Unequal Under the Law

Indigenous Originalism and the Living-Tree Approach within Canadian Constitutional Jurisprudence

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Abstract. This paper examines the use of two contrasting doctrines of judicial interpretation utilized within Canadian constitutional jurisprudence. On one hand, the Supreme Court of Canada interprets cases involving non-indigenous claimants with a living-tree approach, allowing for the modernization of rights into the 21st century. In a contrasting sense, the highest court in Canada has continually rooted indigenous rights in the past, through utilizing the doctrine of originalism, in turn, preventing the flourishing of indigenous rights within Canada. This paper will further contend that, not only does this divergence in approaches exist, it permeates as a precedent through succeeding Court decisions and, in turn, hinders the ability of indigenous communities and indigenous rights to move forward and progress into the 21st century.

Introduction

The history of colonialism within our world has inflicted many scars upon the earth and the indigenous populations that inhabit it (Borrows, 2016: 107). In the case of Canada, this pattern of occurrence follows the rule, and not the exception. From the onset of European contact, indigenous populations within Canada have been marginalized in numerous economic, social, and political facets of life (Kennedy, 2007: 77). However, when examining the marginalized position of indigenous peoples in Canada, few would think to turn their heads towards the judicial system. The allegorical Lady Justice is portrayed as blind and the principle of the rule of law in Canada calls for everyone, regardless of their position in society, to be treated equally under the law. Nevertheless, in an attempt to reconcile indigenous rights with settler rights, the Canadian judicial system has adopted differing approaches to handling the entitlements of each population (Kennedy, 2007: 79).

This paper will examine these different approaches in both a theoretical perspective, reviewing the doctrines of originalism and the living-tree approach; and in a practical perspective, through examining relevant Supreme Court of Canada (SCC) decisions. Furthermore, this paper will illustrate that there is a clear divergence in the methods of interpretation utilized by the SCC as indicated by disparate application of the doctrines of originalism in cases involving indigenous claimants and the use of the living-tree approach when compared to cases involving non-indigenous claimants. Finally, this paper will examine the fact that, not only does this divergence in approaches exist, it permeates as a precedent through succeeding Court decisions and, in turn, hinders the ability of indigenous communities and indigenous rights to move forward and progress into the 21st century.

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Section 35(1): The Inclusion of Indigenous Rights in the Canadian Constitution

Prior to examining the methods utilized to interpret the Canadian Constitution, it is first relevant to understand the form that indigenous rights have occupied within the Canadian constitutional landscape. The first constitutionally relevant document in Canada's history came to be through the "marriage" of the British colonies of Canada, Nova Scotia, and New Brunswick (Borrows, 2016: 105). What was originally entitled *The British North America Act*, later renamed the *Constitution Act, 1867*, holds the well-known phrasing pronouncing that Canada is to have "a Constitution similar in Principle to that of the United Kingdom" (*Constitution Act, 1867*). Thus, in line with the United Kingdom, the Canadian Constitution was to be, and remains, largely unwritten, with certain written aspects (Borrows, 2016: 105). With respect to indigenous peoples, largely disregarding the autonomy, freedom, and culture of pre-existing communities; under section 91(24) of the *Constitution Act, 1867* "exclusive legislative authority relative to 'Indians and lands reserved to Indians'" was granted to the federal government (Borrows, 2016: 107; *Constitution Act, 1867*). During this time period, as established by the Judicial Committee of the Privy Council in *St. Catharines Milling and Lumber Co. v. R.*, indigenous rights, particularly land entitlements, were conceptualized as usufructuary rights (Mickenberg, 1971: 149-150). Meaning, indigenous rights within Canada outwardly presented the facade of being legitimate entitlements but in actuality, they existed solely at the good "will of the sovereign" and could be unilaterally extinguished and heavily regulated by the government of the day (Kennedy, 2007: 81). The 1973 SCC decision in *Calder et al. v. Attorney-General of British Columbia* would alter this exception slightly, by recognizing that indigenous peoples do have an "ownership interest" in their historical lands (Anderson et al., 2004: 639). Nonetheless, indigenous rights still had a long road to travel becoming constitutionally entrenched.

