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EXTRINSIC AIDS AND THE INTERPRETATION OF STATUTES

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Abstract

This thesis considers a question of increasing significance in Canada today - the use of extrinsic aids in the interpretation of statutes.

In the 20th century, more and more aspects of life are governed by specific statutory and regulatory provisions than at any time in the past. It is not enough today for courts to be familiar with common law principles and decided cases. Whilst no up-to-date statistics are available, it is clear that the majority of cases revolve around the interpretation of a statute.

In examining the ways in which the courts handle the complex question of how far to go in seeking assistance in interpreting statutory provisions, primary focus of the thesis is placed on Canadian federal and common law jurisdictions, though cases from England and Australia are also considered. Extensive use is made of articles by American authors who have been prolific in writing on statutory interpretation in general and, in particular, on the use of extrinsic aids. However, little consideration is given to American cases as jurisdictions in the United States vary so widely in their approach. The thesis touches on, but does not

discuss in detail, a number of ancillary topics such as the intention of parliament, decided cases and judicial lawmaking.

The thesis argues that the principles adopted by the courts that allow the admission of certain aids to interpretation for limited purposes only and that do not allow the admission of legislative history in non-constitutional cases create artificial distinctions amongst the various different types of aids. These distinctions serve to obscure rather than elucidate the process of interpretation by the courts. There are no compelling reasons for the courts to reject outright the admission of legislative history in non-constitutional cases. Parliamentary materials should therefore be admissible in accordance with the same rules as those applied to other interpretative aids. Thus, legislative history should be admissible if relevant and weight should be assigned to it in accordance with its reliability and persuasiveness. In addition, it should be admitted not only as background to the legislative enactment but also as an aid to interpreting that enactment.

To this end, the thesis examines some of the interpretive aids used by the courts and the way in which they are used. Part I examines some of the aids found in the printed version of the statute. Part II examines a group of aids that have been classified as part of the general knowledge and experience of the judge. Part III looks at the way in which the courts use related

acts and treaties whilst Part IV deals with the contentious area of legislative history, including Commission reports.

Considerable attention has been given to this last subject as it is the most controversial. The interpretive aids discussed in the first three Parts tend to be used by the courts as a matter of course and little controversy surrounds their use. The principles of statutory interpretation in respect of them are quite settled. It is in the area of the use of legislative history, however, that changes have been proposed and have even been adopted in some American jurisdictions.

INTRODUCTION

Mr. Justice Frankfurter's 3-way rule to the interpretation of statutes was simply, "read the statute, read the statute, read the statute"[1]. This rule has proved to be inadequate in determining the meaning to be assigned to specific statutory provisions.

Three principles have historically governed statutory interpretation in common law jurisdictions. The Mischief Rule looks to the problem that the statute was designed to address and advances a meaning that will achieve a remedy to that problem.[2] The Literal Rule holds that effect must be given to the plain words of the statute[3] and the words must be viewed in the context of the whole statute including the preamble.[4] Finally, the Golden Rule allows the court to depart from the literal meaning of the words if that meaning would create a result so absurd or inconsistent that the court holds that that meaning could not

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[1] Quoted by J.M. Kernochan, "Statutory Interpretation: An Outline of Method", (1976) Dal. L.J. 333, 338.

[2] Heydon's Case (1584) 3 Co. Rep. 7a, 76 E.R. 637 (Exch.).

[3] Vacher and Sons Ltd. v. London Society of Compositors [1913] A.C. 107 (H.L.), 121 per Lord Atkinson:

"If the language of the statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results."

[4] Sussex Peerage (1844) 11 Cl. + F. 85, 8 E.R. 1034 (H.L.)

have been the intention of Parliament.[5] Professor Driedger explains modern statutory interpretation techniques as a synthesis of these three rules.[6] The Modern Principle, he says, is

> The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[7]

The statement of the principle is simple enough. How to carry it through in practice is another matter. Words have no fixed "plain" meaning.[8] The "object" of an Act is not always easily decipherable from its provisions, especially its "object" as it relates to the factual circumstances of the case before the court, and the "intention" of Parliament has been said by some writers to be a figment of the imagination.[9]

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[5] Grey v. Pearson (1857) 6 H.L.C. 61 at p. 106.

[6] E.A. Driedger, Construction of Statutes, 2nd ed. (Butterworths, Toronto: 1983) at p. 87.

[7] Ibid.

[8] Reed Dickerson, The Interpretation and Application of Statutes (Toronto: Little, Brown and Company, 1975).

[9] Ibid.

For these reasons, courts have sought assistance in interpreting statutes from sources outside the specific provision being interpreted. Some of these sources are within the statute itself; others are much more remote. The aids within the statute are sometimes called "intrinsic" aids. The aids that are more remote from the statute are called "extrinsic" aids. The distinction is by no means absolute and many writers use the general designation "extrinsic" to describe both groups.

> I should say that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they are part of it, written in ink discernible to the critical eye.[10]

This statement by Frankfurter, apparently so simple on its face, in fact poses one of the problems of extrinsic aids. What are they? What does Frankfurter mean by "extraneous documentation" and "external circumstances"? Is he right that, were they "written in ink discernible to the critical eye" they would not be considered extrinsic aids and would therefore have a greater influence on the interpretation of the text?

The leading authorities on the interpretation of statutes do not provide a definition of what constitutes an "intrinsic aid" or an "extrinsic aid". Driedger, for example, divides his sources of interpretation into the "Internal Context", where he

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[10] J. Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 Columbia L.R. 527, p. 529.

lists such sources that appear in the printed version of a statute as preambles and marginal notes, and the "External Context" where he considers such sources as commission reports, dictionaries, statutes in pari materia and legislative history.[11] The same type of division is also seen in Cross and in Pearce.[12] Charles describes extrinsic aids as "those materials that are considered to be external to the words of the legislative enactment"[13] and herein lies the key to the problem of establishing what falls into that category for, over the years, some sources that were regarded as external to the words of the legislative enactment have come to be regarded as part of the enactment. As we will see, this is clearly true of the preamble of a statute which, by the federal Interpretation Act is statutorily declared to be part of the statute. The statement is not so clear in respect of such aids as marginal notes which, by the federal Interpretation Act, are declared not to be part of the statute. In the case of headings and punctuation, however, the Interpretation Act makes no such reference and the question as to whether they form part of a statute must be answered from the common law. In addition, it is to be noted that the

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[11] E.A. Driedger, Construction of Statutes, 2nd. ed. (Butterworths, Toronto: 1983)

[12] Sir Rupert Cross, Statutory Interpretation, 2nd. ed. by Bell and Engle (Butterworths, London: 1987); D.C. Pearce, Statutory Interpretation in Australia (Butterworths, Melbourne-Sydney-Brisbane: 1974).

[13] W.H. Charles "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context", (1983) 7 Dalhousie L.J. 7.

provisions of the provincial interpretation acts do not necessarily coincide precisely with the federal one. Thus we find in Ontario, for example, that headings are not part of the statute.

The intermixing of these statutory provisions with the development of case law on the use of the various aids to interpretation has further muddied the picture. We shall see that in Canada and in Ontario, headings are used to interpret statutory provisions and there appears to be no differentiation drawn, in respect of headings, between cases under federal law and cases under provincial law. Interpretation act provisions, therefore, sometimes mean little in the practical context of interpretation.

In addition, the interpretation act provisions declaring marginal notes and headings to be external to the statute run contrary to Frankfurter's explanation that extrinsic aids are not "written in ink discernible to the critical eye" for marginal notes and headings are all present in the printed version of a bill and are therefore clear and discernible.

The thesis will discuss a number of aids frequently used by the courts in the interpretive process. The common element shared by these aids is that they assist judges in the interpretive process. Some are found within the four corners of the statute "written in ink discernible to the critical eye", for example

headings and preambles. Others such as judicial notice and interpretation acts are not. It is contended that the categorization of an aid as intrinsic or extrinsic is irrelevant. The thesis deals with all aids that assist a judge in ascertaining the meaning of a statutory provision and contends that the sole criterion for the admission of these aids is whether they are relevant to the enactment being interpreted. Once admitted, the weight to be assigned to the different aids is determined on the basis of such factors as reliability, authoritativeness and proximity to the legislative process.

The thesis argues that, by applying these criteria to the rule against admitting legislative history in non-constitutional cases and the rule that allows the admission of legislative history only for the limited purpose of demonstrating mischief or background, it can readily be seen that these rules cannot be sustained.

The thesis is divided into four parts. In Part 1 are grouped those aids that are closest to the enacting provision of the statute under interpretation in that they appear in the printed version of the statute. In accordance with Driedger's Modern Principle, they form part of the entire context of the Act for consideration in interpretation. Under the grouping "Knowledge and Experience of the Judge", Part 11, I have included those aids that, though not appearing in the printed statute, are assumed to be part of the knowledge, training and

experience of the judge. Moving further away from the enacting provision, interpretation acts are dealt with under "Related Statutes and Treaties" in Part 111, as are pari materia statutes and treaties. The large topic of commission reports and legislative history, which constitutes almost half of the thesis, has been given a part by itself because it is in this area that the law is still evolving. As is to be expected in a period of evolution, great controversy surrounds the question of whether some of these aids should be admissible at all and, if admissible, whether they should be admitted for all purposes of interpretation or only for certain limited purposes.

Throughout the thesis, primary focus is placed on Canadian federal and common law jurisdictions. The evolution of the principles applied to extrinsic aids in Canada is discussed and there is some discussion of similar developments in England and Australia. Many American authors are cited, as the Americans have been prolific in writing on statutory interpretation in general and, in particular, on the use of extrinsic aids. Little consideration has been given to American cases, however, because of the lack of a consistent approach to the use of extrinsic aids in American state and federal courts. The thesis also touches on, but does not discuss in detail, a number of ancillary topics such as the intention of parliament, decided cases and judicial lawmaking. Though mention is made of the interpretation of delegated legislation, the emphasis of the thesis is on the interpretation of primary legislation.

Finally, it is to be noted that the courts frequently use certain sources without justifying their use. They do not mention that they regard the source as an extrinsic aid, they do not set out the common law principles of interpretation or the appropriate interpretation act provisions that explain their reasons for considering the source and they do not indicate the degree of weight that they assign to the particular source. Caution must therefore be exercised in evaluating the use of the different sources as it is not always clear what part the source played in the final decision.

PART I - ELEMENTS OF THE PRINTED STATUTE

This Part examines some of the sources of interpretative assistance that appear in the statute as printed and passed. Although these have been classified by some writers as "intrinsic" aids to the interpretation of provisions of a statute it is clear that this characterization has made little difference to how the courts have actually used these interpretative aids. On the contrary, it may be seen that the courts have admitted these aids because, as parts of the statute under interpretation, they are regarded as being relevant to the interpretive process. It is in the area of the weight that is accorded to them that distinctions may be seen.

As we shall see, the courts have over the years developed their own rules for attributing weight to these aids and these rules pay little attention either to the characterization of the aid or to specific interpretation act provisions.

PREAMBLES[14]

The preamble of a statute appears in the printed version of the statute as the first paragraph and "sets the scene" for what is to follow. Its purpose is to state the reasons and intended effects of the statute. In this regard it is similar to the long

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[14] for interpretation act provisions, see infra, Part III.

title of the statute which sets out the purpose in general terms. However, the long title is included to satisfy the requirements of parliamentary procedure which provides that amendments may be moved only if they fall within the scope of the long title.[15]

At common law, the preamble to an act was routinely looked to for assistance in interpreting the intention of Parliament and therefore the ambit of the provisions of the Act. As far back as 1769, in the case of Millar v. Taylor, the English Court of King's Bench studied the preamble of the copyright statute of Queen Anne in order to assist it in determining whether an author retained a proprietary right in his work after its publication.[16] The preamble was therefore admissible in interpretation. The principles governing the weight to be assigned to it were set out in the case of A.G. v. Ernest Augustus (Prince of Hanover) in which a 1705 Act to naturalize Sophia of Hanover and certain of her descendants had to be construed.[17] The enacting provision stated clearly that any person who could prove lineal descent from the Princess Sophia was deemed to be a British subject. On the other hand, the preamble could be interpreted to require that the descendant had to be born in the Princess' life time. The

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[15] Beauchesne's Rules and Forms of the House of Commons of Canada (5th ed.) by Fraser, Birch and Dawson (The Carswell Company Limited, Toronto: 1978) p. 218-219. F. Bennion, Statutory Interpretation (Butterworths, London: 1984) p. 575 - 579.

[16] 4 Burr. 2303, 2332; 98 E.R. 201, 217.

[17] [1957] A.C. 436.

Law Lords agreed that a preamble could not be used to limit the ambit of an enactment if the enactment is clear and unambiguous.[18] The preamble is part of the Act, they said, and must be studied as part of the overall context of the Act but it does not carry the same weight as the enacted provisions of the Act. If, in the study of the overall context of the Act, an ambiguity is seen to exist, the construction that best reconciles the enacted provisions with the preamble is then to be preferred. However, the preamble cannot be used to cut down the clear and unambiguous words of the enacting provisions of the statute. This is particularly so where the preamble itself could be interpreted to contain an ambiguity. Lord Normand pointed out other factors that limit the usefulness of the preamble in the interpretation of specific enacted provisions. He said

> There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indication that may be gathered from the preamble. Again, the preamble cannot be of much or any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail.... If they [the enacting words] admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.[19]

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[18] ibid., per Lord Normand, at p. 467. Query whether a statement can ever be clear and unambiguous. Perhaps the Lords should have said that the provision was uncertain in scope.

[19] ibid.

In this case, the clear words of the enacted provisions made all descendants of the Princess Sophia entitled to naturalization even though the Princess was dead. The preamble could not cut down on these clear words to require the descendants to be born in Princess Sophia's lifetime. The effect of the decision was to make virtually all the crowned heads of Europe British subjects.

The Lords' decision supports the view that the preamble of a statute is less important than the enacting provisions of the statute and takes a secondary place to the enacting provisions. The weight assigned to the preamble is less than the weight assigned to the enacting provision and that weight may even be reduced to zero if the enacting provision is clear and unambiguous. This proposition is really nothing more than a restatement of a general proposition of statutory interpretation i.e. that the specific overrides the general. A preamble by its very nature must be a very general statement of what is to be provided in the enacting provisions of the statute. As such, it will always be of lesser importance in interpretation that those very specific enacting provisions that deal with that very topic. General principles of statutory interpretation require that a statute be read as a whole and provisions interpreted in light of

other provisions. A specific provision is generally interpreted to override a general provision[20] but a specific provision may be interpreted in light of a more general provision. This same principle is simply applied in the case of preambles in order that a specific provision may be interpreted in the spirit of the declared general purpose of the statute and that an ambiguous provision may be interpreted in the way that best carries out the purposes of the statute.

In Canada, preambles have been used to set out the circumstances giving rise to an enactment in order to set the scene for justifying the enactment under a particular head of power enumerated in section 91 or 92 of the Constitution Act, 1867. In Reference re Validity of the Wartime Leasehold Regulations,[21] for example, the Court held that the statement in the preambles of both the National Emergency Transitional Powers Act, 1945 and the Continuation of Transitional Measures Act, 1947 that an emergency existed as a result of the war was sufficient to ground Parliamentary authority to make the enactments under the general power to legislate for the peace, order and good government of the country. Similarly, in Reference re Anti-Inflation Act[22] the majority of the judges of the Supreme

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[20] Jackett, C.J., in an obiter statement in The Queen v. Alberta and Southern Gas Co. Ltd. [1978] 1 F.C. 454, makes it clear that this principle cannot be taken too far and must depend on the particular provisions being interpreted.

[21] [1950] S.C.R. 124, [1950] 2 D.L.R. 1.

[22] 68 D.L.R. (3d) 452, 9 N.R. 541, [1976] 2 S.C.R. 373.

Court of Canada considered the preamble of the Act in determining that a national emergency existed, justifying legislation by Parliament under the peace, order and good government power. Though the preamble did not declare a national emergency in so many words, Laskin said:

> The preamble in the present case is sufficiently indicative that Parliament was introducing a far-reaching programme prompted by what in its view was a serious national condition. The validity of the Anti-Inflation Act does not, however, stand or fall on that preamble, but the preamble does provide a base for assessing the gravity of the circumstances which called forth the legislation.[23]

Thus a preamble could not form the sole basis for deciding which head of power might justify the legislation. Similarly, it is not in itself an enacting provision. It is simply an aid to interpreting enacting provisions that, along with other indicators of parliamentary intent both within and outside the statute, adds support to one particular interpretation of the legislative provisions. In constitutional cases, however, it is clearly of considerable weight in determining the constitutional classification.

This particular area of the law would appear to be less important as fewer Acts are drafted with preambles, though it remains important in Quebec where private acts are required by law to contain a preamble that explains why the act should be

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[23] ibid., per Laskin, C.J. at p. 422.

adopted.[24] The new trend in drafting federal statutes is to have a purpose section which is similar to a preamble in that it sets out the thrust of the legislation. Unlike a preamble, however, it appears as a numbered section of the Act and looks like any other enacted provision. The purpose section suffers from the same problems as the preamble. It is usually too general to be of much use in interpreting provisions of the statute. It may be of some use in interpreting ambiguous provisions but even this is doubtful as, even where a statute is badly drafted, its general purpose is clear from a simple reading of its provisions. D. Pearce has summed the situation up well when he stated "... you've got a 200 page Act and you are supposed to say in five lines what its purpose is and hope that it has some magical effect on interpretation."[25]

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[24] A.-F. Bisson, "Préambules et déclarations de motifs ou d'objets" (1980), 40 R. du B. 58. There is a similar requirement in Ontario but it is satisfied by pro forma wording that is not useful in interpretation.

[25] Quoted in Memorandum by the Government of Australia: Meeting of Commonwealth Law Ministers, 1983.

Since the purpose section in federal legislation in Canada is numbered along with the other enacting provisions, it is not truly "extrinsic" to the statute.[26] The fact that the general principles of statutory interpretation apply to these purpose sections and they are essentially no different from preambles supports the view that preambles are no more special aids in interpretation, whether intrinsic or extrinsic, than are other provisions of the statute, whether enacting, explanatory or derogatory. They may, however, be important aids in the interpretation of specific statutory provisions and, as such, are always admissible in the interpretation process. Generally, however, the weight assigned to them by the judges is limited. Indeed, he could decide to assign no weight at all in cases where the preamble or purpose clause is too vague to offer any guidance in interpreting the enacting provision.

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[26] See e.g. section 3 of the Immigration Act, R.S.C. 1985, c. I-2, which contains ten paragraphs of "objectives" of the Act thus providing a framework within which the Act and Regulations are to be interpreted. The Immigration Act, however, is unusual in this extensive explanation of object.

HEADINGS[27]

The rule governing the use of headings in the interpretation of statutes was set out by Kellock J. in the Supreme Court of Canada in Attorney General of Canada v. Jackson.[28] Relying for authority on two English cases, he stated that the title and headings of a statute could not be used as an aid in construction if the words of the provision sought to be construed were clear and unambiguous. In cases of ambiguity, however, the title and headings could be used "to restrain or extend its meaning as best suits the intention of the statute". He went on, however, to find that the words of the provision that he was required to construe were not ambiguous and the headings therefore could not be considered.[29] Stated in other terms, then, headings are admissible if relevant. They are irrelevant if the meaning of the enacting provision is clear. A heading is really little more than a handy catch-word to assist the reader in understanding the organisation and lay-out of a statute, and cannot, by its nature, render the statutory message with the same precision and attention to detail that is found in the enacting provisions of the statute.

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[27] for interpretation act provisions, see infra, Part III.

[28] [1946] S.C.R. 489.

[29] ibid., at p. 495.

The findings of the House of Lords in Director of Public Prosecutions v. Schildkamp, some 25 years after the Jackson case, demonstrate that apparent clarity of a provision is not sufficient to decide the matter.[30] An ambiguity need not be obvious on a reading of the particular provision to be interpreted. It may instead come to light as a result of a review of the order and relationship of the other provisions of the statute. Thus, in Schildkamp, where subsection 332(3) of the Companies Act, 1948 contained no ambiguity on its face and appeared to provide for a general offence in respect of carrying on a business with intent to defraud creditors, the Court held that the provision applied only in respect of a winding-up. In coming to this conclusion, the majority of the court relied on the context of the surrounding sections and the three headings "Winding Up", "Provisions applicable to every Mode of Winding Up" and "Offences antecedent to or in the course of Winding Up." In the words of Lord Upjohn

> When the court construing the statute is reading it through to understand it, it must read the cross-headings as well as the body of the statute and that will always be a useful pointer as to the intention of Parliament in enacting the immediately following sections. Whether the cross-heading is no more than a pointer or label or is helpful in assisting to construe, or even in some cases to control, the meaning or ambit of those sections must necessarily depend on the circumstances of each case, and I do not think it is possible to lay down any rules.[31]

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[30] [1971] A.C. 1.

[31] ibid., at p. 28.

The heading, therefore, has to be admitted and considered along with the provisions of the statute to determine whether any weight should be attached to it. In this case, considerable weight was attached to it, enabling what appeared at first sight to be a general offence to be cut down to an offence in respect of winding up.

In Johnson v. the Queen, the issue before the Supreme Court of Canada was whether the appellant was guilty of performing an "immoral performance" by dancing in the nude.[32] The appellant was charged under subsection 163(2) of the Criminal Code, a provision that appeared under the heading "Offences Tending to Corrupt Morals." In contrast, being nude in public was an offence under section 170 of the Code, a provision that appeared under the heading "Disorderly Conduct." The majority of the Court discussed the significance of the headings, concluding that a nude performance did not become immoral solely because Parliament had made it an offence to be nude in a public place. In the words of Ritchie J.

> In seeking to determine the intention of Parliament in enacting s. 170, I share the view of my brother Spence that some significance is to be attached to the fact that this section appears in the Code under the general heading of "Disorderly Conduct".[33]

How much significance is some significance? Where is the

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[32] (1973) 23 C.R.N.S. 273.

[33] ibid., at p. 277.

line to be drawn? This question was extensively discussed by the Supreme Court of Canada in Skapinker v. Law Society of Upper Canada.[34] Mr. Skapinker was a South African citizen resident in Canada who wished to practise law in the province of Ontario. He met all the requirements for membership in the Ontario Bar except the requirement to be a Canadian citizen. He challenged the provision claiming that it conflicted with subsection 6(2) of the Canadian Charter of Rights and Freedoms which provides that "a permanent resident has the right to pursue the gaining of a livelihood in any province." Section 6 of the Charter falls under the heading "Mobility Rights".

The Court cited the Schildkamp case with approval, adding the caution that, in England, headings are not a product of the parliamentary process. They are frequently added or changed after passage of the act by Parliament and before the legislation is printed in official form. No such problem exists, the Court said, in the case of the Charter which contained the heading preceding section 6 when the resolution was adopted by the Canadian Parliament and also when the Constitution Act was passed by the United Kingdom Parliament.[35] In addition, the Court said

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[34] (1984) 11 C.C.C.(3d) 481, [1984] 9 D.L.R.(4th) 161, [1984] 1 S.C.R. 357, (1984) 53 N.R. 169.

[35] This statement may have to be confined to Charter interpretations as there is some controversy in Canada as to whether headings are amendable or not. In addition, in relation to the power of the Clerk to make changes, see infra, pages 28 to 30.

that the headings of the Charter had been systematically and deliberately included as an integral part of the Charter and consequently must have some significance.[36]

The headings could not change the meaning of a provision which, when read as a whole, was clear and unambiguous. The Court stated, however, that the heading could be used to eliminate one of the possible alternative meanings of the provision. Using this device, the Court went on to reject the appellant's argument that subsection 6(2) established two separate rights, on the grounds that paragraph 6(2)(b) standing alone had no mobility aspect to it. By reading the section as providing one right i.e. to move to a province and then pursue the gaining of a livelihood in that province or a neighbouring province, the Court reconciled paragraph 6(2)(b) with the heading and rejected the proposition that paragraph 6(2)(b) created a right to work. At the same time, the Court rejected the need for residency in the province of work, thus giving meaning to the words "in any province" in paragraph 6(2)(b), which probably would have been drafted as "in that province" had it been intended that residency in a province be a prerequisite of the right to work in the province.

In reading the Skapinker case, it is difficult to assess how far the judgment is influenced by a pre-conceived notion of the

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[36] ibid., at p. 193.

judges that the Charter was not intended to create a right to work. The debate surrounding the adoption of the Charter was so well publicized, the judges could not have failed to have learned many of the concepts that were supposed to be rendered in the Charter. Thus, in interpreting Charter provisions, they would unconsciously apply that knowledge to the provision to achieve the result they knew to be intended. It is seldom that a judge will acknowledge such influences on his interpretation of statutory provisions. Usually, if there is some acknowledgement, it comes in a form that suggests judicial notice. Hence the statement that the Charter headings were systematically and deliberately put into it could be categorized either as the taking of judicial notice of a well-known fact or as part of the general knowledge of the judge.

It is significant to note the importance accorded by the Supreme Court of Canada to its perception that headings in federal statutes are part of the legislation as passed and do not undergo changes after passage as they may do in England. The Court therefore recognized that headings in federal legislation in Canada, being within the four corners of the statute, should be read and interpreted along with all the other provisions of the statute, following the general principles of statutory interpretation. Similarly, in Skoke-Graham et al. v. The Queen[37], the Supreme Court of Canada used the heading "Disorderly

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[37] (1985), 16 D.L.R. (4th) 321, [1985] 1 S.C.R. 106.

Conduct" in the Criminal Code to narrow the meaning of "disturb" in the enacting provision to conduct that is itself disorderly or that would be likely to create disorder and to reject the broader meaning that any conduct that could be disturbing to an observer would constitute an offence.

In jurisdictions where the interpretation act is silent about headings or specifically recognises them as part of the statute, they may be regarded as intrinsic aids in interpretation. In those jurisdictions where the interpretation act provides that the heading is not part of the statute, they may be regarded as extrinsic aids. Regardless of the categorization as intrinsic or extrinsic, headings clearly form an integral part of the printed message of the statute and, following Driedger's Modern Principle, must be interpreted along with all other provisions of the statute. The weight to be accorded to them, however, will vary according to how they fit in with other elements of the statute. The cases show that there is no need to demonstrate ambiguity in an enacting provision before making reference to a heading but a heading in and of itself cannot form the sole basis of a decision. Whilst some weight is accorded to it, support for the particular meaning to be given to a particular provision must be garnered from other provisions of the statute.

MARGINAL NOTES[38]

The common law position on marginal notes is that they should not be used in interpreting provisions of a statute.[39] The reason for this is clear. A marginal note, by its very nature, can capture only the essence of a provision. If the provision is short and lacking in complexity, the marginal note may be accurate. Where a provision is long or complex, however, the marginal note gives only the vaguest guidance.

In addition, consideration must be given to the question of whether the marginal note was in place at the time that the statute passed the legislature. The common law position probably arose precisely because the marginal notes were not in place at the time that a bill was presented to the English House of Commons and were included after enactment. In Chandler v. Director of Public Prosecutions, therefore, Lord Reid rejected the defendants' plea that they could not be convicted under a particular section of the Official Secrets Act 1911 because the marginal note to the section read "Penalties for spying" and it was conceded that the defendants had not been spying. Lord Reid stated that the marginal notes were catchwords and that changes to marginal notes were not voted as amendments in the House but

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[38] for Interpretation Act provisions, see infra, Part III.

[39] E.A. Driedger, Construction of Statutes, 2nd. ed. (Butterworths, Toronto: 1983), at page 133; Regina v. Popovic and Askov (1975), 32 C.R.N.S. 54.

were made by the appropriate officer of the House.[40] He therefore rejected the use of the marginal note as an aid in construction.

His conclusion in that case, however, contrasts markedly with a statement he made only eight years after the Chandler case. In Director of Public Prosecutions v. Schildkamp, he stated that the marginal notes formed part of the printed text of the statute and, as such, should be interpreted along with all other elements of the statute.[41] He went on to say

> ... in very many cases the provision before the court was never even mentioned in debate in either House, and it may be that its wording was never closely scrutinized by any member of either House. In such a case it is not very meaningful to say that the words of the Act represent the intention of Parliament but that punctuation, cross-headings and side-notes do not.[42]

He then concluded that the marginal notes might be used as an aid in interpretation but that they could not be assigned equal weight with the words of the statute.

In Canada, marginal notes are generally in place in the bill presented to the House of Commons for passage. However, the Standing Orders of the House of Commons make provision for the

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[40] [1964] A.C. 763, [1962] 3 All E.R. 142.

[41] [1971] A.C. 1 (H.L.)

[42] at page 10.

Law Clerk to put in marginal notes.[43] Beauchesne's Rules and Forms of The House of Commons of Canada says that the Law Clerk and Parliamentary Counsel are responsible for marginal notes - and even for headings.[44] Debate in the Senate suggests that all changes, large and small, should be the subject of scrutiny by at least a Committee and should not be within the power of the Clerk alone to make.[45] This position was formulated, not in respect of marginal notes specifically, but rather in response to a problem that had arisen in the passage of the Western Arctic (Inuvialuit) Claims Settlement Act. The Commons passed the bill but, when it was considered in the Senate, it was found that there was a

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[43] 1986, S.O. 126 provides

> "126. It is the duty of the Joint Law Clerks of the House to assist Members of the House and deputy heads in drafting legislation; to prepare bills for the Senate after they have been passed by the House; to supervise the printing and arrangement and extending of the Statutes year by year as they are issued at the close of each Parliamentary session; to revise, print and put marginal notes upon all bills; to revise before the third reading all amendments made by select committees, or in Committees of the Whole; and to report to the several Chairmen of the various select committees, when requested so to do, any provisions in private bills which are at variance with general Acts on the subjects to which such bills relate or with the usual provisions of private Acts on similar subjects, and any provisions deserving of special attention."
>
> The Order is particularly interesting as it places the duty on the "Joint Law Clerks" but there are no such persons, the Commons and the Senate each having their own law clerks who are independent of each other.

[44] 5th Edition by Fraser, Birch and Dawson (The Carswell Company Limited, Toronto: 1978).

