is often taken to represent a wholesale rejection of originalism in Canada, in all its forms.⁴

That conclusion is too simple, for the reasons Professor Solum and others have explained. Like nearly every interpretive theory, public meaning originalism can accommodate at least *some* forms of legal change, and possibly a great deal within the “construction zone”. While there is no question that our Supreme Court is disturbed by the spectre of “frozen rights”, Professor Solum reminds us that originalism does not require that the applications of provisions “remain frozen in time”.⁵ And the very notion of a living tree implies that it has roots and a trunk,⁶ and that growth must be constrained within its “natural limits”.⁷ In short, our penchant for arboreal metaphors does not tell us much about the extent to which public meaning originalism is compatible with Canadian interpretive practice,⁸ so we will have to look more closely.

2. Some Canadian Complications

Before I get there, I should mention a few things that complicate the picture in the Canadian context. First, while structural constitutional review – primarily with respect to the division of powers between federal and provincial governments – has been occurring since 1867, our *Charter of Rights* is relatively new, having just celebrated its 35th anniversary. Whereas US courts are now being asked to excavate the original understanding of provisions passed centuries ago, our courts, at least in dealing with the *Charter*, rarely need a detailed forensic investigation to unearth the ‘original’ understanding of the words. We generally use the same ones

² As our most sophisticated defender of the idea, Professor Waluchow, has recently commented, it can be very difficult to distinguish between Canadian living-treeism and forms of modern originalism: see W. Waluchow, *The Living Tree* in Oliver, Macklem, Des Roches (eds), *Oxford Handbook of the Canadian Constitution*, 2017 [Oliver et al, *Oxford Handbook*] at 905-906. Notably, Prof Waluchow tends to limit his defence of the living tree to the more abstract, morally-laden, textually-underspecified phrases in the *Charter*: see e.g. W.J. Waluchow, *Democracy and the Living Tree*, 1 Drake Law Review, 1001-1002. However, it is in precisely such circumstances that public meaning originalism may provide no decisive answers: see generally L.B. Solum, *Originalism and Constitutional Construction*, 82 Fordham Law Review, 2013, 453.

³ *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 136. See e.g. S. Beaulac, *Post-World War I/Quiet Revolution (1920-1970) – Through the Lenses of Legal Interpretations and International Law* in E. Mendes, (ed), *Celebrating 150 Years of Case Law by the Supreme Court of Canada*.

⁴ See generally B. Oliphant, L. Sirota, *Has the Supreme Court of Canada Rejected 'Originalism'?*, 42 Queen's Law Journal, 2016, 107, 111-121.

⁵ Solum, *Testimony*, 9.

⁶ For an incisive treatment, see V. Jackson, *Constitutions as 'Living Trees'? Comparative Constitutional Law and Interpretive Metaphors*, 75 Fordham Law Review, 2006, 921, 943-960 (noting that the living tree doctrine “implies constraints as well as evolution”). See also D. M. Brown, *Tradition and Change in Constitutional Interpretation: Do Living Trees Have Roots?*, 19:1 National Journal of Comparative Law, 2005, 33.

⁷ *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145 at 156. Notably, esteemed originalist Steven Calabresi recently approved of the metaphor. See National Constitution Centre, “The life and legacy of Justice Antonin Scalia” (Feb 18, 2016) Podcast: *We the People*, at 34:55.

⁸ See B.W. Miller, *Beguiled By Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada*, 22:2 Canadian Journal of Law and Jurisprudence, 2009, 331.

today in the same way, and many of the still-leading *Charter* decisions stem from less than a decade after its passage. As a result, a commitment to the *original* public meaning of the *Charter* is not easily distinguished from an adherence to the text, context, and structure of the document itself.

The second complicating factor is that we do not have one written *Charter* in Canada, we have two: one in English, *et une autre en français*.⁹ Neither is treated as a ‘translation’ of the other. They are equally authoritative and equally law.¹⁰ I have not yet thought through how this fact would fit into an originalist model, but my instinct is that it would be considered a welcome complication. Our interpreters have not one but two sets of textual clues, which they must try to reconcile in a sensible manner; ambiguities and even vagueness that may bedevil interpreters can sometimes be resolved by addressing oneself to the other, co-equal, constitutional language.

