TITLE: Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates

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The Supreme Court of Canada has become much more permissive with respect to the use of parliamentary debates in statutory interpretation. This study starts with a detailed review of the twelve cases in which references were made to legislative history in 1999. They show a lack of consistent practice by the Court and that some aspects of the question remain unsettled. The discussion that follows focuses on important issues pertaining to the consultation of such materials: (i) the purpose for which they are used, (ii) the preliminary requirement of legislative ambiguity, (iii) whether they constitute an interpretative means per se, and (iv) the relevant factors to determine their proper weight.

In addition to the 1999 decisions, the paper examines the previous case law on the subject, the situation in other common law jurisdictions, and the rationales underlying the traditional exclusionary rule. The background of the analysis includes the principle of the rule of law, the bygone plain meaning rule of construction, and the modern purposive and contextual interpretative method. Throughout the discussion, the author puts forward certain suggestions to remedy the remaining shortcomings regarding parliamentary debates; his main contribution consists of a set of guidelines to assess their persuasive force in the process of ascertaining the intention of Parliament.

I. Introduction

1 In 1999, the Supreme Court of Canada was quite permissive in relation to the use of parliamentary debates in statutory interpretation. In no less than a dozen cases did it refer to

legislative history to assist in ascertaining the intention of Parliament. An outside observer would think that this was the predictable consequence of opening the door to those extrinsic aids, as the House of Lords formally did in Pepper v. Hart.[1] The problem in Canada, however, is that there has never been a similar comprehensive decision by our highest Court to operate as a paradigm shift away from the traditional strict exclusionary rule and allow the consultation of parliamentary materials in interpreting legislation.

2 This paper will review the 1999 Supreme Court judgments that resorted to parliamentary debates, which will bring out the lack of consistent practice thereof. In the discussion that follows, I shall address some of the principle questions pertaining to the use of parliamentary materials in statutory interpretation again left unanswered. By putting these twelve decisions into a broader perspective, I will try to identify some apparent trends and, when appropriate, propose certain suggestions to remedy the remaining shortcomings. Before moving to the case law, however, it would be useful to set out the terminology applicable to the present study.

3 Documents pertaining to the conception, preparation, and passage of an enactment are generically called "legislative history". They include parliamentary committee reports, government policy papers, outside studies, explanatory memoranda, earlier versions of the legislation, statements before parliamentary committees, and speeches made in Parliament.[2] The latter is what constitutes "parliamentary debates"--often referred to as "Hansard" in common law.[3] In the civil law tradition, legislative history is assimilable to "travaux préparatoires",[4] a term also used in international law.[5]

4 Furthermore, parliamentary debates are said to constitute "extrinsic aids"[6] to the construction of statutes, similar to other reference documents such as dictionaries, statutes in pari materia,[7] and interpretation acts. One must distinguish them from "intrinsic aids", which include the legislation's preamble and headings, as well as its definition section, marginal notes, and punctuation.[8] In the following study, I shall use "parliamentary debates" to mean speeches and statements pertaining to a Bill made in Parliament,[9] which exclude commission reports.[10] The expressions "parliamentary materials" and "legislative history" will designate parliamentary debates and/or commission reports.

II. Decisions

5 A survey of the case law from the Supreme Court of Canada in 1999 shows that there were twelve decisions in which parliamentary debates were referred to by at least one of the judges who participated in the judgments. The review that follows will include a brief factual account of each case, the kernel of the decision, information regarding the debates considered, the discussion on the use of such materials in statutory interpretation, if any, and other related issues as they may arise.

Law v. Canada (Minister of Employment and Immigration)[11]

6 The appellant challenged ss. 44(1)(d) and 58 of the Canada Pension Plan[12] under s. 15(1) of the Canadian Charter of Rights and Freedoms[13] on the ground that they operated an unjustifiable discrimination on the basis of age. The Supreme Court dismissed the appeal in a unanimous

decision, which held that the impugned provisions did not violate the right to equality in the Charter.

7 There were two references to parliamentary debates in this case. The purpose of these consultations was the constitutional characterization of the statutory provisions at hand, i.e. to determine whether impugned sections infringed s. 15(1) of the Charter. The first reference was made at the beginning of the judgment, to identify the objective of the legislation. It would be "to provide contributors and their families with reasonable minimum levels of income upon the retirement, disability or death of the wage earner".[14] Before using any other interpretative tool, Iacobucci J. made a general reference to parliamentary debates[15] to support his conclusion, without elaborating on the author or context of the statements.

8 The second reference was in the last part of the decision where the law was applied to the facts of the case.[16] There, one of the appellant's contentions was to the effect that the objective of the provisions was founded on stereotypical and prejudicial assumptions. This argument, dismissed by the Court, was based partly on the speech made by the Minister responsible for the Canada Pension Plan Bill.[17] It is noteworthy that neither reference was accompanied by a discussion on the use of parliamentary debates in interpretation.

R. v. Gladue[18]

9 This case concerned Part XXIII of the Criminal Code[19] that codified the fundamental purpose and principles of sentencing and, in particular, interpreted s. 718.2(e) regarding available sanctions other than imprisonment, with special attention to Aboriginal offenders. The Supreme Court unanimously dismissed the appeal despite errors below in applying the provision at stake.

10 Justices Cory and Iacobucci first reminded us of the general rules relating to the construction of statutes, referring to previous decisions in the area.[20] The Court adopted a purposive interpretation, which focused on s. 718.2(e)'s remedial objective of reducing over-incarceration for all offenders, particularly for Aboriginal people. To support this conclusion, the Court resorted to parliamentary debates, among other things.[21] They included not only the speeches of the Minister responsible for the Bill,[22] but also statements made by members of Parliament[23] and senators,[24] whose titles and roles, however, were not mentioned. Other elements of legislative history were used as well, such as the testimony of the responsible Minister before the Committee on Justice and Legal Affairs.[25]

11 The references to parliamentary materials were made here to identify the purpose of the impugned legislation. The Court briefly discussed the issue of parliamentary debates in statutory interpretation beforehand. Justices Cory and Iacobucci wrote:

> Although these statements are clearly not decisive as to the meaning and purpose of s. 718.2(e), they are nonetheless helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision in the context of Part XXIII as a whole....[26]

This proposition was based on the Court's 1998 decision in Rizzo & Rizzo Shoes Ltd. (Re).[27]

R. v. Beaulac[28]

12 This case raised an issue relating to language rights protection afforded by s. 530 of the Criminal Code. Two expressions required interpretation: "language of the accused" and "best interests of justice". The Court said that both commanded a liberal construction based on the purpose of the provision at hand.[29] In the end, the Supreme Court ordered a new trial before a bilingual judge and jury.

13 Parliamentary debates came into play in the part of the judgment preceding the actual interpretation of s. 530 of the Criminal Code, where the majority considered the constitutional context of linguistic rights; this was irrelevant to the minority.[30] The Court consulted legislative history to support the interpretation that s. 530 aims at providing substantive equality of bilingualism in court. It is worth noting the absence of discussion on the use of such materials to construe legislation. Also, the first two references[31] failed to mention who made the statements; the last one was that of the Minister of Justice.[32]

M. v. H.[33]

14 The appellant brought a claim for support pursuant to the Family Law Act[34] and challenged the definition of "spouse" under s. 15(1) of the Charter. Section 29 in Part III defines "spouse" as including married persons and also "either of a man and woman who are not married to each other and have cohabited...continuously for a period of not less than three years." In a multiple-reason judgment,[35] with one dissenting judge,[36] the Supreme Court dismissed the appeal and declared the definition of "spouse" of no force and effect.

15 In addition to the language found in the Family Law Act[37] and the Court's case law,[38] the majority referred to legislative history, including several commission reports[39] and parliamentary debates.[40] These materials were consulted along with other interpretative tools to determine the legislation's objectives pursuant to the Oakes[41] test under s. 1 of the Charter. It is notable that one of the commission reports was handed down after the adoption of the impugned statute.[42] Also, the materials related not only to the Family Law Act, but to the predecessor legislation as well.[43] Relevant too, is that the MPs who made the statements were not identified.[44] Finally, despite such an extensive consultation, the majority did not even find it appropriate to address the general issue of parliamentary debates consultations.

16 In a concurring set of reasons, Bastarache J.'s references to parliamentary debates were also delivered in the context of the limitation clause. To determine s. 29's purposes,[45] he resorted to the failed Bill 167,[46] and even its legislative history[47] that was, in fact, a statement made by the Justice Opposition Critic. The other references to parliamentary debates were similar to the majority's.[48] Justice Bastarache wrote the following regarding their use:

> Although legislative history will often be helpful in determining the precise harm [i.e. the mischief] sought to be remedied by law-makers, the ultimate standard for determining the category of harm is the provisions of the legislation itself and the social facts to which it is addressed.[49]

However, he later added:

> There are various theoretical justifications for giving careful consideration to legislative history when considering the legislative purpose of an equality claim....It is simply impossible to analyse whether the legislature has failed to take into account, on an equal footing, the concerns and characteristics of a particular group without, to some degree, examining the terms of their deliberations.
>
> Also, an examination of the legislative history may demonstrate that the legislature failed to accord equal concern to the welfare of some disadvantaged groups. Again, only a review of the processes of evaluation by a legislature can unveil whether this is what has taken place....
>
> From a theoretical standpoint, it makes sense that legislative history should play a particularly important role in the s. 1 analysis.[50]

17 Unlike his two colleagues, Gonthier J. referred to parliamentary debates to assist in deciding whether or not s. 29 violated s. 15(1) of the Charter, not to identify its objectives under s. 1's Oakes test. Before consulting them, however, he expressed the following cautious view as to their role:

> Where the statutory language, in the context of the statute as a whole, is unclear or ambiguous, resort may then be had to other indicia of legislative intent, such as statements made in the legislature, to inform the court's understanding of the purpose of the statute. However, as this Court has cautioned on previous occasions, such indicia of legislative intent, though of assistance in some cases, must be treated with circumspection, given practical concerns as to their reliability, and more theoretical concerns regarding legislative sovereignty: see R. v. Heywood, [1994] 3 S.C.R. 761, at pp. 787-88. Ultimately, the language of the statute itself is authoritative: it may be interpreted in the case of ambiguity by reference to extrinsic sources, but it is the statute, not the sources, which governs.[51]

Justice Gonthier referred roughly to the same materials as the majority did,[52] but he reached a substantially different conclusion regarding the purpose of the impugned legislation.[53]

R. v. G.(B.)[54]

18 This case concerned an exception to admissibility provided in s. 672.21(3)(f) of the Criminal Code. The first question was whether or not a statement can be used when it is obtained in relation to this inadmissible evidence. The majority held that the former must also be excluded if it was contaminated by the latter. The second issue was whether or not the fact that the statement will be utilized merely to challenge the credibility of an accused should influence its admissibility. At common law, inadmissible statements must be excluded whatever the intended use. In the end, the majority interpreted the provision at hand in line with these rules and dismissed the appeal; the dissent[55] opined to the contrary.

