Justice Scalia’s Impact on Canadian Jurisprudence

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I. Introduction

Few American legal figures have attracted as much celebrity or notoriety as Justice Antonin Scalia. Since his unexpected death in February 2016, professors, lawyers and judges have continued to debate his influence on American legal thought. With the confirmation of Justice Amy Coney Barrett and the consequent entrenchment of a conservative majority on the Supreme Court of the United States (“SCOTUS”), debates over Justice Scalia’s legacy will only intensify in the years to come.

To date, few observers have focused on how Justice Scalia impacted jurisprudence outside of the United States.[1] Given the transnational influence of American legal thought, Justice Scalia’s legacy is unlikely to remain an exclusively American one. This essay focuses on Justice Scalia’s impact on Canadian jurisprudence. At first glance, Justice Scalia’s approaches seem distinctly un-Canadian. One pundit opined that he “would have been ‘a fish out of water’ on the bench of the Supreme Court of Canada”.[2] The dominant mode of Canadian constitutional interpretation — living constitutionalism[3] — seemingly represents the diametric opposite of Justice Scalia’s originalism.

Contrary to this narrative, this paper argues that Justice Scalia has left a modest mark on Canadian jurisprudence. This paper first sets forth the key tenets of Justice Scalia’s legal philosophy. It then examines how Canadian courts have directly referenced Justice Scalia. Finally, this paper assesses Justice Scalia’s indirect influence on Canadian law, arguing that various elements of his approach are consonant with Canadian norms of statutory and constitutional interpretation.

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[1] But see Adam Dodek, “How Scalia’s Scathing Attacks Boosted Canada’s Constitution” (February 16, 2016), *Ottawa Citizen*, online: <https://ottawacitizen.com/opinion/columnists/dodek-how-scalias-scathing-attacks-boosted-canadas-constitution>; Mark Warner, “Scalia: More ‘Canadian’ Than You Might Think” (February 19, 2016), *Policy Options*, online: <https://policyoptions.irpp.org/2016/02/19/scalia-more-canadian-than-you-might-think/>.

[2] Ainslie Cruickshank, “Scalia’s Judicial Philosophy in Sharp Contrast to SCC” (February 15, 2016), *iPolitics*, online: <https://ipolitics.ca/2016/02/15/scalias-judicial-philosophy-in-sharp-contrast-to-scc/>.

[3] See *R. v. Comeau*, [2018] 1 S.C.R. 342, 2018 SCC 15, at para 52 (S.C.C.).

II. JUSTICE SCALIA AND THE LAW

In the public eye, Justice Scalia is associated with the substantive content of his jurisprudence: few will forget his vociferous dissents in cases like *Lawrence v. Texas*,[4] in which he refused to strike down a Texas sodomy law, or *Roper v. Simmons*,[5] where he refused to find unconstitutional the execution of juvenile offenders. As this essay will demonstrate, Canadian courts have in several cases referred to Justice Scalia's substantive conclusions of law; such references are incidental, however, and do not necessarily reflect agreement with his substantive views. An evaluation of Justice Scalia's impact on Canadian jurisprudence must consequently focus on his procedural or interpretive approaches rather than on his substantive conclusions of law, especially since Canadian law has resolved or foreclosed many of the substantive issues — such as the death penalty or same-sex marriage — about which Justice Scalia was most passionate. Justice Scalia emphasized two key interpretive concepts: originalism and textualism. In his conception, the former applied to constitutional interpretation and the latter to statutory interpretation.[6] Originalism and textualism are "closely allied schools of interpretation";[7] in both contexts, "the principles aim to discern the meaning that a legal provision had at the time it was adopted."[8]

Justice Scalia publicly advocated for a form of originalism known as "public meaning originalism".[9] According to public meaning originalists, the U.S. Constitution has a "fixed meaning, which does not change (except by constitutional amendment)"; the provisions of the Constitution "mean today what they meant when they were adopted".[10] As Keith Whittington notes, rather than focus on the "concrete intentions of individual drafters of constitutional text", public meaning

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[4] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[5] *Roper v. Simmons*, 543 U.S. 551 (2005).

[6] See Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws" in Amy Guttmann, ed., *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) 3, at 23, 37-38 (and in particular on treating constitutional interpretation as a "distinctive problem", at 37).

[7] William Michael Treanor, "Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's *Bill of Rights*" (2007) 106 Mich. L. Rev. 487, at 495.

