

Purposivism, Textualism, and Originalism in Recent Cases on *Charter* Interpretation

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In this article, the author attempts to fill the gap in Canadian legal literature regarding discussions of our Constitutional interpretation. Despite the Supreme Court of Canada's persistent affirmation of a single interpretative approach of purposivism in both constitutional and Charter cases, the author contends that beyond the surface, both textualism and originalism animate the majority decisions. The Supreme Court's insistence of purposivism as the single interpretive approach is misguided as purposivism is often conflated with other interpretive methods. The paper begins its analysis by reviewing and summarizing the three main approaches to constitutional interpretation. It then describes the longstanding interpretive eclecticism in Supreme Court Charter cases, with different cases embracing purposivism, living tree, and originalist interpretation. It critically assesses both the majority and minority opinions in three recent Charter cases: R v Stillman, R v Poulin, and Quebec (Attorney General) v 9147-0732 Québec Inc. Notwithstanding the fact that the majority in all three cases purported to use purposive interpretation, the author argues that not only were they divided over the application of the methodology, the opinions were, in fact, more textualist or even originalist than the majority claimed. The author ultimately finds that the way in which the Supreme Court actually interprets the Constitution often differs from the way in which it says it interprets the Constitution, and that purposivism may not be the triumphant interpretive method.

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Introduction

Constitutional interpretation has tended to attract comparatively little attention, and even less debate, in Canada. In contrast to the United States, where debates about it continue unabated, a few leading cases are often taken to have settled the important questions,¹ and scholars who question whether they do so are branded as “revisionist”.² Indeed, the lack of debate about competing approaches to interpretation is sometimes taken to be a defining, and positive, characteristic of the Canadian legal culture.³

1. See especially *Edwards v Canada (Attorney General)*, [1930] AC 124, 1 DLR 98 (also known as the Persons Case) [*Edwards*]; *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M*]; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536. For the claim that they (and some others) constitute an orthodoxy that has “with no interruption or exception . . . been followed in Canadian *Charter* case law”, see Stéphane Beaulac, “Constitutional Interpretation: On Issues of Ontology and of Interlegality” in Peter Oliver, Patrick Macklem, & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 867 at 871.

2. See Stéphane Beaulac, “Post-World War I/The Quiet Revolution (1920-1970): Through the Lenses of Legal Interpretation and International Law” in Errol P Mendes, ed, *Canada's Constitutional Democracy: The 150th Anniversary Celebration* (Toronto: LexisNexis, 2017) 79 at 84.

3. For a recent example, see Althia Raj, “Why Canada Doesn't Have the Same Partisan Supreme Court Fights as the U.S.”, *Huffington Post* (3 November 2020), online: <www.huffingtonpost.ca/entry/canada-supreme-court-politics-united-states_ca_5fa17b55c5b6128c6b5cad6a>.

On their surface, recent cases where the Supreme Court of Canada addressed the interpretation of the *Canadian Charter of Rights and Freedoms*⁴ confirm this trend. They strongly or even unanimously affirm the pre-eminence of a single interpretive approach: purposivism. This is the view, articulated by Dickson J, in *R v Big M Drug Mart*, that “[t]he meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect.”⁵ In turn,

the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.⁶

Nevertheless, I shall argue that there has long been less consensus about constitutional interpretation than is often assumed, and that the apparent recent triumph of purposivism masks ongoing disagreements. Indeed, I shall contend that, just below the purposivist surface, we may be seeing the ascendancy of quite different interpretive methodologies, which are best understood as textualist and even originalist. While in my view such an ascendancy would be a welcome development, a defence of these methodologies would be beyond the scope of this article. I will, however, suggest that the Supreme Court should be transparent about the evolution of its approach to interpreting the *Charter*, which at present it is not.

I begin, in Part I, with a (necessarily summary) review of three general approaches to constitutional interpretation, to which I shall refer throughout the rest of the article: purposivism, originalism, and textualism. Next, in Part II, I describe the longstanding interpretive eclecticism in *Charter* cases decided by the Supreme Court. One line of cases did, indeed, embrace purposivism, but another, which seldom overlapped with the first, preferred “living tree” interpretation, while other cases still fit into neither of these lines and are best understood as originalist. In Part III, I turn to three recent decisions: *R v Stillman*,⁷

4. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [the *Charter*].

5. *Big M*, *supra* note 1 at 344 [emphasis removed].

6. *Ibid* at para 117.

7. 2019 SCC 40 [*Stillman*].

R v Poulin,⁸ and lastly *Quebec (Attorney General) v 9147- 0732 Québec Inc.*⁹ All three endorse purposive interpretation, but each is divided over the correct application of this methodology. I then, in Part IV, consider the interpretive methodology deployed by the three majority judgments in *Stillman*, *Poulin*, and *Québec Inc.* I argue that these opinions are more textualist, and perhaps even originalist, than purposivist as this term is often understood. Their endorsement of purposivism and even the ostensible rejection of textualism in *Québec Inc.* are hollow. I conclude by highlighting some questions left unaddressed here.

I. Defining Terms

Although they are frequently used in debates concerning constitutional and statutory interpretation, the terms purposivism, originalism, and textualism lack universally accepted, let alone authoritatively defined, meanings. They are hotly debated by both those who subscribe to the interpretive theories to which they refer and by those who reject them. Moreover, in Canada, originalism and textualism are both ostensibly disfavoured, and the terms used, if they are used at all, primarily in derision, which does not help with establishing generally acceptable understandings. Nevertheless, core definitions can be usefully identified.

For a definition of purposivism, I turn to the work of Benjamin Oliphant,¹⁰ who, drawing on Jeffrey Goldsworthy's analysis, describes a range of related but different interpretive approaches that can be presented under this label.¹¹ The most expansive of these, "abstract principles purposivism", would have the courts enforce and see to the achievement of constitutional purposes they themselves identify "regardless of their compatibility with or grounding in the text as written".¹² An example, given by Mr. Oliphant, is the Supreme Court's decision in *Figueroa v Canada (Attorney General)*,¹³ where the majority

8. 2019 SCC 47 [*Poulin*].

9. 2020 SCC 32 [*Québec Inc.*].

10. See Benjamin J Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms" (2015) 65:3 UTLJ 239 [Oliphant, "Purposes"].

11. See Jeffrey Goldsworthy, "Conclusions" in Jeffrey Goldsworthy, ed, *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) 321 at 322.

12. Oliphant, "Purposes", *supra* note 10 at 250.

13. 2003 SCC 37 [*Figueroa*].

proclaimed that “*Charter* analysis requires courts to look beyond the words of the section” invoked by the claimant.¹⁴ As a result, a citizen’s right to vote or run for election in a general election¹⁵ became a “right of participation [that] embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state”¹⁶ and from there a right of all political parties to access benefits previously offered to some. The Supreme Court of Canada’s jurisprudence giving “constitutional benediction” to the rights of organized labour¹⁷ is another example of this approach.

The more narrowly circumscribed “necessary implications purposivism” still uses purpose to add to constitutional text, but only—at least in its disciplined form—“[w]here a constitutional provision can make no sense whatsoever in the absence of the implication drawn, or where the clear purpose sought to be achieved would be not only undermined or imperfectly realized but actually eviscerated” should the interpreter not draw the implication.¹⁸ To take up another example given by Mr. Oliphant, an implication that ballots cast at an election must be fairly counted rather than arbitrarily thrown away is arguably necessary to make sense of section 3 of the *Charter*, even though its text says nothing of counting procedures.¹⁹

Most narrowly, “definitive document purposivism”²⁰ “takes language that might plausibly support a range of possible meanings and picks from

14. *Ibid* at para 19.

15. See *Charter*, *supra* note 4, s 3.

16. *Figuroa*, *supra* note 13 at para 26.

17. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 3. This case built on *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, which held, at para 86, that “the protection of collective bargaining under s. 2(d) of the *Charter* is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole”, and *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 46, where the majority asserted that section 2(d) had “the purpose of encouraging the individual’s self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by ‘the historical origins of the concepts enshrined’ in s. 2(d)” (citing *Big M*, *supra* note 1 at 344).

18. Oliphant, “Purposes”, *supra* note 10 at 249.

19. See *ibid* at 276–77. See also William Baude, “The Real Enemies of Democracy” (2021) 109 *Cal L Rev* (forthcoming); online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3868601> at 118 (“all of those ballots are wasted paper unless the winner takes power and the loser does not”).

20. Oliphant, “Purposes”, *supra* note 10 at 250, n 57 (for a discussion of the origin of this term).

among them through an investigation into the purposes underlying the guarantees”.²¹ As Mr. Oliphant explains, this form of purposivism typically serves to narrow underdeterminate constitutional language rather than expand the import of a text.²² One example is the Supreme Court’s delineation of the right to liberty in section 7 of the *Charter*. Drawing on the nature and purposes of the *Charter* as a whole, the Supreme Court excluded the extreme (but textually possible) readings whereby this right would have referred either to “unconstrained freedom” or “mere freedom from physical restraint” (notably by way of imprisonment).²³

Turning to originalism, I adopt a definition proposed by one of its foremost exponents, Lawrence Solum. He argues that, at its core “[o]riginalism is based on two ideas: (1) the meaning of the constitutional text was fixed at the time each provision was framed and ratified; and (2) courts and officials should be bound by that fixed meaning.”²⁴ This definition allows for the existence of insignificant differences among originalists, while marking out a shared set of commitments that distinguishes originalists from their critics and opponents.²⁵ Claim (1), the “fixation thesis”, is “the idea that meaning is determined by the original communicative context and linguistic facts at the time of writing”.²⁶ Put differently, the “communicative content” of a constitutional text—that is, “the linguistic meaning communicated by [this] text in context”²⁷—stays the same once the text has been given its authoritative form. This emphasizes the importance of the way in which language was used and the context in which it was used when the provisions of the constitutional text were enacted.

