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SHOULD THE RULES RELATING TO THE ADMISSIBILITY OF EXTRINSIC EVIDENCE BE RELAXED?

OUTLINE OF COMMENTS ON A PAPER PREPARED BY PROFESSOR W. H. CHARLES

MR. JUSTICE J. A. SCOLLIN,
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INTRODUCTION

THE OXFORD ENGLISH DICTIONARY ATTRIBUTES SOME 148 MEANINGS TO THE WORD "WET". THAT VAST POTENTIAL OF ONE SHORT WORD AND ONE OF THE ATTRIBUTED MEANINGS SUGGESTS THAT IN RETHINKING THE SUBJECT OF STATUTORY INTERPRETATION, WE ARE INDEED NOT "ALL WET".

I EMBRACE THE GENERAL THRUST OF PROFESSOR CHARLES' PAPER, BUT NOT WITH UNALLOYED TENDERNESS. LET ME ILLUSTRATE THE ATTITUDE WHICH MAY BE ENCOURAGED BY THE NEW, RELAXED AND SOLICITOUS SEARCH FOR TRUE MEANING. ACCORDING TO THE GLOBE AND MAIL OF AUGUST 12, 1987, MR. CHRISTOPHER SPEYER, CO-CHAIRMAN OF THE SPECIAL PARLIAMENTARY COMMITTEE ON THE MEECH LAKE ACCORD, SAID AT THE MEETING ON AUGUST 11TH THAT "THERE IS A GREAT VIRTUE TO AMBIGUITY" BECAUSE IT MEANS THE COURTS WILL HAVE TO INTERPRET THE CONSTITUTION. IF THIS REPORT IS ACCURATE, THE COMMENT DISCLOSES AN ABDICATION OF THE PRIME RESPONSIBILITY OF THE LAWMAKER TO KNOW AND INTEND WHAT HE IS DOING AND TO EXPRESS HIS PURPOSE IN INTELLIGIBLE LANGUAGE TO WHICH HE HIMSELF WILL OPENLY ATTRIBUTE A MEANING. THIS LAZY AND SUBSERVIENT ATTITUDE OF "LEAVE IT TO THE COURTS" ON SIGNIFICANT CONSTITUTIONAL ISSUES IN CANADA MAY WELL CARRY OVER INDISCRIMINATELY INTO THE TASK OF ENACTING ORDINARY OR CONVENTIONAL LEGISLATION. IT OPENLY UNDERMINES

THE TRADITIONAL FORM OF WESTERN DEMOCRACY IN THAT THE VOTER IS MISLEAD INTO THINKING HE IS ELECTING A LEGISLATOR, WHEREAS WHAT SQUIRMS OUT OF THE BALLOT-BOX MAY BE NOTHING MORE THAN A LEGISLATIVE DELEGATOR. THAT THE TENDENCY IS NOT CONFINED TO THE CONSTITUTIONAL FIELD IS ILLUSTRATED BY THE STUDY IN THE UNITED KINGDOM BY PROFESSOR SACKS, REFERRED TO BY DR. CHARLES AT PAGE 29 OF HIS PAPER, WHICH SHOWED THAT IN ONE OR TWO OF THE 34 CASES STUDIED, PARLIAMENT HAS SIMPLY DECIDED TO LEAVE THE PROBLEM OF CLARIFICATION TO THE COURT.

WITH THOSE INTRODUCTORY OBSERVATIONS OUT OF THE WAY, I HAVE THREE MAIN COMMENTS TO MAKE ON PROFESSOR CHARLES' VERY LUCID PAPER AND A FEW INCIDENTAL ISSUES TO MENTION.