[45] Debates of the Senate Vol. 131 No. 148, May 19, 1988.

mistake as to a particular date. The mistake was described as "a technical error, a typing error".[46] There was some debate among the senators as to whether correction of the error required an amendment by the Senate or whether the Clerk of the Senate could make the correction as an editorial exercise and simply inform the Commons that a correction had been made. Advice was sought from parliamentary counsel who informed the senators that "There is no provision of law nor is there any provision in the Rules of the Senate or in the Standing Orders of the House of Commons that clearly allows for corrections of errors, no matter how small."[47] He went on to say, however, that there is an established practice of making editorial corrections. These are made by the Law Clerks of both Houses acting together and are then initialled by the clerks of both Houses. Thus, where a marginal note is accidentally omitted or bears no resemblance to the substantive content of the provision, the "technical error" may be corrected without the whole House being informed of the change.

Such changes are, however, infrequent and are never made after royal assent. It may be assumed that, since marginal notes are statutorily declared to be outside of the statute, they are probably more susceptible to "editorial corrections" than enacting provisions of the statute and reliance will be placed on

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[46] Debates of the Senate Vol. 131 No. 147, May 18, 1988 at page 3436.

[47] supra, footnote 46 at page 3448.

section 14 of the federal Interpretation Act to justify such corrections.

Despite the common law position and the Interpretation Act, however, marginal notes are still sometimes pleaded before the courts and are even referred to by judges who claim they are using them "only to confirm" a decision already arrived at independently of the marginal note. Thus in Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Company et al., the Saskatchewan Court of Queen's Bench cited the marginal note of a provision in the Business Corporations Act to confirm its view that the provision was limited to derivative actions brought generally by shareholders and would not apply to enable an individual to represent the corporate party before the courts.[48]

Even the Supreme Court of Canada justifies its use of marginal notes in the same way. In R. v. Wigglesworth, the Court was required to decide whether conviction of the appellant of a "major service offence" under the Royal Canadian Mounted Police Act precluded subsequent proceedings against him under the Criminal Code for the same misconduct.[49] Paragraph 11(h) of the Charter of Rights provides inter alia

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[48] (1986), 47 Sask. R. 308.

[49] (1988), 81 N.R. 161.

> 11. Any person charged with an offence has the right
> .....
>
> (h) ..... if finally found guilty and punished for the offence, not to be tried or punished for it again; ....

The question was therefore whether the "major service offence" constituted an "offence" for the purposes of section 11. Madam Justice Wilson held that "offence" was restricted to criminal or quasi-criminal proceedings and proceedings giving rise to penal consequences. It therefore encompassed the "major service offence". In reaching this conclusion, she referred to the marginal note to section 11, "Proceedings in criminal and penal matters" and noted that, although the traditional view has been that marginal notes may not be used as an aid to interpretation, they have been used in some English cases. She pointed out that the Supreme Court of Canada admitted statutory headings as an aid to interpretation and went on to say:

> It must be acknowledged, however, that marginal notes, unlike statutory headings, are not an integral part of the Charter .... The case for their utilization as aids to statutory interpretation is accordingly weaker. I believe, however, that the distinction can be adequately recognized by the degree of weight attached to them.[50]

Wilson's comparison between headings and marginal notes and her view that the question is one of weight and not of admissibility is certainly persuasive and is reflected in the

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[50] at page 180.

decisions of other courts. For example, in Warren v. Chapman[51], the Manitoba Court of Appeal cited Professor Côté[52] as authority for the proposition that marginal notes could not form the basis of a judgment but could be used to confirm an interpretation arrived at by means of other sources. The Court had used the euisdem generis rule to conclude that subsection 2(1) of the Manitoba Human Rights Act which prohibited discrimination in any "notice, sign, emblem or other representation" did not apply to newspaper articles or editorials. It cited the marginal note "Discrimination prohibited in notices, signs etc." as supporting its conclusion. Clearly, the marginal note offered little guidance. However, it must have satisfied the Court to have found that its interpretation of the statutory provision was not contradicted by the marginal note.

The Australian writer, D. Pearce, has said

> ... a side-note is a poor guide to the scope of a section. Nevertheless, a poor guide may be better than no guide and there seems no reason why the court should reject entirely assistance that may, albeit very rarely, be of use to it.[53]

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[51] (1985) 31 Man. R. (2d) 231.

[52] P.-A. Côté, The Interpretation of Legislation in Canada (Les éditions Yvon Blais Inc., Cowansville (Qué): 1984), at pages 46-47.

[53] D.C. Pearce, Interpretation of Statutes in Australia (Butterworths, Melbourne - Sydney - Brisbane: 1974), at page 43.

The section of this thesis on headings has shown that the courts are applying the normal rules of evidence to headings. They are admitting headings in evidence because they are relevant to the interpretation of statutory provisions. They are assigning appropriate weight to headings according to their analysis of the statute as a whole. Marginal notes are very similar to headings. Headings use one or two words to describe the main feature or common element of a part or group of sections, whereas a marginal note, in one or two words, demonstrates the thrust of a provision. The same rules as to admissibility and weight should therefore be applied and the former distinctions made between the two interpretative aids should be set aside.

PUNCTUATION

In Canada, it is well-established that punctuation is part of the statute and may be looked at as an aid in interpretation.

The old English rule in respect of punctuation was that it could not be used as an aid in interpretation because old English bills were passed without any punctuation at all and the punctuation was added later to the printed version.[54] Although

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[54] P.-A. Côté, The Interpretation of Legislation in Canada (Les éditions Yvon Blais Inc., Cowansville (Qué.): 1984), at page 47. This rule has been subject to challenge in England. See, for example R.E. Megarry "Copulatives and Punctuation in Statutes" (1959), 75 L.Q.R. 29.

today in Canada punctuation appears in the version of the bill placed before the House, it is well to be aware that changes may occur to the punctuation under the authority of the law clerks without the change being presented to the House.[55] It is to be assumed that such changes would be made only to correct obvious errors or in cases where the meaning of the provision would not be changed by the insertion or deletion of punctuation.

Drafting manuals caution the drafter not to rely on punctuation as an aid in interpretation. For example, Thornton writes

> It is very wrong to imagine that punctuation is a panacea for all the ills of the way-ward sentence. Moreover, a sentence which is intelligible or unambiguous only with the benefit of punctuation is probably a badly constructed sentence requiring surgery rather than stitchery.[56]

Given the very close and meticulous attention paid by legislative drafters to all aspects of the draft, including punctuation, it would seem reasonable to conclude that the punctuation is intrinsic to the statute, forms an integral part of the message to be conveyed and, as such, should be construed along with the words. The aim of the drafter, however, should be

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[55] see infra, at pages 28 to 30.

[56] G.C. Thornton, Legislative Drafting, 2nd. ed. (Butterworths, London: 1979) at p. 34; and see E.A. Driedger, Composition of Legislation 2nd. ed. (Department of Justice, Ottawa: 1976), at p. 83).

to produce a draft that does not change in meaning by the insertion or deletion of punctuation.

Harvey states that there is a common law rule "of rather uncertain force and weight" to the effect that any amendable part of a statute is available as an aid in interpretation.[57] He goes on to say, however, that he knows of only one example of an amendment being made solely to the punctuation of a section.[58]

In Cardinal v. The Queen[59] the Supreme Court of Canada was required to interpret subsection 49(1) of the Indian Act which provided for the surrender of an Indian reserve if the surrender was

> ... assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose.

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[57] C. Harvey, "The Significance of Punctuation in Statutory Interpretation", (1971) 4 Man. L.J. 354 at 356.

[58] The results of Harvey's questionnaire, appended to his article, indicate that ten legislative counsel and legislative clerks in Canada recollect having seen amendments being made solely to change punctuation whilst seven legislative counsel and legislative clerks have no such recollection.

The example mentioned by Harvey is cited by P.A. Côté in The Interpretation of Legislation in Canada (Les éditions Yvon Blais Inc., Cowansville, Qué: 1984) at page 47, footnote 91 where he states that the Quebec legislature enacted a provision whose sole purpose was to remove a comma from section 22 of the Special Corporate Powers Act, S.Q. 1964, c. 61, s. 2.

[59] [1980] 1 F.C. 149, (1980), 109 D.L.R. (3d) 366, affmd. [1982] 1 S.C.R. 508.

The issue was the significance to be attached to the comma that appears after the word "years". The Federal Court of Appeal had decided that the provision required that a majority of the male members entitled to vote at a meeting be present at the meeting, effectively ignoring the comma and attributing the last phrase to "band", the nearest antecedent.[60] Heald J. in dissent, on the other hand, had attached great importance to the comma as an integral part of the provision and one that required to be considered along with all the other elements of the provision. Thus, he concluded, the last phrase of the provision should be attributed to members (being adult, male band members). The provision therefore required the members of the band entitled to vote to give their assent in a meeting or council summoned for that purpose.[61]

When the case came before the Supreme Court of Canada, Mr. Justice Estey acknowledged that the issue revolved around the significance to be attached to the comma but concluded that the meaning of the section was clear and unambiguous. Drawing support from other provisions of the statute, he did not regard the comma as being of much significance in interpreting the provision, concluding that, if it had any significance, it was only to require that a quorum be in attendance and that a

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[60] 109 D.L.R. (3d) 366, at page 377

[61] at page 370

majority of that quorum vote in favour of surrender.[62] He rejected outright the contention of Heald J. that to read the section in this manner was to substitute the word "present" for the comma.[63]

The Cardinal case clearly illustrates the Canadian position in respect of punctuation. It may be looked at and taken into consideration in interpretation, but it cannot form the basis of a judgment.[64] It is therefore admissible but does not have a great deal of weight attached to it. It can be used to resolve an ambiguity but only in conjunction with other interpretative techniques.

The case of Re Associated Commercial Protectors Ltd. and Mason,[65] is perhaps more instructive as to the use to be made of punctuation. In that case, the Manitoba Queen's Bench considered the importance of a comma in a section of the Manitoba Consumer Protection Act which read

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[62] [1982] 1 S.C.R. 508, at page 516

[63] at page 518

[64] ibid., [1980] 1 F.C. 149, per Mr. Justice Mahoney, at page 155.

[65] (1970) 13 D.L.R. (3d) 643 (Man. Q.B.)

> 78.(1) The director may refuse to grant a licence as a vendor, direct seller, or collection agent
>
> > (a) to any person who has been convicted of any offence against the Criminal Code (Canada) or against this Act, or of any other offence committed in Canada, that, in the opinion of the director, involves a dishonest act or intent on the part of the offender; ...

In holding that the phrase "involves a dishonest act or intent" modified each one of the offences and not just the last one, the Court noted that the comma after the word "Canada" would not have been necessary had that not been the intent. The comma therefore was a factor in favouring one possible interpretation over another. The Court supported its view by noting that many offences under the Criminal Code do not reflect on the moral turpitude of the perpetrator.

Although not characterized by the Court as such, its decision rests more on its perception of what the Consumer Protection Act was intended to do, (the purpose or objective of the statute) than on whether the comma had any value as an interpretative aid. It could equally well have come to the same conclusion even if the comma had not been there. The real basis of the decision rests on the Court's unspoken conclusion that the Act was intended to protect the general public against persons who had already demonstrated an intent to deceive others. Once characterized in that way, it was easy for the Court to hold that some Criminal Code offences do not involve deception and

dishonesty and that therefore the concluding words of the paragraph could apply to the first half of the paragraph. In so doing, the Court demonstrated its own qualitative evaluation of offences and its concept of fair play. It would not deprive a person of a commercial license for a reason unrelated (in the court's evaluation) to the purpose of the Act.

In assigning weight to punctuation, therefore, the grammatical role of the punctuation in the statute and the court's assessment of the purpose of the statute are not the only factors taken into consideration. The courts also make qualitative judgments based, we may assume, on their own knowledge and experience, in particular on their knowledge of what is or is not acceptable to the community at large. This aspect of decisions is discussed further in Part II.

CONCLUSION - ELEMENTS OF THE PRINTED STATUTE

Preambles, headings, marginal notes and punctuation share the common characteristic that they are present in the printed version of a bill placed before the House of Commons. Although marginal notes and punctuation may undergo subsequent "editorial" changes that are not seen by the whole House, these changes do get the sanction of the Clerks of the House of Commons and the Senate, in their capacity of representing the Houses and, we must assume, carrying out the understood intent of the two Houses.[66] Regardless of what an interpretation act might say in respect of whether these sources form a part of an enactment or not, analysis of the cases supports the view that they do, and that they should be subject to the general principles of statutory interpretation that all parts of the statute must be read together and interpreted in light of each other.

The weight to be assigned to these different sources varies in each case. This is in part because of the nature of the source, marginal notes generally carrying less weight than preambles. The marginal note has to capture meaning in only one or two words. It tends, therefore, to be a less persuasive source of interpretive assistance than the more expansive preamble. In each case, the court must review all parts and

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[66] "intent" here is used in the very limited sense that, had Parliament realized a mistake had been made, it would have corrected it.

provisions of a particular statute. Such a review may reveal that the heading or punctuation supports a particular interpretation, contradicts an interpretation that comes through clearly elsewhere in the statute or is irrelevant to the interpretation of a particular provision. The court then assigns weight accordingly. In no case could one of these sources, standing alone, form the sole basis for a decision. Their persuasiveness rests on their interaction with, and interrelation to, other constituent provisions of the statute.

PART II - KNOWLEDGE AND EXPERIENCE OF THE JUDGE

This Part examines a group of extrinsic aids that have traditionally been used extensively in the interpretation of statutes. Dictionaries, scholarly writings and administrative practice have long been recognized as admissible aids to interpretation. In addition, I have included in this grouping judicial notice which may be an important source of interpretive assistance.

The common element among these four interpretative aids is that they are assumed to form part of the knowledge and experience of a judge, lawyer or indeed any other knowledgeable person reading a statute. In particular, they are assumed to have been known by the drafter who drafted the statute and therefore to be part of the message to be conveyed.

DICTIONARIES

The meaning of a statutory provision must, of necessity, be conveyed by the one tool of communication known to man, words. But it has been said

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.[67]

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[67] Towne v. Eisner, 245 U.S. 418 at 425 (1918) per Holmes J.

Hart has argued that certain words have a core meaning but that core meaning is determined only because the words are familiar and are used often in the same contexts.[68] In other words, meaning is determined by general usage. Certainty in the interpretation of these words is therefore possible. However, when these same words are used in a different context or when they are used in combination with other, unfamiliar words, there can be no certainty of interpretation.[69]

Standard drafting practice dictates that, where a word is used in a statute in its ordinary sense, that is, its dictionary meaning, it need not be defined in the statute.[70] The ordinary meaning to be assigned to a word will be influenced by the subject matter of the statute, the context in which the word is used and the persons to whom the statute is addressed.[71] Definitions are used in a statute to clarify the meaning of

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[68] H.L.A. Hart, The Concept of Law (Oxford University Press, Oxford: 1961), at pages 123-125.

[69] Hart's theories have come under considerable attack by legal theorists. He has been accused of interpreting the words of the text in isolation and applying the rule of the "standard case". See, for example, L. Fuller, "Positivism and Fidelity to Law-A Reply to Professor Hart" (1958), 71 Harv. L. Rev. 638, O.M. Fiss, "Objectivity and Interpretation" (1982), 34 Stan. L.R. 739 and P. Brest, "Interpretation and Interest"(1982), 34 Stanford L.R. 765.

[70] E.A. Driedger, Composition of Legislation, 2nd. ed. (Department of Justice, Ottawa: 1976); G.C. Thornton, Legislative Drafting, 2nd. ed. (Butterworths, London: 1979)

[71] Lucie Lauzière, "Le sens ordinaire des mots comme règle d'interpretation", (1987) 28 Les Cahiers de Droit 367.

specific words and expressions used in the statute by assigning statutory meanings to the words and expressions.[72] A definition may be used to narrow or enlarge upon the dictionary meaning of a word.[73] For those words not defined, a dictionary is therefore a fundamental tool not only of the drafter, but also of others who must interpret statutes, be they back-benchers speaking in committee or lawyers advising their clients.[74] But dictionaries are consulted only where there is an absence of judicial guidance or authority on the interpretation of the word in issue. There is therefore a clear hierarchy of aids to interpretation, the highest form being decided cases.[75]

The courts have long relied on dictionaries in interpreting words and phrases.[76] Thus, in The Queen v. Peters,[77] the court had to decide whether an undischarged bankrupt was guilty of the

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[72] supra, footnote 56, at p. 55 and p. 45 resp.

[73] supra, footnote 56, at p. 56-58 and p.45-46 resp.

[74] A. Samuels "The Interpretation of Statutes", [1980] Stat. L. Rev. 86, at p. 113.

[75] Kerr v. Kennedy [1942] 1 K.B. 409 at 413 per Asquith J. It is to be noted, however, that where a provision has been judicially interpreted and it is subsequently re-enacted in the same terms, the federal Interpretation Act, subsection 45(4) provides that Parliament is not deemed to have adopted that judicial interpretation. The Ontario Interpretation Act, section 19, provides the same.

[76] Maxwell on the Interpretation of Statutes 12th ed., P. St. J. Langan, editor (Sweet and Maxwell, London); P.-A. Côté, The Interpretation of Legislation in Canada (Les éditions Yvon Blais Inc., Cowansville (Qué): 1984), at p. 197.

[77] (1886), 16 Q.B.D. 636.

had to decide whether an undischarged bankrupt was guilty of the offence of obtaining "credit" without informing the vendor that he was an undischarged bankrupt. The bankrupt had bought a horse from a dealer with no cash down and no stipulation as to credit. The horse was shipped to the bankrupt who sold it immediately and then refused to pay the dealer. In considering the meaning of the statutory offence of obtaining "credit", Lord Coleridge said

> I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of the courts of law that words should be taken in their ordinary sense, and we are therefore sent for instruction to these books.[78]

He then proceeded to examine the meaning given to "credit" in the dictionaries of Johnson ("correlative to debt") and Webster ("trust, the transfer of goods in confidence of future payment") and concluded that the circumstances of the case fell within these definitions.

The rule that words are used in statutes in their ordinary sense is well established in Canada and dictionary meanings are

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[78] at p. 641.

cited as a matter of course in many cases. In R. v. Videoflicks,[79] Mr. Justice Tarnopolsky, speaking for the Court, used five dictionaries, two of them law dictionaries, to decide whether the accused operated a "retail business" and "sold or offered for sale ... by retail" certain services. It is to be noted that Mr. Justice Tarnopolsky in that case made no distinction between the general dictionaries and the legal dictionaries which he consulted.

Where a word may have a special "legal" meaning, however, a law dictionary is to be preferred. In R. v. Webster,[80] Judge McLellan had to decide whether a ministerial determination under the Fisheries Act was a statutory instrument. He first consulted Bouviens' Law Dictionary, Stroud's Judicial Dictionary and Black's Law Dictionary as to the meaning of the word "determination". Only when he had concluded that there was no special legal meaning did he look to the Shorter Oxford English Dictionary for guidance as to the ordinary meaning of the word.

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[79] (1984), 5 O.A.C. 1, 48 O.R.(2d) 395, at pages 436-7, 14 D.L.R. (4th) 10 (Ont. C.A.); appeal to the Supreme Court of Canada sub nom R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713. In Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1, the court used nine dictionaries in interpreting the phrase "minority language education facilities" contained in section 23 of the Constitution Act, 1982. Both the English and the French version of this section came under scrutiny, thus requiring the court to examine English dictionaries, French dictionaries and a French-English dictionary.

[80] 12 C.E.L.R. 147 (N.S. C.C.); and see Regina v. Popovic and Askov (1975), 32 C.R.N.S. 54 (S.C.C.).

This procedure of consulting legal dictionaries before ordinary dictionaries is consistent with the theory that a word in a statute may be undefined and yet does not bear the ordinary dictionary meaning. A statute must be interpreted with the people to whom it is addressed in mind for the drafter will have consciously couched his words in terms understood by these people.[81] The word, therefore, may bear a meaning that is a special, technical meaning according to the usage of the trade to whose members the statute is addressed and a dictionary or lexicon specific to that trade may be used in preference to a general dictionary.[82]

The converse may also be true. Although a word may have a specific scientific meaning, the popular sense of the word may prevail in the interpretation of a statute that is not highly technical in nature and is addressed to a broad-ranged audience. Thus, in Ontario Mushroom Co. Ltd. and Meadowglen Mushroom Growers Ltd. v. Learie and the Director of Employment Standards of the Ontario Ministry of Labour[83], the court had to determine

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[81] Maxwell on the Interpretation of Statutes, 12th ed., P. St. J. Langan, editor, (Sweet and Maxwell, London: (1969)) p. 84; Unwin v. Hanson, [1891] 2 Q.B. 115; E.A. Driedger, The Composition of Legislation (Department of Justice, Ottawa: 1976).

[82] Perka, Nelson, Hines and Johnson v. R., [1984] 6 W.W.R. 289, (S.C.C.).

[83] (1977), 77 CLLC 14,696 (Ont. Div. Ct.)

whether employees engaged in mushroom growing fell within the exemption from the minimum wage provisions of The Employment Standards Act. The exemption applied inter alia to those "... employed on a farm whose employment is directly related to the primary production of .... vegetables ....". The majority of the court stated that the question before it was to determine whether "farm" excluded the activity of mushroom growing. However, because the original decision couched the question in terms of whether a mushroom was a vegetable and the one dissenting judge in the case followed the same path, the majority of the court also paid considerable attention to that question. Reid J., writing for the majority, examined the dictionary definition of "vegetable" that was relied on by the dissenting judge to hold that a mushroom is not a vegetable and concluded that the definition could equally well be used to support the contrary proposition. He found that a mushroom was a vegetable, on the basis of the evidence given by persons knowledgeable in the field of mushroom and vegetable growing, such as a scientist in charge of mushroom research for the Ministry of Agriculture and a member of the Canadian Horticultural Council. He stated that these were the very kind of people that the statute sought to address and he went on to say

> I am personally a little reluctant to refer to dictionaries for the purpose of contradicting the common understanding of a common term .... I do not go so far as to say that it is open to judges simply to rely on their own experience and treat that as a proper subject of judicial notice, nevertheless, I would have been surprised, based on my experience with the terms vegetable and mushroom, if any other conclusion had been reached.[84]

The position taken by Mr. Justice Reid is supported by Judge Learned Hand who has cautioned "not to make a fortress out of the dictionary".[85]

The Supreme Court of Canada had occasion to decide on this point in Pfizer Company Limited v. D.M.N.R.[86] where the question to be decided was whether oxytetracycline was a "derivative of tetracycline". The Tariff Board had decided this question in the affirmative. The Board had come to that conclusion by considering technical dictionaries on the meaning of "derivative". These dictionaries had given the term a broad meaning that included any chemical substance that was close in

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[84] ibid.

[85] Cabell v. Markham 148 F (2d) 737 at 739 (1945)

> "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

[86] [1977] 1 S.C.R. 456, (1975), 6 N.R. 440.

chemical structure and could theoretically be produced from another substance.

In the Supreme Court of Canada, Pigeon, J. stated that the consultation of a dictionary to determine the usual meaning of a word was not a denial of natural justice.[87] However, this principle means that an ordinary dictionary is to be consulted. The legislation in question was not technical in nature. It was fiscal. It was not appropriate, therefore, for the Board to consult specialized scientific dictionaries to find a meaning that was not the ordinary meaning. The Board was to determine firstly, as a question of law, what a derivative was. Pigeon, J. quoted several recognized non-technical dictionaries as defining the term in a restrictive fashion to mean a chemical substance that could in fact be produced from another chemical substances.[88] It was then a question of fact as to whether oxytetracycline could be produced from tetracycline. The Board had compounded its initial error by consulting the technical dictionaries for a description of oxytetracycline. It was described in them as being prepared from tetracycline. Pigeon, J. stated that the dictionaries relied on were not authoritative. An authoritative technical work would always set out the scientific process by which the one product could be obtained from the other. In addition, evidence of the experts at the

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[87] at pages 463-4.

[88] at page 462.

hearing, although divergent on the question of the meaning of derivative, was clear on the factual question. Oxytetracycline could not be produced from tetracycline. It was the product of a biosynthetic process. The result of the Board's excursion into technical dictionaries not placed in evidence was, therefore, a result that directly contradicted expert testimony on the subject.

In upholding the appeal, the Supreme Court of Canada held that the Board erred in law in not giving the word "derivative" its primary meaning. In addition, there was a miscarriage of justice, in that the Board relied on dictionary meanings that were not entered in evidence before it and were not consistent with the ordinary meaning of "derivative". The dictionary texts upon which the Board relied had not been put to the witnesses by either counsel. Furthermore, they were consulted by the Board after the hearing and neither counsel was given an opportunity to answer.

Pigeon J. stated the principle too broadly when he stated, at page 460, that even words that are technical or scientific are to be construed in accordance with their meaning in common language. In the Pfizer case, the ordinary meaning was taken because the statute was fiscal in nature and was addressed to a general audience. Had it been more technical or scientific in nature, it is possible that a court could have concluded that the more scientific meaning was intended. The fact that even the experts

who testified could not agree on the meaning of the word was probably influential in the Court's conclusion that the ordinary meaning, which was agreed on by all the experts, was the one intended.

The Pfizer case, however, cannot be used as authority for preventing the court from consulting dictionaries which are not introduced in evidence by counsel in order to establish the ordinary meaning of a word. This is made clear in S.K.F. Canada Ltd. v. D.M.N.R.,[89] where counsel for the appellant contended before the Federal Court of Appeal that the Tariff Board proceeded on a wrong principle when it consulted dictionaries not referred to by counsel in order to ascertain the ordinary meaning of the word "adapter". The question before the Board was whether adapter sleeves were "parts of bearings" within the meaning of the tariff items on which the appellant relied. In rejecting the appellant's submission, Urie J. distinguished the Pfizer case stating that, in the case before him, no reliance had been placed by the Board on the dictionary meaning.[90] Reference to the dictionaries had been made only to establish the ordinary dictionary meaning of the word.

The distinction between the cases thus rests on the fact that, in Pfizer, the Board did not seek the ordinary dictionary

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[89] (1983), 47 N.R. 61.

[90] at p. 419.

meaning of "derivative" but set out to find an extraordinary meaning. In so doing, it failed to perform its primary function of determining as a matter of law what the word "derivative" meant in the context in which it was found. In addition, it failed to perform its judicial function of determining on the basis of the expert testimony before it, as a question of fact, whether oxytetracycline was a derivative of tetracycline and therefore whether it fell within the words of the provision or not. No such miscarriage of justice took place in the S.K.F. case. There, the Board sought only to find the ordinary meaning of the word "adapter". The Board did not abdicate its responsibility to weigh the expert testimony given before it as to the purpose and function of an adapter to determine whether it was a "part" within the meaning of the tariff item. The conclusion to which the Board came was sustainable based solely on the evidence before it without reference to the dictionaries.

An important element of the Pfizer case is the distinction that is drawn between the two-step question of law/question of fact process. This matter is discussed in Canada (Attorney General) v. Tucker.[91] A Board of Referees had denied Tucker certain unemployment insurance benefits under the Unemployment Insurance Act on the grounds that he lost his job by reason of his own misconduct. An appeal from that decision was upheld by an Umpire. The Umpire had jurisdiction to overturn the Board's

[91] [1986] 2 F.C. 329

decision only on a question of law. The question before the Federal Court of Appeal was, therefore, whether the interpretation to be given to the word "misconduct" in the Unemployment Insurance Act was a question of law or a question of fact.

The Court held that the interpretation of a word used in a statutory context is a question of law. Thus, whether "misconduct" required intentional or reckless behaviour was a question of law. Whether a particular act or omission falls within the ambit of the statutory expression, however, is a question of fact.[92] The Court concluded that the Umpire had had jurisdiction to hear the appeal. It then went on to find the meaning of the word "misconduct", as used in a statute providing for a penalty, in Black's Law Dictionary.

The first duty of the court, then, as a matter of law, is to find the ordinary meaning of the words employed. In Germain v. The Queen,[93] therefore, Chouinard J. adopted the view expressed by Ritchie J. in Dechow v. The Queen[94] that the ordinary meaning should be applied to the word "publication", used in the Criminal Code in reference to the offence of possessing anything obscene

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[92] Etienne Mureinik in "The Application of Rules: Law or Fact" (1982) 98 L.Q.R. 587 argues that both are questions of law.

[93] [1985] 2 S.C.R. 241, 246

[94] [1978] 1 S.C.R. 951, 966.

for the purpose of publication. The ordinary meaning is "to make public". Although there was no written description of them, articles on display in a sex boutique were therefore published, because they could be seen by people entering the boutique. Similarly, the Supreme Court of Canada in Molchan v. Omega Oil and Gas Ltd. used the Shorter Oxford English Dictionary meaning of "impossible" to establish whether a general partner had contravened the Alberta Partnership Act by making the continuation of the business of a limited partnership impossible.[95]

In certain cases, it may be clear from the statute itself that the ordinary, dictionary meaning of a word was not intended. In Skoke-Graham et al. v. The Queen, for example, the Supreme Court of Canada rejected the ordinary meaning of the word "disturb" (to interrupt, hinder, frustrate) used in the context of disorderly conduct in the Criminal Code. The narrower, legal meaning that required the conduct to create disorder and disturb the peace was clearly intended, they said.[96] Similarly, in Thomson v. Canada[97] Mr. Justice Stone rejected counsel's argument that the ordinary, dictionary meaning of "recommendation" is a suggestion that does not have to be followed. He concluded that

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[95] [1988] 1 S.C.R. 348, 364.

[96] (1985), 16 D.L.R. (4th) 321, [1985] 1 S.C.R. 106; see supra pages 25-26 in respect of the influence of the heading in this decision.

[97] (1988), 50 D.L.R. (4th) 454, 84 N.R. 169.

the word "recommendation" where it appears in subsection 52(2) of the Canadian Security Intelligence Service Act means a proposed course of action that has to be followed. He arrived at this conclusion after an extensive examination of the whole scheme of the Act, its purposes and provisions. Resort to a dictionary does not, therefore, replace the primary principle of statutory interpretation that the statute be read and construed as a whole in light of its object.

