ORIGIN MYTH: THE *PERSONS CASE*, THE LIVING TREE, AND THE NEW ORIGINALISM

Bradley W. Miller*

I. INTRODUCTION

Originalism in Canada – to put it charitably – has "never gained much judicial or scholarly support",[1] and *Edwards v. AG Canada*[2] has been cast as its *bête-noir*.[3] In the *Persons Case* five women successfully challenged the Canadian federal government's interpretation ofsection24 of the *British North America Act, 1867*[4] as blocking the appointment of women to the Senate. Like *Brown v. Board of Education*[5] in the United States, the *Persons Case* has become powerfully symbolic of how judicial review under

* This paper was first prepared for a symposium on originalist constitutional interpretation hosted by the Public Law and Legal Philosophy Research Group at the University of Western Ontario, Faculty of Law in October 2008. I have benefitted from discussions with Grant Huscroft and Lawrence Solum and from helpful comments on earlier drafts from James Allan and Grégoire Webber.

[1] Ian Binnie, "Constitutional Interpretation and Original Intent" in Grant Huscroft and Ian Brodie (eds.), *Cosntitutionalism in the Charter Era* (2004) 345 at 348 [Binnie, "Original Intent"]. While Justice Binnie's observation is formally restricted to "original intentions" originalism, it is a fair statement about all schools of originalism. Originalism in Canada tends to be erroneously equated with original intentions and Binnie himself - having once set out the distinctions between various schools of originalism – flouts them throughout the rest of his article. For a survey of the attitudes towards originalism held by the Canadian legal academy and judiciary, see Bradley W. Miller, "Beguiled By Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22 Can. J.L. & Jur. 331 [Miller, "Beguiled By Metaphors"].

[2] *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.) [more commonly known as the *Persons Case*].

[3] See, for example, Justice Binnie's characterization of the *Persons Case* as a "standing rebuke to an overly deferential attitude to originalism." Binnie, "Original Intent", *supra* note 1 at 366.

[4] The *British North America Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) – since 1982 entitled the *Constitution Act, 1867* – is an act of the U.K. Parliament constituting part of the written constitution of Canada. Section 24 provides:

> The Governor General shall from Time to Time, in the Queen's Name, by Instrument under 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.

[5] 347 U.S. 483 (1954).

the constitution can be used to attack social injustice.[6] Since the early 1980s, it has also been identified by the Supreme Court of Canada as the fount of non-originalist constitutional interpretation in Canada, the constitutional bedrock upon which the methodology of contemporary "living tree" Charter interpretation is founded.[7] These two aspects of the case are related: the possibility of judicially-led social progress is often said to depend on the availability of non-originalist interpretative methodology.[8] The account of the *Persons Case* as rejecting originalism and establishing the "living tree" methodology of constitutional interpretation in Canada is the focus of this chapter.

The *Persons Case* is often read as having delivered the death blow to originalist constitutional interpretation in Canada, providing two objections to any proposal to engage with originalist constitutional interpretation. At the level of doctrine, the rejection of originalism in the *Persons Case* has, over 75 years, been firmly established as a matter of Canadian constitutional bedrock. As a matter of principle, the Persons case demonstrates that originalist interpretation risks binding political communities to the injustices of the past. These two objections have a ready appeal. In the *Persons Case*, the Privy Council not only overturned the Supreme Court of Canada, but rebuked it for deferring to the intentions of the framers when interpreting the *British North America Act 1867* (*BNA Act*) as not allowing for women to be appointed to the Senate. The Privy

---

[6] See, e.g., the editorial of Canadian newspaper proprietor David Asper on the occasion of Persons Day, "A Day to Remember the Famous Five" Editorial, *National Post* (18 October 2006):

> Judicial activism is part of the great history and tradition of Canada, and it has provided much justice to our citizens. We may not always agree with our judges' decisions, but on Persons Day we should at least acknowledge that many of the rights we enjoy today exist because five determined women convinced five lords in England to fix a problem in the law. And the judges had the nerve to do it.

In addition to Persons Day, in 1979 the federal government instituted the Governor General's Awards in Commemoration of the *Persons Case*, on the 50th anniversary of the Privy Council decision; the "famous five" are commemorated on the back of the Canadian 50 dollar bill; the Women's Legal Education and Action Fund hosts annual Persons Day breakfasts, *etc*.

[7] *Hunter et al. v. Southam Inc*., [1984] 2 S.C.R. 145; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. There was little serious debate over constitutional interpretive methodology in Canada prior to 1982. In 1982, however, the enactment of the *Charter of Rights and Freedoms* necessitated a revisiting of constitutional interpretation. The vague, open-ended nature of the *Charter's* rights guarantees posed an interpretive challenge to the Canadian courts, and the Supreme Court of Canada quickly retrieved from the *Persons Case* the metaphor of the living tree and constructed an interpretive methodology around it. Consensus was quickly achieved on the Court and in the academy. See David M. Brown, "Tradition and Change in Constitutional Interpretation: Do Living Trees Have Roots?", 19 National Journal of Constitutional Law (2005) 33. For an exposition of the central commitments of living tree constitutional interpretation in Canada, see Miller, "Beguiled By Metaphors", *supra* note 1.

[8] W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (2007).

Council derided the Supreme Court's "appeal to history"[9] and "narrow and technical"[10] methodology, preferring instead a "large and liberal" style of interpretation which conceived of the constitution as "a living tree capable of growth and expansion within it natural limits."[11] The Privy Council saw itself as faced with two options: (1) joining the Supreme Court in following the path of constitutional originalism to a morally repugnant result, or (2) establishing a non-originalist methodology that would enable courts to respond justly to changing social needs. The Privy Council, on this reading, chose the latter.

The Privy Council's interpretive methodology diverged significantly from the originalism of the Supreme Court. However, I have considerable doubt about the extent to which the Privy Council's reasons can be fairly characterized as following a "living tree" methodology. In what follows, I will offer a close reading of the reasons for judgment in the *Persons Case* both at the Supreme Court and Privy Council, and consider the possibility that the methodology on display in the Privy Council's decision is in fact more closely aligned with originalism; not the originalism of the Supreme Court, but rather the New Originalism that has received significant scholarly attention over the past 20 years. The surprising conclusion that I reach is that this bedrock of Canadian constitutional law is fully consistent with the New Originalism and at odds with the current jurisprudence of the Supreme Court of Canada. Finally, I will provide a brief argument as to why embracing this form of originalism would not, as is often asserted, condemn a political community to constitutional injustice.

II. THE *PERSONS CASE*: AT THE SUPREME COURT OF CANADA

In 1919, Emily Murphy began advocating for women to be appointed to the Senate of Canada, and shortly thereafter openly sought her own appointment.[12] She received several nominations for a seat in the Senate, but was denied appointment by three

[9] *Person Case*, *supra* note 2 at 134.
[10] *Ibid.* at 136.
[11] *Ibid.* at 136.
[12] Robert J. Sharpe & Patricia I. McMahon, *The Persons Case: The Origins and Legacy of the Fight For Legal Personhood* (2007) 74-103 [Sharpe & McMahon, *The Persons Case*].

successive Prime Ministers. Each took the position (supported by legal opinions from the Department of Justice) that a constitutional amendment would be required before women could be appointed to the Senate.[13] Nothing in the *BNA Act* expressly stated that women were ineligible for appointment to the Senate, or public office more generally. The barrier to a Senate appointment, as interpreted by the Department of Justice, was the absence of an express intention to overturn a common law rule. In a series of cases relied on by the Department of Justice, Canadian and English courts had maintained a common law rule that women were ineligible to vote and to hold public office. The rule could only be overturned by explicit legislation to the contrary, as had happened for example, when women obtained legal voting rights in Canada. Universal adult suffrage, though not realized in all of Canada, had been achieved through legislative reform in most provinces at that time.[14] Unlike these legislative acts, section 24 of the *BNA Act*, according to the Department of Justice opinions, did not manifest a clear intention on the part of the framers to overturn this settled precedent and allow for women to be appointed to the Senate.[15]

