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(Ab)Originalism and Canada's Constitution

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John Borrows*

I. INTRODUCTION

Constitutions help people make judgments about how they should live together within a shared territory. They create expectations about how decisions should be made and carried into effect. They also help people address their disagreements. Constitutions identify, generate and organize relationships in ways which enhance or suppress activities of communities and individuals.¹ They do so through an appeal to law, and they are often considered a country's highest form of law. They authoritatively denote who or what someone or something is or does, within a governing framework. If actions are inconsistent with such law they are, not surprisingly, regarded as being unconstitutional, making contrary actions invalid, inapplicable or inoperable. Practitioners of constitutional law should note how their work can sustain, negate, inflect, modify or transform relationships and states of being. Like verbs, constitutions position us in time; they have a past, present and future tense. They explain what brought us together, and what should happen now and later on to sustain our togetherness and measured separateness. Thus, like verbs, constitutions regulate relationships through time; they link objects (persons, places and things) to a reciprocal series of obligations in the real world.

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¹ For a discussion of the centrality of relationships in constitutional law, see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York: Oxford University Press, 2011), at 231-76; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

Constitutional law is best explained as a verb. The word “constitution” comes from the Latin verb *constituere*, and is made up of two roots: *con*, which means “together”, and *statuere*, which means “to establish”. Thus, a constitution can be regarded as an activity of establishing something together. In this light a constitution acts on a person, place or thing, just like a verb. The Anishinaabe people of the Great Lakes attach a similar meaning to this activity, and also characterize constitutional law as a verb. The Anishinaabe use the word *chi-inaakonige* to describe constitutional law. *Chi* means great or large and *inaakonige* means to act on an object through making a judgment, deciding things a certain way, or agreeing on something.² Thus, constitutional law is the great way of acting through judgment, guided decision-making and agreement. The Supreme Court of Canada also characterizes Canada’s Constitution as a verb — as an action and a shifting state of being. A prime activity associated with the country’s Constitution is that it “embraces the entire global system of rules and principles which govern the exercise of constitutional authority”.³ Embracing, governing and exercising authority are necessary constitutional actions. Understanding the Constitution’s fluid state of being is also necessary in regulating governmental practices. In pursuing these activities the Court has said the Constitution is organic⁴ and animate;⁵ in fact, the Supreme Court has repeatedly written that Canada’s Constitution is a living tree.⁶

² *The Ojibwe Peoples Dictionary*, online: University of Minnesota <<http://ojibwe.lib.umn.edu/main-entry/inaakonige-vai>>.

³ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 148 (S.C.C.) [hereinafter “*Quebec Secession Reference*”].

⁴ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] S.C.J. No. 17, [2001] 2 S.C.R. 781, at para. 33 (S.C.C.): “The Constitution is an organic instrument, and must be interpreted flexibly to reflect changing circumstances: *Ontario (Attorney General) v. Canada (Attorney General)*, [1947] A.C. 127 (P.C.)” There are times when the U.S. Constitution has also been called organic; see *Missouri v. Holland*, 252 U.S. 416, at 433 (1920). For an excellent article of this subject, see Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1996) Osgoode Hall L.J. 101 [hereinafter “Slattery”].

⁵ *Beauregard v. Canada*, [1986] S.C.J. No. 50, [1986] 2 S.C.R. 56, at 81 (S.C.C.): “The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people.”

⁶ The leading case on the Constitution as a living tree is *Edwards v. Canada (Attorney General)*, [1929] J.C.J. No. 2, [1930] A.C. 124 (J.C.P.C.) [hereinafter “*Persons Case*”]. An excellent history of the case is Robert Sharpe & Patricia McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007). An example of contemporary references to the living tree can be found in *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, at para. 22 (S.C.C.) [hereinafter “*Same-Sex Marriage Reference*”].

Understanding constitutional law as an ongoing activity, which nourishes a living entity, improves our judgments relating to its genesis, preservation and growth. Recognizing that a constitution has a temporal existence helps us balance the past, present and future when regulating our relationships. This article contends that constitutions are weakened if too much emphasis is placed on either their origins, or our current obsessions, or our future predictions regarding what they require. It is unhealthy to place too much stress on any one part of the roots, trunk or branches of any living tree. Each part needs to bear the weight of growth to be strong and durable. Likewise, Canada's Constitution is at its strongest when interpretation is equally attentive to all forms of authority, including arguments that appeal to its history, text and structure. These modes of argument must be similarly combined with doctrinal authority from previously decided cases, prudential arguments about the costs and benefits of a course of action, and ethical ideas which appeal to the ways Canadians think about their social commitments.⁷

A balanced approach to constitutionalism, which draws on the metaphor of a living tree, can help keep Canada's Constitution dynamic and strong. The "living tree" approach to constitutional interpretation was adopted by the Judicial Committee of the Privy Council in the so-called *Persons Case*.⁸ The question in the *Persons Case* was whether a woman could be appointed to the Senate under section 24 of the *British North America Act, 1867*,⁹ which states that "the Governor General shall from time to time ... summon qualified Persons to the Senate". Since women could not hold political office when this section was enacted, it was argued that this section's meaning could not be changed to accommodate shifting conceptions of a woman's role in political life. The Supreme Court of Canada accepted this argument and decided that the framers' understanding of the Constitution's words could not change with the times.¹⁰ It therefore held that women could not be "qualified persons"

⁷ For further discussions of these six modes of constitutional interpretation, see Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 Can. Bar Rev. 67, at 72-74; and Philip Bobbit, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982).

⁸ *Supra*, note 6, at 136. For a comparative analysis of this metaphor in other constitutional contexts, see Vicki Jackson, "Constitutions as 'Living Trees'? Comparative Constitutional Law and Interpretive Metaphors" (2006) 75 Fordham L.R. 921.

⁹ (U.K.), 30 & 31 Vict., c. 3 [hereinafter "BNA Act"].

¹⁰ The Supreme Court wrote, in *Edwards v. Canada (Attorney General)*, [1928] S.C.J. No. 19, [1928] S.C.R. 276, at 288 (S.C.C.):

Passed in the year 1867, the various provisions of the B.N.A. Act ... bear to-day the same construction which the courts would, if then required to pass upon them, have given to

because they were excluded from political office at the time the Constitution was enacted.

On appeal, the Privy Council disagreed with the Supreme Court's conclusion and overturned its decision. It held that women were persons who could be qualified to be summoned to the Senate. The Court arrived at this conclusion by adopting a living tree interpretative approach. Justice Sankey, writing on behalf of the Privy Council, declared:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention"

Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.¹¹

In the result, women were held to be persons who could be summoned to the Senate because the Privy Council held that the Supreme Court's reliance on the public meaning of "person" in 1867 was too narrow and technical a construction. A large and liberal interpretation required that any ambiguity about the meaning of the word "person" should be resolved by including women.¹²

In the intervening years, the Supreme Court further developed the Privy Council's living tree metaphor and designated it as the preferred approach to constitutional interpretation.¹³ As such, it has become the

them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.

¹¹ *Supra*, note 6, at 136 A.C.

¹² The Privy Council gave the government the burden of proving that the word "person" did not include women: "The word 'person' ... may include members of both sexes, and to those who ask why the word [person] should include females the obvious answer is why should it not? In these circumstances the burden is upon those who deny that the word includes women to make out their case": *Persons Case*, *supra*, note 6, at 138 A.C.

¹³ *Same-Sex Marriage Reference*, *supra*, note 6, at para. 22; *British Columbia (Attorney General) v. Canada Trust Co.*, [1980] S.C.J. No. 86, [1980] 2 S.C.R. 466, at 478-79 (S.C.C.); *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, at para. 94 (S.C.C.); *Reference re Residential Tenancies Act, 1979*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714, at 723 (S.C.C.); *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 52 (S.C.C.); *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] S.C.J. No. 57, [2005] 2 S.C.R. 669, at para. 9 (S.C.C.); *Reference re Provincial Electoral*

dominant form of analysis in determining the Constitution's meaning.¹⁴ As now articulated, this approach allows the Court to look beyond historical understandings of a provision and give it meaning in the light of contemporary circumstances. The Supreme Court has acknowledged this fact in many cases. For example, in the *Securities Reference*,¹⁵ the Court wrote: "This metaphor has endured as the preferred approach in constitutional interpretation, ensuring 'that Confederation can be adapted to new social realities'."¹⁶ In the *Same-Sex Marriage Reference*,¹⁷ the Supreme Court wrote that "'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."¹⁸ This led the Court to conclude that same-sex marriage was not prohibited by the Constitution even though "[s]everal centuries ago it would have been understood that marriage should be available only to opposite-sex couples."¹⁹ In *British Columbia (Attorney General) v. Canada Trust Co.*,²⁰ the Court reaffirmed the living nature of Canada's Constitution, declaring that "[t]here is nothing static or frozen, narrow or technical, about the Constitution of Canada."²¹ This led the Court to deny the idea that the Constitution created historically fixed categories. It wrote: "If the Canadian Constitution is to be regarded as a 'living tree' and legislative competence as 'essentially dynamic' ... then the determination of categories existing in 1867 becomes of little, other than historic, concern."²² The Supreme Court reiterated this theme in *Reference re Provincial Electoral Boundaries (Sask.)*,²³ when it wrote: "The doctrine of the constitution as a living tree mandates that narrow tech-

Boundaries (Sask.), [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158, at 180 (S.C.C.); *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489, at para. 78 (S.C.C.); *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at para. 23 (S.C.C.); *Ontario Home Builders' Assn. v. York Region Board of Education*, [1996] S.C.J. No. 80, [1996] 2 S.C.R. 929, at para. 145 (S.C.C.).

¹⁴ For a series of essays on this topic, see Ian Peach *et al.*, eds., *A Living Tree: The Legacy of 1982 in Canada's Political Evolution* (Markham, ON: LexisNexis Canada, 2007).

¹⁵ *Reference re Securities Act*, [2011] S.C.J. No. 66, [2011] 3 S.C.R. 837 (S.C.C.) [hereinafter "*Securities Reference*"].

¹⁶ *Id.*, at para. 56, also citing *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, *supra*, note 13, at para. 9, *per* Deschamps J.

¹⁷ *Supra*, note 6.

¹⁸ *Id.*, at para. 22.

¹⁹ *Id.*, at para. 25.

²⁰ *Supra*, note 13.

²¹ *Id.*, at 478-79.

²² *Id.*, at 479 (emphasis in original).

²³ *Supra*, note 13.

nical approaches are to be eschewed,” which means that “the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*.”²⁴ As such, the Court wrote: “The tree is rooted in past and present institutions, but must be capable of growth to meet the future.”²⁵ These observations led the *Provincial Electoral Boundaries*²⁶ Court to conclude that the right to vote could not be “viewed as frozen by particular historical anomalies”. It said: “What must be sought is the broader philosophy underlying the historical development of the right to vote — a philosophy which is capable of explaining the past and animating the future.”²⁷ The Supreme Court made a similar point in *Canada (Combines Investigation Act Director of Investigation and Research) v. Southam Inc.*,²⁸ in relation to *Canadian Charter of Rights and Freedoms*²⁹ interpretation, when it wrote, a “constitution ... is drafted with an eye to the future” and therefore we must not “read the provisions of the Constitution like a last will and testament lest it become one”.³⁰ These and numerous other decisions plainly demonstrate that a future-oriented living tree approach to constitutional interpretation is dominant in Canada.

There are good reasons for the dominance of the living tree approach in Canadian law. It invites democratic participation since it reminds us that constitutional law should be an ongoing activity.³¹ Its growth is cultivated on the historical, social, political, cultural, legal and economic grounds in which the constitution-as-practice is situated.³² People will be more inclined to get involved in the Constitution’s development if they realize that it responds to assorted demands on various terrains.³³ A living constitution allows people with different interests to prune and graft it in accordance with its broader context. The Constitution is not just a dead piece of historical writing; it “facilitates — indeed, makes possible — a

²⁴ *Id.*, at 180.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.) [hereinafter “*Hunter v. Southam*”].

²⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

³⁰ *Hunter v. Southam*, *supra*, note 28, at 155.

³¹ For an excellent discussion of this point as it relates to the balance of power between the Prime Minister and Parliament, see Peter Aucoin, Mark D. Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery, 2011).

³² Jack Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011), at ch. 13.

³³ Robert C. Post & Reva B. Siegel, “Democratic Constitutionalism” in Jack M. Balkin & Reva B. Siegel, eds., *The Constitution in 2020* (New York: Oxford University Press, 2009), at 25.

democratic political system by creating an orderly framework within which people may make political decisions”,³⁴ as the Supreme Court wrote in the *Quebec Secession Reference*.

Living tree analysis is also consistent with Canada’s broader constitutional tradition because the country does not have a singular founding moment. Canada’s Constitution gradually evolved;³⁵ it adapted to reflect changing social and political values throughout its history.³⁶ While the passage of the BNA Act³⁷ in 1867 marked an important stage in this evolution, section 52(2) of the *Constitution Act, 1982*³⁸ makes it clear that Canada’s Constitution includes many other laws.³⁹ Furthermore, the *Constitution Act, 1867* (as the BNA Act is now called) also mandates a Dominion with a “Constitution similar in principle to that of the United Kingdom”.⁴⁰ This means Canada’s Constitution draws on centuries of accreted experience with no one occasion dominating as a founding moment.⁴¹ Even in relation to particularly significant moments the organic nature of our tradition makes it appropriate to change the Constitution’s meaning over time.⁴² Indeed, Canada stands in contrast to the experience of the United States, which ratified a singular constitutional text at a particular historic period.⁴³ Viewing the Constitution as a

³⁴ *Supra*, note 3, at para. 78.

³⁵ Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2010), at 1-2. The significance of Canada’s evolutionary constitution for Indigenous peoples is developed in John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [hereinafter “Borrows, *Canada’s Indigenous Constitution*”].

³⁶ *Quebec Secession Reference*, *supra*, note 3, at paras. 33, 46.

³⁷ *Supra*, note 9.

³⁸ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

³⁹ See the Schedule to this Act, which non-exhaustively references 30 such constitutional Acts.

⁴⁰ *Supra*, note 9.

⁴¹ In the *Quebec Secession Reference*, *supra*, note 3, at para. 150, the Supreme Court observed:

The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution ...

⁴² *Ontario Home Builders’ Assn. v. York Region Board of Education*, *supra*, note 13, at para. 145 (S.C.C.). For a discussion of the organic nature of Canada’s Constitution, see Slattery, *supra*, note 4.