19 The majority resorted to parliamentary debates as a first construction tool[56] to ascertain the purpose of the impugned provision. The speech of the Minister of Justice,[57] who was responsible for the enactment, showed that the objective of s. 672.21(3)(f) is to facilitate effective psychiatric assessments, while also protecting the search for the truth in courts. Regarding the use of such materials in statutory interpretation, Bastarache J. wrote:

> The parliamentary history is instructive in this regard. In fact, it is settled that when courts are called upon to consider the constitutionality of an enactment, they may take into account the parliamentary history, which is generally not the case for the ordinary interpretation of an enactment....The same is true when the issue is whether the interpretation of a given enactment is consistent with the values of the Charter.[58]

In the present case, the Court interpreted the provision in light of the relevant Charter values[59] and the presumption of constitutional validity.[60]

Winko v. British Columbia (Forensic Psychiatric Institute)[61]

20 The appellant contended that Part XX.1 of the Criminal Code created a presumption of dangerousness that violated ss. 7 and 15(1) of the Charter. The majority, per McLachlin J., held that a proper reading of the impugned legislation, in view of the relevant constitutional obligations, showed that no burden is placed on the accused. The minority[62] largely agreed with McLachlin J., but would have favoured a more restrictive interpretation.

21 The whole Court agreed that the purpose of Part XX.1 was to pursue the dual objective of public safety and fair treatment of mentally ill offenders. At the outset of her reasons and before using any other interpretative means,[63] McLachlin J. supported this conclusion by referring to a statement of the Assistant Deputy Minister at the Department of Justice, a civil servant, who appeared before the Standing Committee on Justice and the Solicitor General.[64] These parliamentary materials were consulted for the constitutional characterization of the provision, i.e. to determine whether or not it breached Charter rights. There was no discussion on the use of legislative history.

Dobson (Litigation Guardian of) v. Dobson[65]

22 The question in this case was whether or not a mother is liable to her born alive child for injuries arising from prenatal negligence. The majority judgment,[66] per Cory J., was primarily based on the idea of respect for the mother's privacy and autonomy. Further, it was said that the fundamental policy implications in imposing tort liability in these situations should be resolved by the legislature. This is what the British Parliament did through an act prescribing maternal tort immunity subject to an exception for negligent driving.[67]

23 It is with respect to the United Kingdom's regime that, for comparative purposes, British parliamentary materials were consulted. The majority acknowledged the social policy considerations of the issue at hand by resorting to a U.K. Law Commission Report.[68] Further, in deciding against a motor vehicle exception, Cory J. again referred to this Report, and also reproduced a statement of a member of the House of Commons in Westminster,[69] presumably made when the statute was adopted. The MP's particulars were not mentioned. Nor did the Court discuss the English rule--or the Canadian rule for that matter--dealing with the use of parliamentary debates.

Delisle v. Canada (Deputy Attorney General)[70]

24 The appellant brought a constitutional challenge to the definition of "employee" in s. 2(1)(e) of the Public Service Staff Relations Act (PSSRA)[71] and s. 6 of the Canada Labour Code[72] under ss. 2(d), 2(b), and 15(1) of the Charter. Justice Bastarache wrote for the majority that the purpose of the provisions did not violate any Charter right. In dissent, Cory and Iacobucci JJ. were of the view that the provisions' statutory aim was anti-associational.

25 It was the dissenting judges who resorted to legislative history to assist in determining[73] the objective of the definition of "employee" in s. 2(1)(e) of the PSSRA;[74] L'Heureux-Dubé J., concurring, did as well.[75] Although the materials used were not parliamentary debates but a commission report,[76] the remarks on extrinsic aids to interpretation appear broad enough to apply to legislative history in general. Justices Cory and Iacobucci wrote:

> In determining the purpose of an impugned legislative provision, a court should look to intrinsic and admissible extrinsic sources regarding the provision's legislative history and the context of its enactment....Looking to intrinsic sources may be particularly important where there is little admissible extrinsic evidence of legislative purpose. However, in all cases a court is entitled to consider admissible extrinsic sources if they exist, and indeed is duty bound to consider such evidence where it is presented by the parties....Indeed, in Charter cases where a claimant asserts that a law has an invalid purpose, it is to be expected that most if not all of the relevant evidence of legislative purpose will be extrinsic to the statute per se.[77]

The majority addressed the issue of using extrinsic aids, but declined to consult them. Justice

Bastarache's comments are particularly apposite and worth reproducing:

> Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance in determining the purpose of a statute in order to evaluate whether it is consistent with the Charter....Legislative intent must have an institutional quality, as it is impossible to know what each member of Parliament was thinking. It must reflect what was known to the members at the time of the vote. It must also have regard to the fact that the members were called upon to vote on a specific wording, for which an institutional explanation was provided.[78]

Parliamentary materials were examined by the dissent in relation to the constitutional characterization of the provisions, i.e. to decide on their compliance with the Charter.

U.F.C.W., Local 1518 v. KMart Canada Ltd.[79]

26 At issue here was whether the peaceful distribution of leaflets at secondary sites during a labour dispute constituted an unjustifiable breach of freedom of expression protected in s. 2(b) of the Charter. The Supreme Court unanimously held that the effect of the definition in s. 1(1) of the Labour Code[80] with the restrictions on picketing in ss. 65 and 67 was to infringe s. 2(b) of the Charter. Further, the impugned legislation, which completely prohibited leafleting, did not meet the Oakes test, in particular the minimum impairment part of the test.

27 In his s. 1 analysis, Cory J. identified the objective of the provisions as being to minimize the harmful effect of picketing on third parties and the general public. His conclusion was based on the purposes of the Labour Code as stated in s. 2(1), and also on the parliamentary debates of an old version of the Labour Code.[81] The statements to which he referred were what seemed to be a question from a member of the Opposition and the answer provided, presumably, by the responsible minister. The Court was unclear as to the functions of the quoted MPs. There was no discussion on the use of parliamentary materials.

Francis v. Baker[82]

28 Following the parties' divorce, the respondent instigated proceedings to seek, inter alia, an increase in child support pursuant to the Federal Child Support Guidelines.[83] The issue was whether or not the prescribed Table amount was "inappropriate". Looking at its grammatical and ordinary sense, the Court found no ambiguity in the term. Other interpretative methods used to support this conclusion included contextual approach and the principle that one should avoid absurd results. In the end, the appeal was dismissed.

29 Bastarache J., for the Court, began as follows: "Proper statutory interpretation principles therefore require that all evidence of legislative intent be considered, provided that it is relevant and reliable."[84] He said the Guidelines' purpose was to be the establishment, in a predictable and

consistent manner, of fair levels of child support from both parents on marriage breakdown. This was based on the objectives stated in s. 1 of the Guidelines, and also on the speech made by the Minister of Justice on the introduction of the enactment for third reading.[85] Accordingly, parliamentary materials were used here to help to construe the Guidelines, despite the said absence of ambiguity in the word "inappropriate". Again, the Court failed to address the issue of parliamentary debates in legislative interpretation.

Perron-Malenfant v. Malenfant (Trustee of)[86]

30 Pursuant to the applicable provisions of the Civil Code of Lower Canada,[87] only certain life insurance policies were excluded from a seizure made under the Bankruptcy Act.[88] The policy at stake did not fall within any of the exemptions. Therefore, the question central to this appeal was whether or not non-exempt policies could nevertheless be excluded from the divisible property. Based on the language used and interpreted in its historical and broad legislative context, the Court unanimously answered in the negative.[89]

31 A thorough examination of legislative history was completed in order to determine Parliament's intention. It included not only parliamentary debates, but also the previous state of the law[90] and commission reports.[91] Reference was made to two statements.[92] The first was an excerpt from the responsible Minister's speech during the second reading of the enactment.[93] The other one was that of another MP,[94] whose status at the National Assembly was not indicated.[95] Before consulting these materials, Gonthier J. mentioned only in passing that one must be careful in doing so,[96] without any further comment.[97]

R. v. Davis[98]

32 This last decision in 1999 where parliamentary debates were considered relevant is controversial, not least because the Supreme Court eschewed their consultation. The question relating to legislative history was whether or not it is a crime under s. 305(1) Criminal Code to extort sexual favours.[99] The Court unanimously held that it was. Several means of construction were used to reach this conclusion,[100] such as interpreting the legislation in its grammatical and ordinary sense, in context (noscitur a sociis[101]), by reference to its purpose, to its historical origins, and taking into account the heading.[102]

33 A certain confusion arose when Lamer C.J. examined the historical context of s. 305(1) of the Criminal Code. He considered the previous state of the law dealing with extortion by referring to its original common law offence and to the previous versions of the codified infraction. He then wrote:

> Legislative history may be used as an aid in determining the intention of the legislature: see Rizzo Shoes, supra, at para. 31; see also R. v. Vasil, [1981] 1 S.C.R. 469, at p. 487; Paul v. The Queen, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660. However, the legislative history of s. 305 does not shed much light on the meaning of "anything."[103]

The latter finding was supported by a 1967 decision of the Court to the effect that the previous versions of s. 305 were useless because the wording was so different. The Chief Justice ended this part of his reasons as follows:

> As a final point regarding legislative history I would note that there is no Hansard evidence or Committee Reports which illuminate Parliament's intention in enacting the new extortion provision in 1955.[104]

34 It appears from the above statement that Lamer C.J. mixed up the history of the statute and the legislative history of the statute. They are two very different things in legislative interpretation: the first relates to the previous state of the law, the second to the documents pertaining to the enactment's conception, preparation, and passage. What was first examined was actually the history of s. 305 of the Criminal Code, not its legislative history. Note also that, although none existed, the Court nevertheless found it necessary to address the possibility of using parliamentary debates to ascertain legislative intention.

III. Discussion

35 The above review of the twelve cases where the Supreme Court of Canada referred to parliamentary debates in 1999 clearly shows that numerous uncertainties remain as to this method of statutory interpretation. In the discussion that follows, I will address some of the most important questions pertaining to the use of these materials and try to see whether or not this case law sheds some light on them. The Court's jurisprudence on the issue,[105] the situation in other common law jurisdictions,[106] and the rationales supporting the old exclusionary rule[107] will be considered when appropriate.

36 The following analysis of legislative history will be divided in four parts, namely: (i) whether the purpose for which it is used matters, (ii) the need to show ambiguity in legislation, (iii) whether it is an interpretative means per se, and (iv) how to determine its proper persuasive force.

A. Purpose of the Use of Parliamentary Debates

37 Generally speaking, parliamentary materials can be considered for several purposes: as an aid to construing legislation, for the constitutional characterization of statutes, or to assist in interpreting the Constitution. This classification appears to be relevant in the Canadian context because the case law on the judicial consideration of parliamentary debates has developed mainly in relation to constitutional matters. The exclusionary rule was first enunciated in R. v. Gosselin,[108] where the Supreme Court had to construe an ordinary statute. But most of the later elaboration of the Canadian position on the issue was done in constitutional cases.

38 There are two situations where parliamentary materials may be useful for the constitutional characterization of statutes. First, in cases dealing with the division of powers, to help in ascertaining the pith and substance of the challenged legislation in order to decide if it comes within

the competence of the enacting legislative body. Second, in Charter cases, to determine whether the object of the challenged statute breaches a guaranteed right and, if so, whether the limits are justifiable in a free and democratic society pursuant to s. 1 of the Charter.

