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

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Should the Rules Relating to the Admissibility of Extrinsic Evidence be Relaxed?

Before proceeding to a discussion of the assigned topic I would like to raise one or two questions of interpretation. Considering the text alone, the following questions come to mind:

(1) Does the question as framed direct discussion to the question of more intended use of particular material? Does it mean, for example that I should discuss whether material now admissible for certain purposes should be permitted to be used for other purposes? or,

(2) Is the question intended to develop discussion of the possibility that existing rules should be relaxed to allow counsel and the judiciary to use material that is currently prohibited for limited or uinlimited purposes?
or,

(3) Does the question intend a discussion of both (1) and (2)?

(4) Does the Title preclude consideration of the adoption of a more restrictive rule that would prohibit all or most extrinsic evidence?

(5) Should the discussion be limited to the interpretation of ordinary statutes, or should it also cover interpretation of the Charter as well?

(6) What is meant by extrinsic material?

There is no extrinsic evidence I can turn to for assistance. I am left therefore, as you are with the bare text of the title for guidance.

I have interpreted the title of this session to mean that there are existing legal rules which govern the admissibility of extrinsic for purposes of statutory interpretation.

The question to be discussed is whether these rules should be relaxed, in the sense of being made less restrictive so as to allow the admission of different kinds of evidence now prohibited and for purposes now disallowed. In other words, I have selected question (3) as the controlling intent.

As the result of discussion with one of the conference

organizers it was agreed that this discussion would be limited to non Charter interpretation, thus answering question (5). Thus there remains only the question of what is meant by "extrinsic evidence" for purposes of this topic.

In a general way, extrinsic evidence can include any material that is external to the text of the statute itself. This could include earlier versions of the same statute, other statutes dealing with the same subject matter, historical data describing social conditions existing at the time the legislation was enacted, pre-enactment materials in the form of Commission and Committee reports, comments by legislators both inside and outside the house and newspaper descriptions of the new legislation. Our courts have traditionally accepted reference to earlier versions of the same statute, statutes in pan materia, and historical data as legitimate aids to construction, particularly when the statutory language was deemed to be ambiguous.(1)

In more recent times, the debate has centered around the admissibility of particular extrinsic evidence which is connected in some way with the legislative process that leads to the enactment of a particular statute. Such "legislative history" can include: statements made by the Minister responsible for a particular piece of legislation upon its introduction into Parliament on second reading, reports of special parliamentary committees respecting proposed legislation, pre-enactment reports of Royal Commissions, as well as other special Task Forces or

Committees, statements made by members of the legislature during debate upon the Bill and statements made by committee members in Committee, if recorded.

WHAT DO THE PRESENT RULES PROVIDE?

As a matter of practice, our courts have allowed counsel greater leeway in the presentation and use of extrinsic evidence when concerned with constitutional issues.(2) The judicial task of determining the pith and substance of particular statutes and their characterization for purposes of section 91 and 92 application has influenced our courts to adopt a more liberal approach to the admissibility of extrinsic evidence than is the case where non constitutional issues are involved. In those situations in which the court is interpreting the text of the BNA act itself, Canadian courts have worked freely with extrinsic evidence in the form of post Confederation debates and Royal Commission Reports.

In non-constitutional cases, our courts have not been reluctant to use some forms of extrinsic evidence such as data relating to social conditions existing at the time the statute in question was enacted as well as statutes "in pan materia". The creation of Law Reform agencies in Canada within the last fifteen years has resulted in counsel presenting to the Courts, in ever increasing numbers, reports of law reform agencies as extrinsic aids to interpretation. In 1978, the Supreme Court of Canada approved their use in non constitutional cases for the purpose of

it must have sought to meet in the new statute.(3)

