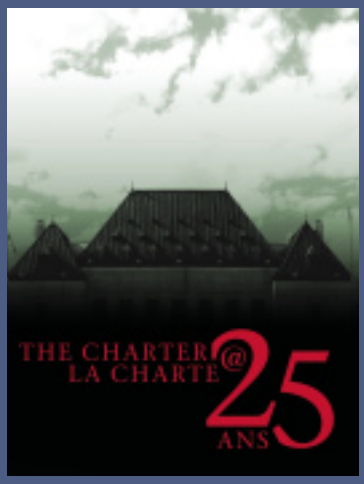
INTERPRETING THE CONSTITUTION: THE LIVING TREE VS. ORIGINAL MEANING

Ian Binnie



Continuing our year-long series *The Charter @ 25*, Justice Ian Binnie of the Supreme Court of Canada argues for "the living tree" interpretation of the Constitution, as opposed to "original meaning." This article is adapted from his debate with Justice Antonin Scalia of the United States Supreme Court at the McGill Institute for the Study of Canada's landmark *Charter @ 25* conference, in Montreal last February 16. Binnie vs. Scalia, as the debate was dubbed, was a riveting performance by both judges.

Dans le cadre de notre série sur les 25 ans de la Charte des droits et libertés, le juge Ian Binnie, de la Cour suprême du Canada, propose d'interpréter la Constitution selon une « approche évolutive » plutôt qu'en privilégiant son « sens premier ». Cet article est tiré du débat qui l'a opposé au juge Antonin Scalia, de la Cour suprême des États-Unis, lors de l'importante conférence « La Charte @ 25 ans » tenue à l'Institut d'études canadiennes de McGill le 16 février dernier. Un débat surnommé « Binnie vs Scalia » au cours duquel les deux magistrats ont offert une éblouissante démonstration de leur savoir.

Justice Scalia espouses what he would call a doctrine of judicial restraint — he does so with such success that the *New Yorker* says he has gained the status of a "rock star." More specifically he espouses what is known as "originalism." The idea is that judges should stick to the "original meaning" of the terms of a constitution, because that is all that was ratified by the people who are governed by it. The text is the sole source of the legitimacy for their judicial decisions. If the text is out of step with society and needs to be updated, it should be done by the people not by the judges. Justice Scalia writes, in *A Matter of Interpretation,* that "what I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."

Of course, the original meaning of the text, if it can be ascertained, should be taken into account. No one argues that it should not be. The issue is whether the framers intended a "frozen rights" approach to our political institutions and our rights and freedoms. Is the Constitution a living tree or a dead tree? Justice Scalia will point out that if a majority of the people don't like their rights frozen, they can amend the Constitution. For 115 years of our history we had no power to amend our Constitution, and once we got an amending formula it became clear that if there is one thing Canadians dislike more than judicial impudence it is an endless series of constitutional conferences. In the United States, the last successful attempt to amend the Constitution was in 1992; the amendment addressed the procedure governing raises in congressional pay. The amendment was actually proposed in 1789, a gestation period of 218 years.

In this country when the government in 1982 proposed a charter of rights and freedoms, the provincial premiers demanded more legislative powers over resources. Prime Minister Trudeau complained that he was supposed to bargain human rights against fish. I proceed on the basis that in *this* country a set of frozen rights will, for all practical purposes, stay frozen. On that basis the question is whether the theory of "original meaning," or as I prefer to call it, a theory of frozen rights with no realistic prospect of a thaw, is correct for Canada.

Whatever may be the right approach in the United States, it seems clear that a frozen rights theory has never been accepted in Canada, and I say that is so for at least four reasons.

Firstly, a frozen rights theory misconceives the nature of our Constitution and our government institutions, and our history, all of which are very different from those of the United States. Secondly, supporters of "original meaning" in Canada ignore the lessons of some of the less glorious episodes in our constitutional history, including the *Persons'*

