Enduring Metaphors: The *Persons Case* and the Living Tree

*Peter C. Oliver**

In this article, the author subjects (now Justice) Bradley Miller's claims regarding the Persons Case *to further and better legal and historical light. The author demonstrates that the* Persons Case*, while written by Lord Sankey on behalf of his Privy Council colleagues and in that sense a product of its time, was indeed authority for a new, progressive method of constitutional interpretation, designed to be both respectful of the* 1867 Constitution *and responsive to a rapidly evolving Canadian society. The author demonstrates that it was certainly received in that way by many of the keenest legal observers of the period, most notably the judges of the Supreme Court of Canada who had been overturned in the* Persons Case*. Despite Miller's emphatic assertions to the contrary, the author argues that Lord Sankey's reasons reveal a reluctance to fix the meaning of "persons" in 1867, and a willingness to consider post-1867 evidence of changing understandings, from the ringing early reference to "the exclusion of women" being "a relic of days more barbarous than ours" through to the repeated references to post-1867 political understandings of the word "persons". The author shows how Lord Sankey's reasons, and, again, the way that they were received and repeated by contemporaneous legal observers, confirm that, contrary to Miller's most-repeated claim, it is the Constitution itself that is the living tree, not just conventions or custom. The author shows how the Privy Council in the 1930s and 40s, and the Supreme Court of Canada in the 1950s, as well as constitutional commentators throughout, continued to cite the* Persons Case *and employ living tree constitutionalism. These examples refute Miller's assertion that the* Persons

* Professor, Centre de droit public uOttawa Public Law Centre, Faculty of Law, University of Ottawa. The ideas discussed here were first set out in the Spring of 2015 in a paper presented in a session discussing "The Canadian Doctrine of the Living Tree" at the Faculty of Law, University of Oxford. An expanded version of that paper was presented at the I.CON-S Conference in Santiago, Chile in July 2019 and at the uOttawa-Queen's public law online works-in-progress event in May, 2021. Many thanks to participants in all of those sessions for insightful comments and suggestions, and particular thanks to Vanessa MacDonnell for typically perceptive and helpful written comments. Of course I alone am responsible for the arguments presented here and for any errors or omissions. I am grateful to Sarah Gagnon, Allison Lowenger, Nelly Farid and, most recently and most significantly, Manula Adhihetty, for excellent research assistance.

Case *was essentially forgotten after it was decided. Miller makes that assertion in order to support the claim that the* Persons Case *and the "living tree" were artificially and misleadingly revived in order to provide support for a new, more activist form of judicial review in the* Charter *era. The author also shows that the Supreme Court of Canada began to cite the* Persons Case *and the "living tree" more frequently in the 1970s well before the Charter was even a realistic prospect, in cases ranging from non-rights-related constitutional law to tax law.*

Given this weight of evidence, the author concludes that it is clearly wrong to give credence to Miller's claims of "hoax", "myths" and "faux-precedents". The Persons Case *is rightly celebrated as an important symbol of women's rights, and as a signpost for a new method of constitutional interpretation. Not only is it correct to continue referring to the Canadian Constitution as a living tree, but it is also fair to say, after almost 100 years, that this is indeed an enduring metaphor.*

I. The *Persons Case* and Living Tree Constitutionalism: Ongoing Influence and Recent Contestations
II. The *Persons Case* in the Supreme Court of Canada
III. The *Persons Case* in the Judicial Committee of the Privy Council
IV. How was the Privy Council Opinion in the *Persons Case* Understood at the Time?
V. The *Statute of Westminster*, the "Organic" Constitution, and "Changing Circumstances"
VI. The "Living Tree" Hiding in Plain Sight
VII. Living Tree Constitutionalism and Its Connection to New Legal Ideas
VIII. Conclusion: The Enduring Legacy of the "Living Tree"

I. The *Persons Case* and Living Tree Constitutionalism: Ongoing Influence and Recent Contestations

Canada is the home of progressive or living tree constitutionalism[1] in the eyes of many comparativists.[2] The prevalence of the living tree approach

1. See *Hunter et al v Southam Inc* [1984] 2 SCR 145 at 155, [1984] 6 WWR 577, Dickson CJC, for a representative and influential description of progressive or living tree constitutionalism in the Canadian courts:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. A constitution, by contrast, is drafted with an eye to the future . . . Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

Ibid.

The terms "progressive" and "living tree" interpretation are often used interchangeably. The term "living tree" will be preferred in this article given its direct linkage to the *Persons Case* (see *In the matter of a Reference as to the meaning of the word "persons" in Section 24 of the British North America Act, 1867*, [1928] 2 SCR 276, [1928] 4 DLR 98 [*Persons Case* SCC]; *Edwards v AG Canada*, [1929] UKPC 86, [1930] 1 DLR 98 [*Persons Case* JCPC cited to DLR]).

2. See e.g. Vicki C Jackson, "Constitutions as 'Living Trees'? Comparative Constitutional Law and Interpretive Metaphors" (2006) 75:2 Fordham L Rev 921 at 943; Aileen Kavanagh, "The Idea of a Living Constitution" (2003) 16:1 Can JL & Jur 55 at 55, nn 63, 71; Jeffrey Goldsworthy, "Constitutional Interpretation" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford, UK: Oxford University Press, 2012), 689 at 698–700; Mark Tushnet, "The *Charter*'s Influence Around the World" (2013)

in the jurisprudence of the Supreme Court of Canada and other Canadian courts is not in doubt,[3] and there continues to be a strong consensus amongst Canadian constitutional commentators in favour of that approach.[4]

50:3 Osgoode Hall LJ 527 at 540; Leonardo Pierdominici, "The Canadian *Living Tree Doctrine* as a Comparative Model of Evolutionary Constitutional Interpretation" (2017) 9:3 Perspectives on Federalism 851. See also Adam M Dodek, "Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism" (2007) 36 SCLR 309 at 321–22.

3. See e.g. in the twenty-first century at the level of the Supreme Court of Canada: *R v Demers*, 2004 SCC 46 at para 78; *Reference re Same-Sex Marriage*, 2004 SCC 79, at paras 22, 24, 26–28; *Reference re Employment Insurance Act (Can)*, ss 22–23, 2005 SCC 56 at paras 9–10; *Canada (Attorney General) v Hislop*, 2007 SCC 10, at paras 94–95; *Reference re Securities Ac*t, 2011 SCC 66 at para 56; *R v NS*, 2012 SCC 72 at para 72; *R v Comeau*, 2018 SCC 15 at paras 33, 39, 52, 83–84; *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at paras 76–78, Abella J, dissenting; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at 479, Rowe J, dissenting; *Reference re Code of Civil Procedure (Que)*, art 35, 2021 SCC 27 at paras 53, 89, Coté and Martin JJ, and 303–04, 330, Abella J, dissenting; *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 179, Abella J, dissenting. See also Consolidated *Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at para 89. Justice Binnie, dissenting, was of the view that the majority had not paid sufficient attention to that which the living tree approach requires, but the majority approach that he criticized has not been understood to signal a movement away from living tree interpretation, as the post-2009 cases cited above indicate (*ibid*). As stated by Asher Honickman, "The Living Fiction: Reclaiming Originalism for Canada" (2014) 43:3 Adv Q 329 at 341 [Honickman, "Living Fiction"]: "There can be no doubt that in the last generation, the living tree has become the primary (and the only officially accepted) method of constitutional interpretation." Honickman is referring (with disapproval) to the consensus regarding living tree (as opposed to originalist constitutional interpretation). Nothing here should give the impression that living tree interpretation is the only method used in Canada. On the variety of interpretative methods that is recognised by the Supreme Court of Canada, see *Comeau*, *supra* note 3 at 52.

4. See e.g. Ian Binnie, "Constitutional Interpretation and Original Intent" in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham, Ont: LexisNexis, 2004) 345; Peter Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough, Ont: Thomson Reuters/Carswell, 2007) (loose-leaf updated 2018, release 1) at 47–51; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Cowansville, QC: Éditions Yvon Blais, 2014) at para IV.60; Halsbury's Laws of Canada (online), *Constitutional Law (Charter of Rights)*, "Introduction: Interpretation of the Charter: General: Charter Interpretation" (I.4.(1)) at HCHR-6 (2019 Reissue) (Newman); "Fascicule 2: L'interprétation en droit constitutionnel" in M Samson, ed, JCQ *Droit public – Droit constitutionnel* (QL); Eugénie Brouillet & Alain-G. Gagnon, "La Constitution Canadienne et la métaphore de l'arbre vivant ; quelques réflexions

However, given the prevalence of the main competing theory of constitutional interpretation in our neighbour, the United States of America, it is not surprising that originalist critics of living tree constitutionalism have begun to appear in Canada. For example, in a few publications over the past decade or so,[5] Bradley Miller, now of the Ontario Court of Appeal, has claimed that the case that is the source of the term living tree, *Edwards v Canada (AG)* (the *Persons Case*),[6] is not the authority for living tree interpretation, and that, instead, it is consistent with originalism, or at the very least, with new originalism.[7] Canadians who think that the *Persons Case* supports living tree

---

politicologiques et juridiques" dans Alain-G Gagnon & Pierre Noreau, dir., *Constitutionnalisme, droits et diversité : Mélanges en l'honneur de José Woehrling* (Montréal : Thémis, 2017) 79; S Beaulac, "Constitutional Interpretation" in Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 867 at 869; W J Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (New York: Cambridge University Press, 2007); WJ Waluchow, "The Living Tree" in Oliver, Macklem & Rosiers, supra note 4; WJ Waluchow, "The Living Tree, Very Much Alive and Still Bearing Fruit: A Reply to the Honourable Bradley W Miller" (2021) 46:2 Queen's LJ 281 [Waluchow, "Living Tree, Very Much Alive"]. See also the statement quoted above in Honickman, Living Fiction, *supra* note 3.

5. See Bradley Miller, "Origin Myth: The *Persons Case*, the Living Tree, and the New Originalism" in Grant Huscroft & Bradley W Miller, eds, T*he Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge, New York: Cambridge University Press, 2011) 120 [Miller, "Origin Myth"]. See also Bradley W Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22:2 Can JL & Jur 331 [Miller, "Originalist Constitutional Interpretation"]; and, more recently, Bradley W Miller, "Constitutional Supremacy and Judicial Reasoning" (2020) 45:2 Queen's LJ 353 [Miller, "Constitutional Supremacy"].

6. *Persons Case* JCPC, *supra* note 1 at 106–07.

7. "Originalism" with respect to constitutional interpretation is the view that the meaning of a constitutional provision is fixed at the time at which it is drafted or enacted. Originalism has two main strands: "original intention" and "original public meaning" (also known as "new originalism"). Proponents of the original intention strand hold that the meaning of a constitutional provision is determined by the subjective intention of its drafters at the time at which it is drafted or enacted. Proponents of the original public meaning or new originalism strand hold that the meaning of a constitutional provision is determined by the meaning it had in public, among the population at large, at the time at which it was drafted or enacted. Proponents of this strand distinguish between "constitutional interpretation", which involves discerning the constitution's semantic content, and "constitutional construction", which involves determining the legal effect of the constitutional text. They accept that the original

interpretation have fallen for a "hoax",[8] according to Miller, a hoax perpetrated since 1982 by promoters of the *Canadian Charter of Rights and Freedoms (*the *Charter)*.[9] Miller makes a great deal of the supposedly awkward wording that Lord Sankey employed in the most famous phrase in the *Persons Case*: "The *British North America Act* planted in Canada a living tree."[10] Miller argues that

public semantic content of a constitutional provision may not fully specify how that provision should be applied in a particular case. In such cases, the meaning of the constitutional provision has to be "constructed" by appealing to considerations outside the public semantic meaning of that provision at the time at which it was drafted or enacted. See Lawrence Solum, "What is Originalism? The Evolution of Contemporary Originialist Theory" in Huscroft & Miller, *supra* note 5, 12 at 16–17, 22–24.