Murphy eventually became resigned to the fact that there was no prospect of political success and instead turned to the courts, joining with four other women (Henrietta Muir Edwards, Nellie McClung, Louise McKinney, and Irene Palby) in 1927 to petition[16] the federal government to use its reference power to seek advice from the Supreme Court of Canada on the question of whether "the word 'Persons' in section 24 of the British North America Act, 1867 include[s] female persons?"[17] On October 19, 1927, the Governor General issued an Order in Council to the Supreme Court setting out both the question - whether "the word 'Persons in s.24 of the British North America Act, 1867, include[s] female persons?" – and the government's position:

---

[13] *Ibid*. at 75.
[14] *Ibid*. at 44. Universal adult suffrage came to Canada piecemeal through a combination of provincial and federal legislation (the federal *Elections Act* incorporated the voters' lists of the provinces), with the western provinces first out of the gate in 1916. All provinces but Quebec had granted women the vote by 1922, with Quebec finally following in 1940.
[15] *Ibid.* at 74-92.
[16] The constitutional provision that permitted five or more interested persons to petition the court has since been repealed.
[17] For a history of the case, see Sharpe & McMahon, *The Persons Case*, *supra* note 12.

> The Minister states that the law officers of the Crown who have considered this question on more than one occasion have expressed the view that male persons only may be summoned to the Senate under the provisions of the British North America Act in that behalf.[18]

The Supreme Court of Canada considered itself bound by the existing common law precedents on the incapacity of women to serve in public office. The only way that the case could be resolved in favour of the petitioners, according to the Court, would be if the legislation in question – section 24 of the *BNA Act* – evidenced the framers' express intention to overturn that precedent. The Court explained that its task was purely a matter of statutory interpretation:

> …we are, of course, 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. Our whole duty is to construe, to the best of our ability, the relevant provisions of the B.N.A. Act, 1867, and upon that construction to base our answer.[19]

A key aspect of the Court's interpretive methodology is that the meaning of a statute is *fixed* at the time that it was enacted:

> Passed in the year 1867, the various provisions of the B.N.A. Act … bear to-day the same construction which courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.[20]

This passage indicates that the meaning of the provision is fixed (or, in the contemporary Canadian idiom, "frozen") at the time the statute was enacted. What "persons" meant in a statute enacted in 1867 is what it must mean in that same statute when interpreted in 1929 or 2009. On this methodology, the word "persons" can never bear a meaning *inconsistent* with (or, more stringently, different from) the meaning fixed in 1867. How is the court to determine what this meaning is? What are the relevant sources that it can canvass? The Supreme Court described its methodology as follows:

> …we have to construe not merely the words of the Act of Parliament but the intent of the Legislature as collected, from the cause and necessity of the Act being made, from a comparison of

[18] *Edwards v. Canada (Attorney General)*, [1928] S.C.R. 276 at 288 [*Edwards*].
[19] *Ibid.* at 281-82.
[20] *Ibid*. at 282.

> its several parts and from foreign (meaning extraneous) circumstances so far as they can be justly considered to throw light upon the subject.[21]

That is, to ascertain this fixed, original meaning, the Court will direct itself in the first instance to the ordinary meaning of the words used.[22] This is with the expectation that the framers intended the words to bear their ordinary semantic meaning, and that the framers' intentions are therefore evident from the words chosen. But because the semantic meaning is given within a particular context, the Court must consider the whole of the statutory context ("from a comparison of its several parts") and the purpose of the legislation ("the cause and necessity of the Act being made") in order to determine the meaning. The Court contemplates that the semantic meaning of the words of a text, when taken out of context, can in fact be contrary to the framers' intended meaning. In such a case, they approvingly cite *Stradling v. Morgan*[23] as authority or giving priority to the original intent over the literal meaning: "[t]he Sages of the Law heretofore have construed Statutes quite contrary to the Letter in some appearance …"[24] What is to control the interpretation is thus the intention of the framers, and the contextual factors are to help in ascertaining what that intention was. So the relevant meaning that is sought is the meaning that the framers' intended, and the evidence that the court will use to determine this meaning is the ordinary meaning in the context of the whole of the legislation, informed by the purpose of the act and (unspecified) extraneous circumstances. This approach has much in common with the school of constitutional interpretation, which is sometimes referred to as "old" or "original intentions" originalism.[25]

Consider how this methodology was deployed by the Court when it interpreted "persons". First, the Court noted that the ordinary semantic meaning of "persons" in 1867 was ambiguous. It was capable of designating male or female persons or both: "[t]here

[21] *Ibid*. at 282, citing *Hawkins v. Gathercole*, 6 DeG. M. & G., 1 [*Hawkins*].
[22] "the ordinary and popular sense" *Edwards, ibid.* at 282, citing *Chorlton v. Lings* (1868) L.R. 4 C.P. 374 at 298.
[23] 1 Plowd. 203.
[24] *Edwards, ibid*. at 282.
[25] For an overview of original intentions originalism, see Larry Alexander, "Simple-Minded Originalism" and Stanley Fish, "The Intentionalist Thesis Once More", and Lawrence B. Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory" in this volume.

can be no doubt that the word "persons" when standing alone *prima facie* includes women."[26] The ambiguity was to be resolved, according to the Court, by giving effect to the intentions of the framers. Not surprisingly (particularly since the Court at that time was reluctant to admit transcripts of legislative debates into evidence) there is little evidence as to what the framers intended, so the Court made a subtle change of course. While it maintained its focus on framers' intent, the inquiry shifted away from ascertaining the actual intentions of any particular individual or group, and towards constructing intentions that could be plausibly attributed to them.

Furthermore, the object of the inquiry was not the framers' intentions with respect to the *semantic* meaning of "persons", but rather their intentions about *application* meaning;[27] that is, how *would* they have answered the concrete question "does s.24 of the *BNA Act* permit women to be appointed to the Senate?" To answer this question about expected application, the Court followed two lines of inquiry. First, it considered the past practice of Canadian governments. The evidence was that no Canadian prime minister from 1867 to date had ever sought to appoint a woman to Senate, and this was taken as evidence that the original understanding (or, equivalently, the original public meaning) of section 24 – an understanding that has been confirmed by every subsequent government – was that section 24 precludes the appointment of women.[28] Second, the Court employed a common law rule of interpretation, adopting the interpretive presumption that legislators are aware of the common law and intend for legislation to be interpreted in a manner consistent with the existing common law, unless express language in the legislation overrides the common law. In this case, the relevant common law rule that was operative in 1867 was that women were under a legal incapacity to hold public office. This was a rebuttable presumption, and to rebut it, the petitioners were required to demonstrate that the framers intended to overturn the common law rule. The Court found no evidence of such an intention.

---

[26] *Edwards*, *supra* note 18 at 285.
[27] For the distinction between semantic meaning and application meaning, see Lawrence B. Solum, "Semantic Originalism" (November 22, 2008). Illinois Public Law Research Paper No. 07-24. Available at SSRN: <http://ssrn.com/abstract=1120244> [Solum, "Semantic Originalism"].
[28] *Edwards*, *supra* note 18 at 284-5.