⁴³ For a discussion of the differences between Canadian and U.S. approaches to constitutional interpretation, see Peter W. Hogg, “The Charter of Rights and American Theories of Interpretation” (1987) 25 *Osgoode Hall L.J.* 87. For a discussion of the development and ratification of the U.S. Constitution, see Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon and Schuster, 2010).

living tree makes more sense in a country like Canada, which has always been engaged in an “ongoing process of constitutional development”.⁴⁴

II. ABNORMAL ORIGINALISM

Despite the dominance of the living tree approach to Canadian constitutional interpretation, unfortunately, there is one set of relationships to which this balanced approach does not apply — that involving Aboriginal peoples. The living tree does not operate when considering Aboriginal and treaty rights because history is said to be determinative in this field. The Supreme Court has concluded that Aboriginal and treaty rights are limited by the parties’ historic intentions and the public meaning attaching to original actions. While non-discriminatory understandings of history must guide constitutional interpretation, the Court’s current approach to Aboriginal rights overemphasizes the past by restricting the Constitution’s meaning to certain foundational moments. This method, which goes by the name originalism, is alive and well in the field of Aboriginal rights.

The justifications for an originalist approach are varied.⁴⁵ Nevertheless, they generally coalesce around an idea that the law has a specific historic meaning to which judges must defer. As such, originalism has been called “a paradigmatic form of legal positivism”.⁴⁶ It gives prominence to the subjective intentions and/or so-called objective public meanings of a constitution’s drafters, ratifiers and/or receivers.⁴⁷ Originalism is often used in an exclusivist, either/or manner, prohibiting and discour-

⁴⁴ *Quebec Secession Reference*, *supra*, note 3, at para. 52.

⁴⁵ The people or group whose intentions count in understanding constitutional meaning at a foundational moment can vary: see Thomas B. Colby & Peter J. Smith, “Living Originalism” (2009) 59 *Duke L.J.* 239. For a discussion of the distinction between old and new originalists, see Randy E. Barnett, “An Originalism for Non-originalists” (1999) 45 *Loy. L.R.* 611. Old originalism is perhaps best represented by the writings of Robert Bork, *The Tempting of America* (New York: Free Press, 1990). New originalism is represented by Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, N.J.: Princeton University Press, 2004); Keith E. Whittington, “The New Originalism” (2004) 2 *Geo. J.L. Pub. Pol’y* 599.

⁴⁶ Peter Smith & Robert Tuttle, “Biblical Literalism and Constitutional Interpretation” (2011) 86 *Notre Dame L.R.* 693, at 695.

⁴⁷ “‘Meaning’ is a capacious concept, and indeed, it has many different meanings, including semantic content, purposes, intentions, practical entailments, and cultural associations. Conceived most broadly, ‘meaning’ includes a vast array of cultural associations, traditions, conventions, and background assumptions”: Jack Balkin, “Nine Perspectives on *Living Originalism*” (2012) *U. Ill. L.R.* 815, at 828.

aging modes of constitutional interpretation based on other grounds.⁴⁸ While attempts have been made to reconcile originalism and living tree constitutionalism,⁴⁹ many are skeptical about the success of these efforts.⁵⁰ Originalism generally places dispositive weight on formative historical understandings and meanings, whereas living tree constitutionalism draws guidance from history but gives it lesser weight.⁵¹ Originalism is perhaps best known for its role in U.S. constitutional law, where many prominent members of the Supreme Court and legal academy strongly support this approach.⁵² It has also been the subject of substantial critique.⁵³

Originalism's place in Canadian constitutional law is incongruous.⁵⁴ The Supreme Court has explicitly distanced itself from this practice.⁵⁵ In

⁴⁸ Peter Hogg, *Constitutional Law of Canada* (Scarborough, ON: Thomson Carswell, 2012), at 15.9(f) and 60.1(e).

⁴⁹ Books and articles have been written trying to convince originalists that originalism is consistent with other modes of interpretation: see Jack Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011). In Canada, there have also been attempts to argue that originalism and living tree constitutionalism need not be mutually exclusive: see Bradley Miller, "Origin Myth: The Persons Case, The Living Tree, and the New Originalism" [hereinafter "Miller, 'Origin Myth'"] in Grant Huscroft & Bradley Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge, UK: Cambridge University Press, 2011), at 120; Bradley Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22 Can. J.L. & Jur. 331.

⁵⁰ Steven G. Calabresi & Livia Fine, "Two Cheers for Professor Balkin's Originalism" (2009) 103 NW.U.L. Rev. 663; John McGinnis & Michael Rappaport, "Original Interpretive Principles as the Core of Originalism" (2000) 24 Const. Commentary 371, at 381; Joel Alicea, "Originalism in Crisis: The Movement Towards Indeterminate Originalism", online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1613065>.

⁵¹ *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, *supra*, note 13, at 507-509 (S.C.C.).

⁵² See Steven G. Calabresi, ed., *Originalism: A Quarter-Century of Debate* (Washington, D.C.: Regnery, 2007); Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 1999).

⁵³ Paul Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 B.U.L. Rev. 204; Mitchell N. Berman, "Originalism Is Bunk" (2009) 84 N.Y.L. Rev. 1; David A. Straus, *The Living Constitution* (New York: Oxford University Press, 2010); Robert W. Bennett & Lawrence B. Solum, *Constitutional Originalism: A Debate* (Cornell, NY: Cornell University Press, 2011); Thomas Colby, "The Sacrifice of the New Originalism" (2011) 99 Geo. L.J. 713.

⁵⁴ Ian Binnie, "Constitutional Interpretation and Original Intent" in Grant Huscroft & Ian Brodie, eds., *Constitutionalism in the Charter Era* (Markham, ON: LexisNexis Canada, 2004) 345, at 348. However, for an argument that Canada's dominant constitutional modes of interpretation are consistent with originalism, see Miller, "Origin Myth", *supra*, note 49, at 120. For an argument that originalism existed within Supreme Court Justice Wilson's judgments, see Adam Dodek, "The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits" in J. Cameron, ed. (2008) 41 S.C.L.R. (2d) 331.

⁵⁵ For commentary see Ian Binnie, "Constitutional Interpretation and Original Intent", *id.* Furthermore, the Supreme Court of Canada did not respond positively to interpreting the Charter in light of the drafters' intent; see *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, *supra*, note 13, at 509.

the *Ontario Hydro v. Ontario (Labour Relations Board)* case,⁵⁶ it wrote: “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.”⁵⁷ Academic commentary has also maintained that “originalism has never enjoyed any significant support in Canada”.⁵⁸ Despite these observations, the Supreme Court and other constitutional participants might be surprised to discover that originalism is flourishing under our noses because the practice does not quite go by this name in Canada. In this country it goes by the name Aboriginalism.

The Supreme Court’s abnormal originalism, or (ab)originalism, measures the constitutionality of Aboriginal claims by attributing public meaning to events that are regarded as being foundational to constitutional relations between Aboriginal peoples and the Crown at some point in the past.⁵⁹ For example, Aboriginal rights can only be claimed if they flow from Aboriginal practices that were “integral to their distinctive culture” prior to European contact.⁶⁰ Similarly, Aboriginal title can only be recognized and affirmed if a group occupied land prior to the assertion

[T]he rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. ... If the newly planted “living tree” which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials ... do not stunt its growth.

⁵⁶ [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327 (S.C.C.).

⁵⁷ *Id.*, at 409.

⁵⁸ Peter W. Hogg, “Canada: From Privy Council to Supreme Court” in Jeffrey Goldsworthy, ed., *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) 55, at 83.

⁵⁹ It may be argued that originalism is textually necessary in Canada’s Constitution because the word Aboriginal comes from the Latin *ab origine*, meaning from the beginning, or *ancestraux* in the French version: see *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 32 (S.C.C.) [hereinafter “*Van der Peet*”]. However, the word “Aboriginal”, like the label “Indian”, is a European invention, and the courts have held that non-native concepts should be applied with great caution when discussing the application of “Western” law to native peoples: see *Amodu Tijani v. Secretary (Southern Nigeria)*, [1921] 2 A.C. 399 at 402-403, cited with approval in *Calder v. British Columbia (Attorney General)*, [1973] S.C.J. No. 56, [1973] S.C.R. 313, at 354 (S.C.C.), where the Privy Council stated:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.

The problem of describing Indigenous peoples in Western terms was discussed in great detail in Edward Said, *Orientalism* (New York: Vintage Books, 1978).

⁶⁰ *Van der Peet*, *id.*, at para. 46.

of settler sovereignty.⁶¹ Likewise, treaty rights must be proved by reference to the common intention between the parties at the time the agreement was made.⁶² In each instance, constitutional rights are contingent upon the Court creating an original public meaning for a past event, when such rights were first recognized,⁶³ “crystallized”,⁶⁴ or contemplated by the parties (in the case of treaties).⁶⁵

While it is perfectly appropriate to draw upon history in considering Aboriginal and treaty rights, holding that rights are solely dependent on past recognition, crystallization or contemplation is a significant break with our country’s dominant constitutional traditions. This is a problem for Canadian constitutional law more generally and for Aboriginal peoples in particular. Therefore, in order to understand and overcome Canadian originalism this paper examines its anomalous existence and identifies genuine alternatives to it. These proposals are drawn from longstanding and current constitutional practices and principles. They are aimed at strengthening and reinforcing Canada’s constitutional law by making it more internally consistent. They confirm, adjust, enlarge and transform our Constitution to bring it in line with its other constituent parts, in accordance with its highest traditions.

Originalism must be supplanted within section 35(1) because it creates a double standard within Canadian constitutional law. Its application constructs an unbalanced interpretative landscape that subjects Aboriginal and treaty rights to greater constitutional constraints than would occur under a living tree approach. Originalism, as applied to Aboriginal peoples, excludes the growth of rights not connected to founding intentions and events. (Ab)originalism considers constitutional meanings to be fixed and limited by particular historical moments. This stands in contrast with a living tree approach that is appropriately attentive to a law’s roots but is more forward-looking in its approach. Originalism and living tree constitutionalism both take meaning from the past, but originalism does not tolerate change in relation to “new social realities”

⁶¹ *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 144 (S.C.C.) [hereinafter “*Delgamuukw*”].

⁶² *R. v. Marshall*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 14 (S.C.C.) [hereinafter “*Marshall (I)*”].

⁶³ *Van der Peet*, *supra*, note 59, at para. 28.

⁶⁴ *Delgamuukw*, *supra*, note 61, at para. 145. For a critique of the crystallization theory of aboriginal title, see John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37 Osgoode Hall L.J. 537, at 558 [hereinafter “Borrows, ‘Sovereignty’s Alchemy’”].

⁶⁵ *Marshall (I)*, *supra*, note 62, at paras. 58, 60.

in the same way as a living tree approach.⁶⁶ While historic legal interpretations should be regarded as helpful by way of analogy when dealing with *sui generis* Aboriginal and treaty rights, they should not be used to deny rights that may spring from other sources.⁶⁷ History should not exclusively determine the source and scope of Aboriginal rights.⁶⁸ Unfortunately, originalism in an Aboriginal context does not sufficiently draw upon other modes of constitutional interpretation which are also attentive to the Constitution's present and future tense.

To create greater balance within the Constitution, Aboriginal and treaty rights must be part of Canada's living tree. This is particularly important because Indigenous societies have the deepest roots on this continent. Their prior and ongoing connection with the land is the soil from which subsequent relations grow.⁶⁹ As with other constitutional provisions, Aboriginal rights should be able to continually expand and mature. Aboriginal and treaty rights should not be automatically restricted by meanings that attached to them at the time of contact, assertion of sovereignty or negotiation. Such limitations sever Aboriginal relationships from the constitution's broader terrain and threaten the sustainability of Canada's constitutional ecology.

Attempts have been made to justify the differential treatment of Aboriginal peoples within Canada's constitution based on the Supreme Court's observation that "Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment."⁷⁰ This acknowledgment opens important space for recognizing constitutional influences arising from non-European sources.⁷¹ However, as the

⁶⁶ The Supreme Court wrote that a living tree approach would allow confederation to change with new social realities in *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, *supra*, note 13, at para. 9, *per* Deschamps J., citing *Reference re Provincial Electoral Boundaries (Sask.)*, *supra*, note 13, at 180.

⁶⁷ Some of these alternative sources might be Indigenous peoples' own laws, human rights law, international Indigenous law, as well as laws based on textual, structural, doctrinal, prudential and ethical modes of constitutional interpretation, see Phillip Bobbitt, "Methods of Constitutional Argument" (1988-1989) 23 U.B.C. L. Rev. 449.

⁶⁸ See John Borrows & Len Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 35 Alta. L. Rev. 9; Borrows, *Canada's Indigenous Constitution*, *supra*, note 35.

⁶⁹ John Borrows, "Ground Rules: Indigenous Treaties in Canada and New Zealand" (2006) 22 N.Z.U.L. Rev. 188.

⁷⁰ *Van der Peet*, *supra*, note 59, at para. 19.

⁷¹ There are many sources of constitutional authority in Canada that are not based in European thought, such as the role the *International Declaration on Human Rights* played in the drafting of the Charter: see *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313, at 348-60 (S.C.C.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.). The Supreme Court has also recognized that

Court indicates,⁷² recognition of Aboriginal difference should not sever Aboriginal rights from broader constitutional traditions that seek to limit the state's reach.⁷³ Placing limits on government action is clearly an important part of our constitutional regime.⁷⁴ This is also the case with Aboriginal rights jurisprudence. As the Supreme Court of Canada observed in the *Sparrow* case,⁷⁵ section 35(1) "gives a measure of control over government conduct and a strong check on legislative power".⁷⁶ Thus, Aboriginal rights should not be placed completely outside of the stream of constitutional history when it comes to considering section 35(1)'s power to constrain governments.⁷⁷ While Aboriginal rights do not flow from the "liberal enlightenment view [that] rights are held by all people in society because each person is entitled to dignity and respect",⁷⁸ as with other constitutional laws they configure and constrain government action, and thus are general and universal in an important respect. In this light, in *Sparrow*, the Supreme Court of Canada explained the place of Aboriginal rights in Canada's constitution as follows: "s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights".⁷⁹ As such, the Court acknowledged that Aboriginal rights placed constraints on the Crown in

Aboriginal rights partially flow from Indigenous peoples' own laws: *Delgamuukw*, *supra*, note 61, at para. 147; *Van der Peet*, *supra*, note 59, at paras. 38-42; *R. v. Marshall*; *R. v. Bernard*, [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220, at paras. 45-54 (S.C.C.). The Indigenous sources of Canada's constitution is discussed in Borrows, *Canada's Indigenous Constitution*, *supra*, note 68.