UTILITY OF EXTRINSIC EVIDENCE

MY FIRST AND PRINCIPAL COMMENT IS THAT, ALTHOUGH THE CONCLUSIONS OF OTHER EMPIRICAL STUDIES HAVE BEEN LESS FIRM, THE STUDY BY DR. CHARLES IS RELEVANT AND USEFUL EVIDENCE OF THE UTILITY OF RESORT IN CERTAIN CASES TO EXTRINSIC EVIDENCE. THE RESULTS SET OUT, PARTICULARLY AT PAGES 29-32 OF HIS PAPER, SUGGEST THAT LEGISLATIVE HISTORY AND BACKGROUND MAY BE RELEVANT IN OVER HALF OF DISPUTED-MEANING CASES. FROM THIS IT FOLLOWS THAT, IF WE ARE SWIMMING IN ROUGH WATER, WE SHOULD NO LONGER REJECT THE

LIFEBELT SIMPLY BECAUSE THE FELLOW WHO THREW IT IS NOT A MEMBER IN GOOD STANDING OF OUR CLUB.

JUDICIAL CONTROL

THE GENERAL UTILITY OF THE LIFEBELT IN MANY SITUATIONS LEADS ME TO MY SECOND MAIN POINT: HOWEVER HELPFUL THE ASSISTANCE MAY SOMETIMES BE, THE COURT MUST NOT BE BURIED AT SEA UNDER A THOUSAND LIFEBELTS. IN HOLDING ITSELF WILLING TO ACCEPT HELP, THE COURT MUST NOT LET THE LIFEBELT-THROWING GET OUT OF HAND. IT MUST HAVE A READY AND PRACTICAL MECHANISM FOR MAKING UP ITS OWN MIND WHETHER THE WATER IS ROUGH ENOUGH TO REQUIRE A LIFEBELT AT ALL.

PRE-TRIAL RULING

SUCH A MECHANISM SHOULD OBVIOUSLY OPERATE IN ADVANCE OF THE TRIAL ITSELF. ACCEPTING THE LIKELIHOOD THAT, IN THE CASE OF A GENUINE DISPUTE, THERE IS A SIGNIFICANT CHANCE OF ASSISTANCE FROM EXTRINSIC MATERIAL, THE COURT NEEDS A PRACTICAL SUMMARY METHOD OF ASSESSING THE POTENTIAL FOR ASSISTANCE IN THE PARTICULAR CASE. THIS SUGGESTS, FOR EXAMPLE, SOME FORM OF NOTICE AND A BRIEF, WRITTEN, SUMMARIZED DEMONSTRATION OF COGENCY SO THAT AN EARLY RULING - NOT, OF COURSE, IRREVERSIBLE - CAN BE MADE EXCLUDING IRRELEVANT MATERIAL OR EVIDENCE THAT APPEARS TO BE OF MINIMAL WEIGHT.

TEST FOR ADMISSION

OF COURSE THE ISSUES OF WEIGHT AND ADMISSIBILITY ARE INTERTWINED AND, IN DECIDING ON THE ADMISSION OF EXTRINSIC EVIDENCE, THE MODERN APPROACH OF THE COURTS TO "SIMILAR FACT" EVIDENCE MAY BE A GUIDE. UNLESS THERE IS A DEMONSTRABLE POTENTIAL FOR COGENCY WITHOUT UNDUE PREJUDICE, THE OPPOSING PARTY AND THE COURT SHOULD NOT HAVE TO CONTEND WITH EXTRANEOUS, DISTRACTING AND POSSIBLY MISLEADING MATERIAL. THE QUESTION SHOULD BE: IS THE SOLUTION FAIRLY ILLUMINATED ONLY BY THE COMBINED LIGHT OF THE STATUTE AND ITS BACKGROUND? IN OTHER WORDS, WHERE THE STATUTE IS EQUIVOCAL, COGENT EVIDENCE BY WAY OF EXTRINSIC FACTS SHOULD BE ADMITTED TO IDENTIFY THE REAL SIGNIFICANCE OF THE LAW.

GENERAL ONUS ON STATE

FINALLY, ON THIS SECOND POINT ABOUT A MECHANISM OF CONTROL, THE QUESTION OF ONUS CANNOT BE ENTIRELY IGNORED. I SUGGEST THAT IN ORDER TO INDUCE AT LEAST A MODICUM OF DISCIPLINE IN THE AUTHORITIES AND THEIR DRAFTSMEN, AND IN THE INTEREST OF FAIRNESS, CONVENIENCE AND COST, WE SHOULD, WHERE THE AUTHORITY IS CONCERNED, RESORT TO EXTRINSIC ASSISTANCE ONLY WHERE THERE IS A REAL LIKELIHOOD THAT THE WORDS OF THE LAWMAKER WILL BE UNJUSTLY MISCONSTRUED IN FAVOR OF THE ENACTING AUTHORITY.