Moving forward, as Canada increasingly sought full independence from the United Kingdom, indigenous peoples would not become heavily involved in constitutional discussions until 1978 (Borrows, 2016: 115). During this period, in an effort to be included, indigenous communities mobilized in support of the recognition of their rights within the Canadian constitutional framework. These movements would take the form of the 'Constitutional Express' where 500 indigenous participants marched from Vancouver to Ottawa and various other attempts to get invited to the discussion tables with federal and provincial governments (Borrows, 2016: 116-117).

Finally, the *Constitution Act, 1982*, section 35(1) would uphold that the "existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed" (*Constitution Act, 1982*). For the purposes of this Act, section 35(2) confirms that "aboriginal peoples of Canada" refers to the Indian, Inuit and Métis communities within Canadian borders (*Constitution Act, 1982*). While this section of the *Constitution Act, 1982*, represented formal recognition and protection of indigenous rights within Canada, the subsequent interpretation from the judiciary of what section 35 rights would encompass within the Canadian constitutional landscape would fall short of hopeful expectations (Walkem & Bruce, 2003: 224-225).

Methods of Constitutional Interpretation

The two methods of constitutional interpretation that will be examined in this paper are the living-tree approach and the doctrine of originalism. First, the utilization of the living-tree approach stems from the idea that the interpretation of the constitution should not be rooted in the

original intentions of the framers who drafted the document (Hogg, 1987: 97). Instead, the living-tree approach calls for the progressive interpretation of constitutional matters, in order to allow for the "growth and expansion [of the constitution] within its natural limits" (Hogg, 1987: 98).

As examined by Bradley Miller, this method of interpretation encompasses a notion of "progressive interpretation" calling for the language and ideas within the constitution to be continuously interpreted to match new realities and circumstances (Miller, 2009: 335). The living-tree approach also calls for a "purposive approach to interpretation" (Miller, 2009: 339). Using the purposive approach, the courts disregard the intended purpose of the framers and instead, aim to identify the larger purpose of the specific guarantee and thus provide "individuals [with] the full benefit" and protection possible (Miller, 2009: 339-340). Finally, while the living-tree approach may appear to place no weight in the history or the intentions of the past, as constitutional scholar Peter Hogg identifies, all interpretation still "must be anchored in the historical context of the provision (2017, 15-50; also Miller, 2009: 343, 349). Notwithstanding this, while there is some place for the original intent of the framers, their intentions are by no means binding on the courts eventual decision (Hogg, 2017, 15-50; Miller, 2009: 343, 349). Thus, a constitution is forever a "work-in-progress" as this method of judicial interpretation enables progressive and constant adaptation and modernization of the living document (Borrows, 2017: 123).

In a contrasting sense, the doctrine of originalism places greater emphasis on the original or historic meanings and intentions of a constitution. This method rose to prominence around the 1970s in the United States as conservatives aimed to ensure constitutional interpretation stayed true to the past (Borrows, 2017: 122). Two common approaches are taken under the originalist approach: either the document is to be interpreted to satisfy the intent of the original framers and draftsmen of the constitution, or it is to be interpreted in order to satisfy the aims of the original population under which the constitution was made for (Greene, 2009: 8). As noted by Jamal Greene, this method incorporates the idea of constant "constitutional fidelity" through resisting interpretations that incorporate aspects of "social change and judicial innovation" (2009: 8-9). Instead, judicial interpretation is focused on the intentions and purposes the original framers and peoples intended to instill upon the constitution (Greene, 209: 8-9). Thus, those utilizing this method of constitutional interpretation, seek to root their analysis in the historical context of the guarantee in order to provide meaning and direction aligned with the original intention of the document.