Third, and perhaps most significantly for my purposes, one generally does not see Canadian judges consciously adhering to any particular interpretive methodology, beyond the obligatory and ritual nods to the “living tree” and other Canadian interpretive pieties.¹¹ It is more common for judges to pick and choose between interpretive approaches as appears to suit a particular case. For instance, a Justice may unequivocally reject originalism in one case,¹² while dissenting in another on the basis that the majority exceeded what was originally intended.¹³ Judges may endorse a particular interpretation because it was “within the contemplation of the framers of the *Charter*” in one sentence, and because the “*Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians” in the very next.¹⁴ And among the most conspicuously originalist judgments of the past few decades¹⁵ was written by the Canada’s most forceful judicial critic of originalism.¹⁶

⁹ This nearly exhausts my knowledge of Canada’s other official language, to my embarrassment.

¹⁰ See generally The Hon. M. Bastarache et al, *The Law of Bilingual Interpretation* (Toronto: LexisNexis, 2008), c. 3, part 1.

¹¹ See e.g. *R v. Comeau*, 2016 NBPC 3, discussed in more detail in Professor Sirota’s contribution to this symposium, where the court began by singing from the Canadian constitutional hymnal (‘living tree’, ‘purposive’, ‘large and liberal’, etc.) only to employ an analysis that was conspicuously originalist.

¹² *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 409, Iacobucci J., dissenting (“This Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution”).

¹³ *Weber v. Ontario Hydro*, [1995] 2 SCR 929 at para 5, Iacobucci J., dissenting (describing the majority approach as one that “differs substantially from my own, which focuses on the intention of those who drafted the *Charter*.”)

¹⁴ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para 78.

¹⁵ *R. v. Blais*, 2003 SCC 44, Binnie J. (basing the judgment on the originally understood meaning of the word “Indian”, and noting that “this Court is not free to invent new obligations foreign to the original purpose of the provision at issue”, that the “analysis must be anchored in the historical context of the provision”, and that “[g]enerous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse”).

¹⁶ See e.g. *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53 at para 89, Binnie J., dissenting (“Canadian courts have never accepted the sort of ‘originalism’ implicit in my colleague’s historical description of the thinking in 1867.”) See also Oliphant & Sirota, *supra* at 113 n 25, 119 n 60-61.

I do not mean to single out these excellent judges; they are not alone. Our Supreme Court, and as far as I can tell, each individual judge, is unabashedly pluralistic and eclectic. We do not have different judges offering rival interpretive approaches, but rather the same judges adopting different approaches from one case to the next. As a result, my attempt to briefly assess the extent to which originalism has some purchase in Canada is likely doomed from the outset. But since we are all here, I will try nonetheless.

3. Canadian Constitutional Interpretation in a Nutshell

In terms of interpretive practice, all of the common ‘modalities’ of constitutional argument – text, history, intention, purpose, structure, values, precedent, pragmatics, and much else – are regularly employed in Canada, as they are elsewhere. What is interesting, however, is that no obvious effort is made to structure their use or articulate a process by which one is preferred to the others, which is typically the role an interpretive theory would play. Instead, the courts will often agree on a medley of every potential interpretive source at once, sometimes articulated in a flurry, and normally without explaining how they all fit together or to what end.

By way of example, a majority of the Supreme Court recently noted, in the span of a few paragraphs, that the Constitution is not “an empty vessel to be filled with whatever meaning we might wish from time to time”; while it must be interpreted in a “large and liberal manner”, “purposively” and “remedially”, we must also focus on the “primacy of the written text”, the “design of our constitutional structure”, and stay “anchored in the historical context of the provision”.¹⁷ The dissenting judges did not disagree expressly with any of those principles, but instead produced an equally diverse recipe of its own, advocating “a broad and purposive reading” that “must clearly be rooted in the words of the provision in question” as “understood in their proper linguistic, philosophic and historical context”, with an effort to achieve “the intent of the makers of our Constitution”.¹⁸ Neither judgment so much as mentioned the words ‘living tree’ or ‘progressive’, despite considering a constitutional text enacted a century and a half ago.