21. *Ibid* at 248–49.

22. See *Ibid* at 258.

23. *B (R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1 at para 80, followed in *Godbout v Longueuil (City)*, [1997] 3 SCR 844, 152 DLR (4th) 577 at paras 63–66 (LaForest J), and eventually endorsed by a majority in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 51.

24. Lawrence B Solum, “Surprising Originalism: The Regula Lecture” (2018) 9 ConLawNOW 235 at 235, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3175412>.

25. See Lawrence B Solum, “Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate” (2019) 113:6 Nw UL Rev 1243 at 1247 (noting “substantial disagreement about what should count as ‘originalism’”, stemming partly from “debates among originalists about the nature of original meaning” and partly from critiques of originalism).

26. Lawrence B Solum, “The Fixation Thesis: The Role of Historical Fact in Original Meaning” (2015) 91:1 Notre Dame L Rev 1 at 2 [Solum, “Fixation Thesis”].

27. Lawrence B Solum, “Communicative Content and Legal Content” (2013) 89:2 Notre Dame L Rev 479 at 479.

Many non-originalists will accept that these factors are relevant, perhaps even important, to constitutional interpretation. Originalists, however, go further in that they also accept claim (2), the “constraint principle”, and “argue that the role of original meaning is not simply that of one factor among many; originalists typically believe that original meaning should constrain constitutional practice”, notably the interpretation of the constitutional text by the courts.²⁸

A reminder of what originalism is *not* may also be useful. Contrary to common caricature, originalism is not “a form of transgenerational mind reading, where the hypothetical subjective beliefs of the departed are considered the sole sources of constitutional meaning”,²⁹ or even significant sources. Originalists are not interested in divining what James Madison, or Jean Chrétien, might have thought about the import of a provision they helped draft, or how they would have expected them to apply. They understand that such an inquiry is necessarily speculative.³⁰ A hypothetical form of originalism focused on original expected applications has no significant scholarly support.³¹ Although the forms of originalism in contemporary scholarship are many, the most popular ones focus on the original public meaning of the constitutional text.³² Others think that the meaning of the constitutional text is to be determined with reference to the intentions of its framers as to meaning (not applications), while others still emphasize the interpretive methods prevalent at the time of constitutional entrenchment.³³

A definition of textualism might be more elusive. Textualism is often contrasted with purposivism, but it has for some time been recognized that the differences between them may be less sharp than one might think.³⁴

28. Solum, “Fixation Thesis”, *supra* note 26 at 8.

29. Benjamin Oliphant & Léonid Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism?’” (2016) 42:1 Queen’s LJ 107 at 121 [Oliphant & Sirota, “Rejected Originalism”].

30. See e.g. Randy E Barnett, “Interpretation and Construction” (2011) 34:1 Harv JL & Pub Pol’y 65 (“ascertaining ‘what the framers would have done’ is a *counterfactual*, not a factual or historical inquiry” at 71 [emphasis in original]).

31. See Oliphant & Sirota, “Rejected Originalism”, *supra* note 29 at 125–26.

32. See *ibid* at 126; Jeffrey Goldsworthy & The Honourable Grant Huscroft, “Originalism in Australia and Canada: Why the Divergence?” in Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge, UK: Cambridge University Press, 2017) 183 at 183.

33. For a brief overview, see e.g. Solum, “Fixation Thesis”, *supra* note 26 at 4–7.

34. See Jonathan T Molot, “The Rise and Fall of Textualism” (2006) 106:1 Colum L Rev 1; John F Manning, “What Divides Textualists from Purposivists?” (2006) 106:1 Colum L Rev 70.

As a starting point, however, the definition given by now-Justice Amy Barrett is convenient. Textualism, she explains,

insists that judges must construe statutory language consistent with its “ordinary meaning.” The law is comprised of words—and textualists emphasize that words mean what they say, not what a judge thinks that they ought to say. For textualists, statutory language is a hard constraint. Fidelity to the law means fidelity to the text as it is written.³⁵

This is not to say that “textualism is literalism” or that “[a] dictionary is a textualist’s most important tool.”³⁶ Textualists accept the significance of context, and even, as part of context, of purpose in the sense of “the mischiefs the authors were addressing”, to the interpretation of legal texts.³⁷ Key to textualism, however, and “what divides textualists from purposivists”, in John Manning’s phrase, is the view that text has priority over purpose, and that purpose, to the extent that it is relevant, is an indication of what the text means, rather than of what outcomes it ought to achieve.³⁸

For textualists, purpose is only an accessory in understanding what the words of an enactment say, useful “when semantic ambiguity creates the necessary leeway”.³⁹ By contrast, purposivism accords—ostensibly at least—no priority to the text being interpreted. The object of interpretation is said to be the purpose of the enactment, the text being an indication, albeit an important (and in practice often a decisive)⁴⁰ one of the purpose,⁴¹ and text

35. Honorable Amy Coney Barrett, “Assorted Canards of Contemporary Legal Analysis: Redux” (2020) 70:4 Case W Res L Rev 855 at 856, citing Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul, MN: Thomson/West, 2012) at 69–77. There is abundant jurisprudence and a vast scholarly literature on the notion of ordinary meaning and its complexities, which we need not consider for the purposes of this article. In a nutshell, “the ordinary meaning of a text is what its words would communicate to ordinary people”: Kevin P Tobia, “Testing Ordinary Meaning” (2020) 134:2 Harv L Rev 726 at 729.

36. Barrett, *supra* note 35 at 856, 858.

37. Manning, *supra* note 34 at 84.

38. See *ibid* at 91.

39. *Ibid* at 85.

40. See *ibid* (noting that “purposivists start—and most of the time end—their inquiry with the semantic meaning of the text” at 87).

41. See *Big M*, *supra* note 1 at 344. See also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 117 (articulating “the ‘modern principle’ of statutory interpretation, that is, that the words of a statute must be read ‘in their entire context and in

at variance with what is taken to be the purpose can be disregarded.⁴²

II. The Supreme Court of Canada's Jurisprudence of Interpretive Eclecticism

Scholars and judges speaking extrajudicially have sometimes declared that constitutional interpretation in Canada follows a unified methodology combining the purposivism of *Big M* and the understanding of the Constitution as a living tree⁴³ derived, or so it is said,⁴⁴ from *Edwards*. While the Supreme Court's jurisprudence did not support this view, as I am about to explain, the Court's unanimous judgment in *R v Comeau*⁴⁵ embraced it. Although *Comeau* was a case about the interpretation of the *Constitution Act, 1867*,⁴⁶ rather than the *Charter*, the Supreme Court's pronouncement there that "[c]onstitutional texts must be interpreted in a broad and purposive manner"

their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (quoting *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21, and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26)): here too, the text is only one factor, and one that must be brought into harmony with purpose.

42. See Manning, *supra* note 34 at 87. Perhaps the best recent example in Canada in the context of statutory interpretation is *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22.

43. See Noura Karazivan, "Constitutional Structure and Original Intent: A Canadian Perspective" (2017) 2017:2 U Ill L Rev 629 ("In Canadian constitutional law, there is no doubt that a broad, purposive, and progressive approach is preferred when it comes to the interpretation of the constitutional text" at 630); Justice Ian Binnie, "Constitutional Interpretation and Original Intent" (2004) 23 SCLR (2d) 345 (incorporating *Big M* and "purposeful interpretation" in a discussion of living tree interpretation). See generally WJ Waluchow, "The Living Tree" in Oliver, Macklem, & Des Rosiers, *supra* note 1 at 891.

44. But see Bradley W Miller, "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York, NY: Cambridge University Press, 2011) 120; Justice Marshall Rothstein, "Checks and Balances in Constitutional Interpretation" (2016) 79:1 Sask L Rev 1 at 2; Oliphant & Sirota, "Rejected Originalism", *supra* note 28 at 136–38 (all arguing that the derivation is misconceived).

45. 2018 SCC 15 [*Comeau*].

46. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

and “in a manner that is sensitive to evolving circumstances”, in accordance with “the living tree doctrine” is, on its face, applicable in the *Charter* context.⁴⁷

However, the view that there is a unified theory of constitutional or *Charter* interpretation in Canadian law is misguided. Purposive interpretation is not synonymous with the living tree approach, as the Court in *Comeau* assumed.⁴⁸ Indeed, one would be hard-pressed to find pre-*Comeau* cases where purposivism and the living tree were both said to inform the interpretive inquiry. *Reference re Provincial Electoral Boundaries (Sask.)*⁴⁹ is a rare exception—and one that proves the rule, as there McLachlin J, as she then was, invoked the living tree’s *roots*⁵⁰ rather than its capacity for “growth and expansion”,⁵¹ on which invocations of this metaphor tend to focus.