Since there is no "official" dictionary in Canada[98], different dictionaries may be looked at and the meanings given in them compared and contrasted. Some difficulty may be encountered, however, where judge and counsel rely on different dictionaries. In Nairne v. Stephen Smith & Co. Ltd.[99], for example, the court had to decide whether a particular wine was a drink or a medicine. The wine was described on its label as a "tonic". During the course of argument, counsel on both sides cited the definition of "tonic" from the Oxford English Dictionary. That definition made no reference to illness or unhealthy condition, describing a tonic as designed to maintain a healthy condition. In contrast, the judge used Webster's Dictionary, where a "tonic" is described as a substance

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[98] The courts show a marked tendency to rely on the Oxford English Dictionary. The drafters of Canada's legislation use the Oxford English Dictionary for English, le Petit Robert for French and Harraps New Shorter French and English Dictionary for French-English, English-French translations.

[99] [1943] 1 K.B. 17.

administered in the treatment of disease. He did not mention the Oxford English Dictionary. He therefore concluded that a "tonic" was a medicine and the wine subject to the provision of the Pharmacy and Medicines Act.

Viewed in another light, the use of dictionaries may be seen as a form of judicial notice in that the ordinary dictionary meaning is a matter of common knowledge. In searching for the "ordinary meaning" of a word, the court must seek the generally accepted meaning of the word at the time of enactment of the statute, unless there is a subsequent enactment that requires some other meaning to be given to the prior enactment. A dictionary of the time period in question may therefore be consulted.[100] In addition, a dictionary must be recognized as authoritative, in the same way that textbooks must be authoritative in order to be relied upon by the court. Thus, the Supreme Court of Canada in Pfizer rejected the use of many of the dictionaries used by the Tariff Board as unreliable and not authoritative.

Unfortunately, the basis on which a court decides which dictionaries are authoritative and which are not is not usually articulated. We must therefore assume that there are two basis on which the judgment is made. Firstly, where the dictionary is

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[100] Sharpe v. Wakefield (1888), 22 Q.B.D. 239, 242, cited with approval in Re Township of Stamford and County of Welland (1916), 37 O.L.R. 155, 182.

as well-known as the Oxford English Dictionary and carries a reputation for thoroughness and accuracy, judicial notice plays an important role. Secondly, in cases such as Pfizer, where the dictionaries in question were very technical and specific to a trade, one would expect one of the parties to challenge the use of a dictionary that was not accepted within that trade. The dictionary would then have to be "proved" in much the same way as an expert witness is. If expert testimony totally contradicted the dictionary, as it did in the Pfizer case on the question of whether oxytetracycline could be produced from tetracycline, then the dictionary would automatically be found to be unreliable and not authoritative.

Finally, the dictionary meaning is less reliable where a phrase rather than a word is to be interpreted. Thus, in Lee v. Showmen's Guild of Great Britain,[101] Somervell, L.J. refused to use the dictionary meanings of "unfair" and "competition" holding that a phrase may not mean the same as the meanings of its component words combined and that "unfair competition" had acquired a special meaning in the context of the Railway Clauses Act.

The admissibility of dictionaries as aids in statutory interpretation is a well-settled area of the law and dictionary definitions are pleaded as a matter of course without any

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[101] [1952] 2 Q.B. 329, 338.

discussion as to admissibility. The acceptance or rejection of a dictionary definition is clearly a matter of the weight to be assigned in the particular case and that weight will vary depending upon whether there is supporting or contradictory evidence to be found within the statute itself or in other relevant sources and on the particular audience to which the statute is addressed.

SCHOLARLY WRITINGS

The case law shows that during the 19th century the use of scholarly writings as an aid in interpreting statutes was well established. In Strother v. Hutchinson, decided in 1837, Tindal C.J. referred to a commentary written by Lord Coke on the statute before the court and stated:

> When we see the authority of so great a writer not only uncontradicted but adopted in all the digests and textbooks we can scarcely err if we adhere to his opinion.[102]

In Re Castioni[103] the court had to interpret the words "of a political character" used in an offence for which there was no extradition. Counsel for the defence introduced in evidence the writings of John Stuart Mill and a History of the Criminal Law by none other than Mr. Justice Stephen, one of the justices hearing the case. Crown counsel referred to a French work on extradition and a work on international law. Although none of the justices appear to have relied on them, Denman J., in his decision, stated that the introduction of textbooks containing possible meanings for the words was of great assistance to the court.

It is interesting to note in that case that there is no discussion of a legal tradition which held that no writer could

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[102] (1837), 4 Bing (N.C.) 83, 89; 132 E.R. 721, 723.

[103] [1891] 1 Q.B. 149.

be cited as an authority in his lifetime.[104] Megarry has suggested that the reason for this rule was twofold.[105] There was believed to be a risk of male fides. For example, the author might use the facts of a situation that he had come to know of in the course of his practice. By expressing an opinion on that fact situation, he might influence the course of the judicial process if and when the matter came to be litigated. Secondly, it was believed that the opinions of living authors had not been tested by the passage of time, whereas the work of a dead author would have gone through a number of editions and criticisms which would serve as a testing ground and would refine the final product.

Even in the 19th century, however, that rule was often disregarded, as it was in the Castioni case, or the courts got around it, as is shown in Greenlands Ltd. v. Wilmshurst. In that case, Vaughan Williams L.J., in reference to Odgers Libel and Slander, stated the view that counsel could not rely on

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[104] R.E. Megarry Miscellany-at-law: A Diversion for Lawyers and Others (Stevens and Sons Limited, London), p. 326-328; D. Vanek, "Citing Textbooks as Authority in England", [1971] Chitt. L.J. 302.

[105] Ibid., at p. 327. Megarry cites one amusing story on this subject at page 328. In a case before the Court of Chancery (Nicholls v. Ely Beet Sugar Factory Ltd. [1936] Ch. 343, 349), Lord Wright M.R. indirectly paid a compliment to Sir Frederick Pollock, an octogenarian, when he stated that "fortunately" Pollock's Law of Torts was not a work of authority. Apparently, the editors of the Law Journal and the Law Times did not understand the significance of the remark and reported the word as "unfortunately". See (1936), 105 L.J. 279, 283; (1936), 154 L.T. 531, 533.

passages from the works of living authors as authorities for their propositions, but they could adopt the author's statement as part of their argument.[106]

The rule has now been virtually abandoned and there appears to be no limit on which scholarly writings may be admitted in evidence. Thus in Pelech v. Pelech Madam Justice Wilson cited an article she herself had written to support her contention that a denial of spousal maintenance could result in deprivation for the children of the marriage.[107] Interestingly, Megarry himself as a judge of the Court of Chancery has commented on the authority of his own works. In Cordell v. Second Clanfield Properties Ltd., counsel relied upon Megarry and Wade's Real Property in argument before Megarry.[108] In his reasons for judgement, Megarry said

> It seems to me that words in a book written or subscribed to by an author who is or becomes a judge have the same value as words written by any other reputable author, neither more nor less. The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he is exposed to the peril of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law. ... I would, therefore, give credit

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[106] (1913), 29 T.L.R. 685, 687.

[107] [1987] 1 S.C.R. 801, at p. 845.

[108] [1969] 2 Ch. 9.

> to the words of any reputable author in book or article as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print, often in apt and persuasive language. But I would do no more than that; and in particular I would expose those views to the testing and refining process of argument. Today, as of old, by good disputing shall the law be well known.[109]

The practice of relying on the writings of a dead author have to some extent been reversed. Though the passage of time may allow for the refinement of the opinion given, it may also render it obsolete and of no application in the modern world. Thus, in R. v. Morgentaler, Smoling and Scott,[110] the Ontario High Court of Justice refused to "place much weight" on the interpretation of the words "liberty and security of the person" found in Blackstone's Commentaries on the Laws of England. The Court stated that Blackstone's work is applicable to the time and place in which it was written (18th century England) and, in so far as it reflects the common law interpretation of liberty, it is totally inapplicable to the interpretation of an entrenched, constitutional document such as the Charter. The dictum in that

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[109] ibid. at p. 16-17; and see Editorial, [1970] Chitt. L.J.

[110] (1984), 47 O.R. (2d) 353 at p. 404, 11 C.R.R. 116 (H.C.J.) at p. 170; interlocutory appeal quashed (1984) 48 O.R. (2d) 519, 41 C.R. (3d) 262, 16 C.C.C. (3d) 1, 14 D.L.R. (4th) 184 (Ont. C.A.); appeal from acquittal allowed, (1985) 52 O.R. (2d) 353, 22 C.C.C. (3d) 353, 48 C.R. (3d) 1, 22 D.L.R. (4th) 641 (Ont. C.A.); appeal allowed [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 62 C.R. (3d) 1.

case should not be interpreted too broadly for, in the same year, the Supreme Court of Canada in Moss v. The Queen relied on Blackstone's Commentaries in interpreting the words "child" and "pupil".[111]

These two opposing cases clearly illustrate that it is not admissibility but weight that is important. The court assigns weight according to relevance. In Morgentaler it is clear from the Court's statements that it found Blackstone's Commentaries to be irrelevant in the context of a 20th century Charter of Rights and Freedoms. In contrast, Blackstone's interpretation of the words "child" and "pupil" were directly relevant in the context of interpreting the common law history in respect of the relationship of authority between parents, teachers and children. The weight accorded in each case, therefore, was vastly different.

Common law lawyers and judges have traditionally used scholarly writings less than civil lawyers and judges.[112] In recent years, however, the Supreme Court of Canada has set a

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[111] [1984] 2 S.C.R. 173.

[112] P.-A. Côté, The Interpretation of Legislation in Canada (Les éditions Yvon Blais Inc., Cowansville (Qué.): 1984), at p. 449.

trend by encouraging increased usage of these sources.[113] In particular, the need to interpret the Canadian Charter of Rights and Freedoms has caused a very marked increase in their usage. Two reasons may be advanced for this. First, many of the Charter cases involve the interpretation of statutes in light of the Charter provisions. Scholarly writings have been used extensively to explain the workings of the statute in question,[114] to illustrate the history of the legislative provisions[115] and to demonstrate the mischief which the statute was designed to ameliorate.[116] Secondly, in the first days of the Charter when there was no body of judicial authority on which to rely in

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[113] See, for example, Bayshore Shopping Centre v. Nepean, [1972] S.C.R. 755, 767, Hudson v. Benallack, [1976] 2 S.C.R. 168, 174-5, Minister of National Revenue v. Shofar Investment Corporation, [1980] 1 S.C.R. 350, 355, Pacific Coast Coin Exchange v. Ontario Securities Commission, [1978] 2 S.C.R. 112, 127.

[114] Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1, in which the court relied on Gilbert, Martin and Sheehan A Hard Act to Follow as a summary of the provisions of the Education Act of Ontario.

[115] In Regina v. Morgentaler (1984), 11 C.R.R. 116, (Ont. H. Ct.). at p. 172, the court used Blackstone's Commentaries to establish the common law position in relation to abortion.

[116] Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1 (Ont. C.A.) at page 18 where reference is made to M. Wade The French Canadians, 1760-1967, an article by Stacey Churchill entitled "So why aren't the French ever satisfied?" and to an article entitled "Educational rights for Franco-Ontarians", published in (1978-79) 9 Interchange Issue No. 4.

interpreting its provisions scholarly writings were often used.[117] Direct Canadian authority was needed to interpret the Charter and this need encouraged many books and articles to be written on it. These scholarly writings provided easy access to Bill of Rights cases and to American caselaw on entrenched constitutional rights and freedoms. They therefore provided for judges and counsel the background and context of the Charter provisions at a time when no judicial guidance was available.

This increased use of scholarly writings is fully endorsed by Mr. Justice Dickson, the Chief Justice of the Supreme Court of Canada, who said in a speech given to the Canadian Bar Association at Edmonton, Alberta:

> It is all too infrequently that a list of authorities in the Supreme Court of Canada includes articles from a learned journal. There is rarely reference to a law school journal. I encourage counsel to read scholarly writings and quote from them.
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> Legal scholars with particular areas of expertise, whether academics or members of the practising bar, should strive to place their knowledge and their insight before the courts by writing and publishing.[118]

He also said that it is vital that, in interpreting the Charter,

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[117] ibid., at O.R. p. 34 where reference is made to Gibson, Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations, Tarnopolsky and Beaudoin, Canadian Charter of Rights and Freedoms: Commentary, Beaupré, Construing Bilingual Legislation in Canada, Craies on Statute Law, E.A. Driedger, Construction of Statutes, and Wheeler's Confederation Law of Canada.

[118] February 2, 1985 at pages 12 and 15.

"the judges have the greatest depth and the highest quality of resources at their disposal".

Although in his address, Mr. Justice Dickson limits his comments to constitutional cases, earlier comments suggest that he thinks scholarly writings should be used more frequently in all cases. In a lecture given at the Faculty of Law of the University of Toronto in 1979, he made it clear that his encouragement of the use of scholarly works in the court room is not limited by the nature of the case.[119] In addition, he discussed the weight to be accorded to them, saying that weight depends on the cogency of the argument, the intellectual honesty of the scholarship, the thoroughness of the research and the reputation of the author.[120]

Scholarly writings are readily admitted in all kinds of cases and their usefulness to the judges has been recognized. In his lecture to the Canadian Bar Association, Mr. Justice Dickson indicated that, in determining legal issues that affect the whole fabric of our society, judges need all resources possible at their disposal. The late Chief Justice Laskin suggested that textbooks should be given the same weight as <u>obiter dicta</u> in

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[119] B. Dickson, "The Role and Function of Judges", [1979] The Law Soc. Gaz. 138 at page 163.

[120] <u>ibid</u>., at page 165.

judicial decisions.[121] Scholarly writings would therefore be persuasive, but not binding. It is clear from the cases that the courts retain their discretion to accept or reject an opinion found in a scholarly writing.

> This court would never hesitate to disagree with a statement in a textbook, however authoritative, however long it had stood, if it thought right to do so. In fact, it has had occasion I think, in the past to differ from statements in Stones Justices' Manual, which justices are accustomed to treat with almost the respect paid to the Bible.[122]

However, archaic rules that reject the works of living authors have been abandoned and scholarly writings are following the trend to admissibility of all interpretative aids that is seen in other areas. Once admitted, of course, the writings must be accorded appropriate weight. Mr. Justice Dickson has set out some of the factors to be considered when assigning weight. The reputation of the author for knowledge and experience in his field is an important factor, but it is a factor that, by its very nature, is largely determined by judicial notice. In the next section, we will see that the other factors that he lists, such as cogency of the argument and intellectual honesty of the scholarship, may also be determined by judicial notice.

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[121] B. Laskin, "The Institutional Character of the Judge", (1972), 7 Isr. L.R. 329, 344-5.

[122] Bastin v. Davies [1950] 2 K.B. 579, 583 per Lord Goddard who then went on to adopt the opinion set out in Bell's Sale of Food and Drugs (12th ed) which was before the court.

JUDICIAL NOTICE

It is a well established rule that when interpreting a statute a judge may take judicial notice of facts that are common knowledge.[123] This means that the judge may, of his own motion and without the production of evidence, recognize that certain facts exist. Judicial notice is not an issue in the cases as judicial notice is not based on the production of evidence and it emanates from a decision or opinion of the judge himself. Judicial notice is frequently an important source of interpretive assistance to the judge. The weight assigned to facts judicially noticed, however, is hard to determine from the cases. This is particularly true in those cases where the judge does not acknowledge that he is using judicial notice as a tool. In addition, in constitutional cases, it is clear that judicial notice may be the most weighty consideration. It may determine whether a statute will be enforced or whether it will be declared ultra vires because it is beyond the constitutional authority of the enacting jurisdiction.

There are many examples of how the courts have used judicial notice expressly in coming to their decisions. In Reference re Alberta Bills, for example, Lord Maugham stated that the Court, in determining whether legislation fell within section 91 or 92 of the British North America Act, could take into account by way

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[123] E.A. Driedger, Construction of Statutes, 2nd. ed. (Butterworths, Toronto: 1983), at p. 151-153.

of judicial notice any public general knowledge of the legislation or its effect.[124] Similarly, judicial notice may be used as a technique to introduce and examine the context in which legislation is enacted. This is particularly true in constitutional cases. In Reference re Validity of the Wartime Leasehold Regulations,[125] three of the seven justices of the Supreme Court of Canada made specific reference to judicial notice or common knowledge of continued economic disturbances caused by the war in concluding that the Wartime Leasehold Regulations remained valid after the cessation of actual hostilities.[126]

The Supreme Court of Canada took a similar approach in Reference re Anti-Inflation Act.[127] The issue before the Court was whether the social and economic circumstances at the time of the passage of the Anti-Inflation Act were sufficiently serious to provide support for the Act under Parliament's power to legislate for the peace, order and good government of Canada. Chief Justice Laskin said:

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[124] [1938] 4 D.L.R. 433, 438; [1938] 3 W.W.R. 337, 343; [1939] A.C. 117, 130 (J.C.P.C.).

[125] [1950] S.C.R. 124, [1950] 2 D.L.R. 1.

[126] the justices' statements are set out in Appendix II.

[127] [1976] 2 S.C.R. 373, 68 D.L.R.(3d) 452, 9 N.R. 541.

> It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it.[128]

He went on to say that any extrinsic material produced in evidence before the Court need prove only that there was a rational basis for the legislation and, in fact, considerable extrinsic evidence was introduced to this end.[129]

Many of the more recent cases in which Courts have employed the judicial notice technique have been cases that required an interpretation of the Canadian Charter of Rights and Freedoms. This may be so simply because the circumstances surrounding the drafting and coming into force of the Charter were well publicized at the time by all the media and are sufficiently recent to be easily remembered. Thus, in Re Williams v. Attorney General for Canada[130] in which the Ontario High Court of Justice had to decide certain questions in relation to judicial review of an Order in Council, the Court rejected the applicant's claim to new proprietary rights protected by the Charter. The Court stated

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[128] ibid., S.C.R., at p. 423.

[129] See Appendix III for a list of some of the extrinsic materials filed.

[130] (1983), 6 D.L.R.(4th) 329.

> In our view, special property rights were omitted from the Charter and no knowledgeable Canadian of our time, not even judges, can fail to be aware that the omission was deliberate.[131]

Similarly, Deschênes, C.J.S.C. made use of this technique in Quebec Association of Protestant School Boards v. Attorney General of Quebec (No. 2)[132] to set the scene surrounding the enactment of the Charter. He begins his description with the words "We all know of the acrimonious debates which unfolded during the last constitutional conference, ...", showing clearly that he relies on judicial notice[133] and concludes that one of the reasons for the acrimonious debates was Quebec's opposition to section 23 of the Charter. In this way, he establishes the context in which the Charter was adopted.

It is seldom, however, that judicial notice is so clearly expressed. More often, a decision contains a simple statement of fact that does not appear to be a conclusion based on evidence introduced by the parties and that we therefore must conclude is introduced by way of judicial notice. In the Skapinker case, for example, Mr. Justice Estey stated, in reference to the Charter,

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[131] ibid., at p. 334.

[132] (1982), 140 D.L.R.(3d) 33, 3 C.R.R. 114 (Qué S.C.).

[133] ibid., at p. 53.

> At the time of the resolution adopted by the Canadian Parliament, and again when the Act was enacted in the United Kingdom Parliament, the Charter of Rights included the heading "Mobility Rights" over section 6.[134]

Judicial notice is a matter for the discretion of the Court. At the request of a party, a court may take judicial notice of certain facts but refuse to give any weight them. Thus in Regina v. Morgentaler, counsel for Dr. Morgentaler argued that the Court should take judicial notice of the fact that women in different parts of Canada have unequal access to therapeutic abortions. The Court refused to assign any weight to this fact, stating that the inequality was not caused by the legislation itself but rather by the forbearance of the Quebec Attorney General from prosecuting under it.[135] A refusal to assign any weight to facts that are judicially noticed, therefore, does not mean that the court does not accept the truth of a particular fact-situation, but rather that it finds it irrelevant in relation to the interpretation of the statutory provision before it.

General knowledge may be stored in the mind or may be gleaned from sources such as dictionaries, textbooks, encyclopedia and even newspapers. In Canada Motor Co. v. Buisson, a Quebec case in which the Cour supérieure laments the system in Canada whereby

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[134] (1984) 53 N.R. 169, at p. 190.

[135] (1984), 47 O.R.(2d) 353 (Ont. S.C.) at p. 158-159; 52 O.R. (2d) 353 (Ont. C.A.); [1988] 1 S.C.R. 30 (S.C.C.)

no commentary on the statute is published nor are the debates of parliamentary committees about it, the Court sought to discover the mischief the article of the Civil Code was designed to remedy by consulting the daily newspaper.[136] The Court stated

> Considérant que cette Cour est bien obligée de s'en rapporter à ces rapports de la presse quotidienne, reproduisant les débats de la législature, puisqu'elle n'a et ne peut avoir aucune autre source de renseignements juridiques, par suite du système parlementaire en pratique dans la legislation de cette province;[137]

What a judge brings to Court in his mind will vary according to his knowledge and experience. It was therefore fortunate for Mr. Justice Jerome that he carried in his mind a recollection that the question before the Court in Auditor General v. Minister of Energy, Mines and Resources[138] had been the subject of discussion in the House during passage of the Auditor General Act. The question at issue was whether the Auditor General was entitled, pursuant to the Auditor General Act, to access cabinet documents relating to the purchase of Petrofina Canada by Petro-Canada, a Crown Corporation. At the time at which the provision in question came before the House, Mr. Justice Jerome was Speaker of the House. He, therefore, did not need to do

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[136] (1922), 60 C.S. 416.

[137] ibid., at p. 423.

[138] [1985] 1 F.C. 719, 23 D.L.R. (4th) 210 (F.C.T.D.); revsd., [1987] 1 F.C. 406, 35 D.L.R. (4th) 693, 73 N.R. 241 (F.C.A.); (1989,) 97 N.R. 241 (S.C.C.).

extensive research to realize that a review of Hansard would provide him with the words of the responsible Minister speaking in the House during the passage of the Bill. Mr. Justice Jerome cited the words of the responsible Minister, he said, only to confirm the conclusion that he himself had already arrived at, that Parliament had deliberately left out any restriction on the Auditor General's right of access.[139]

The case is particularly interesting for two reasons. Firstly, it shows that judicial notice is sometimes used as a technique to introduce evidence that would otherwise be inadmissible. Mr. Justice Jerome does not state the basis on which he may refer to Hansard at a time when it is generally accepted that Hansard is not admissible in evidence. An explanation may be found in the words of MacGuigan, J. in a decision rendered in the Federal Court of Appeal in 1985. He said

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[139] It is to be noted that, in reversing Mr. Justice Jerome's decision, neither the Federal Court of Appeal nor the Supreme Court of Canada commented on his reference to the Minister's statement. An examination of the Minister's statement indicates that Mr. Justice Jerome interpreted it in a broader sense than was justified. The statement makes it clear that the government intent was to preclude other legislation from overriding the access provisions of the Auditor General Act. The statement did not address itself to the question of whether that Act itself contained restrictions on the right to access.

> I am strengthened in this conclusion by the clear indication of the evil sought to be remedied found in the parliamentary debates, of which as public documents this court can take judicial notice.[140] (emphasis added)

The Cour Supérieure in Canada Motor Co. v. Buisson used the indirect approach and consulted a newspaper report of the debates of parliamentary committees, presumably on the basis that the content of newspapers is a matter of public knowledge. MacGuigan J. chose the direct approach but used the same justification. To avoid rejection on appeal, however, the indirect approach may be the safer route.

The second interesting aspect of Auditor General v. Minister of Energy, Mines and Resources is the special position of the judge in relation to the passage of the Act. As Speaker of the House when the Bill went through the House, Mr. Justice Jerome may have been privy to all kinds of information that would not necessarily be reflected in Hansard or in other public documents. How far this information could have influenced his decision in the case is impossible to evaluate and is certainly not revealed in the report of the case.

The circumstances of Auditor General v. Minister of Energy, Mines and Resources are by no means unique. Every judge brings to a case a certain fund of knowledge and experience, perhaps

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[140] Lor-Wes Contracting Ltd. v. Minister of Energy, Mines and Resources, 85 D.T.C. 5310, [1985] 2 C.T. 279, 60 N.R. 321, at page 326.

even bias, that he has acquired during his lifetime. This fund, which I shall call his "interpretative baggage" influences every decision that he makes. It is a form of hidden, unacknowledged judicial notice that is virtually impossible to evaluate in any given case. For example, Mr. Justice Jerome in the Auditor General case does not mention his position as Speaker of the House at the time of the passage of the Act. The facts are so recent, however, that it is reasonable to assume many people are aware of them and have considered that his special knowledge may have influenced his decision. In ten years time, however, these facts will have been forgotten. On a plain reading of the report of the case, then, no such external influences will be identified to have influenced the decision.

Each judge brings to a case a different "interpretative baggage" depending upon his particular knowledge and experience. Whilst a judge is assumed to know the law, there is a vast area of general knowledge that he must also possess in order to understand and decide the cases that come before him. It is in this area in particular that vast differences between judges may be encountered. The question then arises as to how natural justice may be achieved where the litigants cannot possibly know even half the "interpretative baggage" of the judge in their case.

Dominique Manai, in her book entitled Le Juge entre la loi et l'équité[141] goes some way towards answering this question. She argues that in classic legal theory the judge is merely an agent of the legislature who interprets and carries out a legal disposition. Under this theory, he is seen to be quasi-autonomous. He is, however, constrained in part by cultural considerations. He is unlikely to make a decision that runs counter to accepted social norms. In addition, as a product of a long and particular training and education in the law, he will have adopted ways of thinking that are consistent with that training and education. In part, also, his decisions are subject to institutional constraints. The most obvious one of these is the constraint of appeal from his decision and reversal by a higher court.

The American writer McNellie, on the other hand, argues that these constraints are insufficient to "avoid outcomes that reflect primarily the will of the judiciary".[142] Her concern is justified for, as has been noted by Brest, the judiciary is

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[141] (Payot Lausanne: 1985). See also Robert Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988), 46 University of Toronto Faculty of Law Review 136.

[142] Elizabeth A. McNellie, "The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation", 89 Columbia Law Rev. 157.

> mostly white, male, professional, and relatively wealthy. However humble their backgrounds, they are members of a ruling elite.[143]

I would submit that this statement is equally applicable to Canada. The cultural and institutional constraints suggested by Manai may therefore be very limited and may even be totally irrelevant where the text to be interpreted deals with a totally different social environment from that of the ruling elite.

Interestingly, however, McNellie has suggested that the way to avoid decisions that reflect the limited outlook of the judiciary is to admit extrinsic aids that will demonstrate to the judiciary the will of the people supporting the legislation. The aids she suggests are those classified here as legislative history. In advancing this view, she does not deal with the fact that she is then creating a hierarchy of extrinsic aids, judicial notice being at the bottom. That is, however, the inevitable conclusion that one must draw, and it is a conclusion that fits well into the general body of the law on statutory interpretation. In the Pfizer case, we have already seen how, for example, judicial notice of a dictionary meaning could not be used to introduce an unusual meaning or contradict direct expert testimony.[144] In the Ontario Mushroom case, even Mr. Justice Reid recognized the lesser status of judicial notice when he stated

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[143] Paul Brest, "Interpretation and Interest", 34 Stanford Law Rev. 765, at page 771.

[144] supra, Part 11.

his opinion that a judge's own experience is not a proper subject for judicial notice.[145]

Thus, judicial notice is a well-established technique for admitting facts into evidence in the absence of other evidence on these facts. It is extrinsic to the enacting provisions of the statute, though, in the form of "interpretive baggage", it could be described as "intrinsic". Judicial notice, where acknowledged, is given less weight than the enacting provisions of the statute and that weight may be reduced to zero where other evidence contradicts the facts admitted by way of judicial notice. Where judicial notice is not acknowledged, that is, where the judge relies on his own knowledge and experience in a certain area and no evidence is led on that area, however, judicial notice may be seen to carry considerable weight. In addition, judicial notice often carries considerable weight in the determination of the constitutional validity of statutes.

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[145] supra, Part 11.

ADMINISTRATIVE PRACTICE

Where a statutory provision has been consistently interpreted in practice in a particular way, the administrative practice is admissible in evidence as an aid to interpretation.[146] In fact, often the courts are reluctant to adopt a contrary interpretation and will adopt the practice if the provision is capable of being interpreted consistently with it. In Lord Denning's words

> When merchants have established a course of business which is running smoothly and well with no inconvenience or injustice, it is not for the judges to put a spoke in the wheel and bring it to a halt. Even if someone is able to point to a flaw, the courts should not seize on it so as to invalidate past transactions or produce confusion. Communis error facit jus. That is to say, when business has been regulated on the faith of it and the position of parties altered in consequence.[147]

The practice of conveyancers, particularly, has been relied upon to demonstrate the common understanding of the meaning of statutory provisions and has been given a status similar to that

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[146] P.-A. Côté, The Interpretation of Legislation in Canada (Les éditions Yvon Blais Inc., Cowansville (Qué.): 1984) at page 444.

[147] United Dominions Trust Ltd. v. Kirkwood, [1966] 2 Q.B. 431, 455. See also Bastin v. Davies [1950] 2 K.B. 579 at 583, where it was stated:

> It would be unfortunate if doubt had to be thrown on a statement which has appeared in a well-known textbook for a great number of years without being judicially doubted and after it had been acted on by justices and their clerks for many years.

of the common law.[148] In Bayshore Shopping Centre Ltd. v. Nepean Spence J. gave considerable weight to the interpretation of a zoning by-law followed by a municipality and a construction inspector over a considerable period of time.[149] Similarly, where an administrative interpretation has been given to a statutory provision, such as in an Interpretation Bulletin issued by the Minister of National Revenue interpreting provisions of the Income Tax Act, it may be admitted in evidence and used as an aid in interpretation.[150]

According to Swayne, J. in United States v. Moore,[151] the reason for this acceptance of administrative practice and interpretation may be that the administrative branch of government is usually responsible for instructing the drafter of the statute that it later enforces. It is therefore reasonable to assume that the legislature must have intended to accept that interpretation in passing the statute. A better explanation is that the courts accept that people rely on past practice and organize their affairs in accordance with the law as interpreted

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[148] Bassett v. Bassett (1744), 3 ATK 203 at 208, per Lord Hardwicke "The uniform opinion and practice of eminent conveyancers has always had great regard paid to it in all courts of justice."; Re Ford and Hill (1879), 10 Ch. 365, 370; Re Holt's Settlement, [1969] 1 Ch. 100, 115.