39 In Canada (A.G.) v. Reader's Digest Assoc. Can. Ltd.,[109] the Supreme Court applied mutatis mutandis the exclusionary prohibition on legislative history in the constitutional characterization of a statute for division of power purposes. However, this ruling was later so qualified that, nowadays, it is assumed that parliamentary debates can be used to determine whether or not an Act is intra vires of the enacting authority.[110] Under the Charter, there is a series of cases to the effect that parliamentary debates can be consulted at the substantive right stage and/or at the limitative clause analysis.[111]

40 Legislative history can also be utilized to interpret the language of the Canadian Constitution itself. Under the Constitution Act, 1867,[112] although the exclusionary rule applied initially,[113] resort to parliamentary debates has now been allowed for many years.[114] The same is true with the Constitution Act, 1982,[115] especially in relation to the Charter where the Supreme Court did not hesitate for a moment to use such materials to construe its provisions.[116]

41 In several 1999 cases, reference was made to parliamentary debates for the constitutional characterization of legislation, i.e. to determine if there was a Charter infringement. They include Law (whether provisions breached s. 15(1)), M. v. H. (whether limits to s. 15(1) are justified under s. 1), Winko (whether Part XX.1 of the Criminal Code violated the Charter), and KMart (whether a s. 2(b) breach was justified under s. 1). For the majority in R. v. G.(B), Bastarache J. consulted parliamentary debates not to decide a question of Charter compliance per se, but to provide an interpretation consistent with Charter values. This situation was said to command an approach different to the ordinary construction of enactments.[117]

42 Justice Bastarache also made a point of distinguishing the purpose for which legislative history was used in his concurring set of reasons in M. v. H. He wrote that: "From a theoretical standpoint, it makes sense that legislative history should play a particularly important role in the s. 1 analysis."[118] This passage, when read in conjunction with his majority opinion in R. v. G.(B.), seems to indicate that, at least for some members of the Supreme Court, treatment of parliamentary debates should differ according to the purpose for which they are consulted. However, justification for such a distinction has not been satisfactorily elucidated. It would appear that the balance of arguments is actually against it.

43 Historically, the development of the common law rules on the issue has not been based on any differentiation between resorting to parliamentary debates for constitutional characterization or for ordinary legislative interpretation. This is illustrated by Cory J.'s majority reasons in R. v. Heywood, where his jurisprudential review of the use of parliamentary materials did not distinguish between constitutional characterization and the interpretation of statutes in general.[119] Recently, in Rizzo Shoes, Iacobucci J. relied on R. v. Morgentaler,[120] a constitutional case, to support the

proposition that "this Court has recognized that [legislative history] can play a limited role in the interpretation of legislation."[121]

44 The second, more persuasive, argument against operating a distinction based on the purpose for which parliamentary debates are consulted is that the ultimate goal in both categories of cases is exactly the same--to ascertain the intention of Parliament.[122] This so-called "legal fiction"[123] plays the important interpretive function of providing a guide outside the subjective judgement of an adjudicator in order to give effect to the role of Parliament in the legislative process. This idea of an objective determination of legislative intention affords some certainty and predictability to the interpretative mechanism constitutionally entrusted to the judiciary.[124]

45 Now, be it in regards to the meaning of a statutory provision, with respect to the pith and substance of an enactment to determine the proper legislative competence, in respect of the object of the legislation challenged under the Charter, or with regard to the pressing and substantial objective pursuant to the Oakes test, the fundamental purpose for which a court will resort to legislative history boils down to answering one question--what is the intention of Parliament? One might try to create distinctions for one reason or another, but the bottom line for the judge remains the same determination of legislative intention.

46 Therefore, it appears that there is no theoretical justification for treating parliamentary debates differently depending on the purpose for which they are used. The next question is whether or not, before there can be such a consultation, the legislative provision needs to be ambiguous.

B. Ambiguity Requirement

47 Some have defended the view that before considering certain means of interpretation, or before even starting the interpretative process itself, a court must come to the preliminary conclusion that the enactment is unclear, obscure, or ambiguous.[125] Parliamentary debates would constitute one such construction tool that could be used only if an ambiguity exists in the legislation. In the test put forward by the House of Lords in Pepper, Lord Browne-Wilkinson, writing the principal speech, insisted that resorting to these materials was permitted only if the legislation "is genuinely ambiguous or obscure, [or leads to an] absurdity".[126]

48 Contrariwise, in Australia, where the rules dealing with the use of extrinsic aids are codified in s. 15AB of the Acts Interpretation Act, 1901,[127] it was held that these elements can be consulted even if the statute is "clear on its face".[128] In other words, there is no requirement that the legislative provision be found ambiguous beforehand. In the United States of America, when courts first opened the door to legislative history, it was only to construe ambiguous legislation.[129] Some decades later, resort to these materials was allowed for unambiguous statutes[130] and, since the exclusionary rule has been fully repudiated,[131] the issue of clarity is now practically irrelevant south of the border.

49 In Canada, the question of whether or not there needs to be legislative ambiguity before

parliamentary debates can be used remains unsettled. The Supreme Court's case law has seldom mentioned such a requirement.[132] However, in the very case that incorporated the English exclusionary rule in the country, R. v. Gosselin,[133] Tachereau C.J. wrote that, "personally, I would not be unwilling, in cases of ambiguity in statutes, to concede that such a reference might sometimes be useful."[134] In 1999, the Court was somewhat contradictory on this point.

50 In M. v. H., Justice Gonthier expressed the following view in his dissenting reasons: "Where the statutory language, in the context of the statute as a whole, is unclear or ambiguous, resort may then be had to other indicia of legislative intent, such as statements made in the legislature".[135] Similarly, in Delisle, Bastarache J. wrote for the majority: "Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance".[136] In Baker, however, the Court explicitly stated that the term "inappropriate" in s. 4(b) of the Guidelines suffered no ambiguity,[137] but nevertheless proceeded to examine in some detail the enactment's parliamentary debates[138] to support the given interpretation.

51 Some legal commentators[139] have defended the need to establish ambiguity before consulting parliamentary materials on the basis of the rule of law, which was one of the theoretical rationales underlying the traditional exclusionary rule.[140] Put another way, the principle of legal certainty would be affected if a court could use, without the existence of any interpretative obscurity, texts other than the publicly accessible statute.[141] Other commentators, however, have correctly pointed out how difficult it is to decide whether the legislation is ambiguous or unambiguous.[142] This is well illustrated by Lord Oliver of Aylmerton's remarks in Pepper: "Ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact".[143] Ironically, this scenario is what may indeed create legal uncertainties in statutory interpretation.

52 The main problem with the ambiguity requirement is that it perpetuates the rhetoric and myths of the so-called "plain meaning" rule.[144] This strict form of literal interpretive method constitutes the last vestige from the era when courts thought that "Parliament generally changes the law for the worse"[145] and that a statute was an "alien intruder in the house of the common law".[146] It is in this context that Lord Halsbury wrote that "in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting."[147]

53 The plain meaning rule has long been criticized by both commentators[148] and courts.[149] It is now rejected by virtually all common law jurisdictions.[150] As Lord Griffiths wrote in Pepper:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.[151]

54 The meaning of legislative provisions is now inferred from a broader perspective, through a modern approach that F.A.R. Bennion calls the "informed interpretation".[152]. According to this method, courts should put the emphasis not only on the language used, but also equally on the purpose and context of the enactment. As Professor E.A. Driedger states:

> Today there is only one principle or approach, namely, 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.[153]

This passage is repeatedly quoted by the Supreme Court of Canada,[154] although one could argue that the actual application of this interpretative approach is far from consistent.[155]

55 For the same reasons that the plain meaning rule should be considered obsolete, the requirement that legislation be found ambiguous before resorting to parliamentary debates is unwarranted. Be it to justify stopping the interpretative process or to rule against the use of legislative history, when a court holds that a provision is clear or that it is obscure, it has already construed the enactment.[156] As Justice L'Heureux-Dubé appositely wrote in Québec Inc. v. Quebec (Régides Permis d'alcool): "In reality, the 'plain meaning' can be nothing but the result of an implicit process of legal interpretation."[157]

56 Before initiating the interpretative process to determine the intention of Parliament, practically all statutory provisions are susceptible to more than one meaning and, accordingly, may be viewed as unclear. In fact, genuine legislative ambiguity--that which entails real difficulties of construction--is a determination made at the end, rather than at the beginning, of interpretation. Therefore, it is illogical and indeed erroneous to require that an enactment be obscure as a preliminary threshold test to interpretation or, by the same token, as a precondition to invoking parliamentary debates. The truth of the matter is that ambiguity is an inference that can be drawn only after a full assessment of legislative intention, using canons and tools of statutory interpretation, including parliamentary materials.[158]

This brings us to the next question, which is whether or not legislative history constitutes an interpretative technique in itself.

C. Autonomous Interpretative Means

57 The above survey shows that the Supreme Court addressed the general issue of parliamentary debates in the construction of statutes in only half of the twelve cases in which they were considered.[159] Moreover, in two of them, it was done very succinctly indeed.[160] In the other six cases,[161] legislative history was consulted without the slightest discussion beforehand, as if all aspects of its use had long been settled in Canada. We have already seen, in relation to the ambiguity requirement, that this is not true. I now turn to another important, yet unanswered, question--what is the status of parliamentary debates in statutory interpretation?

58 This query concerns the appropriateness of legislative history as an autonomous instrument to ascertain the intention of Parliament. There is, however, a preliminary issue that is strongly linked to this--whether or not parliamentary debates can contradict, and not just confirm, a conclusion founded on other means of legislative interpretation.

59 Pursuant to the Australian s. 15 AB of the Acts Interpretation Act, 1901,[162] extrinsic aids may be used if they confirm the ordinary sense of the legislative provision under examination. Put another way, these materials can be consulted only if they do not contradict the meaning otherwise discovered.[163] In New Zealand, which has not legislated on parliamentary debates, a similar rule applies at common law.[164]

60 On several occasions, the Supreme Court of Canada held that parliamentary debates would be particularly relevant if they affirmed the meaning ascertained through other interpretative methods. In Construction Paquette, for instance, Justice Gonthier wrote: "In the case at bar, the parliamentary debates show that the legislature's reading of the provision was clear and uncontroversial and confirm that the interpretation given is correct."[165] Also, to the same effect are the comments by Gonthier J. in Doré v. Verdun (City)[166] and by McLachlin J. in Finlay v. Canada (Minister of Finance).[167]

61 In the 1999 case of Gladue, Justices Cory and Iacobucci addressed this aspect of the use of parliamentary debates. They expressed the view that, although not decisive, such materials "are nonetheless helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision".[168] Similarly, Bastarache J.'s concurrence in M. v. H. mentioned that, although legislative history is often helpful, "the ultimate standard for determining the category of harm [i.e. the mischief] is the provisions of the legislation itself".[169] As well, dissenting in that case, Gonthier J. wrote that: "Ultimately, the language of the statute itself is authoritative".[170]

62 Theoretically, the principle of the rule of law--that citizens should be able to know and to rely on the legislative text by which they are regulated--provides a justification against the use of parliamentary debates to contradict an enactment's ordinary sense. For reasons of certainty and predictability, statute books must constitute a trustworthy guide on which citizens can base their conduct and actions. Therefore, if they are contradictory and irreconcilable, the methods of interpretation based on the language and purpose of the statute must prevail over elements extrinsic to the enactment, such as speeches and statements made in Parliament.[171]

63 Accordingly, as the Supreme Court seems to favour, parliamentary debates should not be utilized to contradict the legislative sense ascertained through other interpretative means. I would suggest, however, that this exception be limited to the rare situations where there is a direct clash between the statutory text and the extrinsic materials. Only in those extreme cases, for reasons of certainty and predictability, would the rule of law demand that priority be accorded to the enactment; in all other instances, it should be possible to take parliamentary debates into account.