8. See Miller, "Origin Myth", *supra* note 5 at 145.

9. See *Ibid*. Miller's view that the *Persons Case* is not authority for living tree constitutional interpretation has been regularly cited by contributors to Canadian newspapers, blogs and legal publications, not to mention social media, though it has made no appreciable impact on Canadian judicial authority. See e.g. Scott Reid, "The court case that changed everything", (22 October 2012), online: *National Post* <nationalpost.com/opinion/scott-reid-the-court-casethat-changed-everything>; Asher Honickman, "If any leader changed the nature of the court it was Pierre Trudeau -- not Stephen Harper", online: *National Post* <nationalpost.com/opinion/asher-honickman-if-any-leader-changed-the-nature-of-the-court-it-was-pierre-trudeau-notstephen-harper>; Léonid Sirota, "Missing the Forest for the Living Tree" (15 October 2020), online (blog): *Double Aspect* <doubleaspect.blog/2020/10/15/missing-the-forest-for-theliving-tree/>; Honickman, "Living Fiction", *supra* note 3; Asher Honickman, "The Original Living Tree" (2019) 28:1 Constitutional Forum 29 at 29 [Honickman, "Original Living Tree"]; Asher Honickman, "The Original 'Living Tree'" in Advocates for the Rule of Law, online (blog): *Rule of Law* <www.ruleoflaw.ca/the-original-living-tree/>. Miller's view has also been cited with approval by Canadian scholars presenting a picture of Canadian constitutionalism to readers abroad, see e.g. Dwight Newman, "Judicial Power, Living Tree-ism, and Alterations of Private Rights by Unconstrained Public Law Reasoning" (2017) 36:2 UQLJ 247 at 248. More recently, articles generally supportive of Miller's take include Marshall Rothstein, "Checks and Balances in Constitutional Interpretation" (2016) 79:1 Sask L Rev 1; Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42:1 Queen's LJ 107; Léonid Sirota, "Purposivism, Textualism, and Originalism in Recent Cases on *Charter* Interpretation" (2021) 47:1 Queen's LJ 78 at 86. The focus in this article is on Bradley Miller's early publications regarding the *Persons Case*, due to those publications' apparent influence on later commentary.

10. *Persons Case* JCPC, *supra* note 1, 106–07 [emphasis added]— as does Honickman, "Living Fiction", *supra* note 3 at 332 for whom the conclusion that the Constitution is not the living tree is "utterly crucial".

the living" entity was not the *British North America Act, 1867* (the *BNA Act*)[11] (which could apparently not, on Miller's reading, *be* the tree and *plant* the tree), but the usages and constitutional conventions that made up the "constitution similar in principle to that of the United Kingdom",[12] to use the words of the preamble to the *BNA Act*. It follows, according to Miller, that the *Persons Case* cannot be authority for living tree interpretation of the *BNA Act* itself. Having, so to speak, taken the life out of interpretation of the text of the Constitution, at least in the eyes of readers who agree with him, Miller then goes on to say that Lord Sankey's reasons are in any event consistent with new originalism,[13] in that they focus on fixing the public meaning of the Constitution in 1867.

As it happens, and with respect, I do not find Miller's account at all convincing. Although Miller clearly thinks that the supposedly awkward syntax is full of significance, such that he repeats this point each time he writes about and criticizes living tree constitutionalism,[14] no judge (or commentator) at the time the *Persons Case* was decided and no judge since has noted, much less given credence to, this supposedly significant stylistic point. Some contemporary commentators criticizing living tree constitutionalism have of course embraced Miller's argument, as one might expect, but that is a very different thing.[15]

In my view, the famous wording—"[t]he *BNA Act* planted in Canada a living tree"—served an important purpose. By opting for this formulation, Lord Sankey was graciously and diplomatically shifting the focus away from the enacting institution, the United Kingdom Parliament, and onto the *BNA Act* itself, the document that Canadians had held a leading role in drafting. On that reading, it was the Canadian-dominated process of debate and compromise culminating in the *BNA Act*, rather than just the machinery in Westminster, that planted in Canada a living tree that would grow "within its natural limits",[16]

---

11. See (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (Now designated as *Constitution Act, 1867*, formerly *British North America Act, 1867*) [*BNA Act*]. Due to the historical focus of this paper, the latter designation is used below.

12. See Miller, "Origin Myth", *supra* note 5 at 132.

13. See *ibid* at 138–42. Miller and other new originalists would perhaps wish to argue that new originalism does not "take the life" out of the interpretation of the text, given that once the semantic meaning of the text has been fixed it is still possible to engage in *construction*. However, where any ambiguity in the semantic meaning of the text is fixed by having recourse to an original public meaning, the potential for construction is greatly reduced, or in some cases virtually non-existent. For a Canadian discussion of the importance of the distinction between new and old versions of originalism, see Oliphant & Sirota, *supra* note 9.

14. See Miller, "Origin Myth", *supra* note 5; Miller, "Originalist Constitutional Interpretation", *supra* note 5; most recently, Miller, "Constitutional Supremacy", *supra* note 5 at 366–67.

15. See sources cited in note 9.

16. *Persons Case* JCPC, *supra* note 1 at 107.

according to local circumstances (as opposed to those of the United Kingdom or British Empire and Commonwealth). Prepared in the interval between the *Balfour Declaration, 1926* and the *Statute of Westminster, 1931* and Canada's consequent acquisition of equal constitutional status to that of the United Kingdom, Lord Sankey's opinion was admirably sensitive to what would later be referred to as "constitutional autochthony".[17] Accordingly, there was[18]—and is[19]—nothing wrong with reading Lord Sankey's famous statement as most Canadian jurists do: the Constitution is a living tree. Similarly, one might say, "the *BNA Act* drew a blueprint for Canadian government", as a more satisfactory shorthand for the longer, more technical, legalistic sentence, "the Westminster Parliament drew a blueprint for Canadian government in the form of the *BNA Act*". A reader of the first sentence would of course be fully justified and correct in saying that the *BNA Act* itself is the blueprint. Pointing out that the *BNA Act* could not both draw the blueprint and be the blueprint would entirely miss the point.

Miller's other arguments regarding the *Persons Case* and living tree constitutionalism are very detailed, and they frequently relate to his anachronistic attempt to find "new originalism" in the *Persons Case*. It is not possible or helpful to work through those arguments point-by-point in this article, and it is not my intention here to debate the relative virtues of originalist versus living tree

17. On constitutional autochthony, see KC Wheare, T*he Constitutional Structure of the Commonwealth* (London, UK: Oxford University Press, 1960) at 89; P Oliver, "Autochthonous Constitutions" in R Grote, F Lachenmann, R Wolfrum, eds, *Max Planck Encyclopedia of Comparative Constitutional Law* (New York: Oxford University Press, 2017): Autochthony "refers to the fact that a constitution is, legally speaking, 'home grown' or rooted in native soil". By that it is meant that "the constitution owes its existence and authority to "local legal factors, rather than the fact of enactment by a foreign legal process". "According to Kenneth Robinson . . . autochthony turned on whether the constitution was 'home-made' in terms of its content." (*ibid* at paras 1, 3)

18. See *Reference re Regulation and Control of Radio Communication* [1931] SCR 541 at 546, [1931] 4 DLR 865 [*Radio Reference*], Anglin CJC: "On the other hand, *if the [British North America] Act is to be viewed*, as recently suggested by their Lordships of the Privy Council in *Edwards v. Attorney-General of Canada, as 'a living tree*, capable of growth and expansion within its natural limits" [emphasis added].

19. See e.g. the unanimous judgement of the Supreme Court of Canada in *Reference re Securities Act*, *supra* note 3 at para 56, citing Lord Sankey in *Persons Case* JCPC, *supra* note 1 at 136: "Privy Council jurisprudence also recognized that the Constitution must be viewed as a 'living tree capable of growth and expansion within its natural limits'." The Supreme Court of Canada then stated: [t]his metaphor has endured as the preferred approach in constitutional interpretation" (*Reference re Securities Act*, *supra* note 3 at 56).

interpretation.[20] Three arguments stand out, however. First, as noted, Miller argues that the *Persons Case* supports new originalism rather than living tree constitutional interpretation. He repeatedly insists: that "the Privy Council did not marshal any evidence of a change in the semantic meaning of 'person' since 1867"; that there is nothing in the reasons that suggests "that the court believed that any such change had occurred"; "that there is nothing within the reasons for judgment to suggest that the Privy Council believed that changes to a word's meaning subsequent to the enactment of a constitutional test could change the meaning"; and "that the Privy Council believed that semantic meaning is fixed (or frozen) as of 1867", despite clear evidence to the contrary, as we shall see.[21] Second, Miller tries very hard to leave his readers with the impression that the *Persons Case* was essentially forgotten in the years after it was decided. Third, he argues that the *Persons Case* and the living tree were only revived when *Charter* supporters sought to justify "a new, expanded methodology of judicial review".[22] So it may be useful to review what the *Persons Case* actually said, and to see whether it really was forgotten for fifty years only to be revived in the *Charter* era as Miller contends.

Accordingly, I propose to look in some detail at the Supreme Court of Canada and Judicial Committee of the Privy Council (hereinafter "the Privy Council") decisions in the *Persons Case*. Then, rather than simply rely on my own impressions, I will examine how the Privy Council opinion was understood by those contemporaneous to the opinion, notably by the Supreme Court of Canada that had been so unceremoniously overturned. Next, I will look at how the *Persons Cas*e was interpreted in the fifty or so years before the arrival of the *Charter*. Readers should then be in a position to make up their own minds about whether the *Persons Case* stands for living tree interpretation or some

20. For deeper engagement in the debate between living tree constitutionalism and originalism in Canada, see the various publications by Waluchow, supra note 4. For specific engagement with and rebuttal of Bradley Miller's arguments in favour of originalism, see Waluchow, "Living Tree, Very Much Alive", *supra* note 4.

21. Miller, "Origin Myth", *supra* note 5 at 138; Honickman, "Original Living Tree", *supra* note 9 at 29 (which follows Miller's conclusion and categorical mode of expression: "Whatever else may be said about the decision, the Privy Council was clearly *not* endorsing the principle that the meaning of the Constitution should change to reflect the values of modern society." [emphasis in the original]). For a similar statement, see Honickman, "Living Fiction" *supra* note 3 at 331, 333: "the Privy Council's approach in deciphering the meaning of 'persons' was entirely textualist".

22. Miller, "Origin Myth", *supra* note 5 at 138.

form of originalism, and whether we are victims of a hoax regarding the placement of the *Persons Case* at the source of that progressive stream of case law. The intention here is not to put a stop to the debate regarding constitutional interpretation in Canada, but to subject Miller's controversial claims to further and better legal and historical light. This analysis seems particularly timely and appropriate as we approach the century of the much-celebrated *Persons Case*.

II. The *Persons Case* in the Supreme Court of Canada

The enactment of the federal *Women's Franchise Act* in 1918 marked a key moment for women's suffrage in Canada.[23] It gave the right to vote to every woman who was a British subject over the age of twenty-one, provided that they could meet the same qualifications that applied to men.[24] Soon after, due in no small measure to the advocacy of women's rights activist Nellie McClung, Parliament enacted legislation permitting women to be elected to the House of Commons.[25] Five women ran in the federal election of 1921, and one woman Member of Parliament, Agnes MacPhail, was elected. However, women remained excluded from the Senate.