It is thus unsurprising that the purposivist and living constitutionalist jurisprudential streams long ran side by side, mixing comparatively little. Tellingly, *Hunter v Southam Inc*, the case where the Supreme Court of Canada first committed to purposivism as the preferred method of *Charter* interpretation, only referred to *Edwards* to justify “[t]he need for a broad perspective in approaching constitutional documents”⁵²—without discussing the capacity of constitutional meaning to evolve. *Big M*, the leading case on purposive interpretation, does not cite *Edwards* or employ the living tree metaphor at all.⁵³ If anything, its inclusion of the “language chosen to articulate the specific right or freedom” and “the historical origins of the concepts enshrined”⁵⁴ call to mind the less-often-remembered part of the *Edwards* metaphor, that of the natural limits on the living tree’s ability to grow and expand.

47. *Comeau*, *supra* note 45 at para 52.

48. This issue was foreshadowed by Peter W Hogg, “Interpreting the *Charter* of Rights: Generosity and Justification” (1990) 28:4 Osgoode Hall LJ 817 (arguing that the interpretation of the *Charter* cannot be at once “purposive” and “generous”).

49. [1991] 2 SCR 158, 81 DLR (4th) 16.

50. See *ibid* at 187.

51. *Edwards*, *supra* note 1 at 136.

52. [1984] 2 SCR 145 at 155, 11 DLR (4th) 641.

53. The only mention of the “living tree” in *Big M* is in a quotation from the dissenting judgment in the Alberta Court of Appeal, which invoked it to denounce the “sterilization” of the constitutional soil by the extirpation of references to Christianity from the law. See *Big M*, *supra* note 1 at 311. But see Waluchow, *supra* note 43 (asserting that “the Court continued to be wedded to the living tree metaphor” at 900).

54. *Big M*, *supra* note 1 at 344.

Conversely, the discussion of the living tree approach to interpretation in leading cases such as *Reference re Same-Sex Marriage*⁵⁵ and *Reference re Employment Insurance Act (Can.), ss. 22 and 23*⁵⁶ does not refer to *Big M*. Nor do they present themselves as inquiring into the purposes of the constitutional provisions they are interpreting (although both contain extended discussions of the purposes of the statutory provisions whose constitutionality they considered). Extrajudicially, Beverley McLachlin, by then the Chief Justice of Canada, described the living tree method as involving “judges [being] prepared to accept changing social circumstances as a legitimate reason for refusing to accept the law as they found it, and to change it”.⁵⁷ In cases such as these, growth and expansion are at the forefront.

The persistence of a distinction between purposive interpretation and its living constitutionalist counterpart is not surprising. An inquiry into the purposes of constitutional provisions can be, and often is, an inquiry into the purposes of their framers and so is focused more on the past than on the present or future.⁵⁸ It thus stands in some tension with looking to the purposes that the community may attach to these provisions at the time of their interpretation, or the community’s real or perceived contemporary needs and values.

Meanwhile, although it is *de rigueur* to deny this,⁵⁹ a third, originalist stream of interpretive jurisprudence also runs through Canadian constitutional law, including *Charter* jurisprudence. A detailed argument for this proposition has been made elsewhere,⁶⁰ but a few examples bear mentioning. Among non-*Charter*

55. 2004 SCC 79.

56. 2005 SCC 56.

57. Beverley McLachlin, “The Role of the Supreme Court of Canada in Shaping the Common Law” in Paul Daly, ed, *Apex Courts and the Common Law* (Toronto: University of Toronto Press, 2019) 25 at 27.

58. See Oliphant & Sirota, “Rejected Originalism”, *supra* note 29 at Part III(C); Léonid Sirota & Benjamin Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50:2 UBC L Rev 505 at Part II(A) [Sirota & Oliphant, “Originalist”]. See e.g. *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 (“The purpose of s. 15(2) is to save ameliorative programs from the charge of ‘reverse discrimination’”, which was necessary because “[a]t the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory” at para 41).

59. See e.g. Adam M Dodek, “The Dutiful Conscript: An Originalist View of Justice Wilson’s Conception of *Charter* Rights and Their Limits” (2008) 41:2 SCLR (2d) 331 (“[o]riginalism is a dirty word in Canadian constitutional law”, being “either ignored or denigrated” at 333–34); Oliphant & Sirota, “Rejected ‘Originalism’”, *supra* note 29 at Part I(B).

60. See Sirota & Oliphant, “Originalist”, *supra* note 58. For the discussion of *Charter* cases, see also Dodek, *supra* note 59 at Part II.

cases, *Reference re Supreme Court Act, ss. 5 and 6*,⁶¹ which the Court in *Comeau* invokes as a model of *Edwards*-derived purposivism, is narrowly focused on the intentions of the framers of, first, the 1875 *Supreme Court Act*, and then Part V of the *Constitution Act, 1982*. It is thus a model of original intentions originalism rather than living constitutionalism.⁶² Another non-*Charter* case, *Caron v Alberta*,⁶³ much relied on in *Québec Inc*, is a rare example of a case where both the majority and the dissenting opinions are originalist, albeit in different ways. The majority inquires into how the provision at issue would have been understood by various segments of the public at the time of its enactment, while the dissent focuses on the intentions, real or inferred, of its framers.⁶⁴

As for examples of *Charter* cases where a logic consistent with originalism or even best described as originalist was applied, consider *Law Society of Upper Canada v Skapinker*⁶⁵ and *R v Prosper*.⁶⁶ The former concerned the meaning of the right “to pursue the gaining of a livelihood in any province”,⁶⁷ which the Supreme Court interpreted as, in effect, a prohibition on discrimination against out-of-province workers, rather than a general right to pursue a livelihood. *Skapinker* is often cited for its ostensible embrace of the living tree doctrine. But, on closer examination, the Court’s decision was based on the public meaning of textual clues (including the *Charter*’s headings)—not an abstract purpose of the right in question or the needs of society, as a purposive interpretation or one based on the living tree doctrine would suggest.⁶⁸ For its part, *Prosper* addressed the question of whether the right to counsel included a right to state-funded counsel.⁶⁹ It is noteworthy for the rejection, the living tree theory notwithstanding, of the possibility that rights contemplated and deliberately omitted by the *Charter*’s framers might nevertheless be protected.⁷⁰ Both Lamer CJ for the plurality and L’Heureux-Dubé J in dissent took this view.

61. 2014 SCC 21.

62. See Sirota & Oliphant, “Originalist”, *supra* note 58 at 526–27; Goldsworthy & Huscroft, *supra* note 32 at 198.

63. 2015 SCC 56 [*Caron*].

64. See Sirota & Oliphant, “Originalist”, *supra* note 58 at 529–31; Goldsworthy and Huscroft, *supra* note 32 at 198.

65. [1984] 1 SCR 357, 9 DLR (4th) 161 [*Skapinker*].

66. [1994] 3 SCR 236, 118 DLR (4th) 154.

67. *Charter*, *supra* note 4, s 6(2)(b).

68. See Sirota & Oliphant, “Originalist”, *supra* note 58 at 543–44.

69. See *Charter*, *supra* note 4, s 10(b).

70. See Sirota & Oliphant, *supra* note 58 at 549–51.

In short, the Supreme Court of Canada's approach to constitutional interpretation, including *Charter* interpretation, is marked by eclecticism and by the endurance of distinct methods and lines of cases based on these methods. Despite occasional declarations to the contrary, there is no unified interpretive theory,⁷¹ and no one approach had, at least until recently, prevailed. The recent cases to which I am about to turn might seem like a departure in this regard, in that they all seem to embrace purposivism as the one correct approach to constitutional interpretation. However, the foregoing survey—especially that of originalist or quasi-originalist cases—shows that the way in which the Supreme Court actually interprets the Constitution often differs from the way in which it says it interprets the Constitution. It is important to keep this in mind when analyzing the recent cases.

III. The Purposivist Trilogy

Over the course of 2019 and 2020, the Supreme Court of Canada decided three cases in which the interpretation of the *Charter* was at the heart of the issue. On their face, all three cases resulted in strong support for the purposive approach derived from *Big M*. Yet in all three the Court was actually divided about interpretation. I review the majority and minority reasons, insofar as they concern constitutional interpretation, in this Part.

It is worth noting that Supreme Court of Canada decisions that involve the interpretation of the *Charter*'s substantive guarantees tend to be relatively few and far between. Many fundamental interpretive issues have already been settled, and, more commonly, *Charter* cases involve the delineation of reasonable limits on rights under section 1. Others involve what originalist scholars would describe as construction rather than interpretation properly so called: that is, the elaboration of legal doctrines required to give effect to constitutional provisions whose communicative content underdetermines the outcome of a dispute.⁷² The Court's decision in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*⁷³ is of that sort, despite being

71. See Benjamin J Oliphant, "Bobbitt's Paradise: Canadian Constitutional Interpretation and Public Meaning Originalism" (2017) 31:3 *Diritto Pubblico Comparato ed Europeo Online* 617, online: <www.dpceonline.it/index.php/dpceonline/article/view/433/422>.

72. See e.g. Lawrence B Solum, "The Interpretation-Construction Distinction" (2010) 27:1 *Const Commentary* 95; Barnett, *supra* note 29; The Honourable Bradley W Miller, "Constitutional Supremacy and Judicial Reasoning" (2020) 45:2 *Queen's LJ* 353 at Part I.B.