64 Now, the main question is whether legislative history is an autonomous interpretative tool or is a mere secondary element. As we have seen, the Supreme Court has often said that parliamentary debates can confirm the ordinary sense of legislation, as opposed to contradicting it.[172] But what really interests us here is whether these materials can only confirm the meaning discovered through other interpretative methods or whether they constitute an instrument of construction per se. To my knowledge, this aspect has never been directly addressed, either by the Supreme Court or by the doctrine.

65 Often in 1999, the Court made reference to legislative history at the beginning of the interpretative process, even at the very start of the reasons for judgment. This is what happened in Law,[173] R. v. G.(B.),[174] and Winko.[175] In Gladue[176] and Beaulac,[177] in M. v. H.'s majority opinion,[178] as well as in KMart,[179] Baker,[180] and Malenfant,[181] debates were used in combination with other interpretative tools. Significantly, in all these cases, the consultation of the relevant materials did not occur at the end of the reasons where, presumably, it would be done if they were only to confirm a meaning based on other interpretative methods. This is a strong indication that they were considered to be an autonomous technique of construction, not a mere secondary element corroborating a conclusion already reached.

66 In principle, there is no justification for not treating parliamentary debates as an instrument of statutory interpretation in itself. The exclusionary rule prohibiting the use of these materials has been de facto put aside in Canada. Although the Supreme Court has never said it in so many words--nor has it formally considered the pros and cons of the issue--the position seems to be that they are "admissible" in statutory interpretation.

67 Until recently, there were some remaining uncertainties in this regard , as the 1994 decision in Heywood illustrates. After thoroughly reviewing the case law on the use of parliamentary debates, Cory J. held that it was not necessary to give a definitive answer to this million dollar question since the materials at hand were not conclusive. There are still utterances from the Supreme Court that sometimes cast doubt on whether such consultations are permissible. For instance, in 1999, Bastarache J. wrote in R. v. G.(B.) that "it is settled that when courts are called upon to consider the constitutionality of an enactment, they may take into account the parliamentary history, which is generally not the case for the ordinary interpretation of an enactment."[182]

68 However, the decisions in Construction Paquette,[183] Doré,[184] and Rizzo Shoes,[185] as well as the 1999 judgments--especially the comments in Gladue,[186] Delisle,[187] and Malenfant[188]--bear witness to the repudiation of the old exclusionary rule in Canada. Today, it appears settled that legislative history can indeed be used in the construction of statutes,[189] i.e. that it can be consulted to ascertain the intention of Parliament.

69 If there is no further objection to resorting to parliamentary debates--and appropriate weight is given to them, as we shall see[190]--then they should constitute a full-fledged means of construction. These materials are no different than other interpretative elements extrinsic to the enactment, such

as dictionaries, statutes in pari materia[191] or interpretation acts. There is no reason to foster a sterile distinction between using legislative history merely to confirm a conclusion and consulting it along with other techniques of statutory interpretation.

70 As for the ambiguity requirement,[192] such an opposition is artificial and in effect resuscitates the spirit, if not the body, of the plain meaning rule. It creates a second class of interpretative techniques, i.e. those that can be used only later in the process, to further support a conclusion. This constitutes another superfluous preliminary threshold to consulting parliamentary debates, similar to the obscurity precondition. It is illusory to think that courts will actually open the Hansard book only after exhausting all other means of statutory interpretation, just as it was fictitious to allow the consultation of such materials only if the legislation was unclear.

71 Judges should have all canons, methods, and rules of legislative interpretation at their disposal without unnecessary constraints. The Supreme Court seems to have settled that one of the available tools of construction is the consultation of parliamentary debates. The 1999 cases show that they were used not merely to confirm an interpretation, but rather in combination with other techniques of construction. But most importantly, we have seen that there is no reason in principle to treat legislative history as a secondary element of interpretation. Au contraire, it should constitute an autonomous and prime weapon in the court's arsenal.

72 This leads to the last question to examine, which deals with the proper weight to be attached to parliamentary debates in a particular case.

D. Persuasive Force

73 Assuming that courts may indeed resort to parliamentary debates to assist in ascertaining legislative intention,[193] how should they then determine their persuasive force? It is one thing to hold that the ambiguity requirement is passé and that legislative history constitutes a technique of construction in itself, but the most important step is to know their appropriate weight in a given interpretative situation.

74 A simple case is where an enactment makes an explicit reference to parliamentary materials, as it sometimes happens in its preamble.[194] This undoubtedly expresses a plain and authoritative desire of Parliament that these elements be used when interpreting the statute.[195] As a result, considerable weight should be attributed to legislative history in such situations.

75 In all other circumstances, what are the appropriate criteria in measuring the persuasive force of parliamentary debates? I have suggested elsewhere[196] that this evaluation be based on four categories of factors,[197] namely: (i) the reliability of the source of information, (ii) the contemporaneity with the actual legislative process, (iii) the proximity to that process, and (iv) the trustworthiness of the records in which the information is found. Thus, for instance, statements of the Minister responsible for the enactment made at the end of the third reading and found in an official report will carry much more weight than ad-lib comments made in parliamentary committee

by a member of the Opposition in response to an evasive answer given by the Government and recorded only in the assembly president's manuscript notes.

76 In Pepper, Lord Browne-Wilkinson expressed the view, in obiter dictum, that the test[198] for the use of parliamentary debates set out therein was going to be difficult to fulfill. He wrote: "I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."[199] In 1999, the Supreme Court of Canada was not nearly as restrictive as the House of Lords. In fact, it appears that there was very little selectivity, if at all, in the legislative history consulted. But before an appropriate weight can be given to them, one must know the details of the materials actually at stake, which was the main problem with the 1999 decisions.

77 There were cases where statements or speeches were consulted without any mention whatsoever as to the identity of the author, his or her title and role regarding the Bill, or the context in which they were made. This is what happened in Law[200] and in M. v. H.'s majority opinion.[201] In several other cases, the information about the legislative history used was incomplete. In Gladue, for instance, although the first references involved the responsible Minister's speeches, we know nothing significant regarding the statements of the other MPs and senators.[202] Similar shortcomings occurred in Beaulac,[203] KMart,[204] and Malenfant.[205] Of course, in order to evaluate the proper persuasive force of the available debates, it is essential that the interpreter possess their particulars.

78 By contrast, for the majority in R. v. G.(B.), Justice Bastarache's reference to parliamentary materials was sufficiently detailed--speech made by the Minister of Justice Kim Campbell, responsible for the Bill, during the second reading.[206] Similarly, in Baker, Bastarache J. mentioned that the statement used was that of the Minister of Justice, who was responsible for the enactment, when the Guidelines were introduced to Parliament for third reading.[207] Also, in Winko, McLachlin J. specified that the speech consulted was made by Daniel Préfontaine, the Assistant Deputy Minister at the Department of Justice, before the Standing Committee on Justice and the Solicitor General.[208]

79 The last two cited decisions provide a useful illustration of how the weight given to parliamentary debates may differ considerably from case to case. On a spectrum of persuasive force, the statement referred to in Baker is certainly close to the most convincing end of the scale. Drawing from the elements I suggested above:[209] (i) the source of information is highly representative of legislative intention because it was the Minister responsible for the Bill, (ii) the speech was made contemporaneous to the final vote on the enactment, (iii) it is also close to the legislative process, i.e. in introduction to the third reading, and (iv) the statement was taken down in a trustworthy publication, the official report of parliamentary debates. All of these factors justify the attribution of considerable force to the legislative history.

80 In Winko, on the other hand, (i) the author is much less authoritative as it was a civil servant, i.e. the Justice Assistant Deputy Minister, (ii) the statement was made at the time of parliamentary committee, in the middle of the legislative process, (iii) the forum was the Standing Committee on

Justice and the Solicitor General, not particularly proximate to the decision-makers, and (iv) in terms of records, the minutes of the proceedings are official government documents. Of the four categories of factors, all but the last one indicate that the materials ought to fall toward the least persuasive end of the spectrum. Such an analysis was not made by McLachlin J. and, erroneously, she seems to have treated this statement as convincing enough to influence her interpretation of the legislation at issue.

81 There is another case worth examining in some detail because of a problem it raises with respect to the apparent weight given to the materials. In KMart, Justice Cory, for the Court, used the following extracts from the parliamentary debates on the adoption of an old version of the Labour Code:

> Mr. Clark: ..I'll just give you an example: Canadian Tire in Prince George went on strike. There was a campaign to boycott Canadian Tire. There was picketing at other stores of Canadian Tire. That was ruled not to be allowed by the former Labour Relations Board, so what the union did instead was an extensive boycott campaign that involved things like large 4-by-8 signs, almost like election signs, that said "Boycott Canadian Tire." In my riding of Vancouver East alone there were something like 100 4-by-8s up on all the major highways, saying "Boycott Canadian Tire." Can the minister confirm, then--I think it's his intention--that those kinds of acts are still legal under this bill, and not prohibited in any way?
>
> Hon. L. Hanson: Yes, that's also my interpretation.[210]

This appears to be an answer by a member of the Government, the Honorable L. Hanson, to a question asked by an Opposition member, Mr. Clark. Not only is there a problem of gaps in information here,[211] but the probative value of these statements is minimal, to an extent that it is doubtful that they carry enough weight to have any bearing on the interpretation.

82 The main concern is the reliability of the source, i.e. the first element of the guidelines proposed above.[212] An affirmative answer by the Government to a hypothetical interpretation of the legislation put forward by the Opposition does not constitute a very credible statement. Similar to a counsel's subjective question in cross-examination, an MP can formulate his or her inquiry to "make the records" in a way that was not desired by the responsible Minister and, in effect, prompt statements that do not represent the intention of Parliament. In other words, the danger is that MPs--Government, Opposition or other, indifferently--try to "cook the books".

83 Traditionally, this fear was one of the principal practical rationales underlying the exclusionary prohibition regarding parliamentary debates. It is strongly connected to the bygone view that such materials fundamentally lack reliability, and that they are not a trustworthy means of ascertaining legislative intention.[213] The perceived difficulty was that, as J.A. Corry stated: "The process of enacting new legislation is not an intellectual exercise in pursuit of truth; it is an essay in

persuasion, or perhaps almost seduction!"[214] In France, even if there is practically no restriction on the use of parliamentary materials, H. Capitant had similar concerns in mind when he wrote that "[i]l est étonnant que, malgré les leçons de l'expérience, les auteurs et les tribunaux continuent à chercher des éclaircissements là où règne la confusion."[215]

84 The corollary apprehension is that members of Parliament will try to introduce information in parliamentary records--through interventions, questions or remarks--destined to influence future judicial considerations, which indeed would render legislative history objectively less reliable. This practice would more or less manipulate the legislative process, not at its conception level, but at its ultimate construction stage.[216] In the United Kingdom, an incongruous expression has come to refer to the technique of making the records in the hope of having an impact on the interpretation and application of an enactment. From the decision of the same name, British MPs say that they are "pepper-and-harting" the Bill in the House.[217]

85 No doubt, this potential problem of reliability exists and should act as a counsel of caution in deciding how much persuasive force the information found in parliamentary debates deserves.[218] Although, if the barristers do their job well, especially that of the party against which the materials are used, and providing that courts are aware of the possible traps that some statements and speeches in Parliament might represent, the number of cases where such subterfuges will prove successful should, at the end of the day, be limited.

