26. Constitutional interpretation in Canada: watering living trees and Canadian values

Rosalie Silberman Abella[1]

The trajectory of Canada's approach to constitutional interpretation is nothing short of breathtaking. Ever since the Canadian Charter of Rights and Freedoms became part of the Constitution in 1982, the Supreme Court of Canada embraced the new mandate and proceeded to entrench a vibrant approach to constitutional values, tenaciously linking rights protection to democratic aspirations. It has been a continuous interpretative exercise in ever-expanding protection based on ever-expanding awareness of national realities, resulting in public respect and international influence. It was a noble experiment that succeeded majestically.

The Canadian judiciary's commitment to living constitutionalism is expressed as the 'living tree' metaphor, the perspective from which we approach constitutional interpretation. The concept of the living tree is anchored in *Edwards v Canada (Attorney General)*, also known as the *Persons Case*, in which Lord Sankey said that the Constitution Act, 1867 'planted in Canada a living tree capable of growth and expansion within its natural limits', not to be cut down 'by a narrow and technical construction, but rather [given] a large and liberal interpretation'.[2] As a living instrument, the provisions of the Constitution are not frozen in time. Accordingly, regardless of whether the framers of the Constitution intended in 1867 that women would come within the meaning of 'qualified person' eligible for appointment to the Senate of Canada, the Privy Council decided that they were.

This approach recognizes that the Constitution is fundamentally different from an ordinary statute, and interpreting a constitution is not a 'barren exercise in statutory interpretation'.[3] Instead, the Constitution is capable of growth to accommodate and address the realities of modern life and to succeed in its 'ambitious enterprise' of 'structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted'.[4] The Constitution must 'meet new social, political and historical realities often unimagined by its framers', and the judiciary, as 'the guardian of the constitution', must bear these considerations in mind.[5]

The *Persons Case* was decided under the Constitution Act, 1867, but with the introduction of the Canadian Charter of Rights and Freedoms in the Constitution Act, 1982, the Supreme Court quickly affirmed that the Charter was also a part of the living tree. In its first Charter case, the Court characterized the Charter as an organic instrument subject to a 'fine and

[1] I am indebted to my law clerk Nicholas Martin for his extensive research assistance.

[2] *Edwards v Canada (Attorney General)* [1929] UKPC 86, [1930] 1 DLR 98 (PC) 106–107.

[3] *Re Residential Tenancies Act* [1981] 1 SCR 714, 23 (Dickson J).

[4] *Reference re Same-Sex Marriage* [2004] 3 SCR 698 [22][23].

[5] *Hunter v Southam* [1984] 2 SCR 145, 155 (Dickson J).

constant adjustment process', undertaken by the judicial branch, so that it can 'guide and serve the Canadian community for a long time'.[6]

Speaking extra-judicially after his remarkably influential tenure on the Court, Chief Justice Dickson explained that the advent of the Charter challenged judges to 'stay in touch with social change and understand how values are evolving' in order to properly discharge their duty of nurturing an organic document 'capable of growing and accommodating change'.[7]

As this brief overview shows, Canadian judges approach the Constitution as a living instrument capable of adaptation and growth. That is the essence of the living tree metaphor, and it is the perspective from which the interpretative exercise begins.

This perspective leads naturally to a purposive method of constitutional interpretation. The approach was best and definitively set out in two cases authored by Justice Dickson. In *Hunter v Southam*, he explained that the Charter must be 'capable of growth and development over time' through 'broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects'.[8] Then, in *R v Big M Drug Mart Ltd*, he expanded on the meaning of purposive interpretation:

> The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
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> … [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference 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.* The interpretation should be … a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore … be placed in its proper linguistic, philosophic and historical contexts.[9]

This continues to be the leading statement on purposive interpretation in Canada.

In *Big M*, Dickson J drew on the 'values that underlie our political and philosophical traditions' to interpret freedom of religion. As he said, those values

> demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[10]

This approach allows judges to incrementally discover the full and proper scope of the Charter's aspirations and allows the Charter to keep up with an evolving society while also keeping it anchored in its roots. As Lamer CJ observed in the *Reference re Remuneration of Judges of the Provincial Court (PEI)*, the express provisions of the Constitution Act, 1867, are

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[6] *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357, 366 (Etsey J).

[7] Brian Dickson, 'A Life in the Law: The Process of Judging' (2000) 63(2) Sask L Rev 373, 387.

[8] *Hunter v Southam* (n 5) 155–156.

[9] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 344.

[10] ibid 346.