The first conference of the Federated Women's Institutes of Canada, which took place in 1919 and was presided over by Emily Murphy J, passed a resolution requesting that the Prime Minister appoint a woman senator. The resolution argued that women should be among the "persons" qualified to serve in the Senate now that women were voters and were eligible for election to the House of Commons. The National Council of Women and the Montreal Women's Club renewed the request and nominated Murphy J as their candidate. These requests were unsuccessful. The Canadian government at the time took the view that "qualified persons" in the relevant section of the *BNA Act* (s. 24) meant men only.

After eight years without progress, Murphy J, along with Nellie McClung, Louise McKinney, Irene Parlby, and Henrietta Muir Edwards, petitioned the government for an Order-in-Council directing the Supreme Court of Canada to rule on whether women were eligible to be summoned to the Senate. The Minister of Justice, Ernest Lapointe, eventually took the view that it was appropriate to seek the view of the Supreme Court of Canada.

23. *An Act to confer the Electoral Franchise upon Women*, SC 1918, c 20.

24. Those same qualifications excluded Indigenous voters, whether men or women. See Coel Kirkby, "Reconstituting Canada: The Enfranchisement and Disenfranchisement of 'Indians', circa 1837–1900" (2019) 69:4 UTLJ 497.

25. See *Dominion Elections Act*, SC 1920, c C-46.

Having provided the briefest of context, I will now examine the Supreme Court of Canada's opinion in this famous case.[26]

In the *Persons Case*,[27] the Supreme Court of Canada was asked the following question: "Does the word 'Person' in section 24 of the *British North America Act, 1867*, include female persons?"[28] Chief Justice Anglin, with whom Lamont and Smith JJ concurred, was at pains to emphasize that, in answering this question, he and his fellow justices were "in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted".[29] Instead, it was the Supreme Court of Canada justices' duty, as he saw it, "to construe, to the best of our ability, the relevant provisions of the *BNA Act, 1867*, and upon that construction base our answer".[30] Regarding the question that concerns us, whether the provision should be construed according to its meaning in 1867 or its meaning taking into account developments in Canadian society since then, the Chief Justice could not have been more clear. Citing an earlier decision of the Privy Council as authority,[31] he stated that "the various provisions of the *BNA Act* (as is the case with other statutes) bear to-day [i.e. in 1928] the same construction which the courts would, if they required to pass upon them, have given to them when they were first enacted".[32] If Anglin CJ's use of "same construction [as] when they were first enacted" seemed ambiguous, regarding whether what originalists refer to as judicial construction had to be the same as it would have been in 1867, or whether judicial interpretation at whatever moment had to be based

26. For a full account of the *Persons Case*, including the factors which led to it being heard by the Supreme Court of Canada and Judicial Committee of the Privy Council, see Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007).

27. See *Persons Case* SCC, *supra* note 1.

28. "The Governor General shall from Time to Time, in the Queen's Name, by instrument of the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator." *BNA Act*, *supra* note 11, s 24.

29. *Persons Case* SCC, *supra* note 1 at 281. According to Robert Sharpe, Anglin "believed in 'scientific jurisprudence', a version of legal formalism that saw law in terms of fixed, immutable rules akin to the laws of science". See Hon Robert J Sharpe, "The *Persons Case* and the Living Tree Theory of Constitutional Interpretation" (2013) 64 UNB LJ 1 at 9, citing Frank Anglin "Some Differences Between the Law of Quebec and the Law as Administered in the Other Provinces of Canada" (1923) 33 Can Bar Rev 43.

30. *Persons Case* SCC, supra note 1, at 282.

31. See e.g. *Bank of Toronto v Lambe*, [1887] UKPC 29 at 1–2.

32. *Persons Case* SCC, supra note 1 at 282.

on legislators' contemporaneous understanding, his citing of cases that referred to the intent of the legislature clarified the issue.[33]

Of course, determining the intent of the legislature is not always easy. Chief Justice Anglin cited a number of "well-known rules" that could assist the Court.[34] First, in the absence of express language, an intention to put aside the ordinary rules of law should not be imputed to Parliament.[35] And, second, Parliament's language should be considered "in its ordinary and popular sense".[36] Significantly, according to the common law of England (one of the constituent parts of the "ordinary rules of law"), women were, consistent with the case law of the time (that is, the moment of the enactment of the *BNA Act*), "under a legal incapacity to hold public office".[37] This common law legal incapacity of women to sit in Parliament had been fully recognized in the three colonies that came together to form the Dominion of Canada.[38]

But what of the fact that, during the interval between Confederation and the Supreme Court of Canada's consideration of the question, Canada (and other common law polities) had changed markedly? Chief Justice Anglin was well aware of this changing context: "[I]t is not also perhaps to be entirely left out of sight, that in the sixty years which have run since 1867, the questions of the rights and privileges of women have not been, as in former times they were, asleep."[39] "On the contrary," the Chief Justice observed, "we know as a matter of fact that the rights of women, and the privileges of women, have been much discussed, and able and acute minds have been much exercised as to what

33. *Ibid*.

34. *Ibid* at 282.

35. See *ibid*, where Anglin CJC cited *River Wear Commissioners v Adamson*, (1876) 1 QBD 546 at 554.

36. *Persons Case* SCC, *supra* note 1 at 398, citing Byles J in *Chorlton v Lings* (1868), LR 4 CP 374.

37. *Persons Case* SCC, *supra* note 1 at 283. Anglin CJC was quick to clarify, as Willes J had said in *Chorlton v Lings*, supra note 36 at 392, that this incapacity was "referable to the fact . . . that . . . in modern times, chiefly out of respect to women, and a sense of decorum, and not from their want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs". The Chief Justice set out other authority for this proposition: Lord Esher MR in *Beresford-Hope v Sandhurst*, LR 4 CP 374, (1889) 23 QBD 79; Viscount Birkenhead LC in the *Viscountess Rhondda's Claim*, [1922] 2 AC 339 (HL (Eng)) at 362, as well as other, including Scottish, Irish and American cases.

38. *Persons Case* SCC, *supra* note 1 at 284.

39. *Ibid*.

privileges ought to be conceded to women".[40] And, furthermore, what of the fact that "the word 'persons' when standing alone *prima facie* includes women"?[41]

With regard to the first point, about the changing social and political context, Anglin CJ reasserted the argument, alluded to earlier, that the relevant legislature, the Westminster Parliament, had never used the requisite express language to depart from the common law rule.[42] And with regard to the second point (the fact that "persons" could, in normal language, include women), he noted the recurring use of the masculine pronouns "he" and "his", and the failure of Parliament to specify the inclusion of women in section 24 as it had done, expressly, with regard to "'natural born' subjects"[43] in section 23. In the end, Anglin CJ concluded that "it would be dangerous to assume that by the use of the ambiguous term 'persons' the Imperial Parliament meant in 1867 to bring about so vast a constitutional change affecting Canadian women".[44]

A final argument by the petitioners could then be disposed of quickly. According to section 4 of *Lord Brougham's Act*, in force in 1867, "in all Acts words importing the Masculine Gender shall be deemed and taken to include Females".[45] However, according to Anglin CJ's terse logic, "'[p]ersons' is not a 'word importing the masculine gender'". "[T]herefore, ex facie, *Lord Brougham's Act* has no application to it."[46] In the end, Anglin CJ concluded that binding authority required him to reject the argument of the petitioners.

Justice Duff disagreed with the main argument of Anglin CJ but came to the same conclusion via a different route, focussing not on general developments in Britain and other British colonies but on developments in British North America itself. Justice Duff cited other sections of the *BNA Act* where "persons" was clearly used in a manner that included women, a fact that made it hard for him to conclude, according to the logic set up by Anglin CJ, that section 24 excluded women. His general approach was to presume that any ambiguity should be resolved in favour of the greatest constitutional latitude, in order to allow lawmakers to keep up with changes in Canadian society.[47] In this case,

40. *Ibid* at 284–85.

41. *Ibid* at 285.

42. See *ibid*.

43. *Ibid* at 286.

44. *Ibid* at 287.

45. *Interpretation of Acts* 1850 (UK), 13–14 Vict, c 21 (known as, and hereinafter referred to as *Lord Brougham's Act*).

46. *Persons Case* SCC, *supra* note 1 at 288. Chief Justice Anglin went on to cite further English authority in support of this conclusion.

47. See *ibid* at 299. After identifying the ambiguity present in s 24 of the *BNA Act*, Duff J refers to "the presumption that the Constitution . . . was intended to be capable of adaptation

however, Duff J was persuaded that the Senate was very different from the House of Commons, and that sections applying to the former might well deserve to be interpreted differently than those applying to the latter. More particularly, whereas the *BNA Act* gave Parliament powers to determine rules regarding qualification and disqualification of categories of "persons" in the House of Commons, the same was not true regarding the Senate, where the *BNA Act* itself, rather than Parliament, fixed the constitution of that Chamber. That constitutionally "fixed" Chamber was modelled on the second chambers that existed in the British North American colonies prior to 1867, where women were not eligible for appointment. Finally, contrary to Anglin CJ, Duff J attached no importance to the use of masculine pronouns.[48]

III. The *Persons Case* in the Judicial Committee of the Privy Council

The opinion of the Judicial Committee of the Privy Council was delivered by Lord Sankey, the Lord Chancellor. Lord Sankey was well known for progressive and reformist ideas,[49] but whatever his own views and inclinations, he had to

---

to whatever changes (permissible under the Act) . . . [that] might be progressively required by changes in public opinion." (*ibid* at 299). This reasoning was subsequently picked up on by the Appellants in their Factum presented to the Privy Council in *Edwards v AG Canada*, [1929] UKPC 86, [1930] 1 DLR 98 (Factum of the Appellant at para 20 [FOA]).

48. See *Persons Case* SCC, *supra* note 1 at 300–01. Justice Mignault took the view that it was "hopeless" for the petitioners to contend against the binding decisions regarding the legal incapacity of women to hold public office (*ibid* at 303). Although he acknowledged that the word "persons" was of "uncertain import" as a terminological matter, the "grave constitutional change" advanced by the petitioners was "not to be brought about by inferences drawn from expressions of such doubtful import, but should rest upon an unequivocal statement of the intention of the Imperial Parliament", given that "Parliament alone can change the provisions of the *British North America Act* in relation to the 'qualified persons' who may be summoned to the Senate" (*ibid*). Although Mignault J felt the need to state his own version of the grounds for rejecting the petitioners' arguments, he concurred "generally" with the reasoning of Anglin CJC.

49. See Sharpe & McMahon, *supra* note 26. See also Sharpe (2013), *supra* note 29 at 12. Sankey had previously served on a commission to investigate the coal mining industry with two Fabian co-commissioners, Sidney Webb and RH Tawney. To the shock of some of Sankey's more conservative acquaintances, the three commissioners recommended nationalization of the coal industry. See John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2002) at 187.

bring the Privy Council around to his conclusions by means of arguments at least some of which were congenial to the other members' legal philosophies. Consequently, he set out his approach according to a clear, familiar structure, all the while providing himself with scope to develop his more forward-looking ideas: "In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points, *viz*: (i) [t]he external evidence derived from extraneous circumstances *such* as previous legislation and decided cases", and "(ii) [t]he internal evidence derived from the Act itself".[50]

In considering "the external evidence derived from extraneous circumstances", Lord Sankey would eventually focus on the traditional sources—"previous legislation and decided cases"—already referred to.[51] But in the first sentence under this first point, he chose to interpret "external evidence derived from extraneous circumstances" in a more expansive, even rhetorical, mode: "The exclusion of women from all public offices is a relic of days more barbarous than ours."[52] Introducing a theme to which he would later return, Lord Sankey went on to emphasize that "the necessity of th[os]e times often forced on man customs which in later years were not necessary".[53] Clearly, changing social mores were relevant to the interpretive process, but it remained to be seen how that was so.