Two Methods, One Society: The Living Tree Approach & Originalism in Canadian Jurisprudence

As examined prior, two divergent methods dominate the landscape of constitutional interpretation. However, in Canada, as argued by scholars and as upheld by the Supreme Court of Canada itself, the living-tree approach firmly monopolizes the judicial landscape within Canada. In the case of *Ontario Hydro v. Ontario (Labour Relations Board),* the SCC affirmed that, "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" (para. 409). John Borrows has echoed this sentiment, stating that originalism has never obtained significant support within Canada and is largely deemed an unacceptable method of interpretation (2016: 130). Similarly, Peter Hogg has affirmed that through their decisions the highest Court in Canada has repeatedly upheld that, in their interpretation, "that the language of the constitution is not to be frozen" (1987: 97). Thus, it appears as though the support and utilization of the living-tree

approach within Canadian constitutional circles is over-whelming. In reality, however, through the examination of SCC decisions in matters involving non-indigenous claimants and matters involving indigenous claimants it becomes evident, two methods of interpretation actually exist.

To begin, in cases involving non-indigenous claimants, the highest court in Canada often acts prudently to ensure the Canadian Constitution continues to reflect the society governed by it. For example, in *Edwards v. Canada (Attorney General)*, more commonly referred to as the Persons Case; the Privy Council, which represented the highest court in Canada at the time, upheld that under section 24 of the *British North America Act, 1867* (now the *Constitution Act, 1867*) the words "qualified persons," included the eligibly of women for appointment to the Canadian Senate (para. 7). While this decision may not seem groundbreaking, it is a clear example of the living-tree approach, as a strict interpretation of the phrase "qualified persons" as intended in 1867 would clearly be limited to men (Borrows, 2016: 132). However, the Privy Council utilized a "large and liberal interpretation" that allowed for a natural growth in the term "qualified persons" that adapted to match the way in which women had been integrated into society (Borrows, 2016: 132). Similarly, in their decision handed down in the *Same Sex Marriage Reference*, the Court was asked to determine the constitutionality of same-sex marriage. Through adopting an originalist approach, "it would have been understood that marriage should be available only to opposite-sex couples" as intended by the original framers in 1867 (Borrows, 2016: 133). However, the SCC recognized the importance of modernizing the constitution on par with new societal realities and that cementing the constitution in "frozen concepts" ran contrary to the principle that "our Constitution is a living tree" (*Reference Re Same-Sex Marriage*, para. 22).

Finally, in *Re Employment Insurance Act*, the Court grappled with the new reality of women re-entering the workforce after having children, and in the 2005 decision they upheld that federal jurisdiction over employment insurance extended to covering women on maternity leave (Miller, 2009: 336-337). Once again, the Court adopted a living-tree approach, recognizing the need for the Constitution to change "with the needs of the labour force" (*Reference re Employment Insurance Act (Can.)*, para. 66). Thus, it is evident that in handling cases that involve non-indigenous claimants, the SCC has consistently and continually prescribed to the method of constitutional interpretation known as the living-tree approach; continually updating and modernizing the Canadian Constitution so that it reflects the continually changing landscape of the rights and realities of Canadian society.

In stark contrast, the Supreme Court of Canada's handling of cases involving indigenous claimants have been strictly rooted in the concepts of tradition, history, and the significance of the past. This has led to what scholar John Borrows has dubbed the concept of "(Ab)Originalism" in the interpretation of cases involving the section 35(1) rights of indigenous peoples (2016: 130). The first case to reach the SCC that invoked section 35(1) of the *Constitution Act, 1982* was *R. v. Sparrow* (Walkem & Bruce, 2003: 201). In the *Sparrow* decision, the SCC was asked to determine whether or not the Musquaem Indian Band in British Columbia possessed an aboriginal right, pursuant to section 35(1) of the *Constitution Act, 1982*, to fish for food (*R. v. Sparrow*, para. 1-3; Walkem & Bruce, 2003: 201). While the Court ruled in favour of the indigenous claimant, their reasoning was rooted in the fact the community could show a past connection to the land and historical evidence of their fishing patterns (Macklem, 2001: 162-163). In subsequent cases such as, *R. v. Van der Peet*, Dorothy Van der Peet of the Sto:lo nation argued she had an aboriginal right under section 35(1) of the *Constitution Act, 1982* to sell fish (*R. v. Van der Peet*, para. 5-6). The use of the doctrine of originalism would be firmly cemented in the case of *R. v. Van der Peet*, through the establishment of what would come to be known as the 'Van der Peet Test'. Pursuant

