The Persons case eight decades later:
Reappraising Canada’s most misunderstood court ruling

By Scott Reid, MP

[I]t is our view that it is not for the Courts to raise a convention to the status of a legal principle. As pointed out above, courts may recognize the existence of conventions in their proper sphere. That is all that may be properly sought from the Court....

---Supreme Court of Canada, Patriotiation Reference, p 856.

Passages from judgments, like sections of a statute, must also be read in their full context; that context is the whole judgment, the whole of the statute under consideration, the facts of the case and the particular point at issue. Often a sentence or passage from a judgment, when read in its context, reveals a meaning totally different from the impression obtained by reading it in isolation out of context.


For thirty years, it has been orthodoxy in Canada’s legal community that the Constitution is to be interpreted “progressively.” Progressive interpretation means that the legal meaning (or definition) of individual words in the Constitution can be altered by the Supreme Court to reflect changes to the values held by Canadians. Altering the definition of the words in a constitution is in practice indistinguishable from a formal amendment. Thus, the advocates of “progressive interpretation” are claiming that the Supreme Court has the authority to amend the Constitution.

So bold a claim can scarcely be made without some justification, and the advocates of constitutional progressivism provide several---the inflexibility of the constitutional amending formulae adopted in 1982, the lack of a single monolithic legislative intent among the framers of the Constitution as to what the meaning of specific clauses of the Constitution was to be, etc.

But the key argument presented by the progressivists is that Canada is the inheritor of a long-entrenched tradition of judicial re-defining of the meaning of words and phrases in the British North America Act. Therefore, it is claimed, any current exercises of this power are simply following a long and respectable tradition.

The Persons Case as the Capstone of Progressivism

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There is some dispute among progressivists as to when the tradition of judicially redefining the words in the Constitution began, but there is consensus as to the court ruling that provided the definitive expression of this approach. This was a 1929 ruling of the Judicial Committee of the Privy Council, in the case known formally as *Edwards v Attorney-General for Canada*. The decision is today generally referred to as the *Persons* case, because it resolved the question as to whether the words “qualified persons” in section 24 of the *British North America Act, 1867*—(now known as the *Constitution Act, 1867*)—included female persons.

At the time, the case was important because the court’s ruling that women were indeed included within the definition of the term “qualified persons” meant that the Governor General was legally entitled to appoint female senators. However, since 1980 the case has achieved a second claim to fame, as it is now widely assumed that in 1929 the law lords updated the legal meaning of “qualified persons” to reflect the changes that had taken place in Canadian attitudes towards women in the preceding sixty years, thereby setting a precedent by which later judicial updatings of a similar nature can be justified.

In this essay, I will begin the process of showing that this understanding of the *Persons* case is incorrect: the court actually ruled that the phrase “qualified persons” in section 24 meant precisely the same thing in 1929 as it had meant in 1867. The Privy Council concluded that the Governor General had *always* had the power to appoint women to the Senate, but had previously been restrained by a conventional understanding that any such appointment would be inappropriate.

Conventions are patterns of self-restraint, under which political actors refrain from exercising powers that are technically at their disposal. The entire concept of responsible government is founded upon convention, and has no basis in the written text of the constitution. The monarch (in Canada, the governor general), who in theory has unbridled executive powers, is by convention restricted to acting only upon the advice of a prime minister and cabinet who in turn are conventionally empowered to provide this advice only so long as they enjoy the confidence of the House of Commons. This is the most important and well-known convention of Westminster-style parliamentary government, but there are many others.

The concept of “constitutional conventions” was first articulated by Albert Venn Dicey in his 1883 book, *An Introduction to the Study of the Law of the Constitution*. Dicey wrote,

> [C]onventions, understandings, habits, or practices…though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or other officials, are not really laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution", or constitutional morality.

Conventions are subject to change over time and—because they are enforced by popular opinion rather than by the courts—they tend to be accurate reflections of the changing spirit of the times. In this respect, they could be said to be “progressive.” Thus, with the falling-away of popular prejudices against women between 1867 and 1929, no impediment existed to the appointment of women to the Senate.

This was so not because the courts had the power to rewrite the definition of the words “qualified persons” to reflect this change in attitudes. It was so because the men who wrote the *British North America Act* (who might well have wanted to freeze women out of the Senate in perpetuity), had never bothered to write their prejudices into the Act.

As the lord chancellor, Viscount John Sankey, noted in the *Persons* case ruling, in a paragraph that is perpetually overlooked in the literature on the ruling,

> If Parliament had intended to limit the word "persons" in section 24 [of the BNA Act] to
male persons it would surely have manifested such intention by an express limitation, as it has done in sections 41 and 84. The fact that certain qualifications are set out in section 23 is not an argument in favour of further limiting the class, but is an argument to the contrary, because it must be presumed that Parliament has set out in sections 23 all the qualifications deemed necessary for a senator, and it does not state that one of the qualifications is that he must be a member of the male sex.¹

It may well be that the framers of the BNA Act had assumed that women ought never to be sworn in as senators (along with racial minorities, Muslims, Buddhists, homosexuals, etc.). But their failure to set down on paper whatever prejudices they may be supposed to have entertained means that these imagined prejudices are not, and never were, a court-enforceable part of the constitution. “The question,” Lord Sankey wrote in another paragraph of the Persons case ruling (a paragraph which does get quoted, although not always in the correct context), “is not what may be supposed to have been intended, but what has been said.”²

My views, as expressed above, are not shared by Canada’s legal establishment. Indeed, as far as I am aware, the judicial establishment is completely unaware of the possibility that such views could even exist. To the contrary, on the senior ranks of the Canadian bench, the prestige of the Persons case as an authority for the ideology of progressive interpretation can hardly be overstated.

This high degree of deference to the imagined authority of the case would seem to be largely a by-product of Sankey’s lively writing style. Sankey had a flair for colourful metaphors. In the Persons case ruling, he wrote: “The British North America Act planted in Canada a living tree, capable of growth and expansion within its natural limits.” In recent decades, the image of the living tree has been so widely cited in Canadian scholarship that Chief Justice McLachlin refers to it as the “animating premise” of Canadian constitutional interpretation and former Justice Bertha Wilson stated that the “starting point in Canadian law for a discussion of constitutional interpretation is, of course, the ‘living tree’ metaphor formulated by Lord Sankey….”³

A search for the phrase “living tree” on the Canlii database turns up thirty decisions, since 1980, in which the Supreme Court has cited Lord Sankey's use of the metaphor. Frequently, the court misquotes Lord Sankey, as is shown by these examples (all taken from Supreme Court rulings):

- “[T]he Canadian constitution is to be regarded as a ‘living tree’”⁴;
- “[T]he Constitution, viewed as a ‘living tree’, in the expressive words of Lord Sankey…”⁵
- “To evoke Lord Sankey’s celebrated phrase…’the Canadian Charter must be viewed as “a living tree capable of growth and expansion within its natural limits”’;⁶
- “[O]ur Constitution—this ‘living tree’ as it is described in the famous image from Edwards v

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² Ibid at 9 (para 55 in html version prepared for this paper).
⁴ Bertha Wilson, David B Goodman Memorial Lectures, lecture no 2 at 16.
⁷ Gosselin v Quebec (Attorney General), [2002] 4 SCR 429 at para 82.
Attorney-General for Canada…,”;³

• “[T]he constitution must be viewed as a ‘living tree’…”⁴

It is no mere quibble to point out that, pace the citations above, Lord Sankey did not write that the BNA Act is a living tree. In the 53⁴th paragraph of the Persons case ruling, Sankey wrote that the BNA Act planted a tree, separate from the Act itself, which would be capable of growth and expansion within its natural limits.

Such inaccurate citations are fatal to a proper reading of the Persons case, because they lead to the wildly inaccurate assumption that the written constitution (which of course includes both the BNA Act and the Charter) is the living tree to which Lord Sankey referred, when actually the jurisdictional bounds laid out in the BNA Act form his natural limits. These natural limits to the growth of the living tree of Canadian usage and convention came into existence at the moment the tree was planted, which is to say, with the enacting of the BNA Act in 1867. The living tree of usage and convention can grow and expand. By definition, the natural limits—the written text of the Constitution—are fixed and immobile.

So the courts have their metaphor backwards. And once the courts have mistaken the tree for the pot in which it is planted, nothing else that follows can bear the faintest resemblance to what Lord Sankey had in mind in 1929.

All of this will be discussed in more detail below. But first, I have taken extracts from four Supreme Court decisions to show just how central the living tree metaphor is to the doctrine of progressive interpretation, and how important it is to the doctrine’s premise that the courts should treat the definitions of words in the Constitution as being malleable. The extracts are ordered non-chronologically to allow the reader to see that:

(a) only a very small part of the Persons case ruling is ever cited as precedent; and

(b) the Supreme Court believes “progressive” implications to flow from the small part of the ruling that it cites.