[149] [1972] S.C.R. 755 at 768.

[150] Interpretation Bulletins are to be distinguished from technical notes to income tax legislation which form part of the travaux préparatoires and, for that reason, are discussed in Part IV.

[151] 95 U.S. 760, (1877).

by the authority competent to administer that law. Thus, even if some other interpretation of a statute is possible, the one relied upon over the years is to be preferred so as not to, in Lord Denning's words, "produce confusion" or perhaps simply because it is fairer to do it that way.

The persuasiveness of the fairness argument is clearly illustrated in Harel v. Deputy Minister of Revenue of the Province of Quebec.[152] The issue before the Supreme Court of Canada in that case was whether payment on retirement in respect of unused sick leave credits fell within the wording of section 45 of the Income Tax Act. That section provided for a reduced rate of income tax in respect of a "... payment ... on retirement ... in recognition of long service ...". The appellant argued that "in recognition" meant "taking into account" whereas the respondent argued that it signified a gratuitous payment as an expression of gratitude for long service. In finding in favour of the appellant's interpretation of the provision, de Grandpré J. stated that the administrative interpretation placed on the provision over a period of 14 years "has real weight" where the statutory provision is capable of more than one interpretation.[153]

It is important to note, however, that the decision does not rest solely on the evidence of administrative practice. The

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[152] [1978] 1 S.C.R. 851

[153] ibid. at page 859.

court first came to a conclusion in favour of the appellant by examining the history of the provision and then sought confirmation of that conclusion from the evidence of the administrative practice. The distinction drawn by the courts between forming the basis of decision and merely confirming a decision already arrived at by some other means is common in cases in which extrinsic aids are used in interpretation.[154]

The courts have also stated that evidence as to administrative practice will not be given weight unless the provision is ambiguous, a requirement that probably derives from the common law parole evidence rule. That rule provides that parole evidence is inadmissible to vary the clear words of a deed or contract. In the case of administrative practice, the rule goes to weight rather than to admissibility. Thus, in the Harel case, de Grandpré went on to say:

> I am not saying that the administrative interpretation could contradict a clear legislative text; ...[155]

When faced with just such a situation, the Federal Court of Appeal refused to give any weight to the contradictory evidence.

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[154] see, for example, Nowegijick v. The Queen [1983] 1 S.C.R. 29 in which Mr. Justice Dickson cited the Harel case with approval and considered an Interpretation Bulletin in support of the interpretation he had already arrived at by considering the legislative scheme of the Indian Act and the Income Tax Act; see also E.C.G. Canada Inc. v. Canada [1987] 2 F.C. 415.

[155] at page 859; cited with approval by Wilson J. in Mattabi Mines Ltd. v. Ontario (Minister of Revenue) [1988] 2 S.C.R. 175, 196.

The case was Canadian Pacific v. Canadian Transport Commission in which the Court had to determine whether the Review Committee of the C.T.C. had erred in its decision that either of two different tariffs could apply to a shipment of a meat packing company and that the company was entitled to the benefit of the lower of the two.[156] In upholding the decision of the Review Committee, the Court stated that the tariffs were to be construed strictly according to their plain meaning and evidence that the parties intended to deviate from the tariffs as filed with the C.T.C. would be "improper".

It is therefore clear from the cases that evidence of administrative practice and interpretation is admissible in evidence and that it may be assigned considerable weight where the provision under interpretation is ambiguous and the evidence supports one interpretation over the other. However, it remains in the discretion of the court to assign the weight to be given to such evidence. Thus it has been said that a particular administrative practice or interpretation should not be given

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[156] (1987) 79 N.R. 13 (F.C.A.).

weight where the result is to make bad law.[157]

The courts in Canada therefore seem to follow the same principles as in the United States in this regard. The American position has been described as follows:

> Rulings of a department cannot be followed where they are not uniform, where the statute is in the opinion of the Court clear and free from ambiguity, so that the administrative construction would substantially alter the law; where, though the statute is somewhat doubtful, the rulings appear to the Court as unreasonable; or where the statute is in terms applicable to certain situations and the administrative has set itself up as a legislator to supply omissions and defects in the law by applying it elsewhere.[158]

It is reasonable to assume that administrative practice will continue to play an important role as an extrinsic aid to the interpretation of statutes. Today's statutes, and, even more so, its regulations, are so complex and technical, so specialized in one particular area, that judges cannot possibly have the knowledge and experience to understand the nuances of all of them. Thus we see a certain curial deference to the administrator or the specialized tribunal which is assumed to

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[157] Strand Securities Ltd. v. Caswell, [1965] Ch. 958 in which Lord Denning stated that the administrative practice of the land registrar of insisting that a lessee produce his landlord's land certificate before being able to register his lease was bad law in that the lessee had no legal right to compel the landlord to give him the document. Lord Denning therefore refused to give any weight to the administrative practice when interpreting the statutory provisions.

[158] "The Supreme Court on Administrative Construction as a Guide in the Interpretation of Statutes" (1927), 40 Harvard L. Rev. 469.

have the requisite knowledge.[159]

Finally, another principle was set out by the House of Lords in Commissioners of Income Tax v. Pemsel, namely, that where a statute is re-enacted it must be taken that the legislature was conversant with the way in which the provisions of the statute were being administered by the appropriate government department. In not changing the wording of the statute, it is reasonable to assume that the legislature adopted the meaning placed upon the words by those who administered the statute.[160] Where an administration seeks to change its practice in respect of a statutory provision, therefore, it would be wise to change the wording of that provision at the same time. Otherwise, the general populace will rely on the old interpretation and the courts, in the interests of fairness and justice, will support them.[161]

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[159] This curial deference is similar to that identified by H. Wade MacLaughlin, in respect of judicial review in "Judicial review of administrative interpretations of law: How much formalism can we reasonably bear?", (1986), Univ. of Toronto L.J. 343. See Part IV for a discussion of the use of explanatory notes in the interpretation of regulations.

[160] [1891] A.C. 531, 591.

[161] Query - if the wording were not changed, how long would the new administrative practice have to be in force before it would be given weight by the courts? Also, note subsection 45(4) of the federal Interpretation Act which provides that when Parliament reenacts a provision, it is not deemed to have adopted any judicial interpretation of that provision that may have been made.

CONCLUSION - KNOWLEDGE AND EXPERIENCE OF THE JUDGE

As has been seen, the courts use dictionaries, scholarly writings, judicial notice and administrative practice as a matter of course in interpreting statutes. Few even find it necessary to state what they are doing but, when they do, they tend to categorize these sources as "extrinsic aids".

It is clear that they are extrinsic in the sense that they are not set out in detail in the body of a statute. However, they are imported into the statute by every person who reads it, as part of what Dickerson has described as the cognitive function, that is, the initial perception of meaning.[162] As a judge reads a legislative provision, he applies to it his knowledge of ordinary dictionary meanings of words, his general knowledge of how the world functions or what events have taken place and his knowledge of how, in practice, such provisions have been administered. The judge does not consciously have to identify some ambiguity in the provision he is attempting to understand. He will apply his knowledge automatically, in a flash, probably being quite unaware that he is doing so. It is only when asked to explain how he came to a particular conclusion as to meaning, or when he wishes to verify or confirm that his initial conclusion is justifiable, that he will resort to a

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[162] Reed Dickerson, The Interpretation and Application of Statutes (Little, Brown & Company, Toronto: 1975).

dictionary or state that his view is known by everyone.

In this sense, then, these aids are not truly extrinsic but come as part of the interpretive baggage that everyone brings to the reading of a document. They may be seen as part of the general context of all enactments and, as such, are always admissible.

It is as well that they are always admissible for in many cases they are imported into the decision-making process unconsciously by the judge. By identifying all these sources as extrinsic aids, however, we may require the judge to articulate his usage of these sources and to indicate the weight that he assigns to them.

Once admissibility is established, the real question becomes one of weight. An analysis of the cases shows that the courts have established a number of principles for the weighing of such "evidence". Principal among these is that the dictionary, scholarly writing or other source is assigned weight according to its reliability and authoritativeness. In addition, we have seen that sources that are more specific to the context of the legislation carry more weight. These sources may not be relied upon if they contradict the clear meaning of the statute.

The one area in which problems do arise is that of unacknowledged judicial notice. It is impossible to determine

the degree to which a judge's "interpretive baggage" influences his decisions. McNellie's suggestion that that influence may be reduced by the introduction of legislative history is a good one. However, the proposition is too narrowly stated. Since it is clearly established by the cases that a judge may not rely on judicial notice that contradicts evidence placed before the court, the greatest constraint on the judge's freedom to decide is the introduction of such evidence. In addition, other extrinsic aids such as scholarly writings will have an effect on reducing the judge's reliance on his own knowledge and experience.

PART III - RELATED STATUTES AND TREATIES

In this Part, interpretation acts, statutes in pari materia and treaties are discussed. It is a well established principle of interpretation that these aids are admissible as extrinsic aids in the interpretive process.[163] Interpretation acts and statutes in pari materia may also be admitted by way of judicial notice. Given that all judges are assumed to know the law of their own jurisdiction, the use of these aids may not always be acknowledged. Where they are acknowledged, they are accorded less weight than the enacting provisions of the statute. Even where they are not acknowledged, we may assume that the litigants before the court are also knowledgeable in the law of the jurisdiction. If they wished a different interpretation, they would therefore distinguish the interpretation act or other legislation that deals with a similar subject matter in argument and lead evidence to contradict it. In such a case, the related statute or treaty would be accorded less weight. Interpretation acts, statutes in pari materia and treaties, therefore, are given weight according to their closeness to the provision under interpretation and to their persuasiveness in relation to other sources of interpretive assistance that throw light on the provision.

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[163] E.A. Driedger, Construction of Statutes, 2nd ed. (Butterworths, Toronto: 1983) at page 158.

INTERPRETATION ACTS

All jurisdictions in Canada have an interpretation act. An interpretation act has two main functions: to set out the rules in respect of how to read a statute, including the significance to attach to certain aspects of it such as headings and marginal notes, and to establish a dictionary of meanings for certain words and expressions used in statutes. In some jurisdictions, there is also a third function emerging i.e. to set out those aids that may be used in the interpretation of statutes in that jurisdiction. Any person required to interpret a statute should therefore first study the interpretation act of the jurisdiction.

Elements of the Statute

The federal Interpretation Act,[164] like many provincial ones, deals with the "four corners" of the statute and sets out general principles of statutory interpretation. Thus, the purposive approach to statutory interpretation has been given statutory force by its inclusion in section 12 of the Interpretation Act, which states:

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[164] R.S.C. 1985, c. I-21. All subsequent references are to the federal Act unless otherwise indicated.

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[165]

A similar provision may be found in provincial interpretation acts and in the interpretation acts of such countries as New Zealand and Australia.[166]

In keeping with these provisions and included as an aid in carrying out their tenor, section 13 of the federal Act reads

> The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.[167]

This provision is simply a statutory statement of the common law

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[165] This section has been specifically relied on in some cases, for example, Reference re Validity of Regulations as to Chemicals, [1943] S.C.R. 1, [1943] 1 D.L.R. 248 and R. v. Lauzon [1943] 2 D.L.R. 791, 79 C.C.C. 312 (Qué K.B.)

[166] Quebec: Loi d'interprétation, R.S.Q. 1977, c. I-16.
Ontario: Interpretation Act, R.S.O. 1980, c. 219, s. 10.
Nova Scotia: Interpretation Act, R.S.N.S. 1967, c. 151, s. 8(5).
Uniform Interpretation Act, 1973, s. 9.
New Zealand, Acts Interpretation Act 1924, s. 5(j).
Australia, Acts Interpretation Act 1901, s. 15 AA(1). See also E. Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's", (1985), 35 University of Toronto Law Journal 113 for a discussion of these provisions.

[167] Compare:
Quebec, supra, footnote 166, s. 40
Ontario, supra, footnote 166, s. 8
Nova Scotia, supra, footnote 166, s. 10
Uniform Interpretation Act, supra, footnote 166, s. 10
New Zealand, supra, footnote 166, s. 5(e)

position on preambles. It is little help, however, in determining whether a preamble may be used to cut down or enlarge a provision of the enactment. For this, resort must be made to the principles developed under the common law.[168]

Similarly, section 14 of the Interpretation Act restates the common law position on marginal notes; they are not part of the enactment and are inserted for convenience of reference only. The Act therefore specifically provides that marginal notes are extrinsic to the statute. As has been seen, however, case law in England and Canada is now moving to admissibility with the emphasis being placed on how much weight marginal notes may be accorded.[169]

In some jurisdictions, headings are also listed as mere reference aids that are not part of a statute.[170] They are not mentioned in the federal act but, by way of judicial decision, they are regarded as more important than marginal notes and are used in statutory interpretation. In A.G. of Canada v. Jackson,[171] the Supreme Court of Canada applied to a heading the

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[168] supra, Part II.

[169] supra, Part II.

[170] Ontario, supra, footnote 165, s. 9
Uniform Interpretation Act, supra, footnote 166, s. 11
New Zealand, supra, footnote 166, s. 5(f).

[171] [1946] S.C.R. 489, 495 per Kellock, J.

same principle used in regard to preambles. The Court held that a heading could not be used to control the clear words of a statutory provision following it. Case law has ultimately triumphed over interpretation acts so that in a jurisdiction such as Ontario, where the interpretation act specifically states that headings are not part of a statute, headings are still admitted as aids in interpretation and may be given considerable weight in the formulation of a decision.[172]

The case law therefore demonstrates that the Interpretation Act is a codification of principles of statutory interpretation developed at common law. Furthermore, it is susceptible to being superseded by common law developments. The result is that the Interpretation Act carries virtually no weight. Where it duplicates an accepted tenet of the common law, there is no reason to cite it in support. Where it is contrary to current trends in the common law, it is simply ignored.

Interpretation Acts as Extenders of Meaning

The provisions of an interpretation act may also be used to extend the meaning of words and expressions used in a statute. As such, an interpretation act is a basic tool of the legislative drafter and drafting manuals exhort the drafter to rely on its

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[172] see, for example, the Skapinker case, discussed in Part II.

provisions wherever possible.[173] The drafter may therefore draft a provision authorizing the appointment of a public officer and be assured that, by the application of a provision such as subsection 24(1) of the Interpretation Act, his provision also authorizes the termination of the appointment, the re-appointment of the public officer and the appointment of someone else in place of the public officer first appointed under the power. It is not even necessary to state that such an appointment is "during pleasure" as this is covered in subsection 23(1).

Similarly, section 15 of the federal Interpretation Act provides that a definition in one enactment applies to all other enactments dealing with the same subject matter, unless there is a contrary intention in the other enactment. This provision is really an aspect of statutes in pari materia discussed later in this Part. It is, however, crucial to the interpretation of statutes.

An interpretation act may be seen, therefore, in the same light as a dictionary. In the same way as it is not necessary to define in a statute a word that is to bear its ordinary, dictionary meaning, it is not necessary to define a word or

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[173] E.A. Driedger, Composition of Legislation, 2nd. edition (Department of Justice, Ottawa: 1976), at p. 108; G.C. Thornton, Legislative Drafting (Butterworths, London: 1979) at p. 97; Sir William Dale, Legislative Drafting: A New Approach (Butterworths, London: 1977) at p. 292; Commonwealth Secretariat, Legislative Drafting (Commonwealth Secretariat, London: 1978) at p. 4.

expression that is to bear the meaning set out for it in the appropriate interpretation act. A person interpreting a statute in a jurisdiction that has an interpretation act must be very familiar with the provisions of that act for that act imports into the four corners a meaning well beyond that which is, in Frankfurter's words, "discernible to the critical eye". An interpretation act may also be seen as a form of judicial notice. Every judge is assumed to know the law of his jurisdiction and the interpretation act of that jurisdiction is an important part of that law.

Interpretation Acts as Definers of Extrinsic Aids

In addition to using an interpretation act as an aid to interpretation in itself, some jurisdictions have attempted to give more force to their interpretation acts by introducing provisions that delineate the kinds of interpretative aids that may be used in interpreting its statutes. In the process, they offer a kind of definition of what constitutes an extrinsic aid.

The Interpretation Act 1960 of Ghana, for example, provides as follows:

> 19.(1) For the purpose of ascertaining the mischief and defect which an enactment was made to cure and as an aid to the construction of the enactment a court may have regard to any text-book or other work of reference, to the report of any commission of enquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly.

(2) The aids to construction referred to in this section are in addition to any other accepted aid.

This provision greatly adds to the types of extrinsic aids admissible in Ghana by adding the Bill, a memorandum published "by authority" and papers laid before the National Assembly, a list that is close to a definition of travaux préparatoires. It is to be noted that debates of the Assembly are specifically ruled out. Unfortunately, section 19 has not been judicially considered in Ghana.

In Australia, an amendment to the Australian Acts Interpretation Act 1901 made in 1981 enshrined the common law principle that the purpose of a statute must be considered in any interpretation of the statute.[174] New provisions were enacted by Act No. 27 of 1984 to adopt principles similar to the recommendations expressed in the 1969 report of the Law Commission and the Scottish Law Commission on the interpretation of statutes[175] even to the extent of including the record of debates in either House of Parliament as admissible in aid of

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[174] "Guidelines for Interpretation in Australia" [1981] Stat.

[175] Report of the English and Scottish Law Commissions on the Interpretation of Statutes (Law Com No. 21; Scot Law Com No. 11), 1969.

interpretation.[176]

Nothing has come of the English and Scottish Law Commissioners' proposals for the use of extrinsic aids in the interpretation of statutes in the United Kingdom. Their "extreme" proposal that travaux préparatoires should be considered by the courts was not met with approval by the Renton Committee set up to study the Report[177] and the inclusion of such a provision in Lord Scarman's first Interpretation Bill to the House of Lords, 1979-80, was doomed to failure for its inclusion of this recommendation.[178] Although the Renton Committee fully supported the Commission's recommendation to introduce a provision endorsing the purposive approach, Lord Scarman's revised bill, 1981, passed in the House of Lords but did not pass the Commons.[179] The principle features of the bill to be noted are that it did not require that an ambiguity exist before extrinsic aids were admissible, and it allowed reference to be

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[176]The text of the amendment to the Australian Acts Interpretation Act is set out in Appendix 1. See Part IV for a discussion of Re Bolton [1987] 162 C.L.R. 514, in which the High Court of Australia referred to the new Acts Interpretation Act provision as authority for the admission of the speech of the Minister at second reading of the Bill.

[177]Right Hon. Lord Renton, Q.C. "Interpretation of Legislation" [1982] Stat. L. Rev. 7.

[178]"Reform of the Law Making Process" (1980), 130 New Law Journal 177.

[179]F. Bennion "Legislative Technique: Another Reverse for the Law Commissions' Interpretation Bill" (1981), 131 N.L.J. 840, W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983), 7 Dalhousie L.J. 7.

made to everything printed within the Act i.e. punctuation, headings and sidenotes and to reports of Royal Commissions and international agreements. In addition, any document laid before Parliament was to be admissible e.g. government white papers and, finally, any other document that was referred to in the statute being interpreted as being relevant to the interpretation of that statute. The last provision would have opened the way to the preparation of explanatory memoranda to statutes on the European model. However, apparently England is not yet ready for a move in this direction.

An interpretation act may, therefore, be used not only to set out common law principles in respect of aids to statutory interpretation, but also to add new principles not yet accepted by judicial decision.

STATUTES IN PARI MATERIA

The principle of pari materia is based on the assumption that the legislature is consistent in its use of terminology. Thus a court interpreting an ambiguous provision of a statute may look to a statute in pari materia for assistance in interpreting that provision. Two statutes are said to be in pari materia where they deal with the same subject-matter and are closely related in such a way that they form a system or a code of legislation.[180]

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[180] Palmer's Case (1785), 1 Leach C.C. 4th. ed. 355.

In Regina v. Lawrie and Pointts,[181] the court used this principle to determine the meaning of "counsel" and "agent" under the Provincial Offences Act which, it was argued, constituted "an exception otherwise provided by law" to the injunction in the Law Society Act that no person act or hold himself out as or represent himself to be a barrister or solicitor unless he were a member in good standing of the Law Society of Upper Canada. The court sought assistance from other provincial acts dealing with who might represent a person before a court or tribunal, including the Courts of Justice Act, the Police Act and the Legal Aid Act, to conclude that an agent under the Provincial Offences Act need not be a member of the Law Society. There was therefore an exception provided by law to the Law Society Act and the case against the accused was dismissed, with the observation by the court that a new trade or calling of para-legal had been created by the various acts of the legislature.

The Ontario Lawrie and Pointts case was distinguished in British Columbia in Law Society of B.C. v. Lawrie, a similar application to the court to establish who might be authorized as an agent to represent persons before the courts.[182] The British

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[181] (1987), 58 O.R. (2d) 535, 19 O.A.C. 81 (Ont. Distt. Ct.).

[182] (1988), 46 D.L.R. (4th) 456, [1988] 1 W.W.R. 351 (B.C.S.C.).

Columbia Supreme Court found that an apparent conflict between the B.C. Barristers and Solicitors Act and the Offence Act could be resolved by restricting the meaning of the word "agent" found in the latter Act in such a way that it meant an agent who is not prohibited by the former Act from practising law. This meant that an agent who performed that function without remuneration could appear for defendants. Those who charged fees, however, could not. In coming to this conclusion Shaw, J was clearly influenced by his interpretative baggage for he devotes two paragraphs in the judgment to a discussion on how an unrestricted meaning of "agent" would result in unqualified people, even disbarred lawyers and former criminals, being able to represent clients in court.

In C.B. v. The Queen, the Supreme Court of Canada used the pari materia technique to compare the provisions of the Juvenile Delinquents Act and the Criminal Code in relation to whether "without publicity" meant "in camera".[183] Chouinard, J, speaking for the Court concluded that it did because the Criminal Code provision that uses "without publicity" in relation to juvenile offenders was followed by a section that provided that adult offenders be tried in "open court".[184] Peculiarly, he did not seem at all concerned that "in camera" is a well-known term of art that any reasonable person would expect would be used if that

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[183] [1981] 2 S.C.R. 480.

[184] ibid., at page 491.

were the result intended. An examination of the case strongly suggests that the Court was greatly influenced by its own interpretative baggage. Chouinard, J. even compared the Canadian Act with the equivalent English one. The comparison revealed that the two Acts vary significantly in wording, but both provided that newspaper reports of the trial of a juvenile offender could not identify the juvenile.[185] The English Act, however, was clear in allowing newspaper reporters to be present for the hearing. This did not lead Chouinard, J. to conclude that the Canadian Act did likewise. It is rather unclear from the case, therefore, why he made the comparison at all, unless it was to demonstrate the inadequacies of the drafting of the Canadian Act.

The comparison by the courts in C.B. of statutes of different jurisdictions, even of different countries, is not an isolated case. Thus in Canada (Attorney General) v. Canadian Pacific Ltd.,[186] the Supreme Court of Canada sought assistance from the English Workmen's Compensation Act to determine the meaning of "insurable earnings" under the Unemployment Insurance Act. The Court observed that the phrase in the English Act had been interpreted in two important decisions in the English Court of Appeal and the House of Lords and stated:

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185 ibid., at page 487.

186 (1986), 66 N.R. 321.

> That Parliament used the word "earnings" .... is clearly indicative of its intention having regard to decisions on the meaning of the word in a statute of the same nature, i.e., one dealing with social security.[187]

Considerable dangers may be encountered with such an approach, however. To compare a Canadian statute with an English one may be appropriate where the Canadian statute actually derives from the English one and neither has undergone significant amendments since the adoption of the Canadian statute. Where the two statutes have developed independently, however, or where the Canadian statute did not derive from the English one, no reliance should be placed on a comparison between the two. This can be clearly illustrated by the case of Hill v. The Queen.[188] The issue in that case was whether the Ontario Court of Appeal had the power, on an appeal by the accused against sentence, to increase the sentence in the absence of an appeal by the Crown. The decision of the Supreme Court of Canada was in favour of the Court of Appeal's assertion of such a power.

In his dissenting judgment, Chief Justice Laskin compared the wording of the Criminal Code with a similar provision in English legislation.[189] He pointed out that the English Parliament had, in giving the power to vary a sentence, included specific words to indicate that the sentence could be increased or decreased.

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[187] at page 328.

[188] [1977] 1 S.C.R. 827.

[189] at page 833.

No such wording appeared in the Criminal Code. He therefore concluded that no such power was intended in Canada.

Mr. Justice Pigeon, on the other hand, held that the English provisions were irrelevant. He stated that certain parts of the Criminal Code were taken verbatim from the English legislation but that this was not the case with the section before the Court. He went on to say:

> I should also say that I doubt very much whether, in any case, the omission in an enactment of some words found in a similar enactment of another jurisdiction can ever have the effect of restricting the clear meaning of the words actually used. Would not this imply that words used elsewhere could never be omitted as surplusage?[190]

There is no doubt that Mr. Justice Pigeon stated the principles correctly. The theory behind the concept of pari materia is that the legislature is assumed to be consistent in its enactments and that those enactments form a body or code of legislation. The same could not be said of legislation emanating from another jurisdiction.

Another interesting aspect of the case lies in the comments made by Chief Justice Laskin in reference to how the personality and predisposition of the judge may influence the outcome of the case. He specifically stated that the conclusion reached by the individual judge will be influenced by his own particular views

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[190] at page 857.

of what the Supreme Court of Canada's jurisdiction and role should be.[191] It is not often that such a direct statement as to the influence of interpretative baggage is found in a case. It also makes clear why Chief Justice Laskin made the comparison between the Criminal Code provisions and the English legislation. He decided in his own mind that it was unfair for an accused to have to risk having his sentence increased on appeal against sentence because such a risk would deter accuseds from bringing legitimate appeals against sentence. He then had to look around for whatever source would tend to support his decision. The discrepancy between the Canadian and the English legislation tended to support his proposition and so he used it.

Where the legislature has defined a certain word in one statute and has used the same word in a similar connection in a later statute dealing with the same subject-matter, the definition applies in the later statute, unless there are indications of a contrary intention in that later statute.[192] Regardless of whether the later statute is a replacement for the earlier one or a totally new statute, the converse is also true. Where a subsequent statute in pari materia uses wording that is

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[191] at page 831.

[192] Lennon v. Gibson & Howes Ltd., [1919] A.C. 709, 714, per Lord Shaw, re definition of "sugar cane received". This rule is also contained in subsection 15(2) of the federal Interpretation Act which provides that a definition in a statute applies to the statute, any regulations made thereunder and all other enactments relating to the same subject-matter unless a contrary intent is shown.

different from the wording in the earlier statute, it may be implied that the change in wording is intended to convey a change in meaning.[193]

This principle of interpretation must be used with considerable caution, however. Subsection 45(2) of the Interpretation Act provides that an amendment to an enactment is not deemed necessarily to change the law. In addition, as drafting techniques and standards change, the language of statutes hopefully becomes plainer and clearer. No change of meaning, however, is intended in such a case. Perhaps the best example is provided by the 1985 Revised Statutes of Canada which contain considerable changes in terminology and wording in the French version. These changes were made, not out of any intention to change the meaning, but rather out of a desire to improve the standard of the French version, to use more modern terminology and to better parallel the English version whilst maintaining integrity in the French language. Another example is provided in the old English case of Re Wood in which Mellish L.J. stated:

> It appears to me that the framers of this Act thought it would be an improvement to omit words as to intent in the cases where it is not necessary to prove such an intent, the words being then surplusage and misleading; and I think they may have been very properly left out without in any way altering the law.[194]

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[193] City of Ottawa v. Hunter (1900), 31 S.C.R. 7, per Taschereau J. at p. 10; Re Peralta (1985), 16 D.L.R. (4th) 259.

[194] (1872), L.R. 7 Ch. App. 302 at p. 306.

Thus when deciding whether a change in meaning was intended, it is important to consider first whether the change in language demands a change in meaning or whether it permits a change in meaning. In the latter case, the statute as a whole must be examined to determine whether the sense of its provisions requires the conclusion that a change of meaning has occurred.[195]

Not all pari materia statutes will be prior in time to the statute that is being interpreted. However, though a later statute cannot be taken to demonstrate the intention of the legislature at the time of the passage of an earlier statute, the legislature may in the later statute make some declaration or include a definition that throws light on the earlier statute. Similarly, the later statute may indicate that the legislature made certain assumptions as to the construction of the earlier statute.

Once the court finds that a statute is in pari materia, it is clearly admissible. The weight accorded to it, however, will vary in accordance with whether direct testimony has been given, the closeness of the subject matter and, where applicable, the closeness of the other jurisdiction in terms of its legal structure and social fabric.

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[195] Lord Howard de Walden v. I.R.C., [1948] 2 All E.R. 825, 830 per Lord Uthwatt.

INTERNATIONAL TREATIES AND CONVENTIONS

Where a statute is passed in order to fulfil obligations under an international treaty or convention, the treaty or convention is admissible in evidence to assist in the interpretation of the statute, even if the treaty or convention is not specifically referred to in the statute.[196] Although the words of the international treaty or convention may not be identical to those of the domestic statute, if they are similar, there is no presumption that a different meaning was intended as the legal terms of art of the international community may not be the same as those of the domestic country.[197]

An international agreement is treated by the courts as clearly falling into the category of "extrinsic aids". The Vienna Convention on the Law of Treaties is the international equivalent of a domestic interpretation act. The Convention sets out various principles to be followed by signatory countries when interpreting international agreements. For example, article 31 provides that a treaty is to be interpreted in light of its object and purpose and "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the

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[196] Saloman v. Customs and Excise Commissioners, [1967] 2 Q.B. 116.