The Court's reasoning can be summarized as follows:

(1) The BNA Act, section 24 provides that "qualified persons" may be summoned to sit in the Senate.[29]

(2) In interpreting "persons", the word is to be given the ordinary meaning that it would have had in context in 1867;[30]

(3) The meaning of the word "persons" in ordinary use in 1867 was ambiguous between male and female persons;[31]

(4) Given this ambiguity, the Court is to give effect to how the framers intended that s.24 be *applied*; that is, whether the framers believed that section 24 authorized the appointment of women;[32]

(5) The framers of section 24, *had they turned their mind to the question*, would not have understood themselves to have authorized the appointment of women to the Senate;[33]

(6) This application meaning of section 24 is evidenced by the fact that no Canadian government since 1867 had appointed a woman to the Senate, which is evidence of a continuing belief that women were not eligible;[34]

(7) This application meaning is further supported by a common law interpretive presumption:

   a. That the legislature is aware of the common law and that its statutes should only be interpreted as abridging the common law when the legislature does so using express language;

   b. Women were, by a common law rule, legally incapable of holding public office in 1867;

   c. There was no express language used in section 24 of the BNA Act to indicate an intention to overturn the common law rule.[35]

[29] *Ibid. at* 282.
[30] *Ibid.*
[31] *Ibid*. at 286.
[32] *Ibid*. at 285.
[33] *Ibid*.
[34] *Ibid*. at 284-5.
[35] *Ibid*.

(8) Therefore, when section 24 is interpreted in a manner consistent with its original application meaning, it means that women in Canada are not among the "qualified persons" who the Governor General may appoint to the Senate.

What qualifies this as an originalist argument? Because there are so many variants of originalist arguments, it is important to grasp firmly which originalist commitments the Supreme Court of Canada held.

Recall that the Supreme Court's first step in its analysis is textualist; it is concerned with understanding the semantic meaning of the word "person" by giving it the ordinary meaning that it had in context in 1867. So the meaning of "person", on this methodology, is fixed (or frozen) as of 1867. This is the holding for which the judgment is best known, and which is now used by contemporary commentators as the point of contrast with not only the Privy Council's decision, but also with the contemporary methodology of the Canadian courts: the "living tree" doctrine.[36]

While we know that the meaning of "person" is fixed as of 1867, what is it that (according to the Supreme Court) "fixes" the meaning? The most plausible answer is the intentions of the framers, formulated as the subjective intent of the people who either drafted or voted for the section (perhaps as delegates to a convention or as members of Parliament). The intention of the framers is usually sought in the ordinary semantic meaning of the words in context.[37] But where the semantic meaning is vague or ambiguous, the interpreter must move to resolve the vagueness or ambiguity by ascertaining the framers' intentions about how the text was to be applied to the concrete case at hand; that is, the interpreter must ascertain the original expected application of the text.

So in the case at bar the ambiguity about whether "person" indicated men or men and women, was to be resolved by a determination of the framers' intentions about how

[36] Miller, "Beguiled By Metaphors", *supra* note 1.
[37] *Edwards*, *supra* note 18 at 282, citing passages from *Stradling v. Morgan*, 1 Plowd. 203 and *Hawkins*, *supra* note 21.

section 24 was to be applied. As previously noted, there is no evidence that the Supreme Court sought, as a question of fact, to ascertain the *actual* intentions of anyone involved in either drafting section 24 or voting for it. It did not, for example, consult the transcripts of any of the debates surrounding the adoption of the *BNA Act*,[38] or look at any other personal or other contemporaneous writings of individuals involved. The only historical fact that the Court found relevant with respect to interpreting section 24 was the past practice of the prime ministers who nominated persons for appointment to the Senate pursuant to section 24. That is, the Court took the interpretations of section 24 made by governments over the preceding 60 years, and used this as evidence of what "person" meant in 1867. The reasoning seems to have been that (1) each prime minister since 1867 had the authority and duty to interpret the *BNA Act*, (2) each had apparently interpreted it in the exact same way (the evidence being the brute fact that no prime minister had ever nominated a woman for appointment to the Senate), (3) this unanimity was a good reason to believe that "person" in section 24 was intended by the framers to refer to men only.

So the originalism on display is a form of original intentions originalism: the semantic meaning of the words used is taken as evidence of the intentions of the framers, to be supplemented (or even corrected) by any evidence of how the framers intended the provision to be applied. The Court turned to original expected application to resolve the ambiguity in semantic meaning. It then finessed the absence of good evidence about how the framers would have applied section 24, first by holding that the practice of successive governments since 1867 was some evidence of the original intention of the framers, and second, by *attributing* an intention to the framers by the operation of a common law interpretive principle: Parliament is presumed to have been aware of a common law incapacity preventing women from holding public office, and is presumed not to overturn such a rule absent express language.

III. THE PRIVY COUNCIL'S LIVING TREE

[38] It does not appear that such evidence was put before it (or that it would have been accepted into evidence if it were).

The Privy Council overturned the decision of the Supreme Court of Canada and held that "the word 'persons' in section 24 includes members both of the male and female sex, and that, therefore … women are eligible to be summoned to and become members of the Senate of Canada."[39] A striking feature of the Privy Council's methodology is that, like the Supreme Court of Canada, it is thoroughly textualist. The Privy Council is concerned with construing the constitutional meaning of section 24 by first ascertaining the semantic meaning of "person". It does not articulate or follow what might be called a "purposive" methodology; that is, it does not set out to find an interpretation of section 24 that will achieve what the Privy Council understands to be section 24's underlying purpose or policy objective. The advancement of purposes or principles or policy objectives (e.g. to provide for good governance of Canada, to increase the likelihood that those appointed to the Senate will possess requisite ability, to subordinate women, to emancipate women, to promote equality, etc.) are not, on the method on display, used as interpretive criteria. The textualism of the Privy Council is evident throughout the reasons for judgment given by Lord Sankey, and the following passage is exemplary:

> No doubt in any code where women were *expressly* excluded from public office the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed in public office are described under the word "person" different considerations arise.[40]

That is, on the Privy Council's methodology, the interpretive challenge is not in ensuring that a constitutional rule squares with the objective of a provision, and so the possibility that interpretation will reveal a morally objectionable provision is simply not an interpretive problem.[41] The difficulty the Privy Council faced in interpreting section

[39] *Persons Case*, *supra* note 2 at 143.
[40] *Ibid*. at 133-34 (emphasis added).
[41] That is not to say that a morally objectionable constitutional text creates no problem at all. It creates an enormous problem for all persons (and not just judges) who must consider whether, in whatever deliberations they are engaged in (to return a judgment, to enact legislation, to engage or withhold from some course of conduct), the text provides them with a sufficient reason for action. But deliberations over what course of action to take plays no role at all in the prior and more technical task of ascertaining the semantic meaning of a written text.

24 was having to resolve an ambiguity in language. Like the Supreme Court of Canada, it was searching for a linguistic fact:[42] the "original meaning" of the word "person".[43]

Before going any further into the Privy Council's technique for ascertaining the meaning of "person" it is important to take note of a critical (yet unarticulated) methodological postulate that infuses the whole of the Privy Council's reasons for judgment. It is a postulate that is fully consistent with a tenet of originalism expressly articulated and followed by the Supreme Court of Canada: that the meaning of a constitutional text is *fixed* at a particular point in time.[44] In the *Persons Case*, the time of fixation is taken as being the time of enactment of the *BNA Act*, 1867. And so, the Privy Council (together with the Supreme Court) was engaged with ascertaining the meaning of "person" as of 1867. The Privy Council was of course aware that the semantic meaning of words can change over time (and can bear different meanings in different contexts and societies). And so it expressly rejected the argument of the AG Canada that the interpretation of "person" be governed by judicial interpretation of statutes that pre-existed the *BNA Act* by several hundred years.[45] Tacitly, the Privy Council accepted that "person" might have meant "men" in a 17th or 18th century statute (to say nothing of what it meant in the 1st Century), but the job of the court was to determine what "person" meant in 1867.