⁷² *Van der Peet*, *supra*, note 59, at para. 19: "Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society."

⁷³ *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1077 (S.C.C.) [hereinafter "*Sparrow*"]: "... the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights". For a discussion of the place of similarity and difference in Aboriginal and treaty rights, see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

⁷⁴ For a critique of the prevalence of rights discourse in Canadian law, see Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010). For a discussion of the limitations of rights discourse in an Indigenous context, see Christopher Manfredi, "Fear, Hope and Misunderstanding: Unintended Consequences and the Marshall Decision" in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions / Strategies / Direction* (Saskatoon: Purich Publishing, 2004).

⁷⁵ *Supra*, note 73.

⁷⁶ *Id.*, at 110.

⁷⁷ See John Borrows, "Let Obligations be Done" in Hamar Foster, Heather Raven & Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Aboriginal Rights* (Vancouver: UBC Press, 2007) 201, at 212, from which the argument in this paragraph is drawn.

⁷⁸ *Van der Peet*, *supra*, note 59, at para. 18.

⁷⁹ *Sparrow*, *supra*, note 73, at para. 53.

ways consistent with those that governments encounter in other contexts. As the Court wrote:

Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.⁸⁰

Thus, though they have a different source, Aboriginal rights parallel constraints on the Crown that flow from the liberal enlightenment, and thus are part of its living tree. Consider how limitations on government action in the broader context are vital to the Constitution's development. For instance, in 1215 the issuance of the *Magna Carta* restricted Crown rights relative to certain classes of individuals (wealthy landowners), which slowly expanded through time.⁸¹ Despite its limitations,⁸² the *Magna Carta*'s constraint on Crown power is considered to be a pillar of democratic constitutionalism.⁸³ Similarly, the so-called Glorious Revolution of 1688 circumscribed the Crown's authority and made the monarchy subject to Parliament in many important ways.⁸⁴ The English Bill of

⁸⁰ *Id.*, at para. 54. At para. 55:

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of 'recognized and affirmed' that, in our opinion, gives appropriate weight to the constitutional nature of these words.

⁸¹ *Quebec Secession Reference*, *supra*, note 3, at para. 63:

The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867 ... "[T]he Canadian tradition" ... is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation".

⁸² See *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588, at 634 (S.C.C.): "The great defect of *Magna Carta*, however, lay in its failure to provide adequate mechanisms for the enforcement of the rights it purported to guarantee."

⁸³ See Kent McNeil, "Aboriginal Title as a Constitutionally Protected Aboriginal Right" in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: Fraser Institute, 2000):

Magna Carta would have been received as part of the applicable statute law in all the common law provinces. As a fundamental part of the British constitution, no doubt it applies in Quebec as well, despite the reintroduction of French civil law by the *Quebec Act*, 14 Geo. III (1774), c. 83 (U.K.). The preamble to the *Constitution Act, 1867*, *supra* note 64, provides that Canada shall have "a Constitution similar in Principle to that of the United Kingdom".

⁸⁴ For a general discussion of this history, see Edward Vallance, *The Glorious Revolution: 1688, Britain's Fight for Liberty* (London: Little Brown, 2006) [hereinafter "Vallance"]; L.G.

Rights, which sprang from the revolution, obligated the Crown to raise and spend money with the consent of elected parliamentary officials and not of its own accord.⁸⁵ Though these gains were somewhat ambiguous at the time,⁸⁶ the “Glorious Revolution” has become an important constitutional source and many regard it as a cornerstone of liberty throughout the British Commonwealth.⁸⁷ British North Americans enjoyed similar restraints on the exercise of the Crown prerogative when responsible government came to non-Aboriginal Canadians in the 1850s in the Canadian and the Maritime colonies.⁸⁸ Furthermore, the American and French revolutions of the late 1700s, which also purported to restrain Crown sovereignty relative to individual rights, are also regarded as being an essential step in democracy’s development. Canada’s own Charter is in this tradition.⁸⁹

While Aboriginal and treaty rights are exercisable only by Aboriginal peoples, and thus do not flow from the liberal enlightenment in this respect, this should not cause us to overlook the truth that they likewise exist to restrain government action. They are living constitutional traditions. While Aboriginal and treaty rights flow from sources beyond the liberal enlightenment, they nevertheless are synchronous with these broader constitutional traditions: they also constrain governments. Thus, though we must take care to ensure that while we appropriately define Aboriginal rights as having different contours, we must also ensure that we do not place them entirely outside of the Constitution’s broader framework. Unfortunately, the Court’s use of originalism in defining Aboriginal rights is outside the Constitution’s wider framework.

Not only is originalism out of step with Canada’s wider constitutional traditions, it also risks perpetuating the discrimination Aboriginal peoples have encountered throughout the years.⁹⁰ This is because

Schwoerer, ed., *The Revolution of 1688-89: Changing Perspectives* (Cambridge: Cambridge University Press, 2004).

⁸⁵ *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, 1689, December 16, 1689, at 67-73, vol. 9 of Dandy Pickering, ed., *The Statutes at Large* (Cambridge: Bentham, 1762-1804), and 122-28 of *English Historical Documents, 1660-1714*, Andrew Browning, ed. (London: Eyre & Spottiswoode, 1953).

⁸⁶ Vallance, *supra*, note 84, at 164, 177.

⁸⁷ Jonathon I. Israel, ed., *The Anglo-Dutch Moment: Essays on the Glorious Revolution and Its World Impact* (Cambridge: Cambridge University Press, 2003).

⁸⁸ Patrick Malcolmson & Richard Meyers, *The Canadian Regime: An Introduction to Parliamentary Government in Canada* (Toronto: University of Toronto Press, 2009), 37-54.

⁸⁹ The Charter constrains the Crown relative to individual citizens and obligates it to respect enumerated rights in the document.

⁹⁰ For a significant period of time assimilation guided the Crown’s actions towards Aboriginal peoples, as illustrated by the following statement: “Our object is to continue until there is not a

originalism links and then limits interpretation to periods when the Constitution was formed. Since Canada's legal history is saturated with discrimination towards Aboriginal peoples,⁹¹ constitutional standards should not pass along the troubling attitudes, behaviours and intentions of past generations of constitutional actors.⁹² Again, there is nothing wrong with using history as a constitutional standard if it respects the parties' political agency, and such history is tested, contextualized and harmonized with our entire constitutional traditions. For example, treaty interpretation generally requires a greater degree of deference to history than do Aboriginal rights cases. Conversely, the weight of history should be diminished in Aboriginal rights cases. This is because Aboriginal agency is severely restricted when the Court interprets rights through the prism of unilateral Crown actions. Quite simply, under current approaches, Aboriginal rights cases do not consider the historic or contemporary perspectives of Aboriginal peoples regarding Crown unilateralism. These cases take no account of Aboriginal views on the negative impacts of perpetually limiting their rights by the moment of Crown contact and sovereign assertion. The fact that the Crown's historic actions are grounded in discriminatory assumptions regarding Aboriginal inferiority should further diminish history's influence. Treaty interpretation, on the other hand, generally purports to respect the parties' agency when assigning them meaning. While treaty history can itself be problematic, due to power imbalances and differences of opinion, its interpretation at least attempts to consider Aboriginal peoples' views at the time they were signed. History should always be calibrated to non-discriminatory standards for judgment when used as a source of constitutional authority; it should rarely be determinative. Contemporary constitutional standards should not replicate views held by past generations of Canadian leaders

single Indian in Canada that has not been absorbed into the body politic": Duncan Campbell Scott, Testimony before the Special Committee of the House of Commons examining the *Indian Act* amendments of 1920, National Archives of Canada, Record Group 10, vol. 6810, file 470-2-3, vol. 7, 55 (L-3), 63 (N-3), quoted in John Leslie, *The Historical Development of the Indian Act*, 2d ed. (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Branch, 1978), at 114.

⁹¹ *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, Vol. 1 (Ottawa: Supply and Services Canada, 1996), at 137-200, 245-592 [hereinafter "*Looking Forward, Looking Back*"]; *Sparrow*, *supra*, note 73.

⁹² See *R. v. Côté*, [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139, at para. 53 (S.C.C.), citing *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1, at 42 (H.C.):

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

who regarded Aboriginal peoples as inferior and denied their governance and land rights.⁹³ Constitutional doctrines that transmit these and other historically discriminatory beliefs should have no place in Canada's highest law.⁹⁴

The Privy Council avoided adopting ancient discriminatory customs as constitutional standards in the *Persons* Case. It did so after considering the diminished legal and political status of women from before the time of the Roman Empire through the early 20th century. It noted that "The exclusion of women from all public offices is a relic of days more barbarous than ours."⁹⁵ It therefore rejected the law's discriminatory history as an aid to constitutional interpretation. The Court wrote that an "appeal to Roman Law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the *British North America Act* of 1867".⁹⁶ In the face of such bias the Court held that "[t]he appeal to history ... is not conclusive".⁹⁷ In so ruling, the Privy Council discarded arguments rooted in historical discrimination against women. The Supreme Court should take the same approach in relation to Indigenous peoples and similarly reject arguments rooted in historical discrimination.⁹⁸ Limiting Indigenous rights to what was integral to their

⁹³ For an historical overview of these views in the Canadian legal context, see Sidney Harring, *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998), at 8-10; Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990); J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-white Relations in Canada* (Toronto: University of Toronto Press, 2000), at 103-312. For an examination of how Aboriginal peoples can still be labelled as inferior in the present context, see Wayne Warry, *Ending Denial: Understanding Aboriginal Issues* (Toronto: University of Toronto Press, 2008).

⁹⁴ The Supreme Court has indicated that it is inappropriate to view Aboriginal peoples as being inferior: see *Calder v. British Columbia (Attorney General)*, *supra*, note 59, at 346-47:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or cultures, in effect a subhuman species.

⁹⁵ *Persons* Case, *supra*, note 6, at para. 9.

⁹⁶ *Id.*, at para. 39.

⁹⁷ *Id.*, at para. 37.

⁹⁸ Justice Binnie, formerly of the Supreme Court of Canada, would seem to agree. In an article dismissing originalism and arguing for living tree constitutionalism in Canada, he wrote: 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.

distinctive cultures prior to European contact or Crown sovereignty should “become a relic of days more barbarous than ours”.

Thus, even though discriminatory customs historically developed among European nations to take land and governance away from Indigenous peoples, such customs should not form part of our law today.⁹⁹ As noted, these laws were based on assessments of Indigenous inferiority.¹⁰⁰ For example, past discriminatory assessments of Indigenous peoples’ legal and political status are found in North America’s leading case on Indigenous peoples’ rights, *Johnson v. McIntosh*,¹⁰¹ where Chief Justice John Marshall wrote:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves as much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its

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*.

Ian Binnie, “Interpreting the Constitution: Living Tree vs. Original Meaning”, *Policy Options* (October 2007), online: <<http://www.irpp.org/po/archive/oct07/binnie.pdf>>, 104, at 106-107.

⁹⁹ See *R. v. Côté*, *supra*, note 92, at para. 53:

... a static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*. Indeed, the respondent’s proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies. To quote the words of Brennan J. in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C.), at p. 42:

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

¹⁰⁰ Borrows, “Sovereignty’s Alchemy”, *supra*, note 64, at 558-67.

¹⁰¹ 21 U.S. (8 Wheat.) 543 (1823). For further critiques concerning discrimination in *Johnson v. McIntosh* and other cases relying on the doctrine of discovery, see Robert J. Miller *et al.*, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2007); Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2007); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

inhabitants offered an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.¹⁰²

Unilaterally declaring that Indigenous peoples had lesser rights when constitutional principles were formed (due to alleged inferiorities in their character, religion and genius) does not bode well for originalism. At a minimum the doctrine of discovery, using the language of the *Persons* Case, should be considered “a relic of days more barbarous than ours”, rather than the foundation of the law. It does not respect Aboriginal peoples’ agency. Unfortunately, this doctrine explicitly undergirds Aboriginal and treaty rights jurisprudence in Canada to the present day. In 1984 the doctrine of discovery was accepted by the Supreme Court of Canada as one of the country’s constitutional foundations. As the Court observed in *Guerin v. Canada*:¹⁰³

The principle of discovery ... gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians’ rights in the land were obviously diminished.¹⁰⁴

The doctrine of discovery has been reaffirmed in subsequent cases.¹⁰⁵ Following the example of the *Persons* Case, as noted, the Supreme Court should not apply discriminatory customs of this kind in building Canada’s highest law. The appeal to history in matters where discrimination has guided past traditions should not be conclusive when deciding the foundation of our current laws.¹⁰⁶ The doctrine of discovery should be challenged as being contrary to Canada’s broader constitutional approaches.

For example, when the Crown arrived in North America, Indigenous peoples’ territories were not barren and deserted.¹⁰⁷ In fact, despite affirming discovery at most points in the jurisprudence, in at least one instance the Supreme Court of Canada has written: “At the time of the

¹⁰² *Id.*, at 573-74.

¹⁰³ [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335 (S.C.C.) [hereinafter “*Guerin*”].

¹⁰⁴ *Id.*, at 378.

¹⁰⁵ *Sparrow*, *supra*, note 73, at 1103: “[T]here was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown”; *Delgamuukw*, *supra*, note 61, at para. 145: “Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.”

¹⁰⁶ Paraphrasing *Persons* Case, *supra*, note 6, at 134.

¹⁰⁷ Richard Lillich *et al.*, *International Human Rights: Problems of Law, Policy and Practice*, 4th ed. (New York: Aspen, 2006), at 31-34; Paul Keal, *European Conquest and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2003).

assertion of British sovereignty, North America was not treated by the Crown as *res nullius*.¹⁰⁸ Canada's Royal Commission on Aboriginal Peoples also recommended the rejection of the doctrine of discovery because it is "legally, morally and factually wrong".¹⁰⁹ In light of these observations, and in line with the Privy Council's approach in the *Persons* Case, we would do well to apply the following caution to the doctrine of discovery: "Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared."¹¹⁰ It is time to reject archaic and misguided customs and traditions that lie at the heart of Canadian constitutional law, particularly when they rest on Indigenous peoples' legal inferiority. The reasons for considering Aboriginal peoples to be constitutionally inferior have been discredited and should have long since disappeared. It would be incongruous if such approaches continued under the guise of originalism.