1. **Hunter v Southam [1984].**

   The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey’s classic formulation in Edwards v Attorney-General for Canada, cited and applied in countless Canadian cases:

   The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada… Their Lordships [ie. we] do not conceive it to be the duty of this Board [ie. to be our duty]—it is certainly not their [ie. our] desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.¹⁰

2. **Reference re Same Sex Marriage [2004].**

   ‘Frozen concepts’ reasoning [a phrase used by the court to mean that the definition of the words in the constitution is fixed or frozen with the meaning they had in 1867] runs contrary

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¹⁰ *Hunter v Southam*, [1984] 2 SCR 145 at 156 (the inserts in square brackets have been added by me).
to one of the most fundamental principles of Canadian constitutional interpretation: that our constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. In the 1920s, for example, a controversy arose as to whether women as well as men were capable of being considered “qualified persons” eligible for appointment to the Senate of Canada. Legal precedent stretching back to Roman Law was cited for the proposition that women had always been considered “unqualified” for public office, and it was argued that this common understanding in 1867 was incorporated in s. 24 of the Constitution Act, 1867 and should continue to govern Canadians in succeeding ages. Speaking for the Privy Council in Edwards v Attorney-General for Canada (the “Persons” case), Lord Sankey L.C. said at p. 136:

Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the [B.N.A.] Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. [Emphasis added by the Supreme Court of Canada]

A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada’s constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted.11


If the Canadian constitution is to be regarded as a ‘living tree’ and legislative competence as ‘essentially dynamic’ then the determination of categories existing in 1867 becomes of little, other than historic, concern.12


If the newly planted “living tree” which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee [of Parliament, which studied and approved the draft version of the Charter], do not stunt its growth.13

Based on these citations, it can be seen how the Persons case has come to be regarded as an extraordinarily powerful precedent for the notion that the courts are empowered to redefine the words in the Constitution. Only two things are necessary, for this precedent to legitimately lead to the conclusions drawn by the Supreme Court:

1. it is necessary that Lord Sankey and his colleagues intended “living tree” to be a reference to the BNA Act itself, as the Supreme Court asserts in all four of the citations above; and

2. it is necessary that Lord Sankey and his colleagues intended “large and liberal” to be synonymous with “progressive”, as the Court asserts in Re Same Sex Marriage.

11 Reference re Same Sex Marriage, [2004] 3 SCR 698 at para 22 [Ref re Same Sex Marriage], (the inserted text in the first paragraph is mine; the inserted text in the second paragraph, including the square brackets, is in the original).

12 AG BC v Canada Trust Co, supra note 6 at 479 (inline citations omitted; italics in the original).

13 Inserted text in square brackets has been added by me.
But the truth is that Sankey and his colleagues on the Privy Council intended neither of these things. That this is so will be demonstrated in two steps:

- First, by reviewing the *ratio decedendi*, or formal reasons for deciding in the *Persons* case;
- Second, by reviewing the most-cited passage from the 1929 ruling in greater detail.

**The Ratio Decedendi in the Persons Case**

Readers of the *Persons* case are lucky: The Privy Council gave the reasons for its ruling in far clearer fashion than is typical for most courts. Having reviewed all of the evidence and laid aside factors that they regarded as not being a suitable basis for determining the case, Lord Sankey and his colleagues devoted the final paragraph of their ruling to laying out five interlocking reasons for deciding that Section 24 of the BNA Act includes women:

> [H]aving regard:

- (1) To the object of the [BNA] Act, viz., namely, to provide a constitution for Canada, a responsible and developing State;
- (2) that the word “person” is ambiguous, and may include members of either sex;
- (3) that there are sections in the [BNA Act] which show that in some cases the word “person” must include females;
- (4) that in some sections [of the BNA Act] the words “male persons” are expressly used when it is desired to confine the matter in issue to males; and
- (5) to the provisions of the Interpretation Act [which states that the word “person” shall mean person of either gender, unless a contrary intent is explicitly stated in the law]; their Lordships have come to the conclusion that the word “persons” in s. 24 includes members both of the male and female sex….

Three points may be drawn from this *ratio*.

The first is a definition for the phrase “large and liberal.” As noted above, in 2004 the Supreme Court maintained that “large and liberal” was intended by Sankey and his colleagues to be a synonym for “progressive.” This is incorrect. In reason (1) of the *ratio*, the Privy Council points out its reason for the use of “large and liberal.” The object of the BNA Act was to “provide a constitution for Canada, a responsible and developing state” (that is, a state in which responsible government was already in existence, and which was in the process of developing the rules which would, two years later, with Sankey’s active participation, produce the *Statute of Westminster* and achieve full Canadian independence). The object of the BNA Act was therefore to grant plenary powers to the parliament and legislatures of Canada, holding no powers back from the officers responsible for acting under the authority of the Act. In the case of the power to appoint senators, the relevant officer was the governor general.

Reason (1) shows that there is no basis for believing that Lord Sankey and his colleagues were suggesting that the governor general’s powers would have grown over time, so that Viscount Monck (the governor general in 1867) would have been prohibited from appointing women to the Senate, but that his successor in 1929, the Marquess of Willingdon, would have been so empowered. This rules out the possibility that “large and liberal” can be seen as meaning “progressive” or “changeable.”

The second point to be observed is the fact that the remaining four reasons in the *ratio* are based upon a

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14 *Edwards, supra* note 2 at 14 (para 97 in html version prepared for this paper).
close reading of the BNA Act, in which the Act is interpreted as an ordinary British statute. The Privy Council had signaled its intention to interpret the BNA Act as an ordinary statute earlier in its ruling when, immediately following its much-quoted declaration that it would give the Act a large and liberal interpretation, it approvingly cited the following quotation from *Clement’s Canadian Constitution*:

> Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and 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 often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony.

As an ordinary statute, the BNA Act would be subject to all of the normal practices of statutory construction, including the fact that it must be interpreted as construed by the *Interpretation Act*. The *Interpretation Act*, enacted by the UK parliament in 1889, was a quasi-constitutional statute intended to amend the definition of the terms used in all British statutes, in order to produce uniform judicial interpretation of the meaning of these terms. Section 1(a) of the *Interpretation Act* states, “In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, unless the contrary intention appears, words importing the masculine gender shall include females.”

**Earlier in the ruling.** Lord Sankey had noted, with what seems to my eyes to be a tone of disapproval, the fact that the English courts had chosen to ignore the identically-worded provision of the 1850 *Interpretation Act* (which he referred to by its popular name, *Lord Brougham’s Act*). In calling on the authority of the 1889 Act to overcome a series of precedents that had ignored the very same words in an earlier statute, Sankey was making a forceful statement about the importance of courts accepting what he referred to as “Parliament’s real intent,” even when this meant rejecting the authority of earlier court rulings. Sankey’s rejection of a slavish devotion to *stare decisis*, and to the precedential value of wrongly decided cases, has been completely forgotten today. But, as we shall see further on in this paper, Sankey’s attitude towards *stare decisis* made a considerable impression on the succeeding generation of Canadian scholars and statesmen.

The third point to be observed, in connection with the *ratio*, is the complete absence in it of any justification for a progressive interpretive doctrine or for regarding the definitions of words or terms in the Act as malleable. This means that the living tree metaphor, which had been used by the Privy Council midway through the ruling, must have been inserted into the ruling to illustrate some unrelated point. As I will suggest below, this point seems to have been to dispose of the notion that usages and conventions—such as the practice of not appointing women to the Senate—can become legally binding. If I am right that this is the true meaning of the metaphor, then “living tree” was not meant to be a description of the BNA Act itself, and the entire progressive interpretation of the *Persons* case ruling falls apart. We will now explore this proposition.

**The ‘Living Tree’ Paragraph, in Greater Detail**

Two of the four post-1980 Supreme Court rulings cited above give extended quotations from paragraphs 53 and 54 of the *Persons* case ruling. The two quotations overlap, but by means of ellipsis, the Supreme Court manages to leave out a sentence from the end of paragraph 53 that the Court apparently regarded as irrelevant. This omission is a mistake. Far from being irrelevant, the omitted sentence is the key to

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15 *Ibid* at 4, (para 18 in html version prepared for this paper).
16 Just how irrelevant is worth emphasizing. Starting in 1979, the Supreme Court uses the living tree metaphor in 31
the entire passage. If the sentence is omitted, it becomes impossible to understand what Lord Sankey and his colleagues on the Privy Council meant by “living tree.”

The full text of the passage taken from paragraphs 53 and 54, as written by Lord Sankey, is reproduced below. I have italicized the sentence that is repeatedly omitted by the Supreme Court:

53. The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention. [Canadian Constitutional Studies, Sir Robert Borden (1922) p. 55]

54. Their Lordships do not conceive it to be the duty of this Board—it is certainly not their...
desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

The italicized sentence is a direct quotation from p. 55 of Sir Robert Borden’s 1922 book, *Canadian Constitutional Studies*. “Usage” and “convention” are words much less frequently used nowadays than in Lord Sankey’s time, so the meaning of Borden’s sentence, and Sankey’s reason for quoting it, may not be immediately obvious to the modern reader. To provide better context, I have reproduced below the entire paragraph from p. 55 of *Canadian Constitutional Studies*, from which the italicized words are taken. For ease of reference, the sentence quoted in the *Persons* case is italicized:

> The provisions of any constitutional Act are necessarily of so general a character that judicial interpretation is required. Thus no inconsiderable influence upon our Constitution has been exercised by the body of judicial decisions which as grown up in the examination and construction of its provisions by the Courts. *Like all written constitutions it has been subject to development through usage and convention*. Lord Bryce has pointed out the considerable effect of such influence in the United States: ‘the American Constitution has changed, is changing, and by the law of its existence must continue to change in its substance and practical working, even when its words remain the same.’