Insofar as Constitutional cases are concerned, two decisions of the Supreme Court of Canada involving the use of extrinsic evidence are particularly important and instructive. In the Anti-Inflation Act [1976] 2 SCR 373, the court was presented with a vast array of extrinsic evidence by counsel, including a White Paper tabled in the House by the Minister of Finance, an economic study paper, economic statistics, and a speech delivered by the Governor of the Bank of Canada. The material was tendered, not to resolve the construction of terms in the legislation, but to show the social conditions existing at the time of its enactment and the evil it was intended to correct. Chief Justice Laskin approved of the use of extrinsic evidence for these purposes and suggested that "no general principle of admissibility or inadmissibility can or ought to be propounded by this court" and that questions off resort to extrinsic evidence and what kind of evidence might be admitted should depend "upon the constitutional issues which it is sought to adduce such evidence".(4)

Mr. Justice Ritchie declared that extrinsic evidence in general, and the White Paper in particular, were not only admissible but essential in order that the court would have before it the same material that had been before Parliament at the time the legislation was passed. Mr. Justice Beetz was prepared to go further and to consult Hansard, "not to construe and apply provisions of the Anti Inflation Act, but to acertain its constitutional pivot".(5)

In the second case, Re Residential Tenancies Act [1981] 1 SCR 714, the Supreme Court, speaking through Chief Justice Dickson, discussed the admissibility of a law reform commission report which had been offered to show the factual context and purpose of the legislation under consideration. In the course of deciding that such a report was admissible the Court provided the following guidelines concerning the use of extrinsic evidence in constitutional cases:

(1) Extrinsic evidence is admissible to show the operation and effect of the legislation.

(2) Extrinsic evidence may be admitted to show the true purpose and object of the legislation.

(3) Extrinsic evidence cannot be used as an aid to the construction of a statute.

(4) Generally, speeches made inside the legislature are inadmissible because they have little weight.

(5) Extrinsic evidence may be admitted to show the general social background against which the legislation was enacted.

(6) Extrinsic evidence is inadmissible if it is inherently unreliable or against public policy.(6)

Chief Justice Dickson has provided a useful summary of the guidelines to be applied but they are far from self explanatory and are bound to be difficult to administer. For example, guideline (6) which would render inadmissible any extrinsic evidence that is inherently unreliable or against public policy

presumably means that even though the material is used for approved purposes it may still be deemed inadmissible. Such a general rule seems to be in conflict with former Chief Justice Laskin's earlier admonition that in constitutional cases no general rule of admissibility or inadmissibility can or ought to be propounded and that decisions should be on an ad hoc basis based upon the constitutional issues being considered.(7) However, accepting the rule that the later law supercedes the earlier, let us consider this guideline in the context of guideline (4). Hansard debates are specifically dealt with and considered to have little weight because of their generally unreliable nature.(8) Statements made by legislators in the House or in Committee during the legislative process are usually considered to be suspect because it is assumed that political bias will outweigh the desire for objective truth.(9) These statements would probably be considered inherently unreliable within the meaning of guideline (6). But notice that guideline (5) does not impose an absolute bar to the admission of such material and seems to imply that there may be situations where the statements made might be relied upon. Presumably this would involve circumstances where the element of political bias was lacking and therefore the statement could be relied upon for its accuracy and truthfulness. This judgment, to be made by the court, would, I assume, be made on the basis of the stature and reputation of the person making the statement, the context within which the statement was made and, perhaps, the subject matter being discussed.

and, perhaps, the subject matter being discussed.

As for extrinsic evidence that is contrary to public policy, I have been unable to discover any reported cases where extrinsic evidence has been rejected on this basis. At the moment, I cannot imagine what kind of extrinsic evidence would be contrary to public policy and yet meet the inherently unreliable test.

Guideline (3), it seems to me, has two built in difficulties. In the first place, there may be room for disagreement as to when extrinsic evidence is being used as an aid to the construction of a statute. Usually the courts will talk in terms of using extrinsic evidence as direct evidence of intention meaning that the evidence bears directly upon the meaning of words in the legislative text. Evidence that is directed towards the general social policy of the statute or its general purpose from which the court might infer the intended meaning of provisions in the text is considered admissible because it only indirectly indicates meaning.(10) Direct use of extrinsic evidence is equated with construction while indirect use is not. If the extrinsic evidence is not being used to determine directly the meaning of specific words in the statute, but the court is faced with the problem of inferring a power or authority that is not explicitly given by the text but which might legitimately be inferred in light of the general purpose of the act as revealed by that extrinsic evidence, is the evidence being used for purposes of construction?