At the same time, orthodoxy has it that the Canadian Constitution is a “living document”. It requires an “evolutionary interpretation” by which a “judicial ruling changes the existing law or creates new law”.¹⁹ Notwithstanding the importance of history, we are told that “the meaning of the words used may be adapted to modern-day realities”²⁰ and in order to “reflect advances in human understanding”.²¹ Notwithstanding our insistence on the primacy of the text, we have judicially enforceable unwritten constitutional principles,²² and have asserted

¹⁷ *Caron v. Alberta*, 2015 SCC 56 at paras 34–37.

¹⁸ *Ibid* at paras 216–220.

¹⁹ *Canada (Attorney General) v. Hislop*, 2007 SCC 10 [*Hislop*] at paras 93–108.

²⁰ *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 at para 10 [*EI Reference*].

²¹ *Hislop*, *supra* at para 114.

²² *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 53–54.

that we must enforce principles that exist “beyond the words” of a particular *Charter* provision.²³ Notwithstanding the importance of constitutional structure, the courts must undertake a “constant adjustment process”²⁴ with respect to the meaning of constitutional provisions that are “essentially dynamic”.²⁵

If anyone can divine a coherent interpretive philosophy out of these scattered bones I would be indebted. It seems to be everything and nothing at once. To be clear, my point is not that the propositions standing alone are indefensible, nor that they cannot all play a role in a coherent interpretive approach. My point is that the Court tends to state them all in a single breath, at a high level of abstraction, and then pick and choose between them as seems appropriate. We typically are not told why, in one case, we must stay clearly rooted in the written text and its historical confines, while in another case we must go beyond the text or adapt its meaning to speak to modern realities. We are, in short, a Bobbitian paradise, where the choice between interpretive sources in any given case appears guided by the dictates of conscience.²⁶

In light of the above, it would be easy enough to conclude, as most Canadian scholars have, that Lord Sankey banished originalism from our shores as St. Patrick did the snakes from Ireland, but I think that misses an important part of the picture. It is exactly our penchant for interpretive pluralism that we not infrequently come across strong notes of originalist reasoning throughout our history, both before and after the *Charter*.²⁷

One reason we find so many examples of originalist reasoning in the heartland of living constitutionalism is, I suspect, because public meaning originalism is nearly indistinguishable from the orthodox principles of statutory interpretation endorsed by the Privy Council and Canadian courts for centuries.²⁸ I am fond of Lord Reid’s helpful articulation:

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said. (...)

One must first read the words in the context of the Act read as a whole, but one is entitled to go beyond that. The general rule in construing any document is that one should put oneself “in the shoes” of the maker or makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament subject to one qualification. An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public

²³ *Figueroa v. Canada (Attorney General)*, 2003 SCC 37 at para 19. And see Benjamin J Oliphant, “Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms” (2015) 65:3 UTLJ 239 [Oliphant, “Purposivism”].

²⁴ *Law Society of Upper Canada v. Skapinker*, [1984] 1 SCR 357 at para 11.

²⁵ *El Reference*, *supra* at para 9.

²⁶ P. Bobbitt, *Constitutional Interpretation*, 1991, 178-86.

²⁷ See generally L. Sirota, B. Oliphant, *Originalist Reasoning in Canadian Constitutional Jurisprudence*, 50:2 UBC Law Review, 2017, 505.

²⁸ See especially J. Goldsworthy, G. Huscroft, *Originalism in Canada and Australia: Why the Divergence?*, in R. Albert, D.R. Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution*.

knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind.²⁹

I think this passage nicely captures the basic premise of Professor Solum’s originalism – that interpretation is constrained by the meaning of words as understood at the date of passage – and we should not be surprised that these principles have infused Canadian interpretive practice to some extent, including with respect to the constitution.³⁰ Even leaving aside the long history where the application of the orthodox principles was unquestioned, one returns in particular to the seminal *Charter* decisions, where the Courts would generally downplay specific evidence of what was *meant*, but would rather closely scour the text and context of a particular provision to try to sort out what was *said*.