The words quoted in Borden’s final sentence are themselves a quotation, taken from the opening sentence to Chapter 35 of *The American Commonwealth*, an 1888 book by Lord James Bryce (who later would serve as the British ambassador to the United States largely on the basis of the reputation that this book had established for him as an authority on American politics and society).

Dicey’s constitutional conventions.

The Supreme Court’s re-assertion is stated in paragraphs 9 and 10 of its ruling, and reads as follows:

> At the first stage of the analysis, in order to identify the head of power, the Court takes a progressive approach to ensure that Confederation can be adapted to new social realities. The Court has on numerous occasions cited the “living tree” metaphor, and we need not revisit it here: Reference re Same-Sex Marriage, at para 29. While the debates or correspondence relating to the constitutional amendment are relevant to the analysis as regards the context, they are not conclusive as to the precise scope of the legislative competence. They reflect, to a large extent, the society of the day, whereas the competence is essentially dynamic: Martin Service Station Ltd. v Minister of National Revenue, [1977] 2 S.C.R. 996, at p. 1006. In giving them predominant weight, the Quebec Court of Appeal adopted an original intent approach to interpreting the Constitution rather than the progressive approach the Court has taken for a number of years.

> A progressive interpretation cannot, however, be used to justify Parliament in encroaching on a field of provincial jurisdiction. To derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court’s view of what federalism is. *What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions*. The task of maintaining the balance between federal and provincial powers falls primarily to governments. *If an issue comes before a court, the court must refer to the framers’ description of the power in order to identify its essential components, and must be guided by the way in which courts have interpreted the power in the past. In this area, the meaning of the words used may be adapted to modern-day realities, in a manner consistent with the separation of powers of the executive, legislative and judicial branches.*


17 Edwards, supra note 2 at 9, (paras 53 and 54 in html version prepared for this paper).

Bryce opens Chapter 35 by summarizing the previous chapter, in which he had demonstrated that the written American constitution is, just as much as the unwritten constitution of the United Kingdom, subject to the development of unwritten usages and conventions. He writes:

[S]ome of those features of American government to which its character is chiefly due, and which recur most frequently in its daily working, rest neither upon the Constitution nor upon any statute, but upon usage alone. Here are some instances.

The presidential electors have by usage and by usage only lost the right the Constitution gave them of exercising their discretion in the choice of a chief magistrate.

No president has been elected to more than two continuous terms, though the Constitution in no way restricts eligibility.

Bryce goes on to offer nine further examples of usages which in his day restricted the freedom of action of American political actors. These including the very existence of the American party system. As the second of the two examples quoted above demonstrates, such usages may be set aside, without the need for a formal constitutional amendment (as was done when Franklin Roosevelt was elected in 1940 to a third term).

The title of the chapter in which Bryce outlines all of this is “The Development of the Constitution by Usage.” And, just to emphasize the degree to which all of this relates back to the concept of constitutional conventions as conceived in 1883 by Albert Venn Dicey, it is worth noting that Bryce dedicates The American Commonwealth “[t]o my friends and colleagues Albert Venn Dicey and Thomas Erskine Holland.”

Borden’s point, then, in quoting Bryce, would seem to be that usage and convention, which exist under the unwritten constitution of the United Kingdom and under the written constitution in the United States, can also exist under Canada’s hybrid constitution, which contains both a written core (the British North America Act), and an unwritten set of usages and conventions which were planted here when the UK parliament enacted the BNA Act. Like the branches of a living tree, these usages and conventions can grow and expand within the statutory (or “natural”) limits set out in the BNA Act itself.

This explains why the colourful image of the “living tree” was included in the Persons case ruling. The living tree is not a metaphor for the British North America Act itself, but for the usages and conventions that are capable of springing up in connection with Canada’s constitution and which inevitably must grow in the same manner as (but also independently of) the usages and conventions of the unwritten British Constitution, as anticipated in the preamble to the BNA Act, which asserts that Canadians desire a constitution “similar in principle to that of the United Kingdom.”

Decoding the Living Tree Metaphor, Line by Line:

With these facts established, it is possible to engage in a properly contextualized line-by-line review of the famous passage from paragraphs 53 and 54 of the Persons case. The paragraphs are reprinted below, followed first by a wording that I think accurately fleshes out what Lord Sankey and his colleagues were actually saying (but which they evidently did not feel it necessary to spell out), and second by the meaning that the Supreme Court has incorrectly attributed to the text.

The misunderstanding of recent decades shows that it is necessary, after all, to spell things out in a more pedantic and less poetic manner than that employed by the Privy Council. That is what I have done below under the heading “What the Privy Council meant.” Where possible, I have simply added text that

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Lord Sankey and his Privy Council colleagues had used elsewhere in the ruling. This was relatively easy, since paragraphs 53 and 54 of the Persons case ruling were intended as summaries of the more prosaic paragraphs that had preceded them in the text of the decision. The original location of these transposed passages can be determined by allowing your cursor to hover over the relevant text.

**What the Privy Council wrote:**

53. The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention. [Canadian Constitutional Studies, Sir Robert Borden (1922) p. 55]

54. Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.”

**What the Privy Council meant:**

(The hyperlinked words are linked to the other paragraphs of the Persons case ruling from which they are quoted. One hyperlink is to a ruling of the Australian High Court.)

The British North America Act planted in Canada the capacity to develop a uniquely Canadian common law and uniquely Canadian usages and conventions, all of which, like a living tree, are capable of growth and expansion within the limits of the Act. The object of the Act was to grant a Constitution to Canada, similar in principle to that of the United Kingdom. 20 One implication of this is that the common law, as developed by courts which have had to apply the law in different circumstances, in different centuries, to countries in different stages of development, does not apply to Canada, whenever it conflicts with the British North America Act. In particular, any apparent precedent from England in which reference was necessary to the common law disabilities of women is clearly distinguishable. 22

Another implication is that Canada is developing its own set of non-justiciable constitutional conventions. With this in mind, we note with approval Sir Robert Borden’s statement 23, on p. 55 of his 1922 book, Canadian Constitutional Studies, “Like all written constitutions [the BNA Act] has been subject to development through usage and convention.” Borden’s point is that customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. 24 Therefore, the fact that no woman had served or has claimed to serve such an office as Senator is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested. 25

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20 Edwards, supra note 2 (para 59 in html version prepared for this paper).
21 Edwards, supra note 2 (para 21 in html version prepared for this paper).
22 Ibid (para 20 in html version prepared for this paper).
23 Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan, [1931] HCA 34 (“Lord Sankey L.C., speaking of the Canadian Constitution, said that it ‘planted in Canada a living tree capable of growth and expansion within its natural limits,’ and noted with approval Sir Robert Borden's statement that, ‘like all written constitutions it has been subject to development through usage and convention.’”).
24 Edwards, supra note 2 at 7 (para 44 in html version prepared for this paper; “[c]ustoms are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared”).
25 Ibid at 7 (para 43 in html version prepared for this paper). (“Supposing in an Act of Parliament several centuries ago it
Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical, or strict construction, which would be subversive of Parliament’s real intent, but rather to give it a large and liberal interpretation so that the Dominion may be a responsible and developing State within the legislative competence of the Dominion which arise under s. 91 of the BNA Act, as the Provinces are responsible and developing states within the legislative competence which arise under s. 92 of the BNA Act.

The Persons case and the Exclusionary Rule

For many decades, the Persons case has had a prominent place in British legal scholarship. It is instructive to review some of the citations from this literature, as they have a very different tone than the one taken by the Supreme Court of Canada since 1980. Most citations in the British literature focus on the role that the ruling played in rolling back a long-standing rule of statutory interpretation.

A key norm, predominant in Sankey’s day and largely forgotten in our own, was known as the “exclusionary rule.” This rule held that while it was appropriate for the courts to so construct the law as to best reflect the will of Parliament, it was not appropriate to actually examine the legislative history of a law in the course of determining this will.

From a present-day perspective, the exclusionary rule seems perverse. How can a court accurately determine Parliament’s will, if it does not have access to the documentary record of Parliament’s intentions, other than by reference to the words contained in the statute itself? As Canadian scholar John Willis wrote in 1938:

You cannot interpret an Act in the light of its policy without knowing what that policy is: that you cannot discover without referring to all the events which led up to the legislation: but a well-settled rule of law forbids reference to any matters extrinsic to the written words

26 Ibid at 9 (para 54 in html version prepared for this paper). (“The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes [to which narrow construction is normally applied] and statutes [to which large and liberal construction is normally applied]; and 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 often subversive of Parliament’s real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony.”)

27 Ibid at 14 (para 97 in html version prepared for this paper). (“[T]his Board will only set aside such a decision after convincing argument and anxious consideration, but having regard: (1.) To the object of the Act -- namely, to provide a constitution for Canada, a responsible and developing State[…]”)

28 Ibid at 9 (para 56 in html version prepared for this paper). (“It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise 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.”)

of the Act as printed…. The judges do, indeed, always purport to construe wide and general words in accordance with the ‘object’ of the Act … but since they never purport to discover the ‘purpose’ or ‘object’ except from the four corners of the printed Act, you will realise, of course, that they are … merely speculating.