Neither did the Privy Council accept that semantic changes that might have occurred post 1867 could be relevant. The Privy Council did not marshal any evidence of change in the semantic meaning of "person" since 1867, nor is there anything in the

---

[42] On "linguistic facts" see Solum, "Semantic Originalism", *supra* note 27 at 37.

[43] *Persons Case, supra* note 2 at 134. It should be emphasized that the Privy Council understood itself as interpreting a text as to eligibility to sit in the Senate, and not deciding the metaphysical question of whether women are persons. On this point see Frederick Vaughn, *Viscount Haldane: 'The Wicked Stepfather of the Canadian Constitution'* (2010) 214, noting that '(n)o judicial decision has been more inaccurately reported or more willfully distorted than the decision in the *Edwards* case to exclude women from the Senate.'

[44] See the similar observation with respect to the interpretive methodologies of the US Supreme Court in Lawrence Solum, "District of Columbia v. Heller and Originalism", 103 Nw. U. L. Rev. 923 (2009); [Solum, *Heller*].

[45] "…their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasons therefore 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." *Persons Case, supra* note 2 at 134-5

reasons for judgment that suggest that the court believed that any such change had occurred. While the analysis is complicated by the fact that there is no suggestion in the judgment that the meaning of "person" had changed from 1867 to 1929, all the evidence suggests that the Privy Council did not accept that any subsequent changes in linguistic usage should influence interpretation. To the contrary, the one external text cited as instructive of the meaning of "person" – a legislative amendment moved by J.S. Mill before a parliamentary committee – was *contemporaneous* to the passage of the *BNA Act* in 1867:

> Neither is it without interest to record that when upon May 20, 1867, the Representation of the People Bill came before a Committee of the House of Commons, John Stuart Mill moved an amendment to secure women's suffrage, and the amendment proposed was to leave out the word "man" in order to insert the word "person" instead thereof: see Hansard, 3r series, vol. Clxxxvii., col. 817.[46]

Interestingly, Sharpe and McMahon also cite (but attach no significance to) newspaper coverage of the oral hearings before the Privy Council that record the judges' preoccupation with original semantic meaning. Unnamed judges are recorded in newspaper accounts as having asked counsel questions indicating "that they believe themselves concerned entirely with the meaning of the word "persons" used in the *BNA Act* 62 years ago, and the meaning then attached to the word by the imperial Parliament."[47] And when counsel for Edwards *et al.* argued that "[w]ords may change over the course of a century", Lord Tomlin is recorded as having replied, "[w]e must interpret the words in their meaning at the time the Act was passed."[48] So 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 text could change the meaning of the constitutional text. All of the evidence is to the contrary: the Privy Council believed that semantic meaning is fixed (or frozen) as of 1867. The methodology of the Privy Council, the Supreme Court of Canada, and originalist constitutional scholars are, on this point, aligned.

---

[46] *Ibid.* at 143.
[47] "Privy Council Is Puzzled Whether Women 'Persons'" *Toronto Daily Star* (25 July 1929), quoted in Sharpe & McMahon, *The Persons Case*, *supra* note 12 at 175.
[48] "Women and the Senate" *Daily Telegraph* (26 July 1929), as quoted in Sharpe & McMahon, *The Persons* Case, *supra* note 12 at 176.

This reading seems to be at odds with Canadian constitutional bedrock: what of the "living tree"? Did the Privy Council not state that the *BNA Act* is "a living tree capable of growth and expansion within its natural limits"? Is this not a clear repudiation of fixed semantic meaning? Did the Privy Council not reject the proposal that it read the word "persons" as though it were fixed in 1867 and instead choose a new meaning that was better adapted to the changed circumstances of 20th century political culture? This reading of the *Persons Case* – that it repudiated fixed meaning – simply cannot be maintained. But given the centrality of this misreading to contemporary Canadian constitutional scholarship and doctrine, I must go further in setting out the methodology of the Privy Council, paying close attention to the place of the "living tree" metaphor within it.

Recall that the methodology of the Privy Council in interpreting section 24 was first to search for the semantic meaning of "person", relying on (1) "external evidence derived from extraneous circumstances such as previous legislation and decided cases", and (2) "internal evidence derived from the Act itself."[49] It is in a prologue to the discussion of "internal evidence" and after the discussion of "external evidence" that the Privy Council abruptly makes its famous utterance: "[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."[50] The prologue addresses "the circumstances which led up to the passing of the Act"[51] and stresses the differences among the various political communities within the Commonwealth, such that the "customs and traditions" of one country ought not to be used to interpret the legislation of another.[52] In setting forth the history of the Canadian debates and the voting of the delegates in connection with the drafting of the *BNA Act* (and in praising "the political genius of Canadian statesmen") the Privy Council is clearly attempting to minimize the controlling effect of English common law ("so that the Dominion … may

[49] *Persons Case, supra* note 2 at 127.
[50] *Ibid.* at 136.
[51] *Ibid*. at 135.
[52] *Ibid*.

be mistress in her own house").[53] It is as part of this justification for minimizing the significance of English precedent that the living tree metaphor is employed.

It is important to note that the Privy Council did not state that the *BNA Act is* a living tree, but rather that the *BNA Act planted* a living tree. The structure of the metaphor draws a distinction between the BNA Act itself and the thing it planted. What the *BNA Act* planted (through the enumerated provisions (including section 129's continuation of existing law) and the preamble's stated aspiration of "a Constitution similar in Principle to that of the United Kingdom") was the Canadian Constitution in its entirety – written and unwritten, convention and law. What the *BNA Act* planted in Canada – what is "living" – is the Constitution, of which the *BNA Act* is only part. The Constitution, according to the Privy Council, includes not only the *BNA Act* (and, we can now add, other statutes such as the *Constitution Act, 1982*) but also "usage and convention"[54] (and, we should make explicit, constitutional doctrine – the principles and rules derived from the written constitution). It is the Constitution as a whole, made up of the totality of its sources, that is characterized by the Privy Council as a living tree capable of growth and expansion within its natural limits, and *not* the specific textual provisions of the *BNA Act*. The task of textual interpretation is always focussed on recovering the fixed, semantic meaning of the text.

But constitutional interpretation is not the whole of judicial reasoning with a constitution; that is, it is not the whole of constitutional law. A constitution is not self-executing. There remain gaps to fill, ambiguities to resolve, vague expressions to construe, and contested concepts to specify. None of these is the task of interpretation as practiced by the Privy Council in the *Persons Case* (and, latterly, as defined by the New Originalists). The living tree metaphor, I will argue, is only addressed to, and only bears on, this latter stage of analysis that has been usefully termed constitutional construction.

[53] *Ibid*. at 136.
[54] *Ibid*.

The Privy Council sought, from the beginning, to ascertain the semantic meaning of "person", and in so doing, noted the same ambiguity as the Supreme Court of Canada: "[t]he word is ambiguous, and in its original meaning would undoubtedly embrace members of either sex."[55] How was it to resolve the ambiguity? The extrinsic evidence (which was canvassed over six pages) consisted of armchair history,[56] 19th century case law maintaining a common law rule that women were legally incapable of holding public office,[57] and 18th century statutes in which women were denied voting rights in the provinces of Canada, Nova Scotia, and New Brunswick.[58] But the Privy Council held that such history was not a useful aid to interpreting the meaning of "person" as it was used in 1867,[59] and ruled that these "extraneous circumstances" did not constitute a common law interpretive presumption precluding women "from participating in the working of the institutions set up by the Act."[60] Thus, a key point of disagreement with the Supreme Court of Canada emerged: the Privy Council denied the existence of a common law presumption in Canada (without expressing an opinion over whether such a presumption existed in other common law jurisdictions such as England) that women were ineligible to serve in public office.