[197] Post Office v. Estuary Radio, [1967] 1 W.L.R. 847.

treaty" may be used to interpret the treaty.[198] Article 32 goes on to allow specifically for recourse to the preparatory work of the treaty as a tool of interpretation but only to confirm the meaning resulting from the application of article 31, to resolve an ambiguity that might arise from the application of article 31 or where the application of article 31 leads to an absurd or unreasonable result.

It is clear that these provisions speak both to admissibility and to weight but a court interpreting a treaty retains its discretion to assign weight. Thus in Schavernoch v. Foreign Claims Commission[199], the Supreme Court of Canada held that an international agreement could not be used to contradict the clear words of a regulatory provision. The issue before the Court was whether the appellant qualified to receive compensation from the Canadian government for property seized from her by the government of Czechoslovakia when she was resident there just after the Second World War. An Agreement between Canada and Czechoslovakia provided for the payment of a certain sum of money by Czechoslovakia to Canada in respect of claims made by persons who were Canadian citizens at the time the Agreement was signed (1973) and who were Canadian citizens at the time their property

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[198] For text of the Convention, see S. Rosenne, The Law of Treaties: A Guide to the Legislative History of the Vienna Convention (Oceana Publications Inc., Dobbs Ferry, N.Y.: 1970). See also R. v. Parisien, [1988] 1 S.C.R. 950.

[199] (1982), 136 D.L.R. (3d) 447.

was seized (1948 in the case of Schavernoch). Whilst the Agreement did not define "Canadian citizen", there was evidence to show that the Canadian ambassador responsible for the negotiation of the Agreement had agreed with the Czechoslovak government that nationality was determined by dominant nationality. This interpretation appeared in a report of the Ambassador that formed part of the travaux préparatoires of the Agreement. Under this interpretation, the appellant would have been ineligible for compensation because she had spent most of her life preceding the seizure of her property in Hungary or Czechoslovakia. Her dominant nationality was therefore not Canadian. The Foreign Claims (Czechoslovakia) Settlement Regulations that were made to implement the compensation scheme in Canada, however, included a definition of the term "Canadian citizen" that made no mention of dominant nationality. The Court found, therefore, that it should not look beyond the clear words of the regulatory provision to either the Agreement or the travaux préparatoires. The report of the ambassador could have been used to fill in the gap as to the meaning to be assigned to "Canadian citizen" were it not for the plain words of the domestic regulatory provision. Even though the report of the ambassador may have demonstrated the intention of the international agreement, the Court assigned no weight to it. Miss Schavernoch therefore received her compensation.

It is interesting in this context to note the comment by Miers and Page that travaux préparatoires are admissible "if they are readily accessible."[200] There is no discussion by them, however, as to what would be readily accessible or whether an argument could be made that, one party having found that the travaux préparatoires were not readily accessible, the other party could not make reference to them. The comment also contradicts the clear wording of the Vienna Convention.

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[200] D.R. Miers and A.C. Page, Legislation (Sweet and Maxwell, Toronto: 1982, page 190). In Canada, the Access to Information Act classifies these documents as confidential and establishes a 20-year waiting period before they may be accessed.

Conclusion - Related Statutes and Treaties

Interpretation acts are complex aids to the interpretation of statutes. In part, they may be seen as a simple codification of long-established common law principles of interpretation; in part, as a dictionary of words and phrases. The interpretation act of a jurisdiction is supposed to be well-known to all who interpret statutes. It is not within the four corners of the statute to be interpreted but, like the dictionary, its provisions are, or ought to be, in the minds of those reading statutes and in the minds of the drafters of the statutes. Interpretation act provisions, therefore, should carry considerable weight.

Several factors, however, diminish their weight. The statute being interpreted may demonstrate a contrary intent that renders the interpretation act irrelevant. Also, changes in the common law may have superseded the interpretation act. Such changes are probably inevitable in a multi-jurisdiction country such as Canada. The weight assigned to the interpretation acts is accordingly reduced. The Ontario experience with headings demonstrates clearly that the courts will disregard the interpretation act and develop their own rules for assigning weight.

Those interpretation acts that set out a list of extrinsic aids that may be employed in interpreting statutes, however, fall into a different category, as those provisions do not in themselves provide meaning but rather point out a source where meaning may be found. However, given the changes in the common law in many jurisdictions in respect of the use of legislative materials, interpretation acts such as that of Ghana may simply be attempting to codify the common law. Certainly, the provisions of the Ghanaian Act are addressed to admissibility and give no guidance whatsoever as to weight.

Statutes in pari materia and treaties are clearly outside the printed text of a statute. Pari materia statutes in the jurisdiction of the judge are assumed to be known by the judge and, as such, could be seen to be intrinsic. They carry greater weight than statutes outside the jurisdiction as they are closer to the provision under construction and can be seen as more reliable indicators of the focus of the legislation of that jurisdiction. Knowledge of statutes of other jurisdictions or of treaties are not necessarily present in the mind of the reader of the statute. They have been subject to influences that may differ greatly from those of the jurisdiction of the provision under interpretation. As such, these statutes are accorded less weight than statutes in jurisdiction.

Statutes in pari materia and treaties are assigned weight by the courts according to whether they contradict the clear words of the statute, in which case they bear no weight[201] or whether they help to resolve an ambiguity in a statute, in which case the interpretation that best reconciles the statutes that are in pari materia or that best reconciles the statute with the international treaty is favoured and weight is accordingly assigned to the statute or treaty.

Thus a statute or treaty cannot be used to contradict the clear words of a statute. This principle recognizes the statute as the major vehicle of intention and acknowledges that there may be an intent on the part of the legislature to deviate from the other enactment or even to deviate from the international treaty whilst still respecting its general intent. In the Schavernoch case, therefore, it may be that the policy of the government in respect of compensation changed, between the negotiation of the agreement and the making of the regulatory provision establishing the compensation scheme, to a more expansive approach that would embrace persons whose dominant nationality was not Canadian. Such an expansion of eligibility did not offend against the

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[201] Capital Cities Communications Inc. v. C.R.T.C., [1978] 2 S.C.R. 141.

Agreement as the number of possible recipients of compensation was only a factor in determining the amount to be paid by Czechoslovakia to Canada and the distribution of that amount once established was, by the very terms of the treaty, completely in the discretion of Canada. The Court therefore accorded weight to this later expression of intent.

PART IV - DEVELOPMENT OF THE STATUTE

This Part examines the most controversial area of extrinsic aids. It deals with those sources of interpretative assistance derived from the parliamentary process. The term "legislative history" is used as a catch-all to describe the diverse public sources that influence the development of a statute. These include commission reports, drafts of the bill as it proceeds through the House, reports of debates in Hansard, reports of parliamentary committees and speeches of Ministers both in and out of Parliament. The term "legislative history" is similar to the European expression "travaux préparatoires" which is used to describe all the texts relevant to the development of a statute.[202] This Part does not include the history of provisions as legislated, which is discussed in Part III.

As will be seen, many of these sources could also be classified under Part II as they are often part of the knowledge of the judge. The judge is assumed to know the law and these sources are part of the development of that law. In addition, they are often reported in newspapers or in official publications made available to the general public. As such, a judge could take judicial notice of them.

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[202] P.-A. Côté, Interpretation des Lois (Les Éditions Yvon Blais Inc., Cowansville (Qué): 1982), p. 371; Gérard Cornu, Droit Civil (Éditions Montchrestien, Paris: 1988), p. 132.

Legislative history has traditionally been classified by the courts as an inadmissible extrinsic aid. In this century, however, commission reports have come to be recognized as admissible for certain limited purposes. This relaxation of the inadmissibility principle in respect of commission reports is paralleled by a similar relaxation in respect of other legislative history sources. Thus, speeches of Ministers and reports of debates in Hansard have been recognized as admissible in constitutional cases.

The problem for those trying to apply the principles of limited admissibility for certain purposes is to understand what purpose the principles serve. Not only are they arbitrary in nature, but the false barriers break down in practice. The result is that commission reports are used for purposes for which they are not recognized to be admissible. Similarly, speeches and debates are sometimes admitted and used in non-constitutional cases.

This break-down of the stated principles in respect of legislative history leads to two conclusions. Firstly, that the lines between admissibility and inadmissibility are arbitrary and meaningless. The real deciding factors as to whether legislative history may be used are reliability and persuasiveness, which go to weight rather than admissibility. Secondly, the courts themselves are recognizing that the principles are untenable and are gradually eroding them.

COMMISSION REPORTS

Commission reports have become increasingly available to the courts in the 20th century. Although they are routinely admitted in evidence where the interpretation of a statute is in issue, the law in relation to how these reports may be used in interpretation is still in the process of development and is quite controversial.

Commission reports take many different forms, such as reports of law reform commissions, reports of royal commissions and reports of commissions of inquiry. What they all have in common is that they analyze the current law and make suggestions for its improvement. As interpretative aids, therefore, they not only set out the status of the law prior to the adoption of a statute but also demonstrate the kinds of problems that the statute is intended to resolve. They are therefore of significant value in applying the Mischief Rule in statutory interpretation.

In Eastman Photographic Co. v. Comptroller of Patents,[203] for example, the House of Lords had to interpret certain amendments that had been made to the English Patents, Designs and Trade Marks Act as a result of the report of a commission of inquiry into the workings of the Act. In his decision, Lord Halsbury stated that the correct procedure to follow was to compare the

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[203] [1898] A.C. 571 (H.L.).

former provisions, the problems that the amendments were intended to resolve and the amended provisions.[204] He found that the report of the commission of inquiry was the most accurate source of information as to the problems that the amendments were intended to resolve. He therefore used the report as his source in applying the Mischief Rule.

In 1934, counsel before the House of Lords in Assam Railways and Trading Company v. The Commissioners of Inland Revenue[205] attempted to extend the use to which commission reports could be put by arguing that they be used not only to determine the surrounding circumstances at the time of the enactment of the statute but also to interpret the statute itself. The commission report, he argued, would demonstrate the intention of parliament by setting out the purpose or object of the new statute. In the same way as Lord Halsbury applied the Mischief Rule by seeking his information on surrounding circumstances from the commission report, counsel proposed to apply the Golden Rule and seek his information as to object and purpose from the commission report. The Lords held that this was going too far. The commission reports could not be seen to illustrate the intention of Parliament, they said, because the recommendations made by the commissioners were not necessarily followed by Parliament.[206]

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[204] ibid., at page 576.

[205] [1935] A.C. 445.

[206] ibid., at p. 459.

The Supreme Court of Canada has approved the principles established in the Assam case.[207] As a result, commission reports are often used in Canadian courts, especially in constitutional cases, to provide historical background.[208] An analysis of the cases, however, indicates that the courts, even the Supreme Court of Canada itself, may go beyond those principles, whilst at the same time paying lip service to them. Thus in Laidlaw v. Municipality of Metropolitan Toronto,[209] the Supreme Court of Canada had to determine the way in which the amount of compensation payable on expropriation, under the Expropriation Act should be calculated.

The appellant argued that he was entitled to the difference between his actual cost of improvements and the increase, if any, in market value of the property. His improvements had not increased the market value of the property. The respondent argued that the appellant was entitled only to the market value

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[207] See e.g. Home Oil Distributors v. The Attorney General of British Columbia [1940] S.C.R. 444, [1940] 2 D.L.R. 609; Reference re Residential Tenancies [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 (S.C.C.); Morguard Properties v. City of Winnipeg (1983), 3 D.L.R. (4th) 1, 6 Admin. L.R. 206 (S.C.C.). It has also been applied in England - Letang v. Cooper [1965] 1 Q.B. 232, 240; and Australia - Dugan v. Mirror Newspapers Limited (1978), 142 C.L.R. 583 (Aus. H.C.).

[208] Québec Association of Protestant School Boards v. A.-G. of Québec (No. 2) (1982), 140 D.L.R. (3d) 33 (Qué. S.C.); R. v. Videoflicks (1984), 5 O.A.C. 1, 48 O.R. (2d) 395, 14 D.L.R. (4th) 10 (Ont.C.A.); Reference re Education Act of Ontario and Minority Language Education Rights (1984), 10 D.L.R. (4th) 491, 47 O.R. (2d) 1, 27 M.P.L.R. 1 (Ont. C.A.).

[209] (1978), 20 N.R. 515.

of the property. Spence J., speaking for the Court, stated that the Ontario Law Reform Commission Report entitled Basis for Compensation on Expropriation was admissible in evidence. He stated that it could not, however, be used to interpret the statute but only to determine the problems that the statute sought to address.[210]

He then went on to say that the Commission had identified confusion and uncertainty in the area of compensation for expropriation. The Commission had stated that much of the confusion would be dispelled if the Act stated clearly that owners were entitled to full indemnification for all monetary loss caused by expropriation. It also suggested a definition of compensation should be included and should include market value. Spence J. found just such a statement and such a definition in the Act and concluded that the legislators had adopted these recommendations of the Commission.[211]

In order to interpret the words of the particular provision of the statute, "an allowance for improvements the value of which is not reflected in the market value of the land", Spence J. consulted that part of the Commission Report under the heading "unmarketable improvements". He compared the wording of that part with the wording of the Act and found them to be

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[210] ibid., at p. 522.

[211] ibid., at p. 523.

identical.[212] That part of the Report clearly set out that it dealt with improvements that are of value to only an insignificant group of prospective buyers. He therefore concluded that the provision of the Act did not mean that the improvements had no market value but rather that their true value could not be recovered in an ordinary sale of the property because the number of potential buyers was so limited.

After having set out the rule of limited admissibility established in Assam, therefore, the Supreme Court of Canada went on to do exactly what the Assam rule prohibited it from doing. It used the Commission Report to interpret an actual provision of a statute. The Laidlaw case is not an isolated example of the tendency to go beyond the "mischief" and use commission reports to interpret specific provisions. The tendency is particularly noticeable in criminal cases. In R. v. Barnier, Mr. Justice Estey referred to the Royal Commission Report on Insanity, stating that the words "know and appreciate" had been specifically commented upon in the Report and even going so far as to quote the words of the Report in that regard.[213]

In 1983, in Morguard Properties Ltd. v. City of Winnipeg, Mr. Justice Estey repeated the principle set down in the Laidlaw case

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[212] ibid., at p. 526.

[213] (1980), 31 N.R. 273, at p. 288. See also R. v. Schwartz (1976), 8 N.R. 585, 609.

that commission reports are admissible solely as an indicator of the mischief, evil or condition that the Legislature sought to resolve.[214] They could not be used to interpret the provisions of the statute. He determined to resolve the issue in that case, he said, by directly examining the language of the Legislature and he makes no reference to the recommendations of the commission of inquiry in his judgment.[215] This is not to say that he was not influenced by it. Having set out the commissioner's findings that there were significant inequities between classes of properties, individual properties and taxing jurisdictions, it comes as no surprise to find that he concluded that the taxpayer's right to seek a review of his assessment was not affected by the two-year "freeze" on assessments.

Similarly, in 1988, in Hills v. Canada (Attorney-General), the Supreme Court of Canada considered the ambit of the word "financing" as used in connection with labour disputes in the Unemployment Insurance Act.[216] Madam Justice L'Heureux-Dubé traced the history of the provision back to England and commented on a recommendation made by the English Royal Commission on Trade Unions and Employers' Associations that a claimant should not be regarded as financing a labour dispute simply because he was a member of a trade union which was paying strike benefits to those

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[214](1983), 3 D.L.R. (4th) 1, 6 Admin. L.R. 206.

[215]at page 5 D.L.R., page 212 Admin. L.R.

[216][1988] 1 S.C.R. 513.

on strike.[217] It is hard to imagine that the interpretation placed on the provision by the Commission did not in some, albeit small, way influence her final decision. If it did not, she presumably would not have found it necessary to mention it in her decision.

In the recent case of R. v. Mailloux[218], Lamer, J., speaking for the Supreme Court of Canada, stated that a recommendation of the McRuer Commission had been adopted by Parliament and made part of the Criminal Code. The recommendation was that a court of appeal be given the jurisdiction, in cases where insanity was not adjudicated at the lower level, to set aside a conviction and substitute a verdict of "not guilty on account of insanity". His evidence that Parliament had adopted the recommendation was contained in a statement made by the Minister of Justice in the House of Commons during the debate on the proposed amendment to the Criminal Code. By referring to the McRuer Report, Lamer J. was able to reject the contention of the accused that the Court of Appeal could set aside a conviction and substitute an insanity verdict even where the issue of insanity had arisen and been

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[217] ibid., at page 536.

[218] [1988] 2 S.C.R. 1029. See also R. v. Edwards Books and Art Ltd. [1986] 2 S.C.R. 713 (sub nom R. v. Videoflicks in lower courts) in which Chief Justice Dickson relied upon the "suggestions" in the Ontario Law Reform Commission's Report on Sunday Observance Legislation (1970) that proposed legislation should be secular in nature to conclude that the Ontario Retail Business Holidays Act was not aimed at Sunday observance (at pages 744 to 745).

adjudicated in the lower court. The Report was clear in its recommendation of adding jurisdiction only in this limited instance. There is no discussion on the admission of the McRuer Report in evidence. It is introduced with a statement indicating that the Court saw the Report as part of the history of the provision. It was, however, clearly used to interpret a provision to exclude one possible meaning that it could otherwise have had.

In actual practice, then, the Supreme Court of Canada often fails to follow the principle that commission reports are admissible only for the limited purpose of establishing the mischief. This is not really surprising. The recommendations of commissions are generally a matter of public knowledge and frequently form the basis of newspaper articles. They are therefore known not only by the judge but also by the general public. In addition, even if the judge were to rely only on his reading of the commission report during the conduct of the case, it is very hard to consult a document for one purpose only. As one commentator has written:

> We should not be surprised at this, because it would seem to be very difficult for a court to admit a report and yet try to confine itself to a consideration of selective parts of that report for limited purposes without also considering comments that might relate to the meaning of certain provisions or to the recommendations that might suggest the inclusion of certain provisions. One thing would lead to another; the search for mischief would lead to a determination of purpose, and the court would, no doubt, be looking for specific answers to specific questions, whether they materialized or not.[219]

The distinction between admitting commission reports for the purpose of determining the mischief and admitting them for the purpose of interpretation is very arbitrary. It must also be very confusing for the courts, for it is clear that they do not follow it in practice, despite what they say. The courts would place themselves in a more credible position if they were to abandon the rule of limited admissibility. They would then be in a position to express clearly what the rule really is or ought to be. It is a rule as to the weight to be attached to the different elements of commission reports.

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[219] W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983), 7 Dalhousie L.J. 7, 34. It is also interesting to note that the Ontario Supreme Court has recently recognized in a judgment that compartmentalizing the mind in respect of certain information is impossible. In Appleton v. Hawes (unreported) lawyers for the defendant obtained confidential information from a private investigator who worked with the plaintiff. The plaintiff's lawyers were not present when the information was transmitted and were unaware that contact had been made. In requiring that the defendant's lawyers be removed from the record and the defendant retain other counsel, Mr. Justice Steele stated that it was impossible for the defendant's counsel to purge from his mind the privileged information that he had obtained.

The basis of the rule in the Assam case was that it is not possible to tell whether the intention of the legislature was the same as that of the commissioners. It would seem reasonable to assume, therefore, that the rule in Assam could be relaxed where a commission report is specifically mentioned in the preamble of an act. Case law, however, shows that this is not the case. In Swait v. Board of Trustees of the Maritime Transportation Unions,[220] the Superior Court of Quebec considered provisions of the Trustees Act. The preamble to that Act contained specific references to a commission report and to the findings and recommendations of that report. Three of the five judges hearing the case looked at the commission report to establish the mischief that the Trustees Act was intended to resolve. Of the two others, Owen J. found it unnecessary to consider the report because he found constitutional authority for the Act under "navigation and shipping". Rinfret J. stated

> ... il suffit de constater, au préambule de la loi sous étude, la raison pour laquelle le Parlement a jugé nécessaire d'édicter la loi:[221]

He would not therefore look behind the statement even though the clear wording of the preamble indicated that Parliament had intended to adopt the Report.

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220 [1967] B.R. 315.

221 ibid., at p. 329.

Where a draft bill is attached to a commission report and forms part of the recommendations of the commission, the situation is not so clear. In 1971, in Gaysek v. The Queen,[222] the Supreme Court of Canada considered the meaning of "false documents" for the purpose of a forgery case. The Justices were divided on whether a draft bill appended to the Royal Commission Report on the Revision of the Criminal Law could be used to interpret legislation worded in substantially the same way as the draft bill. The majority of the Court (three of the justices) held that no assistance could be drawn from the Report or the draft bill. In contrast, Justices Laskin and Hall, in dissent, held that the report provided "cogent reasons" for concluding that the law of forgery had not changed as a result of the enactment of the new Criminal Code. The terms of reference of the Commission were to rearrange and consolidate, which in itself suggested that no change in the law was intended. In addition, the Commission had provided a table of concordance which paired the provision under scrutiny with the old provision defining "false document", a fact that supported the view that no change in the law was made or intended. Justice Laskin also made reference to an explanation of the law of forgery contained in the Fifth Report of the English Criminal Law Commissioners, dated 1840, which formed the basis upon which the English and Canadian criminal law provisions in regard to forgery were drafted.

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[222] [1971] S.C.R. 888, 15 C.R.N.S. 345.

This attempted extension of the rule by Justices Laskin and Hall is reasonable in the context of the case, but runs counter to Lord Denning's statement of the Assam rule in Letang v. Cooper.[223] He said that it is legitimate to look at the report of a commission for the purpose of ascertaining the mischief that the Act was designed to remedy, but

> ... you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does decide to do something different to cure the mischief.[224]

Lord Denning's position is clearly untenable where the provision adopted by Parliament is identical to the provision proposed in the draft bill of the commissioners. In such a case, it seems unrealistic not to accept the interpretation placed upon the provision by the commissioners. It is reasonable to assume that the interpretation of the commissioners, having been placed before Parliament, must have been accepted by Parliament if no change in wording ensued.

That there appears to be a judicial move in the direction of using a draft bill of a commission as an aid in interpretation where it does not differ substantially from the act as finally passed is also seen in the 1975 decision of the House of Lords in

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[223] [1965] 1 Q.B. 232.

[224] ibid., at page 240.

Black-Clawson International Ltd. v. Papierwerke Waldhof - Auschaffenburg.[225] In the same way as the judges of the Supreme Court of Canada were divided on the issue, so were the Law Lords. The division was also 3 to 2 against using the draft bill. In his argument in support of using the draft bill, Lord Dilhorne stated

> While I respectfully agree that recommendations of a committee may not help much when there is a possibility that Parliament may have decided to do something different, where there is no such possibility, as where the draft Bill has been enacted without alteration, in my opinion it can safely be assumed that it was Parliament's intention to do what the committee recommended and to achieve the object the committee had in mind. Then, in my view the recommendations of the committee and their observations on their draft Bill may form a valuable aid to construction which the Courts should not be inhibited from taking into account.[226]

In addition, he thought that to admit the report for the limited purpose of establishing the mischief and not to consider the recommendations at the same time was to draw "an artificial line that serves no useful purpose". It is clear that, in order to select the information as to mischief, all of the Lords had to read the report in its entirety. Could they then expunge from their minds those parts which they thought to be inadmissible?

The most interesting aspect of the Black-Clawson case, however, is contained in the words of Lord Simon who said

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[225] [1975] 2 W.L.R. 513, [1975] A.C. 591.

[226] ibid., at p. 623, A.C.

> ... that experts publicly expressed the view that a certain draft would have such-and-such an effect is one of the facts within the shared knowledge of Parliament and the citizenry.[227]

He therefore appears to have used judicial notice as a device to make the draft bill and recommendations admissible for the purpose of interpreting the Act. In the alternative, because of his discussions of "experts", he could have applied the theory of admissibility of scholarly writings. Regardless of which head he brought the draft bill under, his argument is an argument for admissibility only. He makes it clear that the weight to be accorded to the draft bill and recommendations remains in the discretion of the Court.[228]

Unfortunately, in Black-Clawson both Lords were able to reach a conclusion on the case before them without having to rely on the draft bill and recommendations. Their statements are therefore obiter dicta. However, developments in the law often find their root in obiter dicta or in dissenting opinions of judges such as Laskin.

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[227] ibid., at page 651, A.C.

[228] ibid., at page 652, A.C.

Since the entry of the United Kingdom into the European Economic Community, there have been many cases in which E.E.C. legislation has had to be construed by the English courts and European rules of interpretation have been applied in those cases.

As the English courts grow more accustomed to the extensive use that is made of extrinsic aids in such cases, there is likely to be a move towards using similar rules in domestic cases. Thus, it has been said:

> The older, and narrower view of the function of the court is strongly entrenched but opinion is moving. The view which Lord Simon adopted would bring English practice a good deal closer to that of other E.E.C. nations than it has been hitherto: ... Whilst as yet, therefore, Lord Simon's plea for a broader approach to statutory interpretation may not have won general acceptance, it may be predicted that that is the way English (and Scottish) courts may be expected to go in the future.[229]

There is real hope that this may happen. When the Animals Act was before the House of Lords, Lord Wilberforce proposed an amendment to it specifically authorizing the use of a law commission report in the interpretation of the Act. The amendment was carried by a vote of 44 to 26, with all the Law

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229 Editorial, "Continental Practice and English Law" (1975), 4 Anglo-American Review 360.

Lords in favour of it, but was defeated in the Commons.[230] In time, however, this may change. Such a change would recognize what is occurring in practice, though not acknowledged. By moving away from principles of admissibility, discussion would be focused on the weight assigned by the courts to the different elements of the commission reports. The result would be a clearer statement of how judges make decisions and how much they are influenced by commission reports.

WHITE PAPERS, SPEECHES AND HANSARD

At common law, legislative history was not admissible in evidence in the courts.[231] The reason for exclusion was stated by Mr. Justice Willes in 1769 in the English case of Millar v. Taylor.[232] He said:

> 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.[233]

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[230] W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983), 7 Dalhousie L.J. 7, at p. 360.

[231] E.A. Driedger, Construction of Statutes, 2nd. ed. (Butterworths, Toronto: 1983), at p. 156.

[232] 4 Burr, 2303; 98 E.R. 201.

[233] ibid., at p. 2332.

This proposition, though not followed by Willes himself in that case,[234] was followed in The Queen v. The Bishop of Oxford in which the English Court of Appeal, though it admitted a speech made by the Lord Chancellor in a debate in the House of Lords, doubted whether the speech should have been admitted and preferred to come to its conclusion from a construction of the statute itself.[235]

Similarly, in Canada, in Gosselin v. The King, Tascherau, C.J. discussed the various opinions given in The Queen v. The Bishop of Oxford and stated that, when counsel began to read from Hansard the debates on the Canada Evidence Act,

> I did not feel justified in departing from the rule so laid down, though, personally, I would not be unwilling, in cases of ambiguity in statutes, to concede that such a reference might sometimes be useful.[236]

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[234] Willes went on to say on the very same page, "But to go into the history of the changes the bill underwent in the House of Commons - It certainly went to the committee, as a bill to secure the undoubted property of copies for ever. It is plain, that objections arose in the committee, to the generality of the proposition; which ended in securing the property of copies for a term; without prejudice to either side of the question upon the general proposition as to the right ..." at page 2333.

[235] [1879] 4 Q.B.D. 525, at pages 576 -578 and pages 599-600.

[236] (1903), 33 S.C.R. 255, at p. 264.

He therefore rejected the admissibility of the debates. It is to be noted however that, although he followed the general rule, he shows a willingness to admit debates under certain circumstances.

The exclusionary rule is not limited to debates reported in Hansard. In Viscountess Rhondda's Claim, where the issue was whether the Act enfranchising women had thereby entitled a peeress to sit in the House of Lords, the Lords rejected the admission of the journals of the House of Commons holding that entries in the journals are merely a record of the result of a debate in the House and, like the debate itself, are not admissible to explain the words in the Act as passed.[237]

In the twentieth century, there has been considerable debate as to the validity of the rule of exclusion of legislative history and some movement has been made away from its rigid enforcement. In arguments for and against admissibility, the fact that these materials are used in European courts and the United States has had a significant impact. Here, we will look at the development of the rule in England, Australia and Canada and then examine some of the arguments that have been put forward both for and against admissibility.

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[237] [1922] 2 A.C. 339, per Lord Wrenbury, p. 399.

It is to be noted that few of the cases actually set out comprehensive arguments for the positions taken. It is not always clear why this is so. In some cases, it may be that the judge believes the principles are so firmly established that there is no need to set them out in his decision. In others, it may be that the judge never turns his mind to whether the legislative history is admissible or not or whether it may be admitted for limited purposes only. It is also possible that, in some cases, the judge hopes that he can use the legislative history and gloss over the questions of admissibility and limited use. By so doing, he may access material that is right on point. At the same time, he does not place himself clearly in the position of rejecting established principles.

England

In 1958 in Escoigne Properties Ltd. v. Inland Revenue Commissioners, Lord Denning specifically rejected referring to Hansard as an aid to interpreting a statute.[238] In 1978, however, in Davis v. Johnson we find him introducing parliamentary materials to support his interpretation of the Violence and Matrimonial Proceedings Act 1976 as covering the situation of the

[238] [1958] A.C. 549, at p. 566 (H.L.).

unmarried mother before the court.[239] In rejecting the decision of the Court of Appeal in two previous cases where the interpretation of the same statute was in issue, Lord Denning, also sitting in the Court of Appeal, noted that in neither of those cases was the judge referred to the Report of the Select Committee on the Bill or the proceedings in Parliament at the time of the passage of the Act. Had they been so referred, he said, they would immediately have understood the intention of Parliament in passing the Act, and would have decided those cases differently. He went on to say:

> This shows how important it is that a court should, in a proper case, have power to refer to the report of a select committee or other travaux préparatoires. It will enable the court to avoid an erroneous construction of the Act; and that will be for the good of all.[240]

Unfortunately, he does not tell us how to decide which is "a proper case". He does, however, elaborate on his reasoning for allowing the use of legislative history. Whilst acknowledging that the courts in England were already prepared to admit parliamentary materials for the limited purpose of ascertaining the mischief that the Act sought to cure, Lord Denning quoted a passage from the judgement of Lord Simon of Glaisdale in the Black-Clawson case. In reference to the use of a commission report in interpreting an act, Lord Simon had stated:

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239 [1979] A.C. 264 (C.A.); [1979] A.C. 317 (H.L.).