At the time of its origin, however, and for decades afterwards, the exclusionary rule was more easily defensible, as there were considerable practical problems associated with the accuracy and objectivity of parliamentary records. On one occasion in the middle part of the eighteenth century, Samuel Johnson reported hearing some others at a dinner party discuss a newspaper report of a particularly inspiring speech that the elder Pitt had just delivered in the House of Commons. Johnson explained to the assembled diners that he himself had composed the speech, including its best rhetorical flourishes, after the fact, on the basis of notes that had been submitted to him by individuals who had been present at the debate, which he himself had not bothered to attend. Under such circumstances, a cautious approach towards such materials is not hard to understand.

The exclusionary rule can be traced back to Justice Willes’ ruling in Millar v Taylor, a 1769 case regarding the interpretation of the Copyright Act of 1709. Four seriatim opinions were issued in this case. Justice Willes held:

The sense and meaning of an act of parliament must be collected from what it says when passed into a law, and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the sovereign.

With time, the exclusionary rule came to be applied more and more universally by the English courts, although it never completely caught on in the United States, where some extraneous evidence was always permitted. In Britain and the Empire, however, the rule became absolute.

The rule was expanded and clarified throughout the next century and a half. In Gorham v Bishop of Exeter [1850], Baron Alderson held, “we do not construe Acts of Parliament by reference to history.” In Richards v McBride [1881], Justice Grove held:

[W]e must construe Acts of Parliament as they are…except in those cases where the words used are so ambiguous that they may be construed in two senses, and even then we must not regard what happened in Parliament, but look to what is within the four corners of the Act, and to the grievance intended to be remedied, or, in penal statutes, to the offence intended to be corrected.

The exclusionary rule was closely linked to the dominance in English law of the literal or plain meaning rule, which stated that all laws should be interpreted according to the plain meaning to be found in the words as written. If this was so, what need had any court, to consult extraneous considerations such as the circumstances at the time the law was enacted, the wording of earlier versions of the Act, or changes that were made in committee to draft versions of the Act?

The plain meaning rule gradually pushed aside the older “mischief” rule, which had first been clearly articulated in 1584 in Heydon’s case, and which had assumed that courts would as a matter of course

30 This story is related in D.G. Kilgour, “The Rule Against the Use of Legislative History: ‘Canon of Construction or Counsel of Caution’” (1952) 30 Canadian Bar Review 769 at 785.
31 Millar v Taylor, [1769] 4 Burr 2303 at 2332 (italics in the original).
33 Richards v McBride, [1881] 8 QBD at 123.
learn about the “mischief” that a statute had been meant to correct, in order to ensure that the construction given to the law would allow it to achieve its objective. By the middle of the nineteenth century, the plain meaning rule dominated the English courts, having been assisted in its rise to dominance by the exclusionary rule.

In time, however, it became evident that the plain meaning rule was often an inadequate method of establishing the will of Parliament. This was particularly true in cases where the lawmakers had made an obvious drafting error—what was known as “lapsis linguae” or as “scrivener’s error.” Since a literal reading of the law sometimes produced an absurd result, the solution was to look beyond the plain meaning of the words and to search “within the four corners of the Act” (ie. the rest of the statute) for some context that might allow the court to draw a conclusion as to the meaning of the unclear words. From this practice, which came to be known as “the golden rule,” it was a logical step to once again to start looking once more outside the text of the Act, and into the circumstances that had caused it to be written.

The process of coming full circle, and once again examining evidence from outside the final text of the statute as written—including the citation of Hansard and parliamentary papers—would take the English courts over two centuries, culminating in Pepper v Hart [1992], in which the House of Lords ruled:34

Rreference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words…. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.

By the time of the Persons case, the exclusionary rule was facing early challenges. The 1936 edition of Craies’ Treatise on Statute Law (from which the following examples are taken) records the initial stages of this slow unravelling.35 First, Lord Halsbury had, in an 1892 decision, concluded that the meaning of certain of the terms with which he was dealing in the case could only be properly determined by being considered in relation to circumstances contemporary to the time of drafting. As this was an ecclesiastical case, Halsbury concluded that works of ecclesiastical history could properly be consulted.36

Two additional cases in the early 1920s also made use of extraneous evidence for the purpose of determining the mischief that Parliament had been seeking to overturn. The first of these was A-G v Brown [1920], where John Sankey (who was then a judge on the Court of King’s Bench and not yet a viscount) made use of general history as a guide to the construction of a statute.37 The second was Viscountess Rhondda’s Claim, a 1922 case dealing with the eligibility of a woman to sit in Britain’s upper house--and therefore a particularly important precedent for Sankey and his colleagues, when they

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34 Pepper (Inspector of Taxes) v Hart, [1992] UKHL 3 at 5 (text before the ellipsis is taken from the opinion of Lord Browne-Wilkinson, at 22. Text after the ellipsis is taken from the opinion of Lord Griffiths).
35 William Felden Craies, A Treatise on Statute Law, Walter Scott ed. 4th ed (London: Sweet and Maxwell, 1936) at 120.
36 Read v Bishop of Lincoln, [1892] AC 644 at 652, 653, 665.
37 Attorney General v Brown, [1920] 1 KB 773 at 793.
were faced with a similar issue seven years later. In Viscountess Rhondda’s Claim, Lord Birkenhead made reference both to the history of the women’s suffrage movement and to a series of earlier cases, taking care to point out that he was making use of the cases—as Craies puts it—“not for the purpose of exemplifying the legal view of the status of women, but as instances … in which the Courts admitted the extraneous circumstances as an aid to interpretation.”

These precedents were clearly known to Lord Sankey and his Privy Council colleagues when they wrote the judgment in the Persons case, for they made the decision to delve extensively into extraneous evidence, devoting twenty-four of the decision’s ninety-seven paragraphs to a wide-ranging historical review of the legal status of women, as far back as Roman times. At paragraph 52 of the ruling, Lord Sankey makes a point of noting that the Privy Council had consulted the Quebec Resolutions of 1864 in the hope of discovering clues as to whether “persons” had been imagined by the Fathers of Confederation to include or exclude women. (The resolutions turned out to reveal nothing of use to the Privy Council; Sankey notes that the relevant resolutions referred only to “members” of the Senate.)

Indeed, as I will show below, in Commonwealth jurisprudence Edwards v A-G Canada has been cited largely as an authority for the use by courts of extraneous evidence that the exclusionary rule had previously forbidden.

English law books—both those published in the immediate wake of the Edwards decision, and those published within the past few years—are unanimous in regarding Edwards as being important primarily for its pioneering willingness to look at extrinsic evidence from the period prior to the adoption of the relevant statute. The examination of pre-enactment extrinsic or contextual information is a key component of modern purposive legal analysis.

Significantly, the inclusion of such information is anathema to the doctrine of progressive interpretation. Progressive interpretation focuses entirely upon extrinsic evidence from the period after enactment, in order, as the Supreme Court has put it, to ensure “continued relevance,” to “accommodate and address the realities of modern life,” and to reflect “the context of contemporary values.” This is why the Supreme Court ruled, in 1985, “If the newly planted ‘living tree’ which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials… do not stunt its growth.” So it is highly relevant that Maxwell cites the Persons case once in connection with the citation of pre-enactment extraneous evidence, Bennion does so twice, and Craies does so four times.

The references in Bennion are particularly instructive. In both of Bennion’s references, Edwards is cited as a pioneering rejection of the by-then traditional restriction on the citation of parliamentary materials

38 Edwards, supra note 2 at 3 and 4 (paras. 14 and 22 in html version prepared for this paper; cites this case).
40 Paragraphs 10-13, 24-41, 44, 45 and 96 are devoted to the examination of extraneous evidence predating the adoption of the British North America Act. Paragraphs 91-95 are devoted to post-Confederation history.
41 Ref re Same Sex Marriage, supra note 12 at para 23.
42 Ibid at para 22.
43 Canada (Attorney General) v Mossop, [1993] 1 SCR 554.
46 The two citations are on pp 661 and 679.
in court rulings. The more striking of the two citations comes at the conclusion of Bennion’s discussion as to how the exclusionary rule rose to dominance. Having cited no less than sixteen cases in which the English courts had reiterated and endorsed the exclusionary rule, over a period stretching from 1769 to 1922, Bennion begins its discussion of the gradual rolling-back of the rule with these words:

However Lord Sankey LC in 1929, when delivering the judgment of the Judicial Committee of the Privy Council [in Edwards v A.-G. Canada], referred to Hansard, without discussing the question of its admissibility, on the construction of the Representation of the People Act 1867.

Bennion is referring to the penultimate paragraph of the Persons case ruling, prior to the five-point ratio, where Sankey and his colleagues point out that it is difficult to accept that Parliament could have intended to use the words “person” or “persons” to denote men alone in section 24 of the British North America Act (enacted in March 1867), when only two months later, in May 1867, it deliberately avoided the use of the word “person” in an Act governing the conduct of elections, in order to ensure that women would be denied the franchise:

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, 3rd series, vol. 187, column 817.

This is all stated in a tone that is so understated and matter-of-fact that it is easy to miss the point: Sankey was challenging the exclusionary rule in general, and was directly rejecting the express refusal to look at the alterations made to Bills as they pass through committee. Up to 1929, English courts had consistently agreed with the characterization of evidence drawn from parliamentary committees to be “wisely inadmissible,” and with Lord Chancellor Halsbury’s injunction, “[N]or can we determine [an Act’s] construction by any reference to its original form.”

Thus, unless Bennion has overlooked an earlier ruling, Lord Sankey’s decision in the Persons case was the first ruling in over a century in which an English court at the most senior level had used Hansard in an overt effort to establish the original meaning of an Act of Parliament.