'elaborations of the underlying, unwritten, and organizing principles found in the preamble', and the Charter is to be understood in the same way.[11]

A paradigmatic example of this approach is *Re BC Motor Vehicle Act*, in which Lamer J rejected a procedural 'due process' interpretation of the 'principles of fundamental justice' in favour of a substantive vision.[12] Lamer J drew on the specifically enumerated principles of fundamental justice in Sections 8–14 of the Charter, finding that all of them emanated from a justice system built on 'the dignity and worth of the human person'.[13] Those values constituted the common thread that would guide the future development of the principles of fundamental justice.

Another example of the Court's muscular approach to rights protection is found in its jurisprudence on the rights of Indigenous peoples. Section 35 of the Constitution Act, 1982, which recognizes and affirms Aboriginal and treaty rights, is the constitutional framework through which the goal of reconciliation is pursued.[14] It is a 'solemn commitment', the underlying purpose of which compels a 'generous, liberal interpretation of the words in the constitutional provision'.[15] This has also led the Court to generously interpret the concept of 'the honour of the Crown' as imposing a duty on the Crown to act honourably in all of its dealings with Indigenous peoples.[16]

Purposive interpretation in Canada is, thus, a rich and dynamic interpretative method, in part, because the purpose of any given right or freedom is ascertained by reference to the larger, underlying values of the Charter as a whole. Those values include respect for everyone's inherent dignity, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions that enhance the participation of individuals and groups in society.[17]

Until the fall of 2020, there was no controversy with respect to the proper perspective and methods of constitutional interpretation in Canada. The living tree concept underlying the Constitution and a purposive methodology were firmly established. But a recent decision may suggest that a more restrictive approach to constitutional interpretation is on the horizon. The majority reasons in *Quebec (Attorney General) v 9147-0732 Québec inc*, despite maintaining that a purposive approach is necessary, ascribed 'primordial significance' to the constitutional text.[18] It remains to be seen whether the majority judgement will be the seed from which an increasingly formalist, legalistic reading of the Charter will emerge. The difference in approach did not yield different outcomes between the majority and concurring reasons in this case, and both concluded that the prohibition against cruel and unusual punishment in

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[11] *Reference re Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3 [107].

[12] *Re BC Motor Vehicle Act* [1985] 2 SCR 486.

[13] ibid 503.

[14] *R v Van der Peet* [1996] 2 SCR 507 [31] (Lamer CJ); *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [81] (Lamer CJ).

[15] *R v Sparrow* [1990] 1 SCR 1075, 1106, 1108 (Dickson CJ and La Forest J).

[16] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 [17] (McLachlin CJ).

[17] *Big M* (n 9) 346; *R v Oakes* [1986] 1 SCR 103, 136 (Dickson CJ); *Reference re Prov Electoral Boundaries (Sask)* [1991] 2 SCR 158, 188 (McLachlin J).

[18] *Quebec (Attorney General) v 9147-0732 Québec inc* 2020 SCC 32, [2020] 3 SCR 426 [4] (Brown and Rowe JJ).

section 12 of the Charter protects only people not corporations, but undue reliance on text over purpose and values may well divide the Court in a future case.

As for international and comparative sources, the approach of Canadian judges to constitutional interpretation has always been characterized by an enthusiastic willingness to learn what they can from courts outside the country facing similar issues.[19] Between 2000 and 2016, the Supreme Court of Canada cited 1,791 decisions from foreign courts, mostly in constitutional law.[20] And various international law sources have helped Canadian judges 'in the global search for the best intellectual resources [they] can find'.[21]

In fact, as Professor Ran Hirschl explains, constitutional migration has been an indispensable contributor to Canada's brand of constitutionalism. The rise of a 'confident, distinctly Canadian approach to constitutionalism and a corresponding maturation of the Supreme Court' has been 'enriched by general appreciation of and selective engagements with comparative constitutional ideas'.[22] While non-binding international law does not attract the presumption of conformity, it continues to be relevant and can assist in delineating the breadth and content of Charter rights.[23]

Just as Canadian constitutionalism has benefited from international sources, the Canadian Constitution itself, and the interpretative methods developed by its judges, have, in turn, had significant global influence. The Charter was influential in the drafting of several rights-protecting instruments, including in South Africa, Israel, and New Zealand.[24] And, more pertinently, Canadian doctrine on constitutional interpretation has been adopted by courts around the world. As Aharon Barak writes, 'Canadian law serves as a source of inspiration for many countries'.[25]

The Charter, and its predecessor the Canadian Bill of Rights, emerged as a part of the global response to 'World War II's shocking indifference to human dignity and the devastating human rights abuses it tolerated'.[26] It is among many post-WWII rights-protecting instruments that, as Professor Lorraine Weinrib explains, 'share a constitutional conception that transcends the history, cultural heritage and social mores of any particular nation state'.[27] Through their guarantees of specific rights, these instruments 'crystallize the more

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[19] ibid [98] (Abella J) citing Adam M Dodek, 'Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities' (2009) 47 SCLR 445, 454.