Despite deep problems underlying Aboriginal rights jurisprudence, the Supreme Court has not employed a living tree approach when considering the rights of Aboriginal peoples. In fact, the only time the Supreme Court considered the living tree approach as applied to Aboriginal peoples it was rejected on the facts of the case. The case was *R. v. Blais*,¹¹¹ where the Court was asked to find that Métis peoples were Indians under sections of the 1930 *Natural Resources Transfer Agreement* ("NRTA").¹¹² The Supreme Court rebuffed this assertion on the grounds that the language, historical context and views of the NRTA's drafters did not support the Métis' claim.¹¹³ When the Court was asked to apply a living tree interpretative approach, it refused, and wrote:

We decline the appellant's invitation to expand the historical purpose of para. 13 on the basis of the "living tree" doctrine enunciated

¹⁰⁸ *R. v. Marshall; R. v. Bernard*, *supra*, note 71, at para. 132. Unfortunately, despite critiquing *res nullius*, the doctrine of discovery applied in this case because the Aboriginal peoples were regarded as being nomadic at the time that the Crown asserted sovereignty, such that they could not claim exclusive possession of the land they used.

¹⁰⁹ See *Looking Forward, Looking Back*, *supra*, note 91, at recommendation 1.16.2, at 696: Federal, provincial and territorial government further the process of renewal by: (a) acknowledging that concepts such as *terra nullius* and the doctrine of discovery are factually, legally and morally wrong

¹¹⁰ *Persons* Case, *supra*, note 6, at 134.

¹¹¹ [2003] S.C.J. No. 44, [2003] 2 S.C.R. 236 (S.C.C.) [hereinafter "*Blais*"].

¹¹² For a history of the *Natural Resources Transfer Agreement*, see Frank Tough, "Metis and Treaty Rights: The Forgotten Constitution: The Natural Resources Transfer Agreements and Indian Livelihood Rights, ca. 1925-1930" (2004) 41 *Alta. L. Rev.* 999.

¹¹³ *Blais*, *supra*, note 111, at paras. 19-34.

by Lord Sankey L.C. with reference to the 1867 *British North America Act: Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. ...

This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide “a continuing framework for the legitimate exercise of governmental power”: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *per* Dickson J. (as he then was), at p. 155. But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. ... Similarly, Binnie J. emphasized the need for attentiveness to context when he noted in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14, that “[g]enerous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse.” Again the statement, made with respect to the interpretation of a treaty, applies here.¹¹⁴

In the *Blais* case the Supreme Court held that the application of a living tree approach would produce a result that was inconsistent with the NRTA’s “original purpose”. An interpretative approach that conveyed “after-the-fact” generosity was thus rejected. However, “after-the-fact largesse” is precisely the kind of generosity resulting from the *Persons* Case, particularly as developed by the Supreme Court over the past 70 years. Women were qualified “persons” to be appointed as Senators within the Constitution despite a historic context that denied women the right to vote or claim political office.

III. ORIGINALISM AND THE CANONS OF CONSTRUCTION

In refusing to apply a living tree approach in the *Blais* case, it should be noted that the Court supported its opinion by applying the “generous rules of interpretation” that apparently exist to benefit Aboriginal peoples. Ironically, while expansive in one respect, these canons of construction ultimately constrain Aboriginal and treaty rights in the way they are used by the Court. This is because the Court says these “special rules” are only “dictated by the special difficulties of ascertaining what in fact was agreed to” when law was made.¹¹⁵ Notice the originalism communicated in the Court’s formulation of the canons of construction.

¹¹⁴ *Id.*, at paras. 39-40.

¹¹⁵ *Marshall (I)*, *supra*, note 62, at para. 14.

Since the distinctive rules for interpreting Aboriginal rights only exist to help the Court weigh evidence of historic purposes, these limits pose substantial problems for Aboriginal peoples.¹¹⁶ They cannot be used to go beyond a law's original meaning, as can occur in living tree jurisprudence.¹¹⁷ It is ironic that allegedly generous rules would have the effect of ultimately restricting interpretations of Aboriginal rights, especially when these rules appear very generous on the surface.

Generously construing intentions when Aboriginal peoples were viewed as inferior is not the same thing as unequivocally repudiating laws rooted in such discriminatory beliefs. Generosity should lead the Court to acknowledge that many of the government's formative policies were "wrong, have caused great harm, and have no place in our country", as the government of Canada acknowledged in its 2008 Statement of Apology to Aboriginal peoples.¹¹⁸ Regrettably, the Court has not yet taken this step in relation to the way it developed and applies its canons of construction. Thus, these special rules sustain original intentions and public meanings, though they try to put them in their best light, troubling as these experiences may be. Thus, these special rules apply despite the fact that many of the country's formative laws and policies were designed to undermine Aboriginal peoples' lands, governance and lifestyles. This should raise awareness that any interpretive "generosity" associated with originalism has its limits. It is a generosity that tacitly emphasizes the identification of problematic past intentions. This is opposed to the forward-looking view of living tree jurisprudence that incorporates Indigenous legal traditions,¹¹⁹ adopts a "progressive interpretation", "accommodates and addresses the realities of modern life"¹²⁰

¹¹⁶ The Supreme Court held that there is a "boundary that must not be crossed" when interpreting Aboriginal rights: *Mitchell v. Canada (Minister of National Revenue – M.N.R.)*, [2001] S.C.J. No. 33, [2001] 1 S.C.R. 911, at para. 39 (S.C.C.) [hereinafter "*Mitchell*"]. This boundary line is set by originalism.

¹¹⁷ *Reference re Provincial Electoral Boundaries (Sask.)*, *supra*, note 13, at 180:

The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed. ... It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.

¹¹⁸ Government of Canada, *Statement of Apology*, June 11, 2008, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100015644>>.

¹¹⁹ See, *infra*, Part V of this paper, where it should become clear that the extension of a living tree approach into s. 35(1) jurisprudence and beyond would lead to a greater scrutiny of originalism's colonial roots and enhance the role of Indigenous peoples' own role in the constitution's ongoing formation.

¹²⁰ *Canada (Attorney General) v. Hislop*, *supra*, note 13, at para. 94.

and rejects historical discrimination.¹²¹ “Generous” originalism will not produce as many benefits as living tree constitutionalism because the framework in which it applies is much narrower.

1. Treaties, Originalism and the Canons of Construction

I have been arguing that distinctive canons of construction applicable to Aboriginal and treaty rights, unfortunately, do not function in a manner analogous to the living tree doctrine because they have been developed and applied within the context of originalism. This restricted view is part of a broader history in which the courts have long deployed distinctive canons of construction when considering Aboriginal issues.¹²² To unequivocally show their originalism, these canons will now be examined in further detail by reference to case law. In the treaty realm, Chief Justice Marshall of the United States Supreme Court first articulated special interpretive principles for dealing with Indigenous peoples in the case of *Worcester v. Georgia*.¹²³ Justice Marshall developed this approach to better understand and give effect to the Cherokee nation's intentions at the time their treaties were negotiated.¹²⁴ Justice Marshall broadly construed specific provisions within these treaties to understand the Indians' original intent in entering such agreements. These rules developed through the years and they were consolidated in *Jones v. Meehan*¹²⁵ in 1899, and have played an important role in the United

¹²¹ *Persons Case*, *supra*, note 6, at 136 A.C.

¹²² See Leonard Rotman, “Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence” (1997) 46 U.N.B.L.J. 1.

¹²³ 31 U.S. (6 Pet.) 515, 8 L. Ed. 483. For further discussion of the development of Indians' canons of construction in the United States, see Charles Wilkinson & John Volkman, “Judicial Review of Indian Treaty Abrogation: ‘As Long as the Water Flows or Grass Grows Upon the Earth’. How Long a Time is That?” (1975) 63 Cal. L. Rev. 601.

¹²⁴ *Worcester v. Georgia*, *id.*, at 553-54 U.S.

¹²⁵ *Jones v. Meehan*, 175 U.S. 1 (1899), at 10-11:

In construing any treaty between the United States and an Indian tribe, it must always ... be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

States throughout the intervening years.¹²⁶ In 1990 the Canadian Supreme Court approvingly cited these rules in the case of *R. v. Sioui*.¹²⁷ The *Sioui* case also endorsed previous Canadian citations of these canons from the cases of *R. v. White and Bob*¹²⁸ and *R. v. Taylor and Williams*¹²⁹ and *R. v. Simon*.¹³⁰ The Court has continued to apply these canons to understand a treaty's original intent in the cases of *R. v. Horseman*,¹³¹ *R. v. Badger*,¹³² *R. v. Sundown*,¹³³ *R. v. Marshall (I)*,¹³⁴ *R. v. Marshall (II)*,¹³⁵ *R. v. Marshall*; *R. v. Bernard*¹³⁶ and *R. v. Morris*.¹³⁷

A brief review of each of these cases reveals their obvious originalism. The *White and Bob* case focused on original intent to bring out "the importance of the historical context, including the interpersonal relations of those involved at the time, in trying to determine whether a document falls into the category of a treaty under s. 88 of the *Indian Act*."¹³⁸ The *Taylor* case canvassed original intentions because "[c]ases on Indian or aboriginal rights can never be determined in a vacuum."¹³⁹ Thus, the

¹²⁶ The canons of Indian treaty constructed have been applied in leading U.S. Supreme Court cases, such as *United States v. Winans*, 198 U.S. 971, 25 S.Ct. 662, 49 L. Ed. 1089 (1905); *Winters v. United States*, 207 U.S. 564, at 576-77 (1908); *Choate v. Trapp*, 224 U.S. 665, at 675 (1912); *Carpenter v. Shaw*, 280 U.S. 363, at 367 (1930); *Choctaw Nation v. United States*, 318 U.S. 423, at 431-32 (1943); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, at 174 (1973); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, at 195-98 (1999).

¹²⁷ [1990] S.C.J. No. 48, [1990] 1 S.C.R. 1025 (S.C.C.) [hereinafter "*Sioui*"]. At paras. 16, 18: Our courts and those of our neighbours to the south have already considered what distinguishes a treaty with the Indians from other agreements affecting them. The task is not an easy one. In *Simon v. The Queen*, [1985] 2 S.C.R. 387, this Court adopted the comment of Norris J.A. in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) (affirmed in the Supreme Court (1965), 52 D.L.R. (2d) 481), that the courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration. ... In my opinion, this liberal and generous attitude, heedful of historical fact, should also guide us in examining the preliminary question of the capacity to sign a treaty ...

¹²⁸ [1964] B.C.J. No. 212, 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd [1965] S.C.J. No. 80, 52 D.L.R. (2d) 481n (S.C.C.) [hereinafter "*White and Bob*"].

¹²⁹ [1981] O.J. No. 3135, 34 O.R. (2d) 360 (Ont. C.A.) [hereinafter "*Taylor*"].

¹³⁰ [1985] S.C.J. No. 67, [1985] 2 S.C.R. 387 (S.C.C.) [hereinafter "*Simon*"].

¹³¹ [1990] S.C.J. No. 39, [1990] 1 S.C.R. 901, at 907 (S.C.C.) [hereinafter "*Horseman*"].

¹³² [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at paras. 4, 41 (S.C.C.) [hereinafter "*Badger*"].

¹³³ [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at paras. 24-25 (S.C.C.) [hereinafter "*Sundown*"].

¹³⁴ *Supra*, note 62, at paras. 9-14.

¹³⁵ [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 19 (S.C.C.) [hereinafter "*Marshall (II)*"].

¹³⁶ *Supra*, note 71, at para. 26.

¹³⁷ [2006] S.C.J. No. 59, [2006] 2 S.C.R. 915, at para. 19 [hereinafter "*Morris*"].

¹³⁸ *Sioui*, *supra*, note 127, at para. 45, citing *White and Bob* (B.C.C.A.), *supra*, note 128, at 649.

¹³⁹ *Taylor*, *supra*, note 129, at 367.

Court wrote: “It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty’s effect.”¹⁴⁰ The *Simon* case applied the view that “Indian treaties should be given a fair, large and liberal construction in favour of the Indians” to give effect to the “intention of creating mutually binding obligations” in a treaty between the Mi’kmaq and the Crown.¹⁴¹ The *Horseman* case held that the Court “must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time”.¹⁴² It also wrote, “to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with to-day’s formal requirements”.¹⁴³ Generous “back-word” looking rules were also used to assist with originalist interpretations in the *Badger* case, which similarly sought to understand “the intention of the framers”.¹⁴⁴ *Sundown* likewise held that these rules were in place to “take into account the First Nation signatory and the circumstances that surrounded the signing of the treaty”.¹⁴⁵ *Marshall I* adopted the point of view of a 17th-century “official bystander” to ensure that modern treaty interpretations accord with their original public meaning.¹⁴⁶ The same *Marshall* Court also used originalism to “choose from among the various possible interpretations of the *common* intention [at the time the treaty was made]”.¹⁴⁷ In *Marshall II* the Court reiterated that the rules of treaty interpretation were aimed at understanding what “was in the contemplation of either or both parties to the 1760 treaty”.¹⁴⁸ The Court was also firm in indicating that treaties “cannot be wholly transformed” by engaging in an “extended interpretation” of their original meaning.¹⁴⁹ This view was reinforced in *R. v. Marshall; R. v. Bernard* when the Court observed that an Aboriginal group’s historic “activity must be essentially the same” as what was occurring in the past in order to receive recognition.¹⁵⁰ Finally, the

¹⁴⁰ *Id.*, at 367.

¹⁴¹ *Simon*, *supra*, note 130, at para. 27.

¹⁴² *Horseman*, *supra*, note 131, at 907.

¹⁴³ *Id.*

¹⁴⁴ *Badger*, *supra*, note 132, at paras. 4, 41.

¹⁴⁵ *Sundown*, *supra*, note 133, at para. 25.

¹⁴⁶ *Marshall (I)*, *supra*, note 62, at para. 43.

¹⁴⁷ *Id.*, at para. 14 (emphasis in original).

¹⁴⁸ *Marshall (II)*, *supra*, note 135, at para. 20.

¹⁴⁹ *Id.*, at para. 19.

¹⁵⁰ *R. v. Marshall; R. v. Bernard*, *supra*, note 71, at para. 25.