IV. Conclusion

86 In 1999, the Supreme Court of Canada was quite active with respect to statutory interpretation, especially with the dozen cases where it thought it appropriate to refer to parliamentary debates to assist in ascertaining the intention of Parliament.[219] None of them, however, constitute a Canadian version of Pepper, whereby an adequate analysis of the issue is provided, including the pros and cons of using such materials and how to determine their persuasive force. Instead, these cases left unanswered numerous questions of which I have attempted to address the most important.

87 There are two other aspects that, for reasons of brevity, could not be discussed in great length. Briefly, the first one is the validity of using parliamentary debates from other countries in an extended comparative interpretation, as the Court did in Dobson.[220] In this case, Cory J. resorted to the statement made by a member of Parliament in Westminster.[221] The consultation was intended to further support the conclusion that, at common law in Canada, there is no exception to the maternal immunity for injuries arising from prenatal negligence to a born alive child. Needless to say, such a reference to legislative history did not bring much to the issue at bar,[222] not least because the case was not even one of statutory interpretation, but one of common law torts.

88 Another interesting question is the possible different treatment of parliamentary debates--and other travaux préparatoires--required when interpreting private law enactments in the distinctive civilian jurisdiction of Quebec. In the 1999 case of Malenfant,[223] the civil law expert at the Supreme Court, Justice Gonthier, did not point to any difference in the use of legislative history when he

construed two provisions of the Civil Code. The same approach had been adopted as well in the Quebec law cases of Construction Paquette[224] and Doré,[225] also per Gonthier J. However, I doubt that this aspect is definitely settled[226] since it has never been addressed directly by the Court.[227]

89 This paper concentrated on four important issues dealing with the use of parliamentary debates in statutory interpretation. The first one related to the purposes for which these materials can be used, i.e. to interpret ordinary legislative provisions, for the constitutional characterization of statutes, or as an aid to construing the Constitution. We saw that, fundamentally, the reason for resorting to legislative history in all these situations is the same--to discover the intention of Parliament. Consequently, the treatment of such materials should not be affected by the purpose behind the consultation.

90 The second question examined above is the alleged need that, before referring to parliamentary debates, one must come to the preliminary conclusion that the legislation at hand is unclear. The principle of the rule of law does not justify such a restriction. In fact, it was demonstrated that the ambiguity requirement is a leftover from the plain meaning rule, which has now generally been rejected here and elsewhere. An informed interpretation without unnecessary restrictions as to the use of legislative history should be favoured instead.

91 The status of parliamentary materials in the construction of statutes was next examined. We saw that the rule of law requires that priority be given to the literal and purposive methods of interpretation over the information found in legislative history, but only in cases of direct clashes between them. In all other situations, I argued that these materials constitute an autonomous interpretative means to ascertain legislative intention, and not just a secondary element to corroborate a conclusion.

92 Finally, probably the most important issue relating to the utilization of parliamentary debates in statutory interpretation was discussed--how courts should determine their proper weight. The criteria I have been proposing include: (i) the reliability of the source of information, (ii) the contemporaneity with the actual legislative process, (iii) the proximity to that process, and (iv) the trustworthiness of the records in which the information is found. Unfortunately, this question of persuasive force has never been properly addressed by the Supreme Court. The 1999 cases were no exception and, in effect, I tried to show that some of the materials used did not carry much weight at all.

93 All these shortcomings regarding the use of parliamentary debates in legislative interpretation will not be remedied unless the Court bites the bullet and tackles them one by one when the proper case comes around. Until then--to borrow from a saying about the old forms of action[228]--the plain meaning rule might be buried but, regarding some aspects of legislative history, it still rules us from the grave.

* * *

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1 [1993] A.C. 593 (H.L.).

2 See P.W. Hogg, Constitutional Law of Canada, 3rd ed., looseleaf (Toronto: Carswell, 1992) at 57-1; F.A.R. Bennion, Statutory Interpretation: A Code, 2nd ed. (London: Butterworths, 1992) at 454.

3 This expression comes from T.C. Hansard who, starting in 1803, was the second reporter of the debates in the House of Commons in Westminster (the first one was W. Cobbett in 1803). It is only after 1908, however, that these parliamentary reports became official in England and in other Commonwealth jurisdictions.

4 See F. Gény, Méthode d'interprétation et sources en droit privé positif, t. 1, 2nd ed. (Paris: Librairie générale de droit et de jurisprudence, 1919) at 293; H. Capitant, "L'interprétation des lois d'après les travaux préparatoires" D.H. 1935. Chron. 77; S. Strömholm, "Legislative Material and Construction of Statutes-Notes on the Continental Approach" (1966) 10 Scandinavian Studies in Law 173; M. Couderc, "Les travaux préparatoires de la loi ou la remontée des enfers" D. 1975. Chron. 249.

5 See art. 31 and 32 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

6 See W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983) 7:3 Dalhousie L.J. 7 at 8, who talks about "materials that are considered external to the words of the legislative enactment".

7 That is, of the same substance, dealing with similar matters.

8 See F. Frankfurter, "Some Reflections on the Reading of Statutes" (1947) 47 Colum. L. Rev. 527 at 529, who referred to these sources of interpretation lying within the four corners of the statute as "written in ink discernible to the judicial eye." It is not in all Canadian jurisdictions where marginal notes and headings are considered intrinsic to the legislative text. For instance, at the federal level, s. 14 of the Interpretation Act, R.S.C. 1985, c. I-21, explicitly states that marginal notes are not part of the statute. In Saskatchewan, s. 12 of the Interpretation Act, 1995, S.S. 1995, c. I-11.2, excludes both marginal notes and headings.

9 It is important to note that statements subsequent to the adoption of a statute cannot be considered part of its legislative history: see P. Brazil, "Reform of Statutory Interpretation-the

Australian Experience of Use of Extrinsic Material: With a Postscript on Simpler Drafting" (1988) 62 Austl. L.J. 503 at 509-10.

10 Traditionally, such materials were treated differently as they could be used only to ascertain the mischief that the statute was enacted to cure, not for the purpose of giving meaning to the legislative text itself: see Herron v. Rathmines and Rathgar Improvement Commissioners, [1892] A.C. 498 (H.L.); Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs and Trademarks, [1898] A.C. 571 (H.L.); Assam Railways and Trading Co. v. Commissioners of Inland Revenue, [1935] A.C. 445 (H.L.). This distinction does not exist anymore, and commission reports can now be utilized to determine the intention of Parliament: see R. v. Secretary of State for Transport, Ex parte Factortame Ltd., [1991] 1 ALL E.R. 70 (H.L.). Likewise, in Canada, with regards to the old rule: see Laidlaw v. Toronto (Metropolitan), [1978] 2 S.C.R. 736, 87 D.L.R. (3d) 161; Morguard Properties Ltd. v. Winnipeg (City), [1983] 2 S.C.R. 493, 3 D.L.R. (4th) 1-and the new position: see Hills v. Canada (A.G.), [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193; R. v. Mailloux, [1988] 2 S.C.R. 1029. In Australia, see Bitumen and Oil Refineries (Australia) Ltd. c. Commissioner for Government Transport (1955), 92 C.L.R. 200 (H.C. Aus.); Dillingham Constructions Pty. Ltd. v. Steel Mains Pty. Ltd. (1975), 132 C.L.R. 323 (H.C. Aus.). In New Zealand, see New Zealand Educational Institute v. Director-General of Education, [1982] 1 N.Z.L.R. 397 (N.Z. C.A.).

11 [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1, judgment on March 25, 1999.

12 R.S.C. 1985, c. C-8.

13 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11.

14 Law, supra note 11 at para. 8.

15 House of Commons Debates (10 August 1964) at 6636.

16 Law, supra note 11 at para. 97.

17 House of Commons Debates (16 November 1964) at 10122.

18 [1999] 1 S.C.R. 688, 171 D.L.R. (4th) 385, judgment on April 23, 1999.

19 R.S.C. 1985, c. C-46.

20 See Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at paras. 20-23, 154 D.L.R. (4th) 193; R. v. Chartrand, [1994] 2 S.C.R. 864 at 875, 116 D.L.R. (4th) 207. The Court also referred to the commentators E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at 87; and, R. Sullivan, Driedger on the Construction of Statutes, 3rd ed.

(Toronto: Butterworths, 1994) at 131; and, s. 12 of the federal Interpretation Act, supra note 8, governing the purposive construction of enactments.

21 The Court also extensively discussed the social context when s. 718.2(e) of the Criminal Code was enacted, including Canada's problems of over-incarceration and the over-representation of Aboriginals in prisons.

22 House of Commons Debates (20 September 1994) at 5871, 5873.

23 House of Commons Debates (22 September 1994) at 6028.

24 Debates of the Senate (21 June 1995) at 1871.

25 Minutes of Proceedings and Evidence, Issue No. 62 (17 November 1994) at 62:15.

26 Gladue, supra note 18 at para. 45 [emphasis added].

27 Supra note 20 at paras. 31, 35.

28 [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193, judgment on May 20, 1999.

29 Ibid. at para. 34.

30 Ibid. at para. 1, Lamer C.J. and Binnie J.

31 House of Commons Debates (6 May 1986) at 12999; House of Commons Debates (7 July 1988) at 17220.

32 House of Commons Debates (2 May 1978) at 5087.

33 [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577, judgment on May 20, 1999.

34 R.S.O. 1990, c. F.3.

35 Justices Cory and Iacobucci wrote the decision for the majority, but, awkwardly, not in a common set of reasons; Cory J. drafted the part on s. 15(1) and Iacobucci J. did the s. 1 analysis. Justices Major and Bastarache wrote concurring reasons.

36 Justice Gonthier dissented.

37 See the preamble as well as ss. 1, 29, 31, and 33 of the Family Law Act, supra note 34.

38 See Moge v. Moge, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456.

39 See Ontario, Law Reform Commission, Report on Family Law, Part VI, "Support

Obligations" (Toronto: Ministry of the Attorney General, 1975); Ontario, Ministry of the Attorney General, Family Law Reform (Toronto: Ministry of the Attorney General, 1975); Ontario, Law Reform Commission, Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act (Toronto: Ontario Law Reform Commission, 1993).

40 Ontario, Legislative Assembly, Debates (26 October 1976) at 4102-4103; Ontario, Legislative Assembly, Debates (18 November 1976) at 4793-4801; Ontario, Legislative Assembly, Debates (22 November 1976) at 4890-91, 4898; Ontario, Legislative Assembly, Debates (18 October 1977) at 901, 904.

41 R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

42 The Ontario Law Reform Commission, supra note 39, was presented three years after the adoption of the Family Law Act in 1990. See also Bastarache J.'s reasons that referred to this commission report as well: M. v. H., supra note 33 at para. 297.