Turning to previous legislation and decided cases, but still within the point regarding "external evidence", Lord Sankey acknowledged both that the common law over the centuries seemed to indicate that women were not in general capable of exercising public functions, and that legislation such as *Lord Brougham's Act* (indicating that words importing the masculine gender should be taken to include the feminine) had not affected the dominant current of authority.[54] Lord Sankey noted that the opinion of Anglin CJ relied principally on this authority; however, at this point Lord Sankey signalled the Privy Council's preference for the approach, if not the conclusion, of Duff J. In other words, rather than address the matter as one turning on the general rules of the

50. *Persons Case* JCPC, *supra* note 1 at 99 [emphasis added].

51. *Ibid*.

52. *Ibid* at 99.

53. *bid*.

54. See *ibid* at 100–01.

common law and related general legislation, it was necessary to consider section 24 as part of a series of enactments relating to the introduction of the parliamentary system *in the British North American colonies*. Lord Sankey cited multiple enactments in relation to British North America, from the *Royal Proclamation of 1763* to the *Quebec Act 1774* and the *Constitutional Act 1791*, to the *Act of Union 1840* and subsequent amendments to it and noted that within this class of acts the word "persons" was used in a way that did not limit it to males only.[55]

Returning to the theme of the common law's long-standing exclusion of women from public office, Lord Sankey had both a general and local objection to bringing this "extraneous circumstance" too much to bear on the question at hand. First, more generally, ancient customs, however relevant, should not be allowed to overwhelm laws, keeping in mind that the word "persons" in a law is at the very least "ambiguous" and certainly "capable of embracing members of either sex".[56] "Customs are apt to develop into traditions which are stronger than law", mused Lord Sankey, noting that such stubborn customs and traditions "remain unchallenged long after the reason for them has disappeared".[57] An "appeal to history" was not therefore conclusive.[58] Second, with local considerations in mind, Lord Sankey felt that it could not be right "to apply rigidly to Canada of to-day the decisions and reasonings . . . which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development".[59] Accordingly, their Lordships viewed Roman law and early English decisions as ill-suited to the task of building "a secure foundation" for the *BNA Act*.[60] Apparently, just as "stubborn customs and traditions" should not overwhelm the law, nor should "decisions and reasonings" developed at another time and for another context apply rigidly to the "Canada of to-day".[61]

With respect to the first point ("external evidence derived from extraneous circumstances") regarding how to interpret the word "persons" in section 24 of the *BNA Act*, Lord Sankey concluded, in agreement with Duff J, that there was

55. See *ibid* at 102–03.

56. *Ibid* at 104–105. The instinct to allow ambiguity to persist in order to allow greater scope to deal with future eventualities was also part of Duff J's approach and formed part of the Appellants' argument before the JCPC, as explained in *supra* note 47 and accompanying text.

57. *Ibid* note 1 at 105.

58. *Ibid*.

59. *Ibid*.

60. *Ibid*.

61. *Ibid*. Lord Sankey could, of course, have referred to the Canada of 1867 but chose instead to refer to "Canada of to-day".

no rule of interpretation *for the BNA Act* that required a presumption that women were excluded from participating in the working of institutions set up by the Act.[62]

Turning to the second point ("the internal evidence derived from the Act itself"), Lord Sankey paused to make yet another contextual point regarding "the circumstances which led up to the passing of the *[BNA] Act*"[63] prior to looking at the various sections of that Act: "The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing *a continuous process of evolution*."[64] Accordingly, their Lordships were at pains "not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another".[65] Was that markedly contextual interpretation nonetheless frozen in time, that is, the time of enactment? The reference to "a continuous process of evolution" suggested a negative answer, but Lord Sankey chose to drive home the message by means of an unforgettable, positive phrasing of the point: "The *B.N.A. Act* planted in Canada a living tree capable of growth and expansion within its natural limits."[66] Was the "living tree" only a reference to evolving constitutional usages and conventions as Miller suggests? The placement of this sentence in a section entitled "the internal evidence derived *from the Act itself*" strongly suggested a negative answer. Furthermore, the sentence that followed the reference to the "living tree" showed no such narrow intent: "The object of the [BNA] Act was to grant *a Constitution* to Canada."[67] It is hard not to notice that the comments on the issue of interpretation of the constitutional text clearly refer back to their exposition of the "living tree" in emphasizing the cutting, the growth, and the limits to that growth in interpreting the BNA Act: "Their Lordships do not conceive it to be the duty of this Board—and certainly not their desire—*to cut down* the provisions *of the Act*[68] by a narrow and

62. *Ibid* at 106.

63. *Ibid*.

64. *Ibid* [emphasis added].

65. *Ibid.*

66. *Ibid* at 106–07.

67. *Ibid* at 107 [emphasis added].

68. *Ibid* [emphasis added]. I am grateful to an anonymous reviewer who pointed out that this reference to the Board's desire not to "cut down the provisions *of the Act*" would seem to be a full answer to Miller and others' suggestion that the "living tree" simply referred to the persistence of flexible conventions and not the Act itself. As the anonymous reviewer observed, not only do we see the metaphor of the tree applied to the *BNA Act* (through the phrase "cutting down"), but we also see the suggestion that courts should allow those branches to grow (albeit within fixed limits) so as to allow evolving conditions within Canada to determine particular constitutional meanings.

technical construction so that the Dominion *to a great extent, but within fixed limits*, may be mistress in her own house."[69]

Lord Sankey then quoted the Canadian textbook writer, WHP Clement,[70] to the effect that courts must interpret the *BNA Act* "by the same methods and exposition which they apply to other statutes".[71] It may be that the decision to include the reference to Clement was to reassure his Privy Council colleagues that Canada was faithful to traditional principles of statutory interpretation, but the subsequently-quoted sentence in Clement seemed to reveal an intention by Lord Sankey to keep to his more progressive line: "But there are statutes and statutes",[72] stated Clement, and interpretation of the *BNA Act* clearly required particular care given its great importance to the new nation. Returning to his earlier theme, Lord Sankey noted that Clement quoted the argument of respected Canadian lawyers, Oliver Mowat and Edward Blake, before the Privy Council in earlier cases, to the effect that the *BNA Act* should be interpreted "on all occasions in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal".[73] And returning to the "there are statutes and statutes" theme, Lord Sankey emphasized that "[t]heir Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country."[74] As Clement had indicated "the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish" would be inappropriate if "applied to an Act passed to ensure the peace, order and good government of a British colony".[75]

After these important expansive preliminaries regarding what was ostensibly the part about "the internal evidence derived from the Act", Lord Sankey finally discussed the *BNA Act* itself. He noted, for example, the Preamble's reference to "a constitution similar in principle to that of the United Kingdom" and several sections' use of the word "persons" in contexts that seemed to indicate either sex. It is worth remembering here a point made earlier in the reasons to the

69. *Ibid* [emphasis added].

70. See Hon WHP Clement, *The Law of the Canadian Constitution*, 3rd ed (Toronto: Carswell, 1916) at 347, cited in *Persons Case* JCPC, *supra* note 1 at 107. See also Honickman, "Living Fiction", *supra* note 3 at 29–30.

71. Clement, *supra* note 70 at 347.

72. *Ibid*.

73. Argument before the Privy Council in *St Catharine's Milling v The Queen* (1888) 14 App Cas 46, [1888] 12 WLUK 31, quoted in *Persons Case* JCPC, *supra* note 1 at 107.

74. *Persons Case* JCPC, *supra* note 1 at 107.

75. Clement, *supra* note 70 at 347.

effect that the word "persons" is "ambiguous".[76] If women were "expressly excluded", that would have made matters clear. However, the word "persons" "in its original meaning" would embrace members of either sex.[77] Half a century before the systematic promotion of the theory of constitutional originalism, it would have been surprising if this "original meaning" referred to either original legislative intent or original (contemporaneous) public meaning. In fact, it seems clear from the context that Lord Sankey is referring here to the original semantic meaning that had emerged since its first linguistic usage in general parlance. And yet that original semantic meaning was not determinative; the word "persons" remained "ambiguous". This approach was consistent with Duff J's instinct discussed above, as argued by the Appellants before the Privy Council—that is, to prefer broader meanings that make room for progressive changes in public opinion rather than to close the door to such changes by preferring narrow meanings.[78] The refusal to fix the semantic meaning here would seem to go against Miller's anachronistic attempt to fit Lord Sankey's reasons into the mould of new originalism.[79] If "original meaning" referred neither to original legislative intention nor to contemporaneous public meaning, and if the semantic meaning was otherwise unclear, then how were their Lordships to proceed?[80]

It may be helpful at this point to reprise the key, broader considerations that Lord Sankey had been at pains to emphasize. First, do not let the general history of the common law and legislation in the British tradition and in different parts of the British Empire determine the meaning. Second, do let the local context inform that meaning. Third, remember that that local context like all context is in constant evolution. Fourth, keep in mind that the *BNA Act* is not just a statute, but the Constitution of a new country. Fifth, accordingly, interpret that Constitution, within its natural limits, but also in a large, liberal, and comprehensive spirit, keeping in mind the evolving context referred to already. Sixth, prefer the presumption in favour of leaving constitutional ambiguity in place (so as to permit future flexibility) rather than artificially fixing a narrower constitutional meaning.

76. *Persons Case* JCPC, *supra* note 1 at 104–05.

77. *Ibid* at 104.

78. See FOA, *supra* note 47 and text accompanying note 47.

79. See *Persons Case* JCPC, *supra* note 1 at 104–05.

80. Miller, "Origin Myth", *supra* note 5 reads "original meaning", anachronistically (and erroneously it is argued here), as suggesting a new originalist intention to fix the semantic meaning according to its public meaning in 1867.

It is with these broader considerations in mind, then, that we must read one of the key turning points in the opinion: "The word 'person' as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not."[81] Lord Sankey continued, "[i]n these circumstances the burden is upon those who deny that the word includes women to make out their case."[82]

Lord Sankey then went through the textual arguments for and against the narrow interpretation of the word "persons". This sort of analysis would be familiar to more scientific or formalistic lawyers such as Anglin CJ. But that section was followed by a few remarkable paragraphs, in which Lord Sankey considered "the history of these sections and their interpretation in Canada", "[f]rom Confederation to date", interpretation here referring to interpretation by Canadian political institutions and actors rather than courts.[83] Of what relevance could this post-1867 political and social history be if it were not to inform a "living" or evolving interpretation of that Constitution? Their Lordships were not forcing an 1867-specific meaning on the ambiguous term "persons"; instead, they were letting that meaning emerge with time. The subsequent paragraphs were prefaced with post-1867 temporal references, "[f]rom Confederation to date" has already been mentioned, but we also find "[f]rom Confederation up to 1916", "from 1916 to 1922", and "[a]t the present time women are entitled to vote and to be candidates".[84] Again, what relevance can there be for these post-1867 references, if it is not to support a "living" interpretation of the text of the Constitution? And yet, as noted earlier, Miller claims on multiple occasions that there is no evidence in the judgment of the relevance of post-1867 understandings of the word "person".[85]

In coming to their eventual conclusion, their Lordships stated that they were mindful of the fact that a heavy burden lay on them before they set aside a unanimous Supreme Court of Canada. They began their list of five reasons[86] for doing so with a statement that placed the technical reasons that followed in a dynamic temporal perspective: "[H]aving regard (1) [t]o the object of the Act

81. *Persons Case* JCPC, *supra* note 1 at 108.