So, far from being the capstone in a line of progressivist rulings in which the English judiciary ruled that the law (including Canadian constitutional law) was to be read as ignoring original intent, the Persons case was actually the ruling which reintroduced an unapologetically originalist reading of the law, using original documents such as records of Parliamentary debates as resources to assist in explaining the

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49 Ibid, at 659.

50 R v Hertford College, [1878] 3 QBD 693 at 707.

51 Herron v Rathmines and Rathgar Improvement Commissioners, [1892] AC 498 at 502.
meaning of statutes whose meaning could not be established solely by searching within the “four corners” of the printed Act.

**Lord Sankey’s comments on progressive interpretation and the Persons case in his later rulings**

The *Persons* case is not Sankey’s only decision, relating to Canada, that is cited by the authorities as a leading case in the use of legislative history. In the 12th (1969) edition of *Maxwell on the Interpretation of Statutes*, the discussion of the use of historical materials by the English courts begins with these words: 52

> Examples of attention being paid [in court rulings] to the historical setting of legislation abound. In a Canadian constitutional appeal, Lord Sankey L.C. said: “The process of interpretation as the years go on ought not to 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 sections 91 and 92 should impose new a new and different contract upon the federating bodies.”

The quotation is taken from Sankey’s 1931 ruling in *Re Regulation and Control of Aeronautics in Canada*. (In the next sentence, *Maxwell* cites the *Persons* case as further example of a case making use of historical evidence.)

It is worth quoting at greater length from *Re Regulation and Control of Aeronautics*.

> Inasmuch as the [BNA] Act embodies a compromise under which the original provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to 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 sections 91 and 92 should impose a new and different contract upon the federating bodies.

> But while the Courts should be jealous of upholding the Charter of the Provinces as enacted in section 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole.

Sankey was clearly taking great care to ensure that his ruling would not be seen as a justification for tipping the delicate balance of powers—in either direction—from the original compromise of 1867.

One of the most striking pieces of evidence as to the care Sankey was taking to be respectful of the original meaning of the BNA Act is the fact that in the second paragraph above, he quoted nearly verbatim from the speech with which Lord Carnarvon had, on February 19, 1867, introduced the British North America Bill to the House of Lords at Second Reading (that is, at the stage of debate where its principles and objects were laid out). 53 His recitation of Lord Carnarvon’s words is uncredited; Sankey’s

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53 What Lord Carnarvon said was this: “The real object which we have in view is to give to the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces…”

goal does not seem to have been, as it was in paragraph 96 of the *Persons* case, to overtly draw attention to the fact that he regarded the practice of consulting Hansard to be a legitimate judicial practice. Rather, his goal seems to have been to capture, as accurately as possible, the original, publicly-stated meaning of the BNA Act.

This is powerful evidence of Sankey’s desire to respect the intentions both of Parliament and of the Fathers of Confederation. But even a detailed review of these two paragraphs only hints at the strength of Sankey's resolve to clarify, in this ruling, his opposition to the judicial practice of progressively moving away from the original meaning of constitutional provisions.

The passages quoted above are taken from paragraphs 21 and 22 of Sankey’s ruling. But two other paragraphs (paragraphs 19 and 20) are even more striking. Here Sankey *lays out* what amounts, very nearly, to a manifesto for originalism:

Under our system, decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the Statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.

To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.\(^{54}\)

Read in any context, Sankey’s words are a powerful reaffirmation of his commitment to always respect the original publicly-stated meaning of the Constitution. But when these paragraphs are put into their actual context, it is possible to shed additional light on Sankey’s view as to how his own catchphrases from the *Persons* case ought to be interpreted.

Sankey and his Privy Council colleagues were dealing with an appeal from the Supreme Court of Canada, in which the justices had written individual opinions partly concurring and partly dissenting from each other, on each of the four reference questions that had been posed by the Canadian government. The Supreme Court had been so divided that its response to two of the four questions was simply, “the answers are to be ascertained from the individual opinions or reasons certified by the judges.” One of the seriatim opinions was that of Justice Lawrence Cannon, who made extensive reference to the *Persons* case.\(^ {55}\) Therefore, this appeal was Lord Sankey’s first opportunity to clarify whether or not he agreed with a lower court’s understanding of the *Persons* case ruling.

Cannon then concluded that all of this had no impact on the distribution of powers between the Dominion and provincial governments, and that since the *Persons* case decision was not applicable to

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\(^{54}\) Reference Re Regulation and Control of Aeronautics in Canada, [1932] AC 54 (JCPC) at 7, [http://www.bailii.org/uk/cases/UKPC/1931/1931_93.html](http://www.bailii.org/uk/cases/UKPC/1931/1931_93.html) (paras 19 and 20 in html version prepared for this paper) [*Ref Re Aeronautics* (JCPC)].

questions of the division of powers, he would instead have to rely upon the Privy Council’s other brand-new ruling in *A.-G. Canada v. A.-G. British Columbia*, which laid out a four-part test for determining the division of powers. Cannon stated:  

Although the Lord Chancellor in the Edwards case says that

the B.N.A. Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports
to deal in very few words,

it would seem … that he makes that statement non-applicable to the question of the legislative competence either of the Dominion or its provinces; judges cannot afford to give to a text which is clear a liberal and large interpretation in favour of Dominion power to the detriment of the provinces, and vice versa.

Cannon therefore set Edwards aside, and applied instead the four-part test from *A.-G. Canada v. A.-G. British Columbia*. He concluded:  

I would therefore say, with respect for those who believe that our constitution must be stretched to meet new conditions as they arise in the life of the people, that aviation was not foreseen nor considered when the enumeration of [section] 91 [of the BNA Act] was made, and that the words “property and civil rights” in section 92, are wide enough to give power to the provinces of legislating, with the required uniformity, to ensure safe and satisfactory regulation of aircraft throughout the Dominion…I would therefore answer [Reference Question #3] in the negative.

Cannon’s choice of words, in this final paragraph, is interesting. The reference to the constitution being “stretched” bears more than a passing resemblance to the Supreme Court’s Twenty-First Century claim that “[b]y way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted.” When dealing with the issue of changing and unforeseen circumstances that has, in recent decades, been said to justify progressive interpretation, Cannon’s conclusion was that the *Persons* case had nothing useful to say, and that it is therefore necessary for the courts to turn to other rulings for guidance.

A year after Justice Cannon and the rest of the Supreme Court handed down their rulings, Lord Sankey and the Privy Council ruled on the appeal of the Supreme Court’s decision. Sankey authored the Privy Council’s ruling.

Sankey answered Reference Question #3 positively—that is, he rejected Justice Cannon’s conclusion (Sankey also disagreed with Justice Cannon on Reference Question #4). But Sankey seems to have understood that observers might wrongly conclude that in rejecting Justice Cannon’s conclusions the Privy Council was also rejecting the entire body of Justice Cannon’s reasoning. He seems to have been anxious, whilst rejecting Cannon’s answers to Reference Questions #3 and #4, to reinforce Cannon’s conclusion that the *Persons* case ruling was not to be understood as a licence for the federal government to invade areas of provincial jurisdiction. This explains Sankey’s careful choice of words about the...
importance of not “whittl[ing] down the provisions of the original contract”, and also his decision to place his manifesto where he did in his ruling, directly after he had responded to Reference Questions #3 and #4.\(^{60}\)

The “sixty colours” metaphor can, therefore, be regarded as Sankey’s own after-the-fact clarification as to what he had meant by “large and liberal,” and perhaps also of “living tree.”

This is the closest that Sankey ever came to again referring to the living tree metaphor. He would once more cite the Persons Case as a precedent, in his ruling in British Coal v. the King, but his focus in that case was on reaffirming that the BNA Act should be interpreted in a large and liberal manner. The term “living tree,” which had never been meant to apply to anything other than the question of whether Canada’s usages and conventions were autonomous from those of the United Kingdom, never again crossed his lips.

A further quotation from another ruling will show just how firmly Sankey was opposed to the judicial adventurism for which he has since become the poster child. In American law, Sankey is best-known for his obiter dicta from a 1929 ruling which would be, nearly four decades later, repeated by the United States Supreme Court in its landmark ruling in Miranda v Arizona [1966]: “[It] is not admissible to do a great right by doing a little wrong.” The American court used Sankey’s words to illustrate the fact that the police had done a little wrong by failing to provide Ernesto Arturo Miranda, a habitual criminal who was undoubtedly guilty of the violent crime for which he was standing trial, with information regarding his constitutional right against self-incrimination. On this basis, Miranda’s confession was set aside, leading to the now-universal American police practice of “Mirandizing” all suspects by reading them their rights.

The phrase which was quoted by the U.S. Supreme Court had originally been used by Sankey in Hobbs v Tinling, one of the final cases on which he had ruled prior to his elevation the high office of Lord Chancellor, and had been intended by him to be a warning that the courts themselves ought to be bound by strict procedural rules, even when this leads to an undesirable outcome. Sankey’s full warning is as follows:\(^{61}\)

> Learned counsel for the respondents repeatedly pressed us [the court] with the argument that... we need not look too strictly upon the means by which the result was obtained. With this I strongly disagree. It is not admissible to do a great right by doing a little wrong. The inequalities of life are not so dangerous in a State whose subjects know that in a Court of law at any rate they are sure to get justice, and it is not sufficient to do justice by obtaining a proper result by irregular or improper means.