One telling example is the *Motor Vehicle Reference*, in which the Court held that the term “principles of fundamental justice” included substantive principles of justice, rather than just procedural ones.³¹ The Court famously refrained from relying on the framers’ intentions to the contrary, as expressed in the testimony of the drafters of the provision; however, so might originalists like Professor Solum, who notes that while those intentions might supply some evidence, the meaning of the text does not derive from what the framers thought it should mean.³²

I choose the *Motor Vehicle Reference* advisedly, as it is commonly taken to sound the death knell for originalism under the *Charter*, and has been the wellspring of an especially contentious and active body of case law.³³ Even our most highly (and deservedly) esteemed constitutional oracle, Professor Hogg, who is generally dismissive of ‘originalism’ and supportive of ‘progressive interpretation’, argues that the Court should not have so blithely rejected the clear intention of the framers in this particular instance.³⁴

I must confess that, like Lord Reid, I am not particularly drawn to this position, at least as a matter of interpretive obligation. In my view, constitutional drafters must speak clearly if they want to be heard clearly, both by the public’s representatives voting on the constitution and later by the courts interpreting it. While interpreters should not be quick to stretch or misread an idea clearly communicated, it is not obvious to me that they should prefer one reading of opaque language solely because that may be how certain drafters might prefer it to be read. If the drafters wanted to ensure procedural protections only, they could have very easily said so; they might have used the common term “natural justice”, or more radically, the word “procedural” at some point. They did not use terms

²⁹ *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffmburg A-G* [1975] AC 591 at 613.

³⁰ On the links between Canadian statutory and constitutional interpretation, see Stéphane Beaulac, *Constitutional Interpretation: On Issues of Ontology and of Interlegality*, in Oliver et al, *Oxford Handbook*, *supra*.

³¹ *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486. Discussed in more detail in Oliphant & Sirota, *supra* at 138-142.

³² Solum, *Testimony*, at 2.

³³ Section 7 has been aptly referred to as the *Charter’s* “problem child”. See J. Cameron, *From MVR to Chaoulli v. Quebec: The Road Not Taken and the Future of Section 7*, 34 *The South Carolina Law Review*, 105.

³⁴ See P.W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, looseleaf) at §60.1 (e-g).

with clear meanings to express their purportedly clear intention, but rather obtained a consensus to enact the grandiose and pregnant phrase “principles of *fundamental justice*”.

While some may see the analysis in the *Motor Vehicle Reference* as a smoke screen, it strikes me as a genuine effort to get to the bottom of how a reasonably well informed member of the public, or perhaps a lawyer acquainted with the orthodox principles of statutory interpretation, would understand the terms in context.³⁵ Justice Binnie later explained that the decision was justified based on the “common meaning of words”, adding that “if someone handed a judge an apple and called it a banana the judge would still be required by his or her oath of office to fearlessly declare it to be an apple”.³⁶

I suspect that public meaning originalists would normally agree, and indeed, from the perspective of public meaning originalism, the Court’s reference to the “living tree” in *Motor Vehicle Reference* seems to be of the unobjectionable sort. It was used to disavow heavy reliance on drafters’ intentions or expected applications, not the original understanding of the words placed in context, which could not have evolved much from the day of passage of the *Charter* only a few years prior. That is, the Court did not hold that while the disputed phrase “principles of fundamental justice” *now* includes substantive protections, it might *later* mean only procedural protections or something else entirely; rather, it held that in determining which understanding was correct, evidence of the intentions of the drafters should not be given controlling weight in the balance, particularly where those ran contrary to what the Court considered to be the best (and necessarily still “original”) understanding of the text and structure of the *Charter* itself.

Overall, there is no shortage of decisions in Canada adopting forms of originalism,³⁷ and equally no shortage of decisions which reject its core precepts.³⁸ My concern is that we are never really told when or why one should give way to another, which risks turning constitutional interpretation into a glorified shell game. Each interpretive canon has a counter-canon,³⁹ and so interpreters at least appear to be entirely liberated. And without any theoretical grounding or apparent desire to find one, the litany of interpretive principles are employed to the extent they are considered suitable to the context (or, for cynics, convenient to reach a favoured result), and otherwise ignored.