[8] Jeffrey S. Sutton & Edward Whelan, eds., *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law* (New York: Crown Forum, 2020), at 25.

[9] See Lawrence B. Solum, "What Is Originalism? The Evolution of Contemporary Originalist Theory" in Grant Huscroft & Bradley W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 12, at 22-23.

[10] Jeffrey S. Sutton & Edward Whelan, eds., *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law* (New York: Crown Forum, 2020), at 12.

originalists focus on the "textual meaning of the document" at the time of enactment.[11]

The shift to public-meaning originalism occurred because older forms of originalism, which focused on the original intent of the Constitution's Framers or on the original expected applications of a provision, appeared increasingly untenable. Randy Barnett has noted that these older forms of originalism were impractical in part because "it is impossible to discover and aggregate the various intentions held by numerous framers".[12] Of course, Justice Scalia was often irregular in his applications of originalism: although he might have flown the banner of public meaning originalism, he often retreated towards the doctrines of original intent and expected applications, which he so often decried.[13] Yet despite his methodological inconsistencies, the "conventional story" undoubtedly associates Justice Scalia closely with public-meaning originalism.[14]

In an influential treatise on statutory interpretation co-authored with Bryan Garner, Justice Scalia further championed the concept of textualism.[15] In *Reading Law*, Garner and Justice Scalia stated that to be a textualist is to "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extra-textually derived purposes and the desirability of the fair reading's anticipated consequences".[16] They articulated a number of interpretive canons that, when applied properly, would prevent judges from inserting their "own thoughts into texts".[17] Justice Scalia was particularly opposed to reliance on legislative history as a tool of statutory interpretation, warning that legislative history could not serve as a "genuine indication of the will" of the legislature.[18]

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[11] Keith Whittington, "The New Originalism" (2004) 22 Geo. J.L. & Pub. Pol'y. 599, at 609-10.

[12] Randy E. Barnett, "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism" (2006) 75 U. Cin. L. Rev. 7, at 8.

[13] See Thomas Colby, "The Sacrifice of the New Originalism" (2011) 99 Geo. L.J. 713, at 773; Jamal Greene, "The Age of Scalia" (2016) 130 Harv. L. Rev. 144, at 155.

[14] Lawrence B. Solum, "What Is Originalism? The Evolution of Contemporary Originalist Theory" in Grant Huscroft & Bradley W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 12, at 22-23.

[15] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012).

[16] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), at xxvii.

[17] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), at 9, 33.

[18] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United

These twin approaches — originalism and textualism — were both means to an end. According to Justice Scalia, judges who applied originalism and textualism would manifest judicial constraint, a trait integral to the preservation of the separation of powers and ultimately, to democracy itself.[19]

III. JUSTICE SCALIA'S DIRECT INFLUENCE ON CANADIAN JURISPRUDENCE

One important — though not dispositive — method of measuring Justice Scalia's influence on the Canadian justice system is to track courts' direct references to his legal opinions or extra-judicial writings. Canadian courts have referenced Justice Scalia in 38 cases.[20] This section analyzes that dataset both quantitatively and

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States Federal Courts in Interpreting the Constitution and Laws" in Amy Guttmann, ed., *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) 3, at 31, 35.

[19] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), at 82.