43 See The Deserted Wives' and Children's Maintenance Act, R.S.O. 1937, c. 211, and The Family Law Reform Act, 1978, S.O. 1978, c. 2.

44 Except once, when the name of Mr. McMurtry was mentioned: M. v. H., supra note 33 at para. 98. Only later did we learn, in Gonthier J's and Bastarache J.'s reasons, that he was the Attorney General for Ontario when the relevant legislation was adopted.

45 In M. v. H., ibid. at para. 347, he opined that the objectives of s. 29 of the Family Law Act are "to impose support obligations upon partners in relationships in which they have consciously signalled a desire to be so bound (i.e., through marriage); and upon those partners in relationships of sufficient duration to indicate permanence and seriousness, and which involve the assumption of household responsibilities, or other career or financial sacrifices, by one partner for the common benefit of the couple, and which cause or enhance an economic disparity between the partners."

46 Equality Rights Statute Law Amendment Act, 1994. However, as the majority pointed out in M. v. H., supra note 33 at para. 105, this was an error because a failed amendment cannot influence the interpretation of the law: Interpretation Act, R.S.O. 1990, c. I.11, s. 17.

47 Ontario, Legislative Assembly, Debates (1 June 1994) at 6583.

48 M. v. H., supra note 33 at paras. 338, 340, 342-43.

49 Ibid. at para. 323 [emphasis added].

50 Ibid. at paras. 326-28 [emphasis added].

51 Ibid. at para. 182 [emphasis added].

52 Ibid. at paras. 187, 203, 220.

53 He was of the view that s. 29's purpose is "to recognize the social function specific to opposite-sex couples and their position as a fundamental unit in society, and to address the dynamic of dependence unique to men and women in opposite-sex relationships": ibid. at para. 181.

54 [1999] 2 S.C.R. 475, 174 D.L.R. (4th) 301, judgment on June 10, 1999.

55 Justices L'Heureux-Dubé, Gonthier, and McLachlin.

56 The other canons of interpretation used included the rule that legislation infringing on the common law must be interpreted restrictively and the maxim cessante ratione legis, cessat et ipsa lex (when the rationale of the act is exhausted, its application also stops).

57 House of Commons Debates (4 October 1991) at 3296.

58 R. v. G.(B.), supra note 54 at para. 37 [emphasis added].

59 They relate to ss. 7, 13, and 24(2) of the Charter.

60 See Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1078, 59 D.L.R. (4th) 416.

61 [1999] 2 S.C.R. 625, 175 D.L.R. (4th) 193, judgment on June 17, 1999.

62 Justices L'Heureux-Dubé and Gonthier.

63 Later in her reasons, McLachlin J. construed s. 672.54 by looking at the language used and by examining the legislative context of the provision: Winko, supra note 61 at paras. 47-48.

64 House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General, Issue No. 7 (9 October 1991) at 6.

65 [1999] 2 S.C.R. 753, 174 D.L.R. (4th) 1, judgment on July 9, 1999.

66 Justices L'Heureux-Dubé and McLachlin wrote a concurring set of reasons.

67 See Congenital Disabilities (Civil Liability) Act 1976 (U.K.), 1976, c. 28.

68 Law Commission No. 60, "Report on Injuries to Unborn Children" in Law Commission Reports, vol. 5 (Great Britain: Professional Books, 1979) at para. 55.

69 U.K., H.C., Parliamentary Debates, 5th ser., vol. 904, col. 1589, at col. 1595 (6 February 1976).

70 [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513, judgment on September 2, 1999.

71 R.S.C. 1985, c. P-35.

72 R.S.C. 1985, c. L-2.

73 Other interpretative tools, also extrinsic to the impugned provisions, were used by Cory and Iacobucci JJ., such as executive orders, statutes in pari materia (of the same substance, dealing with similar matters) and expert reports: see Delisle, supra note 70 at paras. 92-96, 99-106.

74 Justice Bastarache, for the majority, rejected the conclusions drawn from these sources: see ibid. at para. 20.

75 Ibid. at para. 5.

76 Canada, Preparatory Committee on Collective Bargaining in the Public Service of Canada, Report (Ottawa: Queen's Printer, 1965).

77 Delisle, supra note 70 at para. 79 [emphasis added].

78 Ibid. at para. 17 [emphasis added].

79 [1999] 2 S.C.R. 1083, 176 D.L.R. (4th) 607, judgment on September 9, 1999.

80 Labour Relations Code, S.B.C. 1992, c. 82 [hereinafter Code].

81 British Columbia, Legislative Assembly, Debates (10 June 1987) at 1695.

82 [1999] 3 S.C.R. 250, 177 D.L.R. (4th) 1, judgment on September 16, 1999.

83 S.O.R./97-175, adopted under the Divorce Act, R.S.C. 1985 c. 3 (2nd Supp.), as am. by S.C. 1997, c. 1, s. 11 [hereinafter the Guidelines].

84 Baker, supra note 82 at para. 35. He cited the judgments in Rizzo Shoes, supra note 20; Chartier v. Chartier, [1999] 1 S.C.R. 242, 168 D.L.R. (4th) 548; as well as the commentator Driedger, supra note 20 at 87.

85 House of Commons Debates (6 November 1996) at 6197.

86 [1999] 3 S.C.R. 375, 177 D.L.R. (4th) 257, judgment on September 17, 1999.

87 Quebec, Cividl Code of Lower Canada: Report of the Commissioners for the Codification of the Laws of Lower Canada relating to Civil Matters (Quebec: G.E. Desbarats, 1865) [hereinafter Civil Code].

88 Bankruptcy Act, R.S.C. 1985, c. B-3.

89 Justice Gonthier also referred to the principle that the legislature does not speak for nothing, as well as to the principles expressed in the maxims generalia specialibus non derogant (a general rule does not modify a specific rule) and ab absurdo (interpretation avoiding absurd results), to dismiss the respondent's arguments regarding the oblique action in art. 1031 Civil Code: Malenfant, supra note 86 at paras. 41-42, 52.

90 See Act to secure to Wives and Children the benefit of Assurances on the lives of their Husbands and Parents, S. Prov. C. 1865, 29 Vict., c. 17; An act to consolidate and amend the law to secure to wives and children the benefit of assurances on the lives of their husbands and parents, S.Q. 1878, 41 & 42 Vict., c. 13; Husbands' and Parents' Life Insurance Act, R.S.Q. 1925, c. 244; Husbands and Parents Life Insurance Act, R.S.Q. 1964, c. 296.

91 Ministère des Institutions Financières du Québec. Compagnies et Coopératives, Service des Assurances, Rapport Faribault, 1957-1960; Quebec, Civil Code Revision Office, Report on the Québec Civil Code, vol. 1 (Quebec: Éditeur officiel du Québec, 1978).

92 Later, there was also a general reference to parliamentary debates when the concern for consumer protection was discussed; however, no material was utilized: Malenfant, supra note 86 at para. 45.

93 Québec Assemblée nationale, Journal des débats (19 novembre 1974) at 2873.

94 Ibid. at 2875.

95 Only his name, Marcel Léger, a Member of National Assembly for the riding of Lafontaine, was given: Malenfont, supra note 86 at para. 35.

96 Malenfant, ibid. at para. 35.

97 He cited Construction Gilles Paquette Ltée v. Entreprises Végo Ltée, [1997] 2 S.C.R. 299, 146 D.L.R. (4th) 193; P.-A. Côté, Interpretation of Legislation in Canada, 2nd ed. (Cowansville: Yvon Blais, 1991).

98 [1999] 3 S.C.R. 759, 179 D.L.R. (4th) 385, judgment on November 25, 1999.

99 The other questions were: (i) whether there could be consent to sexual activity if it was obtained through blackmail, (ii) whether the principle coming from Kienapple v. The Queen, [1975] 1 S.C.R. 729, 44 D.L.R. (3d) 351 applied to convictions of extortion and sexual assault, (iii) whether the trial judge erred by not considering the defence of honest but mistaken belief in consent, and (iv) whether the trial judge was mistaken in applying the principle of reasonable doubt. The Court did not find it appropriate to answer the first two questions and dismissed the last two.

100 In para. 42, the Chief Justice referred to the excerpt from E.A. Driedger, supra note 20, adopted in Rizzo Shoes, supra note 20 at para. 21, about the general approach to legislative interpretation.

101 That is, an interpretation which favours consistency in meaning for the same word used on multiple occasions in a statute: see R. v. Zeolkowski, [1989] 1 S.C.R. 1378 at 1387, 61 D.L.R. (4th) 725; Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385 at 400, 89 D.L.R. (4th) 218.

102 The said heading is entitled "Offences Against Rights of Property".

103 Davis, supra note 98 at para. 50.

104 Ibid.

105 The principal cases include R. v. Gosselin (1903), 33 S.C.R. 255; Canadian (Wheat Board) v. Hallett and Carey Ltd., [1951] S.C.R. 81, 1 D.L.R. 466, rev'd, [1952] A.C. 427 (P.C.); Canada (A.G.) v. Reader's Digest Assoc. Can. Ltd., [1961] S.C.R. 775, 30 D.L.R. (2d) 296; R. v. Vasil, [1981] 1 S.C.R. 469, 121 D.L.R. (3d) 41; R. v. Morgentaler, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537; Construction Paquette, supra note 97; Rizzo Shoes, supra note 20.

106 These will include the United Kingdom, Australia, New Zealand, and the United States.

107 This traditional English judge-made rule prohibits the use of parliamentary debates as an aid to statutory interpretation: Millar v. Taylor (1769), 4 Burr. 2303, 98 E.R. 201 (K.B.); Beswick v. Beswick, [1968] A.C. 58 (H.L.); Pepper, supra note 1. The reasons behind this rule can be grouped in three categories: historical, theoretical, and practical-for a comprehensive discussion of them, see S. Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998) 43 McGill L.J. 287 at 313-21.

108 Supra note 105 at 264. See also Canadian (Wheat Board), supra note 105; Reviews by K.C. Davis, "Legislative History and the Wheat Board Case" (1953) 31 Can. Bar Rev. 1; and, J.T. MacQuarrie, "The Use of Legislative History" (1952) 30 Can. Bar Rev. 958.

109 Supra note 105 at 793. See also Texada Mines v. British Columbia (Attorney General), [1960] S.C.R. 713 at 720, 24 D.L.R. (2d) 81.

110 See Reference re: Anti-Inflation Act (Canada), [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452; Reference re: Residential Tenancies Act 1979 (Ontario), [1981] 1 S.C.R. 714 at 721, 123 D.L.R. (3d) 544; Reference re: Upper Churchill Water Rights Reversion Act 1980 (Newfoundland), [1984] 1 S.C.R. 297 at 318, 8 D.L.R. (4th) 1. However, see contra RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at 242, 127 D.L.R.

(4th) 1, La Forest J. (dissenting).

111 See, among others, R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713 at 749, 35 D.L.R. (4th) 1; R. v. Whyte, [1988] 2 S.C.R. 3 at 24-25, 51 D.L.R. (4th) 481; Irwin Toy Ltd. v. Qué. (A.G.), [1989] 1 S.C.R. 927 at 983-84, 58 D.L.R. (4th) 577; Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326 at 1371-72, 64 D.L.R. (4th) 577; R. v. Heywood, [1994] 3 S.C.R. 761 at 788-89, 120 D.L.R. (4th) 348.