Such a problem arose recently in connection with the

of Canada concerning wire tap authorization.[11] The issue, in both cases, was whether the provisions of the Criminal Code, which authorized a wire tap in certain circumstances, also, by implication, authorized what would otherwise constitute an unlawful entry (trespass) upon private property in order to install the wiretap. Counsel tried to introduce extrinsic evidence in the form of a committee report and a copy of the minutes of a Standing Committee of Parliament to support the contention that the legislature intended to authorize the necessary trespass if required.

In Reference Re Private Communications,[12] the majority of the Supreme Court were prepared to find such implied authority. Mr. Justice Estey did not make reference to the use of extrinsic evidence but referred instead to his reasons for decision in Lyons v R. [1985] 2 WWR 1, heard before the Reference case but with judgment rendered on the same day. In the Lyons[13] case Justice Estey, speaking again for the majority declared

> "This material is not considered by the courts in arriving at the proper construction to be placed upon the language used by the legislature but only with reference to the aims of the legislating body and the evils with which it was then contending."[14]

Chief Justice Dickson, in dissent, declared that the extrinsic evidence offered could not be used as direct evidence of a legislative intention to impliedly authorize an entry upon private property.[15]

The same extrinsic material was thus being used to answer

The same extrinsic material was thus being used to answer the question - Did the legislature intend to authorize the police to make an unlawful entry in order to plant listening devices? One member of the court (with others concurring) saw such a process as involving the construction of the statute and the provision of direct assistance as to legislative intent (p. 207). The majority, on the other hand, considered the materials to be of indirect assistance only since they were only being used to inform the court about the social problem or mischief the legislation was intended to counteract and the aims of Parliament in passing the statutory provisions. With a better understanding of the mischief and the general aims of the legislature, the court was then able to answer the question of the legislature's more specific intent concerning an unlawful entry. Does such a distinction in relation to use make any sense? Can a court realistically use extrinsic material to clarify general legislative intent without also considering the effect of that same material upon the more specific legislative intent? The court is involved in statutory construction in both instances. (16)

One would have thought that direct evidence of intention would be more relevant than indirect evidence and if relevancy were the determining criteria the rule should be reversed. But relevancy is not the test. The real reason for courts not wanting to admit extrinsic evidence as direct evidence of legislative intention and meaning seems to be that they do not want to be bound by the effect of such evidence. Since the material does

not form any part of the authoritative text, to let it control the interpretive function as direct evidence of meaning and intent would be to usurp the court's constitutional role. Use of the same material as indirect evidence does not have the same limiting effect upon the court's interpretive discretion.

But the outcome of the two cases was not dependent, I would submit, upon the use of extrinsic evidence as either direct or indirect evidence of legislative intention. The differences between the majority and minority judgements in these cases seems to be in different emphases upon different social values, with the majority stressing the need for and importance of effective law enforcement and the minority more interested in protection of private property rights and privacy.

So where does this leave us? Supreme Court decisions in the Anti Inflation[17] and Residential Tenancies[18] cases indicate that extrinsic evidence can now be used to show the operative effect of the legislation, its true object or purpose and to provide general background information. However, if the extrinsic evidence is deemed by the court to be inherently unreliable or against public policy it will be inadmissible even though used for an otherwise acceptable purpose. Hansard debates are generally inadmissible but there may be exceptions. The more recent Supreme Court decisions in Lyons v. R. and The Private Communications Reference hold that the same rules apply to non constitutional cases as well.[19]

How, then, can and should the current rules be relaxed? One

direct evidence of intention, to permit the material to be used as a guide to the intended meaning of specific portions of the text. Another possibile extension would involve lifting the general, but not absolute, prohibition against the use of Hansard Debates in particular. A final possibility involving an extension would be to eliminate the prohibition against inherently unreliable material or that which is deemed contrary to public policy.