[20] *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, [2014] A.J. No. 110, 2014 ABQB 66 (Alta. Q.B.); *Alberta v. McGeady*, [2014] A.J. No. 171, 2014 ABQB 104 (Alta. Q.B.); *Bellatrix Exploration Ltd. (Re)*, [2020] A.J. No. 1453, 2020 ABQB 809 (Alta. Q.B.); *Bizon v. Bizon*, [2014] A.J. No. 530, 2014 ABCA 174 (Alta. C.A.); *Bondfield Construction Co. v. The Globe and Mail*, [2018] O.J. No. 1639, 2018 ONSC 1880 (Ont. S.C.J.); *BrettYoung Seeds Limited Partnership v. Dyck*, [2013] A.J. No. 567, 2013 ABQB 319 (Alta. Q.B.); *Byers v. Pentex Print Master*, [2003] O.J. No. 6 (Ont. C.A.); *Canada v. Canada North Group Inc.*, [2019] A.J. No. 1154, 2019 ABCA 314 (Alta. C.A.); *Cartwright v. Rocky View County Subdivision and Development Appeal Board*, [2020] A.J. No. 1262, 2020 ABCA 408 (Alta. C.A.); *Composite Technologies Inc. v. Shawcor Ltd.*, [2017] A.J. No. 518, 2017 ABCA 160 (Alta. C.A.); *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.); *Friedmann v. MacGarvie*, [2012] B.C.J. No. 2314, 2012 BCCA 445 (B.C.C.A.); *Hamilton v. Conrad Estate*, [2015] N.B.J. No. 315, 2015 NBQB 232 (N.B.Q.B.); *W. (L.M.) v. S. (S.L.)*, [2018] S.J. No. 72, 2018 SKQB 39 (Sask. Q.B.); *Lubberts Estate (Re)*, [2014] A.J. No. 660, 2014 ABCA 216 (Alta. C.A.); *Mackay v. Canada (Attorney General)*, [2010] F.C.J. No. 1016, 2010 FC 856 (F.C.); *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.); *Penner International Inc. v. Canada*, [2002] F.C.J. No. 1617, 2002 FCA 453 (F.C.A.); *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.); *R. v. Anugaa*, [2018] Nu.J. No. 2, 2018 NUCJ 2 (Nu. C.J.); *R. v. Arcand*, [2010] A.J. No. 1383, 2010 ABCA 363 (Alta. C.A.); *R. v. Bagot*, 1999 CanLII 4138 (Man. Prov. Ct.); *R. c. Charrron*, [2018] J.Q. no 5014, 2018 QCCS 2495 (Que. S.C.); *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263 (Alta. C.A.); *R. v. Hiscoe*, [2011] N.S.J. No. 615, 2011 NSPC 84 (N.S. Prov. Ct.); *R. v. Hughes*, [2020] Nu.J. No. 52, 2020 NUCA 15 (Nu. C.A.); *R. v. Joe*, [2016] Y.J. No. 73, 2016 YKTC 31 (Y.T. Terr. Ct.); *R. v. Lam*, [2003] A.J. No. 811, 2003 ABCA 201 (Alta. C.A.); *R. v. S. (K.)*, [2020] O.J. No. 3171, 2020 ONCJ 328 (Ont. C.J.); *R. v. Mills*, [2019] O.J. No. 6050, 2019 ONCA 940 (Ont. C.A.); *R. v. Walsh*, [2021] O.J. No. 602, 2021 ONCA 43 (Ont. C.A.); *Raywalt Construction Co. v. B. (J.R.)*, [2005] A.J. No. 1811, 2005 ABQB 989 (Alta. Q.B.); *Rheault v. Hammond*, [2013] A.J. No. 1001, 2013 ABQB 530 (Alta. Q.B.); *Robertson v. Edmonton (City) Police Service (#10)*, [2004] A.J. No. 805, 2004 ABQB 519 (Alta. Q.B.); *Rodriguez v. British Columbia (Attorney General)*, 1992

qualitatively. In terms of methodology, a search on the CanLII and Westlaw databases revealed 41 cases in which administrative bodies or courts referenced Justice Scalia. This section focuses only on court cases that referenced Justice Scalia. Of course, there may be additional cases that the search inadvertently missed.

A quantitative reading of the dataset indicates that two judges within the Canadian judicial system drive a sizable proportion of references to Justice Scalia and that references to him have increased in recent years. The cases in the dataset are geographically diverse and come from different court levels. Three of the cases were from the Supreme Court of Canada ("SCC") and 17 came from intermediate appellate courts. Half the cases came from either the Court of Queen's Bench of Alberta or the Court of Appeal of Alberta. Two judges were particularly apt to cite Justice Scalia: Justice Thomas Wakeling of the Alberta Court of Appeal referred to him in 11 opinions,[21] while Justice Jack Watson of the same court referenced him in three opinions.[22] There were three additional cases in which Justice Watson or Justice Wakeling signed a joint opinion or panel decision that cited Justice Scalia.[23] In terms of chronology, references to Justice Scalia have increased in recent years: only six of the cases date from before 2010, with the remaining 32 dating from 2010 and later.