82. *Ibid*.

83. *Ibid* at 112 [emphasis added].

84. *Ibid*.

85. See passages quoted in the text accompanying note 21. Similarly see Honickman, "Living Fiction", *supra* note 3 at 331, 333; Honickman, "Original Living Tree", *supra* note 9 at 29.

86. See *Persons Case* JCPC, *supra* note 1 at 112–13. Three of the ensuing four points begin with the word "That" – e.g., "(2) That the word 'person'", "(3) That there are sections in the Act", "(4) That in some sections the words 'male persons'". These three points do not follow on grammatically from the opening phrase "[h]aving regard:", whereas the first point, beginning with "(1) To the object" does so. Accordingly, the first point reads more easily as a general

viz., to provide a constitution for Canada, a responsible *and developing state*".[87] Their Lordships then concluded that the word "persons" in section 24 "includes both members of the male and female sex".[88]

IV. How Was the Privy Council Opinion in the *Persons Case* Understood at the Time?

One of the first Canadian judges to interpret the meaning of Lord Sankey in the *Persons Case* was Anglin CJ, the very person whose reasons had been so pointedly corrected by the Privy Council.

In the *Reference re Regulation and Control of Radio Communication* (*Radio Reference*) of 1931,[89] the Supreme Court of Canada had to decide whether the federal Parliament or the provincial legislatures had jurisdiction over radio broadcasting, a technology that did not exist in 1867. The closest the Constitution came to such a form of communication was the reference to "telegraphs" in section 92(10)(a), such telegraphs falling under federal jurisdiction when extending over provincial or international borders.

In contrast to his essentially formalist analysis in the *Persons Case*, Anglin CJ announced early on in the judgment his decision in favour of federal jurisdiction by way of reasons that other formalists might refer to as policy arguments: "My reason for so concluding is largely that *overwhelming convenience*—under the *circumstances amounting to necessity*—dictates that answer."[90] Chief Justice Anglin provided a hint as to what "overwhelming convenience" and

"having regard", with the other points reading more as individual reasons. Rothstein, *supra* note 9, also lists these five reasons in concluding that Lord Sankey's judgment is of a more traditional kind, though, with great respect, he does not raise the arguments set out earlier in this section, including the multiple references to post-1867 Canadian usage of the word "persons", and he does not note that the reasons are all framed in a dynamic, temporal perspective.

87. Miller, "Origin Myth", *supra* note 5 [emphasis added].

88. *Persons Case* JCPC, *supra* note 1 at 113.

89. See *Radio Reference*, *supra* note 18.

90. *Ibid* at 545–46 [emphasis added].

"circumstances amounting to necessity" might mean in quoting with full acceptance his colleague Newcombe J's account of the state of radio technology:

> I interpret the reference as meant to submit the questions for consideration *in the light of the existing situation and the knowledge and use of the art*, as practically understood and worked, and, having regard to what is stated in the case, assumed as the basis for the hearing. Therefore I proceed upon the assumption that radio communication in Canada is practically Dominion-wide; that the broadcasting of a message in a province, or in a territory of Canada, has its effect in making the message receivable as such, and is also effective by way of interference, not only within the local political area within which the transmission originates, but beyond, for distances exceeding the limits of a province, and that, consequently, *if there is to be harmony or reasonable measure of utility or success in the service, it is desirable, if not essential, that the operations should be subject to prudent regulation and control*.[91]

We see here Anglin CJ's considerable emphasis on the context of the early 1930s in the interpretation of the constitutional text, rather than exclusively on the meaning as understood in 1867 as would have been his focus before the Privy Council's remonstrations in the *Persons Case*.

What could explain such a turnaround? Chief Justice Anglin argued, on the one hand, that given that radio communication was "not only unknown to, but undreamt of by, the framers" there should be no expectation that "language should be found in [the *BNA*] Act explicitly covering the subject matter".[92] It was at this point that he invoked the Judicial Committee of the Privy Council's recent decision in the *Persons Case*. Even if expressed using somewhat awkward syntax, Anglin CJ's reasons seem to flatly contradict Miller's double-assertion that the significance of the *Persons Case* is exaggerated and that it is wrong to read Lord Sankey as saying that the *BNA Act* is the "living tree" in question:

> On the other hand, *if the Act is to be viewed*, as recently suggested by their Lordships . . . "*as a living tree,* capable of growth and expansion within its natural limits", and if it "should be on all occasions interpreted in a large, liberal and

91. *Ibid* at 546 [emphasis added].

92. *Ibid*.

> and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in a very few words", and bearing in mind that "we are concerned with the interpretation of an Imperial Act, but an Imperial Act creating a constitution for a new country", every effort should be made to find in the *BNA Act* some head of legislative jurisdiction capable of including the subject matter of this reference.[93]

The earlier reference to current "convenience" and to the "circumstances" prevailing in the early 1930s, and the repeated invocation of Lord Sankey's most ringing phrases from the *Persons Case*, indicate that Anglin CJ had understood that he was not to proceed in anything like the way he had proceeded in his own *Persons Case* reasons. Accordingly, he found that head of legislative jurisdiction in the reference to "telegraphs" alluded to earlier. Clearly, "telegraphs" did not include "radio" in 1867, and yet Anglin CJ did not resort to the residual ("peace, order and good government") power or simply to an *ejusdem generis* argument.[94] This is "living tree" constitutionalism of a kind that Anglin CJ would not have embraced a few years earlier.

Justice Rinfret dissented in that same case, concluding that radio broadcasting was a local matter.[95] His understanding of the Privy Council's reasons in the *Persons Case* is very revealing nonetheless. He began by noting, as Anglin CJ and others had, that radio was not even imagined in 1867. But he then went on to say that the *BNA Act* "is always speaking", and that its provisions must be "gradually"[96] given "an increasingly wider meaning"[97] "as the scientific inventions and developments in our national life require new constitutional solutions".[98] This language of progressive, evolving interpretation was new to

93. *Ibid* [emphasis added].

94. See Miller's attempts to minimize or eliminate the significance of living tree interpretation by means of *ejusdem generis* argumentation. Miller, "Originalist Constitutional Interpretation", *supra* note 5 at 337; Miller, "Origin Myth", *supra* note 5.

95. Justice Lamont was in substantial agreement with Rinfret J. See *Radio Reference*, *supra* note 18.

96. "*[À] fur et à mesure que*". The original version from the Supreme Court Reports is in French (*ibid* at 556) [translated by author].

97. "*[U]n sens de plus en plus étendu*" (*ibid*) [translated by author].

98. "*les inventions scientifiques et les développements de la vie nationale exige de nouvelles solutions constitutionnelles*" (*ibid*) [translated by author].

Rinfret J as it was to his colleagues, and he left no doubt as to where it had been learned, citing the Judicial Committee of the Privy Council's reasons in the *Persons Case* by way of authority for the propositions just quoted. It just so happened that in Rinfret J's view, the new "developments in our national life" pointed towards provincial jurisdiction.

Other contemporaneous evidence provides support for the momentous declaration of a new approach to constitutional interpretation rather than the "nothing to see here" version put forward by Miller. With regard to the *Aeronautics Reference*[99] litigation, Government of Canada lawyers apparently spoke of the *Persons Case* as having set out "rules of progressive construction".[100] Numerous commentators at the time clearly believed that the Judicial Committee of the Privy Council opinion in the *Persons Case* set forth an important new doctrine. The leading British constitutional law expert of the day, Ivor Jennings, viewed it as "a most remarkable decision":[101]

> For in effect it wiped out the rule that the Canadian Constitution is a statute, to be interpreted like other statutes. Commonsense tells us that nobody in 1867 contemplated that women could become senators. Yet because the Act was a Constitution it was given a *progressive interpretation* . . . [S]ome will agree that the strictly legal or historical method of interpretation leads often to nonsense.

A leading expert on the British Empire and Commonwealth and staunchly formalist scholar, Arthur Berriedale Keith, unsurprisingly reacted strongly against the new approach, stating that "no decision of the Privy Council is probably harder to defend as sound in law".[102] In Canada, George P Henderson took the view that the Privy Council opinion in the *Persons Case* was "not . . . in

99. *Reference re Regulation and Control of Aeronautics in Canada*, [1930] SCR 663, [1931] 1 DLR 13 [*Aeronautics Reference* SCC]; *Reference re Regulation and Control of Aeronautics in Canada*, [1931] UKPC 93 [*Aeronautics Reference* JCPC]

100. Saywell, *supra* note 49 at 193. I am grateful to my colleague, Carissima Mathen, for pointing me to this reference. For more of Professor Mathen's analysis of the *Persons Case*, see Carissima Mathen, Courts Without Cases: The Law and Politics of Advisory Opinions (Oxford, UK: Hart Publishing, 2019) at 132–37.

101. W Ivor Jennings, "The Statute of Westminster and Appeals to the Privy Council" (1936) 52:2 Law Q Rev 173 at 181–82 [emphasis added], cited by Saywell, *supra* note 49 at 192.

102. A Berriedale Keith, "The Privy Council Decisions: A Comment from Great Britain" (1937) 15:6 Can Bar Rev 428 at 429, cited by Mathen, *supra* note 100 at 136.

strict accordance with well understood legal principles" and that their Lordships had in fact "altered the constitution of the Senate of Canada" by "judicial legislation".[103] If we are to believe that the "living tree" was given new and progressive significance only in the post-*Charter* era, as Miller argues, then we may have trouble explaining why the Supreme Court of Canada felt the need to alter its prior approach to constitutional interpretation and why the case produced such strong reactions, positive and negative, at the time.

It is worth reminding ourselves at this point that the "living tree" approach to constitutional interpretation was never about *unlimited* interpretive flexibility to deal with a changing context. Lord Sankey had referred to a "living tree . . . *within its natural limits*" or "within fixed limits".[104] With regard to the fixed jurisdictional limits set out in sections 91 and 92 of the *BNA Act*, Lord Sankey had been careful to point out that, though the new interpretive approach appeared to be generally available, the issue and the facts of the *Persons Case* had nothing to do with the federal division of powers.[105] At a time when the federal division of powers was still influenced by a "watertight compartments" view,[106] and by the potential zero-sum stakes that accordingly applied each time a federalism question came to be decided, a too-flexible interpretation could have been seen to place in jeopardy the 1867 "compromise", a political settlement that Lord Sankey regarded as "a lasting monument to the political genius of Canadian statesmen".[107] In the *Aeronautics Reference*, where the division of powers was at stake, Lord Sankey emphasized that "the process of *interpretation as the years go on* ought not to be allowed to dim or whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies".[108]

---

103. George P Henderson, "Eligibility of Women for the Senate" (1929) 9 Can Bar Rev 617 at 628, cited by Mathen, *supra* note 100 at 136.

104. *Persons Case* JCPC, *supra* note 1 at 107 [emphasis added].

105. See *ibid*, where Sankey stated: "It must be remembered . . . that their Lordships are not here considering the question of the legislative competence either of the Dominion or its provinces which arises under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its provinces their respective spheres of Government".

106. See *AG Canada v AG Ontario* [1937] 1 WWR 299 at 312, [1937] 1 DLR 673. On the watertight compartments approach to federalism then and now see Hogg, *supra* note 4 at 47–51.