Unconvinced of the usefulness of the external evidence, the Privy Council moved to consider the "internal evidence", that is, the features of the *BNA Act* as a whole that can assist in the interpretation of "persons" and section 24.[61] It was at this point, before beginning the technical legal analysis of the statute as a whole, that the Privy Council briefly detoured for its meditation on interpretive methodology, including the excursion into the living tree metaphor. At this juncture, the Privy Council observed that it had an obligation not to interpret "legislation meant to apply to one community by a rigid

[55] *Ibid.* at 134.
[56] *E.g*. "Such exclusion [of women from deliberative assemblies] is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms." *Ibid*. at 128.
[57] *Ibid.* at 128-30.
[58] *Ibid*. at 131-3.
[59] "...their Lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act, 1867." *Ibid.* at 135.
[60] *Ibid.*
[61] *Ibid.*

adherence to the customs and traditions of another."[62] With this move it neatly sidestepped the potentially troublesome (primarily) English precedent interpreting "person" in other statutory contexts. The Privy Council then recorded the history of deliberation in the provincial assemblies and the drafting of resolutions and their revisions, before praising the revised resolutions, which were said to be "based upon a consideration of the rights of others … expressed in a compromise which will remain a lasting monument to the political genius of Canadian statesmen."[63]

Importantly, the Privy Council noted that the relevant resolutions that were used to draft the *BNA Act* "do not shed any light on the subject under discussion".[64] Even though the Privy Council noted that such evidence would likely be inadmissible in any event,[65] the search of early proceedings in order to resolve the ambiguity (coming, as it does, immediately on the heels of the Privy Council's account of the deliberative process from which the BNA Act emerged, and its praise for the genius of the framers) is suggestive that the Privy Council was searching the resolutions for statements that could help resolve the ambiguity of the meaning of "person" in 1867. Nevertheless, the Privy Council cautioned that its method is not to search for statements of framers' intent: "the question is not what may be supposed to have been intended, but what has been said."[66]

Here, then, emerges a clear difference between the methodology of the Privy Council and that of the Supreme Court of Canada: the Privy Council indicated that it believed that the semantic meaning of section 24 was fixed by the *plain meaning of the text*, while the Supreme Court of Canada believed that the semantic meaning was fixed by the *intentions of the framers*. The Supreme Court of Canada thus followed the form of originalist methodology dominant in the United States until the 1980s, and the Privy Council anticipated the subsequent move to original public meaning by jurists such as

[62] *Ibid*.
[63] *Ibid*. at 136.
[64] Referring, as they did, "generally to the "Members" of the Legislative Council." *Ibid*. at 136.
[65] *Ibid*.
[66] *Ibid*. at 137, citing *Brophy v. A-G Manitoba*, [1895] A.C. 202, 216.

Justice Scalia.[67] The difference between the two courts in the determination of *how* meaning is fixed (intentions versus original public meaning) is of secondary importance. What is critical to note is the interpretive commitment common to both courts: the semantic meaning of the constitutional text is fixed as of 1867.

After this brief discourse on methodology, the Privy Council began a clause-by-clause search of the *BNA Act* for provisions mentioning "person" or related terms. Buried in the middle of this catalogue of constitutional provisions is the abrupt announcement of a rule of constitutional interpretation that Lord Sankey did not attempt to ground in the common law or otherwise justify:

> The word "person" ... may include members of both sexes, and to those who ask why the word [person] should include females the obvious answer is why should it not? In these circumstances the burden is upon those who deny that the word includes women to make out their case.[68]

So the burden was thus placed on the government to adduce the necessary evidence to resolve the ambiguity. If the there was insufficient evidence to safely ground a conclusion one way or the other, the adopted rule meant that the ambiguity would be resolved in favour of the inclusive reading of "person". It was the adoption of this rule of construction in place of the English common law presumption relied on by the Supreme Court of Canada that raised the ire of early commentators on the decision.[69]

At this point, having sidelined English common law, and having announced the interpretive presumption in favour of "person" including both male and female, the Privy Council turned to consider the "internal evidence" from the *BNA Act* of the meaning of

---

[67] Antonin Scalia, *A Matter of Interpretation*, Amy Gutmann (ed.), (1997). The move to original meaning is discussed in Lawrence B. Solum, " What is Orignalism?: The Evolution of Contemporary Originalist Theory" in this volume.

[68] *Persons Case*, *supra* note 2 at 138.

[69] George F. Henderson, "Eligibility of Women for the Senate" (1929) 7 Can. Bar Rev. 617 [Henderson, "Eligibility of Women"]; W.P.M. Kennedy, "The Judicial Interpretation of the Canadian Constitution" (1930) 8 Can. Bar Rev. 703; Vincent C. MacDonald, "Judicial Interpretation of the Canadian Constitution" (1936) 1 U.T.L.J. 260; W. Ivor Jennings, "The Statute of Westminster and Appeals to the Privy Council" (1936) 52 Law Q. Rev. 173; W. Ivor Jennings, "Constitutional Interpretation: The Experience of Canada" (1937) 51 Harv. L. Rev. 1 [Jennings, "The Experience of Canada"]; W.P.M. Kennedy, "The British North America Act: Past and Future" (1937) 15 Can. Bar Rev. 393; and Vincent C. MacDonald, "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar Rev. 77. It is telling that none of these commentaries, except Macdonald (1936), even mention the living tree metaphor.

"person". It was on the basis of this evidence gleaned from the other sections of the *BNA Act* (as well as a passing reference to the *Interpretation Act, 1889*)[70] that the Privy Council formally concluded that "person" in section 24 indicated both male and female persons. The internal evidence included the fact that other sections of the *BNA Act*, such as ss. 11 and 133, use "person" to denote male and female persons.[71] The Privy Council also noted that, some of the time, when what is intended is to denote "male person", the *BNA Act* uses an express limitation such as "male person" or "male British subject", as in ss. 41 and 84.[72] The Privy Council presumed that the qualifications for senators set out in section 23 of the *BNA Act* (age, citizenship, property ownership, wealth, and residence) constituted a complete list, and noted that being male was not listed as a qualification.[73] Finally, the Privy Council concluded with a restatement of the onus that it placed on the government: "[i]f Parliament had intended to limit the word 'persons' in section 24 to male persons it would surely have manifested such intention by an express limitation".[74] On the strength of this internal evidence, the Privy Council concluded that "person" in section 24 indicates male and female persons.

We can question whether, absent the interpretive presumption adopted, the internal evidence was sufficiently strong to permit the conclusion that "person" in section 24 indicates male and female persons. The fact that "person" is used in other sections of the same statute to indicate male and female persons is hardly conclusive that it was similarly used in section 24. Likewise, the application of the *Interpretation Act, 1889* – referenced only once (and obliquely) in the main body of the reasons,[75] carrying none of the burden of the argument and thrown belatedly at the foot of a summary of considerations on the last page of the judgment – is neither obvious nor beyond debate.

---

[70] That "provides that words importing the masculine gender shall include females." This reference was provided to counter the argument that the use of the masculine pronoun in s. 23, which set out the qualifications of a Senator, was determinative that Senators must be male. The *Interpretation Act* itself was not held to have any direct application in determining the meaning of "person".
[71] *Persons Case*, *supra* note 2 at 140-41.
[72] *Ibid*. at 141. Although, in fact, the phrase "male person" does not appear in these sections, or any other section of the *BNA Act*.
[73] *Ibid*. at 141-2.
[74] *Ibid*. at 141.
[75] *Ibid*. at 139-40.