Sankey's non-official writings are likewise devoid of any content suggesting that he ever endorsed the notion that the meanings of words and phrases in the law should be regarded as malleable. The closest thing that I have been able to locate, to something that appears (at least at first glance) to be a reiteration of the doctrine of progressive interpretation is a sentence taken from Sankey's foreword to Frederick John Port's 1929 book, Administrative Law.

Sankey writes on the subject of the rules needed to administer the vast new undertakings in which the British state was then engaging as it created a modern welfare state. He stated “Some new method must be devised either by adapting old law to modern situations or creating a new code to deal with them.” Sankey's words, at first glance (but only at first glance), appear to endorse progressive judicial

\(^{60}\) Ref Re Aeronautics (JCPC), supra note 55 at 7, 8 (paras 15, 16, and 19-23 in the html version prepared for this paper) (Questions 3 and 4 are answered, respectively, in paragraphs 15 and 16 of the Judicial Committee’s ruling; paragraphs 19-23 deal with the importance of respecting the original contract).

\(^{61}\) Hobbs v Tinling, [1929] 2 KB 1 at 53.
interpretation, in which extraneous, post-enactment evidence is relevant. But this is followed, a paragraph later, by the following clarification: “As above suggested, the question whether the scope of Administrative Law should be extended is one for the statesman….\textsuperscript{62}

This foreword, written mere months prior to the \textit{Persons} case ruling, would suggest that Sankey was keenly aware of the need for the law to be updated to reflect changing circumstances, but that he endorsed the traditional method of dealing with this need: the enactment, by Parliament, of appropriate laws. Politically, Sankey was a socialist, a Labourite, and a reformer. As a judge, he was a staunch defender of always reading the law in conformity with its original meaning.

**Early Canadian commentary on the \textit{Persons} Case**

For the first several decades after it was handed down, the Privy Council ruling in the \textit{Persons} Case was regarded by Canadian writers as important primarily because it challenged previous rulings of the Judicial Committee of the Privy Council on the question of the division of powers between the federal and provincial governments. These prior rulings had, in the eyes of mid-century Canadian scholars, interpreted the BNA Act in violation of the original intent of the Fathers of Confederation. Sankey was, in the eyes of these commentators, the champion of the original vision of a centralized Canada led by a vigorous Dominion government with few restraints on its powers.

Whether the ruling in the \textit{Persons} case actually endorsed centralized federalism is a question that I will not pursue. The point to be stressed is that no Canadian scholar, in the first few decades after the ruling was handed down, imagined the ruling to justify a doctrine of progressive interpretation in which the legal definitions of words like “person” can be judicially altered from time to time in order to give the Constitution continued relevance and legitimacy. This novel interpretation would have to await the 1980 ruling of Chief Justice Dickson in \textit{A.-G. B.C. v Canada Trust}, quoted near the start of this paper.

More typical of pre-1980 scholarship is a 1935 article by Brooke Claxton, who wrote:\textsuperscript{63}

\begin{quote}
[Lord Sankey’s ruling in \textit{Re Regulation and Control of Aeronautics} and Lord Dunedin’s ruling in \textit{Re Regulation and Control of Radio Communication}] in conjunction with those in the \textit{Persons Case} and \textit{Combines Investigation Act Case} do a good deal to blow the dust of previous decisions off the clear words and purpose of the constitution and give reason to hope that the power to legislate for the peace, order and good government may yet contain the residue of power for the Dominion which the Fathers of Confederation undoubtedly intended.
\end{quote}

The same interpretation was taken a quarter-century later, in a 1959 article in which Gerald Rubin encouraged the courts to follow Sankey’s example from the \textit{Aeronautics} ruling and place more faith in the federal jurisdiction over “peace, order and good government.” This approach would, Rubin concluded, roll back a series of nineteenth-century rulings in which “the [BNA] Act was deliberately twisted in favour of the provinces ... for reasons of policy.”

Rubin suggested the following antidote:\textsuperscript{64}

\begin{quote}
If [judges] are prepared, as Lord Sankey urged, to treat the British North America Act as a
\end{quote}

\begin{footnotes}
62 John Sankey, Foreword to Frederick John Port, \textit{Administrative Law} (London: Longmans, Green and Co, 1929) at ix.
64 Gerald Rubin, “The nature, use and effect of reference cases in Canadian Law,” (1959-60) 6 \textit{McGill Law Journal} 168 (in the original article, the second paragraph is a footnote to the first paragraph).
\end{footnotes}
‘living tree, capable of growth,’ to eschew narrow canons of interpretation and slavish adherence to stare decisis, the form in which the case comes before them will not be an insuperable obstacle to a decision based upon the text of the Act and the realities of Canadian life.

The ‘living tree’ metaphor was employed in Edwards v Attorney General for Canada, a reference, but not one involving the question of legislative jurisdiction. It is possible to discern much of the same approach in Lord Sankey’s opinion in the Aeronautics Reference, particularly in his ‘sixty colours’ analogy....

Ivor Jennings’ 1937 article in the Harvard Law Review, summarizing seventy years of Privy Council rulings on the British North America Act, characterized the Persons case as being one of a number of cases from the late 1920s and early 1930s that showed that “there was a new spirit abroad,” which dictated the Privy Council would not be as respectful as it had previously been of its own precedents established by previous decisions favouring the powers of the provinces at the expense of the Dominion. Jennings made no reference to the living tree metaphor, but concluded instead that “it is significant that in a summary at the end of the judgment Lord Sankey gave as his first reason ‘the object of the Act, to provide a constitution for Canada, a responsible and developing State.’”

Similarly, in the 1949 House of Commons debate over amendments to the Supreme Court Act terminating appeals to the Judicial Committee of the Privy Council, Major James Coldwell, the leader of the Cooperative Commonwealth Federation, stated:

I have listened to the discussion on this question of stare decisis, and to me it seems that to accept it unreservedly would place this country and its judiciary in something of a strait-jacket. In my reading of the British North America Act and the discussion preceding the adoption of that act in 1867, the fathers of confederation thought of it in the way that was described by Lord Sankey in 1929....

[I]t seems to me that any attempt to fasten upon Canada the past judgments of the privy council would defeat the very objective the fathers of confederation had in view at the outset —the planting of a living tree capable of growth and development in the future.

Other commentators were as committed as Coldwell was to a more centralized federation, but despaired at Sankey’s ruling, which they took to be entirely too conventional. In 1937, WPM Kennedy of the University of Toronto wrote in the Canadian Bar Review:

The [full text of the Persons case has], alas, been overlooked too frequently; but when they are examined Lord Sankey does not appear as the John Marshall of the Canadian constitution....The Edward’s Case left [the BNA Act] just where Strong J. left it in 1879 or Lord Hobhouse in 1887: construction as in other statutes.

The 1930s saw, for the first time, the advocacy by Canadian scholars of a doctrine of progressive interpretation similar to the one that would, half a century later, be introduced by the Supreme Court. Vincent MacDonald, a law professor at Dalhousie University, first introduced the idea in a 1933 article in the Canadian Bar Review. McDonald declared, “A constitution is intended never to be outgrown but to speak permanently and to be given a progressive construction which will keep it an apt instrument of

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government even in its application to circumstances not foreseen by its framers.” Yet the *Persons* case decision, then only four years old, was so clearly not an appropriate basis for such a doctrine that McDonald never thought to even mention the ruling (let alone the ‘living tree’ metaphor) in this article. To the extent that there can be said to have been a scholarship on the case in the subsequent decades, there is little to suggest that it was understood as justifying progressivism. As late as 1982, Elmer Driedger wrote:69

This case decided only that women were persons qualified to be summoned to the Senate....At common law women were disqualified from holding office, but at the time of the *Edwards* case that disqualification no longer applied to Canada, if ever it did. The British North America Act, 1867, however, was a British statute and the question in the *Edwards* case was simply whether that common law rule applied to that Act. The Privy Council held that it did not.

**Canadian judicial comment on the ‘Living Tree’: the first fifty years.**

In its ruling in *Canada (A-G) v Hislop* [2007] the Supreme Court made the following counterfactual assertion: “From the time Lord Sankey L.C. used these words [i.e. ‘living tree’] to characterize the nature of the Canadian constitution, courts have relied on this expression to emphasize the ability of the Constitution to develop with our country.”70 It would be more accurate to say that this is the exact opposite of what actually happened.

The Supreme Court itself made reference to the living tree metaphor only four times in the first fifty years after Lord Sankey’s ruling. The metaphor was cited by Justice Cannon in his concurring opinion in *Re Regulation and Control of Aeronautics* [1930], by the court in *Re Regulation and Control of Radio Communication* [1931], for a second time by Justice Cannon in his dissent in *Re Weekly Rest in Industrial Undertakings Act, Minimum Wage Act and Limitation of Hours of Work Act* [1936], and by the court in *Quebec (A-G) v Blaikie (no 1)* [1979]. I have not been able to locate any judicial references, between 1937 and 1979, to the living tree (although references to other parts of the *Persons* case were made from time to time).

In none of these four cases, which will be explored below, did the court (or the dissenting judge) use the metaphor, as alleged by the Court in *Hislop*, “to emphasize the ability of the Constitution to develop with our country.”

On the other hand, it should be acknowledged that there were, in the first years following the Privy Council’s 1929 ruling in the *Persons* case, at least two occasions on which litigants used the imagined authority of Lord Sankey to urge the courts to read the BNA Act (or even the statute book as a whole) as changing at the behest of the courts in order to reflect contemporary values. These arguments were, in both instances, swatted down by the courts.