107. *Persons Case* JCPC, *supra* note 1 at 106.

108. *Aeronautics Reference* JCPC, *supra* note 99 at 70 [emphasis added]. Justice Cannon, dissenting, was alone in taking the view that the reasoning in the *Persons Case* regarding

This quotation is taken by Sirota and Oliphant to indicate that "the great constitutional horticulturalist" was intent on remaining true to what we would now call originalist reasoning.[109] I do not read it that way. To my mind, rather than abandoning progressive or "living tree" interpretation just over two years after first setting it out, he was instead applying the "within its natural limits" part of the "living tree" formula in the "original contract" of the division of powers. According to the zero-sum logic[110] that characterized the then-dominant watertight compartments approach to the division of powers, an evolving interpretation of powers in favour of either Ottawa or the provinces was a corresponding loss of power for the other level of government. As already noted, Lord Sankey had emphasized that the 1867 compromise was not at stake in the *Persons Case*, whereas it most certainly was in the *Aeronautics Reference*. However, in Lord Sankey's ultimate view, the addition of aeronautics to the federal list of powers would not upset that compromise.

While this analysis helps us to understand Lord Sankey's 1929 and 1931 reasons in their historical context, leaving matters there risks creating a potential misunderstanding regarding Canadian legal federalism jurisprudence and the extent of any given relevance of the *Persons Case*. Two points are called for. First, not all division of powers disputes involve straightforward zero-sum consequences where the "natural limits" must be called upon as reminders of the restraints on the growth of the living tree. Second, the fact that the division of powers jurisprudence moved beyond the watertight compartments view of the division of power was itself a powerful illustration of living tree interpretation at work. The second point will be addressed in the next section.

On the first point, despite the zero-sum consequences of division of powers in the watertight compartments era, there has been an important role for progressive or living tree interpretation in Canadian federalism, beginning as early as 1931. As already noted, some questions of constitutional interpretation regarding the division of powers are not clear-cut zero-sum questions, where Ottawa's gain is the provinces' loss, or vice versa. For instance, in some cases the issue is not simply whether Parliament's powers should be expanded to *take*

---

constitutional interpretation was not at all applicable in cases having to do with the division of powers.

109. Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50:2 UBC L Rev 505 at 512–13. Similar arguments (to which similar replies are applicable) can be found in Honickman, "Original Living Tree", *supra* note 9 at 30.

110. On the zero-sum logic of the watertight compartments theory of the division of powers, see Nathalie J Chalifour, Peter Oliver & Taylor Wormington, "Clarifying the Matter: Modernizing Peace, Order, and Good Government in the *Greenhouse Gas Pollution Act* Pricing Appeals" (2021) 40:2 Nat'l J Const Law 153 at 159, 179, 181–82, 188–89, 210.

away from the provinces' powers, but whether Parliament's existing powers could include something that had not been contemplated in 1867. This was what was at stake in the *Radio Reference* and *Aeronautics References*,[111] as we have seen, and it was also at issue in the landmark *Proprietary Articles Trade Association v Canada (AG)* case,[112] in which Lord Atkin refused to accept that "Criminal Law" as used to describe Parliament's power in s. 91(27) of the *BNA Act* was a historically fixed category such that anti-combines, an offence not known to the law of England or Canada in 1867, would be excluded from that head of power. Instead, he concluded that the Criminal Law power must be interpreted so as to authorize the creation of new crimes. A similar question in relation to the Criminal Law power, but this time concerning the division of power between Canada and the United Kingdom, arose in the next significant invocation of the *Persons Case* in 1935.

V. The Statute of *Westminster*, the "Organic" Constitution, and "Changing Circumstances"

The *Statute of Westminster*, 1931 placed new pressures on the interpretation of the *BNA Act*.[113] The *BNA Act* had been drafted with a continuing role in

111. It is of course the case that the addition of radio and aeronautics to the federal list of powers was a corresponding failure of the provinces' attempt to acquire that new power, a loss in that sense. However, radio and aeronautics were not, as a result of their novelty, subject matters that had in the past been under provincial jurisdiction only for them to be handed over to federal jurisdiction. That would have been the case if, for instance, a socially-directed insurance scheme (e.g., for unemployment) had been assigned to federal jurisdiction (in advance of the 1940 unemployment insurance amendment). See *Reference re Employment and Social Insurance Act*, [1937] 1 DLR 684, (sub nom *Canada (AG) v Ontario (AG)*) [1937] 1 WWR 312. For further elaboration on the difference between taking away a provincial power and giving it to Parliament, and simply adding a new power under Peace, Order and Good Government (POGG), Chalifour, *ibid* at 189.

112. See *Proprietary Articles Trade Association v Canada (AG)*, [1931] 2 DLR 1, [1931] 1 WWR 552.

113. The Canadian constitutional historian, Eric Adams, has written, convincingly, that "[t]he living tree metaphor has been largely embraced as an approach to liberal and progressive constitutional interpretation, but in its own time and context, set against the backdrop of the Balfour Declaration, the politics of independence, and on the eve of the passage of the *Statute of Westminster, 1931*, the living tree was an expression and confirmation of Canada's constitutional distinctiveness and independence". See EM Adams, "Canadian Constitutional Identities" (2015) 38:2 Dalhousie LJ 311 at 331, n 78.

mind for the Westminster Parliament and the Judicial Committee of the Privy Council at the top of, respectively, the legislative and judicial hierarchies. It could not be said, for example, that the framers and legislators of the *BNA Act* intended for the Parliament of Canada to legislate to end appeals to the Privy Council when it granted Parliament power over Criminal Law.[114] They would have assumed, if they thought about it at all, that changing the role of the Imperial Privy Council in the judicial hierarchy was beyond the powers of the new Canadian Parliament, given the British North American colonies' ongoing subordinate status in the Imperial scheme. However, when the *Statute of Westminster, 1931* gave Dominions the power to legislate extraterritorially and to amend or repeal UK legislation, the question arose whether the power under section 91 of the *BNA Act* to legislate in relation to Criminal Law could embrace legislation ending Privy Council appeals in criminal matters.[115] A number of approaches to constitutional interpretation were possible (keeping in mind that new originalism was not known to jurists at that moment in our constitutional history).

On the one hand, the Constitution could have been interpreted so as to confer on the new institutions the powers that the British Parliament intended to confer in 1867, according to the meaning of Criminal Law at that time. On this basis, ending appeals to the Privy Council in criminal matters would not have been within the power given to the federal Parliament, because such a power would have involved legislative amendment of Imperial statutes dealing with extraterritorial (and hierarchically superior) subject matter, i.e., the powers of the British Privy Council. On the other hand, it was possible to assume that,

114. New originalist readers may want to make a distinction here between original intention and original public meaning. The discussion in this part refers to intention in 1867 terms simply to differentiate the more traditional or formal approach to statutory interpretation that preceded the *Persons Case* SCC, such as that used by the SCC in that case, and the more progressive interpretation put forward by Lord Sankey. The point here is that, contrary to Miller's assertions, it is the living tree interpretation that is already being favoured after 1931. Even if a new originalist construction of "Criminal Law" could arrive at the same conclusion as the living tree interpretation in this example, to speak of new originalism in the context of the 1930s and 40s is anachronistic, as already pointed out.

115. Those familiar with the Canadian division of powers may wonder why the residual "peace, order and good government" power was not invoked as a full answer to the question. It must be remembered that at this moment in Canada's constitutional history, the Privy Council had reduced that power to an "emergency" power, available only at times of war or other exceptional crisis. See *Reference Re Board of Commerce Act, 1919 (Canada)*, [1922] 1 AC 191, 60 DLR 513; *Toronto Electric Commissioners v Snider*, [1925] AC 396, [1925] 2 DLR 5.

as a document prepared with longevity in mind, the Constitution was designed to adapt to the changing circumstances in which it would be applied, so that the meaning of its terms could evolve in accordance with the evolution of the Canadian polity. On this basis and given that the words "Criminal Law" were broad enough to embrace an expansive interpretation of the Parliament of Canada's post-1931 powers, the legislation ending Privy Council appeals in criminal matters would be *intra vires*.

As we have seen, these issues regarding constitutional interpretation were addressed, in the interval between the *Balfour Declaration* of 1926 and the enactment of the *Statute of Westminster* in 1931, in the *Persons Case*.[116] Just a few years later, in *British Coal Corporation v The King*, the Privy Council interpreted the federal Parliament's power, including the Criminal Law power, so as to allow Canadian legislation to end Privy Council appeals in criminal matters, despite the fact that such an object had not been intended or contemplated in 1867.[117] Lord Sankey cited the *Persons Case* as authority for favouring a "large and liberal" interpretation over a "narrow and technical" one: "In interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted."[118] An interpretation frozen in 1867 would have made this conclusion impossible, but the "living tree" view (taking into account Canada's growth from colony to nation) allowed this further devolution of power to Canada without the need for constitutional amendment. The positioning of the term "organic" alongside references to "flexible interpretation" and "changing circumstances" made the linkage to living tree constitutional interpretation even clearer, as we shall see.[119]

---

116. See *Persons Case* JCPC, *supra* note 1.

117. [1935] UKPC 33 at 7–8 [*British Coal Corporation*].

118. *Ibid* at 8. The Privy Council's focus in this case was on the removal of constitutional obstacles that had been deemed before 1931 (in the case of *Frank Nadan v The King* [1926] UKPC 13 [*Nadan*]) to prohibit such Canadian legislation. However, even with those obstacles removed, post-1931, Canadian legislation had to be anchored in a head of federal power in order to be considered valid. As noted by the Board in *British Coal Corporation*, *supra* note 115 the Privy Council in *Nadan*, *supra* note 118, had already begun to answer questions of *vires* or competence: "Under what authority, then, can a right [of Privy Council appeals] so established and confirmed be abrogated by the Parliament of Canada? *The British North America Act*, by section 91, empowered the Dominion Parliament; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of 'the criminal law'" (*ibid*).

119. While the term "organic statute" clearly has a technical meaning in constitutional law, referring to the principles or institutions of government, the adjective 'organic' in its more general sense happens to align nicely with the living tree metaphor. As argued here, it is not surprising that Lord Sankey and Lord Jowitt put the phrases side by side. If readers are not

A dozen years after *British Coal Corporation v The King*, in a challenge to the termination by the federal Parliament of all remaining appeals to the Privy Council, Jowitt LC once again favoured an interpretation that took into account Canada's social and political evolution: "It is . . . irrelevant that the question is one that might have seemed unreal at the date of the *British North America Act*. To such an organic statute the *flexible interpretation* must be given which *changing circumstances* require."[120] Lord Jowitt approved Viscount Sankey's approach to constitutional interpretation, in referring both to an "organic" statute and, more importantly, to a living tree approach ("flexible interpretation . . . that changing circumstances require") first set out in the *Persons Case*.

Before moving on, it may be helpful to make a further point about "living tree" constitutional interpretation and federalism. While it is true that the *Persons Case* was not specifically cited very frequently[121] (though more often

---

convinced that organic has this double sense, then "wide amplitude", "flexible interpretation" and "changing circumstances" together make the point, without the need for any support from the second sense of "organic". It should be noted that Miller too makes the link between "organic" and "living tree". See Miller, "Originalist Constitutional Interpretation", *supra* note 5; Miller, "Origin Myth", *supra* note 5.