But what is clear is that the Privy Council believed that the interpretation of the frozen text, aided by a supplementary rule of construction, was dispositive of the issue before it on appeal. The standard narrative about the Privy Council's methodology as expressed by Sharpe and McMahon (to take one example), that it was born of "the idea that the constitution was a timeless document capable of adapting over time to meet the changing needs of Canadian society"[76] contains some truth but is entirely mistaken in a vital respect. Canadian constitutional law has adapted to changing circumstances, such as unanticipated technological changes like the telephone and atomic energy, as well as social changes such as the full participation of women in the workforce.[77] This continual adaptation is born of the doctrine that the powers granted in the *BNA Act* "cover the whole area of self-government within the whole area of Canada"[78], and is a matter of specification, or gap-filling, of the *eiusdem generis* variety. It is a sort of progressive interpretation that is equally supported by originalist interpreters and non-originalist.[79] Sharpe and McMahon, however, read the *Persons Case* as going well beyond this sort of modest, common ground, gap-filling. In it, they find authority for the astonishing proposition that "that the courts [are] now free, on the basis of changed social circumstances, to permit *what had plainly been forbidden* when the constitution was written".[80] But such a grant of judicial power – to permit what is expressly forbidden – is not entailed by the concept of an organic or living constitution. Neither was it understood in such a way by the Privy Council, holding as it did that if the text had *expressly* provided for the appointment of men only, no interpretive difficulties would have arisen.[81] If the Privy Council had approached the BNA Act as though it were a living tree

[76] Sharpe & McMahon, *The Persons* Case, *supra* note 12 at 202.
[77] Examples of how Canadian constitutional law has responded to these and other changes are set out in Miller, "Beguiled By Metaphors", *supra* note 1 at 333-9.
[78] *A-G (Ontario) v. A.G (Canada)*, [1912] A.C. 571 (P.C.) [*A-G (Ontario)*] as cited in Jennings, "The Experience of Canada", *supra* note 69 at 20.
[79] See discussion in Miller, "Beguiled By Metaphors", *supra* note 1 at 337-8.
[80] Sharpe & McMahon, *The Persons Case*, *supra* note 12 at 202 (emphasis added).
[81] In a similar vein, see the Privy Council's reasons for judgment in *A-G Ontario*, *supra* note 78 "in the interpretation of a completely self-governing Constitution founded upon a written organic instrument …if the text is explicit the text is conclusive, alike in what it directs and what if forbids. When the text is ambiguous … recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside

in the sense offered by Sharpe and McMahon, it would have reasoned that: (1) while "person" in section 24 originally meant "male person", (2) new attitudes towards women in Canada meant that Canada had outgrown the concept of personhood reflected in section 24, and that (3) the judiciary was thus authorized to reauthor "person" as inclusive of male and female persons, in spite of the original meaning of 1867. Yet such reasoning is not to be found in the judgment.

It ought to have been no surprise to Sharpe and McMahon that the *ratio* they purport to find – that courts are authorized by changed circumstances to permit what the constitutional text forbids – "did not have an immediate resonance in the Canadian legal community."[82] The reason that the purported *ratio* had no resonance was because it is entirely absent from, and antithetical to, the Privy Council's methodology in the *Persons Case*.[83] Neither should it have been a surprise that "[o]ne finds only passing references to the living tree principle in the decisions of the Supreme Court well into the 1970s."[84] When they argue that "the *Persons* case did not come into its own until the dawn of the *Charter* era"[85], they offer no explanation of how it is that this central holding of the *Persons Case* remained hidden from view for 50 years, and they accordingly gloss over the nature of the revolution in judicial review that occurred on reception of the Charter.[86]

---

of Canada) or otherwise clearly repugnant to sense." Cited in Jennings, "The Experience of Canada", *supra* note 69 at 20.

[82] Sharpe & McMahon, *The Persons Case*, *supra* note 12 at 202.

[83] A review of the scholarly literature on point in the decade after the judgment will disclose almost no references to the living tree. The predominant objection to the Privy Council's decision was that it ought not to have departed from treating the *BNA Act* as an ordinary statute, subject to ordinary rules of statutory interpretation, such as giving effect to original intent of the framers as the Supreme Court of Canada had done. *E.g*., Henderson, "Eligibility of Women", *supra* note 69.

[84] Sharpe & McMahon, *The Persons Case*, *supra* note 12 at 202. Interestingly, the first reference to the Persons case in the modern era, *Quebec (AG) v. Blaikie*, [1979] 2 S.C.R. 1016, came in the year of the 50th anniversary of the *Persons Case*, the same year that the federal government instituted the Governor General's Awards in Commemoration of the Persons case.

[85] Sharpe & McMahon, *The Persons* Case, *supra* note 12 at 202-03.

[86] Sharpe, however, supplies the material to answer this question in the 2003 biography of Brian Dickson that he co-wrote with constitutional scholar Kent Roach, *Brian Dickson: A Judge's Journey* (2003). That book documents the conscription of the *Persons Case* by Justice Dickson 50 years after the fact to provide faux-precedential cover for the jurisprudence of the Dickson court celebrated by Sharpe and others. An account of that book's deficiencies in historical method and theoretical analysis is provided by R.W. Kostal, "Shilling for Judges: Brian Dickson and His Biographers" (2006) 51 McGill L.J. 199. For a powerful argument that the living tree doctrine is a child of Charter-era judging, see David M. Brown, "Tradition and Change in Constitutional Interpretation: Do Living Trees Have Roots?", 19 National Journal of Constitutional Law (2005) 33.

But the *Persons Case* was, in fact, received fully formed in 1929. What transpired at the "dawn of the *Charter* era" was that a convenient phrase was lifted out of context, emptied of its meaning, and pressed into the service of judges seeking historical validation for a new, expanded methodology of judicial review.

IV. THE PRIVY COUNCIL AND THE NEW ORIGINALISM

When read through the lens of originalist interpretation, however, there remains something unsatisfying about Lord Sankey's judgment. I have argued that the Privy Council approached this case with the assumption that its job was to ascertain the meaning of a text, and that it was thoroughly textualist in its method. I have also argued that the evidence suggests that the Privy Council embraced a position that would later be articulated by originalists (both new and old): that the meaning of a text is fixed (or frozen) at the time of its enactment. I argued that contrary to the reasons of the Supreme Court of Canada (but in keeping with the New Originalists) the Privy Council held that the fixed meaning of the text is not to be determined according to the *intentions* of the framers, but rather according to its original public meaning. And finally, I argued that the Privy Council made a mistake in implementing its own methodology; its conclusion ought to have been that the ambiguity could not be resolved on the evidence before it. There was a failure on the part of the drafters to convey the meaning of the legislation precisely. The evidence was simply not determinative as to what "person" meant. Interpretation, then, understood in the narrower sense used by the New Originalists, did not provide an answer to the constitutional question referred by the government of Canada. The whole of the decision, had it been properly reasoned, would not have turned on the interpretation of "person" (as a matter of recovering an historical fact) but rather on the adoption of the rebuttable presumption (that "person" includes female persons) that Lord Sankey stipulated but nowhere attempted to justify or ground.