Without any context, these trends are not particularly illuminating. A large number of references to Justice Scalia does not necessarily mean that a specific court or justice is originalist or textualist; to the contrary, a judge might refer to Justice Scalia in order to demonstrate how inappropriate his ideas are within the Canadian context. Similarly, the recent increase in references to Justice Scalia could prove

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CanLII 726 (B.C.S.C.); *Ross v. Ross*, [2013] A.J. No. 914, 2013 ABQB 490 (Alta. Q.B.); *Runkle v. Canada*, [2016] A.J. No. 200, 2016 ABCA 56 (Alta. C.A.); *Unifor, Local 707A v. SMS Equipment Inc.*, [2017] A.J. No. 230, 2017 ABCA 81 (Alta. C.A.).

[21] *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, [2014] A.J. No. 110, 2014 ABQB 66 (Alta. Q.B.); *Bizon v. Bizon*, [2014] A.J. No. 530, 2014 ABCA 174 (Alta. C.A.); *BrettYoung Seeds Limited Partnership v. Dyck*, [2013] A.J. No. 567, 2013 ABQB 319 (Alta. Q.B.); *Canada v. Canada North Group Inc.*, [2019] A.J. No. 1154, 2019 ABCA 314 (Alta. C.A.), Wakeling J.A., dissenting; *Cartwright v. Rocky View County Subdivision and Development Appeal Board*, [2020] A.J. No. 1262, 2020 ABCA 408 (Alta. C.A.); *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263 (Alta. C.A.); *Lubberts Estate (Re)*, [2014] A.J. No. 660, 2014 ABCA 216 (Alta. C.A.); *Alberta v. McGeady*, [2014] A.J. No. 171, 2014 ABQB 104 (Alta. Q.B.); *Rheault v. Hammond*, [2013] A.J. No. 1001, 2013 ABQB 530 (Alta. Q.B.); *Ross v. Ross*, [2013] A.J. No. 914, 2013 ABQB 490 (Alta. Q.B.); *Unifor, Local 707A v. SMS Equipment Inc.*, [2017] A.J. No. 230, 2017 ABCA 81 (Alta. C.A.).

[22] *Bellatrix Exploration Ltd. (Re)*, [2020] A.J. No. 1453, 2020 ABQB 809 (Alta. Q.B.); *R. v. Hughes*, [2020] Nu.J. No. 52, 2020 NUCA 15 (Nu. C.A.); *Raywalt Construction Co. v. B. (J.R.)*, [2005] A.J. No. 1811, 2005 ABQB 989 (Alta. Q.B.).

[23] *R. v. Arcand*, [2010] A.J. No. 1383, 2010 ABCA 363 (Alta. C.A.); *Composite Technologies Inc. v. Shawcor Ltd.*, [2017] A.J. No. 518, 2017 ABCA 160 (Alta. C.A.); *Runkle v. Canada*, [2016] A.J. No. 200, 2016 ABCA 56 (Alta. C.A.).

meaningless if Canadian courts are only referring to him in passing. It is thus important to read these quantitative patterns in context. A qualitative analysis of these cases indicates that Justice Scalia's impact has been modest — that is, neither negligible nor overwhelming. Many Canadian courts and justices have found great value in his prescriptions on statutory interpretation. Generally, those same actors have been less swayed by his originalism or substantive conclusions of law, although there are notable exceptions.

In over half of the surveyed cases, Canadian courts or justices referred to Justice Scalia's views on textualism.[24] Generally, such references were positive, with those actors relying on passages from *Reading Law*, for example, to buttress their conclusions. One helpful example comes in *Ross v. Ross*: Wakeling J.A., in interpreting section 17(4) of the *Divorce Act*, drew on Garner and Justice Scalia's guidance on the omitted-case canon, whereby a "matter not covered is not covered".[25] Such a reference can hardly be termed controversial, since Wakeling J.A. drew on similar guidance from a classic Canadian treatise.[26]

Some courts referenced Justice Scalia's views on textualism while simultaneously distinguishing between the Canadian and American approaches to statutory interpretation. In *Runkle v. Canada*, for example, Costigan, Watson and Wakeling JJ.A. of the Court of Appeal of Alberta noted that Justice Scalia "was well known for his resistance to consideration of legislative debates as an interpretive tool in relation to legislation", but acknowledged that "Canada's traditions are more hospitable to