Morris case highlighted the Court's originalist framework that "promises in the treaty must be placed in their historical, political, and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time".¹⁵¹

From the foregoing review it is clear that originalism plays a significant role in the Supreme Court's treaty jurisprudence. Generous interpretative rules are consistently referenced but they are deployed to assist the Court's retrospective search for meaning. These rules do not take us out of the past in determining the intentions of the framers or in understanding an agreement's public meaning. While treaty interpretation should exhibit a greater deference to history because it respects the parties' agency when assigning them meaning, it should not be used to limit the availability of future rights not discussed during the negotiations.¹⁵² Living tree jurisprudence does not operate within such limits. It permits "progressive constitutional development" which, while attentive to a law's roots, also keeps its eye more firmly on the present and future by "structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted".¹⁵³

2. Aboriginal Rights, Originalism and the Canons of Construction

Yet originalism is not only practised in section 35(1)'s treaty jurisprudence. It is also present in the Court's treatment of Aboriginal rights and title. For example, in the Supreme Court's first case dealing with Aboriginal rights, it wrote: "Section 35(1) must be given a generous, large and liberal interpretation and uncertainties, ambiguities or doubts should be resolved in favour of the natives."¹⁵⁴ A brief review of some of the leading cases in this area, such as *Van der Peet*,¹⁵⁵ *Delgamuukw*,¹⁵⁶ *R.*

¹⁵¹ *R. v. Morris*, *supra*, note 137, at para. 18.

¹⁵² By way of contrast, treaty jurisprudence in the United States does not regard treaties as exhaustive statements of law. Issues not discussed during treaty negotiations continue to be vested in Indigenous communities: see *United States v. Winans*, *supra*, note 126. In this case the Court held that treaties are "not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted". Thus, anything not discussed in a treaty is retained by the tribe. This is known as the reserved rights doctrine; the tribes retain everything within their territory unless they affirmatively give it up: *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

¹⁵³ *Same-Sex Marriage Reference*, *supra*, note 6, at para. 23; *Ontario Home Builders' Assn. v. York Region Board of Education*, *supra*, note 13, at para. 145.

¹⁵⁴ *R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723, at para. 133 (S.C.C.).

¹⁵⁵ *Supra*, note 59.

¹⁵⁶ *Supra*, note 61.

v. Sappier; *R. v. Gray*¹⁵⁷ and *R. v. Marshall*; *R. v. Bernard*¹⁵⁸ similarly shows that the application of these canons is strongly correlated with the Court's originalism. In fact, most section 35(1) cases do not ground their interpretation of Aboriginal rights on the contemporary relationship between Aboriginal peoples and the Crown. As occurs with treaties, the Supreme Court picks an "original" moment to guide its interpretations and it repeatedly uses the canons of construction to elucidate this moment (which the Court has itself fabricated). In the *Van der Peet* case the defining moment for recognizing and affirming Aboriginal rights is the one immediately prior to contact with Europeans¹⁵⁹ because "the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence — the ancestry — of aboriginal peoples in North America".¹⁶⁰ Under this formulation Lamer C.J.C. tautologically concluded that Aboriginal rights possess "original" rights because Aboriginal peoples are "Aboriginal".¹⁶¹ Thus, on this formulation Aboriginal rights can only be claimed if they are based on "practices, customs and traditions [that are rooted in the] pre-contact societies".¹⁶² This test forces the parties into an originalist framework with public meaning (recognition and affirmation of Aboriginal rights) being assigned to first contact.

Likewise, in the *Delgamuukw* case, the Supreme Court also placed the proof of Aboriginal title in an "original" moment. However, *Delgamuukw* moved that moment from contact to sovereignty. In this regard the *Delgamuukw* court wrote that "[i]n order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the *time at which the Crown asserted sovereignty over the land subject to the title*."¹⁶³ The Court said that "sovereignty is the appropriate time period" for proving Aboriginal

¹⁵⁷ [2006] S.C.J. No. 54, [2006] 2 S.C.R. 686 (S.C.C.) [hereinafter "*Sappier*"].

¹⁵⁸ *Supra*, note 71.

¹⁵⁹ The Court held that the test for proving Aboriginal rights would be links to "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right": *Van der Peet*, *supra*, note 59, at para. 46.

¹⁶⁰ *Id.*, at para. 32.

¹⁶¹ Justice Lamer distinguished Aboriginal rights from other "liberal" rights and wrote that "aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society". He then went on to say that Aboriginal rights "arise from the fact that aboriginal people are *aboriginal*; ... aboriginal rights 'inhere in the very meaning of aboriginality'": *id.*, at para. 19.

¹⁶² *Id.*, at para. 62. For a critique of this view see Russell Barsh & Sakej Henderson, "The Supreme Court's *Van der Peet* Trilogy: Native Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 [hereinafter "*Barsh & Henderson*"]; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *Am. Indian L. Rev.* 37.

¹⁶³ *Delgamuukw*, *supra*, note 61, at para. 144 (emphasis in original).

title because “aboriginal title crystallized at the time sovereignty was asserted”.¹⁶⁴ Thus, as with Aboriginal rights, the proof of Aboriginal title depends on the Court assigning public meaning to a past event; in this case the original public meaning is said to be the recognition of underlying Aboriginal title when the Crown asserted sovereignty over Aboriginal groups. This demonstrates how the doctrine of discovery lies at the heart of the Court’s originalism. Pinning constitutional meaning to the moment that Aboriginal rights were diminished¹⁶⁵ actually makes the Crown the main recipient of the Court’s generous interpretive stance. Crown sovereignty and the “magic moment of European contact” as McLachlin J. once critically described it, become the default position for defining the meaning and limits of future Aboriginal rights within an originalist framework.¹⁶⁶

The Supreme Court reinforced this framework in the cases of *Sappier*¹⁶⁷ and *R. v. Marshall; R. v. Bernard*.¹⁶⁸ The *Sappier* case held that reference to pre-contact practice is necessary to prove Aboriginal rights in order “to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society”.¹⁶⁹ In fact, the Court stated that the absence of such originalist evidence makes it next to impossible to claim rights under section 35(1). While the Court was careful to declare that “aboriginal rights are not frozen in their pre-contact form”,¹⁷⁰ any reasonable analysis of the Court’s originalism cannot evade the fact that contemporary Aboriginal practices are frozen out of constitutional inclusion if they do not have pre-contact correlations. They become frozen rights despite the Court’s reasons to the contrary.¹⁷¹

¹⁶⁴ *Id.*, at para. 145. For a critique of crystallization of title more broadly, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), at 93-94 [hereinafter “Borrows, *Recovering Canada*”].

¹⁶⁵ The Supreme Court noted that Aboriginal rights were diminished at contact in *Guerin v. Canada*, *supra*, note 103, at 377-78:

... the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. *In that respect at least the Indians’ rights in the land were obviously diminished*; but their rights of occupancy and possession remained unaffected ... (my emphasis)

¹⁶⁶ Justice McLachlin used this language in dissent in *Van der Peet*, *supra*, note 59, at para. 247.

¹⁶⁷ *Supra*, note 157.

¹⁶⁸ *Supra*, note 71.

¹⁶⁹ *Sappier*, *supra*, note 157, at para. 22.

¹⁷⁰ *Id.*, at para. 23.

¹⁷¹ Barsh & Henderson, *supra*, note 162; John Borrows, “The Trickster: Integral to a Distinctive Culture” (1997) 8:2 Const. Forum Const. 27, at 29-38.

The *R. v. Marshall; R. v. Bernard* case reaffirmed these principles and observed that the proof of Aboriginal and treaty rights both rested on (ab)originalist premises. Thus, the Court wrote: “The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right.”¹⁷² This sentence reveals the Court’s interpretive fusion of Aboriginal *and* treaty rights within an originalist framework. The application of this test led the Court to conclude that Mik’maq people could not claim Aboriginal title because their historic land use did not correspond to common law conceptions of physical occupation when the Crown asserted sovereignty.¹⁷³

IV. THREE ALTERNATIVES TO (AB)ORIGINALISM

The Court does not have to adopt an originalist approach when interpreting Aboriginal and treaty rights. Section 35(1)’s jurisprudence could be brought within the constitutional mainstream by highlighting the contemporary nature of Aboriginal and treaty rights. Lines of authority more consistent with a living tree approach could be emphasized. This would help to ensure that the “past plays a critical but non-exclusive role in determining the content of [Aboriginal] rights and freedoms”.¹⁷⁴ In taking this path the Supreme Court could highlight one of three prominent alternatives to originalism within section 35(1). These three alternatives are arguments relating to (1) the restraint of government authority; (2) the continuity of Aboriginal rights; and (3) the ongoing obligation of the Crown to act honourably in all its dealings with Aboriginal peoples. While history is relevant in each of these approaches, the Court more appropriately focuses on the contemporary aspects of the Crown’s relationship to Aboriginal peoples in the following examples.

The first illustration of a living-tree-like approach to Aboriginal rights is found in the leading case in the field, *Sparrow*.¹⁷⁵ While there are contrary tides in the *Sparrow* case, the Court did not generally link Aboriginal rights to a founding moment. Instead it held that the meaning of section 35(1) was to be “derived from general principles of constitutional interpretation”.¹⁷⁶ As a result, the Court explicitly developed these

¹⁷² *R. v. Marshall; R. v. Bernard*, *supra*, note 71, at para. 48.

¹⁷³ *Sappier*, *supra*, note 157, at paras. 60-67.

¹⁷⁴ *Reference re Provincial Electoral Boundaries (Sask.)*, *supra*, note 13, at 180.

¹⁷⁵ *Supra*, note 73.

¹⁷⁶ *Id.*, at 1106.

principles within a “framework for an interpretation ... that ... gives appropriate weight to the constitutional nature of these words”.¹⁷⁷ To accomplish this task the Court cited the *Manitoba Language Reference* to highlight the fact that section 35(1) was to be interpreted “in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government”.¹⁷⁸ These statements are similar to what was said in the *Persons* Case, which declared: “That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words.”¹⁷⁹ Putting canons of construction in this broader, more contemporary approach in the *Sparrow* case, the Court held that Aboriginal rights exist to restrict government action. This demonstrates section 35(1)’s living constitutional status, which operates to both channel and constrain government power. In this light, the Court found that section 35 demanded that the government justify “any government regulation that infringes upon or denies aboriginal rights”.¹⁸⁰ It said that “[s]uch scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick* ... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada ...”¹⁸¹

These are not the words of originalism; instead they measure Aboriginal rights by a contemporary purpose, which is the “affirmation of aboriginal rights”.¹⁸² This is more consistent with a living tree approach. Construing provisions liberally in the *Sparrow* case is aimed at affirming rights, even when they grow significantly beyond their historic roots. Thus, when the *Sparrow* Court appropriately considers the past it does so by simultaneously emphasizing present political realities. As a result, the Court used generous rules of interpretation to highlight that “[t]he relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”¹⁸³ To assist in the development of this relationship the Court wrote that sensitivity to the Aboriginal perspective on the meaning of the right at

¹⁷⁷ *Id.*, at 1016.

¹⁷⁸ *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 745 (S.C.C.), cited in *Sparrow*, *supra*, note 73, at 1106.

¹⁷⁹ *Persons* Case, *supra*, note 6, at 136 A.C.

¹⁸⁰ *Sparrow*, *supra*, note 73, at 1109.

¹⁸¹ *Id.*

¹⁸² *Id.*, at 1106.

¹⁸³ *Id.*, at 1108.

stake is crucial to its definition.¹⁸⁴ The Court's focus on Aboriginal perspectives and the constitutional nature of the parties' current relationship, as opposed to the search for its origins, is more consistent with the Court's broader living tree approach to constitutional interpretation.

A second alternative to the Supreme Court's originalism is found in an aspect of the *Mitchell* case,¹⁸⁵ which emphasized the continuity of Aboriginal rights.¹⁸⁶ An interpretive approach that emphasizes the contemporary, continuing nature of Aboriginal rights is much closer to a living tree model. This is because a focus on continuity takes our gaze away from first contact and emphasizes relations between Aboriginal communities and the Crown since their initial encounters.¹⁸⁷ This is also a more generous interpretive approach. It gives the Court some freedom to look beyond the initial roots of an Aboriginal right to see how its branches have "grown and expanded with their natural limits" (to use the language of the *Persons* Case). Nevertheless, one has to be careful in considering continuity as an alternative to originalism. Originalism could overtake the continuity thesis if too much weight is given to the common law's initial recognition of Aboriginal peoples' pre-existing law and interests.¹⁸⁸ For example, the *Mitchell* Court is quite clear that Aboriginal rights would only receive protection if they had continuity with "practices, traditions or customs that existed prior to contact".¹⁸⁹ Nevertheless, if

¹⁸⁴ In *Sparrow, id.*, at 1112, the Court wrote: "While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

¹⁸⁵ *Supra*, note 116.

¹⁸⁶ For a critique of the *Mitchell* case, see Gordon Christie, "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum" (2002) 16 S.C.L.R. (2d) 285.

¹⁸⁷ This is most consistent with the approach which dominated U.S. Federal Indian case law before the U.S. Supreme Court between 1959 and the early 1980s: see Charles Wilkinson, *American Indians, Time and the Law* (New Haven: Yale University Press, 1987). Felix Cohen was the most prominent proponent of this approach: see *Handbook of Federal Indian Law* (Washington: Department of Interior, 1941), at 122-23. During the Rehnquist Court era, Federal Indian case law became more preoccupied with originalism. For a critique of the U.S. Supreme Court's approach, see Frank Pommersheim, *Broken Landscapes: Indians, Indian Tribes, and the Constitution* (New York: Oxford University Press, 2009); Walter Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Golden, Colo.: Fulcrum Publishing, 2010); Robert Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005).

¹⁸⁸ In discussing the nature of Aboriginal rights the Court observed that English law "accepted that the aboriginal peoples possessed pre-existing laws and interests" while recognizing that "the Crown asserted that sovereignty over the land, and ownership of its underlying title": *Mitchell, supra*, note 116, at para. 9.