NO DISTINCTION IN PRINCIPLE BETWEEN TYPES OF LEGISLATION

My third and final main point is that the general thrust of Professor Charles' suggestions ties in with the now fashionable "purposive" approach to interpretation. That approach is now well-established in Canada in constitutional interpretation and experience in the United Kingdom suggests that, with the trend to broad statutory language, there is no reason why the same approach should not be taken in assessing ordinary or conventional legislation. As expressed by Dickson, C.J.C. in Hunter v. Southam, [1984] 11 D.L.R. (4th) 641 at 650, the approach consists of "a broad purposive analysis which interprets specific provisions of a constitutional document in the light of its larger objects".

SUBSIDIARY LEGISLATION

Granted that this same approach may often be suitable for dealing with federal and provincial legislation, at least where the language is broad and may carry several meanings, is such an approach suitable for interpreting the more mundane mass of subsidiary lawmaking which encompasses, for example, regulations, bylaws and even orders-in-council? Again, it seems to me that it is

DIFFICULT TO AFFIRM THE APPROACH FOR ONE TYPE OF LAWMAKING AND TO DENY IT FOR ANOTHER. INDEED, IF WE ARE PREPARED TO PURPORT TO FIND PURPOSE IN THE AMORPHOUS MIND OF A LEGISLATIVE CHAMBER, WE MAY BE ON MUCH FIRMER GROUND IN DEALING WITH SUBSIDIARY LAWMAKING WHICH, IF IT IS UNCLEAR, MAY BE FIRMLY TRACED TO A SPECIFIC SOURCE AND POSSIBLY TO A CLEARLY EXPRESSED DESIGN. GRANTED THE SAME RULE AS TO ONUS THAT I SUGGESTED ABOVE, THERE IS NO REASON WHY EXTRINSIC EVIDENCE SHOULD NOT BE AVAILABLE IN THE CASE OF THIS "MINOR" LEGISLATION ALSO.

DIRECT STATEMENTS OF INTENTION

IN NO CASE, OF COURSE, IS THE ADMISSION OF EXTRINSIC MATERIAL AN ASSURANCE THAT IT WILL RECEIVE ANY PRE-ORDAINED WEIGHT. IN THIS CONNECTION, I DO NOT THINK IT PRACTICAL TO DELETE PASSING REFERENCES TO INTENTION AS OBJECTIONABLE INCURSIONS BY ORDINARY MORTALS INTO THE EMPIRE OF THE JUDICIARY. WHAT IS USELESS SHOULD BE TAKEN WITH THE USEFUL TO PRESENT A COHERENT WHOLE. WE DO NOT WANT TO BE ACCUSED OF CREATING A SELECTIVE BACKGROUND BY TAKING THE EXTERNAL EVIDENCE ITSELF OUT OF ITS OWN CONTEXT.

VARYING WEIGHT: ABSTRACT & SPECIFIC

IN ASSESSING THE WEIGHT OF SUCH EVIDENCE, THE COURTS WILL, OF COURSE, BE CAREFUL NOT TO GIVE THE IMPRESSION THAT THEY ARE BOUND IN ANY WAY TO ACCEPT, AS

BINDING, EXTRA-JUDICIAL VERSIONS OF THE IMPORT OR MEANING OF LEGISLATION. ON THE OTHER HAND, IF THE COURTS ARE GOING TO LOOK TO EXTRINSIC MATERIAL FOR ASSISTANCE, THEY MUST BEWARE OF THE IMPRESSION OF INTELLECTUAL ARROGANCE. I COMMEND TO YOUR ATTENTION THE FOLLOWING REMARKS BY PROFESSOR MONAHAN ABOUT WEIGHT WHICH, ALTHOUGH MADE IN RELATION TO CONSTITUTIONAL INTERPRETATION, MAY WELL APPLY GENERALLY.