A firmer foundation for the result was available. To make that case, I will make an argument for what the Privy Council ought to have done if it had in fact determined that the ambiguity of "person" could not be resolved on the basis of the historical and textual

evidence. Sometimes, as in the *Persons Case*, interpretation will not yield a single, determinate answer to a constitutional question, but will reveal ambiguity. And while resolving ambiguity is, in the first instance, a matter of interpretation (a matter of determining a linguistic fact),[87] sometimes interpretation can only leave an ambiguity unresolved. And additionally, interpretation may determine that words are not (or not only) ambiguous, but that they are *vague*, admitting of core cases and borderline cases, with no bright lines to distinguish among them.[88] Or words may refer to concepts that are not vague, but are contested for other reasons (e.g. justice, marriage). In all of these cases, interpretation is exhausted before the answer to a constitutional question can be reached. But judicial reasoning is not exhausted by the more or less technical task of statutory interpretation. One of the strengths of the New Originalism is its attention to aspects of judicial reasoning other than interpretation, in part by its insistence that the clear conceptual distinction be maintained between constitutional *interpretation* (a matter of ascertaining the linguistic facts about words) and constitutional *construction*. The time to engage in constitutional construction only begins when the task of interpretation has been concluded.[89]

On one of Solum's formulations, constitutional *construction* is the "activity of translating the semantic content of a legal text into legal rules, paradigmatically in cases where the meaning of the text is vague."[90] But "translation" does not adequately describe the judicial role here; it carries an unfortunate connotation of direct correspondence between the text and the legal rules derived from the text, and thus fails to capture the creative (yet bounded) nature of construction that elsewhere Solum tirelessly describes throughout his work. Construction is not a matter of determining the meaning of words, but (again in Solum's words) of creating "subsidiary rules that resolve vagueness"[91] or (we can add) other interpretive indeterminacies. The province of construction is the creation of constitutional rules and principles to fill in gaps where the text is

[87] Solum, "Heller", *supra* note 44.
[88] *Ibid*.
[89] See Lawrence B. Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory" in this volume.
[90] Solum, "Heller", *supra* note 44.
[91] *Ibid*.

indeterminate with respect to a constitutional question. The bounded nature of construction is apparent if one understands construction to be a *determinatio*, an adoption of specific rules that are not themselves morally required prior to their adoption and could well have been made differently.[92] A norm or rule chosen or selected by a process of *determinatio* is rationally underdetermined in the sense that there are other norms or rules that could have been chosen instead and would equally have been supported by practical reason. But the choice is not entirely open-ended: there are choices that will be ruled out as inconsistent with principles of practical reason, particularly by obligations (in any given legal system) to respect existing commitments about the institutional role of the different branches of government, and "fit" with existing law.[93] Apart from the limits that can be inferred from the interpretation of the text itself (e.g. a construction must never contradict the text)[94] little can be said in the abstract about the considerations that ought to guide and limit construction; the appropriate reach of construction is highly contingent on the needs, circumstances, and previous commitments (including decisions to rule out some constructions and decisions about institutional roles and competencies) of the specific political community whose law is under consideration.

The interpretation of a constitutional text (in the narrow sense of interpretation used by the New Originalists) is largely a matter of technique, of description. It is the search for some fact of the matter. When interpretation is completed and the semantic meaning of the text has been described, the judge must still choose or create the legal rules that are consistent with the meaning of the text, and must apply the rules to the facts at hand. This construction includes the identification and selection of norms, rules, and principles from among other competing norms, rules, and principles as bearing on the judicial decision. To return to the specific example from the case at hand, the Privy Council (I have argued) ought to have acknowledged that interpretation could return no determinate answer to the question of the whether "person" in section 24 included female persons, and then expressly acknowledged that it was now engaged in the construction of supplementary

[92] See John Finnis, *Aquinas: Moral, Political, and Legal Theory* (1998) at 255-74.
[93] Ronald Dworkin, *Law's Empire* (1986), John Finnis, "Commensuration and Public Reason" in Ruth Chang, (ed.), *Incommensurability, Incomparability, and Practical Reason* (1997) 215 at 230-31.
[94] Such a limit is on view in Justice L'Heureux-Dubé's dissent in *R. v. Prosper*, [1994] 3 S.C.R. 236 at 287.

rules in order to resolve the controversy. And, of course, the Privy Council did in fact construct just such a supplementary rule: the rebuttable presumption that "person" includes female persons. The Supreme Court of Canada, for its part, was similarly engaged in constitutional construction when it adopted a contrary presumption in favour of restricting the reading of person to "male persons". These two divergent constructions demonstrate how construction contains an element of choice. But the choice is not entirely open-ended. It was not an option, for example, to construct a constitutional rule such that "person" for the purposes of section 24 shall mean person over the age of 40. Such a construction would be ruled out by section 23, which expressly set an age qualification of 30. And when there are multiple possible constructions, each of which are sufficiently consistent with the text, there may be previous commitments of the political community (such as legal principles) and moral reasons that support one construction over another. In the *Persons Case*, there are legal principles (supported by moral reason) to prefer the construction of the Privy Council over the construction of the Supreme Court of Canada; reasons that if they had been articulated by Lord Sankey would have immensely strengthened the reasons for judgment. In Dworkin's language, the Privy Council's reasons had better fit and justification. One such legal principle that bears on the outcome of the *Persons Case* is the basic equality of persons, which was, and is, a principle of the common law.[95] But the obligation is deeper than that: it is not only a matter of following precedent, but of reflecting on law's point, its purpose.[96]

If law exists for the sake of benefitting *persons* generally, and serving the needs of those persons in particular political communities, then there can be no justification for excluding any class of persons from law's protection or concern. Paradigmatic exclusions include those noted by Finnis: the exclusion of black slaves from the possibility of obtaining citizenship in *Dred Scott v. Sandford*,[97] the exclusion of the unborn from recognition under the law in *Roe v. Wade*[98] (and in Canada, *Winnipeg v. G(J)*[99]). An

[95] See *e.g.*, the extended argument in T.R.S. Allan, *Constitutional Justice* (2001). This is not, of course, to make the argument that equality has always been respected by the common law in every respect.
[96] John Finnis, "The Priority of Persons" in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence*, 4th series (2000) 1 at 4-5.
[97] *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).
[98] *Roe v. Wade*, 410 U.S. 113 (1973)

exclusion of an entire class of persons from participating in a deliberative political institution – absent any cogent justification such as that provided by age restrictions – is another example.[100] Absent a justification for why women ought to be excluded from participation in the Senate, a law which makes persons eligible for appointment to the Senate ought to be constructed (to the extent that construction is available) as including women. A reflection on the nature of law's authority, of the reasons that we have for treating law as providing authoritative reasons for action, disclose that its claim to our allegiance depends in large measure on its justice. So it would have been entirely appropriate – and preferable – for Lord Sankey to have reflected on the purpose of the *BNA Act* – to serve the common good of a particular political community – and to have articulated that good as being the good of all members of the community, male and female. To recognize women as equal members in that community would require adopting just the constitutional construction that he did – a rule that presumes that "person", in the context of qualification to serve in the political institutions of a society, must mean male and female.

Even where it results in no difference to the disposition ultimately reached, adherence to the New Originalist methodology is a significant advance over conceiving of the constitutional text as fundamentally malleable. The discipline of the interpretation/construction dichotomy includes a respect for the constitutional text and the judicial role, entailing a frank acknowledgment of limits set by the text, and honesty and transparency about the scope and nature of the judicial creativity being deployed in the generation and application of constitutional rules.

V. THE PROBLEM OF INJUSTICE

It might be objected that I have chosen my example too well; happily, in this case, an adherence to originalist methodology would not (and in fact, did not) return a morally

---

[99] *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.
[100] This is not to suggest that there can never be justifications for excluding classes of persons from deliberative political institutions. Justifications are readily at hand for excluding, for example, children and non-citizens.

objectionable result. But what if we were to pose a counterfactual s.24 in which the framers had expressly stated that *only male persons* were eligible for appointment to the Senate, and *not* women? Interpretation in such a case, as the Privy Council noted, would be easy. There would be no ambiguity or vagueness. The interpretation would clearly and straightforwardly reveal that section 24 did not authorize the Governor General to appoint women to the Senate. It would seem, then, that originalist methodology in such a case would require a judge to rule against Edwards *et al*. This is the spectre raised by Binnie J. in describing the *Persons Case* as a "standing rebuke to an overly deferential attitude to originalism".[101]

Of course, such a ruling would not mean that Canadians would forever be held back by the "dead hand of the past" and that women could never be appointed to the Canadian Senate. Courts are not the only engine of legal change and it would be hard to believe that, but for judicial intervention, the Canadian Senate would today remain an all-male preserve. Constitutional amendment always remains a possibility, as does legislative and executive action that is not prompted by the courts. But even remaining focused exclusively on the judicial role, things are not so bleak. Originalists are not committed to a form of legal positivism that places law beyond moral evaluation. As Gerard Bradley argued in 1992, "nothing in a sound account of originalism implies that law, including constitutional law, is beyond normative evaluation, or denies that there are natural and inalienable rights".[102] And nothing in a sound account of the judicial role in Canada insulates the judge from the moral obligations that are binding on all persons, whether they are public officials like judges and legislators or persons without public roles.