112 Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3. The issue has seldom arisen, probably because of the sparse records of debates at the constitutional conferences of Charlottetown (1864), Quebec (1864), and London, England (1866).

113 See Lambe v. North British Mercantile Fire & Life Insurance Co. (1887), 12 A.C. 579 (P.C.); Attorney General for Ontario v. Attorney General for Canada, [1912] A.C. 571 (P.C.). See also V.C. MacDonald, "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar Rev. 77; B. Laskin, Canadian Constitutional Law, rev. 4th ed. (Toronto: Carswell, 1975) at 59-65.

114 See, among others, Jones v. New Brunswick (Attorney General), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583; Quebec (Attorney General) v. Blaikie, [1979] 2 S.C.R. 1016, 101 D.LR. (3d) 394; Reference Re Legislative Authority of the Parliament of Canada in Relation to the Upper House, [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1; MacDonald v. Montreal (City), [1986] 1 S.C.R. 460, 27 D.L.R. (4th) 321; Reference Re Bill 30, an Act to Amend the Education Act (Ontario), [1987] 1 S.C.R. 1148; Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 40 D.L.R. (4th) 18. See also F. Vaughan, "The Use of History in Canadian Constitutional Adjudication" (1989) 12 Dalhousie L.J. 59.

115 Being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. There are abundant records of the debates surrounding the adoption of this Act, including the seven preliminary versions: see R. Elliot, "Interpreting the Charter-Use of the Earlier Versions as an Aid" (1982) Charter Edition, U.B.C. L. Rev. 11-and the parliamentary materials both at the Federal Government and at Westminster in England: see P.W. Hogg, supra note 2 at 15-45. Given the modern position regarding the Constitution Act, 1867, supra note 112, and also with respect to Charter provisions, there is little doubt that parliamentary debates can also be used to assist in interpreting the Constitution Act, 1982.

116 See, among others, R. v. Dubois, [1985] 2 S.C.R. 350 at 360, 22 D.L.R. (4th) 503; Reference re Motor Vehicle Act (British Columbia) s. 94(2), [1985] 2 S.C.R. 486 at 504-507, 24 D.L.R. (4th) 536; United States of America v. Cotroni, [1989] 1 S.C.R. 1469 at 1479-80; Mahe v. Alberta, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69.

117 R. v. G.(B.), supra note 54 at para. 37.

118 Supra note 33 at para. 328 [emphasis added].

119 Supra note 111 at 788-89.

120 Supra note 105.

121 Supra note 20 at para. 35.

122 See H.W. Jones, "Statutory Doubts and Legislative Intention" (1940) 40 Colum. L. Rev. 957 at 973, who wrote: "The principle that doubtful questions should be resolved in accordance with 'legislative intention' requires, in this signification of 'intention' that the judge interpret the statute not in the light of his own personal notions of justice and expediency but in the light of the legislative conceptions of justice and expediency which underly the policy of the enactment." See also V. Sacks, "Towards Discovering Parliamentary Intent" [1982] Stat. L.R. 143.

123 See M. Radin, "Statutory Interpretation" (1930) 43 Harv. L. R. 863 at 869-70; A. Cox, "Judge Learned Hand and the Interpretation of Statutes" (1947) 60 Harv. L. R. 370 at 372; R. Dickerson, The Interpretation and Application of Statutes (Boston: Little, Brown and Company, 1975) at 73-79.

124 See J.M. Kernochan, "Statutory Interpretation: An Outline of Method" (1976) 3 Dalhousie L.J. 333 at 352; J. Evans, Statutory Interpretation: Problems of Communication (Auckland: Oxford University Press, 1988) at 287; O. Hatch, "Legislative History: Tool of Construction or Destruction" (1988) 11 Harv. J. L. & Pub. Pol'y 43 at 47.

125 For a review of the different sorts of ambiguous, obscure or unclear legislation, see T.S.J.N. Bates, "The Contemporary Use of Legislative History in the United Kingdom" (1995) 54 Cambridge L.J. 127 at 139-45.

126 Supra note 1 at 620.

127 See online: Australasian Legal Institute <www.austlii.edu.au/au/legis/cth/consol_act/aia1901230/ index.html> (last modified: 13 July 2000).

128 Commissioner of Australian Federal Police v. Curran (1984), 55 A.L.R. 697 at 706-707 (F.C. (Gen. Div.)).

129 See, among others, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

130 See Boston Sand and Gravel Co. v. United States, 278 U.S. 41 (1928).

131 In United States v. American Trucking Associations, 310 U.S. 534 (1939) at 544, for

instance, Reed J. wrote that "there certainly can be no 'rule of law' which forbids [the reference to legislative history], however clear the words may appear on 'superficial examination.'" This position, however, has led to an overuse of parliamentary materials: see J.L. Carro & A.R. Brann, "The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis" (1982) 22 Jurimet. J. 294; P.M. Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term" (1983) 68 Iowa L. Rev. 195; P.M. Wald, "The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court" (1990) 39 Am. U. L. Rev. 277. There is now a new trend in the United States against the use of extrinsic aids to statutory interpretation: see R. Dickerson, "Statutory Interpretation: Dipping into Legislative History" (1983) 11 Hofstra L. Rev. 1125; K.W. Starr, "Observations About the Use of Legislative History" [1987] Duke L.J. 371; N. Zeppos, "Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation" (1990) 76 Virginia L. Rev. 1295; H.W. Baade, "'Original Intent' in Historical Perspective: Some Critical Glosses" (1991) 69 Texas L. Rev. 1001; W.D. Slawson, "Legislative History and the Need to Bring Statutory Interpretation under the Rule of Law" (1992) 44 Stanford L. Rev. 383. The return to this more restrictive rule of statutory interpretation has been principally voiced by Justice Scalia at the Supreme Court. He has defended the view that such materials should be consulted only in the rare instances where the legislative text is absurd on its face. For a list of these cases, see W.N. Eskridge Jr., "The New Textualism" (1990) 37 U.C.L.A. L. Rev. 621 at 635-36.

132 See, among others, Heywood, supra note 111 at 787-89.

133 Supra note 105.

134 Ibid. at 264 [emphasis added].

135 Supra note 33 at para. 182 [emphasis added].

136 Supra note 70 at para. 17 [emphasis added].

137 Supra note 82 at para. 36.

138 Ibid. at para. 38.

139 See Côté, supra note 97 at 417; Evans, supra note 124 at 281-82; Davis, supra note 110 at 10; Sir R. Cross, J. Bell & Sir G. Engle, Statutory Interpretation, 3rd ed. (London: Butterworths, 1995) at 157; J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1 at 10.

140 See the House of Lords in Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg (A.G.), [1975] A.C. 591 at 638 (H.L.) (Lord Diplock), 629 (Lord

Wilberforce). See also Cory J. in Heywood, supra note 111 at 787-88.

141 See Fothergill v. Monarch Airlines Ltd., [1981] A.C. 251 at 279-80 (H.L.); Pepper, supra note 1 at 619-20. See also Cross, Bell & Engle, supra note 139 at 152-53; Sullivan, supra note 20 at 438-39; Dickerson, supra note 123 at 144; Charles, supra note 6 at 20; F. Bennion, "Hansard-Help or Hindrance? A Draftsman's View of Pepper v. Hart" (1993) 14 Statute L. Rev. 149 at 155; L.-P. Pigeon, "L'élaboration des lois" (1945) 5 R. du B. 365 at 369-70.

142 See C.B. Nutting, "The Ambiguity of Unambiguous Statutes" (1940) 24 Minn. L. Rev. 509; F.J. de Sloovère, "Extrinsic Aids in the Interpretation of Statutes" (1940) 88 Univ. of Pennsylvania L. Rev. 527 at 531-32.

143 Supra note 1 at 620.

144 See Sullivan, supra note 20 at 430; Kernochan, supra note 124 at 343-44.

145 F. Pollock, Essays in Jurisprudence and Ethics (London: Macmillan, 1882) at 85.

146 H.F. Stone, "The Common Law in the United States" (1936) 50 Harv. L. R. 4 at 15.

147 Hilder v. Dexter, [1902] A.C. 474 at 477 (H.L.).

148 See, among others, N.J. Singer, Statutes and Statutory Construction, vol. 2A, 5th ed. (New York: Clark Boardman Callaghan, 1992) at 5-6; M. Zander, The Law-Making Process, 4th ed. (London: Butterworths, 1994) at 121-27.

149 In England, Lord Denning wrote in Magor and St. Mellons Rural District Council v. Newport Corporation, [1950] 2 All E.R. 1226 at 1236 (C.A.): "We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." This decision was confirmed by the House of Lords in [1952] A.C. 189, but Denning's comments were condemned. In the United States, Holmes J. stated in Towne v. Eisner 245 U.S. 372 at 376 (1917), that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought". Learned Justice Hand, in Giuseppi v. Walling, 144 F.2d 608 at 624, (2nd Cir. 1944) wrote that "[t]here is no surer way to misread any document than to read it literally".

150 For a very thorough analysis of the fall of, and problems with, the literal rule, as well as the rise and virtues of the modern purposive and contextual approach, with particular attention given to the Canadian position, see L'Heureux-Dubé J.'s dissenting reasons in 2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool), [1996] 3 S.C.R. 919 at para. 73 ff, 140 D.L.R. (4th) 577.

151 Supra note 1 at 617.

152 Supra note 2 at 427-29. What Bennion refers to as the "informed interpretation" approach is called the "modern interpretation rule" by Sullivan, supra note 20 at 131-35; "modern interpretation" by Gény, supra note 4 at 277; and "pragmatic dynamism" by W.N. Eskridge, Dynamic Statutory Interpretation (Cambridge, U.S.: Harvard University Press, 1994) at 50-57.

153 Supra note 20 at 87. See also Sullivan, supra note 20 at 131; P.-A. Côté, Interprétation des lois, 3rd ed. (Montreal: Thémis, 1999) at 364-73.

154 See, in recent years, Davis, supra note 98 at para. 42; Baker, supra note 82 at para. 34; Rizzo Shoes, supra note 20 at para. 21. See also, regarding the modern liberal interpretation, R. v. Hydro Québec, [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32; Alberta (Treasury Branches) v. Canada (Minister of National Revenue - M.N.R.), [1996] 1 S.C.R. 963, 133 D.L.R. (4th) 609; R. v. Lewis, [1996] 1 S.C.R. 921, 133 D.L.R. (4th) 700; Friesen v. Canada, [1995] 3 S.C.R. 103, 127 D.L.R. (4th) 193; Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385, R. v. Creighton, [1993] 3 S.C.R. 3, 105 D.L.R. (4th) 632; R. v. DeSousa, [1992] 2 S.C.R. 944, 95 D.L.R. (4th) 595.

155 The Court has fallen back on the literal interpretative approach on several occasions: see, among others, 65302 British Columbia Ltd. v. Canada,[1999] 3 S.C.R. 804 at para. 51, 179 D.L.R. (4th) 577, judgment on November 25, 1999 (despite remarks to the contrary). See also R. v. Thomas, [1998] 3 S.C.R. 535; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, 143 D.L.R. (4th) 385; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550, 139 D.L.R. (4th) 415; R. v. McIntosh, [1995] 1 S.C.R. 686; Canada v. Antosko, [1994] 2 S.C.R. 312.