to this three step test, indigenous claimants must show "the existence of an aboriginal right", that the practice, custom, or tradition is "of central significance to the aboriginal society in question", and that a continuity exists between the claimed practice and the practice that existed pre-contact with the Europeans (*R. v. Van der Peet*, para. 50, 54, 59).

This "integral to a distinctive culture" standard, rooted in customs, practices, and traditions solely of the past, would go on to be applied to countless SCC decisions involving indigenous claimants and further cement the doctrine of originalism (Borrows, 2017: 120). For example, in 1993 case of *R. v. Powley*, Steve Powley and his son sought to uphold their right as members of the Métis community to hunt for moose in the area of Sault Ste. Marie, Ontario (para. 6). In order to accomplish this task, the Powleys had to turn to history, and provide evidence to the courts that there was a clear link between their modern practice of hunting and the hunting patterns of their ancestors (*R. v. Powley*, para. 41, 45, 37). This has led to Métis rights claimants to feel the Courts are seeking "an unreasonably narrow" definition of what constitutes community and land ownership in direct opposition to the meaning the Métis people have (Sloan, 2016: 145). This constant need for aboriginal claimants to turn to history has had real and recognizable impact on the ability of aboriginal claimants to further the protection of their rights. For instance, in cases where the decision handed down in *Powley* was applied, only three claimants out of a total of 50 cases were successful in their trials (Sloan, 2016: 145).

In the 2001 case of *Mitchell v. Minister of National Revenue (M.N.R.)*, Grand Chief Michael Mitchell of the Mohawk of Akwesasne held he possessed an aboriginal right to transport goods for trade across the US-Canada border without being required to pay customs duties on the items (para. 1-2). While the territory of the Mohawk of Akwesasne transects the US-Canada border, the group's rights to mobility and trade across this territory were established in both the Jay Treaty and the Treaty of Ghent (Mitchell, 1989: 112). However, the claimant in this case would fall victim to the aforementioned *Van Der Peet* Test, as Canada's highest court deemed that "this practice [of trading] was neither a defining feature of their [past] culture nor vital to their collective identity" therefore no aboriginal right could be present (*Mitchell v. MNR)*. Furthermore, in the case of *Delgamuukw v. Attorney General of British Columbia*, Indigenous claimants argued they held aboriginal title to approximately 58,000 square kilometres of territory in the province of British Columbia (para. 7). Although the case was lost on a technicality, Chief Justice Lamer still affirmed that an indigenous claimant must identify "that [they] occupied the lands in question at the time at which the Crown asserted sovereignty over the land" (*Delgamuukw v. Attorney General of British Columbia,* para. 144).

Thus, evidencing the Court's insistence on rooting any potential for the existence of an indigenous right to a specific and unchangeable moment in history (Borrows, 2017: 128). This has created a necessity within cases involving aboriginal claimants in which these claimants must reach back into the past to somehow prove the legitimacy of their rights as they exist in present day. Overall, while some indigenous claimants have been successful in obtaining recognition of their rights under section 35(1), in a larger sense, the necessity to root indigenous rights in "pre-contact" terms negatively impacts the potential for progression and modern recognition of indigenous communities and their rights (Macklem, 2001: 163-164).