[20] Klodian Rado, 'The Use of Non-Domestic Legal Sources in Supreme Court of Canada Judgments: Is this the Judicial Slowbalization of the Court?' (2020) 16 Utrecht L Rev 57, 61.

[21] *9147-0732 Québec inc* (n 18) [106] (Abella J).

[22] Ran Hirschl, 'Going Global? Canada as Importer and Exporter of Constitutional Thought' in Richard Albert and David R Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press 2018) 305, cited in ibid 106.

[23] *9147-0732 Québec inc* (n 18) [99] (Abella J), [36] (Brown and Rowe JJ).

[24] See Lorraine E Weinrib, 'Human Dignity as a Rights-Protecting Principle' (2005) 17 NCJL 325, 341; Lorraine E Weinrib, 'The Canadian Charter as a Model for Israel's Basic Laws' (1993) 4(3) Const F 85, 85; Adam M Dodek, 'Canada as Constitutional Exporter: The Rise of the "Canadian Model" of Constitutionalism' (2007) 36 SCLR 309; Adam M Dodek, 'The Protea and the Maple Leaf: The Impact of the Charter on South African Constitutionalism' (2004) 17 NJCL 353.

[25] Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 203.

[26] *9147-0732 Québec inc* (n 18) [97] (Abella J).

[27] Lorraine E Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2009) 90.

objective abstract constitutional principles of equal citizenship and inherent human dignity'.[28] Accordingly, it makes sense that Canadian constitutional law is influential with other countries who share the post-WWII model of rights protection.

The influence of Canada's purposive approach appears to have been greatest in Israel and South Africa. Canadian decisions were the second most cited foreign precedents in Supreme Court of Israel constitutional decisions between 1994 and 2010.[29] In the very first case decided by the Constitutional Court of South Africa, the Court adopted Dickson J's statement in *Big M* as a leading international authority for the 'principles upon which a constitutional bill of fundamental rights should be interpreted'.[30] Shortly thereafter, the Constitutional Court solidified *Big M*'s impact, holding that the South African Bill of Rights must be interpreted generously and purposively, giving 'expression to the underlying values of the Constitution'.[31] As in Canada, the South African Constitution has been described as a 'living tree', which is 'given life and meaning through the development of a jurisprudence that is rooted in an understanding of the context and purpose of the Constitution'.[32] Beyond these examples, *Big M* has been cited in a diverse range of countries including Australia, the Bahamas, Belize, Botswana, Fiji, Hong Kong, India, Indonesia, Lesotho, Namibia, New Zealand, Samoa, Tuvalu, Uganda, Vanuatu, Zambia, and Zimbabwe.[33]

The influence of Canada's method for defining the scope of constitutional rights is matched only by its approach to justifying limits on those rights. Section 1 of the Charter states: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[34]

In the leading case of *R v Oakes*, Dickson CJ, adapting a proportionality analysis with roots in German law,[35] approached the interpretative task purposively. He observed that 'any s. 1 inquiry must be premised on an understanding that the impugned limit violates … rights and freedoms which are part of the supreme law of Canada' and that inclusion of the words 'free and democratic society' signal that 'the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution'.[36] These considerations mean that limits on rights must be subject to a stringent standard of justification. The limit must advance a pressing and substantial objective and be realized by means that are reasonable and demonstrably justified. This

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[28] ibid.

[29] Suzie Navot, 'Israel: Creating a Constitution—The Use of Foreign Precedents by the Supreme Court (1994–2010)' in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013) 145.

[30] *S v Zuma and Others* [1995] ZACC 1 [15].

[31] *S v Makwanyane and Another* [1995] ZACC 3 [9].

[32] *Ferguson and Others v Rhodes University* [2017] ZACC 39 [18].

[33] Lawrence David, 'R v Big M Drug Mart Ltd Case (Can)', *Max Planck Encyclopedia of Comparative Constitutional Law* (2018) <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e561> accessed 23 March 2023.

[34] Canadian Charter of Rights and Freedoms, s 1.

[35] See *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39 [68] (Lord Reed) (dissenting); Dieter Grimm, 'Proportionality in Canadian and German Jurisprudence' (2007) 57 UTLJ 383.

[36] *Oakes* (n 17) 135–36.

incorporates a proportionality test – now widely known as the '*Oakes* test' – requiring the state to demonstrate that the means are rationally connected to the objective, they are minimally impairing of the right, and that there is a proportionate balance between the salutary and deleterious effects of the measures that limit the right.