240 ibid., at p. 276.

> Where Parliament is legislating in the light of a public report, I can see no reason why a court of construction should deny itself any part of that light and insist on groping for a meaning in the darkness or half-light.[241]

Having accepted that a review of the parliamentary materials would throw some light on the case before him, Lord Denning went on to say

> And it is obvious that there is nothing to prevent a judge looking at these debates privately and getting some guidance from them. Although it may shock the jurists, I may as well confess that I have sometimes done it. I have done it in this very case. It has thrown a flood of light on the position. The statements made in committee disposed completely of Mr. Jackson's argument before us. It is just as well that you should know of them as well as me.[242]

He then proceeded to examine statements made in the Standing Committee of Parliament during consideration of the bill.

On appeal, the House of Lords flatly rejected Lord Denning's argument for inclusion and held that legislative history could be resorted to only for the limited purpose of ascertaining the mischief to be corrected. For once, reasons for that rejection were given. Lord Diplock stated that no analogy could be drawn between proceedings in Parliament in the United Kingdom and the travaux préparatoires often examined by courts in European Economic Community countries. Community legislation is accompanied by an explanatory memorandum that is published in the

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[241] Black-Clawson v. Papierwerke Waldhop Auschaffenburg, [1975] 2 W.L.R. 513, [1975] A.C. 591, 622 (H.L.).

[242] supra, footnote 239, at p. 277 (C.A.).

Official Journal of the Community and is therefore of a very different character "from what is said in the passion or lethargy of parliamentary debate".[243]

Lord Scarman also commented on Lord Denning's use of legislative history. He stated that there are two good reasons why it should not be used. First, he said, legislative history is inherently unreliable and tends towards confusion rather than clarity.[244]

> The cut and thrust of debate and the pressures of executive responsibility, essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language. And the volume of Parliamentary and ministerial utterances can confuse by its very size.[245]

In addition, it was his view that the rule against using legislative history was a rule imposed by Parliament itself and could not therefore be changed by the judges. However, he went on to say that since England is now exposed to the methodology of the European Economic Community in interpreting its legislation, it might be appropriate for Parliament to adopt the E.E.C. style of introducing a lengthy preamble that identifies the materials that may be used in construing the legislation.

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[243] Supra, footnote 239 at p. 329 (H.L.).

[244] ibid., at p. 349.

[245] ibid., at p. 350.

Lord Dilhorne, on the other hand, stated that the reason for the exclusionary rule is essentially a matter of practicability.[246] Not only would counsel in every case be burdened with the obligation of sifting through many Hansards, but a court, once counsel had drawn its attention to some relevant passage in Hansard, would feel obliged to search further to see if there was any other relevant material. He was of the opinion that there would be difficulty for counsel in obtaining access to older reports of debates in Select Committees and in any case, in a very large number of instances, such a search of legislative history would throw no light on the question before the court. He went on to criticize Lord Denning's admission that he often looked at legislative history before a case started, holding that

> While, of course anyone can look at Hansard, I venture to think that it would be improper for a judge to do so before arriving at his decision and before this case I have never known that done. It cannot be right that a judicial decision should be affected by matter which a judge has seen but to which counsel could not refer and on which counsel had no opportunity to comment.[247]

This latter point was subsequently reiterated by the House of Lords in Hadmor Productions Ltd. v. Hamilton,[248] again a case in

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[246] ibid., at p. 337.

[247] ibid., at p. 337.

[248] [1983] 1 A.C. 191, [1982] 1 All E.R. 1042.

which the Lords rejected Lord Denning's use of Hansard at the Court of Appeal level. Lord Diplock, with whom the other Lords concurred, did not use the arguments for exclusion that he had used in Davis v. Johnson but adopted the view expressed in that case by Lord Dilhorne that it offended natural justice for a judge to rely on materials not drawn to the attention of the parties and on which counsel did not get an opportunity to speak.[249]

This is by no means the only occasion on which a judge may take counsel by surprise. As we have seen, the whole interpretative baggage of the judge is not put to counsel for the judge himself is unaware of many of these factors which influence his decision. The result may well be unfair in that counsel are not given an opportunity to cross examine on the parliamentary materials. Unlike the judicial notice situation, however, the problem could be easily solved for, if legislative history were recognized to be admissible for all purposes, then counsel would know to research this area before trial. Should something of significance arise out of that research, counsel would then be able to introduce it into evidence and each party would thus be assured the opportunity to cross examine on it.

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[249] ibid., A.C. p. 232; All E.R. p. 1055.

Lord Denning's enthusiasm was never curbed by these decisions adverse to his position. In Regina v. Local Commissioner for Administration for the North and East Area of England,[250] he got around the Lord's interdiction by consulting Professor Wade's textbook Administrative Law, which under the principles of interpretation in regard to the use of extrinsic aids he was entitled to do. In that textbook, Professor Wade had set out part of a public address given by the ombudsman to the Society of Public Teachers of Law which included passages drawn directly from Hansard. In this way, Lord Denning was able indirectly to gain guidance on the meaning that Parliament had given to the word "maladministration" in the Local Government Act, 1974. With tongue in cheek, he stated

> And we have not yet been told that we may not look at the writings of the teachers of law ... I hope therefore that our teachers will go on quoting Hansard so that a judge may in this way have the same help as others have in interpreting a statute.[251]

Despite some promising moves in that direction, however, it appears that the exclusionary rules in England are not about to change in the near future. In fact, in their 1969 Report on Statutory Interpretation, the Law Commissioners of England and

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[250] [1979] Q.B. 287.

[251] at p. 311.

Scotland proposed the retention of the exclusionary rule for debates in the legislature on the grounds of the difficulty of isolating information that could be useful to the courts and of making the relevant information available in a convenient and accessible form.[252]

Australia

Prior to the amendment of Australia's Acts Interpretation Act in 1984 to allow the introduction in evidence of documents approved by Parliament and designed to explain a statute,[253] Australian courts followed the exclusionary rule in regard to legislative history.[254]

In South Australia v. The Commonwealth, the reason given for exclusion was the impossibility of deciphering from the two Houses of Parliament and one hundred and ten voting members belonging to different parties and having opposing views, a coherent interpretation of the meaning of any particular

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[252] F. Bennion "Legislative Technique: Another Reverse for the Law Commissions' Interpretation Bill" (1981), 131 N.L.J. 840.

[253] Supra, Part III.

[254] D.C. Pearce, Interpretation of Statutes in Australia (Melbourne-Sydney-Brisbane, Butterworths: 1974) at p. 47.

provision.[255] This reasoning was endorsed by Gibbs, J. in South Australian Commissioner for Prices and Consumer Affairs v. Charles Moore (Aust.) Ltd.[256] If legislative history were admissible, he said, the courts would be faced with the impossible task of deciding which statements made in the House carried more weight and the need for counsel to research legislative history would "tend to aggravate the delay and increase the cost of litigation."[257] In that case, Stephen J. also rejected outright the use of legislative history. Only two years later, however, we find Stephen J. in Dugan v. Mirror Newspapers Ltd. "venturing far into the use of legislative history" only to conclude

> ... it leads to no conclusion different from that which would have followed from a disregard of anything extrinsic to the words of the legislation itself. The experience suggests that any partial and limited use of legislative history may involve its own peculiar hazards.[258]

Whether this is so may soon be determined by those cases decided since the passage of the 1984 amendment to the Acts Interpretation Act. An examination of one such case, however, suggests that the admission in evidence of parliamentary materials may have no impact on the way in which judges decide

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[255] [1942] C.L.R. 373, at 409-410 (Aus. H.C.).

[256] (1976-1977), 39 C.L.R. 449 (Aus. H.C.).

[257] Ibid., at p. 461.

[258] (1978), 142 C.L.R. 583 at p. 599 (Aus. H.C.).

cases. Thus in Re Bolton,[259] the High Court of Australia admitted in evidence the second reading speech of the Minister who introduced the Defence (Visiting Forces) Act. This admission was justified by reference to the Acts Interpretation Act of Australia. The speech of the Minister specifically stated that the provision before the Court was intended to affect not only those who deserted while their forces were visiting in Australia but also deserters from any country who came to Australia after deserting. The majority of the Court, however, refused to assign weight to this statement. By reading the Act as a whole, they concluded that it affected only visiting forces in Australia. They also relied on the common law principle that provisions affecting the liberty of a person must be clear and precise before they will be enforced by the courts. In their opinion, it was not clear that the provision was intended to catch a wider group than visiting forces. They made this statement despite the fact that the Minister had specifically stated in his speech that the provision was put in the Defence (Visiting Forces) Act only as a matter of convenience and was not intended to be limited by that title.

An analysis of the case makes it clear that the Court regarded it as unreasonable to affect the liberty of a deserter who not only came from another country but had deserted many years before in a war in which Australia had no part. Brennan J. stated that

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[259] [1987] 162 C.L.R. 514 (Aus. H.C.).

the maintenance of discipline in foreign forces stationed outside Australia was not part of any obligation undertaken by Australia.[260] Strongly influenced by their own interpretative baggage, therefore, they chose to pay lip service to the Acts Interpretation Act while at the same time giving virtually no weight to the declared intent of the legislature.

CANADA--NON-CONSTITUTIONAL CASES

It is clear from Canadian cases that the Courts apply different rules in regard to the admissibility of legislative history depending on whether the case involves a constitutional issue. Although the rule in regard to admissibility of legislative history has been expressed as a rule of exclusion, legislative history has at times been admitted by the courts and used to determine mischief, as is done with Commission reports. In Wall and Redekop Corp. v. C.J.A., for example, the British Columbia Court of Appeal stated that the Labour Relations Board did not err in admitting debates in the Legislature into evidence for the purpose of determining the mischief or condition that the B.C. Labour Code was intended to resolve.[261] Similarly, the New Brunswick Court of Appeal in Breau et al. v. Soucy and Cyr found that it was permitted to review legislature debates for the

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[260] ibid., at p. 527.

[261] [1989] 1 W.W.R. 183.

purpose of determining the historical background of the legislation before the Court.[262]

The gradual relaxation of the inadmissibility rule seen in relation to commission reports is also seen in relation to parliamentary materials. It starts as an admission "only to confirm" a decision already arrived at by other means. This trend is clear, for example, in The Queen v. Board of Broadcast Governors in which McRuer, C.J.H.C. stated:

> In considering the intention of the Legislature under our law (it is different in some countries) the Court cannot be influenced by what is said by a Minister when introducing the legislation in Parliament. It is, however, satisfying to note that my decision on this branch of this case is consistent with a statement made by the Minister when the Broadcasting Act was introduced.[263]

He then quoted the Minister's statement from Hansard to show that Parliament had intended to limit appeal rights under that Act to questions of law only. There is no indication in the case as to how the extract from Hansard came to be before McRuer. We can only assume that he took judicial notice of it as a matter of public record.

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[262] (1983), 52 N.B.R. (2d) 44.

[263] (1961), 31 D.L.R. (2d) 385, at p. 398.

The trend continued in Stevenson and McLean v. R.[264] in which an Ontario Court cited with approval the statement by Lord Reid in Warner v. Metropolitan Police Commissioners that parliamentary materials might be used where their consultation might "settle the matter immediately one way or the other".[265] The parliamentary debates filed by counsel before the Ontario High Court, however, failed to meet Lord Reid's test and therefore did not form part of the basis of that Court's decision in the case.

Relaxation of the exclusionary rules reached its zenith in R. v. Vasil[266] which was heard by the Supreme Court of Canada before the Stevenson and McLean case but judgment was not rendered until after the decision in Stevenson and McLean. In Vasil, the Supreme Court of Canada actually used parliamentary materials to interpret the Criminal Code provisions in regard to murder, specifically the phrase "unlawful object". Lamer, J. speaking for the majority, stated "Reference to Hansard is not usually advisable."[267] He then went on to refer to the speech of the Minister of Justice introducing the draft Criminal Code in the House in 1892, in which the Minister of Justice explained the

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[264] (1980), 57 C.C.C. (2d) 626, 19 C.R. (3d) 74 (Ont. C.A.).

[265] [1968] 2 W.L.R. 1303, 1316, [1969] 2 A.C. 256, 279. It is to be noted that Lord Reid did not rely on parliamentary materials in reaching his decision in that case.

[266] (1981), 35 N.R. 451; [1981] 1 S.C.R. 469.

[267] ibid., S.C.R. at p. 487.

proposed sections of the Criminal Code dealing with murder.[268] Lamer J. stated that, since in that speech the Minister of Justice quoted verbatim the reasons given by the Royal Commissioners in Great Britain for their proposed changes to the English law upon which the Canadian Criminal Code was modelled, the Canadian Parliament must have adopted not only the sections proposed by the Royal Commissioners but also their reasons. In this way, he was able to found his decision on the report of a Royal Commission in a different jurisdiction.

This line of jurisprudence was followed by the Ontario High Court in Babineau v. Babineau[269] in which Grange J. reviewed the authorities, making specific reference to Vasil and to Stevenson and McLean, and concluded that the court could now look at the parliamentary materials relating to the statute under construction. This view led him to examine the comments of the responsible minister in introducing the Motorized Snow Vehicles Act, 1974 in the legislature and the contents of the Interim Report of the Select Committee on Motorized Vehicles. He stated, however, that he had examined these materials only to determine whether they would "settle the matter one way or the other" and concluded that they did not in the particular case before the

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[268] The Vasil decision came only five years after the Supreme Court of Canada decision in Reference re Anti-Inflation Act and was probably strongly influenced by it.

[269] (1981), 122 D.L.R. (3d) 508, 32 O.R. (2d) 545 (Ont. S.C.); Affd. (1982), 133 D.L.R. (3d) 767, 37 O.R. (3d) 527 (Ont. C.A.).

Court. Whether that statement means that he assigned no weight or not is hard to determine. It also raises the question as to what weight would have been assigned had he decided that the materials did settle the matter.

Reference must also be made to the decision of the Federal Court of Appeal in New Brunswick Broadcasting v. Canadian Radio-Television and Telecommunications Commission[270] in which that Court was asked to consider a speech delivered by the minister responsible for the Government's response to the Royal Commission on Newspapers to the Graduate School of Journalism at the University of Western Ontario. The report of that Commission formed the background to the Direction to the CRTC on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors which was before the Court. Speaking for the Court, Thurlow, J. sought to distinguish this speech from other speeches made by other parliamentarians on the grounds that it was made by the responsible minister and it purported to announce the policy decided on by the Cabinet. As such, he said, it demonstrated the intention of the Governor in Council in making the Direction and was similar to the government pamphlet admitted in evidence in the Churchill Falls case.[271] He concluded, however, that the

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[270] (1984), 55 N.R. 143, 13 D.L.R. (4th) 77.

[271] Churchill Falls (Labrador) Corporation Ltd. v. Attorney General of Newfoundland (1984), 8 D.L.R. (4th) 1 (S.C.C.)

speech added little to what could already be deduced from the legislation, the Direction and the explanatory note appended to the Direction.

An important distinguishing factor between these two cases that is not mentioned by Thurlow J. is that the actions of the Governor in Council are an expression of governmental will not subject to the same political pressures and compromises as legislation going through Parliament or a provincial legislature. The responsible minister does, in fact, speak for Cabinet and, under the doctrine of Cabinet solidarity, may announce policies that represent a consensus of Cabinet. How far a responsible minister may reflect the views of Parliament, however, will vary appreciably according to the degree of pre-eminence obtained by the governing party in the House.

In 1985, MacGuigan, J. in the Federal Court of Appeal attempted to enunciate the present rule in respect of the admission of parliamentary materials. He stated that the rule appears to be the same as the rule for commission reports. They may be used for the purpose of establishing the mischief that the enactment seeks to remedy but may not be used in direct interpretation of the

statute.[272] The statement does not indicate whether parliamentary materials could be used in the indirect interpretation of the statute and, if so, what does that mean? There is no discussion in any of the cases of any distinction between direct and indirect interpretation and it is hard to think of what the distinction might be. Most likely, MacGuigan, J. was simply protecting himself against appeal by phrasing the rule in that way. In addition, the statement does not account for cases such as Vasil (which was specifically referred to by MacGuigan, J.) which make it clear that parliamentary materials are sometimes used to aid in the (direct?) interpretation of statutory provisions.

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[272] Lor-Wes Contracting v. M.N.R. 85 D.T.C. 5310, [1985] 2 C.T. 279, 60 N.R. 321.

CANADA--CONSTITUTIONAL CASES

For a long time, the exclusionary rule in respect of legislative history was applied equally to constitutional cases. For example, the rule was referred to with approval by the Supreme Court of Canada in Texada Mines v. Attorney General of British Columbia[273]. Similarly, in Attorney General of Canada v. Readers' Digest Cartwright, J. rejected the statement made by the Minister introducing the bill as inadmissible.[274] He went on to say:

> I can discern no difference in principle to afford a sufficient reason for holding it to be admissible where, the words of the statute being plain, it is sought to show that Parliament was encroaching upon a field committed exclusively to provincial jurisdiction.[275]

He thus, he said, regarded its rejection as a matter of law and not as a matter of inconvenience, though he had to point out that, if it were admissible, he could see no ground on which anything said in the House could then be excluded.[276]

In the event, the Supreme Court of Canada reversed itself in the 1976 Reference re Anti-Inflation Act, in which a large body

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[273] [1960] S.C.R. 713, 720, 32 W.W.R. 37, 24 D.L.R. (2d) 81.

[274] [1961] S.C.R. 775, 30 D.L.R. (2d) 296, [1961] C.T.C. 530.

[275] ibid., S.C.R. at p. 792.

[276] ibid., at p. 793.

of varied extrinsic materials was introduced in evidence.[277] Chief Justice Laskin addressed the question of admitting extrinsic materials by stating first, that, though admitted, they were "subject to reserve by the Court as to their relevancy and as to their weight" and second, that they were introduced not to aid in the actual construction of the provisions of the Anti-Inflation Act but rather to give guidance as to its constitutional characterization.[278] By exposing the mischief that the Act sought to remedy and the effect that the Act would have, the extrinsic materials would demonstrate whether there was a constitutional basis for the legislation.[279] He referred to Lord Maugham's statement for the Privy Council in Reference re Alberta Bills that extrinsic materials are admissible "in a proper case"[280] and to Tascherau J.'s statement in Lower Mainland Dairy Products Board v. Turner's Dairy Ltd. that extrinsic materials may be used "in certain cases".[281] He concluded that

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[277] [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541 and see Appendix III for a list of some of the extrinsic materials admitted.

[278] ibid., S.C.R. at p. 387.

[279] See B. Strayer, Judicial Review of Legislation in Canada University of Toronto: Toronto 1968,) at p. 156-157.

[280] [1939] A.C. 117, at p. 130 (J.C.P.C.).

[281] [1941] 4 D.L.R. 209, [1941] S.C.R. 573, at p. 583.

> ... no general principle of admissibility or inadmissibility can or ought to be propounded by this Court, and that the questions of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues on which it is sought to adduce such evidence.[282]

There were cases, he said, where a court could reach a conclusion on the constitutional validity of legislation without reference to extrinsic aids. They were therefore not admissible in such a case.[283] He cited Texada Mines Ltd. v. Attorney-General of British Columbia[284] as an example where the court had stated that a ministerial statement, if tendered by the parties, would not have been admissible.[285] Nor, he said, were they admissible in Cairns Construction Ltd. v. Government of Saskatchewan[286] because there the subject in issue was whether a tax was a direct tax and there is already a legal test, that does not vary with the particular economic circumstances, for determining whether a tax is or is not a direct tax. He also distinguished Attorney-General of Canada v. Reader's Digest Association (Canada) Ltd.[287] which, he said, illustrated a situation in which

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[282] Supra, footnote 277, S.C.R. at p. 389.

[283] This principle would appear to be the counterpart of that which holds that extrinsic evidence is not admissible unless the statutory provision is ambiguous, a principle that we have seen is not honoured in practice.

[284] [1960] S.C.R. 713, 32 W.W.R. 37, 24 D.L.R. (2d) 81.

[285] Supra, footnote 277, S.C.R. at p. 390.

[286] (1958), 27 W.W.R. 297, 16 D.L.R. (2d) 465; affd., [1960] S.C.R. 619, 24 D.L.R. (2d) 1.

[287] [1961] S.C.R. 775, 30 D.L.R. (2d) 296, [1961] C.T.C. 530.

Parliament's use of its taxation power was challenged as colourable. The decision of the Court in that case to exclude extrinsic evidence was proper, he said, because Parliament's taxation power is plenary and only in a very "unusual case" could the use of the power be colourable. He concluded by holding that the Reference re Anti-Inflation Act was an appropriate case in which to use extrinsic evidence because the dispute of the parties revolved around whether the social and economic circumstances on which Parliament relied to pass the Anti-Inflation Act were sufficient to ground authority in the power of Parliament to legislate for the peace, order and good government of Canada and the extrinsic evidence was directly relevant to that issue.[288]

One commentator has explained these views as

> The extrinsic evidence was material because the formulation of the rule of law with respect to the operation of the emergency doctrine in the Constitution was based on the existence of a temporary situation which could only be dealt with by legislative action in Parliament. It is apparent that the less probative judicially noted facts are in establishing an emergency, the more important extrinsic materials become. The existence of war or some other emergency of a fundamental nature is not likely to require an examination of extrinsic materials but the farther one moves from such obvious emergencies the more necessary extrinsic evidence becomes to make the connection between the actual circumstances and the head of power.[289]

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[288] Supra, footnote 277, S.C.R. at p. 390.

[289] R.B. Buglass, "The Use of Extrinsic Evidence and the Anti-Inflation Act Reference" (1977), 9 Ott. L. Rev. 183.

Since the Reference re Anti-Inflation Act, the constitutional cases of the 1970's and 1980's have seen an increased use of not only legislative history but all kinds of extrinsic materials. These materials are used by the courts not only to throw light on the constitutional characterization or constitutional pivot of the legislation but also to establish the historical background to the challenged legislation[290] and to determine the mischief that the legislation was designed to cure.[291] Thus, debates in the Legislature,[292] debates in Parliament,[293] public statements of authoritative government figures[294] and government pamphlets[295] have all been used for these purposes.

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[290] Quebec Association of Protestant School Boards v. A.-G. of Quebec (No. 2) (1982), 140 D.L.R. (3d) 33 (Qué. S.C.); Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1.

[291] Central Canada Potash v. Attorney-General of Saskatchewan (1975), 57 D.L.R. (3d) 7 (Sask. Q.B.); (1977), 79 D.L.R. (3d) 203 (Sask. C.A.)

[292] Société Asbestos Ltée v. Société Nationale L'Amiante (1981), 128 D.L.R. (3d) 405 (Qué. C.A.)

[293] Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373, per Beetz J. in dissent at p. 469.

[294] Central Canada Potash v. Attorney-General of Saskatchewan (1975), 57 D.L.R. (3d) 7 (Sask. Q.B.); (1977), 79 D.L.R. (3d) 203 (Sask. C.A.) - statement of Premier of Saskatchewan and government white papers; Quebec Association of Protestant School Boards v. Attorney-General of Quebec (No. 2) (1982), 140 D.L.R. (3d) 33 - statement of Minister of Education.

[295] Churchill Falls (Labrador) Corporation Ltd. v. Attorney General of Newfoundland (1982) 134 D.L.R. (3d) 288 (Nfld. C.A.); (1984), 8 D.L.R. (4th) 1 [1984] 1 S.C.R. 297 (S.C.C.); Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1 Reference re Residential Tenancies Act 1979, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 - green paper.

In 1984, McIntyre J. speaking for the Supreme Court of Canada in Churchill Falls reviewed the development of the use of extrinsic materials in constitutional cases. He stated that extrinsic evidence is admissible to show the historical background against which the legislation was enacted but is not admissible as an aid to construction.[296] He went on to say that in constitutional cases, particularly where colourability of the legislation is an issue, extrinsic evidence may be used to ascertain not only the operation and effect of the impugned legislation but also its true object and purpose.[297] Of the considerable volume of extrinsic evidence filed in the case, he specifically rejected speeches made by prominent politicians in Newfoundland on the grounds that such speeches are inherently unreliable. Much of the rest of the extrinsic evidence, he said, consisted of materials explaining the negotiations leading to the power contract between the Churchill Falls Company and Hydro-Quebec and, as such, were a matter of public knowledge in Newfoundland.[298] He thus recognized that judicial notice was another avenue by which such materials could be admitted in evidence.

In addition, he considered a government pamphlet entitled "The Energy Priority of Newfoundland and Labrador" to be receivable in

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[296] Supra, footnote 295, D.L.R. at p. 19.

[297] ibid.

[298] ibid., at page 20.

evidence. He stated that the pamphlet was designed to inform the financial community of the government's reasons for enacting the Reversion Act, which expropriated the assets of the Churchill Falls Company. After stating that the pamphlet was published after passage of the Reversion Act through the Legislature but before Royal Assent, he contradicted his previous statement that it showed the government's reasons for enacting the Reversion Act and held that the pamphlet was evidence of the intent of the Legislature.[299]

As already noted, the weight to be accorded a government statement that interprets an act of the legislature has to be limited. The government does not necessarily reflect the views of the legislature taken as a whole. It may have to give in on important aspects of its legislative plan in order to get the legislation through the legislature. By issuing an interpretive document after passage through the Legislature and before royal assent, the Newfoundland government in Churchill Falls may be seen to have tried to minimize whatever changes were made to the legislation during passage by producing a document that purported to explain what the Legislature had done.

In the event, however, the government pamphlet proved to be the undoing of the Newfoundland government, for McIntyre J. used it effectively to demonstrate that the purpose of the Reversion Act

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[299] ibid.

was to derogate from the rights of Hydro-Quebec under the power contract. He found the Act to be colourable legislation and, as such, ultra vires the constitutional power of the Province.

Where the Constitution itself is interpreted by the courts, a very broad view is taken of admissibility. Thus, the Confederation Debates that gave rise to the British North America Act, 1867 may be admitted in evidence and examined in detail both in respect of historical background and object and in respect of the changing wording of the various drafts of particular provisions.[300]

Similarly, in the many cases where interpretation of provisions of the Canadian Charter of Rights and Freedoms has been at issue before the courts, legislative history has been extensively used. In Reference re Education Act of Ontario and Minority Language Rights, for example, the report of the Constitutional Conference preceding repatriation of the constitution, the report of the Premier's Conference, a government paper and a statement made by the Minister of Justice to the Special Joint Committee on the Constitution were all admitted in evidence to establish the

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[300] Manitoba Language Rights Reference (1985) 59 N.R. 321 (S.C.C.); and see D.G. Kilgour "The Rule against the use of Legislative History: "Canon of Construction or Counsel of Caution"?" (1952), 30 Can. Bar. Rev. 769, 780.

context of the minority language education rights provisions of the Charter.[301]

But the Charter cases go even further. Despite the reminder in the Churchill Falls case of the old rule of construction that extrinsic evidence cannot be used to interpret a statutory provision, we find the courts either using such evidence directly or citing it as confirmatory of an opinion already arrived at, however dubiously. Thus in R. v. Rowbotham, Ewaschuk J. makes the bald statement that section 8 of the Charter guarantees Canadians protection against seizure of oral communications by wiretaps, with no explanation as to how he arrived at that conclusion. He then proceeds to "confirm" his view by citing a similar view expressed by the Minister of Justice to the Special Joint Committee on the Constitution.[302] Similarly, the Chief Justice of the British Columbia Court of Appeal in Bhindi and London v. British Columbia Projectionists used early drafts of the Charter and evidence given by the Minister of Justice to the Special Joint Committee on the Constitution to decide that section 32 of the Charter applies only to governmental matters and does not include private contractual activities.[303]

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[301] (1984), 47 O.R. (2d) 1; see also Regina v. Seo (1986), 51 C.R. (3d) 1, 54 O.R. (2d) 293 (Ont. C.A.); R. v. McDonald (1985), 51 O.R. (2d) 745 (Ont. C.A.).

[302] (1984), 42 C.R. (3d) 164 (Ont. S.C.).

[303] [1986] 5 W.W.R. 303, 29 D.L.R. (4th) 47 (B.C.C.A.); leave to appeal to the S.C.C. refused.

The Supreme Court of Canada in the B.C. Reference Case[304] commented directly on the admissibility of evidence adduced before the Special Joint Committee on the Constitution and the weight to be accorded to it. Speaking for the majority of the Court, Lamer J. found that such evidence, though admissible as historical background, carries little weight in interpretation.[305] He stated that the Churchill Falls case made it clear that speeches and declarations of prominent figures are inherently unreliable and that Reference re Residential Tenancies Act[306] showed that speeches made in the Legislature have little evidential weight. He went on to say that Minutes of the Proceedings of the Special Joint Committee are admissible and carry more weight than speeches made during parliamentary debates but "should not be given too much weight." The fact that the evidence pertained to the Charter rather than to another statute, he said, did not alter its inherent unreliability as proof of the intention of the legislature.

The Supreme Court of Canada, however, seems to be divided on the question of the use to which legislative history may be put in constitutional cases. In R. v. Morgentaler, Mr. Justice McIntyre in dissent supported his view that the right to an

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[304] Reference re Section 94(2) of the Motor Vehicle Act, (1985), 23 C.C.C. (3d) 289; 24 D.L.R. (4th) 536; [1986] 1 W.W.R. 481.

[305] ibid., D.L.R. at p. 554.

[306] (1981), 37 N.R. 158, 123 D.L.R. (3d) 554, [1981] 1 S.C.R. 714 (S.C.C.).

abortion is not included in section 7 of the Charter by quoting from the Minutes of the Special Joint Committee on the Constitution.[307] His use of those Minutes to interpret section 7 of the Charter runs directly counter to his statement made only four years earlier in the Churchill Falls case that legislative history may not be used as an aid in construction.