Case, where the courts in Canada embarrassed themselves by holding, in accordance with the "original meaning" of section 32 of the *Constitution Act, 1867*, that women were not qualified for appointment to the Senate because they were not "qualified persons." Thirdly, the argument about "original meaning" is at bottom an argument about judicial legitimacy. I do not think judges need apologize for not being elected. The legitimacy of the courts does not flow from the ballot box but from the fact that our Constitution, like the American Constitution, envisages a system of checks and balances. Our system includes an unelected judiciary who are supposed to bring to their job something more than a capacity to research the writings of our ancestors, what I believe is described in the United States as "law office history" (or, less reverentially, "ancestor worship"). Fourthly, I believe that the "living tree" approach has served us well. In terms of government powers, the federal government would have overwhelmed the provinces under the "original meaning" of the division of powers set out in 1867 with consequent pressure in some regions to separate, or radically to overhaul the confederation, which in the absence of an amending power or a civil war, would have been impossible. Insofar as the Canadian Charter of Rights and Freedoms is concerned, the framers specifically rejected the idea that rights should be frozen as of the date of enactment. The history of Charter negotiations demonstrates that in many cases, the framers had only the most general idea of the scope of the rights they were entrenching in the Constitution, drawn largely from European and US precedents, and so they chose very open textured language, which they then delegated to the courts to refine and develop. However, in Canada, unlike the United States, the elected framers balanced this delegation to the courts with a legislative power to override court decisions with respect to most Charter rights and freedoms, including the freedom of expression, freedom of association, including even the right to life, liberty and security of the person. In other words, Parliament and the provincial legislatures largely retained the power to prevail over the courts in cases where they see fit to do so.

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Returning, then, to my first proposition. Proponents in Canada of "original meaning" misconceive the nature of our Constitution. Ours is not a revolutionary document. Confederation was coaxed into existence by a series of British Colonial Secretaries including Earl Henry Grey (1802-1894), the third Earl by that name. Unlike Thomas Jefferson, Earl Grey today is chiefly remembered more for his blend of tea rather than his philosophic writings. The *Constitution Act, 1867* contains no visionary statement of a bold new democracy. On the contrary it established an unelected Senate that is authorized to kill legislative measures enacted by the elected House of Commons. In 1867 it promised a form of government of the people, for the people but only to the extent the Crown represented by the imperial government in London considered good for us. According to section 9 of the *Constitution Act, 1867*, executive authority is vested in the Queen. By convention, of course, she exerts that authority on the advice of her Prime Minister and Cabinet, but no such limitation is expressed in the Constitution. Nothing in the Constitution speaks of the prime minister, or requires the government to enjoy the confidence of the House of Commons. According to section 16 of the *Constitution Act, 1867*, the Queen could designate Moose Jaw as the capital of Canada without consulting anybody, just as she designated Ottawa without much consultation. A language law made by the elected representatives in Quebec could be set aside by Ottawa, and a federal budget could be disallowed by Queen Victoria sitting in London. Even opponents would have been outraged at such interference in elected politics, but the *Constitution Act, 1867* authorizes, and in its original meaning was *meant* to authorize, just such a disallowance.

The fact is that the politicians learned from experience that a power of disallowance that looked like a good idea on paper was a bad idea in practice, and they got around the original meaning of the Constitution by adopting certain constitutional conventions which are defined as parliamentary practices that contradict the text of the Constitution. In the parliamentary context adherence to original meaning would have been a disaster.

It seems clear that our judges have always accepted, along with our legislators and members of the executive, that Canadian society evolves and that while the constitutional text remains the same it is interpreted now in the only way it can be, by Canadians of today not by the colonial judges of 1867.

My second proposition is that Canadians who support the original meaning or frozen rights approach ignore some of the more embarrassing episodes in our constitu-

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Justice Ian Binnie of the Supreme Court of Canada proposes a "living tree" interpretation of the Constitution in his debate with US Supreme Court Justice Antonin Scalia, famously a proponent of "original meaning" at McGill University's *Charter @ 25* conference.

tional history that occurred when the courts failed to move with the times. Almost anyone with any interest in Canadian history knows that in 1928, the Supreme Court of Canada held that the reference in our Constitution to "qualified persons" eligible to sit in the Senate excluded women; that is to say that women, as a class, without exception, were declared unqualified for public office. Justice Scalia will say that public policy belongs to the elected representatives, but for the Supreme Court of Canada to say no to women in 1928 was as much a public policy pronouncement as it was for the Judicial Committee of the Privy Council to say yes to women when the case reached that final court on appeal in 1930. It is sometimes said in this country that the use of "original meaning" to support positions against abortion and in favour of capital punishment equally reflect policy choices rather than dispassionate legal doctrine.