In the first claim, which came before the Supreme Court as an appeal from the Quebec Court of King’s Bench, involved a claim arising from the death of a woman’s “natural” son (that is, a son who had been born out of wedlock). The death having been allegedly caused by the negligence of the municipality of Montreal West, the mother maintained an action for damages. The matter to be settled by the court was not whether the town had indeed been negligent, but whether the provision in article 1056 Quebec's civil code, which limited the damages that could be paid to the mother of a natural child to an amount lower

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68 VC Macdonald, (1933) 11 Canadian Bar Review 581 at 582.


70 Canada (Attorney General) v Hislop, [2007] 1 SCR 429 at para 94.
than what would be paid to the mother of a legitimate child, ought to be overturned. The basis for such a ruling would have been the appellant's claim that Lord Sankey's words regarding the “living tree” served as authority to set this law aside and equalize the status of all parents.

Chief Justice Anglin dismissed this argument in the following words: 71

It was argued at bar that a construction of art. 1056 C.C. excluding natural parents and illegitimate children savours of barbarism and would shock the sensibilities of persons holding enlightened views, and that, accordingly, the courts should give to it a construction more consistent with humane and liberal ideas. The short answer to this contention is that the courts must await the action of the legislature, whose exclusive province it is to determine what should be the law.

Justice Duff, who would shortly be appointed Anglin’s successor as chief justice, concurred: “We have before us a dry question of law, and I do not think it incumbent upon me to express either approval or condemnation of the well known traditional attitude of the common law, of England as well as of France, toward illegitimacy.” 72

A second case, in Alberta, revolved around an unpleasant divorce. This time, the argument that Lord Sankey had authorized the courts to rewrite the Constitution never made it past the province’s Court of King’s Bench, where Justice McGillivray dismissed it in the following words: 73

It seems to me that none of the observations of Viscount Sankey can be said to provide legal justification for an attempt by Canadian Courts to mould and fashion the Canadian Constitution by judicial legislation so as to make it conform according to their views to the requirements of present day social and economic conditions.... That which is emphasized as I appreciate Viscount Sankey’s pronouncements is that in interpreting a section or sections of the B.N.A. Act the whole scheme of Confederation should be kept in mind so that each section may be interpreted with such possible liberality as to give effect to the whole scheme of self-government which the Imperial Parliament intended and in few words attempted to enact.

Let us now return to the four cases in which, prior to 1980, the Supreme Court or members of the Supreme Court made reference to the living tree metaphor.

The first reference was made in the Court’s 1931 ruling Reference re Regulation and Control of Radio Communication. The Supreme Court was charged with the dual task of determining whether radio communication ought to be treated as falling under federal or provincial jurisdiction, and of determining whether the fact that Canada was a signatory to an international convention would cause the convention to be enforced upon the provinces, notwithstanding any of the normal jurisdictional considerations.

In dealing with the first of these questions, Chief Justice Anglin made reference to the Persons case ruling: 74

[I]f the [BNA] Act is to be viewed, as recently suggested by their Lordships of the Privy Council in Edwards v Attorney General of Canada

71 Town of Montreal West v Hough, [1930] SCR 113 at 128.
72 Ibid at 129.
73 Kazakewich v Kazakewich, [1937] 1 DLR 548 at p 567.
74 Reference re Regulation and Control of Radio Communication, [1931] SCR at 546.
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 comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in 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. If, however, it should be found impossible to assign that subject matter to any specifically enumerated head of legislative jurisdiction, either in section 91 or in section 92 of the BNA Act, it would seem to be one of the subjects of residuary power under the general jurisdiction conferred on the Dominion by the opening paragraph of section 91.

This is the first case, of which I am aware, in which a court erroneously read Lord Sankey’s words as suggesting that the BNA Act itself ought to be regarded as a living tree. However, it seems that the consequence that Justice Anglin assumed to follow from this conclusion was very different from the progressive implications drawn by his post-1980 successors on the Supreme Court. He assumed that the applying the “living tree” metaphor meant treating each of the heads of power as being capable of growing to cover one or another of the new technologies that would arise from time to time, rather than turning first to the federal government’s residuary power as a catch-all for new innovations not contemplated by the Fathers of Confederation.

Cannon’s concurring opinion in Re Regulation and Control of Aeronautics was the opinion to which Sankey seems to have been responding when he wrote his “sixty colours” analogy. This case is discussed above and does not need to be reviewed again here.

The second and third references to the living tree metaphor were made by Justice Lawrence Cannon—once in a concurring opinion, and once in a dissent.

Cannon attempted to derive principles from each of the two rulings, and to apply these principles to the four reference questions before the court. He quoted paragraphs 53 - 56 of the Persons case, including the reference to the living tree, the quotation from Borden, and Lord Sankey’s injunction to always give the BNA Act a large and liberal interpretation.

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He then concluded that all of this had no impact on the distribution of powers between the Dominion and provincial governments, and that since the Persons case decision was not applicable to questions of the division of powers, he would have to rely upon the Privy Council’s other brand-new ruling, which
laid out a four-part test for determining the division of powers. He stated:

Although the Lord Chancellor in the Edwards case says that

the B.N.A. Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words,

it would seem by the above-quoted reservation [i.e. Sankey’s observation that “their Lordships are not here considering question of the legislative competence either of the Dominion or its provinces”] that he makes that statement non-applicable to the question of the legislative competence either of the Dominion or its provinces; judges cannot afford to give to a text which is clear a liberal and large interpretation in favour of Dominion power to the detriment of the provinces, and vice versa.

Cannon therefore set Edwards aside, and applied the four-part test from A.-G. Canada v A.-G. British Columbia. He concluded: 75

I would therefore say, with respect for those who believe that our constitution must be stretched to meet new conditions as they arise in the life of the people, that aviation was not foreseen nor considered when the enumeration of [section] 91 [of the BNA Act] was made, and that the words “property and civil rights” in section 92, are wide enough to give power to the provinces of legislating, with the required uniformity, to ensure safe and satisfactory regulation of aircraft throughout the Dominion….

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In 1936, Justice Cannon again cited the living tree metaphor, in his dissent in one of the Labour Conventions cases. This time, Cannon used the metaphor to convey a meaning diametrically opposed to the one that would be assigned to it in a later generation. To Cannon, the living tree metaphor conveyed the idea that even when external circumstances change, the constitution remains rooted.

He wrote,

The only direct legislative authority expressly given to the Parliament and Government of Canada concerning foreign affairs is found in [section 132 of the BNA Act] and is limited to the performance of the obligations of Canada or any province thereof arising under treaties between the Empire as a whole and a foreign country. The Imperial Parliament saw to it that Imperial interests would be protected by federal legislation. But to pass legislation--affecting the provinces--to ratify a treaty or agreement by Canada alone--under an evolution which came to pass since Confederation--with a foreign power, previous consultations between the federal and provincial self-governing parts of our Confederation seem to me logical and the only way to preserve peace, order and good government in Canada and save the very roots of the tree to which our constitution has been compared. In order to grow, if it be a growing instrument, it must keep contact with its native soil--and draw from the constituting province new force and efficiency. 76

As noted elsewhere in this essay, I do not believe that Lord Sankey had intended the metaphor to convey this particular meaning, since its real purpose was to serve as an image of Canada’s evolving constitutional conventions. But the relevant point here is that whether Justice Cannon was correct or

75  Ref Re Aeronautics (SCC), supra note 56 at para 140.
incorrect in his understanding of the living tree, he did not imagine that Sankey had meant it to serve as
a metaphor for progressive interpretation.

This would be the Court’s last reference to the metaphor for over forty years, until 1979.

When it revived the living tree metaphor after its four-decade hibernation, the Supreme Court once
again gave a traditional—and I would say accurate—reading to the Persons case, citing it as an
authority for the conclusion that the provisions of section 133 of the British North America Act, which
oblige Quebec to operate its courts in both French and English, ought to be given a large and liberal
interpretation.

In Quebec (A-G) v Blaikie (no. 1), the court ruled:77

[T]here are observations by Lord Sankey of the need to give the British North America Act
a broad interpretation attuned to changing circumstances: ‘The British North America Act’,
he said at p. 136, ‘planted in Canada a living tree capable of growth and expansion within its
natural limits’. Dealing as this Court is here, with a constitutional guarantee, it would be
overly technical to ignore the modern development of non-curial adjudicative agencies
which play so important a role in our society, and to refuse to extend to proceedings before
them the guarantee of the right to use either French or English by those subject to their
jurisdiction.

This was a ruling based on the application of fixed constitutional rules to changed circumstances.
Regardless of what changes had taken place in the attitudes of Quebecers, what counted was not a
reevaluation of Quebec’s constitutional obligations on the basis of ‘contemporary values’ in order to
achieve ‘relevance’ or ‘legitimacy.’ Rather, the word ‘court’ was given a large and liberal, rather than
a narrow and technical interpretation, in order to achieve the object of the Act. Interpreting the word
‘court’ narrowly, so as to permit non-curial adjudicative agencies to operate in French alone, would
have violated the compromise achieved at Quebec City in 1866—an arrangement which Lord Sankey
had characterized as being “based upon a consideration of the rights of others and expressed in a
compromise which will remain a lasting monument to the political genius of Canadian statesmen.”78

Consider, by contrast, what a progressive reading of section 133 would have produced. A court
concerned with “relevance”, “legitimacy” and “contemporary values” would have had to interpret the
rights protected under s. 133 of the BNA Act as having been stripped away by the progressively
changing values of Quebec society, which by the late 1970s was far less tolerant of the rights of its
English-language minority than it had been in 1867.