Rooted in the Past: Preventing Progression & Modernization of Indigenous Rights

Through the examination of both SCC decisions involving indigenous and non-indigenous claimants it becomes clear the jurisprudence differs dramatically. Not only do these approaches

differ, but, as examined by Ardith Walkem, through adopting an approach of originalism in matters regarding indigenous claimants, the highest court in Canada has sharply hindered the modernization of indigenous rights and has actively restricted the "constitutional, political, and legal space available to Indigenous Peoples within Canada" (Walkem & Bruce, 2003: 216). Thus creating an impossibility for the recognition of "contemporary" claims to indigenous rights when the courts would never refuse recognizing the present-day rights of other identifiable groups such as women, gay, or lesbian persons (Borrows, 2017: 115). Moreover, unlike the interpretation and recognition of non-indigenous claimants' rights, indigenous communities and their rights become "problematically rooted in abstract reasoning" that further divides and segregates them from the realities faced by other Canadians as the SCC continually invokes the necessity of historical significance and continuity (Borrows, 2016: 4).

Additionally, through minimizing the space indigenous rights are permitted to occupy, the Court only affirms the over-arching authority of the state (Walkem and Bruce, 2003: 216). As examined by Dawnis Kennedy, "The [Van der Peet] test [Lamer C.J.C.] develops…hinders the ability of Canadian courts to achieve" any level of civil engagement with indigenous peoples in Canada (2007: 85). Clearly, exposing a paradigmatic relationship between the Crown and indigenous peoples that is only further cemented through succeeding decisions handed down by the SCC in their interpretation of the section 35(1) rights of indigenous peoples (Walkem & Bruce, 2003: 216). As highlighted by Audra Simpson, this discourse exposes a larger paradigm where settler law and resulting rights are usually, if not always, placed ahead of the rights and law of indigenous peoples (2008: 191). Thus, not only does the SCC maintain an originalist approach to handling cases involving indigenous claimants, in essence, the Court has actively harmed the progression of indigenous communities within Canadian borders by recognizing them only as "past-tense peoples" and failing to recognize the potential and allow for the recognition of their progressive rights and entitlements (Borrows, 2017: 120).

In a time when the Canadian state is emphasizing the need for reconciliation, the judicial branch of the state is ensuring that very goal stays fully out of reach. With their repeated and steadfast insistence on utilizing the doctrine of originalism the Canadian government is effectively creating what Shin Imai deems a "disincentive to negotiate" (2003: 309). Imai believes this disincentive is created when courts continually rely on historical evidence to solve what are largely contemporary issues (2003: 320-321). Instead of encouraging open and productive communication this framework continuously hinders the rights and interests of indigenous groups in favour of the rights and interests of the state's apparatus. Thus, without the necessary advancements in the Canadian courts this fractured relationship with continually permeate and place stress on an already tenuous relationship between indigenous groups and the Canadian state.

Conclusion

In theory, the Supreme Court of Canada endorses the utilization of a living-tree approach that seeks to progressively and purposefully interpret the Canadian Constitution, creating a living document that naturally grows and evolves with Canadian society. In actuality, it becomes clear that in matters involving indigenous claimants versus non-indigenous claimants, the Supreme Court of Canada has actually adopted two distinct methods of constitutional interpretation. In instances involving indigenous claimants, the Supreme Court adopts an originalist doctrine, seeking to root and freeze indigenous rights in the past or in a specific historical moment. This is accomplished through requiring indigenous claimants to showcase historical significance and

historical continuity of any potential right they seek to actualize. Not only is it clear that the Court utilizes divergent methods to interpret these cases, the negative impact on the recognition of contemporary indigenous rights and the relationship between indigenous communities and the state also becomes plainly apparent. While an optimal concept of justice promises to serve the public blindly, impartially and consistently, the Canadian reality has proven to be removed from this ideal perspective through utilizing dual methods of interpretation dependent on the claimant of the case. Thus, while non-indigenous peoples have seen their rights grow, flourish, and modernize in line with a living-tree approach to constitutional interpretation, indigenous peoples within Canada have seen their rights constricted and fixed in the past under the doctrine of originalism.

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