Justice Scalia asks what gives a judge the special wisdom to evolve the Constitution over time. Of course the same question can be asked about how the judges can divine the original meaning of a document written 230 years ago. My answer is that judges could and should move cautiously and incrementally. It did not take a rocket scientist to appreciate in 1930 that women were capable of holding public office. In the *Persons' Case*, it had become clear that Canadian society had moved on from its 1867 roots and it was right and proper for the court to move with it. Our Senate today has 35 women, about a third of its number, but the credit does not belong to the framers of 1867. It belongs to the women who refused to acquiesce in such an outdated concept of the inequality of women, and the judges who eventually agreed with them, and abandoned "original intent" for a meaning more consistent with the values of Canadian society, which had learned from experience and moved on from the views of their colonial forebears.

I offer another example. The issue of the treatment of racial minorities has been difficult in both Canada and the United States. Canadians will remember that until the last 50 years or so Aboriginal peoples in Canada were effectively denied almost all civil rights on the basis, and I quote a Nova Scotia judge writing in 1929, that:

> *The savages' rights of sovereignty even of ownership were never recognized.... In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians*

Eventually our Supreme Court declared this approach to be "unacceptable" and brought to bear a more contemporaneous view of aboriginal peoples and of federal responsibilities under section 91(24) of the *Constitution Act, 1867*. In 1984, I acted for the federal government in a case that decided that exercise by the Crown of its power to accept a surrender of Indian lands creates a trust enforceable in the courts, a conclusion which would have been unthinkable in 1867. However, the evolving view of the courts toward Aboriginal rights, initially signalled in *Calder v. Attorney General of British Columbia*, in 1973, in effect was endorsed by the political leadership when they included a recognition of existing treaty and aboriginal rights in the *Constitution Act, 1982*.

In all of these examples an unacceptable gap had opened up between the original meaning of the Constitution and what people in Canada were prepared to live with. Nobody thought about a constitutional amendment because we had no power of amendment. Nor was it considered objectionable that the agents of change in both these cases were the judges. After all in *Somerset's Case* in 1772, Lord Mansfield held that there was no legal basis in England for slavery based in part on an evolutionary reading of the provision in the *Magna Carta* that no man "should be killed, imprisoned or disseised except by the lawful judgment of his peers or by the law of the land." He apparently felt things had evolved in the 557 years since the *Magna Carta* had been signed in 1215.

In the United States there has been an even greater evolution in the constitutional treatment of racial minorities. In the *Dred Scott v. Sandford* case in 1857, Chief Justice Taney of the United States Supreme Court relied on "original intent" to deny that Afro-American slaves were "constituent members of the sovereignty" to be included among "we the people." His view, and I quote:

> *We think they are not, and they are not included and were not intended to be included, under the word 'citizens' in the Constitution.*

Some jurists, including the late Chief Justice Rehnquist, argue that despite Chief Justice Taney's assertions to the contrary, the decision in *Dred Scott* did not reflect original meaning but was a departure from it. The fact of the matter is that the American Constitution in its present form had in 1857 co-existed with slavery for more than half a century under the supervision of judges who were probably more conversant with the "original meaning" of the Constitution than Americans are today.

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My third proposition is that advocates of the "original meaning" or frozen rights theory believe that the only source of legitimacy in Canadian society is conferred by elected office, that if Canada is to move with the times the only agent of change should be elected members. That is not in fact our tradition. In the 1981 constitutional hearings before the Parliamentary Committee, the fact the judges are not elected was seen as a strength not a weakness. In the matter of minority education rights, for example, the justice minister, Jean Chrétien, suggested that within the broad framework of section 23 of the Charter it should be left to the courts to work out the scope of the rights on a case-by-case basis, saying:

> *The courts will decide and it would be out of the political arena, where the matter is sometimes dealt with by some people who do not comprehend or do not want to comprehend. I think we are rendering a great service to Canadians by taking some of these problems away from the political debate and allowing the matter to be debated, argued, coolly before the courts with precedents and so on. It will serve the population, in my judgment very well.*

The fact judges are independent of electoral politics was seen by the Parliamentary Committee as one of the strengths of our system, not a weakness.