> "PROFESSOR DWORKIN HAS ATTEMPTED TO ANSWER THIS QUESTION THROUGH REFERENCE TO A DISTINCTION BETWEEN 'CONCEPTS' AND 'CONCEPTIONS'. A 'CONCEPTION' IS A SPECIFIC ACCOUNT OR UNDERSTANDING; A 'CONCEPT' IS USED TO CONVEY SOME GENERAL IDEA. DWORKIN'S VIEW IS THAT ONLY THE CONCEPTS USED BY THE DRAFTERS OF THE CONSTITUTION ARE BINDING ON LATER INTERPRETERS. ALTHOUGH THE DRAFTERS MAY WELL HAVE HAD CONCEPTIONS OF THEIR OWN AS TO THE MEANING OF CONSTITUTIONAL LANGUAGE, THESE CONCEPTIONS NEED NOT BE USED IN DECIDING CASES. ACCORDING TO DWORKIN, THE DRAFTERS THEMSELVES DID NOT INTEND TO GIVE THEIR OWN CONCEPTIONS ANY SPECIAL WEIGHT.
>
> DWORKIN'S DISTINCTION BETWEEN CONCEPTS AND CONCEPTIONS, WHILE EXTREMELY ATTRACTIVE, HAS BEEN SUBJECTED TO WIDESPREAD CRITICISM IN THE AMERICAN CONSTITUTIONAL LITERATURE. DESPITE THE DIFFICULTIES WITH DWORKIN'S APPROACH, IT CAPTURES ONE IMPORTANT TRUTH ABOUT THE SIGNIFICANCE OF AUTHORIAL INTENT IN CONSTITUTIONAL INTERPRETATION: JUDGES DECIDING CASES OUGHT TO TAKE SERIOUS ACCOUNT OF GENERALIZED PURPOSES OR INTENTIONS

OF THE DRAFTERS, WHILE AT THE SAME TIME ACCORDING LESS WEIGHT TO THE DRAFTERS' VIEWS AS TO THE PRECISE MEANING OF PARTICULAR WORDS OR PHRASES. THIS CONCLUSION IS CONSISTENT WITH THE PROCESS OF DRAFTING A CONSTITUTION. A CONSTITUTION IS DESIGNED TO STATE THE GENERAL AND ENDURING PRINCIPLES WHICH ARE TO GOVERN THE LIFE OF THE POLITY. THE ROLE OF THE DRAFTERS IS SIMPLY TO DEFINE THOSE GENERAL PURPOSES RATHER THAN TO DECIDE INDIVIDUAL CASES. THE TASK OF APPLYING THE LANGUAGE OF THE DOCUMENT TO PARTICULAR CIRCUMSTANCES IS THE RESPONSIBILITY OF JUDGES RATHER THAN THE AUTHORS. IT FOLLOWS THAT JUDGES SHOULD PAY PARTICULAR ATTENTION TO THE GENERAL PURPOSES AND POLICIES OF THE DRAFTERS, BUT ACCORD LITTLE OR NO WEIGHT TO THEIR OPINIONS ON THE OUTCOME OF PARTICULAR CASES. THIS ANALYSIS DOES NOT DEPEND ON DWORKIN'S DISTINCTION BETWEEN CONCEPTS AND CONCEPTIONS WHICH, IN ANY CASE, PROBABLY NEVER OCCURRED TO THE DRAFTERS. THE ANALYSIS IS MUCH MORE STRAIGHTFORWARD.

MY SUGGESTION IS THAT THE USE OF LEGISLATIVE HISTORY CAN BE STRUCTURED ALONG A CONTINUUM RANGING FROM THE MORE ABSTRACT AND GENERALIZED PURPOSES OF THE DRAFTERS, WHICH SHOULD BE ACCORDED SIGNIFICANT WEIGHT, TO THEIR VIEWS ON THE APPLICATION OF SPECIFIC PROVISIONS, WHICH ARE ENTITLED TO MINIMAL OR NO WEIGHT...."