Before trying to reach a conclusion with regard to these possible extensions, it might be helpful to review some of the reasons given in support of a more liberal use of extrinsic evidence, as well as some of the arguments against such an extension.

Arguments Favouring A More Extensive Use of Extrinsic Evidence and Relaxation of Current Rules

(1) Separation of Powers and the Proper Judicial Function

Since the separation of powers doctrine commits courts to the discovery and application of legislative intention, it is essential that courts accurately and effectively carry out their assigned function. According to this reasoning, any evidence, including extrinsic evidence, should be logically relevant and therefore legitimately consulted in the search for intention. However, the development of modern legislation, much of which is framed either in extremely technical language or in very general

framed either in extremely technical language or in very general terms leaving the details to be filled in by administrative agencies or others, has created a situation where legislative intent cannot be readily found, with any degree of precision, in the words of the statute alone.[20] The result has been to impell counsel and courts alike to turn to background materials such as Law Commission Reports, White Papers, Hansard Debates, and other external material. Lord Roskill of the English House of Lords has observed:

> "I think we have now almost reached the stage . . . where the courts will resort to every legitimate extrinsic means to ascertain the right answer to a point of statutory construction and will no longer be unemancipated slaves of rules of construction which may all too often serve to obscure and even to defeat rather than enlighten the judicial path." [21]

His Lordship, however, would not include use of Hansard as a legitimate means of obtaining an answer but would have extended the search to include expert committee reports upon which the legislation was based. Other members of the English judiciary, by contrast, including Lord Denning and Lord Hailsham, have indicated that they would not hesitate to consult Hansard and have done so. [22]

The search for legislative intention assumes its reality and the possibility of its discovery. Several legal commentators have argued that courts are, in fact searching for a phantom a legal fiction which, if it exists at all, exists only in the minds of the judges. As Professor Ronald Dworkin has argued,

> of [the legislature] waiting to be discovered, even in principle. There is only some such thing waiting to be invented." (23)

It has also been suggested that the legislative process results, not in a consensus of the majority but, at most, a compromise between interest groups.(24)

But the concept of legislative intent is a hardy one and one that continues to be invoked by our courts. Whether we view it as an intellectual necessity for the judge without which the legislative process makes little sense(25) or as a concept that maintains an acceptable balance between judicial activism and complete deference to the will of others, "between unabashed paternalism and unconditional noninterventionism",(26) the concept is hard to dislodge. Perhaps it would be more factually accurate to speak in terms of the search for information concerning the intentions of "knowledgeable participants who are instrumental in the modification and passing of laws".(27)

Even to speak of legislative intention requires some clarification. The concept is used, in some circumstances, to refer to the legislature's general intentions with reference to the general aims or purposes of the statute in question. In other circumstances, the court may use the term in a narrower sense of the legislators' intention to have the statutory provisions encompass a particular factual situation. In yet a third situation, legislative intent is used in the sense of the meaning the legislature intended certain words or phrases to convey.

Legislative intent can thus be a rather narrow concept or a

Legislative intent can thus be a rather narrow concept or a relatively broad one depending upon the sense in which the term is used. Similarly, the permissible use of extrinsic evidence may vary as well as its usefulness. But even though extrinsic evidence may not provide a clear, definitive answer to questions involving specific legislative intent, judicial exposure to the external materials may very well give the court a better appreciation and understanding of the social policy underlying the legislation being construed as well as its general aims and objectives.

(2) THE GROWING TRANSCENDENCY OF THE PURPOSE OR PURPOSIVE APPROACH

The development of the purpose approach to interpretation seems to have been an attempt to avoid the need to probe for a very subjective legislative intent and yet at the same time to maintain judicial deference to the legislature. It apears to avoid the difficulty of a search for that "will of the wisp" that perhaps fictional legislative intent, while at the same time giving the appearance of a more functional approach to interpretation. (28)

In the United States, particularly, as a result of the influence of Hart & Sacks' "The Legal Process", the predominant judicial approach has been the search for legislative purpose. Rather than a blind adherence to traditional maxims of broad application, Hart and Sacks advocated judicial decision making that focussed upon the particularities of the case and the

policies underlying the statutory provisions.[29] Statutory purpose became the keystone and was discovered with the help of legislative history. Willard Hurst has described the process in the following way:

> "Emphasis is on coming to a specific focus on a given statute in its full dimensioned particularity of policy, rather than emphasizing material or values not immediately connected to that enactment. Courts now seem usually to strive to grasp the distinctive message of statutory words, taken in their own context, with reference to the documented process that produced that particular act, including legislative history deserving credibility, and policy guides supplied by the legislature's successive development of the given policy area and related areas. The twentieth-century emphasis thus is not on broad, standardized formulas, but on custom built determinations, fashioned out of materials immediate and special to the legislation at issue." [30]

Canadian and English courts have also adopted the purpose approach as the predominant approach.[31] In Canada, such a development will no doubt be accelerated by the purposive approach to the Charter advocated and used by the Supreme Court of Canada.[32] In their efforts to understand and give effect to the legislative message and with a growing awareness that the full message is seldom conveyed by the text alone, our courts have resorted to a broader context supplied by the extrinsic materials. The search for legislative purpose or purposes in modern statutes can be just as frustrating and difficult as the search for legislative inten-tion and the desire to consult extrinsic materials will be in-creased rather than diminished.

(3) The Effect of Modern Communication and Language Theory

Most modern theories of language and communication stress the importance of context as a crucial factor in the process of communication and interpretation. For a recipient reader to accurately receive and understand the ideas and concepts carried by the text of a communication, ideally the text should be read and interpreted against as broad a contextual background as possible. But not all theories of language and communication are consistent in their view of the effect of language. Older, more traditional theories tend to focus upon the intention of the author or sender of the communication. Other theorists argue for and stress the objective reality of the communication and its meaning, separate and apart from the intention of the author.(33) For these theorists language, in most circumstances is definitive enough to be able to stand on its own. Some of the more modern theorists, sometimes referred to as deconstructionists, contend that language has no meaning, "the word carries with it . . . [an] indeterminacy of meaning".(34) Between the two polar positions (1) that a text possesses a definite, objective meaning within its four corners and (2) that texts have no meaning capable of discovery and any meaning attributed to the text is created by the reader/interpreter, lie a group who believe that "meanings are the property neither of fixed and stable texts nor of free and independent readers but of interpretive communities that are responsible both for the shape of a reader's activities and for the text these activities produce".(35)

It is hard to deny the fact that many modern statutes contain vague and ambiguous language. In some cases this is because the legislature has utilized general, open-ended word symbols because more precise and determinate words cannot be used due to the fact that adequate scientific or other conventional tests have not been developed. Lacking more precise measuring standards, the legislature resorts to the use of vague standards such as "reasonable" with consequent delegation to a judge, jury or administrative official of the job of application to specific situations. In other circumstances, the political realities may require the legislature to resort to a calculated ambiguity in order to achieve an agreement between competing groups in the legislative arena.[36] By so doing, the parties involved, in effect, agree to allow an objective third party, the court or administrative agency, to act as an arbiter and to place a more determinate meaning upon the imprecise provision.[37] In still other circumstances, the legislators themselves may not understand completely, or at all the meaning of the words used in the sense of their operational effect and scope and so have no real intent in this regard.

Legislative language may thus be unclear for a number of reasons. Where this is so, the importance of context is even more evident. Although some theories of language may seem to suggest that context, at least that of the author of the communication, is not important, on the whole it continues to occupy a position of importance in communication and language theory

generally. As long as our courts continue to see their constitutional role primarily as law finders, the search for legislative intent and statutory purpose will continue and with that search an inclination and desire to broaden rather than narrow the interpretive context.

OBJECTIONS TO THE USE OF EXTRINSIC EVIDENCE

A general objection to the use of extrinsic evidence, such as Law Reform Commission Reports, Royal Commission Reports, Report of Parliamentary Committees, government White Papers, as well as Hansard Debates, is based upon the effect such a procedure would have upon our fundamental legal premise that a citizen is held accountable for his or her activities because of a presumed knowledge of the existing law.(38) Of particular importance with regard to the criminal law, it follows that a citizen should not be punished for violating a Committee Report or a Minister's statement made during legislative debate.(39) To punish a citizen in these circumstances violates our traditional concept of democracy and offends our understanding and adherence to the rule of law.