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[24] *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, [2014] A.J. No. 110, 2014 ABQB 66 (Alta. Q.B.); *R. v. Arcand*, [2010] A.J. No. 1383, 2010 ABCA 363 (Alta. C.A.); *Bellatrix Exploration Ltd. (Re)*, [2020] A.J. No. 1453, 2020 ABQB 809 (Alta. Q.B.); *BrettYoung Seeds Limited Partnership v. Dyck*, [2013] A.J. No. 567, 2013 ABQB 319 (Alta. Q.B.); *Canada v. Canada North Group Inc.*, [2019] A.J. No. 1154, 2019 ABCA 314 (Alta. C.A.); *Cartwright v. Rocky View County Subdivision and Development Appeal Board*, [2020] A.J. No. 1262, 2020 ABCA 408 (Alta. C.A.); *R. c. Charrron*, [2018] J.Q. no 5014, 2018 QCCS 2495 (Que. S.C.); *Composite Technologies Inc. v. Shawcor Ltd.*, [2017] A.J. No. 518, 2017 ABCA 160 (Alta. C.A.); *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.); *Hamilton v. Conrad (Estate)*, [2015] N.B.J. No. 315, 2015 NBQB 232 (N.B.Q.B.); *R. v. Hughes*, [2020] Nu.J. No. 52, 2020 NUCA 15 (Nu. C.A.); *Alberta v. McGeady*, [2014] A.J. No. 171, 2014 ABQB 104 (Alta. Q.B.); *Lubberts Estate (Re)*, [2014] A.J. No. 660, 2014 ABCA 216 (Alta. C.A.); *R. v. Mills*, [2019] O.J. No. 6050, 2019 ONCA 940 (Ont. C.A.); *Raywalt Construction Co. v. B. (J.R.)*, [2005] A.J. No. 1811, 2005 ABQB 989 (Alta. Q.B.); *Rheault v. Hammond*, [2013] A.J. No. 1001, 2013 ABQB 530 (Alta. Q.B.); *Ross v. Ross*, [2013] A.J. No. 914, 2013 ABQB 490 (Alta. Q.B.); *Runkle v. Canada*, [2016] A.J. No. 200, 2016 ABCA 56 (Alta. C.A.); *Unifor, Local 707A v. SMS Equipment Inc.*, [2017] A.J. No. 230, 2017 ABCA 81 (Alta. C.A.); *R. v. Walsh*, [2021] O.J. No. 602, 2021 ONCA 43 (Ont. C.A.).

[25] *Ross v. Ross*, [2013] A.J. No. 914, 2013 ABQB 490, at para. 27 (Alta. Q.B.). *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[26] *Ross v. Ross*, [2013] A.J. No. 914, 2013 ABQB 490, at para. 27 (Alta. Q.B.).

courts using legislative debates for such purposes".[27] The Court did not blindly rely on an inapposite statutory tradition but engaged carefully with Justice Scalia's prescriptions. Thus, while Canadian courts have at times engaged with Justice Scalia's textualism, they tend to do so in a cautious and cabined way.[28] Canadian courts do not necessarily rely on Justice Scalia's interpretive canons to displace a traditional Canadian understanding of the law, but often reference him to buttress a conclusion that they likely would have reached regardless.

In a handful of cases, Canadian courts referred to Justice Scalia's notions of judicial philosophy and constitutional interpretation.[29] In *Ontario (Attorney General) v. G*, the SCC found that an Ontario statute contravened section 15 of the *Canadian Charter of Rights and Freedoms*, which guarantees equality rights.[30] The Court divided, however, on how to structure the remedy. Whereas the majority articulated four core remedial principles that ought to structure the exercise of remedial discretion under section 52(1) of the *Constitution Act, 1982*, Côté and Brown JJ. rejected the four-factor approach in their joint dissent and argued that section 52, which is narrowly worded, ought to result in "immediate declarations of invalidity".[31]

The dissent quoted at length from Justice Scalia's essay, "The Rule of Law as a Law of Rules".[32] In the quoted excerpts, Justice Scalia argued that when an appellate judge decides an issue on the "basis of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law".[33] The dissent echoed Justice Scalia's suspicion of a totality-of-the-circumstances approach, arguing that section 52(1) was clear: "Our Constitution makes an exact pronouncement on the matter of suspended declara-

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[27] *Runkle v. Canada*, [2016] A.J. No. 200, 2016 ABCA 56, at para. 12 (Alta. C.A.).

[28] See, *e.g.*, *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, [2014] A.J. No. 110, 2014 ABQB 66, at paras. 61-62 (Alta. Q.B.); *Unifor, Local 707A v. SMS Equipment Inc.*, [2017] A.J. No. 230, 2017 ABCA 81, at paras. 72-74 (Alta. C.A.).