P. MONAHAN, **THEORY OF JUDICIAL REVIEW**, U.B.C. LAW REVIEW, VOL. 21:1, P.87 AT PP.123-124.

IN THE LIGHT OF THESE AND OTHER ARGUMENTS, IT IS NOT SURPRISING THAT QUESTIONS HAVE ARISEN AS TO THE

VALIDITY OF THE INTERPRETATION BY THE SUPREME COURT OF CANADA OF THE WORDS "PRINCIPLES OF FUNDAMENTAL JUSTICE" IN SECTION 7 OF THE CHARTER: REFERENCE RE SECTION 94(2) OF THE MOTOR VEHICLE ACT, [1985] 2 S.C.R. 486. EVEN WITH A CONSTITUTION, AND OBVIOUSLY WITH AN ORDINARY STATUTE WHICH IS READILY AMENDABLE, THE JUDICIARY MUST NOT APPEAR TO LAY CLAIM TO A VASTLY SUPERIOR INSIGHT OR WISDOM. A CONSTITUTION CAN BE AMENDED IF THE ORIGINAL WORDS DO NOT MATCH THE TRUE ORIGINAL ABSTRACT PURPOSE AND EVEN MORE SO WITH THE ORDINARY, READILY AMENDABLE STATUTE THE COURTS MAY FAIRLY AND SENSIBLY DEFER TO FIRM AND CLEAR EXPRESSIONS OF LEGISLATIVE PURPOSE.

SO MUCH FOR THE THREE MAIN POINTS. I AGREE WITH PROFESSOR CHARLES' APPROACH; I THINK THE COURTS MUST BE FAIR BUT SELECTIVE IN RECEIVING THE EVIDENCE; AND I THINK THEY MUST DEVELOP A FIRM APPROACH TO ALLOCATION OF WEIGHT. THOSE POINTS BEING MADE, I MENTION A FEW OTHER ISSUES WHICH MAY ARISE.

BILINGUAL STATUTES

FIRST, WHAT OF DIFFERENCES IN MEANING BETWEEN THE TWO VERSIONS OF ORDINARY BILINGUAL STATUTES? FORMAL STATUTORY RULES EXIST, AS IN THE FEDERAL OFFICIAL LANGUAGES ACT, TO HELP RESOLVE THE PROBLEM. THE QUESTION IS: ARE THOSE RULES EXCLUSIVE OR IS EXTRINSIC EVIDENCE OF PURPOSE AVAILABLE TO CHALLENGE OR CONTRADICT THE RESULT OF APPLYING

THE STATUTORY FORMULA? THE RESOLUTION OF THE ISSUE OF DIFFERENCES IN MEANING BETWEEN THE ENGLISH AND FRENCH VERSIONS OF CONSTITUTIONAL INSTRUMENTS MAY INDICATE A POSSIBLE LIMIT ON THE USE OF EXTRINSIC EVIDENCE. THERE IS NO CONSTITUTIONAL INTERPRETATION PROVISION TO GOVERN PREFERENCE IN THE EVENT OF DIFFERENCE, BOTH VERSIONS BY S.57 OF THE CONSTITUTION ACT BEING "EQUALLY AUTHORITATIVE". WHAT, THEN, IF EXTRINSIC MATERIAL SUCH AS A COMMITTEE DEBATE CLEARLY SUPPORTS THE PURPOSE REPRESENTED BY ONE VERSION AND DOWNPLAYS OR NEGATES THE OTHER? IS IT OPEN TO GIVE ONE MORE "AUTHORITY" OR MODIFY ITS SIGNIFICANCE BY REFERENCE TO SUCH EXTRINSIC MATERIAL? SEE GENERALLY J.P. MCEVOY, THE CHARTER AS A BILINGUAL INSTRUMENT, (1986) 64 CAN.BAR.REV. 155. SEE ALSO, FOR EXAMPLE, IN RELATION TO S.24(2) OF THE CHARTER THE MAJORITY REASONS OF LAMER, J. IN R. V. COLLINS (1987) 56 C.R. (3D) 193 AT 213, WHERE HE ADOPTS THE "LOWER THRESHOLD" OF THE FRENCH TEXT AS LESS ONEROUS TO THE ACCUSED AND, HE ARGUES, MORE CONDUCIVE TO A FAIR TRIAL, WHICH IS ONE OF THE PURPOSES OF THE PROVISION. ADMITTEDLY THE TWO VERSIONS DO NOT POSE EXACTLY THE SAME TEST. THE DRAFTING WAS DONE IN THE ENGLISH LANGUAGE AND, BEFORE THE COMMITTEE, ALTHOUGH THE MEANING OF THE FRENCH VERSION WAS NOT NEGATED, THE ENGLISH VERSION WAS DISCUSSED AT SOME LENGTH ENTIRELY IN ENGLISH: SEE MINUTES OF PROCEEDINGS AND EVIDENCE OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON THE