73. 2020 SCC 13 [*Conseil scolaire*].

ostensibly concerned with the interpretation of the *Charter*, and having been cited as such in *Québec Inc.*⁷⁴ As Wagner CJ himself explains in his majority reasons, *Conseil scolaire* dealt with the application of “judge-made concepts . . . developed to compensate for the silence of s. 23 [of the *Charter*] regarding the level of services and the quality of instruction it guarantees to official language minorities”.⁷⁵

By contrast *Stillman*, *Poulin*, and *Québec Inc* are cases of interpretation in the strict sense of the term. They all involve the determination of the *Charter*’s communicative content—the meaning of its words, understood in context. They are not concerned with the elaboration of legal doctrine as, for example, *Conseil scolaire* is. Once the meaning of the contentious words is clarified, the answer to the questions raised in the cases follows straightforwardly.

A. *Stillman*

In *Stillman*, the Supreme Court had to interpret the exception to the right to trial by jury guaranteed by section 11(f) of the *Charter* “in the case of an offence under military law tried before a military tribunal”, and specifically the phrase “military law”. More specifically still, the issue was whether ordinary civilian offences (notably those created by the *Criminal Code*) committed by service members, which are incorporated by reference by section 130(1)(a) of the *National Defence Act*,⁷⁶ are thereby made part of military law alongside the specifically military offences created by the *Code of Service Discipline*.⁷⁷ Despite all judges professing to adhere to purposive interpretation, five⁷⁸ found that the civilian offences were also “offence[s] under military law”, while two⁷⁹ would have found that they are not.

The majority held that both *Charter* rights and the exceptions to them ought to be interpreted in the purposive manner outlined in *Big M*.⁸⁰ Justices Moldaver and Brown found that the purpose of the right to trial by jury is to protect the accused against the state and also to involve the public in the administration of justice. That of the military law exception is to preserve the

74. See *Québec Inc*, *supra* note 9 at paras 69 (per Abella J), 140 (per Kasirer J).

75. *Conseil scolaire*, *supra* note 73 at para 21.

76. See RSC 1985, c N-5.

77. See *ibid*, Part III.

78. See *Stillman*, *supra* note 7 (Justices Moldaver and Brown, joined by Wagner CJ and Abella and Côté JJ).

79. See *ibid* (Justices Karakatsanis and Rowe).

80. See *ibid* at para 22.

longstanding, separate system of military justice, which serves to maintain discipline and morale in the armed forces. The majority reviewed the history, remit, and functioning of this system at considerable length.

Justices Moldaver and Brown then turned to the phrase “military law” itself. With reference to parliamentary debates that took place when the version of the *National Defence Act* in force in 1982 was being enacted, they pointed out that “‘military law’ was understood as ‘the law which governs the members of the army and regulates the conduct of officers and soldiers as such, in peace and war, at home and abroad’” and included “a provision transforming ordinary civil offences into service offences”.⁸¹ They also noted that the *Criminal Code* “at the time of the *Charter’s* enactment defined (and still defines) ‘military law’ as including ‘all laws, regulations or orders relating to the Canadian Forces’”.⁸² They further pointed to the Supreme Court’s decision in *MacKay v The Queen*,⁸³ where the majority opinion spoke of civilian offences incorporated by reference by the *National Defence Act* as being part of military law. Justices Moldaver and Brown concluded that it is “far more likely that the purpose of the military exception was to recognize and preserve the status quo” than to “reverse this longstanding state of affairs”.⁸⁴ Justices Moldaver and Brown rejected attempts to restrict the scope of the phrase “military law” as unsupported by the *Charter’s* text, inconsistent with other aspects of the Supreme Court’s military justice jurisprudence, and unworkable in practice.

Justices Karakatsanis and Rowe saw things very differently. While appealing to the same passage from *Big M* setting out the principle of purposive interpretation as the majority, they stressed that exceptions to *Charter* rights should be approached with caution. In their view, the purpose of section 11(f) is to uphold “the interests of the accused and of society in holding a jury trial when prosecuting serious criminal offences”.⁸⁵ These interests must not be undermined by allowing trials not sufficiently connected with military service to be held in the military, rather than the civilian, justice system.

Like the majority, Karakatsanis and Rowe JJ considered history, but they looked farther back into the past to point out that the jurisdiction of military courts long remained narrow and was seen as a supplement to that of the civilian courts, only to be resorted to when civilian courts were unavailable.⁸⁶

81. *Ibid* at para 74.

82. *Ibid* at para 75.

83. [1980] 2 SCR 370, 114 DLR (3d) 393.

84. *Stillman*, *supra* note 7 at para 78.

85. *Ibid* at para 141.

86. See *ibid* at paras 154–59.

They also referred to *MacKay*, but to McIntyre J’s concurring opinion rather than the majority’s; this concurrence stressed the need for a military connection to bring an offence within the jurisdiction of military courts. Justices Karakatsanis and Rowe noted that this requirement was “adopted by the Court Martial Appeal Court . . . one year after the *Charter*, and has been applied with some regularity over the past thirty years”.⁸⁷ History thus supported the view that “military courts *should* have jurisdiction . . . where quick and efficient justice was necessary to uphold discipline”,⁸⁸ and not otherwise.

Justices Karakatsanis and Rowe concluded that section 11(f) of the *Charter* required a nexus between an offence and military service before that offence could be tried within the military justice system. This was essential to avoid unduly limiting the right to trial by jury and giving Parliament and military prosecutors the ability to shape the contours of this right. The lack of such a requirement in the *Defence Act* infringed the *Charter*, and the infringement was not justified in a free and democratic society.

B. Poulin

Poulin concerned the application of the right of a person “found guilty of [an] offence . . . if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment”⁸⁹ to situations where there had been more than one variation of punishment in the relevant time span. The respondent had been found guilty of sexual offences for which conditional sentences became available after he had committed his crimes, and then were abolished before he was tried and sentenced. On what was termed the “binary view” of the right, he had to be sentenced to either the sentence that existed at the time of the offending or that applicable at the time of sentencing. On the “global view”, which had been preferred by all Canadian courts that had previously considered the issue, all sentences that had been available at any point between the offending and the sentencing were potentially available. A 4-3 majority of the Supreme Court⁹⁰ found that a purposive approach to section 11(i) of the *Charter* led to the

87. *Ibid* at para 164.

88. *Ibid* at para 166 [emphasis in original].

89. *Charter*, *supra* note 4, s 11(i).

90. Justice Martin, joined by Wagner CJ and Moldaver and Côté JJ.

conclusion that the binary view was correct. The dissent⁹¹ preferred the global view.⁹²

Justice Martin's discussion of the interpretation of section 11(i) started with a lengthy review of the practical implications of the binary and global views. However, although hinting at the practical advantageousness of the binary view, this was only a prelude to the purposive analysis. Justice Martin stated that "a *Charter* right must be interpreted purposively — that is, in a manner that is justified by its purposes".⁹³ This is not to say that the right must be interpreted "generously", if generously is taken to mean in the manner most favourable to the claimant.⁹⁴ *Charter* interpretation would take into account existing jurisprudence, the language and history of the provision, and then "turn to the heart of the purposive analysis: deciding which interpretation of s. 11(i) is supported by the right's purposes".⁹⁵

Justice Martin noted that the Supreme Court had previously recognized that section 11(i) had a twin purpose. First, it upheld "the rule of law and, more specifically, the principle of legality", understood here to mean "that persons who rely on the state of the law in conducting themselves, or who risk the liability associated with a law in breaking it, should not subsequently be held to different laws, particularly more stringent ones".⁹⁶ Second, it secured fairness.⁹⁷ The parties agreed on this.⁹⁸

However, Martin J undertook her own analysis of section 11(i). She considered, first, its language, focusing on the term "lesser", which in her view "evokes the comparison of two options. Whereas comparative terms ending in 'est' or 'st' single out one thing from the others, comparative terms ending in 'er' contrast one thing with another."⁹⁹ This suggested that section 11(i)'s text supported the binary view of its import. Justice Martin rejected the submission that the term "between" in section 11(i) meant that the entire period from the time of the commission of the offence to sentencing had to be considered.

91. Justice Karakatsanis, joined by Abella and Brown JJ.

92. The majority and the dissent also disagreed about whether the case, which became moot when the respondent died prior to the hearing, should have been decided at all, but this is not relevant to my argument here.

93. *Poulin*, *supra* note 8 at para 53.

94. See *ibid* at paras 53–55.

95. *Ibid* at para 57.

96. *Ibid* at para 59 (referring to *R v KRJ*, 2016 SCC 31 at paras 22–25).

97. See *ibid* at para 61.

98. See *ibid* at para 63.

99. *Ibid* at para 68.