[29] See, *e.g.*, *Anu R. v. Anugaa*, [2018] Nu.J. No. 2, 2018 NUCJ 2 (Nu. C.A.); *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.); *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

[30] *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

[31] *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38, at para. 237 (S.C.C.), Côté and Brown JJ. dissenting in part.

[32] Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U. Chicago. L. Rev. 1175.

[33] Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U. Chicago. L. Rev. 1175, at 1182.

tions: they are exceptional."[34] By injecting "ill-conceived" factors into the section 52(1) analysis, Côté and Brown JJ. argued, the majority's formulation would ultimately promote "uncertainty and unpredictability".[35] Given how common multi-factored tests are in Canadian constitutional jurisprudence, the dissent's decision to stand with Justice Scalia is significant: *Ontario (Attorney General) v. G* indicates that certain Canadian judges have not only referred to Justice Scalia in simple cases of statutory construction, but also relied on him when making higher-order arguments concerning the judicial role or constitutional interpretation.

Unsurprisingly, Canadian judges have also attacked Justice Scalia's notions of constitutional interpretation or the judicial role. In the SCC's decision in *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, which focused partially on the role of international law in Canadian constitutional interpretation, Abella J. criticized Justice Scalia's attitude towards foreign law.[36] Noting that Justice Scalia had "sought to curtail the influence and use of international sources", Abella J. warned in her concurrence that the placement of "unnecessary barriers in the way of access to international and comparative sources gratuitously threatens to undermine Canada's leading voice internationally in constitutional adjudication".[37] Justice Abella's reference to Justice Scalia in *Quebec (Attorney General)* starkly contrasts with Côté and Brown JJ.'s positive reference to him in *Ontario (Attorney General)*.

Finally, in almost half of the surveyed cases, Canadian courts engaged with Justice Scalia's substantive conclusions of law.[38] Given Canadian courts' regular consideration of foreign law, this is not particularly surprising. Usually, Canadian

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[34] *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38, at para. 244 (S.C.C.).

[35] *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38, at paras. 248, 251 (S.C.C.).

[36] *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

[37] *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, [2020] S.C.J. No. 32, 2020 SCC 32, at para. 105 (S.C.C.).

[38] *R. v. Bagot*, 1999 CanLII 4138 (Man. Prov. Ct.); *Bizon v. Bizon*, [2014] A.J. No. 530, 2014 ABCA 174 (Alta. C.A.); *Bondfield Construction Co. v. The Globe and Mail*, [2018] O.J. No. 1639, 2018 ONSC 1880 (Ont. S.C.J.); *Byers v. Pentex Print Master*, [2003] O.J. No. 6 (Ont. C.A.); *Friedmann v. MacGarvie*, [2012] B.C.J. No. 2314, 2012 BCCA 445 (B.C.C.A.); *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263 (Alta. C.A.); *R. v. Hiscoe*, [2011] N.S.J. No. 615, 2011 NSPC 84 (N.S. Prov. Ct.); *R. v. Lam*, [2003] A.J. No. 811, 2003 ABCA 201 (Alta. C.A.); *Mackay v. Canada (Attorney General)*, [2010] F.C.J. No. 1016, 2010 FC 856 (F.C.); *R. v. Joe*, [2016] Y.J. No. 73, 2016 YKTC 31 (Y.T. Terr. Ct.); *R. v. S. (K.)*, [2020] O.J. No. 3171, 2020 ONCJ 328 (Ont. C.J.); *W. (L.M.) v. S. (S.L.)*, [2018] S.J. No. 72, 2018 SKQB 39 (Sask. Q.B.); *Penner International Inc. v. Canada*, [2002] F.C.J. No. 1617, 2002 FCA 453 (F.C.A.); *Robertson v. Edmonton (City) Police Service (#10)*, [2004] A.J. No. 805, 2004 ABQB 519 (Alta. Q.B.); *Rodriguez v. British Columbia (Attorney General)*, 1992 CanLII 726 (B.C.S.C.).

courts did not go out of their way to cite Justice Scalia but rather cited relevant American cases that happened to feature an opinion by him. In one such case, the British Columbia Court of Appeal considered the majority opinion in the SCOTUS ruling in *Oncale v. Sundowner Offshore Services*, wherein Justice Scalia noted that same-sex sexual harassment could constitute sex discrimination.[39] Since Canadian courts often draw on the jurisprudence of SCOTUS, such incidental references to Justice Scalia may well continue as Canadian courts continue to engage in comparative legal analysis.