120. *Attorney-General for Ontario et al v Attorney-General for Canada et al and Attorney-General of Quebec* [1947] UKPC 1, [1947] AC 127 at 154 [*AG Ontario v AG Canada*, cited to AC] [emphasis added]. In the 1947 case, the interpretation issue turned on the meaning of s 101 of the *Constitution Act, 1867*. Honickman, "Living Fiction", *supra* note 3 at 335, n 23 rightly points out that the *Persons Case* JCPC was not cited in the reasons. Although given the frequent references to Lord Sankey's opinion in the closely connected *British Coal Corporation*, *supra* note 117, and Lord Jowitt's explicit reference to "*flexible* interpretation . . . that *changing* circumstances require" that was hardly necessary (*AG Ontario v AG Canada*, *supra* note 120 at 115) [emphasis added]. As Honickman acknowledges, the headnote writer thought fit to render the significance of the case in terms that confirmed the living tree approach: "changing circumstances may alter the way in which the language operates" (Honickman, "Living Fiction", *supra* note 3 at 335, n 23).

121. See, however, the various Supreme Court of Canada and Privy Council cases cited above. See also *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 at 922, [1952] 1 DLR 161, where Rand J invoked the *Persons Case* in order to support a dynamic interpretation of the division of powers:

> It was argued that the expression "works and undertakings" should be read conjunctively, and that whatever else might be said of an organized bus service, it could not be called a "work". But *in the interpretive attitude of the Judicial Committee as expressed in* Edwards v. Attorney General of Canada *(1), and as exemplified in the* Radio Case *(2), the modes of works and undertakings within head 10(a) await the developments of the years.* [emphasis added].

than Miller lets on), the progressive form of constitutional interpretation that it set out had widespread influence in Canadian constitutional law. In other words, once the new approach to constitutional interpretation was articulated in the *Persons Case*, it was not always necessary to make express mention of that case before proceeding consistently with the "living tree" approach. For example, one of the "changing circumstances" that became increasingly apparent in the years after the *Persons Case* was that a watertight compartments conception of federalism was, practically speaking, unworkable, given a rapidly changing Canadian society. The increasing recognition of the double aspect doctrine and the weakening of that which constituted conflict for the purpose of federal paramountcy were two signs of the "living tree" doctrine at work, whether labelled as such or not.[122] As WR Lederman noted in 1962 regarding

---

Ibid. Honickman, "Living Fiction", *supra* note 3, n 335 also ignores this case, perhaps because it referred to living tree interpretation without using that particular phrase (though the citation to *Edwards*, that is, the *Persons Case* JCPC, *supra* note 1, should have sufficed).

Writing in 1951, Professor Bora Laskin, future Chief Justice of Canada, showed full awareness of the significance of the *Persons Case* in a section of his casebook entitled "the limitations of historical arguments" in constitutional interpretation, excerpting key passages, beginning with the famous reference to the "living tree", in order to illustrate what he called "progressive interpretation". As Laskin stated by way of commentary:

> *The framers of the constitution could not foresee the revolutionary economic and social changes that have since taken place and therefore could have no intention at all concerning them.* Whatever powers Confederation was intended to confer on the Dominion, *these intentions cannot provide answers for many of the questions which agitate us now* for the simple reason that the conditions out of which present difficulties arise were note even remotely considered as possibilities. *The intentions of the founders cannot, except by chance, provide solutions for problems of which they never dreamed.*

Bora Laskin, *Canadian Constitutional Law: Cases and Text on Distribution of Legislative Power* (Toronto: Carswell, 1951) at 11–16 [emphasis added.]

122. For an account of Canadian federalism's evolution beyond (without entirely abandoning) watertight compartments, see e.g. Wade Wright, "Federalism(s) in the Supreme Court of Canada During the McLachlin Years" (2018) 86 SCLR (2d) (reprinted in Daniel Jutras & Marcus Moore, eds, *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership* (Markham: LexisNexis, 2018)) 213 at 220–25; Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36:2 McGill LJ 309. For confirmation—if highly critical confirmation—of the difference that living tree constitutionalism has made in moving from watertight compartments

such changing circumstances, "our community life—social, economic, political, and cultural—is very complex and will not fit neatly into any scheme of categories of classes without considerable overlap and ambiguity occurring".[123] At the same time, an expansive interpretation of property and civil rights and ongoing strict boundaries on federal labour jurisdiction, for example, represented fidelity to the original compromise and the "natural limits" that flowed from that.[124]

---

to what we now refer to as flexible or cooperative federalism, see Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta L Rev 225.

123. WR Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" in WR Lederman, ed, *The Courts and the Constitution* (Toronto: McClelland & Stewart, 1964) 200 at 201 (originally published in WR Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1962-63) 9:3 McGill LJ 185) [Lederman, *The Courts and the Constitution*]. See also WR Lederman, "The Classification of Laws and the *British North America Act*" in Lederman, *The Courts and the Constitution* at 192 where he explicitly links legal federalism doctrine and analysis, and the version of the living tree approach to constitutional interpretation set out in *AG Ontario v AG Canada*, *supra* note 119 [emphasis added]:

> Another way to put this point is to say that changed economic and social conditions and a different moral climate will give to present or proposed laws new features of meaning by which they may be classified and may also alter judgments on the relative importance of their severable classifiable features. As their Lordships of the Privy Council said: "*It is . . . irrelevant that the question is one that might have seemed unreal at the date of the B.N.A. Act. To such an organic statute the flexible interpretation must be given that changing circumstances require*".

Lederman, *The Courts and the Constitution*, *supra* note 123 at 192. See also Laskin, supra note 120 at 12 referring to "revolutionary economic and social changes".

124. See e.g. the ongoing frequency with which *Parsons v Citizens' Insurance Co.* (1881), 7 App Cas 96, 1881 CarswellOnt 253, has been cited by the Supreme Court of Canada to affirm provincial jurisdiction over property and civil rights and labour. By way of further examples, see *Carnation Co v Quebec (Agricultural Marketing Board)* [1968] SCR 238 at 245, 67 DLR (2d) 1; *Canadian Pioneer Management Ltd v Saskatchewan Labour Relations Board* [1980] 1 SCR 433 at 444, [1980] 3 WWR 214; *Reference re Securities Act* 2011 SCC 66 at para 46.

VI. The "Living Tree" Hiding in Plain Sight

Bradley Miller claims that the *Persons Case* "remained hidden from view for fifty years"[125] only to be discovered in order to provide "faux-precedential" validation for judges advancing "a new, expanded methodology of judicial review" in the era of the *Charter*.[126] We have already seen that the *Persons Case* did indeed support progressive interpretation and was viewed as such by judges and commentators at the time of the decision. We have also seen that the case was applied by way of support for that progressive form of interpretation in the period when Miller claims it was hidden. One did not have to look hard to find it: the references to an "organic constitution", "progressive interpretation", "flexible interpretation", and "changing circumstances" were helpful clues, if the citation to the *Persons Case* in each instance was not plain enough for all to see.[127] Furthermore, throughout this period, Canadian constitutional jurisprudence moved from colonial and watertight compartments perspectives to independent, flexible, and cooperative federalism perspectives, all the while seeking to maintain the federal equilibrium that had been negotiated in the lead up to Confederation.

---

125. Miller, "Origin Myth", *supra* note 5 at 138. See also Honickman, "Living Fiction", supra note 3 at 336 where Honickman also discounts the pre-1980 Supreme Court of Canada references to progressive interpretation referred to above. He dates what he refers to as "the living tree revolution" from the 1980 Supreme Court of Canada decision in *Canada Trust Co v British Columbia (Attorney General)* [1980] 2 SCR 466, 112 DLR (3d) 592. See also Honickman, "Original Living Tree", *supra* note 9 at 30.

126. Miller, "Origin Myth", *supra* note 5 at 138.

127. See the SCC and JCPC references to the *Persons Case* and/or living tree constitutional interpretation in the 1930s and 40s referred to above, and, in *Winner*, *supra* note 121 at 922 in the 1950s, where one finds Rand J's reference to the *Persons Case* and to the need for interpretation of constitutional powers to "await the developments of the years". See discussion in notes 119–123. See in particular Laskin, supra note 121 at 12 in 1951 referring to the *Persons Case* with regard to "progressive interpretation" in response to "revolutionary economic and social changes" about which the framers could not possibly have foreseen. In the 60s, 70s and pre-Charter early 80s, see Bora Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 3rd ed (Toronto: Carswell, 1966) at paras 156–57; Henri Brun & Guy Tremblay, *Droit public fundamental* (Québec: Presses de l'Université Laval, 1972) at 288–89; JD Whyte and WR Lederman, *Canadian Constitutional Law* (Toronto: Butterworths, 1975) at 71–76; PW Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 96–98; G-A Beaudoin, *Essais sur la Constitution* (Ottawa: Presses de l'Université d'Ottawa, 1979) at 98–100; Gil Rémillard, *Le fédéralisme canadien : Éléments constitutionnels de formation et d'évolution* (Montréal: Québec/Amérique, 1980) at 349; Pierre-André Côté, *Interprétation des*

Given that the "living tree" was hiding in plain sight, so to speak, it is hard to give much credence to Miller's talk of "origin myths", "faux-precedents", and the like.[128] Furthermore, as Miller himself concedes, the Supreme Court of Canada began citing the *Persons Case* more frequently in the 1970s, *before* the *Charter* had emerged out of the uncertainties of the patriation crisis of the early 1980s. It is hard then to believe his theory that the courts revived the *Persons Case* simply to advance a more robust era of judicial review in the post-1982 *Charter* era. For a start, one would have to revise history and recast Estey and Beetz JJ as judicial activists. Justice Estey began citing the *Persons Case* as early as 1974,[129] when he was on the Court of Appeal for Ontario. Miller neglects to mention that Beetz J referred to the "essentially dynamic" interpretation of the Canadian constitution in the 1976 *Martin Service Station Ltd v Minister of National Revenue* decision.[130] Furthermore, if one searches for references to the relevance of "changing circumstances" to constitutional interpretation one finds, for example, the following statement from Laskin CJ in the *Anti-Inflation Reference* of 1976: "a Constitution designed to serve this country in years ahead ought to be regarded as a resilient instrument capable of adaptation to changing circumstances".[131]

Miller rightly notes that the Supreme Court of Canada explicitly referred to the "living tree" in the 1979 *Quebec (AG) v Blaikie* decision, but he does not remind us that this was a case that had nothing to do with the then-non-existent *Charter*, the *Canadian Bill of Rights*, or anything that could be described as "a new, expanded methodology of judicial review" in the *Charter* era.[132] The main target of Miller's argument is the future Chief Justice, Brian Dickson; though it is again hard to credit Miller's *Charter*-linked conspiracy theory when we see Dickson CJ citing the *Persons Case* and the "living tree" in a 1980 tax case,[133]

---

lois (Cowansville, QC : Yvon Blais, 1982) at 221, 227 ("interprétation large et évolutive"). And yet Honickman, "Living Fiction", *supra* note 3 and Honickman, "Original Living Tree", *supra* note 9 follow Miller in finding virtually no references to the *Persons Case* and to living tree interpretation in this period. See discussion at note 118.

128. Miller, "Origin Myth", supra note 5 at 138. See also Honickman, "Living Fiction", *supra* note 3 for the reference by Honickman to a "living tree revolution" beginning in 1980.

129. See *Regina v Pelletier* (1974), [1975] 4 OR (2d) 677, 18 CCC (2d) 516.

130. (1976), [1977] 2 SCR 996 at 1006, 67 DLR (3d) 294: "Legislative history provides a starting point which may prove helpful in ascertaining the nature of a given legislative competence; but . . . it is seldom conclusive as to the scope of that competence for legislative competence is essentially dynamic"(*ibid*).