Justice Martin then turned to the history of section 11(i). She noted that, “[u]nlike those *Charter* rights that refer to evolving, open-ended standards — such as ‘reasonable’ and ‘unreasonable’ . . . ‘fundamental justice’ . . . and ‘cruel and unusual’ . . . — s. 11(i) enunciates a rule with a particular application. In simple terms, s. 11(i) was enacted to confer a particular, constant protection.”¹⁰⁰ The right being thus fixed, its “origins”, albeit “not determinative of the right’s proper scope . . . provide an instructive starting point” for understanding it.¹⁰¹ Justice Martin reviewed the common law rules on which section 11(i) builds, early drafts of what would eventually become the *Charter* and parliamentary debates leading up to the *Charter*’s enactment, as well international instruments that predated the *Charter* and were considered by its framers. She summarized this review by stating that “[a] global right was not part of the legal landscape; the common law certainly did not recognize one, and none of the enactments inspiring s. 11(i) embraced one either.”¹⁰² It is worth highlighting that Martin J dismissed the relevance of a later reinterpretation of section 11(i)’s equivalent in the *Convention for the Protection of Human Rights and Fundamental Freedoms*,¹⁰³ emphasizing “that, at the time of the *Charter*’s enactment, [it] was not understood as conferring a global right”.¹⁰⁴

Justice Martin then returned to the issue of section 11(i)’s purposes, insisting that they might “justif[y]” an interpretation “not support[ed]” by its origins.¹⁰⁵ However, she rejected the submission that adopting the binary view of the section 11(i) right would result in unfairness to offenders, noting that perfect parity of sentences imposed on individuals convicted of the same offence before and after legislative changes was neither required nor practically achievable. She also argued that adopting a global view of the right would have a number of undesirable consequences at the level both of principle and practice.

Justice Karakatsanis, by contrast, defended the global view of section 11(i). In her opinion, this view “finds ample support in the words of s. 11(i), which suggest a continuum between the time of commission and the time of sentencing”,¹⁰⁶ and clearer language would have been necessary “to codify the restrictive interpretation proposed” by the Crown.¹⁰⁷ Adopting such an

100. *Ibid* at para 70.

101. *Ibid*.

102. *Ibid* at para 71.

103. 213 UNTS 221.

104. *Poulin*, *supra* note 8 at para 82.

105. *Ibid* at para 85.

106. *Ibid* at para 148.

107. *Ibid* at para 150.

interpretation would go against the principle that “a generous *and* purposive approach must be taken to the interpretation of *Charter* rights,” which “cannot be limited to rights and freedoms that existed before the enactment of the *Charter*, whether by virtue of the common law, international law or otherwise”.¹⁰⁸ Justice Karakatsanis also took the position that the binary view of section 11(i) did not agree with its purpose to uphold the Rule of Law due to the risk of an accused person’s reliance on the law as it stands at various points in the course of a prosecution being set to naught by a change of the law prior to sentencing. Finally, she saw no practical obstacles to adopting the global view.

C. *Québec Inc*

The issue in *Québec Inc* was whether corporations may avail themselves of the *Charter*’s protection against “any cruel and unusual treatment or punishment”.¹⁰⁹ The Supreme Court unanimously held that they may not, and unanimously endorsed purposive interpretation. However, there were significant differences between the majority opinion¹¹⁰ and the principal concurrence,¹¹¹ including on the issue of how purposive interpretation of *Charter* rights was to be conducted.¹¹² Indeed, these differences seem to be the reason why Abella J may have lost the majority after having initially been assigned to write the Court’s judgment.¹¹³

108. *Ibid* at para 151 [emphasis in original].

109. *Charter*, *supra* note 4, s 12.

110. Justices Brown and Rowe, joined by Wagner CJ and Moldaver and Côté JJ.

111. Justice Abella, joined by Karakatsanis and Martin JJ.

112. Justice Kasirer authored a brief concurrence endorsing “the principle that *Charter* rights must be given a large, liberal and purposive interpretation”, but not going into much further detail. See *Québec Inc*, *supra* note 9 at para 140.

113. On the phenomenon of judges initially assigned to write the majority judgment and losing the support of enough colleagues for their opinion to become a concurring or dissenting one, see Peter J McCormick, “‘Was it Something I Said?’: Losing the Majority on the Modern Supreme Court of Canada, 1984-2011” (2012) 50:1 *Osgoode Hall LJ* 93. As McCormick explains, “when we find a long dissent (or separate concurrence) . . . attached to a short judgment that begins, ‘I have read the reasons of my colleague, but with respect I cannot agree’ . . . [o]ne or more of the judges who supported one position at conference has now been persuaded to join what was initially a minority position but now enjoys the support and the signatures of a majority of the panel”. See *Québec Inc*, *supra* note 9 at 103. Justice Abella’s opinion in *Québec Inc* is the one that includes the discussion of facts, decisions below, and all the issues, while that of Brown and Rowe JJ is presented as a response to it. See *Québec Inc*, *supra* note 9 at para 3.

For Brown and Rowe JJ, the purposive interpretation of a *Charter* provision “*must begin* by considering the text of the provision . . . because constitutional interpretation, being the interpretation of the text of the Constitution, must first and foremost have reference to, and be constrained by, that text”.¹¹⁴ They added that “[g]iving primacy to the text”¹¹⁵ is also the way to avoid framing the purpose of a provision too narrowly or too broadly. Their main objection to Abella J’s opinion was that it “minimiz[ed] the primordial significance assigned by this Court’s jurisprudence to constitutional text”¹¹⁶ in this process. At the same time, Brown and Rowe JJ rejected Abella J’s charge that they were favouring a narrowly textualist approach.¹¹⁷

Analyzing section 12 of the *Charter*, Brown and Rowe JJ first noted that “the words ‘cruel and unusual treatment or punishment’ refer to *human* pain and suffering, both physical and mental”.¹¹⁸ They endorsed Abella J’s historical analysis, while also pointing out that its language differs from the instruments that inspired it, going back to *Magna Carta*, in that “the right not to be denied reasonable bail without just cause was carved off from the right to be free from cruel and unusual punishment, and placed in s. 11(e) of the *Charter*”, while “[e]ven more significantly, the protection against ‘excessive fines’ was not retained at all.”¹¹⁹ In their view, these differences in framing and wording were “highly significant, if not determinative: excessive fines (which a corporation can sustain), without more, are not unconstitutional”.¹²⁰ Justices Brown and Rowe suggested that the purpose of section 12 has to do with protecting human dignity, and that, for this reason, it does not protect corporations.¹²¹

114. *Québec Inc*, *supra* note 9 at paras 8–9 [emphasis in original].

115. *Ibid* at para 10.

116. *Ibid* at para 4.

117. I return to this rejection in Part IV.C, *below*.

118. *Québec Inc*, *supra* note 9 at para 14 [emphasis in original].

119. *Ibid* at para 16.

120. *Ibid* at para 17. Cf Léonid Sirota, “Climb Out”, *Double Aspect* (6 March 2019) online (blog): <doubleaspect.blog/2019/03/06/climb-out/> (“The Charter does things somewhat differently from its forbears. The right ‘not to be denied reasonable bail without just cause’ is placed in a separate provision (section 11(e)) from the protection against cruel and unusual punishment (section 12). The proscription of ‘excessive fines’, meanwhile, has not been retained. These drafting choices ought to matter. In particular, the *Charter’s* text means that excessive fines are not, without more, unconstitutional.” [Paragraph break removed]) [emphasis omitted].

121. See *Québec Inc*, *supra* note 9.

Two additional points made by Brown and Rowe JJ in their discussion of the use of international and foreign materials in *Charter* interpretation are relevant. First, they insisted that “[a]s a constitutional document that was ‘made in Canada’ . . . the *Charter* and its provisions are primarily interpreted with regards to Canadian law and history.”¹²² International and foreign materials could not “define the scope of *Charter* rights”.¹²³ And second, Brown and Rowe JJ drew a distinction between international instruments that came into effect before the *Charter*, and those that came after it. In their view, “[i]nternational instruments that pre-date the *Charter* can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed”, even if they were not legally binding on Canada.¹²⁴ By contrast, “[i]t can readily be seen that an instrument that post-dates the *Charter* and that does not bind Canada carries much less interpretive weight than one that binds Canada and/or contributed to the development of the *Charter*.”¹²⁵

Like the majority, Abella J claimed the mantle of purposivism—properly understood—for herself. In her view, however, “elevating the plain text” of the *Charter*’s provisions “to a factor of special significance” was a mistake.¹²⁶ Due to its often “vague, open-ended language . . . [t]he text of those provisions may . . . be of comparatively limited assistance in interpreting their scope”.¹²⁷ Indeed, attaching too much importance to constitutional text “could unduly constrain the scope of those rights” or make inconsequential details such as “the presence of a comma” into decisive factors.¹²⁸ It also undermined the Constitution’s ability to develop and “creates a risk that, over time, . . . rights will cease to represent the fundamental values of Canadian society and the purposes they were meant to uphold”.¹²⁹ Finally, “[a] textualist approach would also make Canadian constitutional law more insular,”¹³⁰ by which Abella J meant both less inclined to consider foreign authority and less attractive as a reference point to foreign jurists.

122. *Ibid* at para 20.

123. *Ibid* at para 28.

124. *Ibid* at para 41.

125. *Ibid* at para 42.

126. *Ibid* at para 72.

127. *Ibid* at para 74.

128. *Ibid* at para 75 (referring to *District of Columbia v Heller*, 554 US 570 (2008)).

129. *Ibid* at para 76.

130. *Ibid* at para 78.