What is interesting in this is not that the Court as a whole has been inconsistent, which is to be expected, but that one cannot easily identify any

³⁵ This is not to say that the Court was necessarily successful in its various textual and contextual inferences in that case, just that the types of arguments it used would be quite familiar to a public meaning originalist. See generally Oliphant, Sirota, *supra* at 138-141. Nor is it to say that, having concluded that the term “principles of fundamental justice” does not indicate procedural protections only, that the Court has been altogether successful in the course of constitutional ‘construction’. See e.g. the indictment set out in Cameron, “The Road Not Taken”, *supra*.

³⁶ This is attributed to the author of the principal judgment in the *Motor Vehicle Reference*, Justice Lamer. See Binnie, “Original Intent”, *supra* at 351.

³⁷ Perhaps the most notable example in the context of the *Charter* has been the steadfast exclusion of property rights, which has been defended exclusively on originalist grounds: see Sirota, Oliphant, *supra* at 552-553.

³⁸ Sometimes in the same judgment: compare *Hislop*, *supra* at paras 94-95, and at paras 72-73.

³⁹ Sirota, Oliphant, *supra* at 564-565.

interpretive fault lines between judges. I wonder to what extent that is an indication of an analytically stable consensus, as opposed to an indication that everyone can agree when nothing meaningful enough to provoke controversy is being said.⁴⁰

4. Professor Solum's Lessons

Whether or not one ultimately adopts Professor Solum's preferred interpretive approach, a consideration of the ideas set out in his testimony might go some ways towards confining the vast degree of interpretive discretion in Canada, if we were so inclined. I want to highlight three lessons in particular.

First, we might benefit, at least in some contexts, from an attempt to distinguish between 'interpretation' and 'construction'; between growth and dynamism *within* the original understanding of the words as opposed to shifting *between* different meanings; between attributing a meaning to words and creating doctrine to put that meaning into effect.

This point might be illustrated by discussing the dominant interpretive approach in the context of the *Charter*: "purposivism". The 'purposive approach' as originally articulated required interpreters to turn their minds to "the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*".⁴¹ This contains all of the interpretive tools that an originalist might advise using, by prescribing interpretations that, while not overly narrow or technical,⁴² are nonetheless grounded in the written word "placed in its proper linguistic, philosophic and historical contexts".⁴³

However, because we have always conflated the tasks of interpretation and construction, the purposive approach has been a coat of many colours in practice. The courts frequently will use 'purposes' derived from textual, contextual, structural and historical markers to resolve narrow textual ambiguities (i.e. 'interpretation') or to develop doctrine within vague text (i.e. 'construction'), both of which a public meaning originalist could accept. But 'purposivism' is also used to stretch and enlarge the meaning of the text so as to better achieve its purpose, and sometimes, to enforce stand-alone, judicially-identified purposes. This leaves the courts with an enormous amount of power to add or subtract to the Constitution as seems necessary to achieve broad political goals or advance moral values, any

⁴⁰ I should issue a disclaimer here: it is of course easy for me, as someone who bears no burden of power or responsibility to the population, to grouse from the sidelines, and demand unbending commitment to principle, come what may. I do not intend to stop grouching because of that, but I do recognize how difficult the task of constitutional interpretation is, and how much more difficult that task would be when your answers matter in the real world.

⁴¹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344 [*Big M Drug Mart*].

⁴² As many originalists would advise. See e.g. A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, 1997, 23 ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means") and J. Goldsworthy, *Interpreting the Constitution in its Second Century*, 24 Melbourne Law Review, 2000, 677, 687-689 (criticizing interpretive 'literalism' as "narrow, formalistic and obstructive").

⁴³ *Big M Drug Mart*, *supra* at 344.

number of which can be found latent in any modern Constitution.⁴⁴ And because we do not consciously distinguish between the tasks of attributing meaning to words and subsequently applying those meanings in concrete cases, “purposivism” can function as a distracting buzzword, which tends to paper-over the more nuanced interpretive debates that, I suggest, we should be having.