This proportionality test has been widely endorsed. The House of Lords and United Kingdom Supreme Court relied on *Oakes* in jurisprudence under the Human Rights Act 1998,[37] including in *Bank Mellat*, in which Lord Reed (dissenting) provided an edifying discussion of proportionality and gave Dickson CJ full credit for his influence, calling *Oakes* 'the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning'.[38] It was also adopted by the Supreme Court of Israel in the transformative *Mizrahi Bank* case, the progenitor of Israel's 'constitutional revolution'.[39] Notably, the limitations clause used in Israel's Basic Law was influenced by Section 1 of the Charter.[40] The same is true in South Africa, where the limitations clause in its Bill of Rights 'reflects section 1 plus the *Oakes* test',[41] and where *Oakes* has been cited on numerous occasions.[42] New Zealand also adopted a limitations clause based on the Charter, and *Oakes* is a regularly cited authority.[43] In Australia, even in the absence of a written bill of rights with a limitations clause, the High Court considered *Oakes* when evaluating the reasonableness of a limit on freedom of communication.[44]

Given that the general Canadian approach to interpreting rights and their limits has been widely cited, it is unsurprising that our interpretation of specific rights and freedoms has found international favour too. In South Africa, our section 15 equality jurisprudence, built on a commitment to substantive equality first recognized in *Andrews v Law Society of British Columbia*,[45] influenced the Constitutional Court in the development of its own equality law.[46]

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[37] *Huang v Secretary of State for the Home Department* [2007] UKHL 11 [19].

[38] *Bank Mellat* (n 35) [74].

[39] *Bank Mizrahi v Migdal Cooperative Village* [1995] Isr L R 1, 244 (Barak P).

[40] Aharon Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 UTLJ 369, 370.

[41] Dodek, 'The Protea and the Maple Leaf' (n 24) 362; see also Heinz Klug, 'The Canadian Charter, South Africa and the Paths of Constitutional Influence' in Albert and Cameron (n 22) 405.

[42] *Makwanyane* (n 31) [105–107]; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25 [36], [39].

[43] See *R v Hansen* [2007] NZSC 7.

[44] *Mulholland v Australian Electoral Commission* [2004] HCA 41 [34-35]; Tania Groppi, 'A User-Friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies' (2007) 36 SCLR 337, 357.

[45] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

[46] Albie Sachs, 'Equality Jurisprudence: The Origin of the Doctrine in the South African Constitutional Court' (1999) 5(1) Rev Const Stud 76; *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; *Prinsloo v Van der Linde and Another* [1997] ZACC 5; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17.

Israel, too, has cited our equality law,[47] and the New Zealand Court of Appeal has engaged in a comprehensive analysis of doctrinal developments under section 15 of Canada's Charter.[48]

Canadian law on freedom of religion has been used by the House of Lords,[49] the South African Constitutional Court,[50] and the New Zealand High Court,[51] among others, and our free expression jurisprudence has also been influential in various countries. This is, in part, because, as the High Court of Australia has observed, the Supreme Court of Canada has rejected 'any notion of completely unabridged freedom of speech'[52] and, as the South African Supreme Court of Appeal put it, 'unlike the USA, where the right to freedom of expression has a unique position, greater emphasis is placed on the right to equality and the value of diversity and multiculturalism' in Canada.[53] In the European Court of Human Rights, as Professor Lech Garlicki has observed, Canadian authorities are regularly cited, usually in cases originating from the United Kingdom,[54] including cases dealing with prisoners' voting rights and assisted suicide.[55]

It has been almost 40 years since Canada received the gift of the Charter. As this brief overview shows, it is the gift that keeps on giving, nationally and globally. The Charter is a luminous avatar of rights and freedoms in enthusiastic action, and because of the courageous interpretative brilliance, particularly of its early judicial explorers, it has helped keep democracy in Canada safe and inspiring.

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[47] *El-Al Israel Airlines v Danielowitz* HCJ 721/94 (1994); *Israel Women's Network v Government* (1994) HCJ 453/94 (1994).

[48] *Ministry of Health v Atkinson* [2012] NZCA 184 [79]–[97].

[49] *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15 [22].

[50] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11 [87].

[51] *Moore v Moore* [2015] 2 NZLR 787 [144].

[52] *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63 [341] (Callinan J).

[53] *Qwelane v South African Human Rights Commission and Another* [2019] ZASCA 167 [82], citing Thomas J Webb, 'Verbal Poison—Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System' (2011) 50 Washburn LJ 445.

[54] Lech Garlicki, 'The European Court of Human Rights and the Canadian Case Law' in Albert and Cameron (n 22) 348–370.

[55] ibid, citing *Hirst v the United Kingdom* [2005] ECHR 681 (GC) and *Hirst v the United Kingdom* [2004] ECHR 122 which relied on *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 and *Pretty v the United Kingdom* [2002] ECHR 2346/02, which relied on *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519.