According to Abella J, purpose must be inferred from a variety of contextual indicia, there being no “rigid hierarchy among these interpretative guides”,¹³¹ although Abella J also suggested that “the principles and values underlying the enactment of the *Charter* provision are the primary interpretive tools.”¹³² In order to interpret section 12, Abella J referred to dictionary definitions of the word “cruel”, the jurisprudence on the scope of related *Charter* rights, and the history of section 12. Justice Abella also referred, copiously, to recent interpretations of section 12’s equivalents in foreign and international instruments. This was justified, she argued, by the fact that “Canada’s rights protections emerged from the same chrysalis of outrage” about Nazi crimes “as other countries around the world”,¹³³ and ensured that Canada maintains a “leading voice internationally in constitutional adjudication”.¹³⁴ All these sources tended to the same conclusion:

In line with the global consensus, [section 12’s] purpose is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals . . . Since it cannot be said that corporations have an interest that falls within the purpose of the guarantee, they do not fall within s. 12’s scope.¹³⁵

IV. Purposivism Prevails—but Which One?

To repeat the obvious, *Stillman*, *Poulin*, and *Québec Inc* all combine unanimous endorsements of purposive interpretation with substantial disagreements between the majority and minority opinion about what this means. Under the surface of rhetorical agreement, there remains a lively ongoing debate about how the *Charter* should really be interpreted. In this part, I analyze these opinions to argue that, in all three cases, the majorities deploy primarily textualist and originalist techniques, while the minorities find them too restrictive and argue for more expansive approaches to interpretation.

131. *Ibid* at para 80.

132. *Ibid* at para 70.

133. *Ibid* at para 98.

134. *Ibid* at para 106.

135. *Ibid* at paras 135–36.

For ease of reference, I briefly recap the definitions of purposivism, textualism, and originalism explained in Part I. Purposivism, in its various forms, invokes the purposes of constitutional rights to choose among conflicting readings of constitutional provisions, or supplement them where necessary, or even to give purposes direct effect regardless of textual details. Textualism, by contrast, is the view that the meaning of the constitutional text (understood in context) is what is binding on the courts, which may not disregard the text to give effect to abstract purposes. Originalism, for its part, holds that the meaning of constitutional provisions is fixed at the time of their enactment (the fixation thesis) and, in this fixed form, binding on courts giving effect to these provisions (the constraint principle).

A. *Originalism and Textualism in the Purposivist Trilogy*

With these definitions in mind, we can analyse the majority opinions in the cases reviewed above to see whether originalism and textualism are hiding behind their purposivist rhetoric. Indeed they are, and the dissenters, who in each case appeal to a less historically and textually bound purposivism, are wise to what is going on.

The majority opinion in *Stillman* is perhaps the most obviously originalist of the three. The key passage in Moldaver and Brown JJ's reasons is the discussion of the way in which the phrase "military law" had been used by officials, by the *Criminal Code*, and by the Supreme Court itself, in the decades prior to the entrenchment of the *Charter*. By contrast, and unlike the dissenting opinion, they take no interest in the way in which "military law" has been interpreted after 1982. Implicitly, they seem to accept both the fixation thesis (the meaning of the phrase "military law" was fixed with the *Charter's* coming into force and no longer evolves) and the constraint thesis (this meaning binds the Supreme Court).

Contrast this with the dissent. It rejects the fixation thesis, as is evident from its appeal to historical evidence that either long precedes or, even more importantly, follows the enactment of the *Charter*, rather than that of the crucial period immediately preceding 1982. It also rejects the constraint thesis, and instead proceeds from a view of how the constitution *ought* to treat the relationship between civilian and military justice, reading into the phrase "military law" a limitation that is, in its view, desirable, but has no obvious foundation in the constitutional text.

By comparison with *Stillman*, the majority opinion in *Poulin* is not quite originalist. At least, Martin J seems to reject the constraint thesis, insisting that an interpretation built on the purpose of a *Charter* right can in some circumstances override one focused on history. That said, as we have seen, Martin J pays close attention to the pre-entrenchment history of section 11(i) of the *Charter*

and rejects the relevance of those materials that postdate its entrenchment. She thus seems to accept implicitly something akin to the fixation thesis.

More than an originalist one, however, Martin J's reasons strike a textualist tone, paying close attention to the grammatical and semantic nuances of the provision they interpret. While ostensibly beginning with purpose rather than text, Martin J's opinion accords a key importance to the text's choice of "particular" rather than "open-ended" language. Moreover, it rejects the common idea that purposive interpretation must be generous. It is the text, rather than any judicially imposed ideal of constitutional protection, that determines the *Charter's* scope.

Justice Karakatsanis' opinion, meanwhile, squarely rejects the fixation thesis and, despite making some textual points, seems primarily motivated by a preference for generous interpretations of the *Charter* and a sense of what broadly articulated purposes require. Of the three cases I consider here, the contrast between the majority's textualism and the minority's pure purposivism may be the weakest in *Poulin*, but it is distinctly noticeable nonetheless.

In *Québec Inc* too, the majority opinion is primarily textualist; that is, it is concerned with the ordinary meaning of the words it interprets, in context. As we have seen, Brown and Rowe JJ stress the "primacy" of the text over other considerations, and focus on the word choices of the *Charter's* framers (including their choice to use language that is different from other rights-protecting instruments).¹³⁶ The primacy of the text and its constraining effect is the ground on which they part company from Abella J.

There is, moreover, at least a nod to originalism, or at a minimum to the constraint thesis, in Brown and Rowe JJ's recognition of a significant distinction between the relevance of international materials that predate the *Charter* and those that postdate it. To be sure, the latter are not entirely irrelevant in Brown and Rowe JJ's view, at least if Canada has ratified them. But rather than forming part of the context that must be taken into account in determining the *Charter's* meaning, post-*Charter* international materials only guide interpretation at the margins.

Contrast this, again, with the minority opinion. For Abella J, the *Charter's* text has no claim to primacy in the interpretive exercise. Indeed, it might not really matter much at all: after all, when she discusses international materials, Abella J suggests that differently worded provisions all have the same import, without pausing to inquire whether the textual differences may be significant. As we have seen, she also professes incredulity at the idea that grammatical details may influence the contents of constitutional protections.

136. See *ibid* at paras 9–10, citing *Caron*, *supra* note 63 at para 36.

In addition to textualism, Abella J unequivocally rejects both the fixation and the constraint thesis. For her, rather than the *Charter's* framers, it is “the Court”—the Supreme Court, that is—that “has, over time, decided who and what came within the *Charter's* protective scope”.¹³⁷ The Supreme Court of Canada’s view of what constitutional protections are “due”—of what, in then-Judge Barrett’s words, it “thinks” the *Charter* “ought to say”—is decisive. The Supreme Court, in other words, is not bound by anything settled when the *Charter* was framed.

To sum up: the ostensibly purposivist decisions in *Stillman*, *Poulin*, and *Québec Inc* are purposivist in name rather than in fact. The key arguments that support the majority opinions and distinguish them from the more obviously purposivist minority reasons are originalist (in *Stillman*) or textualist with nods to originalism (in *Poulin* and, even more so, *Québec Inc*). Throughout, majorities accept that constitutional text is a dominant consideration in interpretation, and that pre-entrenchment materials are pre-eminently, if not exclusively, relevant in ascertaining its meaning. This is a far cry from *Comeau's* insistence on “broad” interpretations “sensitive to evolving circumstances”.¹³⁸ There is no mention of the living tree in any of the three majority opinions (and, for that matter, in the dissents in *Stillman* and *Poulin*, although Abella J’s concurring opinion in *Québec Inc* does refer to it quite prominently).

B. Is It Purposivism After All?

To the forgoing analysis there is, admittedly, a weighty objection: the authors of the majority opinions in *Stillman*, *Poulin*, and *Québec Inc* would likely not accept it. They describe their reasoning as purposivist rather than originalist or textualist, after all. Indeed, in *Québec Inc*, Brown and Rowe JJ pointedly reject the textualist label; I return to this in the next section. Here, I explain why, in my view, the cases I have described as the purposivist trilogy are not truly purposivist.

The reasoning of the majorities in *Stillman*, *Poulin*, and *Québec Inc* corresponds to none of the versions of purposivism described above. Despite

137. *Québec Inc*, *supra* note 9 at para 49. Justice Abella has expressed similar views extrajudicially, writing that “[a] Supreme Court . . . is the final adjudicator of which contested values in a society should triumph”. “An attack on the independence of a court anywhere is an attack on all courts”, *The Globe and Mail*, 26 October 2018, online: <www.theglobeandmail.com/opinion/article-rosalie-abella-an-attack-on-the-independence-of-a-court-anywhere-is/>

138. *Comeau*, *supra* note 45 at para 52.

occasional references to very broadly stated principles such as the Rule of Law (in *Poulin*) or human dignity (in *Québec Inc*), it does not aim at giving these principles effect regardless of textual support. Nor does it aim at drawing implications to realize these principles despite textual silences or gaps. On the contrary, in all three cases, the *Charter's* text is seen as giving sufficient effect to the principles and purposes at issue, and the focus is on ascertaining the manner in which it does so.