My fourth proposition is that the living tree approach has served Canada well. This certainly does not mean that people agree with the Supreme Court in all its decisions. On occasion they are highly controversial, but over the long haul it seems that people agree the courts are doing their job, and that our Constitution *should* be interpreted in light of all our experience as a country over the past 140 years, not just what was known to the colonial statesmen who met at Charlottetown and Quebec in 1864. I mentioned earlier that if the plan of government envisaged by the *Constitution Act, 1867* had been imple-

mented according to its "original meaning" it would have resulted in a degree of centralization in Ottawa that would have threatened the country's future existence.

The Fathers of Confederation meeting in 1866 in the shadow of the American Civil War were alarmed at the divisiveness of the theory of states' rights, and called for a more centralized federation, including the power of the federal Parliament to legislate generally for the "peace, order and good government of Canada." Equally the federal government was given extremely broad powers over trade and commerce. In the early days, the Supreme Court applied the "original meaning" of these powers and gave a broad scope to federal legislation, moving toward a highly centralized state in which the federal government could micro-manage everything down to the level of licensing local liquor establishments.

As the country in general and the courts in particular gained experience with the new Constitution, it was realized that if federal powers were applied as originally contemplated, the provinces would be reduced to little more than municipalities, a situation that many parts of the country were not willing to accept, as the history of the various secessionist movements in Western Canada and Quebec illustrates.

The courts, based on the country's evolving experience, began to curb federal power by striking down laws that intruded into areas of provincial jurisdiction.

It was held that each level of government was sovereign in its allocated sphere, with neither the federal government nor the provinces being subordinate in status or importance to the other, a theory which is very much at odds with the original scheme, as the existence of a federal power of disallowance in the *Constitution Act, 1867* plainly demonstrates.

However, for Canadians, as for Americans, the real controversy over "original meaning" focuses on human rights. In the United States the critical issues are abortion and capital punishment. In Canada, the issues are different and include language rights, gay marriage and, more recently, the duty of reasonable accommodation for minorities. In both countries, the critics argue that the courts have increased their own power by reading in rights that are not there. Our Canadian Charter of Rights and Freedoms is only 25 years old. Surely, the critics say, if there was ever a situation in which "original meaning" is not only desirable but entirely workable, it must be in this situation.

Of course, if a constitutional provision is clear and unambiguous, it is simply applied according to its terms. Section 4 says that elections must be held at least every five years. This sort of provision gives very clear guidance. But most constitutional provisions are written in very general language, which can be interpreted in different ways, especially when read with other provisions in the Constitution. Expressions like "cruel and unusual punishment" undoubtedly mean something different in 2007 than they did in 1867 or 1791. Public floggings were considered perfectly acceptable then. Justice Scalia has expressed doubt that he could uphold as constitutional a statute providing for public floggings in the United States today even though it could have been considered neither cruel nor unusual in 1791. This, he acknowledges apologetically, makes him a "faint-hearted originalist," which he hastens to distinguish from a "moderate non-originalist." Moderate non-originalists will be delighted with the concession on the public floggings issue.

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Christopher Manfredi of McGill University and other critics say more generally that the courts have pushed too far in subjecting laws to Charter review, but I believe that had the courts taken an "original meaning" approach they would have pushed further still. Section 52 of our Charter says that "a law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." In 1982 the plain meaning of the word "law" undoubtedly included the Québec Civil Code and the common law of the other provinces. According to the advocates of "original meaning," therefore, every legal aspect of private affairs, whether under the Quebec Code or the common law, whether dealing with private contracts, wills and trusts or family matters, would be subject to Charter challenge. The Charter of Human Rights and Freedoms would apply to every law dealing with relationships. The state would have a place not only in the bedrooms of the nation, but in its kitchens, living rooms, garages and workplaces to a far greater extent than it does now. The courts declined to accept this enormous jurisdiction, and adopted a more modest interpretation, holding that the role of the Charter should be restricted to fights against the government not your neighbour.

And what about equality rights? I happened to be in the Depart-

ment of Justice from 1980 to 1982. The draft of the Charter originally proposed by the government did not include an equality clause. The government put forward a non-discrimination clause targetting certain prohibited grounds such as race, religion and gender. It was the elected members of the Parliamentary Committee who greatly expanded its scope to provide that every individual is equal before and under the law. They added these words:

> *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.*

The grounds of discrimination proposed by the government were reduced by parliamentarians to mere particulars of a more general right to equality. Thus, in the early days of the Charter, workers injured on the job in Newfoundland successfully contended that a worker's compensation act that denied them access to the courts to seek tort damages like everybody else, but instead required them to deal with a regulatory board, violated equality rights. Under the "original meaning" of section 15, every classification made in every statute or common law in the country could be the subject of a lawsuit. Rich people might have gone to court to complain that they were paying an unfair share of the tax burden, even though wealth is not identified as a prohibited ground of discrimination.