¹⁸⁹ *Id.*, at para. 12. Justice McLachlin wrote:

Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs

we recognize Aboriginal peoples as complex contemporary communities, the continuity thesis has greater potential to develop along the lines of a living tree approach because it emphasizes the branches of Aboriginal development, and not their initial recognition. Thus, the *Mitchell* case holds great potential when it observes that:

European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them ... Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada ...¹⁹⁰

The presumption of the survival and continuous exercise of Aboriginal rights can be a key point in rejecting originalism. While Indigenous peoples would strongly resist the three limitations McLachlin C.J.C. placed on the continuity of their rights,¹⁹¹ there are sound arguments that Indigenous rights, obligations and conflict resolution procedures are compatible with the Crown's assertion of sovereignty.¹⁹² Indigenous peoples affirm that many of their most important rights were not surrendered by treaties and were not extinguished by clear and plain government legislation.¹⁹³ These facts would be clearer if a living-tree-like reconciliation was the lens through which the courts interpreted the

that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet, supra*, at paras. 54-59 (emphasis in original)).

¹⁹⁰ *Id.*, at para. 10.

¹⁹¹ Gordon Christie, "Aboriginal Citizenship: Sections 35, 25 and 15 of Canada's Constitution Act, 1982" (2003) *Citizenship Studies* 481-95.

¹⁹² Borrows, *Canada's Indigenous Constitution, supra*, note 35, at 136.

¹⁹³ See, generally, Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publications, 2007); Daniel Paul, *We Were Not the Savages: A Mi'kmaq Perspective on the Collision between European and Native American Civilizations*, 21st Century ed. (Halifax: Fernwood, 2000) [hereinafter "Paul, *We Were Not the Savages*"]; Boyce Richardson, ed., *Drum Beat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989); Kiera Ladner & Leanne Simpson, eds., *This Is an Honour Song: Twenty Years Since the Blockades* (Winnipeg: Arbeiter Ring Publishing, 2010).

parties' relationships.¹⁹⁴ They hold that their laws co-exist with common law and civil law traditions, and that they could be considered a strong part of Canada's constitutional law in the present day.

The continuity thesis is therefore a much stronger ground on which to build the interpretation of Aboriginal rights. It highlights the existing nature of Aboriginal rights, which allows for the growth and development of Indigenous law and tradition as part of the law of Canada.¹⁹⁵ This interpretation is more consistent with the Court's living tree constitutionalism, which states that "[t]here is nothing static or frozen, narrow or technical, about the Constitution of Canada."¹⁹⁶ For this reason, the continuity theory of Aboriginal rights as discussed in the *Mitchell* case is an important alternative to the originalism that is found in most Aboriginal rights cases.

The third alternative to the Supreme Court's originalism comes from the case of *Haida Nation v. British Columbia*.¹⁹⁷ While history is once again relevant in the *Haida* case, the Court's reasons do not inflexibly fasten constitutional rights and obligations to one historic moment. Contemporary obligations are always present under the approach taken in this case. This is apparent when the Court writes that "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."¹⁹⁸ The implication of this conclusion is that "[r]econciliation is not a final legal remedy in the usual sense ... it is a process."¹⁹⁹ Under this formulation rights are not time-bound; the fulfilment of a constitutional obligation does not begin and end by reference to the past. Constitutional obligations must be "determined,

¹⁹⁴ See *Van der Peet*, *supra*, note 59, at para. 31:

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

For a wide-ranging discussion of reconciliation, see Paulette Regan, *University of British Columbia Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: University of British Columbia Press, 2010).

¹⁹⁵ Sakej Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, 2006).

¹⁹⁶ *British Columbia (Attorney General) v. Canada Trust Co.*, *supra*, note 13, at 478-79.

¹⁹⁷ [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter "*Haida*"].

¹⁹⁸ *Id.*, at para. 17.

¹⁹⁹ *Id.*, at para. 32.

recognized and respected” in the present, especially in circumstances where rights have not yet been reconciled with Crown sovereignty.²⁰⁰ With the contemporary nature of Aboriginal rights fully on display in the *Haida* case, the Supreme Court developed a test for the contemporary consultation and accommodation of Aboriginal rights. It wrote that constitutional duties arise “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it”.²⁰¹ This test reveals that constitutional rights are related to the Crown’s ongoing assessment of the impact of its activities on Aboriginal peoples. The characterization of the Crown’s constitutional obligation does not primarily depend on assigning meaning to past events. Since the constitutional relationship does not solely depend on initial assessments of the strength of the Aboriginal group’s historically based claims, the Court says this can foster “a relationship between the parties that makes possible negotiations”, which it regards as “the preferred process for achieving ultimate reconciliation”.²⁰² Clearly, the *Haida* case is an alternative to the Court’s originalism in the field of Aboriginal rights.

If the Supreme Court further explored the contemporary implications of the three approaches identified in this section, Canada’s Constitution would be more unified and less discriminatory. Aboriginal peoples’ rights would be considered in a broader light, and Canada would be strengthened. This would be more consistent with the Privy Council’s living tree approach, which is that the Constitution “should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words”.²⁰³

²⁰⁰ *Id.*, at para. 25. Even where reconciliation has taken place the accommodation of Aboriginal and treaty rights is an ongoing process: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 51-58 (S.C.C.).

²⁰¹ *Haida*, *supra*, note 197, at para. 35.

²⁰² *Id.*, at para. 38.

²⁰³ *Persons Case*, *supra*, note 6, at 136 A.C.

V. ABORIGINAL LEGAL TRADITIONS, LIVING TREES AND ORIGINALISM

The Supreme Court should also consider the state of Indigenous approaches to constitutional law in adopting living tree alternatives.²⁰⁴ Living tree constitutionalism resembles one significant source of Indigenous law grounded in analogies to the natural world.²⁰⁵ This environmentally based approach to legal interpretation develops rules for regulation and conflict resolution from a study of the world's behaviour.²⁰⁶ Indigenous peoples who practise this form of law draw analogies from the behaviours of ecosystems, watersheds, rivers, mountains, valleys, meadows, lakes and shorelines to guide legal actions.²⁰⁷ Given this focus it is no surprise that Indigenous peoples would be attracted to constitutional metaphors based on living things. In fact, one of the strongest metaphors Indigenous peoples use in describing their relations with the Crown is "as long as the shine shines, the grass grows, and the river flows".²⁰⁸ This metaphor, while possessing much deeper meaning,²⁰⁹ is

²⁰⁴ Indigenous perspectives on the law are relevant to constitutional interpretation. As the Supreme Court of Canada wrote in *Sparrow*, *supra*, note 73, at 1112: "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake".

²⁰⁵ Indigenous law based on environmental sources is discussed in greater depth in Borrows, *Canada's Indigenous Constitution*, *supra*, note 35, at 28-35 and Borrows, *Recovering Canada*, *supra*, note 164, at 29-55.

²⁰⁶ An interesting example of how environmental law might develop and be operative within Indigenous communities is found in the writings of Julie Cruikshank: see Julie Cruikshank, *Do Glaciers Listen? Local Knowledge, Colonial Encounters, and Social Imagination* (Vancouver: University of British Columbia Press, 2005). See also William Robinson as told by Walter Wright, *Men of Medek*, 2d ed. (Kitimat, B.C.: Northern Sentinel Press, 1962); Jo-Anne Fiske & Betty Patrick, *Cis Dideen Kat (When the Plumes Rise): The Way of the Lake Babine Nation* (Vancouver: University of British Columbia Press, 2000); Kiera L. Ladner, "Governing Within an Ecological Context: Creating an AlterNative Understanding of Blackfoot Governance" (2003) 70 *Studies in Political Economy* 125, at 150; James [Sákéj] Youngblood Henderson, "Mikmaw Tenure in Atlantic Canada" (1995) 18 *Dal. L.J.* 196, at 218; John Borrows, "Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008) 161.

²⁰⁷ Analogies to law and the natural world are found in many treaty speeches: see Robert Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997). For a more general discussion of analogical reasoning, see Cass R. Sunstein, "On Analogical Reasoning", *Commentary* (1993) 106 *Harv. L. Rev.* 741.

²⁰⁸ For a discussion of this concept in law, see Wilkinson & Volkman, "Judicial Review of Indian Treaty Abrogation", *supra*, note 123. An early use of a similar phrase is found in a treaty made by William Penn with the Conestoga in 1701: see Kevin Kenny, *Peaceable Kingdom Lost: The Paxton Boys and the Destruction of William Penn's Holy Experiment* (New York: Oxford University Press, 2009), at 15: "as long as the Sun and Moon shall endure". Benjamin Franklin reported this treaty as saying, "as long as the sun shall shine, or the waters run in the rivers" in Jared Sparks, ed., *The Works of Benjamin Franklin: Autobiography*, pt. 2 (Boston: MacCoun, 1882). Other associations between treaties and the phrase are found in Harold Cardinal & Walter Hildebrandt, *Treaty*

usually associated with treaties and emphasizes the perpetual nature of agreements to live together in peace, friendship and respect.²¹⁰ An organic, animate, growth-oriented approach to law is also found in the Haudenosaunee constitution, also called *Kaianerekowa* or Great Law of Peace.²¹¹ This constitution binds the Six Iroquois Confederacy together under principles of peace, power and righteousness.²¹² The grand symbol of the *Kaianerekowa* is a Great White Pine tree with four white roots of peace extending in four cardinal directions.²¹³ The tree has long needles that grow as the confederacy prospers.²¹⁴ The nations and its people are allegorically seated in concentric circles around the tree, also illustrating

Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations (Calgary: University of Calgary Press, 2000), at 20; Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Sarah Carter & Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal-Kingston: McGill-Queen's Press, 1996), at 133; Rene Fumoleau, *As Long as this Land Shall Last: A History of Treaty 8 and 11* (Toronto: McClelland and Stewart, 1976), at 74, 133, 240, 257, 314, 340, 502; Arthur Ray, J.R. Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's Press, 2000), at 116-17. For a contrary view about questioning the relationship of this phrase to treaties, see Sharon Venne, "Understanding Treaty Six: An Indigenous Perspective" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 173, at 194.

²⁰⁹ For example, see Deanna Christensen, *Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and Their Vision for Survival, 1816-1896* (Shell Lake, SK: Ahtahkakoop Publishing, 2000), at 5-14, for a brief discussion of laws related to the sun, waters and earth. For an ingenious literary treatment of this idea, see Thomas King, *Green Grass, Running Water* (Toronto: Harper Collins, 1993).

²¹⁰ For example, when Alexander Morris proposed Treaty 6 he said, "What I trust and hope we will do is not for today or tomorrow only; what I promise and what I believe and hope you will take, is to last as long as that sun shines and yonder river flows": Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They were Based, and other Information Relating Thereto* (Saskatoon: Fifth House Publishers, Saskatoon, 1991), at 202; see similar words in relation to Treaty 3, at 51. This phrase was also used in an 1818 treaty with the Ojibway: see J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), at 101.

²¹¹ Francis Jennings, *The Ambiguous Iroquois Empire* (New York: W.W. Norton and Company, 1990).

²¹² Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999). Some commentators have made "originalist-type" arguments linking the Great Law of Peace to the U.S. Constitution: see Donald A. Grinde, Jr., & Bruce E. Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: American Indian Studies Centre 1991) [hereinafter "Grinde & Johansen"]; Bruce E. Johansen, *Forgotten Founders: How the American Indian Helped Shape Democracy* (Boston: Harvard Common Press, 1982) [hereinafter "Johansen"]; Elizabeth Tooker, "The United States Constitution and the Iroquois League" [hereinafter "Tooker"] in James Clifton, ed., *The Imaginary Indian: Cultural Fictions and Government Policy* (New Brunswick, NJ: Transactions Publishers, 1996) 108.

²¹³ The Haudenosaunee have in times past invited others to seek shelter in their Confederacy and Great Law: see William Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman, Okla.: University of Oklahoma Press, 1998), at 73.

²¹⁴ Fenton, *id.*, at 103.

growth. A great eagle sits atop the tree to watch for the peace and safety of the confederacy. The Great Law is a living tree.²¹⁵ Aboriginal peoples of the Pacific Northwest also have constitutions related to trees. The Haida, Nisga'a, Gitskan, Wetsuwet'en, Tsimshian, Tahltan, Tlingit, Salish, Heiltsuk, Nuu-Chah-Nulth and Kwakwaka'wakw all carve poles that communicate their relationships to territory, ancestors and the natural world around them.²¹⁶ Unlike living trees, which metaphorically grow forever, totem poles are designed to eventually fall down and decay as they return to the earth. This reinforces the idea that constitutional laws, though carved from deep histories, are to be re-inscribed every few generations to ensure they remain relevant through time.²¹⁷ Thus, this metaphor produces effects that are similar to the living tree doctrine. Other Indigenous peoples in Canada also root their highest laws in analogies related to living beings.²¹⁸

²¹⁵ Anishinaabe people at the time also formulated law based on living trees. One such example comes in a council at Detroit in 1773. In this case a Shawane chief named Tshwabame was speaking on behalf of Anishinaabe people who were accused of murdering several fur traders. In the course of his speech he recalled that when their British Father replaced their French Father at Detroit he "planted a Tree" so that whenever "any bad thing" should happen they could "assemble at s[aid] tree & talk together" and "try to moderate any difficulties": Speech of Tshwabame Shawanese & Minitowabe Chiefs, with Sixteen Sawinan Indians who brot in ye three Murderers of Pond &c., Detroit, 9-10 May 1773, Haldimand Add. 21,670: 42-45. I thank Mark Walters for bringing this reference to my attention.

²¹⁶ For a discussion of First Nations' use of trees and poles in communicating their laws and political relationships, see Marius Barbeau, *Totem Poles* (Ottawa: Queen's Printer, 1950); Michael D. Blackstock, *Faces in the Forest: First Nations Art Created on Living Trees* (Montreal: McGill-Queen's Press, 2001).

²¹⁷ Johnny Mack has observed that the Nuu-chah-nulth nation cannot rely on a reified constitutional order because they are living in a constant state of renewal, where history is brought to the present by carvers/weavers whose hand is greatly inspired by contemporary, lived experience as well as the past that, of course, constitutes the present. ... [T]he phrase "dead tree constitutionalism" [seems] to capture the corporeal character of the indigenous constitutional order. That is to say, the constitutions, much like ourselves, have a physicality and life expectancy. Thus, we are charged with the responsibility of knowing the histories reflected in the totems and, having lived within the world normativised by them, go about the task of carving/weaving new ones. Personal communication, April 11, 2012. He has written about this issue more generally in Johnny Mack, *Thickening Totems Thinning Imperialism* (LL.M. Thesis, University of Victoria, 2009), at 128-36 [unpublished].

