Living Tree Doctrine

The “living tree” doctrine refers to a method of constitutional interpretation that allows for Canada’s Constitution to change and evolve over time while still acknowledging its original intentions.[1] The doctrine achieves a balance between two seemingly contradictory goals: predictability and flexibility. To be effective, the Constitution must consist of a predictable set of rules. That way, Canadians know how their activities are governed, and Canada and the provinces can be governed in a consistent manner. On the other hand, flexible interpretation accommodates the realities of changing modern life. If the Constitution could not be interpreted this way, it would be frozen in time and become more obsolete than useful.[2]

Two Canadian cases illustrate the balance between the constitutional predictability and flexibility that embody the living tree principle. *Edwards v Canada*,[3] a cornerstone in constitutional interpretation, introduced the living tree metaphor and the courts’ need to interpret the Constitution more broadly. Otherwise known as the “Persons Case,” *Edwards* was a 1929 decision by Canada’s highest court at the time, the Judicial Committee of the Privy Council (JCPC) in Britain. After analyzing the Constitution’s use of the term “persons,” which had always referred to men, the JCPC decided that both men and women were now “persons” and therefore eligible to sit in the Canadian senate.[4] According to Justice Sankey, while constitutional stability and integrity is of the utmost importance, the Constitution “also planted in Canada a living tree capable of growth and expansion within its natural limits."[5] Women may not have been able to vote or hold office in 1867, but times had changed and so had constitutional interpretation. The decision helped women gain a measure of equality to men in the political arena.

More recently, cases like *Reference Re Same-Sex Marriage* updated the living tree concept. This 2004 case questioned the constitutional validity of same-sex marriage. Building on Justice Sankey’s “living tree” metaphor, Chief Justice McLachlin introduced another metaphor, stating that the “ ‘frozen concepts’ reasoning runs contrary 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.”[6] By allowing the term “marriage” to adapt or grow with contemporary times, its meaning within legislation became modernized and subsequently included unions of same-sex couples.[7]

Allowing the Constitution to evolve is not a simple task. Doing so takes time and considerable thought, and the courts make changes only after much deliberation. Sections of the Constitution that are questioned or challenged must be examined within the context of contemporary society to ensure that they adapt to change but still maintain the “framers’ intent,” or what the Constitution’s authors were trying to achieve.[8] Therefore, contemporary interpreters must focus on what the originators *intended* it to accomplish rather than what the text actually states before allowing the Constitution to evolve or remain unchanged.[9]

[1]Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough: Thomson, 2007) at 36.8(a)

[2]*Ibid; Reference Re Same Sex Marriage*, 2004 SCC 79 (CanLII) .

[3]*Edwards v Canada (Attorney General)* [1930] AC 124 at 124, 1929 UKPC 86 .

[4]*Ibid.*

[5]*Ibid*.

[6]*Same-Sex*, *supra* note 2 at para 22.

[7]*Ibid*.

[8]William Beal, *Cardinal Rules of Constitutional Interpretation* (Buffalo, US: William S Hein & Co, Inc, 2000) at 257.

[9]*Ibid*.