The cases illustrate that the courts have come a long way from the absolute rule of exclusion. They are clearly uneasy and cautious about how far they are willing to go. The Charter cases have afforded the best examples of situations where they are willing to admit almost anything that could be of assistance. Instead of a rule of inadmissibility in these cases, there is clearly developing a rule as to weight. Thus Lamer J. in the B.C. Reference Case has set out a hierarchy of parliamentary materials in which he assigns greater weight to thoughtful testimony adduced before a parliamentary committee than to speeches expounded in the legislature in the heat of debate.

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[307] [1988] 1 S.C.R. 30, at page 143.

ARGUMENTS FOR AND AGAINST THE ADMISSIBILITY OF LEGISLATIVE HISTORY

In this section, I will examine the validity of some of the arguments that have been made for and against the admissibility of legislative history.

Constitutional Constraints

Initial rejection of legislative history was made on the grounds that neither the Upper House nor the Sovereign knew of what was said in the Commons and could therefore not have acted in passing and assenting to the legislation being interpreted on the basis of what had been said.[308] This viewpoint, seldom discussed today, is based on two theories. Firstly, to admit legislative history, particularly debates, into evidence would be to invade the privilege of Parliament.[309] Up to the twentieth century, Parliament protected its privilege by forbidding the publication of its debates.[310] In England up to 1980, it was necessary, according to a resolution of the House of Commons passed in 1818, to get special leave of the House to introduce in

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[308] Millar v. Taylor (1769), 4 Burr. 2303; 98 E.R. 201; Gosselin v. The King (1903), 33 S.C.R. 255.

[309] Davis v. Johnson, [1979] A.C. 317, 350, per Lord Scarman.

[310] D.G. Kilgour, "The Rule Against the Use of Legislative History: "Cannon of Construction or Counsel of Caution"?" (1952), 30 Can. Bar Rev. 769 at 783-786.

court as part of a case details of statements made in the House. This resolution, however, was not rigorously enforced by the House of Commons, which often gave leave after the event. The resolution was finally reversed in 1980.[311]

Today, both in England and in Canada, there are efficient methods of reporting parliamentary debates, they are published regularly and distributed widely, and Parliament is not making an issue of the invasion of its privileges. This theory of exclusion is therefore no longer valid and has not been used in more recent cases.

The second reason for rejection of legislative history, it was said, was that the court's function is to interpret legislation by seeking a meaning that conforms to the intention of the legislature in enacting the legislation. No intention can be ascertained by looking only at one segment of the legislative unit of Commons, Senate and Sovereign. Debates in the Commons, therefore, cannot be used to determine the intention of the Legislature as a whole. In practice, however, this theory has little substance as the power of the Senate to effect changes in enactments passed by the Commons is severely limited and the Governor General, like the English sovereign, is a mere figure-head who makes no changes to the wishes of the Commons. The

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[311] P.M. Leopold, "Reference in Court to Hansard", [1981] Public Law 316.

intention of the three-tier legislature is therefore in practice almost synonymous with the intention of the Commons.

In modern cases, one argument that is made against admissibility is that reference to debates only creates confusion,[312] that it is difficult to decipher any common intention from the large number of opposing views expressed by members in debate[313] and that the speeches of individual members of the House are inherently unreliable.[314]

Kerans, J. in Reference re Validity of Compulsory Arbitration Provisions of Public Service Employee Relations Act, where he was faced with the problem that different parties introduced ministerial statements that apparently contradicted each other, called the problem "trial by quotation".[315] Much has been written

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[312] Davis v. Johnson, [1979] A.C. 317; Dugan v. Mirror Newspapers Ltd. (1978), 142 C.L.R. 583.

[313] South Australia v. The Commonwealth, [1942] C.L.R. 373.

[314] MacMillan Bloedel v. The Queen in Right of British Columbia (1984), 16 D.L.R. (4th) 151.

[315] (1984), 16 D.L.R. (4th) 359 (Alta. C.A.) - appeal to the Supreme Court of Canada dismissed, [1987] 1 S.C.R. 313.

on the difficulty of determining the intention of Parliament. [316] This is due, in part, to the fact that the expression is used in at least two different ways. Some who use it mean "what Parliament meant". Those who espouse this theory believe in the Literal Rule of statutory interpretation. They, therefore, do not look beyond the actual words used by Parliament and do not allow extrinsic materials to influence their interpretation of the text. This theory does not stand up to close examination as there are too many different factual situations to be covered by any statutory provision. Many of them would not have been thought of at the time at which the statute was drafted. In addition, a statute is simply a compilation of words and phrases. Each has its own fringe of meaning which has to be interpreted. There is therefore always a periphery of meaning of the statute as a whole which has to be interpreted.

Today, there is more acceptance for the theory of parliamentary intention that holds that it means the objective that parliament sought to achieve by its legislative enactment. When faced with a difficult situation, then, the judge must ask himself which

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[316] see e.g. Reed Dickerson, The Interpretation and Application of Statutes (Little, Brown & Co., Toronto: 1975); J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954), 32 Can. Bar Rev. 624; M. Radin, "Statutory Interpretation" (1930), 43 Harv. L. Rev. 863; J.M. Landis, "A note on "Statutory Interpretation"" (1930), 43 Harv. L. Rev. 886; G. MacCallum, "Legislative Intent" (1966), 75 Yale L. J. 754.

solution would be most in accord with the legislative purpose. This kind of intention is often (but not always) discoverable through an examination of the enactment and also through an examination of extrinsic aids. Those who support this theory of intention, therefore, look to preambles and purpose clauses for assistance in discovering the objective. They may also seek assistance from extrinsic aids. It is this group that may seek to discover the objective of an enactment and a general idea as to certain inclusions in and exclusions from its ambit by an examination of what was said in debate. One commentator has written:

> A judge is certainly not bound to accept the construction put upon a statute by a legislator who may have been speaking only for himself, but as a judge he will surely have had sufficient experience in weighing evidence to enable him to make an accurate estimate of the degree to which a statement made during debate reflects the general understanding of the legislative body as a whole.
>
> The discovered circumstance that no objection was taken to the construction placed upon a bill by a speaker in debate would be at least some evidence that the speaker's understanding of its meaning was shared by the other members. If, moreover, a comparison of the several speeches made in debate on a measure indicates that each speaker was of the same belief as to the meaning or legal effect of the statute, that concordance would be highly persuasive evidence of a prevailing legislative judgment.[317]

This is particularly so where the statement is made by an authoritative member who may be seen to be the spokesman for the government that is sponsoring the legislation. Thus, we see the

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[317] H. Jones, "Extrinsic Aids in the Federal Courts" (1940), 25 Iowa L. Rev. 737, 751-752.

development in constitutional cases of acceptance of speeches made by Ministers responsible for the legislation[318] and of government papers and pamphlets issued to explain the government's position in relation to a particular topic or proposed legislation.[319] The oft-repeated argument against admission of legislative history that it would be impossible for the courts to decide which materials carry more weight[320] is therefore less persuasive than it at first appears.

Assistance to the Court

An argument in favour of admitting legislative history is that it is the daily function of a court to assign weight to a variety of evidence placed before it. Our courts have shown that they know how to assign weight and they routinely do so in accordance with the reliability and persuasiveness of the evidence. In addition, the difficulty of admitting legislative history in evidence in some cases for certain purposes and not in other cases for other purposes is well illustrated by the cases. In the same way as many of the judges confuse the issues of admissibility and weight (which has caused me to discuss the two

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[318] New Brunswick Broadcasting Co. Limited v. Canadian Radio-Television and Telecommunications Commission (1984), 13 D.L.R. (4th) 77, 55 N.R. 143, 235 (Fed. C.A.).

[319] Churchill Falls (Labrador) Corporation Ltd. v. Attorney-General of Newfoundland (1984), 8 D.L.R. (4th) 1 (S.C.C.)

[320] South Australian Commissioner for Prices and Consumer Affairs v. Charles Moore (Aust.) Ltd. (1976-1977), 39 C.L.R. 449.

together in this paper), they do not always maintain the distinctions that have been drawn between constitutional and non-constitutional cases and between admission for the purpose of explaining the mischief and object of the legislation and admission for the purpose of interpreting particular provisions of the legislation. This confusion in the cases suggests that these distinctions are artificial and should be eliminated.

The problem was recognized by one commentator in the immediate aftermath of the decision in Attorney General of Canada v. Reader's Digest.[321] In an article in the McGill Law Journal, Rosenstein stated:

> It is respectfully submitted that a judge will admit commission reports and Parliamentary debates when they enable him to reach a decision which he considers most appropriate on the basis of the facts of the case before him. In such a situation, he will simply allow the debates or report as evidence of surrounding circumstances and will support this by saying that such evidence is indicative not of intention but of the materials which were before Parliament at the time the statute was enacted.[322]

Rosenstein argues that Kerwin's statement in Reader's Digest referring to his decision in Home Oil Distributors v. Attorney-General of British Columbia[323] is indicative of this propensity. Kerwin said

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[321] 30 D.L.R. (2d) 296, [1961] S.C.R. 775.

[322] M. Rosenstein, "The Attorney-General of Canada v. The Reader's Digest Association (Canada) Ltd., Sélection du Reader's Digest (Canada) Ltée" (1961-62), 8 McGill L. Journal 62, 65.

[323] [1940] S.C.R. 444, [1940] 2 D.L.R. 609.

> ... I, with the concurrence of Rinfret J., as he then was, took into consideration a report of a Commission under the circumstances there existing, but only for the purpose of showing what was present in the mind of Parliament.[324]

According to Rosenstein's persuasive argument, the words "under the circumstances there existing" can be taken to mean that the report assisted the judge in coming to his decision, while the words "but only for the purpose of showing what was present to the mind of Parliament" demonstrate the judge's justification of the admission of the evidence. Certainly, the latter words are used constantly throughout the cases and it is hard to believe that a judge can so far compartmentalize his mind that he is influenced by extrinsic aids only for one purpose and not for another.

In addition, the cases where legislative history has been admitted ostensibly only to confirm an opinion already arrived at are suspect, for there is no way of knowing whether the legislative history was considered only <u>after</u> a conclusion was reached on other grounds or whether the legislative history itself determined the conclusion that was reached. The legislative history could well have had a much greater persuasive force than that which is acknowledged by the Court.[325]

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[324] <u>ibid</u>., D.L.R. at page 782.

[325] H. Jones "Extrinsic Aids in the Federal Courts" (1940), 25 Iowa L. Rev. 737, 752; M. Radin, "Statutory Interpretation" (1930), 43 Harv. L. Rev. 863, 864.

It has been said that legislative history may be used where its use avoids an erroneous construction of a statute[326] or where its introduction would settle the question before the court one way or the other.[327] Neither statement is useful as a guide as to when legislative history may be introduced. Until it has been admitted in evidence and examined thoroughly, there is no way of knowing whether it will avoid an erroneous construction or settle the matter.

In the Wheat Board case,[328] for example, legislative history was not considered either at the Supreme Court of Canada level or before the Judicial Committee of The Privy Council. K.C. Davis has forcefully argued, however, that had the Judicial Committee considered the legislative history relating to the National Emergency Transitional Powers Act, specifically drafts of the

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[326] Davis v. Johnson, [1979] A.C. 264.

[327] Babineau v. Babineau (1981), 122 D.L.R. (3d) 508; Affd. 133 D.L.R. (3d) 767. Warner v. Metropolitan Police Commissioners, [1968] 2 W.L.R. 1303, [1969] 2 A.C. 256, per Lord Reid at p. 1316; cited with approval in Stevenson and McLean v. R. (1980), 57 C.C.C. (2d) 626, 19 C.R. (3d) 74, (Ont. C.A.).

[328] Canadian Wheat Board v. Hallet and Carey Ltd., [1951] S.C.R. 81; [1951] 1 D.L.R. 466; reversed on appeal to Privy Council sub nom; Attorney-General of Canada v. Nolan, Hallet and Carey [1952] A.C. 427; [1952] 3 D.L.R. 432; 6 W.W.R. (N.S.) 23 (J.C.P.C.).

bill and debates in the House of Commons, it could not have arrived at the conclusion that it did.[329]

The Judicial Committee claimed that it could not look at the legislative history because the Order in Council in question was clear and unambiguous on its face and they could not enquire behind the words. Ambiguity is another area in which the courts are not always clear in their pronouncements. Where some state, as did the Judicial Committee, that extrinsic evidence is not admissible to explain words that are clear and unambiguous, others never mention this issue. Sometimes it is only by examining the extrinsic evidence that an ambiguity becomes obvious, thus showing that the apparently "clear" meaning was never really clear.[330]

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[329]K.C. Davis, "Legislative History and The Wheat Board Case" (1953), 31 Can. Bar Rev. 1; for a contrary view of the case, see D.G. Kilgour, "The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution"?" (1952), 30 Can. Bar Rev. 769 at 779, disputed by J.T. MacQuarrie in "The Use of Legislative History" (1952), 30 Can. Bar Rev. 958. For a discussion of English cases that would have been decided differently had legislative history been admitted, see S. Cretney "Judicial Blinkers" (1969), 119 N.L.J. 301.

[330]F.J. de Sloovère, "Extrinsic Aids in the Interpretation of Statutes" (1940), 88 U. Pa. L. Rev. 527, p. 531-532. In referring to the American courts de Sloovère says, at p. 548,

> "... it is rather difficult to determine whether courts reject arguments and opinions in debates because they are irrelevant or misleading; or though relevant, entitled to little weight, despite ambiguities in the statute; or because they cannot be brought in for the purpose of raising doubts as to a meaning apparently clear on its face."

However, the more usual case is that in which one party alleges that the provision in issue is clear and unambiguous whilst the other alleges that it is ambiguous. In arguing for the admissibility of legislative history, Davis stated that such materials should not be used where they would contradict the plain words of the legislative provision for people should be entitled to rely on a "reasonably clear" statute.[331] However, that statement begs the question because the Judicial Committee found that the provisions in issue were clear and unambiguous. The better view is surely that the legislative history may answer the question at issue between the parties as it did in Babineau v. Babineau. In such cases,

> if it does, those parties are helped, and if it does not, they are probably not harmed, unless harm results from mere inconvenience of consulting the legislative history.[332]

Whether it does or not is a question of weight and not of admissibility.

It is to be noted, however, that in an article entitled "Towards Discovering Parliamentary Intent" Sacks claimed that, in the selected cases which she studied, a wider acceptance of legislative history by the Court would not have changed the outcome of the case for the history, too, was ambiguous and shed

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[331] Supra, footnote 329, at p. 10.

[332] ibid., at p. 10-11.

no light on the case at issue.[333] Sacks opined that, in many cases, the sponsors of bills do not themselves know how they want a particular provision to be interpreted. They therefore deliberately evade giving clear answers to questions posed in the Commons and "pass the buck" to the judges to decide.

> In every case studied, the disputed clause was either undebated or received obscure and confusing replies from the Minister.[334]

She concluded, however, that reference to the debates was helpful if only to reveal that responsibility for the final interpretation had deliberately been left to the judges.

The idea that the public in general and the parties before the Court in particular should have a clear idea on whom rests the responsibility for a particular interpretation of a provision was expressed by Lord Reid in Warner v. Metropolitan Police Commissioners.[335] He said

> Members of both Houses are particularly interested in the liberty of the subject and if it were intended by those promoting a Bill to extend the old but limited class of cases in which absence of mens rea is no defence I would certainly expect Parliament to be so informed. Then, if Parliament acquiesced, those who dislike this kind of legislation would know whom to blame.[336]

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[333] [1982] Stat. L. Rev. 143, at p. 152.

[334] ibid., at p. 157.

[335] [1968] 2 W.L.R. 1303, [1969] 2 A.C. 256.

[336] ibid., W.L.R. at p. 1316.

Burden of Research

The "mere inconvenience" for counsel of having to research legislative history mentioned by Davis has received much attention both by those opposed to and those in support of the admissibility of legislative history. Firstly, it is said that once legislative history is consistently admitted in evidence in all cases, lawyers would be acting negligently if they did not examine all legislative history before advising their clients on the interpretation that could be placed on particular statutory provisions.[337] There is no denying that this is true. But it is more an argument for the recognition of the use of legislative history than an argument against. We have seen from the cases that it is not always clear in what kind of case a court will use legislative history or for what use it may be put. In addition, we have cited cases where the judge came to his decision after studying Hansard even though counsel had not placed any extracts from Hansard in evidence. The prejudice that results to counsel in such a case is completely avoided if he knows he must examine the legislative history in every case and the risk of appearing to have given negligent advice is reduced. Laskin's statement that "... no general principle of admissibility or inadmissibility can or ought to be propounded ..." is not acceptable as it leaves counsel in doubt as to his obligations to

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[337]S.J. Gibb, "Parliamentary Materials as Extrinsic Aids to Statutory Interpretation" [1984] Stat. L. Rev. 28, 35.

his client. He will be damned if he spends time and clients' money on reading Hansard only to find that the judge in the case has decided that this particular case is not a "proper case" for the admission of legislative history; and he will be damned if he doesn't examine the legislative history and the judge decides that it is relevant and bases his decision on it. In constitutional cases, particularly in reference cases, it is clear that he must examine the legislative history. But for other cases, he is left in some doubt.

Second, it is said that more than "mere inconvenience" results from the onus of studying legislative history as such a study greatly increases the cost and delays of litigation.

> These arguments should not be underestimated. But they sound less convincing in the context of a 10-day hearing in the House of Lords, with copious citation of 19th century case law.[338]

Indeed the cost of a hearing is high, and more so as a case proceeds to the higher courts. If the issue could be resolved in the lower courts by a reference to legislative history, both time and money would be saved. In addition, research into legislative history is no more burdensome than research into the case law, though it may be necessary for law schools to start giving courses on how to go about researching legislative history.[339]

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[338] S. Cretney, "Judicial Blinkers" (1969), 119 N.L.J. 301, at p. 302.

[339] E. Finlay "Crystal Gazing: The Problem of Legislative History" (1959), 45 A.B.A.J. 1281.

Both types of research may yield nothing of particular value in respect of the issue at hand, but no lawyer would proceed to court without first having ascertained that there is, in fact, no case law that "sheds light" on the issue. A similar exercise in respect of legislative history that may well "decide the matter one way or the other" is surely a valuable and necessary exercise.

Accessibility

A more serious challenge to the admissibility view is that which questions the accessibility of legislative history, particularly in federal states where the materials of both federal and provincial legislatures would have to be researched.[340] In France, this is not a problem, as the travaux préparatoires are printed and published along with the statute.

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[340] J.L. Carro and A.R. Brann: "The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis" (1982), 22 Jurimetrics Journal 294; 9 J. of Legislation 282; NOTE: "A Decade of Legislative History in the Supreme Court, (1960), 46 Va. L. Rev. 1408; B.A. Liddle, "Statutory Construction - Use of extrinsic aids in Wisconsin, [1964] Wisconsin Law Rev. 660; J. Lawson and W.A. Partain: "Intrinsic and Extrinsic Aids to Statutory Construction: Ohio State Bar Association Committee Reports" (1957), 26 U. Cin. L. Rev. 299.

The legislative background to the statute is therefore readily accessible.[341] This is not the case in the United States. Yet there, legislative history has been used to such an extent that Frankfurter has remarked "only when legislative history is doubtful do you go to the statute".[342] A great deal has been written in the United States about the difficulty that counsel

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[341] M. Couder, "Les travaux préparatoires de la loi ou la remontée des enfers", D. 1975, chron. p. 249. Travaux are used extensively in the interpretation of statutes in France, but as far back as 1930, the authoritative French legal writer Henri Capitant wrote an article deploring the practice and praising the English rule of exclusion. (H. Capitant, "L'interprétation des lois d'après les travaux préparatoires", Recueil Hebdomadaire Dalloz, 1935, chronique, p. 77). Couder's article is a refutation of the position taken by Capitant. Couder argues that the travaux may well answer the question at issue before the court. In addition, he says, the nature of parliamentary procedure in France is such that, combined with the extensive publication of the travaux at all stages, the parliamentary materials produced can be used analytically and comparisons made at various stages in the process (there is even a comparison table published for each reading of the bill).

It should also be noted that, in Quebec, the Report on the Quebec Civil Code, a compilation of the travaux préparatoires of the Civil Code Revision Office, is admissible in evidence to assist in the interpretation of the Civil Code. The compilation is similar to that which is published in France in respect of its legislation, but does not include the legislative debates that took place during adoption of the Civil Code. See Sylvio Normand, "Les travaux préparatoires et l'interprétation du Code civil du Québec" (1986), 27 Cahiers de droit 347.

[342] F. Frankfurter "Some Reflections on the Reading of Statutes" (1947), 47 Columbia L.R. 527, at 543.

faces in trying to find legislative history.[343]

The situation in the federal sphere in Canada and in such provinces as Ontario is a little different. Not only are the Hansard reports of debates in Parliament and in the legislatures produced daily and given widespread distribution both by subscription and in libraries but also, with the surge in volume and accessibility of computer information services, reports of debates may soon become accessible by means of these computer services. At the moment, there are computer data bases carrying oral and written questions in the House and also major newspaper reports which pinpoint important issues dealt with in debate. In addition, there has been a great increase in commercial research facilities that will research specific areas of the law for a fee. In the same way as many lawyers conduct their real estate business by using professional title search companies, because they find it cheaper in the long run and obviously less time consuming to allow someone who works in the area every day to do the job than to do it themselves, there is a growing trend for lawyers to use professional research facilities. One commentator has even suggested that some enterprising law publisher might start a new publication entitled "Parliamentary Statements on

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[343] See e.g. E. Finley "Crystal Gazing: The Problem of Legislative History" (1959), 45 A.B.A.J. 1281 in respect of problems faced in the past in the United States. Also, Lord Roskill in "Some Thoughts on Statutes, New and Stale" [1981] Stat. L. Rev. 77 states that the House of Lords' Library contained no copy of the Renton Report in 1980 and he had to go to the House of Commons to obtain a copy.

Statutes", a kind of statute citator that would give the legislative history relevant to the provisions of the statute.[344] Such a service is available in the United States (Congressional Information Service) and is carried in computer data bases.[345]

An indication that the French model of publishing the travaux préparatoires along with the statute may be influencing Canada may be seen in two particular areas of legislative activity. The first of these is the area of tax legislation where, since 1982, technical notes that explain changes being made to the Income Tax Act are published by the Minister of Finance. Chantal Jacquier has argued forcefully that these technical notes must be admissible in evidence.[346] She states that, unlike parliamentary debates, they are not inherently unreliable. They are public documents introduced by the responsible minister and are written by public officials, as opposed to politicians. If the government brochure in the Churchill Falls case was admissible, then the technical notes must also be.[347] Jacquier's argument for admissibility is consistent with the need of judges for as much information as possible when interpreting more and more complex

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[344] G. Cain, "Interpretation of Statutes: Reference to Parliamentary Debates", New Zealand Law Journal 22 May 1962, 207 at p. 209.

[345] Reed Dickerson, The Interpretation and Application of Statutes (Toronto: Little, Brown and Company, 1975), at p. 147-154.

[346] Chantal Jacquier, "Des notes techniques en harmonie avec la loi" (1987), 35 Canadian Tax Journal 1384.

[347] ibid., at p. 1405.

and technical laws. And our income tax legislation is by far one of the most complex and technical.

The second such area is the area of subordinate legislation. Regulations published in the Canada Gazette Part II have for long been published with an explanatory note that explained little. It was essentially a reiteration of the main themes of the regulations. Since 1986, however, regulations have been published with a very extensive explanation entitled Regulatory Impact Analysis Statement. These statements not only describe the background to the regulations but also set out the main features of the regulations and their anticipated effect. In Teal Cedar Products (1977) Ltd. v. Canada, the respondent argued that an amendment made by the Governor in Council to the Export Control List was ultra vires in that the factual information on which the Governor in Council relied was not accurate.[348] Mr. Justice Pratte cited extensively from the Regulatory Impact Analysis Statement to demonstrate why the Governor in Council had made the amendment. This information was not necessary to the decision in the case, but Mr. Justice Pratte's use of it indicates a willingness on the part of many of the judiciary to seek help wherever they can find it. Since the Statement is published along with the regulations or amendments, this kind of information is easily accessible. It is to be noted, however, that Dickerson has expressed the view that making legislative

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[348] (1988), 92 N.R. 308 (F.C.A.).

history more available will only increase the judicial appetite for it.[349]

Some commentators have expressed concern that the need to research legislative history would increase the effects of unequal resources of the parties, to the benefit of the wealthier party who could afford to pay the lawyer's time to do the research.[350] This, surely, is not an argument against the admission of legislative history. The costs of legal action have always worked against those of lesser means (unless, of course, they are sufficiently poor to qualify for legal aid). Similarly, the argument that those who live close to centres where there are legislatures have advantages that are denied those who live far away[351] is a fact of life that has always been with us. Those who live in Ottawa can access the Supreme Court of Canada library for case law that cannot be accessed easily by someone living in a small village 100 miles north of Timmins. Would we argue therefore that cases reported only in the series having widest circulation (Supreme Court Reports, Federal Court Reports and Dominion Law Reports) are admissible in argument?

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[349] "Statutory Interpretation: Dipping into Legislative History" (1983), 11 Hofstra L. Rev. 1125 at p. 1160.

[350] See e.g. J.W. Hurst, Dealing with Statutes (Columbia University Press: New York: 1982) at p. 55.

[351] ibid.

Practice of Lawyers and Judges

According to Lord Hailsham, practising lawyers normally do consult legislative history as a matter of course when advising their clients. He is quoted in an article by F. Bennion as saying

> If they [i.e. opponents of the United Kingdom Law Commissions' Bill] really think that courts and practitioners do not read Blue Books in order to find out what statutes mean, they are living in a complete fool's paradise. When I was at the bar I was constantly having to advise as to the meaning of statutes and as constantly I was finding, as I do in this House and as I do when I sit judicially, that the words of the parliamentary draftsmen are at first sight incomprehensible ... I always look at Hansard, I always look at the Blue Books, I always look at everything I can .... dear, dear barristers, do grow up.[352]

Though the House of Lords was sharply critical of Lord Denning's admission in Davis v. Johnson that he read the reports of Hansard in private to guide him in interpreting statutory provisions, Lord Hailsham's admission that he, too, makes such a study suggests not only that the practice is more widespread than the House of Lords would have us believe,[353] but also that it has

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[352] "Legislative Technique: Another Reverse for the Law Commissions' Interpretation Bill" [1981] N.L.J. 840, at p. 841.

[353] A. Samuels, in "The Interpretation of Statutes" [1980] Stat. L. Rev. 86 says at p. 97 in reference to Law Commission commentaries on their own draft bills "Judges peep at the material during adjournments". There is no reason to believe that the situation is not the same in regard to Hansard.

proved to be a useful exercise and judges are, in fact, getting some guidance from the reports.[354] If the judges are not permitted to acknowledge in court the assistance that the legislative history has afforded them, not only is there a denial of natural justice in the particular case but also a false message is conveyed to the lawyers and law students who later study the reported case and attempt to follow the reasons for decision. Furthermore, Lord Denning has reduced the whole procedure to an absurdity by relying in Regina v. Local Commissioner for Administration for the North and East Area of England on a textbook that quoted a public address by the ombudsman that incorporated passages drawn directly from Hansard.[355] Thus, in his book The Discipline of Law, Denning states

> Hansard is for the Judges a closed book. But not for you. You can read what was said in the House and adopt it as part of your argument - so long as you do not acknowledge the source. The writers of law books can go further. They can give the very words from Hansard with chapter and verse. You can then read the whole to the Judges.[356]

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[354] See Michel Krauss, "Interprétation des lois - histoire legislative" (1980), 58 Can. Bar Rev. 756, wherein he discusses the effect of "secret law" in the Drybones case.

[355] Supra, p. 144.

[356] (Butterworths, London: 1979) at p. 10; see also D.G. Kilgour, "The Rule against the use of Legislative History: "Canon of Construction or Counsel of Caution"?" (1952), 30 Can. Bar Rev. 769, 773.

CONCLUSION - DEVELOPMENT OF THE STATUTE

It is clear from an analysis of the cases in this area that there is a general trend towards greater admissibility of legislative history for a wider variety of purposes. The old rule of inadmissibility no longer holds true. In the same way as commission reports have come to be accepted as admissible at least to determine the mischief that a statute seeks to address, so debates and speeches are acknowledged as admissible for that limited purpose. Furthermore, in constitutional cases, such sources may be used to determine the pith and substance of impugned legislation.

The difficulty of admitting evidence for limited purposes is demonstrated in the cases by the fact that in some cases the judges expound the rule and then proceed to use the extrinsic evidence for the actual interpretation of statutory provisions. It is in constitutional cases, particularly in reference cases to which courts seem to apply more relaxed rules, that the courts are beginning to show that they can in fact deal with legislative history successfully.

Once it is accepted that legislative history may be relevant to the interpretation of a statute, then it must be seen to be

admissible.[357] Once admitted, appropriate rules have to be applied to determine the weight that should be accorded to it. That weight will depend upon the reliability of the source of the evidence, its contemporaneity with the actual legislative process, its proximity to the legislative process and the context in which it is to be found.[358]

Thus the speech made by the responsible minister who introduces a bill in the Commons can be seen to carry more weight than the statement of an opposition back bencher made to a group of his constituents. In the first case, the Minister's speech can be seen to be a reliable statement of the government's interpretation of the bill. The speech is made contemporaneously with the debate on the bill and passage of the bill and the minister, as sponsor of the bill, is close not only to the drafters to whom his department gave instructions for the bill

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[357] "... Whatever theories may be devised to use or exclude parts of the legislative history of a statute and to weigh admissible extrinsic aids, their use must depend not upon whether a legislative intent, in its variant meanings from application in specific cases to legislative objects, is actually discoverable, but rather upon whether they are relevant and helpful in applying that statute in particular cases."

F.J. de Sloovère, "Extrinsic Aids in the Interpretation of Statutes" (1940), 88 U. Pa.L. Rev. 527, 529.