Nor is the reasoning of the majorities in these cases an example of definitive document purposivism. To be sure, the three cases involve choices within “a range of possible meanings” that could be ascribed to the *Charter* provisions at issue.¹³⁹ In *Poulin* and *Québec Inc*, moreover, the majority’s choice was the narrower one of the available options, as is typical of this version of purposivism (*Stillman* is more complex, because it involved the interpretation of an exception rather than a right; the exception was interpreted broadly, but the right was narrowed as a result). But, crucially, it is not “an investigation into the purposes underlying the guarantees” that was decisive in making the majority judges opt for the readings they chose.¹⁴⁰ As shown above, it was the text itself, understood wholly or at least in part in accordance with its meaning at the time of the *Charter's* enactment, that was decisive.

Indeed, the majority opinions’ invocations of purposivism do minimal or no work in supporting their reasoning, in contrast to those in the minority reasons. Thus, in *Stillman*, references to the purpose of section 11(f) as a whole or of the military justice exception are superfluous. The majority ascertains the meaning of the words at issue and resolves the dispute on the basis of that meaning alone, and assertions to the effect that the text was intended to say what it said rather than something else are as unnecessary as they are obvious. In *Poulin*, the purposes of section 11(i) act, at most, as a possible check on the interpretation derived from the provision’s text, with Martin J arguing that the fairness purpose is not undermined by the binary view of its meaning.¹⁴¹ It is, as we have seen, the textualist and nearly originalist arguments that determine the meaning of section 11(i). Finally, in *Québec Inc*, the majority’s references to human dignity as the purpose of section 12 do not advance its argument, which as we have seen rests on the meaning of the provision’s words and its history. On the contrary, the reference to human dignity unnecessarily burdens the reasoning with

139. Oliphant, “Purposes”, *supra* note 10 at 248.

140. *Ibid* at 248–49.

141. See *Poulin*, *supra* note 8 at paras 86–98.

what is, by the Supreme Court's own well-known admission, "an abstract and subjective notion".¹⁴²

C. Does the Québec Inc Majority Reject Textualism—and Why Would It Try?

Before concluding, there remains another matter to consider: the seemingly pointed dismissal of textualism in the majority opinion in *Québec Inc*. Justices Brown and Rowe claim that a "system [which] holds that the Constitution and every statute should be understood according to the reading of a reasonable reader at the time of enactment' and in which '[r]eference to the history of the text's creation . . . is not allowed'", or "one where the analysis is strictly restricted to the text of the Constitution . . . are not remotely consistent with [the approach] which we apply and which our law demands".¹⁴³

Although they do not name it, Brown and Rowe JJ's comments are, of course, directed at originalism as much as textualism.¹⁴⁴ Indeed, if Brown and Rowe JJ are right that their approach is inconsistent with accepting the fixation and constraint theses, theirs would be the Supreme Court's first rejection of originalism as it is now commonly understood. Until now, the only versions of originalism that had been clearly rejected were those disfavoured by originalists themselves, which focus on original expected applications and outcomes.¹⁴⁵

Yet, though Brown and Rowe JJ's language is seemingly clear-cut and perhaps even unusually forceful, their lordships do protest too much. As we have seen, their own analysis in *Québec Inc* strongly suggests that the time of enactment of a constitutional text is of special significance. While their focus may be more on the framers than on the "reasonable reader" of the provisions being enacted, this is, at most, a preference for one form of originalism, focused on original intentions, over another, focused on original public meaning.¹⁴⁶ In the statutory realm,

142. *R v Kapp*, 2008 SCC 41 at para 22.

143. *Québec Inc*, *supra* note 8 at para 12 (respectively citing Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116:1 Harv L Rev 19 at 82–83 and referring to Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dal LJ 519 at 544).

144. The silent dismissal of originalism is consistent with Professor Dodek's suggestion that originalism is a dirty word in Canadian law, too much so, it seems, to be mentioned even in the course of being rejected.

145. Oliphant & Sirota, "Rejected Originalism", *supra* note 29 at Part III; Goldsworthy & Huscroft, *supra* note 32 at 183.

146. See Oliphant & Sirota, "Rejected Originalism", *supra* note 29 at Part II(A) (for a brief overview of the differences between these two strands of originalist thought).

“the rule . . . that the words of a statute must be construed as they would have been the day after the statute was passed”¹⁴⁷ is well-established,¹⁴⁸ and it would surely take more than this disclaimer by Brown and Rowe JJ in a case that does not deal with statutory interpretation at all to overturn it.

There is more. The majority reasons in *Québec Inc* rely primarily on *Caron* and *Stillman* as authorities on the proper approach to constitutional interpretation. Yet, as noted above, the majority reasons in *Caron* focused on ascertaining the meaning of the constitutional provisions at issue there by reference to how they would have been understood by a reasonable reader, or more precisely by several different types of reasonable readers, “at the time of enactment”.¹⁴⁹ And the majority’s reasoning in *Stillman* too, as we have already seen, was primarily based on the interpretation of the constitutional text as it would have been understood at the time of its enactment. It would be most odd to rely on these two cases among all the others in the Supreme Court’s peripatetic jurisprudence on constitutional interpretation to reject public meaning originalism. So odd, in my view, as to be altogether implausible.

Finally, let us observe that, whatever their views on the appropriateness of referring to statements made in the course of legislative debates when interpreting statutes, originalists are by no means averse to exploring “the history of the [constitutional] text’s creation”.¹⁵⁰ In fact, their propensity to do so has attracted the attention of commentators pointing out that it seems to be at odds with their position on statutory interpretation.¹⁵¹ That said, even in the statutory realm, textualist judges do not object to the use of *all* forms of history: for example, they would of course regard information on the state of the law before the statute’s enactment as relevant. It is difficult to tell just what Brown and Rowe JJ are referring to do when they denounce interpretation that ignores the history of legislative texts entirely, but, in any case, it is not originalism or textualism as actually practiced by the proponents of these interpretive approaches.

Thus, despite its categorical language, there is less to the rejection of textualism (and originalism) by Brown and Rowe JJ in *Québec Inc* than meets the eye.

147. *Sharpe v Wakefield*, [1888] 22 QBD 239 at 242, 37 WR 187 (CA) (Lord Escher MR), aff’d in *Sharpe v Wakefield*, [1891] AC 173, 39 WR 561.

148. See *Perka v R*, [1984] 2 SCR 232 at 264–65, 13 DLR (4th) 1; *R v DLW*, 2016 SCC 22 at para 20.

149. See text accompanying note 63, *above*.

150. Barak, “A Judge on Judging, *supra* note 143, cited in *Québec Inc*, *supra* note 9 at 12.

151. See William N Eskridge Jr, “Should the Supreme Court Read The Federalist but Not Statutory Legislative History?” (1998) 66:5/6 Geo Wash L Rev 1301.

When considered alongside the substance of their approach, the precedents to which they appeal, and textualism and originalism as they are actually practiced, this rejection amounts, at most, to a preference for giving more weight to the intentions of the framers, as expressed inter alia in “legislative history”, than some textualists and originalists would deem advisable.

Both the embrace of purposivism and the rejection of textualism in *Stillman*, *Poulin*, and *Québec Inc* are above all rhetorical. So long as originalism and even genuine textualism are seen as “dirty words” in Canadian constitutional law, it should not surprise us that courts may feel compelled to resort to such rhetoric. It is best understood, however, in a La Rochefoucauldian vein, as the tribute that alleged vice pays to purported purposivist virtue.

Yet dissembling is never harmless. Mislabeled an originalist or textualist interpretation as purposivist makes it possible for the adherents of an entirely different version of purposivism to invoke cases that contradict their views as support for them. Justice Abella did just that in *Québec Inc*, referring to the majority opinions in both *Stillman* and *Poulin*.¹⁵² As will be apparent from the foregoing discussion, it is the majority opinion in *Québec Inc*, rather than Abella J’s, that is consistent with the majority opinions in these cases. But these opinions’ failure to acknowledge their textualist orientation exposed them to manipulation of this sort. It would be better for the sake of transparency and clarity of thought of subsequent judges as well as commentators if judges inclined to textualism and originalism could own their interpretive choices.

Clarity of thought is especially necessary in this area because many of the Supreme Court of Canada’s judges seem not to have taken a consistent approach to interpretation in the purposivist trilogy cases. Some have: Wagner CJ, and Moldaver and Côté JJ, were in the majority in all three cases, while Karakatsanis J was consistently in the minority. Justice Kasirer, of course, only took part in one case (and took no sides there). The others, however, vacillated. The case of Rowe J, co-author of the dissenting opinion in *Stillman* and of the majority one in *Québec Inc*, is perhaps the most striking, but the inconsistent votes of Abella, Brown, and Martin JJ are no less puzzling.

Conclusion

The Supreme Court of Canada has not been consistent in its approach to constitutional interpretation. Two acknowledged strands—one purposivist, the other drawing on the living tree metaphor—long ran through its

152. See *Québec Inc*, *supra* note 9 at para 73.

jurisprudence, and so did an unacknowledged but robust originalist one. Academic and occasionally judicial claims to the effect that a unified theory of constitutional interpretation is authoritative do not stand up to scrutiny. Against this background, the Supreme Court's robust endorsement of purposivism, unalloyed with living constitutionalism, as the authoritative method for interpreting the *Charter* in three recent cases in (relatively) quick succession is noteworthy.