This general objection, basic as it is, assumes several things. First of all, that citizens will or have read the enactment, secondly, that the enactment will be reasonably clear and unambiguous and thirdly, that the citizen will be able to understand what the enactment provides. The first assumption is

questionable in reality, even if we restrict it to statutes that are of immediate and every day importance to the average citizen, such as the Criminal Code, the provincial Motor Vehicle Acts or Liquor Control Acts. It is more likely that new statutory provisions wilil be first read and digested by professional advisors such as lawyers, accountants or other special interest groups, as reported in trade journals or other specialized reporting services. The citizen is more likely to be informed of new legislative initiatives by the general media. Such a realization only serves to emphasize the need for timely, objective, accurate reporting of the important provisions of the new legislation, by the media.(40)

This reality, I must admit, does not appear to have been accepted by Lord Diplock who in Black-Clawson Int'l Papier-Werke Waldhof Ashoffenburg Ag [1975] A.C. 591 was able to justify referring to a Committee Report in the following way:

> "[W]here . . . statements are made in official reports commissioned by government, laid before Parliament and published, they may be used to resolve .. . ambiguity in favour of a meaning which will result in correcting . . . deficiencies in preference to some alternative meaning that will leave the deficiencies uncorrected. The justification of this use of such reports as an aid to the construction of the words used in the statute is that the knowledge of their contents may be taken to be shared by those whose conduct the statute regulates and would influence their understanding of the meaning of ambiguously enacted words." (41)
> (Underlining is mine)

Perhaps Lord Diplock was influenced by the fact that since the

words were ambiguous even a person who had not read the Committee report would only have a 50% chance of being unfairly surprised. Even assuming a very small group of affected citizens, the assumption that they read the Committee report seems difficult to accept. Presumably, had the text been clear, resort to the extrinsic material would have been unnecessary and prohibited.

As for assumption two, the recognized indeterminacy of language of varying degrees, the growing tendency of legislatures to draft generally worded provisions and to delegate specifics to others, as well as the political expedient of enacting deliberately vague provisions, makes this assumption of questionable validity in many cases. In those cases where the language itself is reasonably specific, the technical nature of many contemporary statutes, dealing as they often do with complex social problems, decreases the chance that the ordinary citizen who takes the time to read the statute will understand it. Luckily, much of our contemporary legislation has a social welfare base and instead of imposing sanctions for prohibited conduct confers welfare benefits of various kinds.[42] A failure to properly appreciate the true meaning of such legislation will not have the same negative effect as would violation of a Criminal Code provision.

While theoretically the political and legal importance of public knowledge of the law is not to be denied, in reality this factor, I suggest, is of declining importance and has to be balanced against other factors insofar as it is a consideration

in the judicial approach to the use of extrinsic evidence.

Effect Upon the Judiciary

There are a group of related objections which have as their central theme and concern the effect that admission of extrinsic evidence will have upon the judiciary. One argument stresses the fact that such material would not only permit but encourage judges to engage in law making to an unacceptable extent. The fear is that extrinsic material would be used in an attempt to justify what is in essence the translation of personal judicial value choices into binding legal rules. There is, of course, great debate and differences of opinion as to what constitutes law making in a legislative sense and where the boundary line should be drawn. There does seem to be a difference between a court choosing one of two possible meanings of the text, as opposed to the same court reading into a statute some procedure or process that is not provided by the text but which appears necessary to make the statute operationally effective.[43] There are other circumstances, however, involving the application of the statute, in which the application decision clearly makes law by delineating the scope of the statutory provisions. But such a situation is generally considered to fall within acceptable bounds of judicial law making. The law making objection to extrinsic evidence seems to assume the existence of an objective test that will easily separate acceptable from non-acceptable

situations.[44]

Another fear expressed by some commentators is that easy access to extrinsic materials will incline courts to take the easy way out of statutory interpretation problems by seeking a ready-made or convenient answer in the material instead of engaging in the hard work of textual analysis.[45] This objection and concern seems to be diametrically opposed to the preceeding objection which centered upon judicial creativity.