It is possible that in conducting comparative analyses, Canadian judges may find that a domestic legal approach is imperfect and should draw closer to the American example or, more specifically, to Justice Scalia's approach. For example, in the controversial case *R. v. Hills*,[40] Wakeling J.A. argued in his concurrence that the SCC ought to revise its reading of section 12 of the Charter, which stipulates: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Referencing Justice Scalia some 13 times, Wakeling J.A. accused the SCC of attributing to section 12 "a meaning the language cannot plausibly bear" and of acting "as if it were a member of the legislative branch of government".[41] In concluding that Canadian courts could only employ section 12 to strike down punishment that was *both* cruel and unusual, rather than punishment that was *either* cruel or unusual, Wakeling J.A. canvassed Justice Scalia's jurisprudence on "cruel and unusual punishment" and ultimately relied on a passage from Garner and Justice Scalia's *Reading Law*.[42] In future cases, Canadian judges might follow Wakeling J.A.'s lead and draw on Justice Scalia's jurisprudence to make the case that Canadian law over- or under-reaches.

The foregoing analysis has demonstrated that Canadian courts do habitually refer to Justice Scalia's jurisprudence. While such references are not necessarily common, they indicate that Justice Scalia has had a modest impact on Canadian jurisprudence. Certain Canadian judges have regularly drawn on Justice Scalia's vision of statutory interpretation, while referring less often to his views on constitutional interpretation or conclusions of substantive law. Given the regularity with which Canadian courts cite foreign jurisprudence,[43] it is likely that references to Justice Scalia will continue in years to come, with the bulk of those references focused on his textualist methods.

IV. JUSTICE SCALIA'S INDIRECT INFLUENCE ON CANADIAN JURISPRUDENCE

Direct references by Canadian courts are a clear, but imperfect measure of Justice

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[39] *Friedmann v. MacGarvie*, [2012] B.C.J. No. 2314, 2012 BCCA 445, at para. 33 (B.C.C.A.).

[40] *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263 (Alta. C.A.).

[41] *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263, at paras. 134, 144 (Alta. C.A.).

[42] *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263, at para. 209 (Alta. C.A.).

[43] Robert Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018), at 178.

Scalia's influence on the Canadian system. A full depiction of Justice Scalia's legacy must account for indirect mechanisms of influence too: in particular, how have Canadian courts responded to the ideas most associated with Justice Scalia's jurisprudence? If Canadian courts were firmly opposed to originalism and textualism, for example, then Justice Scalia's influence would clearly be negligible. By way of conclusion, this paper canvases recent scholarship and argues that Canadian courts are rather more receptive to both originalism and textualism than is traditionally appreciated. Indeed, there is room in Canadian jurisprudence for greater engagement with Justice Scalia's approaches.

According to the traditional narrative, originalism plays little to no role in Canadian constitutional interpretation.[44] Yet scholarship in recent decades has demonstrated that originalism is by no means foreign to Canadian constitutional interpretation.[45] Benjamin Oliphant and Leonid Sirota argue that "partly or even wholly originalist decisions are part and parcel of our constitutional law, and they are too numerous to be regarded as aberrations or wished away".[46] While Canadian courts have not applied originalism in a disciplined or consistent manner, they occasionally apply public meaning originalism, an approach that remains intimately connected to Justice Scalia.[47] The idea that Scalian originalism is somehow foreign to Canadian law is thus incorrect.

Similarly, Canadian jurisprudence is not entirely hostile to the textualist methods that Justice Scalia championed. While "no Canadian court will probably ever describe itself as textualist", Canadian methods of statutory interpretation are at least sometimes consonant with textualism.[48] For example, Côté J., writing for the majority in *MediaQMI Inc. v. Kamel*, has held that recourse to parliamentary history

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[44] See Ian Binnie, "Interpreting the Constitution: The Living Tree vs. Original Meaning" (October 1, 2007), *Policy Options*, online: <https://policyoptions.irpp.org/magazines/free-trade-20/interpreting-the-constitution-the-living-tree-vs-original-meaning/>; Robert Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018), at 239.