[358] W.K. Hurst, "The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria" (1980), 12 Pacific L.J. 189; Rhodes, White and Goldman "The Search for Intent: Aids to Statutory Construction in Florida" (1978), 6 Florida St. U.L.R. 383. - for a criticism of Rhodes et al. see R. Dickerson, "Statutory Interpretation: Dipping into Legislative History" (1983), 11 Hofstra L. Rev. 1125, 1143-1148.

but also to Cabinet itself. Finally, such a speech is usually well thought out, clearly drafted and intended to inform parliament of the issues. In contrast, whilst the statement of the opposition back bencher may be reliable in regard to his own interpretation of the bill, it cannot be seen to be a reliable guide as to what the object of the bill is and how certain provisions of it are intended to achieve that object. The opposition member is far removed from the government decision-making process and, though the statement may be made around the same time that the bill is being considered in the House, it is not made in the course of the debates, where others would have an opportunity to correct any errors or exaggerations. Quite the contrary, the statement is made in a forum where one would expect to find some exaggeration and "government bashing". Although not enunciated in these terms, it is probably out of an analysis of this type that the principles of admissibility and weight expressed by the Supreme Court of Canada in constitutional cases such as Churchill Falls have emerged.

Thus, the speech from the throne, the speech made by the responsible Minister in introducing the legislation,[359] statements and responses made by the responsible Minister during debate and reports to parliament by parliamentary committees may be used as

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[359]Milner suggests that better evidence than the Minister's speech is the departmental memorandum prepared to assist the minister in answering questions - see J.B. Milner "The Use of Legislative History" (1953), 31 Can. Bar Rev. 228 at p. 229.

reasonably reliable sources of interpretive assistance. Whereas, in descending order of importance, statements made by other Ministers, statements made by government members in debate, statements made by opposition members in debate and statements made by any member outside Parliament must be regarded as unreliable sources. There is no reason to believe that Canadian judges are any less skilled than American ones who, Kernochan has asserted, at least at the federal level in the United States, have shown a considerable "grasp of the realities" of the legislative process and have consistently shown an ability to weigh evidence drawn from the legislative process in the same way as they weigh other evidence adduced in court.[360] Quite the contrary, Canadian cases illustrate that our judges, too, have a "grasp of the realities".

There is a great fear among many commentators that the use of parliamentary debates will lead to a "manufacturing" of the evidence. This trend has already been seen in the United States where it is not unusual for a member of Congress to "amend" the congressional record after debate has closed. According to Folsom,

> Experienced Congressional leaders today are aware of the significance of legislative history materials in statutory construction. They often take pains, in reports and in floor explanations of measures they sponsor, to spell out for that very purpose the intent of particular provisions. In some quarters it has been

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[360] J.M. Kernochan, "Statutory Interpretation: An Outline of Method" [1976] Dal L. J. 333, 351.

> alleged that legislative intent is "manufactured" by deliberately drafting a statute in broad or ambiguous terms and then inserting in the committee report a statement giving the provision an interpretation which, if it had been plainly expressed in the statute, might not have been accepted by Congress.[361]

Whilst it is clear that the courts cannot control parliamentary practice, at the same time no such trend to "cook the books" has been detected in the Canadian, Australian or English systems. However, were the courts to switch their attention from a study of the actual words used in a statute to a reliance on statements made in the legislature, the effect could be to allow the executive to legislate through Hansard, and thus give the executive even greater powers of government than it already has.[362]

It has been suggested that all bills should have appended to them an explanatory memorandum or a preamble explaining the

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[361] G.B. Folsom Legislative History: Research for the Interpretation of Laws (University Press of Virginia, Charlottesville: 1972) at p. 6; and see S.L. Wasby, "Legislative Materials as an Aid to Statutory Construction: A Caveat" (1963), 12 J. Public L. 262, 264. For the view that ambiguity is purposeful, see D. Payne, "The Intention of the Legislature in the Interpretation of Statutes" [1956] Current Legal Problems, 96 at p. 106.

[362] W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983), 7 Dalhousie L.J. 7 at p. 35; J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954), 32 Can. Bar Rev. 624, at p. 637.

purpose and provisions of the bill on the European model.[363] Whilst there are advantages to this methodology, it has the disadvantage of creating "split-level" legislation and, according to Charles, instead of interpreting the provisions of the statute, the court spends most of its time interpreting the provisions of the explanatory memorandum. For these reasons, many have rejected the concept. Both in the Ghanaian Interpretation Act and that of Australia, however, it is this type of legislative history that is permitted to be used in interpretation. It forms a clearly defined source that is easily referred to in an interpretation act and might even assist the members of Parliament in better appreciating the ramifications of the bill under consideration. Thus, J.A. Corry has written:

> Ministers are likely to have grasped the general purpose and to have thought anxiously about the political implications of the proposed measure. But quite often the best of them will be hazy on the detailed bearing of a complex measure and on the way in which it is to be fitted into the existing law.[364]

There may therefore be real advantages to having a government-sponsored, well thought-out and well drafted memorandum before

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[363] per Lord Scarman in Davis v. Johnson, supra footnote 161; see Memorandum by the Government of Sri Lanka in Memoranda of Meeting of Commonwealth Law Ministers, Colombo, Sri Lanka, 1983 re use of statements of legal effect appended to bills in Sri Lanka; and S. Stromholm, "Legislative Material and the Construction of Statutes: Notes on the Continental Approach" (1966), 10 Scandinavian Studies in Law 175 for the use of travaux préparatoires in Europe.

[364] J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954), 32 Can. Bar Rev. 624, at p. 631.

the members of Parliament and (if the rule of exclusion is changed) before the Courts instead of relying on the limited knowledge of the Minister and the vagaries of the parliamentary forum. The appearance of such a memorandum in the form of technical notes to income tax legislation in Canada could be construed as a first step in this direction.

Whether such a memorandum ever becomes part of our parliamentary practice or not, the trend towards admitting legislative history and using it even in interpreting statutory provisions is clearly established. It cannot be denied that, if a questionable marginal note is admissible, then, logically, legislative history should also be admissible. Though admission of legislative history in all cases may give rise initially to problems such as accessibility, these problems are by no means insurmountable. The cases show that the judges know how to assign weight to legislative history when it is before them. The weight they do assign varies according to the source, greater weight being accorded to those sources that are more reliable and persuasive. The admission of legislative history in cases to date probably indicates the judges' need for more information and assistance in interpretation in what is an increasingly complex society where legislation is often very technical in nature.

CONCLUSION

As the field of law becomes more complex and technical and is increasingly dominated by statute law, the importance of statutory interpretation is constantly growing. It is clear from many of the statements made by judges both in and out of the courts that they feel the need of as much help as they can garner from whatever source they can get it. The classification of the sources to which they look for assistance into "intrinsic" or "extrinsic" is clearly irrelevant. The courts look to all sources that are relevant to the interpretive process and assign weight to them according to their reliability and persuasiveness.

Aids such as preambles, headings, marginal notes and punctuation are present in the statute as printed and passed. The weight assigned to them varies from case to case depending on how they relate to, and interact with, other provisions of the statute. These aids are not used as the sole basis for a decision. They may, however, throw light on an enacting provision enabling the court to prefer one meaning of the provision over another.

The same may be said for dictionaries, scholarly writings, judicial notice and administrative practice. Although ostensibly the information in these sources is present in the minds of all who read the statute, they are recognized as extrinsic aids that may influence the interpretation of an enacted provision. The

principles followed by the courts in assigning weight to scholarly writings and administrative practice do not appear to cause problems. The same cannot be said for dictionaries. Although the courts have established principles for assigning weight to dictionary meanings, it is clear from the cases that the principles are easier to relate than to follow. It is often difficult to determine from a reading of any particular case just how influential these aids were in the decision-making process. This is particularly true of judicial notice and what I have called the judge's interpretive baggage.

Although an interpretation act would seem to be an important source of interpretive assistance, it has been seen that some of its provisions are a mere codification of principles developed at common law. Where the interpretation act of a jurisdiction lags behind the common law, its provisions are simply ignored by the courts. Interpretation act provisions that provide whether aids such as marginal notes or punctuation are to be used in the interpretive process therefore carry little weight.

Statutes in <u>pari materia</u> are often used as sources of interpretive assistance. The weight assigned to them may vary greatly according to whether the statute was passed in the same jurisdiction as the statute under construction and also how closely the subject matter of the two statutes is related. Where one of the statutes is derived from the other, as is the case with some statutes that were imported from England, the statute

in pari materia may have some weight. The cases show, however, that considerable caution must be exercised in such cases as the two statutes may have undergone considerable amendments in two very different jurisdictions after that importation. Where this is the case, no weight should be assigned to the pari materia statute.

It is frequently stated that no resort may be made to extrinsic evidence if the statutory provision under interpretation is clear and unambiguous. The cases, however, demonstrate that this is not the practice in fact and frequently the question of ambiguity is never addressed by the courts. Sometimes, there is no ambiguity on the face of the statute but one emerges when extrinsic aids are introduced. It may therefore be concluded that the rule as to the requirement for ambiguity is improperly stated as a rule in respect of admissibility. In reality, it is a rule as to weight. Extrinsic aids could not, therefore, be used to radically change the initially perceived meaning of a statutory provision. Not only does an aid not carry sufficient weight but also it would be unfair to the parties who had relied on that initially perceived meaning. Where extrinsic evidence may colour the interpretation to be placed on a statutory provision, however, it may be accorded some weight.

The cases have shown that the courts have admitted various types of extrinsic aids in evidence for a long period of time and there has been a gradual trend towards greater admissibility.

This is seen, for example, in the phasing-out of the rule against citing the works of living authors. Today, the rule is recognized as a rule in respect of weight. If the author is recognized for his scholarliness and reliability, his works are accorded considerable weight. If not, his works may be admitted, but little or no weight is accorded to them.

This trend towards greater admissibility now stands at the door of legislative history. In the twentieth century, the door has been opening. Commission reports are now accepted as admissible, but for limited purposes, whilst parliamentary materials are accepted as admissible in certain kinds of cases for certain purposes.

The cases have shown that the "limited purpose" formula frequently breaks down and is clearly untenable in practice. Once a document is admitted to demonstrate the mischief that a statute is intended to correct, the contents of the document are inevitably retained in the mind of the judge. He may not even know it himself, but he will use that information to interpret provisions and come to a conclusion. More importantly, if it is accepted that legislative history constitutes part of the knowledge of the judge, then they form part of the "interpretative baggage" that he brings to a case whether he knows it or not. Since both Lord Denning and Lord Hailsham have admitted that they look at these sources anyway, we may assume other judges do too.

It would therefore be fairer to the parties and give a more coherent body of jurisprudence if these aids were accepted as admissible. We could then hope that, presented as part of the evidence in a case, the judge would address the questions of the weight to be assigned and the reliability and persuasiveness of the extrinsic aid and would articulate his conclusions in his decision.

An examination of the cases indicates that legislative history is more readily accepted and used in reference cases than in any other, though Charter cases follow a close second. However, in a recent Charter case[365], the Supreme Court of Canada has affirmed the view expressed in the B.C. Reference case that minutes of parliamentary committees should be accorded minimal weight, presumably because they are regarded as unreliable. What is really interesting about that statement is that the Court went on to say that in the case before the Court, the minutes gave no enlightenment anyway as to whether subsection 6(1) of the Charter was intended as a protection against extradition.[366] That latter statement must be emphasized for it raises the question as to whether the Court would have assigned more than minimal weight to the minutes had they in fact given some enlightenment to the interpretation of subsection 6(1).

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[365] United States of America v. Cotroni; United States of America v. El Zein (1989), 96 N.R. 321.

[366] ibid., at p. 328.

The Chief Justice of the Supreme Court of Canada has expressed the view that the rules in respect of the admissibility of extrinsic aids should be relaxed, though it is important to note that he made this statement many years before he became Chief Justice and that the comment was made in an extra-judicial setting. He said

> In my view, resort to both legislative history, including Hansard, committee minutes and White Papers, as well as to material referable to the construction of the Act, such as Guidelines and Orders-in-Council, might well be considered to be permissible. This is, of course, always subject to the court's assessment as to relevancy and weight. Knowledge of the circumstances which occasioned enactment of the measure, that is to say "the evil" the statute is aimed at, will assist the court in characterizing the Act, whether for constitutional purposes or otherwise. So too, will knowledge of its operation and its effects. In other words, extrinsic evidence is valuable not only where the question of constitutional validity arises, but also where the issue to be resolved is the meaning of the terms of the legislation. Extrinsic evidence may or may not be decisive in a given case, but it cannot fail to assist a court in appreciating the thrust of the measure. Justice should be blind to the status or station of the parties; it must not be blind to the purpose of Parliament.[367]

He has therefore endorsed the view that extrinsic aids should be admitted for all purposes, including interpretation of the meaning of words and phrases used in a statute.

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[367] B. Dickson, "The Role and Function of Judges", [1979] The Law Soc. Gaz. 138, at p. 164. This statement of Chief Justice Dickson is much clearer than his statement in Reference re Residential Tenancies, [1981] 1 S.C.R. 714 that "generally speaking, speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight" (at page 721), a statement that suggests some confusion between admissibility and weight.

Similar thoughts are being expressed by judges and writers in England and Australia. Essentially, they are following the trend exhibited both in the Supreme Court of the United States and in many of the state courts. Certainly, whilst the arguments against admissibility are real, it is impossible to justify the ostrich approach when the solution to an interpretation problem is available and, sometimes, is even publicly known. The judicial system, with its traditions and technicalities, is sometimes lacking in credibility before the general public. The credibility of the system in general, and of judges in particular, greatly suffers when a judge has to adopt some ruse to introduce the relevant information into his decision, as Lord Denning did in Regina v. Local Commissioner for Administration for the North and East Area of England. Similarly, it suffers when everyone knows or suspects that, even though the judge held that certain evidence was inadmissible or was admissible only for a limited purpose, he based his decision on it and invented some other argument to justify his decision.

Judges need all the help they can get in grappling with modern-day legal problems. Any extrinsic aid that is relevant and may be of assistance in coming to a decision ought to be admissible for such a purpose, and since "necessity is the mother of invention", we may be sure that some of the physical problems relating to the availability of extrinsic aids such as Hansard debates will be overcome by modern technological ingenuity.

APPENDIX I

Acts Interpretation Act - Australia
Acts Interpretation Amendment No. 27, 1984

Use of Extrinsic Material in the Interpretation of an Act

"15AB. (1) Subject to sub-section (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material -

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when -

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of sub-section (1), the material that may be considered in accordance with that sub-section in the interpretation of a provision of an Act includes -

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

APPENDIX I (cont.)

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with sub-section (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to -

(a) the desirability of persons being able to reply on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying that Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage."

APPENDIX II

Reference re Validity of the Wartime Leasehold Regulations - Justices Statements - Judicial Notice

Kerwin, J. at p. 11

> "It is apparent from the documents of which we are entitled to take judicial notice that the Leasehold Regulations were originally part of various controls of enterprise and services, ..."

Tascherau, J. at p. 18

> "In the present instance, no evidence of any kind has been submitted to show that the emergency has disappeared and that normal conditions are now prevailing. On the contrary, common knowledge, to which it is surely permissible to appeal in a case of this kind, and the very valuable exhibits in the record which I have usefully consulted, to test the accuracy of the statements, lead me to the irresistible conclusion that an emergency still exists as an aftermath of the war:"

Rand J. at p. 22

> "By what means, then, is it to be determined that economic disturbances caused by the war have not yet "entirely" disappeared? A conclusion of this sort is to be gathered from an appreciation of conditions throughout the country. Evidence of that is furnished to Parliament by the representatives in both the Houses: it is gathered by the agencies of the Dominion Government charged with country-wide enquiry, which are at the same time receiving-centres of complaints and communications from all districts. There is also the common knowledge of which the Court can take judicial notice."

and at p. 23

> "With those declarations and the matters of general public knowledge, at least not inconsistent with them, before us, and with nothing seriously challenging them, it would be quite impossible for this Court to find that the war conditions had in fact entirely disappeared, that the declarations of Parliament were not made in good faith, and that its legislation, for some purpose other than that of an orderly acccommodation of the Regulations to the last stages of the economic derangement, was a colourable device for dealing with matters beyond its jurisdiction.

APPENDIX 111

Examples of some of the extrinsic materials filed in Reference re Anti-Inflation Act

(a) the White Paper entitled Attack on Inflation,

(b) the monthly bulletin of Statistics Canada for October, 1975 containing, inter alia, various consumer price indices,

(c) a study by Professor Richard G. Lipsey on

(1) the harm caused by inflation,
(2) Canadian inflationary experience,
(3) the state of the Canadian economy in 1975 and
(4) various policy options in dealing with inflation,

(d) telegrams from a large number of economists supporting Professor Lipsey's analysis,

(e) the transcript of the speech delivered on September 22, 1975 by the Governor of the Bank of Canada,

(f) a comment prepared by the Ontario Office of Economic Policy on the need for national action and including a critique of Professor Lipsey's study.

Bibliography

L.D. Barry, "Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Charter of Rights and Freedoms" (1982), 60 Can. Bar Rev. 237.

Barwick, The Honourable Sir Garfield, "Divining the Legislative Intent" (1961), 35 Aus. L. J. 197.

F. Bennion, "Legislative Technique: Another Reverse for the Law Commissions' Interpretation Bill" (1981), 131 N.L.J. 840.

F. Bennion, Statutory Interpretation (Butterworths, London: 1984)

Beauchesne's Rules and Forms of the House of Commons of Canada (5th ed.) by Fraser, Birch and Dawson (The Carswell Company Limited, Toronto: 1978).

A.-F. Bisson, "Préambules et déclarations de motifs ou d'objets" (1980), 40 R. du B. 58.

Paul Brest Legislative Intent" (1961), 35 Aus. L. J. 197.

F. Bennion, "Legislative Technique: Another Reverse for the Law Commissions' Interpretation Bill" (1981), 131 N.L.J. 840.

F. Bennion, Statutory Interpretation (Butterworths, London: 1984)

Beauchesne's Rules and Forms of the House of Commons of Canada (5th ed.) by Fraser, Birch and Dawson (The Carswell Company Limited, Toronto: 1978).

A.-F. Bisson, "Préambules et déclarations de motifs ou d'objets" (1980), 40 R. du B. 58.

Paul Brest, "Interpretation and Interest", 34 Stanford Law Rev. 765.

R.B. Buglass, "The Use of Extrinsic Evidence and the Anti-Inflation Act Reference" (1977), 9 Ott. L. Rev. 183.

G. Cain, "Interpretation of Statutes: Reference to Parliamentary Debates", New Zealand Law Journal 22 May, 1962, 207.

H. Capitant, "L'interprétation des lois d'après les travaux préparatoires", Receuil Hebdomadaire Dalloz, 1935, chronique, p. 77.

J.L. Carro and A.R. Brann, "The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis" (1982), 22 Jurimetrics Journal 294; (1982) 9 J. of Legislation 282.

W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983), 7 Dalhousie L.J. 7

J.A. Clarence-Smith, "Interpretation of Statutes" (1970), 4 Man. L.J. 212.

Commonwealth Secretariat, Legislative Drafting (Commonwealth Secretariat, London: 1978).

"Continental Practice and English Law", Editorial (1975), 4 Anglo-American Review 360.

Gérard Cornu, Droit Civil (Éditions Montchrestien, Paris: 1988).

J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954), 32 Can. Bar Rev. 624.

P.-A. Côté, "Les Règles d'Interprétation des Lois: des Guides et des arguments" (1978), 13 R.J.T. 275.

P.-A. Côté, The Interpretation of Legislation in Canada (Les éditions Yvon Blais Inc., Cowansville (Qué): 1984).

P.-A. Côté, Interprétation des Lois (Les éditions Yvon Blais Inc., Cowansville (Qué): 1982.

M. Couder, "Les travaux préparatoires de la loi ou la remontée des enfers", D. 1975, chron. 249.

S. Cretney, "Judicial Blinkers" (1969), 119 N.L.J. 301. Sir Rupert Cross, Statutory Interpretation, 2nd. ed. by Bell and Engle (Butterworths, London: 1987).

Sir Rupert Cross, Statutory Interpretation, 2nd. ed. by Bell and Engle (Butterworths, London: 1987).

Sir William Dale, Legislative Drafting: A New Approach (Butterworths, London: 1977).

Sir William Dale, "Principles, Purposes, and Rules" [1988] S.L.R. 13.

K.C. Davis, "Legislative History and the Wheat Board Case" (1953), 31 Can. Bar Rev. 1.

Lord Denning, The Discipline of Law, (Butterworths, London: 1979).

de Sloovère, "Extrinsic Aids in the Interpretation of Statutes" 88 U. Pa. L. Rev. 527.

Dick, Legal Drafting (Carswell Company Limited, London: 1972).

Reed Dickerson, The Fundamentals of Legal Drafting, (Little Brown & Company, Toronto: 1965).

Reed Dickerson, The Interpretation and Application of Statutes (Little, Brown & Company, Toronto: 1975).

Reed Dickerson, "Statutory Interpretation in America: Dipping into Legislative History - 1", [1984] Stat. L.R. 76; (1983), 11 Hofstra L. Rev. 1125.

Reed Dickerson, "Statutory Interpretation in America: Dipping into Legislative History: - 11", [1984] Stat. L. Rev. 141.

Brian Dickson, Address to the Canadian Bar Association, Edmonton/Alberta, Feb. 2, 1985.

B. Dickson, "The Role and Function of Judges", [1979] The Law Soc. Gaz. 138.

E.A. Driedger, Composition of Legislation, 2nd. ed. (Department of Justice, Ottawa: 1976).

E.A. Driedger, Construction of Statutes, 2nd. ed. (Butterworths, Toronto: 1983).

Gerald Dunkin, Odgers' Construction of Deeds and Statutes, 5th ed. (Sweet & Maxwell, London).

S.G.G. Edgar, Craies on Statute Law, 7th ed. (Sweet and Maxwell, London: 1971).

Editorial, [1970] Chitt. L.J.

E. Finley, "Crystal Gazing: The Problem of Legislative History" (1959), 45 A.B.A.J. 1281.

O.M. Fiss, "Objectivity and Interpretation" (1982), 34 Stan. L.R. 739

G.B. Flosom, Legislative History: Research for the Interpretation of Laws (University Press of Virginia, Charlottesville: 1982).

J. Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 Columbia L.R. 527.

L. Fuller, "Positivism and Fidelity to Law-A Reply to Professor Hart" (1958), 71 Harv. L. Rev. 638

S.J. Gibb, "Parliamentary Materials as Extrinsic Aids to Statutory Interpretation", [1984] Stat. L. Rev. 28.

"Guidelines for Interpretation in Australia", [1981] Stat. L.R. 181.

H.L.A. Hart, The Concept of Law (Oxford University Press, Oxford: 1961)

E.G. Hudon, "Statutes: Interpretation" (1977), 55 Can. Bar Rev. 370.

E.G. Hudon, "Quelques mots sur la recevabilité des éléments de preuve extrinsèque devant les tribuneaux: le Canada et les États-Unis" (1981), 22 Les Cahiers de Droit 371.

J.W. Hurst, Dealing with Statutes (Columbia University Press, New York: 1982).

W.K. Hurst, "The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria" (1980), 12 Pacific L.J. 189.

R.H. Jackson, "The Meaning of Statutes: What Congress Says or what the Court Says" (1948), 34 A.B.A.J. 535.

Chantal Jacquier, "Des notes techniques en harmonie avec la loi" (1987), 35 Canadian Tax Journal 1384.

Q. Johnstone, "The Use of Extrinsic Aids to Statutory Construction in Oregon" (1949), 29 Oregon L. Rev. 1

H. Jones, "Extrinsic Aids in the Federal Courts" (1940), 25 Iowa L. Rev. 737.

H.W. Jones, "The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes" 1939, 25 Wash. L. Q. 2.

J.M. Kernochan, "Statutory Interpretation: An Outline of Method", (1976) Dal. L.J. 333.

D.G. Kilgour, "Use of Legislative History" (1952), 30 Can. Bar Rev. 1087.

D.G. Kilgour, "The Rule against the use of Legislative History: "Canon of Construction or Counsel of Caution"?" (1952), 30 Can. Bar Rev. 769.

Michel Krauss, "Interprétation des lois - histoire legislative" (1980), 58 Can. Bar Rev. 756.

J.M. Landis, "A Note on Statutory Interpretation" (1930), 43 Harv. L. Rev. 886.

B. Laskin, "The Institutional Character of The Judge" (1982), 7 Isr. L.R. 329.

Lucie Lauzière, "Le sens ordinaire des mots comme règle d'interpretation", (1987) 28 Les Cahiers de Droit 367.

W.A. Leitch, "Interpretation and the Interpretation Act, 1978", [1980] Stat. L. Rev. 5.

Dominique Manai, Le Juge entre la loi et l'équité (Payot Lausanne: 1985).

Elizabeth A. McNellie, "The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation", 89 Columbia Law Review 157.

P.M. Leopald, "References in Court to Hansard", [1981] Public Law 316.

Brad A. Liddle, "Statutory Construction - Legislative Intent - Use of extrinsic aids in Wisconsin", [1964] Wisconsin Law Rev. 660.

G. MacCallum, "Legislative Intent" (1966), 75 Yale L.J. 754.

J.M. Macrossan, "Judicial Interpretation" (1984), 58 Australian Law Journal 547.

Vincent MacDonald, "Constitutional Interpretation and Extrinsic Evidence" (1939), 17 Can. Bar Rev. 77.

J.T. MacQuarrie, "The Use of Legislative History" (1952), 30 Can. Bar Rev. 958.

Maxwell on the Interpretation of Statutes 12th ed., P.St. J. Langan, editor, (Sweet & Maxwell, London: 1969).

R.E. Megarry, Miscellany-at-Law, A Diversion for Lawyers and Others (Stevens and Sons Limited, London).

Memorandum by the Government of Sri Lanka, Meeting of Commonwealth Ministers, 1983.

Memorandum by the Government of Australia, Meeting of Commonwealth Law Ministers, 1983.

David Miers, "Citing Hansard as an Aid to Interpretation" [1983] S.L.R. 98.

David R. Miers and Alan C. Page, Legislation (Sweet & Maxwell, London: 1982).

J.B. Milner, "The Use of Legislative History" (1953), 31 Can. Bar Rev. 228.

Étienne Mureinik, "The Application of Rules: Law or Fact?" (1982), 98 L.Q.R. 587.

Sylvio Normand, "Les travaux préparatoires et l'interprétation du Code civil du Québec" (1986) 27 Cahiers de droit 347.

"Note, A Reevaluation of the Use of Legislative History in the Federal Courts" (1952), 52 Columbia L. Rev. 125

"Note, A Decade of Legislative History in the Supreme Court 1950-59" (1960), 46 Va. L. Rev. 1408.

R. Nunez, "The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination" (1972), 9 Cal. West L. Rev. 128.

C. Nutting, "The Relevance of Legislative Intention Established by Extrinsic Evidence" (1940), 20 B.U.L. Rev. 601.

Douglas Payne, "The Intention of the Legislature in the Interpretation of Statutes", [1956] Current Legal Problems 96.

D.C. Pearce, Interpretation of Statutes in Australia (Butterworths, Melbourne - Sydney-Brisbane: 1974).

L.-P. Pigeon, Rédaction et interprétation des lois, (éditeur officiel, Québec: 1978).

M. Radin, "A Short Way with Statutes" (1942), 56 Harv. L. Rev. 388.

M. Radin, "Statutory Interpretation" (1930), 43 Harv. L. Rev. 863.

Report of the English and Scottish Law Commissions on the Interpretation of Statutes (Law Com. No. 21; Scot. Law Com. No. 11, 1969).

"Reform of the Law Making Process" (1980), 130 New Law Journal 177.

Rt. Hon. Lord Renton, Q.C., "Interpretation of Legislation", [1982] Stat. L. Rev. 7.

R.M. Rhodes, J.W. White and R.S. Goldman, "The Search for intent: Aids to Statutory Construction in Florida" (1978), 6 Florida St. U.L.R. 383.

S. Rosenne, The Law of Treaties: A Guide to the Legislative History of the Vienna Convention (Oceana Publications Inc., Dobbs Ferry, N.Y.: 1970).

M. Rosenstein, "The Attorney-General of Canada v. The Reader's Digest Association, (Canada) Ltd., Sélection du Reader's Digest (Canada) Ltée" (1961-62), 8 McGill L.J. 62.

Lord Roskill, "Some Thoughts on Statutes, New and Stale", [1981] Stat. L. Rev. 77.

V. Sacks, "Towards Discovering Parliamentary Intent", [1982] Stat. L. Rev. 143.

A. Samuels, "The Interpretation of Statutes", [1980] Stat. L. Rev. 86.

J. Sparkman, "Legislative History and The Interpretation of Laws" (1950), 2 Ala. L. Rev. 189.

B.L. Strayer, Judicial Review of Legislation in Canada (University of Toronto, Toronto: 1968).

S. Stromholm, "Legislative Material and the Construction of Statutes: Notes on the Continental Approach" (1966), 10 Scandinavian Studies 175.

R. Stringham, "Crystal Gazing: Legislative History in Action, (1961), 47 A.B.A.J. 466.

"The Supreme Court on Administrative Construction as a Guide in the Interpretation of Statutes" (1927), 40 Harvard L. Rev. 469.

H. Thornstedt, The Principles of Legality and Teleological Construction of Statutes in Criminal Law (1960), 4 Scandinavian Studies 211.

G.C. Thornton, Legislative Drafting 2nd. ed. (Butterworths, London: 1979).

E. Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's", (1985), 35 University of Toronto Law Journal 113.

D. Vanek, "Citing Textbooks as Authority in England" [1971] Chitt. L. J. 302.

S.L. Wasby, "Legislative Materials as an Aid to Statutory Construction: A Caveat" (1963), 12 J. Pub. L. 262.

Robert Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988), 46 University of Toronto Faculty of Law Review 136.

TABLE OF CASES