The Persons Case in Commonwealth Jurisprudence before 1980

Starting almost immediately after the ruling was handed down, Commonwealth courts began to cite
Edwards v A-G Canada—particularly in India. Indeed, until the 1980s, the case was cited more
frequently in Indian than in Canadian courts. Commonwealth jurisprudence regards the Persons case in
exactly the same way as the English lawbooks (probably because the courts relied so heavily upon these
authorities). In India, Edwards has been cited in a number of decisions as an authority for consulting

77 A-G Quebec v Blaikie, [1979] 2 SCR 1016 at 1029.
78 Edwards, supra note 6 at para 8 (“the Quebec conference … framed a number of resolutions. These resolutions as
revised by the delegates from the different Provinces in London in 1866 were based upon a consideration of the rights of
others and expressed in a compromise which will remain a lasting monument to the political genius of Canadian
statesmen. Upon those resolutions the British North America Act of 1867 was framed and passed by the Imperial
legislature”).
extrinsic evidence as to the intent of the legislature. *Bhuramal and Others v State of Rajasthan*, a 1956 case, is typical:

In *Edwards*..., the Judicial Committee laid down that though it was permissible to consider two points, namely, the external evidence derived from extraneous circumstances such as previous legislation and decided cases and the internal evidence from the Act itself, *the conclusion based on [post-enactment] legislative practice must not be pushed too far.*

Note the final words. The lesson taken by the Indian court from the *Persons* case ruling is that the only kind of extraneous evidence that actually matters to a court attempting a ‘progressive’ interpretation—that is to say, the period after the statute has come into force—ought to be treated with caution.

In addition to this ruling from the Rajasthan courts, *Edwards* has also been cited as an authority for the use of historical materials, in rulings by the courts in Punjab, Madras (twice) and Bihar. In a 1958 ruling of the Allahabad High Court, the *Persons* case is specifically cited as an authority for the use, by the court, of original documents from an early draft of the Constitution of India in order to determine the meaning of an unclear term:

In the present case, the word in question is ‘sedition’. In AIR 1950 SC 124 (p. 128, para 11) (B), the existence of the word ‘sedition’ in Article 13(2) of the Draft Constitution and its final deletion was, noted by Patanjali Sastri J. In *Henrietta Muir Edwards v Attorney General for Canada*, on the question whether the word ‘person’ includes ‘females’, Lord Sankey referred to the debates reported in Hansard, 3rd series Vol. 37, Col. 817, and to John Stuart Mill’s amendment proposing person, instead of ‘man’. The debates and proceedings [from the drafting of the Constitution of India], therefore, have value as a matter of historical interest.

The *Persons* case has also been cited repeatedly by Indian courts, from the Supreme Court of India on down, as an authority for giving a large and liberal construction to the powers assigned by the state. None of the Indian rulings imagines Sankey to have stated that “large and liberal” should be understood in the manner proposed by the Supreme Court of Canada in 2004, when it equated the term “large and liberal” with “progressive.” A progressive reading of powers necessarily assumes that these powers are initially slight, and grow more expansive over time.

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85 *Ref re Same Sex Marriage*, supra note 12 at para 23, (“[a] large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada’s constitutional document”).
On the contrary, the Indian courts have used the *Persons* case to show that the constitutional powers awarded to the central and state governments were, when viewed as a whole, expansive from the start. This viewpoint, which assumes a static but expansive construction of assigned powers, is summarized in the following sentence, taken from the same paragraph of a 1941 ruling of the Madras High Court in which court has just cited the *Persons* case: “It is a well established principle that within the limits of subject and area assigned to a Legislature by the Imperial Parliament, its powers to make laws are as supreme and plenary as those of Parliament itself.”

Outside India, I have come across only two rulings (one from Ireland and the other from Australia) that cite the *Persons* case—although I can hardly pretend that I have made an exhaustive search of Commonwealth jurisprudence. In the Irish case, *The State (Ryan) v Lennon* [1936], the *Persons* case was invoked to justify the conclusion that Amendment no. 17 to the 1922 Constitution of the Irish Free State, which authorized the use of military tribunals, was constitutional. Justice Sullivan wrote:

> The general principle applicable to the interpretation of statutes is well settled, although the language in which the principle is stated is not always identical: the words of the statute should be given their ordinary and natural meaning unless that would lead to an absurdity or inconsistency. It is, however, quite consistent with that general principle that certain statutes should receive a liberal construction while others should be strictly construed; and there is authority for the proposition that an Act such as the Constitution should be liberally interpreted. In *Edwards v Attorney-General for Canada* [1930] A.C. 124 the Privy Council were called upon to interpret a section of the British North America Act, 1867 (the object of which was to grant a Constitution to Canada), and in expressing the opinion of the Board, Lord Sankey, at p. 136, said:— "Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation….”

This is in keeping with the general tenor of the Indian citations, and makes no hint at regarding the *Persons* case as an authority for progressivism.

The Australian case, *Victorian Stevedoring v Dignan* [1931] comes closer than any other pre-1980 case to citing the *Persons* case as an authority for a progressive interpretation of constitutional law. Indeed, the term “progressive” is even employed. But sharp limits to the courts’ ability to rewrite the constitution, which are not congruent with modern Canadian progressivism, are clearly emphasized in the ruling (and have been italicized by me):

> This close relationship between the legislative and executive agencies of the Commonwealth [of Australia] must be kept in mind in examining the contention that it is the Legislature of the Commonwealth, and it alone, which may lawfully exercise legislative power. "It is the duty of the Judiciary," said Isaacs J. (as he then was) in the case of *Commonwealth v Colonial Combing, Spinning and Weaving Co*, "to recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter. It is only when those common law principles are exhausted that legislation is necessary."

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87 *The State (Ryan) v Lennon*, [1936] Irish Reports 170.

88 *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan Informant*, [1931] HCA 34, (1931) 46 CLR 73.
Much the same method of approach to the solution of constitutional questions is adopted by the Judicial Committee of the Privy Council. In *Edwards v Attorney-General for Canada*, Lord Sankey L.C., speaking of the Canadian Constitution, said that it "planted in Canada a living tree capable of growth and expansion within its natural limits," and noted with approval Sir Robert Borden's statement that, "like all written constitutions it has been subject to development through usage and convention." The Australian Constitution should receive the same "large and liberal interpretation" as that accorded by the Privy Council to the *British North America Act*.

A careful reading of this passage makes it clear that, unlike the post-1980 Supreme Court, Australia’s High Court had read and properly understood Lord Sankey’s reference to Sir Robert Borden and Borden’s application of the Diceyan concept of usages and conventions to the written constitution of Canada (and by extension, to the written constitution of Australia).

**Conclusion**

Based on the evidence presented above, it seems safe to say that the Supreme Court’s interpretation of the *Persons* case, from 1980 onwards, as an authority for the doctrine of progressive interpretation, is:

1. based on no precedents;
2. runs contrary to the preceding fifty years of scholarship on the Privy Council’s ruling; and
3. contradicts a half-century of judicial citations.

Additionally, the progressive interpretation contradicts both the internal logic of the *Persons* case and the express words of the ruling itself.

To describe the *Persons* case as former Supreme Court justice Ian Binnie has done, as “a standing rebuke to an overly deferential attitude to originalism,” is to reveal that one knows less about the ruling itself than about its latter-day mythology. The image that some of Sankey’s well-intentioned but ill-informed hagiographers have given, of John Sankey, champion of progressive interpretation, is contradicted by his rulings in *A-G v Brown* [1922], the *Persons* case [1929] and *Re Regulation and Control of Aeronautics in Canada* [1932], which establish him as perhaps the leading practitioner, on the English bench in the 1920s and 1930s, of the interpretive technique that would, in later decades, come to be known as “originalism.”

The Supreme Court cannot be right in its post-1980 reading of the *Persons* case unless the interpretation offered by the courts in India, Ireland and Australia between the 1930s and the 1970s is wrong. The Supreme Court cannot claim that its interpretation is accurate unless it asserts that its own earlier interpretation, given in 1931 and confirmed by Lord Sankey himself in the *Aeronautics* reference, was inaccurate. It cannot argue the centrality of the living tree metaphor to Canadian constitutional interpretation without explaining away Sankey’s sixty colours analogy. It cannot continue to quote the first, second and fourth sentences from the most famous paragraphs of the *Persons* case without acknowledging the existence, in their midst, of the third sentence in that passage, which by quoting Sir Robert Borden gives context to the whole, revealing that this passage is no justification for the proposition that the courts are empowered to replace the definitions of words in the constitution with new definitions that the court believes to better suit the spirit of the times.

In short, eight decades after Lord Sankey’s ruling, and thirty years after the Supreme Court seized upon

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the *Persons* case to justify its decision to selectively redefine individual words and phrases in the constitution, the time is overdue for a reappraisal. If the Supreme Court wishes to continue to preach the gospel of progressive interpretation, it will have to base its claim on a scriptural text other than *Edwards v A-G Canada*, which turns out to be no precedent at all.