²¹⁸ Paul, *We Were Not the Savages*, *supra*, note 193, at 156 (comparing political authority to the light of the moon); Jean-Guy Goulet, *Ways of Knowing: Experience, Knowledge and Power Among the Dene Tha* (Vancouver: University of British Columbia Press, 1998), at 61-107; Andie Diane Palmer, *Maps of Experience: The Anchoring of Land to Story in Secwepmec Discourse* (Toronto: University of Toronto Press, 2005), at 118-35; *Looking Forward, Looking Back*, *supra*, note 91, at ch. 4; Fikret Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Philadelphia, PA: Taylor & Francis, 1999); Robert Brighton, *Grateful Prey: Rock Cree Human-Animal Relations* (Berkeley: University of California Press, 1993); Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Feasts and Land Claims* (Vancouver: University of British

None of the above references suggest that the living tree doctrine as proclaimed by the Privy Council has its origins in Aboriginal peoples' law.²¹⁹ Each legal tradition independently embraced living constitutionalism on its own terms. The same could be said about originalism. Aboriginal peoples can be originalists too, in relation to their own laws, and in relation to Canada's broader constitutional traditions. In fact, originalist and dynamic interpretative practices are present in most traditions. For example, originalism has similarities to Biblical and Koranic literalism,²²⁰ and living constitutionalism has parallels with biblical hermeneutics and religious syncretism.²²¹ These examples often have relevance for constitutional interpretation.²²² Aboriginal peoples' legal perspectives and practices are as varied as other legal traditions in the world, even within particular communities. Thus, when considering Indigenous peoples' own constitutional traditions it is important to recognize the diversity of approaches within these societies, including originalism.

For example, Indigenous laws privileging originalism in a Cree community are on display in the *Sawridge* decision.²²³ This case consid-

Columbia Press, 1994), at 122; Mariano Aupilaarjuk *et al.*, *Interviewing Inuit Elders, Vol. 2: Perspectives on Traditional Law*, Jarich Oosten, Frédéric Laugrand & Wim Rasing, eds. (Iqaluit: Nunavut Arctic College, 1999).

²¹⁹ This is contrary to the claim of some scholars in the United States that the U.S. constitution was partially inspired by Indigenous legal traditions: see Grinde & Johansen, *supra*, note 212; Johansen, *supra*, note 212; Tooker, *supra*, note 212.

²²⁰ For a discussion of the similarities and differences between originalism and biblical literalism, see Peter Smith & Robert Tuttle, "Biblical Literalism and Constitutional Interpretation" (2011) 86 *Notre Dame L. Rev.* 693; Jaroslav Pelikan, *Interpreting the Bible and the Constitution* (New Haven: Yale University Press, 2004); Karen Armstrong, *The Bible: A Biography* (New York: Atlantic Monthly Press, 2007). For arguments about literalism and dynamic interpretation under the Koran, see Anver Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010); Anver Emon, "Techniques and Limits of Legal Reasoning in Shari'a Today" (2009) 2 *Berkeley Journal of Middle Eastern & Islamic Law*, at 101-24; Mohammad Hashim Kamali, "Law and Society: The Interplay of Revelation and Reason in the Shariah" in John L. Esposito, ed., *The Oxford History of Islam* (Oxford: Oxford University Press, 1999), at 107-10.

²²¹ Bruce Corley & Steve W. Lemke, *Biblical Hermeneutics: A Comprehensive Introduction to Interpreting Scripture*, 2d ed. (Nashville: Broadman and Holman: 2009); Michael Fishbane, *The Garments of Torah: Essays in Biblical Hermeneutics* (Bloomington: Indiana University Press, 1992); Henry Virkler, *Hermeneutics: Principles and Processes of Biblical Interpretation* (Grand Rapids, MI: Baker House Books, 1991). For a philosophical application of hermeneutics, see Hans Georg Gadamer, *Truth and Method*, J. Weinsheimer & D.G. Marshall, trans., 2d rev. ed. (New York: Crossroad, 2004); Charles Stewart, *Syncretism/Anti-Syncretism: The Politics of Religious Synthesis* (New York: Routledge, 1994).

²²² Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988).

²²³ *Sawridge Band v. Canada*, [1995] F.C.J. No. 1013, [1996] 1 F.C. 3 (F.C.T.D.) [hereinafter "*Sawridge*"]. The Federal Court of Appeal determined that the trial judges' decision raised a reasonable apprehension of bias: see *Sawridge Band v. Canada*, [1997] F.C.J. No. 794, [1997] 3 F.C.

ered a First Nation's constitutional obligations to accept women as members when they had been disenfranchised and re-enfranchised by the *Indian Act*.²²⁴ Only First Nations women's legal status was at issue because Indian men did not lose Indian status under the Act.²²⁵ The Sawridge Band argued they had no obligation to accept First Nations women as citizens if they married non-Indian men. Testimony was given to make the point that it was Cree custom "since aboriginal times" until the present day for women to take their husband's membership status, or lack thereof.²²⁶ Thus, if women "married out" and lost their Indian status, the Band argued that this was consistent with original Cree principles. This law, regarded as fundamental to the way the community constituted itself, was that "woman follows man". Agnes Smallboy, an elder in the trial, testified as follows:

Q. MR. HEALEY: How did you come to be a member of the Ermineskin Band?

A. When I was young, I married into the reserve to a man who was named Pete Morin.

Q. What Indian band did you belong to before you married Pete Morin?

580 (C.A.). The subsequent history of this case eventually led to its dismissal: see *Sawridge First Nation v. Canada*, [2008] F.C.J. No. 389, 2008 FC 322 (F.C.); *Sawridge Band v. Canada*, [2009] F.C.J. No. 465, 2009 FCA 123 (F.C.A.), leave to appeal refused [2009] S.C.C.A. No. 248 (S.C.C.).

²²⁴ For commentary on this case, see Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 Const. Forum Const. 4; Joyce Green, *Exploring Identity and Citizenship: Aboriginal Women, Bill C-31 and the Sawridge Case* (Doctoral dissertation, University of Alberta, 1997) [unpublished]; Joyce Green, "Canaries in the Mines of Citizenship: Indian Women in Canada" (2001) 34 Canadian Journal of Political Science 4; Thomas Isaac, "Case Commentary: Self-Government, Indian Women and Their Rights of Reinstatement under the Indian Act: A Comment on *Sawridge Band v. Canada*" [1995] 4 C.N.L.R. 1.

²²⁵ For a review of this history, see *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, Vol. 4 (Ottawa: Ministry of Supply and Services, 1996), at 24-36. Important cases challenging the *Indian Act's* discrimination against Indian women are as follows: *Lavell v. Canada (Attorney General)*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 (S.C.C.); *Lovelace v. Canada*, 36 U.N. GOAR Supp. (No. 40) Annex XVIII, U.N. Doc. A/36/40 (1981); *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, [2007] B.C.J. No. 1259, 2007 BCSC 827, [2007] 3 C.N.L.R. 72 (B.C.S.C.); *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, [2009] B.C.J. No. 669, 306 D.L.R. (4th) 193 (B.C.C.A.); *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, [2009] S.C.C.A. No. 234 (S.C.C.). To partially remedy sex-based discrimination in the *Indian Act*, Parliament passed two amendments to the *Indian Act: An Act to amend the Indian Act*, R.S.C. 1985, c. 32 (1st Supp.) (Bill C-31); and *Gender Equity and the Indian Registration Act*, R.S.C. 2010, c. 18 (Bill C-3).

²²⁶ *Sawridge, supra*, note 223, at 46, 116 (F.C.T.D.).

A. I was a member of the Sampson Band. In our language, we call it “the land of the willows”. [TT3, at page 270.]

Q. MR. HEALEY: Why did you leave your band and join the Ermineskin Band when you married Pete Morin?

A. I did not know the man before I married him. In our system, a woman ... or the parents made arrangements for the marriage of their daughters. And when my parents told me that I was to go and live with this man, I obeyed my parents. ...

Q. Does the woman always go with the man as you did in the Ermineskin Band?

A. Yes, that was the way it was — or has been.

Q. Is that the Indian way today?

A. It is still the way it is today. ...²²⁷

The argument to sustain the practice of “woman follows man”, as described in this case, can be labelled as originalist. It seeks to maintain the imputed first intentions of Cree ancestors and the Creator,²²⁸ and it vests this practice with public values considered foundational to Cree political organization, at least by those making these arguments.²²⁹ While we should not forget that there are diverse viewpoints within Indigenous law,²³⁰ some of which may vigorously oppose discrimination,²³¹ other

²²⁷ *Id.*, at 92-93 F.C.

²²⁸ Wayne Roan testified at trial:

... the supreme being that gave me the language to identify these things. That’s the way he said it. That’s the way I believe it, that’s the way I recognize it, and nothing you’re going to say is going to change that. It is part of my way of life. It is not yours, it is my way. All I’m doing here is for you to try and understand I put into place, that’s the way things worked.

Id., at 100 F.C.

²²⁹ Elders in the *Sawridge* case regarded the idea of “woman follows man” as being foundational to Cree organization. They argued that Cree ways would be threatened if women who have non-native husbands did not follow them off the reserve when they married. These values are clearly discriminatory and cannot be excused by reference to original Cree teachings and law. Nevertheless, Elder Sophie Mackinaw testified at trial: “I want to talk specifically about the white husband in this instance. It is not clear that the white husband is going to be able to accept our ways and live the way we are. It may be that the white man who comes to live on our reserve will want to impose his own values, his ways which he is familiar with on us, on our communities”: *id.*, at 29 F.C.

²³⁰ For an excellent discussion of the rich diversity of Indigenous legal thought, see Val Napoleon, *Ayook: Gitksan Legal Order, Law and Legal Theory* (Ph.D. Dissertation, University of

Indigenous communities have also made arguments that originalism requires discriminatory results.²³² As argued above, (Ab)originalism should not be used to sustain discrimination. Discriminatory originalism is problematic, regardless of its nature and source. Whether used by distinguished members of the Supreme Court of Canada, or by respected elders within Indigenous communities, adverse discrimination should be rejected as contrary to other constitutional approaches within each tradition.²³³

There are also reasons to reject originalism even in cases where discrimination is not at issue. As suggested earlier, it is an unbalanced approach because it does not sufficiently contextualize the present and future tenses of constitutional law. Furthermore, originalism does not offer any greater determinacy than alternative interpretive approaches. Though not a Canadian example, the following illustration raises these issues. It involves the Ottawa First Nation, a people also Indigenous to Canada. The Ottawa are Anishinaabek people who are divided by the border between Canada and the United States. As such, they are found on Manitoulin Island in Ontario and in communities around northern Lake Huron and Lake Michigan. The Little River Band of Ottawa Indians, a sub-group of the larger nation, resides on the eastern shores of Lake Michigan around Manistee Michigan. They are organized under a constitution that consists of a nine-member elected Council, an elected

Victoria Faculty of Law, 2009), online: <<http://dspace.library.uvic.ca:8080/bitstream/handle/1828/1392/napoleon%20dissertation%20April%2026-09.pdf?sequence=1>>.

²³¹ For internal Indigenous opposition to discrimination on the basis of sex within Indigenous communities, see the work of the Native Women's Association of Canada, online: <<http://www.nwac.ca/>>. Indigenous women have developed important critiques of discrimination from within many Indigenous traditions: see Val Napoleon, "Aboriginal Discourse: Gender, Identity and Community" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009); Sarah Deer, B. Clairmont & C.A. Martell, eds., *Sharing our Stories of Survival: Native Women Surviving Violence* (Lanham, MD: AltaMira Press, 2008).

²³² Arguments made by Indigenous peoples that appear to be originalist in the U.S. context are found in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *In the Matter of Village Authority to Remove Tribal Council Representative (Bacavi Certified Question)* (February 11, 2010) No. 2008-AP-0001 (Hopi Appellate Court); *In re Menefee* (May 5, 2004) No. 97-12-092-CV, 2004 WL 5714978 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court); *Kavena v. Hopi Indian Tribal Court* (March 21, 1989) NAHT 0000002 (Hopi Appellate Court); *Allen v. Cherokee Nation Tribal Council* (2006) 6 Am. Tribal Law 18 (Cherokee Nation Judicial Appeals Tribunal).

²³³ Indigenous peoples are traditional, modern and post-modern and their constituting laws should constantly be cross-referenced to ensure that rights are not frozen in the past: see Borrows, *Recovering Canada*, *supra*, note 164, at 75-76.

Ogema (Chief) and a Tribal Court.²³⁴ The Ottawa Tribal Court constantly grapples with different modes of constitutional interpretation in making its decisions, as occurs in the other 330 Tribal Courts in the United States.²³⁵ This struggle is found in the case of *Champagne v. Little River Band of Indians*, decided before the Little River Band of Indians Court of Appeal.²³⁶

The issue in the *Champagne* case was whether the Tribal Council's statutory incorporation of certain provisions of Michigan State criminal law was contrary to the Little River Ottawa Band Constitution. A former Tribal Court judge, who had been convicted of the crime of attempted fraud under an Ottawa Band statute, argued that the adoption of Michigan law that criminalized the crime of attempted fraud was an unconstitutional "abrogation of tribal sovereignty and a violation of tribal customs and traditions".²³⁷ He contended that the Michigan-inspired

²³⁴ See Constitution of the Little River Band of Indians of Manistee, Michigan, online: <<https://www.lrboi-nsn.gov/council/docs/Constitution%20-%202004%20Amendments.pdf>>. The Preamble reads:

We, the Little River Ottawa people have asserted our sovereignty throughout history including in the Treaty of Chicago [August 29, 1821; 7 Stat 218], the Treaty of Washington [March 28, 1836; 7 Stat 491], and the Treaty of Detroit [July 31, 1855; 11 Stat 621].

Between the last treaty and the present day, the Grand River Ottawa people who became the Little River Band of Ottawa Indians were known and organized under several names, including members of "Indian Village" on the Manistee River, residents of the Pere Marquette Village or "Indian Town", Unit No. 7 of the Northern Michigan Ottawa Association, the Thornapple River Band, and finally the Little River Band of Ottawa Indians.

On September 21, 1994, Public Law 103-324 (108 Stat 2156) was enacted, reaffirming federal recognition of and confirming the sovereignty of the Grand River Bands comprising the Little River Band of Ottawa Indians (referred to as the Tribe or Little River Band).

As an exercise of our sovereign powers, in order to organize for our common good, to govern ourselves under our own laws, to maintain and foster our tribal culture, provide for the welfare and prosperity of our people, and to protect our homeland we adopt this constitution, in accordance with the Indian Reorganization Act of June 18, 1934, as amended, as the Little River Band of Ottawa Indians.