It was the courts, not the framers, who shrank from this larger vision of equality and concluded that the Charter should be interpreted as an anti-discrimination law not an anti-classification law, which would have put on the government the onus of justifying every distinction made by statute between people, whatever the ground.

If you ask where the court gets its mandate to give an interpretation of the Constitution other than its "original meaning," I say it comes from a shared understanding of the framers and judges that this would be the role of the courts. For example, when the Minister of Justice presented the Charter to the Parliamentary Committee, he explicitly stated that the "government intended to avoid the problem of frozen rights by entrenching a broadly worded Charter that would require the judiciary to play an important role in defining the content of rights and to allow for the continual evolution of their meaning." Of course, words like "cruel and unusual treatment or punishment" provide some guidance, but our framers rejected the idea that what was meant by the words "cruel and unusual" in 1982 should bind Canadian society forever. The Minister said, "It is essentially a drafting problem to ensure that entrenched rights will not be 'frozen.' If the Charter casts the rights in broad terms and contains a clause stating that the rights listed in the Charter are not exclusive, courts will have sufficient latitude to interpret the rights flexibly but subject to reasonable limitations."

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One of the most important provisions of the Charter is section 1 which says that its rights and freedoms are:

> *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

When asked by a committee member what that meant, the minister replied, during his first appearance before the committee, "It will be the courts who will decide. The way I understand the courts to operate, the precedents will determine the next move. It will be the court because we are not giving them other tests than these."

In other words, section 1 says what it says. The committee declined to work toward a consensus about what "the original meaning" could or should be. They laid down the most general of tests and felt comfortable leaving it up to the courts to develop the tests precise content. And the test developed by the courts, I might say, is more deferential to the elected legislators in matters of public policy than a reading of the actual wording of section 1 might suggest.

Having rejected a "frozen rights" theory, and fully appreciating the role of the courts in delineating and fleshing out the guaranteed rights and freedoms, the Parliamentary Committee also provided in section 33 of the *Constitution Act, 1982*, an override clause whereby Parliament or a provincial legislature could insist that a law operate *notwithstanding* a provision included in enumerated sections of the Charter. The override must be re-enacted every five years but if that is done it can go on forever. The elected branches of government have, therefore, given themselves the last word. It cannot be said in Canada, as it is in the United States, that the Supreme Court is not last because it is always right but is right because it is always last. Section 33 is as much part of the Constitution as any other provision. Whether or not it is used is a matter of political judgment. It is a matter between the politicians and the voters. It has nothing to do with the courts.

Thomas Jefferson, a man who was very well versed in the "original meaning" of the US Constitution,

opposed any theory of frozen rights. He wrote, "We might as well require a man to wear still the coat which fitted him when he was a boy, as civilized society to remain ever under the regimen of their barbarous ancestors." The state in 2007 is much more activist, interventionist, intrusive and controlling of the lives of its citizens than ever before. The checks and balances must be correspondingly stronger. Jefferson expected the constitutional renewal would have to occur every 20 years or so, in a never ending series of constitutional conferences, a prospect which to Canadians is the stuff of nightmares.

Justice Scalia will tell you that on the Supreme Court of the United States only a minority of the judges advocate "originalism." The other judges acknowledge that judges like everybody else should learn from experience. Justice Scalia is well-known for his view that Supreme Court judges in the United States should not be moved by constitutional pronouncements by judges of other countries, precisely because such statements can have no relevance to the original meaning of the United States Constitution, so I will end with the observation of an earlier member of the United States Supreme Court, Justice Oliver Wendell Holmes, who wrote in 1920:

> *[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.*

Justice Ian Binnie, named to the Supreme Court of Canada in 1998, is a graduate of McGill University, Cambridge and University of Toronto. Adapted from his debate with Justice Antonin Scalia of the United States Supreme Court at the McGill Institute for the Study of Canada's Charter @ 25 *conference. The streaming video of the debate may be viewed at the MISC Web Site, www.misc-iecm.mcgill.ca*