More notable still, however, is the fact that the method majorities in each of these cases endorsed is not purposive as this term would traditionally have been understood in Canadian law, and was in fact understood by minority judges in these cases. Despite its labelling as purposive, the approach of the majorities in *Stillman*, *Poulin*, and *Québec Inc* has more in common with textualism, and even, especially in *Stillman*, with originalism. These judgments pay close attention to the *Charter's* language, including grammatical nuances. While they are also attentive to context, they draw clear distinctions between contextual elements that predate the *Charter*, and of which its framers and its contemporaneous readers would have been aware, and those that developed in the following years and decades.

Meanwhile, the invocations of purposivism in the majority judgments bear little justificatory load, and even a direct rejection of textualism in *Québec Inc* appears to be more ostentatious than substantial. It is, in all likelihood, the consequence of a desire not to be seen as breaking with the pre-existing jurisprudence—even though this jurisprudence was rather less consistent than it may have seemed.

With their purposivist rhetoric and originalist or textualist reasoning, the cases examined above seem to only add to the inconsistency of the law of constitutional interpretation in Canada. This is perhaps a pessimistic conclusion to draw—but the history of this law supplies ample grounds for pessimism. Nonetheless, one might also hope that these three cases mark the beginning of a trend. Addressing somewhat different issues, decided by differently constituted majorities, they might, after all, signal that the Supreme Court is coming to accept that courts engaged in *Charter* interpretation must pay closer attention to constitutional text and to its history than they had typically done in recent decades.

To be sure, it is still too early to be confident that this trend will take hold. The decisions analyzed above are not entirely consistent with one another, and employ rhetoric that, as we have seen, furnishes ready arguments to those who would like to reverse course. But such inconsistencies are probably inevitable. We should not expect judicial decisions—especially the decisions of a multi-member and collegial court, such as the Supreme Court of Canada—to exhibit the single-minded coherence to which academic theorizing can at least aspire. Majority reasons given in such a court are inevitably the result of a negotiation; concurring and dissenting reasons supported by multiple judges are likely to be

so too. It is at least possible that minor inconsistencies in a developing line of cases are merely the visible signs of a law working itself pure.

I end by highlighting two issues which I cannot fully address within the scope of this article, but which will be relevant if that is indeed what we are observing and the trend towards textualism and originalism reflected in the purposivist trilogy takes hold. First: what place, if any, would there be for purposivism in a more textualist and originalist jurisprudence? Without defending this hypothesis here, I would suggest that an inquiry into the purpose of constitutional provisions would still be useful and arguably even necessary at the *construction* stage—that is, as noted above, when elaborating doctrine to implement vague textual provisions—rather than as part of *interpretation* proper. This approach is consistent with Mr. Oliphant’s definitive document purposivism, and is recommended by persuasive American scholarship.¹⁵³ At the interpretation stage, however, the purposivist label is unhelpful at best, and misleading at worst.

Second: would a trend towards textualist and even originalist constitutional interpretation be a good thing? From the perspective of those who, as Mr. Oliphant has summarized this position, believe “that constitutional language cannot constrain interpretation, the rule of law is a myth, and constitutional law is nothing more than politics”,¹⁵⁴ this trend will be a retrograde step towards judicial obfuscation. For those who would prefer judges to be the “expositor[s] and guardian[s] of our constitutional values”,¹⁵⁵ it may well seem like an abdication of judicial duty.

The other view, which Mr. Oliphant defends, is that “[a] dedication to ascertaining the meaning of the words popularly chosen is required to distinguish the practice of interpretation from constitutional creation, and the role of the courts from that of legislatures.”¹⁵⁶ A trend towards greater emphasis on the *Charter’s* text, understood in light of its history and perhaps even as of the moment of its enactment, would be a manifestation of such dedication. Like Mr. Oliphant, I would welcome such change in our law. However, in this article, I have contented myself with drawing it out from the ambiguous

153. See Randy E Barnett & Evan D Bernick, “The Letter and the Spirit: A Unified Theory of Originalism” (2018) 107:1 *Geo LJ* 1.

154. Oliphant, “Purposes”, *supra* note 10 at 245 (references omitted).

155. Richard Albert, “The Expositor and Guardian of Our Constitutional Values” in Marcus Moore & Daniel Jutras, eds, *Canada’s Chief Justice: Beverley McLachlin’s Legacy of Law and Leadership* (Toronto: LexisNexis Canada, 2018) 193 at 193. See also Abella, *supra* note 135.

156. Oliphant, “Purposes”, *supra* note 10 at 247.

and perhaps misleading rhetoric of the Supreme Court; I have not defended this development, if that is what it truly is, against possible criticisms. That project must await its turn.

Post-Script

As this article was being edited, the Supreme Court of Canada delivered its decision in the challenge to the constitutionality of the Ontario legislature's restructuring of the Toronto City Council in the middle of an ongoing municipal election campaign.¹⁵⁷ *City of Toronto* was not, primarily, a decision about constitutional interpretation. It involved, first, an issue of constitutional construction (in the sense explained above)¹⁵⁸ concerning the distinction between the "positive" and "negative" aspects of the freedom of expression; and second, an issue about the nature and effect of unwritten constitutional principles. Nonetheless, the majority¹⁵⁹ and the dissent¹⁶⁰ touched on matters of interpretation and, specifically, on some of the cases discussed above, in a way that deserves a brief comment.

In embarking on the discussion of the *Charter* issue, the majority explained that "[a] purposive interpretation of *Charter* rights must begin with, and be rooted in, the text", referring to *Québec Inc.*¹⁶¹ While the ensuing discussion was concerned neither with the text nor with the purpose of the *Charter*'s freedom of expression guarantee, the majority returned to this theme in addressing the second issue: that of unwritten constitutional principles. Although acknowledging that the Constitution consists of both textual norms and unwritten rules and principles,¹⁶² the majority stresses the primacy of the text. Principles can serve to interpret the text, notably in helping identify the purposes of its provisions,¹⁶³ and to draw necessary implications from the text,¹⁶⁴ but it is only inconsistency with the text that can justify declaring

157. See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [*City of Toronto*].

158. See *supra* notes 72–75 and accompanying text.

159. Chief Justice Wagner and Brown J, with Moldaver, Côté, and Rowe JJ.

160. Justice Abella, dissenting, with Karakatsanis, Martin, and Kasirer JJ.

161. *City of Toronto*, *supra* note 157 at para 14.

162. See *ibid* at para 49.

163. See *ibid* at para 55.

164. See *ibid* at para 56.

a law unconstitutional.¹⁶⁵ Notably, the majority distinguishes federalism from other principles by emphasizing what it regards as federalism’s “strong textual basis”.¹⁶⁶

In addition to stressing the primacy of the constitutional text, the majority attaches special importance to the deliberations that occurred and the choices that were made at the moment of the text’s enactment. It endorses the argument, advanced by the majority judgment in the Court of Appeal for Ontario, that “[u]nlike the rights enumerated in the *Charter*—rights whose textual formulations were debated, refined, and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority”, unwritten principles “have no canonical formulations”, which makes them unsuitable for judicial enforcement.¹⁶⁷ And, for its own part, it points out that “[t]he absence of municipalities in the constitutional text is . . . a deliberate omission . . . The constitutional status of municipalities, and whether they ought to enjoy greater independence from the provinces, was a topic of debate during patriation . . . In the end, municipalities were not constitutionalized”,¹⁶⁸ and it would be wrong for the courts to extend to municipal democracy constitutional protections that the *Charter*’s framers rejected.

Not unlike the majority, the dissent speaks of “a unified purposive approach to rights claims”.¹⁶⁹ However, much like in the trilogy described above, the dissent’s purposivism contrasts with the majority in that it rejects the primacy of text. As with the majority, this is most apparent in the dissent’s discussion of unwritten principles, which in its view are more important than text. It writes: “unwritten principles are our Constitution’s most basic normative commitments from which specific textual provisions derive . . . Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles.”¹⁷⁰ Legislation can be invalid for infringing principles, as well as specific textual provisions, and the majority’s textual argument to the contrary, “like much of the rest of its analysis, is a highly technical exegetical exercise designed to overturn our binding authority”.¹⁷¹

165. See *ibid* at para 54.

166. *Ibid* at para 50.

167. *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 at para 85; quoted *ibid* at para 59.

168. *City of Toronto, ibid* at para 81.

169. *Ibid* at para 152.

170. *Ibid* at para 168.

171. *Ibid* at para 183.

To repeat, unlike the cases analyzed above, *City of Toronto* was not directly concerned with the interpretation of the *Charter*. However, these comments are revealing and consistent with the trends described in that analysis. Once again, the majority and dissent both ostensibly endorse purposive interpretation, even as they sharply divide over the role of text and of abstract principles in constitutional law. Once again, for the fourth time in three years, the majority, albeit a narrow one this time, emphasizes the primacy of text and the special importance of the *Charter's* framing. Applying this approach to questions of *Charter* interpretation in the future would lead the Supreme Court further down the textualist and, occasionally and partially, but noticeably, originalist trail blazed by *Stillman*, *Poulin*, and *Québec Inc.* The rejection of textualism and originalism in the latter case now seems even less meaningful than it already was. By contrast, if the dissent's approach to the Constitution prevails in the future, constitutional interpretation is likely to look more like abstract principles purposivism. Whichever of these possibilities eventuates, however, it seems likely that terminological confusion will persist, to the detriment of the clarity of both academic and judicial thinking.