Second, the coherence of Canadian interpretive practice has suffered from the false dichotomy so common in political debates, if no longer in sophisticated legal ones, between utter constitutional rigidity and unbounded flexibility. All forms of constitutional change – for instance, the need to accommodate constitutional provisions to new technology – are taken as a refutation of originalism *tout court*.⁴⁵ We sometimes believe that we must either have a constitution that can apply to modern circumstances or one that requires horse-drawn carriages to have the right of way on public roads.⁴⁶ As Professor Cameron has argued:

the ‘living tree’ doctrine has over the years provided a rationale for granting the Constitution as liberal an interpretation as possible. Otherwise, as the Court suggested in *Secession Reference*, the text would place the Constitution in a straightjacket. And there is little to choose between a living tree and a straightjacket.⁴⁷

Until we can break free of this mythical dichotomy, which Professor Solum helpfully challenges,⁴⁸ I do not expect we will make it far in bringing some coherence or consistency to the task of constitutional interpretation in Canada, should we want it.

The final lesson I want to highlight is an implicit one: that originalists like Professor Solum have carefully described what they believe the object of the interpretive inquiry is and should be. They have explained why, in their view, the original public meaning is the proper focus of attention, what its limits are, and how each of the modalities ‘fit’ into the overall project.⁴⁹ Our difficulty in Canada is that we do not seem sure what we are looking for, and therefore cannot say whether or to what extent a particular interpretive data point will help us find it. It is often a practice disconnected from an objective.⁵⁰ For those who think that

⁴⁴ See generally Oliphant, “Purposivism”, *supra*.

⁴⁵ See e.g. *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 23.

⁴⁶ I did not make this example up. See S. Fine, “Retired Canadian jurists respectfully dissent from Scalia’s approach, style” *Globe and Mail* (February 15, 2016) (“Horses used to have the right of way on the road,” John Major, a retired Canadian Supreme Court judge, said, using some sarcasm of his own, to explain why he never accepted Justice Scalia’s originalism. “There came a time when courts thought maybe cars should have the right of way.”)

⁴⁷ J. Cameron, *The Written Word and the Constitution’s Vital Unstated Assumptions*, in Thibault, Pelletier, Perret (eds), *Essays in Honour of Gerald A Beaudoin: The Challenges of Constitutionalism*, 2002, 112.

⁴⁸ Both briefly in his testimony, and in more detail elsewhere: see e.g. L.B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 *Texas Law Review*, 2012, 147; L.B. Solum, *The Interpretation-Construction Distinction*, 27 *Const. Comm.*, 2010, 95, 115-118.

⁴⁹ See e.g. K. Whittington, *On Pluralism within Originalism*, in Huscroft, Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation*, 2011.

⁵⁰ See the discussions in M. Berman, K. Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 *Texas Law Review*, 2013, 1739, and C. Green, *Constitutional Truthmakers*, *Notre Dame Journal of Law, Ethics and Public Policy*, 2017.

originalists like Professor Solum are searching for the wrong thing, it may be helpful to propose an alternative target,⁵¹ so we can see where it leads us.

5. Conclusion

I do not anticipate a robust debate on these issues blossoming in Canada anytime soon. That occasion may have to await a less circumspect Supreme Court affixing large branches to the Constitution, or lopping them off, in a way that shifts us away from a relatively mild centrism within our political climate. In the meantime, I suspect that Professor Solum's insights, and the healthy debate that originalism has generated elsewhere, will pass us by. Most appear content with a discretionary cornucopia of abstract interpretive principles to be prioritized, expanded, narrowed, rejected, or ignored, in any given case, often without explanation on the plane of principle, provided that the courts use its discretion thoughtfully and conscientiously, as ours almost always do. Indeed, if the measure of interpretive wisdom is a sort of case-by-case sensibility – using the various modalities of argument as they appear suitable to a particular interpretive problem and in order to reach an attractive result – I think our Supreme Court tends to do rather well on that metric, at least a lot of the time. The hard question is whether we can, or should, expect more than that.

⁵¹ Or, perhaps, stop pretending there *is* a target, as we commonly do. See e.g. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para 42 (“In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that *the Constitution* is respected.” [emphasis added]).