156 See Zander, supra note 148 at 121-27; Singer, supra note 148 at 5-6; Eskridge, supra note 152 at 38-41; Radin, supra note 123 at 869; M. van de Kerchove, L'interprétation en droit Approche pluridisciplinaire (Bruxelles: Facultés universitaires St-Louis, 1978) at 37; F.E. Horack Jr., "In the Name of Legislative Intention" (1932) 38 West Virginia L.Q. 119 at 121.

157 Régie, supra note 150 at para. 154 [emphasis in original].

158 See Sullivan, supra note 20 at 430.

159 These are Gladue, supra note 18; M. v. H., supra note 33; R. v. G.(B.), supra note 54; Delisle, supra note 70; Malenfant, supra note 86; and Davis, supra note 98.

160 In Malenfant, ibid. at para. 35, Gonthier J. stated: "With the necessary caution required in using this material...I also draw attention to the legislative debates surrounding the adoption of Bill 7." In Davis, supra note 98 at para. 50, Lamer C.J. merely wrote: "Legislative History may be used as an aid in determining the intention of the legislature".

161 These are Law, supra note 11; Beaulac, supra note 28; Winko, supra note 61; Dobson, supra note 65; KMart, supra note 79; and Baker, supra note 82.

162 Supra note 127.

163 See Re Australian Federation of Construction Contractors; Ex parte Billing (1986), 68 A.L.R. 416 at 420 (H.C. Aus.); Mills v. Meeking (1990), 91 A.L.R. 16 at 21 (H.C. Aus.). See also D.C. Pearce & R.S. Geddes, Statutory Interpretation in Australia, 3rd ed. (Sydney: Butterworths, 1988) at 47.

164 See Real Estate House (Broadtop) Ltd. v. Real Estate Agents Licensing Board, [1987] 2 N.Z.L.R. 593 at 596 (C.A.).

165 Supra note 97 at 311 [emphasis added].

166 [1997] 2 S.C.R. 862 at 885, 150 D.L.R. (4th) 385.

167 [1993] 1 S.C.R. 1080 at 1111, 101 D.L.R. (4th) 567.

168 Supra note 18 at para. 45 [emphasis added].

169 Supra note 33 at para. 323.

170 Ibid. at para. 182.

171 This position was defended by the commentator Frankfurter, supra note 8 at 543-44, who expressed the view that interpreters should not be limited to the legislative text, but when using extrinsic aids such as legislative history, they must be confined by the text. Similarly, Lord Browne-Wilkinson wrote in Pepper, supra note 1 at 635: "The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?"

172 See, among others, Construction Paquette, supra note 97 at para. 20; Gladue, supra note 18 at para. 45.

173 Supra note 11 at para. 8.

174 Supra note 54 at paras. 37-38.

175 Supra note 61 at para. 22.

176 Supra note 18 at para. 28.

177 Supra note 28 at paras. 22-23.

178 Supra note 33 at paras. 84, 94, 98.

179 Supra note 79 at para. 60.

180 Supra note 82 at para. 38.

181 Supra note 86 at para. 35.

182 Supra note 54 at para. 37 [emphasis added].

183 Supra note 97 at para. 20.

184 Supra note 166 at paras. 33-37.

185 Supra note 20 at paras. 31, 35.

186 Supra note 18 at para. 45.

187 Supra note 70 at para. 17.

188 Supra note 86 at para. 35.

189 See Côté, supra note 153 at 552.

190 See Part III.D., below.

191 That is, of the same substance, dealing with similar matters.

192 See Part III.B., above.

193 See supra at notes 183-89 and accompanying text.

194 See A.-F. Bisson, "Préambules et déclarations de motifs ou objects" (1980) 40 R. du B. 58 at 64.

195 See Bennion, supra note 2 at 448-49.

196 See Beaulac, supra note 107 at 323-24.

197 See also 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.M. Rhodes, J.W. White & R.S. Goldman, "The Search for Intent: Aids to Statutory Construction in Florida" (1978) 6 Fla. St. U. L. Rev. 383.

198 Parliamentary materials will be admissible in England where: "(a) legislation is

ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear": Pepper, supra note 1 at 640.

199 Ibid. at 634 [emphasis added]. See also Bates, supra note 125 at 145-48.

200 Supra note 11 at para. 8, the first and main reference to parliamentary debates.

201 Supra note 33 at para. 84, 94; in para. 98, the majority finally put a name on the author of the statements, Roy McMurtry, who is the Attorney General for Ontario, as we learned later in Gonthier J.'s and Bastarache J.'s reasons, and who presumably is the Minister responsible for the enactment.

202 Gladue, supra note 18 at paras. 46-47.

203 Supra note 28 at paras. 22-23. The first two references to parliamentary debates did not even mention their authors; the last one was a speech by the Minister of Justice who, presumably, was responsible for the enactment. There was nothing as to when those statements were made, i.e. at first, second, or third reading.

204 Supra note 79 at para. 60. Only the names of the MPs were given, without any detail as to their role regarding the enactment or as to when the quoted exchange took place.

205 Supra note 86 at para. 35. The first reference mentioned that the statement was by the responsible Minister at the second reading of the Bill. However, the second one was incomplete as it gave only the name, party, and constituency of the author-nothing about his function and the time of the statement.

206 Supra note 54 at para. 38.

207 Supra note 82 at para. 38.

208 Supra note 61 at para. 22.

209 See supra at footnote 197.

210 British Columbia, Legislative Assembly, Debates (10 June 1987) at 1695.

211 There was no detail as to the MPs' titles and roles regarding the enactment or as to when these statements were made, i.e. at first, second or third reading.

212 There is not enough information to evaluate the materials' contemporaneity to, and proximity with, the legislative process-i.e. the second and third criteria of the guidelines.

213 See Dickerson, supra note 123 at 154-62.

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

215 Capitant, supra note 4 at 79 [emphasis added].

216 See Bennion, supra note 2 at 452; Starr, supra note 131 at 376-77; C.P. Curtis, "A Better Theory of Legal Interpretation" (1950) 3 Vand. L. Rev. 407 at 411; G.B. Folsom, Legislative History: Research for the Interpretation of Laws (Charlottesville: University Press of Virginia, 1972) at 6; S.L. Wasby, "Legislative Materials as an Aid to Statutory Construction: A Caveat" (1963) 12 J. Pub. L. 262 at 264. For the view that ambiguity is sometimes left on purpose, see D. Payne, "The Intention of the Legislature in the Interpretation of Statutes" (1956) 9 Current Leg. Prob. 96 at 106.

217 A key-word search of Hansard reports in England-either on CD-ROM or on the Web (www.parliament.the-stationery-office.co.uk/pa/cm/cmhan srd.htm)-with "pepper" and "hart" brings up several hits of instances where MPs were aware that their interventions could potentially influence the future judicial interpretation of the enactment under consideration.

218 See D.G. Kilgour, "The Rule Against the Use of Legislative History: 'Canon of Construction of Counsel of Caution?'" (1952) 30 Can. Bar Rev. 769, particularly at 776.

219 It is certainly worth pointing out that so far in 2000, on four occasions the Supreme Court resorted to parliamentary materials. In the cases of R. v. Proulx, [2000] S.C.J. No. 6, at paras. 20, 36, online: QL (SCJ), judgment on January 31, 2000, Lamer C.J.; and, R. v. Wust, [2000] S.C.J. No. 19 at paras. 31-32, online: QL (SCJ), judgment on April 13, 2000, Arbour J., references were made to parliamentary debates and commission reports for the purpose of construing the provisions of the Criminal Code at issue; there was no discussion whatsoever on the use of such materials in statutory interpretation. In the other two cases, Global Securities Corp. v. British Columbia (Securities Commission), [2000] S.C.J. No. 5 at para. 25, online: QL (SCJ), judgment on April 13, 2000, Iacobucci J.; and, Reference re Firearms Act (Can.), [2000] S.C.J. No. 31 at paras. 17, 20, online: QL (SCJ), judgment on June 15, 2000, the Supreme Court resorted to extrinsic materials-government affidavits, parliamentary debates, commission and committee reports-in order to determine the pith and substance of the legislation constitutionally challenged pursuant to the division of powers. In the latter case, the remarks formulated seem to provide some modest directives concerning the use of such materials, and they appear broad enough to encompass all purposes for which they may be utilized. Indeed, the Court wrote in Reference re Firearms Act (Canada), ibid. at para. 17: "A law's purpose is often stated in the legislation, but it may also be ascertained by reference to extrinsic material such as Hansard and government publications....While such extrinsic material was at one time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material

may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight" [references omitted], [emphasis added].

220 Supra note 65 at para. 67.

221 Parliamentary Debates, supra note 69.

222 Similar reservations about persuasive force may be expressed regarding the legislative history, not of the actual statutory provision, but of the previous state of the law. For instance, in M. v. H., supra note 33 at paras. 94, 98, the materials used by the majority related not only to the Family Law Act, but also to the predecessor legislation. As well, in KMart, supra note 79 at para. 60, it is the legislative debates pertaining to a previous version of the Labour Code that the Court consulted. There is no doubt that these elements, which are quite remote from the legislative process of the statutory provisions at stake, should not carry much weight in the determination of legislative intention.

223 Supra note 86 at para. 35.

224 Supra note 97 at para. 20.

225 Supra note 166 at paras. 33-37.

226 See, among others, F.P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada (Montreal: Wilson & Lafleur, 1907) at 80ff; P.B. Mignault, "Le Code civil de la province de Quebec et son interpretation" (1935-1936) 1 U.T. L.J. 104 at 114ff. See also, more recently, Bisson, supra note 196 at 65, Côté, supra note 99 at 395; S. Normand, "Les travaux préparatoires et l'interprétation du Code civil du Québec" (1986) 27 C. de D. 347; C. Masse, "Le recours aux travaux préparatoires dans l'interprétation du nouveau Code civil du Québec", in Le nouveau Code civil : interprétation et application-Les journées Maximilien-Caron 1992, (Montreal: Thémis, 1993) 149.

227 A further question in relation to Quebec private law is the role of the Commentaires du ministre de la Justice: Civil Code of Québec-Un mouvement de société (Quebec: Gouvernement du Québec, 1993) whose status differs from other travaux préparatoires because they were published subsequently to the adoption of the new Code. They would be assimilable to doctrinal writings: Côté, supra note 153 at 526; C. Masse, supra note 226 at 159. In Doré, Justice Gonthier referred to the Commentaires, but did not elaborate much on their role in the interpretation of the new Code: Doré, supra note 166 at para. 14. See also D. Jutras, "Le ministre et le Code-essai sur les Commentaires" in Mélanges Paul-André Crépeau (Cowansville: Yvon Blais, 1997) 451.

228 See F.W. Maitland, The Forms of Action at Common Law (London: Cambridge University Press, 1936) at 2, who wrote: "The forms of action we have buried, but they still

rule us from their graves." This expression illustrates that, although the forms of action have lost their procedural significance since the English Judicature Act, 1873, they are still highly relevant to classify and develop several areas of substantive law, including rules of contract, torts, property, and restitution: K. Zweigert & H. Kötz, An Introduction to Comparative Law, 2nd ed., vol. 1 (Oxford: Clarendon Press, 1987) at 205-207.