The Band also has a bureaucracy consisting of 28 different departments administering programs and processes necessary to running a modern government.

²³⁵ The varied interpretive approaches within Tribal Courts can be studied in Matthew Fletcher, *American Indian Tribal Law* (New York: Aspen Publishers, 2011) [hereinafter "Fletcher"]; Justin Richland & Sarah Deer, eds., *Introduction to Tribal Legal Studies*, 2d ed. (Lanham, MD: Altamira Press, 2010); Carrie Garrow & Sarah Deer, eds., *Tribal Criminal Law and Procedure* (Lanham, MD: Altamira Press, 2004); Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (Minneapolis: University of Minnesota Press, 2009); Justin Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008).

²³⁶ Case No. 06-178-AP, June 2007 (Little River Band of Indians Court of Appeal); see also Fletcher, *id.*, at 405-12.

²³⁷ *Id.*, at 409-10.

statute was inconsistent with Anishinaabek traditions and tribal law, and was therefore unconstitutional. The Little Ottawa Band Court of Appeal rejected these arguments. While noting that it was laudable to seek the development of a “sophisticated legal system based on Anglo-American legal models [which] preserves the cultural distinctiveness of Ottawa culture through the development of tribal law and the preservation of tribal customs and traditions”, the Court of Appeal nevertheless found that the judge “attempted to procure money that was not owed to him”.²³⁸ It held that “Justice Champagne does not and cannot identify an Ottawa custom or tradition that would excuse him for his actions.”²³⁹ The accused judge believed that the Band’s statute was unconstitutional because the crime of “attempt” was not found in their pre-contact laws, whereas the Court of Appeal held that the crime of “attempt” was consistent with the First Nation’s broader powers under the constitution unless there was evidence to the contrary. If the Court had concluded its opinion at this point the case would have nicely illustrated two different views of originalism within Anishinaabek constitutionalism. This would have demonstrated originalism’s indeterminacy given the contradictory nature of the parties’ understanding of, and approach to, history.²⁴⁰ However, the Little River Band Court of Appeal went one step further and held that appeals to originalism would not completely solve the issue. The Court thus wrote: “It would be a sad day for this community to acknowledge that an action reflecting an intention of an individual to fraudulently procure money from the Band is excused because the word ‘attempt’ does not exist in Anishinaabemowin, as Justice Champagne alleged at oral argument.”²⁴¹ Thus, the Court concluded that appeals to history alone would not answer the question in this case. In these and other reasons the Court indicated that concerns aside from originalism would guide their reasons.

²³⁸ *Id.*, at 410.

²³⁹ *Id.*

²⁴⁰ There is a vast literature discussing the indeterminacy of originalism in the U.S. context: see Thomas McAfee, “Originalism and Indeterminacy” (1996) 19 Harv. J. L. & Pub. Pol’y 429 (1996); Reva B. Siegel, “Dead or Alive: Originalism as Popular Constitutionalism in Heller” (2008) 122 Harv. L. Rev. 191; Erwin Chemerinsky, *Interpreting the Constitution* (New York: Praeger Publishers, 1987), at 75-80; Paul Brest, “The Misconceived Quest for the Original Understanding” (1980) 60 B.U.L. Rev. 204. The Supreme Court of Canada also discussed originalism, in relation to the Charter: see *Reference re Motor Vehicle Act (British Columbia)* S. 94(2), *supra*, note 13, at paras. 51-53.

²⁴¹ Fletcher, *supra*, note 235, at 410.

VI. CONCLUSION

Originalism within an Indigenous legal context can be as problematic as it is within Canada's broader framework. Ultimately, one must make a distinction between history as a source of authority in constitutional law and originalism. Nothing in this paper should be construed as rejecting appropriate historical context when interpreting Aboriginal and treaty rights. Aboriginal peoples' laws and relations lie at the roots of Canada's living tree, and are necessary to its subsequent healthy development. History is an important resource in understanding and developing constitutional relationships; without it we would cease to be ruled by law and be cut off from guidance available from the past. Thus, non-discriminatory historical understandings should influence the interpretation of Aboriginal and treaty rights in the Canadian constitution.

Thus, while this paper rejects originalism, it does not reject history. My arguments are a matter of emphasis. My objection to originalism is related to how it excludes other modes of interpretation as applied to Aboriginal peoples. It has been deployed in narrow and inflexible ways. It has been used to hold that constitutional rights do not exist without historic analogues. When used in this fashion originalism trumps other modes of constitutional interpretation. Constitutional claims are limited by what was "integral to a distinctive culture" prior to European contact or the "assertion" of Crown sovereignty.²⁴² If an Aboriginal group has signed a treaty with the Crown, constitutional rights cannot be claimed unless they are connected to the common intention between the parties at the time an agreement was made.²⁴³ All this is to say that the Court has not just looked to history as a source of authority in Aboriginal cases; it has used history to exclude rights that could be recognized through other interpretive forms. This approach and the results it produces are inconsistent with Canada's broader living tree tradition.

While this paper argues for a clear rejection of originalism, lest I be misunderstood, I want to conclude by re-emphasizing the importance of history as a very important resource for legal reasoning.²⁴⁴ I will do so by returning to the *Champagne v. Little River Band of Indians* case, decided

²⁴² *Van der Peet*, *supra*, note 59, at para. 46, and *Delgamuukw*, *supra*, note 61, at para. 144.

²⁴³ *Marshall (I)*, *supra*, note 62, at para. 14.

²⁴⁴ The importance of a non-exclusivist use of history in constitutional law is found in *Reference re Provincial Electoral Boundaries (Sask.)*, *supra*, note 13, at 180: "The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed," which means that "the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*".

before the Little River Band of Indians Court of Appeal,²⁴⁵ discussed above. While this Court rejected originalism, it did not turn its back on history. In fact, the Court draws upon historical sources in framing its opinion. It did so by citing stories related to Nanaboozhoo, the Anishinaabe trickster.²⁴⁶ These stories function as law in Anishinaabek communities. Thus, the Court wrote:

There are many trickster tales told by the Anishinaabek involving the godlike character Nanabozho. One story relevant to the present matter is a story that is sometimes referred to as “The Duck Dinner.” See, e.g., John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* 47-49 (2002); Charles Kawbawgam, “Nanabozho in a Time of Famine”, in *Ojibwa Narratives Of Charles and Charlotte Kawbawgam and Jacques LePique, 1893-1895*, at 33 (Arthur P. Bourgeois, ed. 1994); Beatrice Blackwood, “Tales of the Chippewa Indians”, 40 *Folklore* 315, 337-38 (1929). There are many, many versions of this story, but in most versions, Nanabozho is hungry, as usual. After a series of failures in convincing (tricking) the woodpecker and muskrat spirits into being meals, Nanabozho convinces (tricks) several ducks and kills them by decapitating them. He eats his fill, saves the rest for later, and takes a nap. He orders his buttocks to wake him if anyone comes along threatening to steal the rest of his duck dinner. During the night, men approach. Nanabozho’s buttocks warn him twice: “Wake up, Nanabozho. Men are coming.” Kawbawgam, *supra*, at 35. Nanabozho ignores his buttocks and continues to sleep. When he awakens to find the remainder of his food stolen, he is angry. But he does not blame himself. Instead, he builds up his fire and burns his buttocks as punishment for their failure to warn him. To some extent, the trick has come back to haunt Nanabozho — and in the end, with his short-sightedness, he burns his own body.

The relevance of this timeless story to the present matter is apparent. The trial court, per Judge Brenda Jones Quick, tried and convicted the defendant and appellant, Hon. Ryan L. Champagne, a tribal member, an

²⁴⁵ Case No. 06-178-AP, June 2007 (Little River Band of Indians Court of Appeal); see also Fletcher, *supra*, note 235, at 405-12.

²⁴⁶ For a discussion of the trickster, see John Borrows, “With or Without You: First Nations’ Law (in Canada)” (1996) 41:3 McGill L.J. 629, at 630-65, Barbara Babcock Adams, “A Tolerated Margin of Mess: The Trickster and His Tales Reconsidered” (1975) 11 *Journal of Folklore Institute* 147; Henry Rowe Schoolcraft, “Historical and Methodological Perspectives” in Andrew Wiget, *Critical Essays on Native American Literature* (Boston: G.K. Hall, 1985), at 21; John Borrows, “Constitutional Law From a First Nations Perspective” (1994) 28:1 U.B.C.L. Rev. 1, at 6-10; Gerald Vizenor, *The Trickster of Liberty: Tribal Heirs to a Wild Baronage* (Minneapolis: University of Minnesota Press, 1988).

appellate justice, and a member of this Court, of the crime of attempted fraud. Justice Champagne's primary job during the relevant period in this case was with the Little River Band of Ottawa Indians. Part of his job responsibilities included leaving the tribal place of business in his personal vehicle to visit clients. While on one of these trips, Justice Champagne took a personal detour and was involved in an accident. The Band and later the trial judge concluded that his claim for reimbursement from the Band was fraudulent. Judge Quick found that Justice Champagne "attempted to obtain money by seeking reimbursement from the Tribe for the loss of his vehicle by intentionally making a false assertion that he was on his way to a client's home at the time of the accident." *People v. Champagne*, Opinion and Judgment at 6, No. 06-131-TM (Little River Band Tribal Court, Dec. 1, 2006) (*Champagne III*). Justice Champagne was neither heading toward the tribal offices nor toward a client's home.

Like Nanabozho, Justice Champagne perpetrated a trick upon the Little River Ottawa community — a trick that has come back to haunt him. It would seem to be a small thing involving a relatively small sum of money, but because the Little River Ottawa people have designated this particular "trick" a criminal act, Justice Champagne has burned himself. ...²⁴⁷

After this introduction, the Little River Band Court of Appeal's reasons for judgment go to great lengths to substantiate this conclusion. They demonstrate a positive, non-discriminatory use of history in showing how the crime of attempt is not contrary to Anishinaabek constitutionalism. They simultaneously use history and move beyond it by deploying traditional law in the present tense. Nanaboozhoo's Duck dinner case is a significant source of authority for judging the wrongfulness of the judge's attempted fraud.²⁴⁸ Ironically, the Supreme Court

²⁴⁷ *Supra*, note 245.

²⁴⁸ Elsewhere, I have argued:

Nanabush roams from place to place and fulfills his goals by using ostensibly contradictory behaviors such as charm and cunning, honesty and deception, kindness and mean tricks. The trickster also displays transformative power as he takes on new personae in the manipulation of these behaviors and in the achievement of his objectives. Lessons are learned as the trickster engages in actions which in some particulars are representative of the listener's behavior, and on other points are uncharacteristic of their comportment. The trickster encourages an awakening of understanding because listeners are compelled to confront and reconcile the notion that their ideas may be partial and their viewpoints limited. Nanabush can kindle these understandings because his actions take place in a perplexing realm that partially escapes the structures of society and the cultural order of things.

of Canada has not used history in this fashion, to this point because its originalism and “generous” canons of construction have not allowed Indigenous law to grow in this way.²⁴⁹ Originalism has thus stunted the growth of Canada’s Indigenous Constitution.²⁵⁰ Fortunately, the citation of Indigenous law, as a past, present and future-oriented part of Canada’s Constitution could help nourish and sustain a living tree constitutionalism.

If living tree principles were applied to Aboriginal peoples, we could one day say about Canada’s Aboriginal and treaty rights jurisprudence: “This metaphor has endured as the preferred approach in constitutional interpretation, ensuring ‘that Confederation can be adapted to new social realities’.”²⁵¹ We would have an Aboriginal jurisprudence which holds that “‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life”.²⁵² We would also apply the view that: “[t]here is nothing static or frozen, narrow or technical, about the Constitution of Canada.”²⁵³ Thus, we would say, about Aboriginal and treaty rights: “If the Canadian Constitution is to be regarded as a ‘living tree’ and legislative competence as ‘essentially dynamic’... *then the determination of categories existing in 1867 becomes of little, other than historic, concern.*”²⁵⁴ This would allow us to reinforce an approach that holds that: “the past plays a critical but non-exclusive role in determining the content of the rights and freedoms” within the Constitution.²⁵⁵ As such, we could conclude in relation to Aboriginal and treaty rights: “The tree is rooted in past and present institutions, but must be capable of growth to meet the future.”²⁵⁶ If originalism was rejected in favour of living tree constitutionalism in ways consistent with the spirit of this paper, Aboriginal and treaty rights

John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) 22 Am. Indian L. Rev. 37.

²⁴⁹ For a discussion of the use of Anishinaabe law as a source of Canadian Law, see Borrows, *Recovering Canada*, *supra*, note 164, at 15-20, 47-54.

²⁵⁰ For an in-depth discussion of the place of Indigenous law in Canada’s Constitution, see Borrows, *Canada’s Indigenous Constitution*, *supra*, note 35.

²⁵¹ *Securities Reference*, *supra*, note 15, at para. 56, also citing *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, *supra*, note 13, at para. 9, *per* Deschamps J.

²⁵² *Same-Sex Marriage Reference*, *supra*, note 6, at para. 22.

²⁵³ *British Columbia (Attorney General) v. Canada Trust Co.*, *supra*, note 13, at 478-79.

²⁵⁴ *Id.*, at 479 (emphasis in original).

²⁵⁵ *Reference re Provincial Electoral Boundaries (Sask.)*, *supra*, note 13, at 180.

²⁵⁶ *Id.*

would be more strongly rooted in “a philosophy which is capable of explaining the past and animating the future”.²⁵⁷ Interpreting Aboriginal and treaty rights as living traditions would mark an important maturation point in the ongoing evolution of Canada’s organic constitution.²⁵⁸ This would stand in significance alongside the achievement of responsible government, the extension of women’s political rights in the *Persons* Case and the extension of civil rights before the Charter came into force.²⁵⁹ We must not “read the provisions of the Constitution like a last will and testament lest it become one”.²⁶⁰ This goes for Aboriginal and treaty rights, as much as it does for other parts of Canada’s Constitution.

²⁵⁷ *Id.*, at 181.

²⁵⁸ John Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2004).

²⁵⁹ William Kaplan, *The Jehovah’s Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989); *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.); *Reference re Alberta Legislation*, [1938] S.C.J. No. 25, [1938] S.C.R. 100 (S.C.C.); *Saumur v. Quebec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.); *Switzman v. Ebling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

²⁶⁰ *Hunter v. Southam*, *supra*, note 28, at 155.