It is to be expected in a basically just constitutional order (as I take the Canadian system to be) that interpretation of the constitutional text will not be morally problematic. And it is to be expected that on those occasions when interpretation needs to be supplemented by construction, that it constitutional constructions will be available that

[101] Binnie, "Original Intent", *supra* note 1 at 366.
[102] Gerard V. Bradley, "The Bill of Rights and Originalism", (1992) U. Ill. L. Rev. 417 at 429.

are both consistent with the demands of morality and consistent with existing law.[103] However, in those rare cases where it is not possible to come up with a plausible interpretation that is morally acceptable, and the text is specific enough that it blocks a remedial constitutional construction (as in the counterfactual that I have posed) then we must further consider what it is that a judge is being asked to do, and whether applying or following the law would require a judge to violate a binding moral norm. The question of what a judge should do in such a scenario lies within the domain of legal philosophy. And so the answer one gives will depend largely on one's answers to deep questions about the nature and authority of law.[104] While law is presumptively to be treated as authoritative and to be obeyed, its claims to obedience can nevertheless be defeated in circumstances where a law conflicts sufficiently with the goods that law is meant to secure.[105] That is, it remains a possibility for a law to lose its presumptive obligatory force when it is sufficiently unjust, such as when it commands the violation of moral norm of greater force. To use a stock example, it would allow for a judge to refuse to apply a law that called for the judge to knowingly punish the innocent for the greater good of the community.

Lord Sankey would have been morally justified, if confronted with the counterfactual section 24, in advising the Government of Canada that the counterfactual section 24 was unjust and ought not to be applied. And if Lord Sankey had been presiding over an ordinary appeal rather than a constitutional reference, he would have been justified in refusing to apply the counterfactualsection24 with respect to the ban on women's participation, providing that he stated clearly that whilesection24 was the law, it was too inequitable to be applied. But this obligation not to violate a moral norm does not provide judges with plenary authority to refuse to apply the law simply because they find the law to be suboptimal in some respect. It does not, for example, generate a free-

[103] And, in fact, this is how I characterize the Privy Council's decision in the *Persons Case*.
[104] See John Finnis, *Natural Law and Natural Rights* (1980) [Finnis, *Natural Law*]; Joseph Raz, *The Authority of Law*, 2nd ed., (2009); Leslie Green, *The Authority of the State* (1990). Also see helpful discussion in Timothy Endicott, "Subsidiarity of the Law and the Obligation to Obey", 50 Am. J. Juris. 233 (2005), and response by Gerard V. Bradley, "Response to Endicott: The Case of the Wise Electrician", 50 Am. J. Juris 257 (2005).
[105] See John Finnis, "Natural Law Theories" (5 February 2007), s. 1.5.1, online: Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/natural-law-theories/#LegPriRemDefPosLaw>

standing power to reauthor laws in order to optimize resource allocations such as, to use a Canadian example, reading economic and social rights into section 7 of the *Charter*, on the grounds that more just distributions could be achieved if such judicially enforceable rights had been included in the *Charter*.[106]

If a judge decides that he or she should refuse to apply an iniquitous law, the judge must be transparent about the fact that the judge is refusing to apply what he or she judges undoubtedly to be the law. There may be adverse consequences to the judge that flow from that action: appeal, sanction, or even removal from the bench. A judge who frankly states that a law is so egregiously wrong that it cannot warrant obedience allows for other political actors to assess the judge's decision and to disagree and remedy it where necessary. This is preferable to a judicial reauthoring under the guise of interpretation, which arrogate authority that has not been given by the Constitution of Canada.

VI. CONCLUSION

So what if I am right and "living tree" constitutional interpretation is a Dicksonian invention and its institutional pedigree is a hoax? Is there any point to calling foul after play has carried on for nearly 30 years and arguing that there is support for originalist interpretation in Canadian law? First, there is good reason to question living tree methodology, not least because, as it has been articulated and practiced in Canadian law, it has functioned as more of an after-the-fact rationalization for judicial decision-making than it does as guide to judicial decision-making.[107] Second, it is not a simple matter to determine the extent to which the central commitments of the living tree methodology are inconsistent with originalism. This is partially due to the difficulty in establishing just what the central commitments of the living tree methodology are.[108] Many of the

[106] I do not here attempt to set out the circumstances which would justify, as a matter of political morality, a judge in refusing to apply an unjust law, but see the discussion in Finnis, *Natural Law*, *supra* note 102, c. 12 and Finnis, "Natural Law Theories" (5 February 2007), *ibid*. at s. 3.3.
[107] See Miller, "Beguiled By Metaphors", *supra* note 1, and Bradley W. Miller, "Review Essay: *A Common Law Theory of Judicial Review* by W.J. Waluchow" 52 Am. J. Juris. 297 (2007).
[108] Miller, "Beguiled By Metaphors", *supra* note 1.

commitments of living tree methodology are in fact consistent the New Originalism, with the partial exception of originalism's insistence on fixed meanings. I say "partial exception" because in most cases the objection to fixed meanings that are offered by proponents of living tree methodology in Canada are confined to fixation by original intention, not original public meaning. The reading of the *Persons Case* that I have provided here suggests that the metaphor of the living tree has genuine application to the stage of constitutional construction, and is in that way consistent with New Originalism. The *Persons Case* demonstrates that two of the central commitments of the New Originalism – fixed meanings and the interpretation/construction divide – have a home in what has been accepted as Canadian constitutional bedrock. Furthermore, while Sharpe and McMahon argue that the *Persons Case* established that courts are now free to permit what the constitution forbids, there is no support in the *Persons Case* or elsewhere in Canadian law for such an extreme version of living tree methodology.

So it would not be such a revolutionary thing to openly embrace the New Originalism within Canadian constitutional doctrine. But there remains the objection of principle: should courts embrace the methodology of the New Originalism? Why not just stick with the old creed? Ultimately, it does not much matter whether one uses the label of living tree or originalism. What matters is the soundness of the ideas adopted. Scholars calling themselves originalists have had some insights which can bear much fruit if incorporated into Canadian constitutional doctrine. Two of the key analytical advances are a commitment to fixed meanings and to clearly separating the two tasks of interpretation and construction.

An adoption of this methodology (of fixed meanings and the interpretation/construction distinction) would give the Supreme Court of Canada resources with which to adequately respond to demands currently placed on it to embrace "interpretations" (really, constructions) of the Charter that are antithetical to the settlement reached under the Charter (specifically with respect to economic and social rights). It is imperative that the Court, in considering these issues, confront the limits of interpreting the constitutional texts, and frankly acknowledge what is at stake in

undertaking what is really constitutional construction. If judges discipline themselves in such a way, they will have to confront the question of whether they have proper warrant in the Canadian constitutional order to undertake the constructions that they have been urged to make in cases such as *Gosselin v. Québec (Attorney General*.[109] They would avoid passive and obscuring language ("[o]ne day section 7 may be interpreted to include positive obligations")[110] and own up to their own agency. Construction is much more controversial than interpretation and, for purposes of accountability, courts should lay bare when they have stopped doing the one and have started doing the other.

[109] [2002] 4 S.C.R. 429.
[110] *Ibid*. at para. 82.