[45] See John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 S.C.L.R. 351; Adam M. Dodek, "The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits" (2008) 41 S.C.L.R. (2d) 331; Bradley W. Miller, "Beguiled by Metaphors: The Living Tree and Originalist Constitutional Interpretation in Canada" (2009) 22 Can. J.L. & Jur. 331.

[46] Leonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50 U.B.C. L. Rev. 505, at 510.

[47] Benjamin Oliphant & Leonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42 Queen's L.J. 107, at 138-41.

[48] Mark Mancini, "On Canadian Statutory Interpretation and Recent Trends" (July 20, 2020), online (blog): *Double Aspect* <https://doubleaspect.blog/2020/07/20/on-canadian-statutory-interpretation-and-recent-trends/>. See *Entertainment Software Assn. v. Society of Composers, Authors and Music Publishers of Canada*, [2020] F.C.J. No. 671, 2020 FCA 100,

cannot result in the "refusal to apply a clear rule". Where a statute sets forth a clear rule, "courts do not have to interpret — let alone implement — the objective underlying a legislative scheme or provision" but must instead interpret the "text through which the legislature seeks to achieve that objective".[49] In certain circumstances then, Canadian courts are obliged to treat the text as paramount when conducting statutory interpretation.

Mark Mancini, canvassing multiple cases, has pointed to a "new, reborn form of textualism in Canadian law that incorporates purpose but makes it a servant to text".[50] Of course, Canadian textualism differs in important respects from Scalian textualism. Notably, while Justice Scalia vehemently opposed the use of legislative debates in the process of statutory interpretation, Canadian courts have typically taken a more flexible approach towards legislative intention.[51] Yet the importance of text and, more specifically, of the "ordinary meaning of the text" in the Canadian context indicates that Canadian and Scalian textualism share at least some common principles.[52] This would explain why courts occasionally draw on Justice Scalia and Garner's prescriptions in *Reading Law*. Indeed, these prescriptions are by no means alien to Canadian statutory interpretation; many of the interpretive canons that Justice Scalia emphasized already inform Canadian jurisprudence.

Since originalism and textualism find ample expression in Canadian jurisprudence, the question emerges: should Canadian courts continue to reference Justice Scalia only in select and cabined circumstances or should they deal more forthrightly with his jurisprudence? The Canadian context is obviously unique. Our jurists should avoid engaging in hasty comparativism. But given that Canadian courts have, in certain contexts, employed textualist and originalist methods, it is also clear that Canadian jurisprudence has much to gain from engaging more directly with certain of Justice Scalia's ideas. For lawyers and judges who wish to challenge received Canadian wisdom on constitutional and statutory interpretation, Justice Scalia's writing may serve as a solid theoretical foundation. Conversely, recourse to Justice Scalia might help proponents of living tree constitutionalism and

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at paras. 33, 42-44 (F.C.A.); *TELUS Communications Inc. v. Wellman*, [2019] S.C.J. No. 19, 2019 SCC 19, at paras. 82-83 (S.C.C.).

[49] *MediaQMI inc. v. Kamel*, [2021] S.C.J. No. 23, 2021 SCC 23, at paras. 38-39 (S.C.C.).

[50] Mark Mancini, "On Canadian Statutory Interpretation and Recent Trends" (July 20, 2020), online (blog): *Double Aspect* <https://doubleaspect.blog/2020/07/20/on-canadian-statutory-interpretation-and-recent-trends/>.

[51] See Hon. David Stratas & David Williams, "The Bullet-Proof Administrative Decision-Maker: Maximizing the Chances of Surviving a Judicial Review" (2020; working paper), at 5, permalink: <https://dx.doi.org/10.2139/ssrn.3719276>. See also *MediaQMI inc. v. Kamel*, [2021] S.C.J. No. 23, 2021 SCC 23, at paras. 37-38 (S.C.C.).

[52] Hon. David Stratas & David Williams, "The Bullet-Proof Administrative Decision-Maker: Maximizing the Chances of Surviving a Judicial Review" (2020; working paper), at 4, permalink: <https://dx.doi.org/10.2139/ssrn.3719276>.

purposive statutory interpretation to defend the traditional tenets of Canadian legal theory more elegantly. If public meaning originalism is truly inappropriate for the Canadian context, the SCC — when the opportunity arises in the future — should clearly explain why this is so, while also acknowledging the ways in which Canadian constitutional law has relied on originalist concepts. Deeper engagement with Justice Scalia's jurisprudence will, at the very least, nourish the roots of the living tree.