CONSTITUTION OF CANADA, VOL. 48 PP.123-124. NOTWITHSTANDING THAT BOTH VERSIONS ARE EQUALLY AUTHORITATIVE, IT HARDLY SEEMS CONSISTENT WITH A PURPOSIVE APPROACH TO IGNORE THE BACKGROUND ENTIRELY AND TO RELY FOR A DETERMINATION OF PURPOSE ONLY ON A SOMEWHAT LIMITED VIEW OF "FAIRNESS" IN THE TRIAL PROCESS.

IN PRINCIPLE, THE PROBLEM IS THE SAME AS THAT WHICH ARISES IN CONNECTION WITH ANY OTHER EQUIVOCAL STATUTE; AS PROFESSOR GEOFFREY MARSHALL OF QUEEN'S COLLEGE, UXFORD, HAS POINTED OUT, THE RELEVANCE OF EXTRINSIC EVIDENCE MAY BE LESS IN CONTESTING A MEANING THAT IS CLEARLY PRESENT IN THE WORDS THAN IN SUGGESTING A MEANING WHERE THE WORDS ARE GENERAL AND UNCLEAR. SUCH AN APPROACH COMMENDS ITSELF FOR SOME CONSIDERATION, AT LEAST, WHEN TWO VERSIONS OF A STATUTE LEAVE UNCLEAR THE PRECISE MEANING OF THE PROVISION AND EXTRINSIC EVIDENCE IS NOT BARRED BY LAW.

EVIDENCE
ON APPEAL

SECOND, SHOULD APPELLATE COURTS READILY ACCEPT EXTRINSIC EVIDENCE IN AID OF STATUTORY INTERPRETATION WHEN FIRST TENDERED ON APPEAL? THE ONTARIO COURT OF APPEAL DID THIS IN R. V. SEO (1986) 51 C.R. (3D) 1 AT 10-15, BUT THE EVIDENCE THERE WAS LED IN SUPPORT OF A SECTION 1 CHARTER LIMIT WHERE ACCUSED/APPELLANT FIRST RAISED THE CONSTITUTIONAL ISSUE ON APPEAL. I WOULD EXPECT THAT IN

NON-CONSTITUTIONAL CASES APPELLATE COURTS WOULD TAKE THE SAME GENERAL APPROACH AS THEY TAKE UNDER SECTION 610 OF THE CRIMINAL CODE AND WOULD EXPECT PROPER JUSTIFICATION FOR THE FAILURE TO TENDER THE MATERIAL AT TRIAL.

INCOMPLETE EVIDENCE

THIRD, WHAT SHOULD THE COURT DO WHERE A DETAILED READING OF THE MATERIAL DISCLOSES THAT THE PARTIES HAVE TENDERED ONLY PORTIONS OF THE EXTRINSIC MATERIAL? MAY THE COURT CONSULT OTHER PORTIONS TO DETERMINE IF THEY ARE RELEVANT AND OF ASSISTANCE IN RESOLVING THE ISSUE? COMPARE THE DISCUSSION OF **JUDICIAL RESEARCH AS JUDICIAL NOTICE** BY PROFESSOR M.H. OGILVIE, [1986] 64 CAN.BAR REV. 183. ALTHOUGH THE COURT SHOULD NOT, ON ITS OWN MOTION, GO DIRECTLY TO EXTRINSIC EVIDENCE IN THE FIRST INSTANCE, IT IS SURELY UNREALISTIC TO EXPECT IT TO ACT ON WHAT MAY BE MISLEADINGLY INCOMPLETE MATERIAL.