131. *Reference re Anti-Inflation Act*, [1976] SCR 373 at 412, 68 DLR (3d) 542.

132. Miller, "Origin Myth", *supra* note 5 at 138.

133. *Canada Trust Co v British Columbia (AG)*, [1980] SCR 466 at 478, 112 DLR (3d) 592.

two years before the proclamation of the *Constitution Act, 1982*, at a moment when patriation and any related *Charter of Rights and Freedoms* appeared destined for failure. Rather than the hoax that Miller conjures up for us, a more likely explanation for the renewal of interest in the *Persons Case* in the 1970s in Canada was the increasing frequency of rumours regarding new forms of resistance to the activism of the Warren Court in the United States, and the ensuing acceleration of interest in originalist theories in the hope of justifying a more restrained methodology of judicial review in that country.[134] Miller's surreal account of "living tree" mythology does not square with Canadian constitutional history since 1929.

VII. Living Tree Constitutionalism and Its Connection to New Legal Ideas

As we have seen, the *Persons Case* was viewed as a new approach to constitutional interpretation by the courts of the 1930s and was applied subsequently, sometimes through reference to analogous concepts, such as the idea of an "organic" constitution developing in accordance with a "flexible", "dynamic", or "progressive" form of interpretation that in turn took into account "changing circumstances".[135] But the enduring legacy of the "living tree" metaphor was never just a matter of the binding authority of the *Persons Case*. Lord Sankey had not invented a new theory of constitutional interpretation out of thin air. It was connected to a current of legal ideas that had influenced even the most traditional of lawyers in the early part of the last century.[136] In the months before the *Persons Case* was decided by the Privy Council, at a moment

134. For an account of this acceleration of interest, see Solum, *supra* note 7 at 13–17.

135. As discussed above at footnote 119, "organic" has a technical meaning as well as potential "living" resonance. The inclusion of this word in the list is not critical to the point being made here. "Flexible", "dynamic", "progressive" and especially "changing circumstances" convey that point on their own. And yet, it seems to likely that the "living" resonance of the word "organic" would not have been lost on those judges who used it when discussing living tree interpretation or its equivalent. As noted earlier, Miller, "Originalist Constitutional Interpretation", *supra* note 5 and Miller, "Origin Myth", *supra* note 5 also make this link.

136. For general accounts of the shifting intellectual currents in legal circles in North America in the inter-war years, see (regarding the US) Neil Duxbury, *Patterns of American Jurisprudence* (New York: Oxford University Press, 1997) at ch 2; Marie-Claire Belleau & Derek McKee, "Le réalisme juridique et ses précurseurs dans la théorie du droit des États-Unis" in Stéphane

when Lord Sankey may well have been preparing his reasons, Sir Frederick Pollock, the venerable legal historian and long-time editor of the *Law Quarterly Review*, presented a lecture and later published an article that considered the judicial role generally and, more particularly, how judges should act in the face of the rapidly changing circumstances of the twentieth century.[137] Pollock's musings were not ideas that had occurred to him in the moment; they were the conclusion of a lifetime of thinking and writing about law, life, and legal history. As a loyal correspondent (for over sixty years) with Oliver Wendell Holmes, Jr.,[138] Pollock was no doubt aware of the new wave of ideas that we

Bernatchez & Louise Lalonde, dir., *Approches et fondements de droit: Interdisciplinarité et théories critiques* (Montréal : Éditions Yvon Blais, 2019) at 495–530; and (regarding Canada) Richard Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council (1995)" 23 Man LJ 496. In general terms these intellectual currents revealed new discomfort with viewing law entirely in formal terms, and greater interest in whether and to what extent those same legal forms achieved, in more concrete terms, that which they promised.

137. The decision in the *Persons Case* JCPC was rendered on 29 October 1929. As noted below at note 138, Pollock's lecture was delivered in March 1929 and published in the prestigious and much-read (in legal circles) *Law Quarterly Review* in July 1929.

138. Mark De Wolfe Howe, ed, *Holmes-Pollock Letters*, 2nd ed (Cambridge, Mass: Belknap, 1961). Sir Frederick Pollock was a fellow of law at the University of Oxford and, together with Frederic Maitland, the leading English legal historians of the period. Oliver Wendell Holmes, Jr, was without doubt one of the great American jurists at the turn of the last century. Holmes was a fervent critic of legal formalism, and famous in wider circles for certain law-related aphorisms, such as: "The life of the law has not been logic; it has been experience." See Oliver Wendell Holmes, Jr, *The Common Law* (Boston: Little, Brown & Co, 1881) at 1. See also Oliver Wendell Holmes, Jr, "The Path of the Law" (1897) 10 Harv L Rev 457 at 465–66 [Holmes, Jr, "The Path of the Law"]. Holmes was generally very sceptical of judges who based their decisions on supposed formal logic: "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion, and repose is not the destiny of man" (*ibid*). Holmes' approach to the law evinced an awareness of the role of policy considerations in judicial craft. As Belleau & McKee note, *supra* note 136 at 508, Holmes marked the arrival of the twentieth century by setting out a new sense in which law was dependent on (though by no means reducible to) policy, and inseparable from social context. Not surprisingly, Holmes' ideas were influential in the emergence of both the sociological approach to law and legal realism. For further discussion see Duxbury and Belleau & McKee, *supra* note 136 and Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (New York: Oxford University Press, 2013). During most of the period of his correspondence with Pollock, Holmes held high judicial office, as an Associate Justice of the United States Supreme Court (1902–32).

now refer to as American legal realism and sociological jurisprudence.[139] In "Judicial Caution and Valour",[140] Pollock made no reference to American intellectual developments, but he clearly grasped the tension between formal law and the changing circumstances into which the law inevitably plays out and what that meant for the judicial craft:

> [The court] must find and apply the rule which in all the circumstances appears most reasonable . . . The duty of the Court is to keep the rules of law in harmony with the enlightened common sense of the nation. Such a duty, being put upon fallible men, cannot be performed with invariable and equal success. It is a matter of judgment, knowledge of the world, traditional or self-acquired bent of opinion, and perhaps above all of temperament. Caution and valour are both needed for the fruitful constructive interpretation of legal principles. The court should be even valiant to override the merely technical difficulties of professional thinking, and also current opinions having some show of authority, in the search for a solution which will be acceptable and in a general way intelligible to reasonable citizens, or the class of them whom the decision concerns. Judicial valour of this kind is in no way akin to headstrong ambition or love of innovation for its own sake.

139. Legal realism is often presented in such a way as to make it appear ridiculous: a caricature, perhaps based on some of the most famous phrases rather than the general substance of the movement. Rather than viewing law simply as "whatever judges decide", as the caricature often presents it, many legal realists took seriously whether the law as set out in the law books (legislative and judicial) actually achieved its purported aims. See Duxbury, *supra* note 136; Dagan, *supra* note 138. The suggestion here is not that living tree constitutionalism is a form of realism, sociological jurisprudence or instrumentalism, much as its opponents would like to see it characterized and caricatured in that way; rather, it is suggested that living tree interpretation as first set out for Canadian purposes in the *Persons Case* appeared to acknowledge the relevance of both formal legal requirements and the (often changing) circumstances into which formal law inevitably plays out. Whereas the former loom larger in many day-to-day legal disputes, the latter also become relevant in the hard cases that make their way to the higher courts. That awareness is apparent even in the traditionally-trained, ever-inquiring mind of Holmes's long-time correspondent, Sir Frederick Pollock.

140. Frederick Pollock, "Judicial Caution and Valour" (1929) 45:3 Law Q Rev 293 at 294–297 (article based on a lecture delivered to the Faculty of Law in the University of London, 6 March 1929) cited (in part) in *Forbes v Manitoba (AG)* [1936] SCR 40 at 69, [1936] 1 DLR 465, Cannon J, dissenting.

> Public opinion itself is not infallible. No man or body of men can always be rightly informed of all the relevant facts; and even those moralists who have been foremost in proclaiming the supremacy of the law of nature in general, and the individual conscience in particular, have likewise insisted that right information is a necessary condition of right judgment . . . Some men are born with a bent for constructive speculation and others with an aversion to it. The former sort are eager to generalize, and, when they meet with new facts, are not happy till they have brought them under a new formula. The latter will never commit themselves to a new general proposition if they can help it, and seek the cover of positive authority or something that looks like it at every step, even if that step is the drawing of an obvious consequence . . . On the whole the balance is weighted against speculation by the fact that it needs a share of energy, intelligence and imagination beyond the average allowance of educated citizens and still more by the constant passive resistance of mere inertia.
>
> From this point of view the problem of judicial interpretation is to hold a just middle way between excess of valour and excess of caution . . . Discretion is good and very necessary, but without valour the law would have no vitality at all.

There is no indication that Lord Sankey attended or read this lecture. It is, however, a powerful indicator of the sorts of ideas that were swirling around even the most traditional legal circles at this moment in United Kingdom legal history.[141]

VII. Conclusion: The Enduring Legacy of the "Living Tree"

In this article, I have demonstrated that the *Persons Case*, while written by Lord Sankey on behalf of his Privy Council colleagues and, in that sense, a

141. See Saywell, *supra* note 49 at 187. In a chapter entitled "Lord Sankey and 'Progressive Constructionism', 1929-1935", John Saywell relates that in conversation with Lord Haldane and Professor Harold Laski before his elevation to Lord Chancellor, John Sankey had taken "what Laski described as 'the obvious and sensible view that judges inevitably legislate' and claimed that he was 'interested in the endeavour to make the case emit a big working principle'"(*ibid*).

product of its time, was indeed authority for a new, progressive method of constitutional interpretation, designed to be both respectful of the 1867 Constitution and responsive to a rapidly-evolving Canadian society. It was certainly received in that way by many of the keenest legal observers of the period, most notably the justices of the Supreme Court of Canada who had been overturned in the *Persons Case*. Despite Miller's emphatic assertions to the contrary, Lord Sankey's reasons reveal a reluctance to fix the meaning of "persons" in 1867, and a willingness to consider post-1867 evidence of changing understandings, from the ringing early reference to "the exclusion of women" being "a relic of days more barbarous than ours" through to the repeated references to post-1867 political understandings of the word "persons".[142] I have shown how Lord Sankey's reasons, and, again, the way that they were received and repeated by contemporaneous legal observers, confirm that, contrary to Miller's most-repeated claim, it is the Constitution itself that is the living tree, not just conventions or custom. I have shown how the Privy Council in the 1930s and 1940s, and the Supreme Court of Canada in the 1950s, as well as constitutional commentators throughout, continued to cite the *Persons Case* and employ living tree constitutionalism. These examples refute Miller's assertion that the *Persons Case* was essentially forgotten after it was decided. Miller makes that assertion in order to support the claim that the Persons Case and the "living tree" were artificially and misleadingly revived in order to provide support for a new, more activist form of judicial review in the *Charter* era. I have also shown that the Supreme Court of Canada began to cite the *Persons Case* and the "living tree" more frequently in the 1970s, well before the *Charter* was even a realistic prospect, in cases ranging from non-rights-related constitutional law to tax law.

Given this weight of evidence, it is clearly wrong to give credence to Miller's claims of "hoax", "myths", and "faux-precedents". The *Persons Case* is rightly celebrated as an important symbol of women's rights and as a signpost for a new method of constitutional interpretation. Not only is it correct to continue referring to the Canadian Constitution as a living tree, but it is also fair to say, after almost one hundred years, that this is indeed an enduring metaphor.

142. *Persons Case* JCPC, *supra* note 1 at 99.