CUMULATIVE HEARSAY

FOURTHLY, AS TO THE LIMITS OF ACCEPTABLE EVIDENCE, I SUGGEST THAT WE CANNOT GENERALLY ACCORD - OR RELY ON - THE TOLERANCE SHOWN BY FIVE MEMBERS OF THE SUPREME COURT OF CANADA IN NOT REJECTING NEWSPAPER CLIPPINGS ATTACHED TO AFFIDAVITS IN RETAIL, WHOLESALE AND DEPARTMENT STORE UNION V. SASKATCHEWAN, (1987) 74 N.R. 321. IN THAT CASE BOTH PARTIES WERE CONTENT WITH THE RECORD BUT I SUSPECT THAT MATERIAL OF THIS SORT WOULD NOT BE ADMITTED TO ASSIST IN THE INTERPRETATION OF AN ORDINARY STATUTE OR SUBSIDIARY LEGISLATION.

INFERENCE FROM ABSENCE

FIFTH, WHERE THE EXTRINSIC MATERIAL DISCLOSES NO DISCUSSION OF A MATTER, THAT FACT MAY BE USEFUL TO NEGATIVE A POTENTIAL INTERPRETATION OTHERWISE AVAILABLE ON THE TERMS OF THE STATUTE. THE REASONING IS BY INFERENCE FROM ABSENCE IN THE MANNER OF SECTION 30(2) OF THE CANADA EVIDENCE ACT, R.S., C.307. THE ARGUMENT IS THAT IF THE SUGGESTED MEANING HAD BEEN INTENDED, A REFERENCE TO IT WOULD REASONABLY HAVE BEEN EXPECTED. SEE FOR SUCH A USE IN CONSTRUING THE CHARTER THE MAJORITY REASONS OF MCINTYRE, J. IN REFERENCE RE COMPULSORY ARBITRATION, [1987] 74 N.R. 99 AT 132. THE COURT REFERRED TO FOREIGN LEGISLATION ON UNIONS AND THE RIGHT TO STRIKE, WHICH IT TOOK THE LEGISLATORS TO HAVE BEEN AWARE OF, AND OBSERVED:

> "WHILE A RESOLUTION WAS PREPARED FOR INCLUSION OF A SPECIFIC RIGHT TO BARGAIN COLLECTIVELY, NO RESOLUTION WAS PROPOSED FOR THE RIGHT TO STRIKE...THIS AFFORDS STRONG SUPPORT FOR THE PROPOSITION THAT THE INCLUSION OF A RIGHT TO STRIKE WAS NOT INTENDED."

WORDS AND THOUGHT

FINALLY, THE DECISION IN THIS SORT OF DEBATE ON THE ADMISSIBILITY OF EXTRINSIC EVIDENCE IN STATUTORY INTERPRETATION IS ULTIMATELY FOUNDED ON TWO GENERAL EXPECTATIONS, ONE BASED ON EXPERIENCE, THE OTHER ON HOPE: FIRST, WORDS ARE CHAMELEONS; AND SECOND, REASON RULES THE

RULES OF LAW. MORDEN, J.A. OF THE ONTARIO COURT OF APPEAL HAS NOTED THE FUTILITY OF LOOKING AT WORDS ALONE, SHORN OF THE WIDER ASPECTS OF THEIR CONTEXT. HE SAID: "OFTEN WORDS ALONE HAVE NO MEANING. THEY ONLY HAVE A POTENTIAL RANGE OF SENSES." AND ON THE ULTIMATE FUTILITY OF PROPOUNDING FIXED RULES TO GOVERN THE METHOD BY WHICH THE MIND DRAWS CONCLUSIONS, HE QUOTED THAYER, "FOR REASONING THERE IS NO LAW OTHER THAN THE LAWS OF THOUGHT.": LAW SOCIETY OF UPPER CANADA GAZETTE, VOL. XV11 249 AT 274.