A third concern envisages the development of an ever increasing judicial appetite for extrinsic information such as has been seen in some American jurisdictions like California.[46] If this were to develop as a pervasive problem, there would obviously seem to be a need to draw a line beyond which external evidence would be deemed inadmissible.

A final concern and objection points out that the additional extrinsic material will only add to the volume of material that will have to be read, interpreted and evaluated by the court. Already lengthy and expensive litigation will be made even more lengthy and expensive to the detriment of all and particularly those with limited financial resources. Clearly admission of a broader range of external material will impose a greater burden upon the court. The court will have to be cautious in its evaluation of the material realizing that the presentor may have selected the most persuasive and beneficial excerpts from a broader context. If opposing counsel has done the same thing, then the court may get a more balanced view of the material

presented but with more material to read and assess. If both counsel do not provide material, the court is then faced with the decision whether to search for a broader range of extrinsic material dealing with the same statutory provisions or restrict itself to an assessment of the material provided, in the realization that it is self serving and may even be misleading to some extent.

The two remaining objections, accessibility and reliability of the external material are major objections that have been considered by courts and the Law Commission in the United Kingdom.(47) The accessibility argument really has two aspects to it. One goes to the factor of unfair surprise and the citizen's ability to be apprised of external material that might affect the interpretation of the basic legal text in the statute. We have already seen that Lord Diplock was prepared to assume that Committee reports would be available for public perusal. Hansard does not appear on the shelves of local bookstores but is available in public libraries and can be obtained by subscription. Some external materials are more readily available than others for public use. But the question of accessibility also goes to the question of access by the profession and the ease with which some members of the bar are able to obtain the material while others may experience great difficulty. The fear is that large law firms servicing financially well heeled clients will have an unfair advantage over those who do not have the means of obtaining the extrinsic materials. General availability was one of the

factors that weighed heavily in the decision of the UK Law Commission to refuse to recommend the use of legislative history as an extrinsic aid to construction.[48] It is a problem that does not seem to have deterred the American courts but it remains a real problem nevertheless.

Reliability has always been, and continues to be a major judicial concern with the use of extrinsic evidence. Reliability will depend upon the source of the information and the purpose or purposes for which it was generated and used. For example, statements made by the Minister responsible for the proposed legislation in the course of introducing the Bill on second reading should be a reliable outline of the general purposes of the new legislation and its underlying policies. However on occasion, it is possible that statements made may not accurately describe the general thrust of the new legislation. This may be done deliberately in some cases, for political reasons. In other circumstances, the Minister may have been improperly briefed or may not have personally understood all of the ramifications of the new Bill. Statements made inside the legislature by other Members of Parliament may be even less informed and objective. Statements made as to the meaning of particular provisions in a Bill will vary both in their reliability and the extent to which they may reflect the eventual legislative intention.

In the case of Committee and Commission Reports, their reliability is usually not affected by bias or lack of

objectivity or even lack of knowledge, as might be the case with personal statements by members of the legislature. Reliability relating to reports is more connected with the relationship between the report and the final legislative product. Recommendation of a Commission may or may not have been accepted and acted upon by the legislature. In cases where the Commission provided a draft statute based upon their recommendation and a comparison of the draft Commission statute with that enacted by the legislature reveals identical or almost identical provisions, the reliability of the Report as to legislative intention will be high.

The Usefulness of Extrinsic Materials

Finally, it has been argued that considering all the difficulties presented by its use the value of extrinsic material is negligible in that it provides little guidance towards the resolution of interpretive questions facing the court. How useful is extrinsic material? The answer to this question depends, first of all, upon what a court would consider "useful" and, secondly, upon the existence of any empirical studies that might have been done to test the question of usefulness.

If we consider first the question of what is useful we might agree that the most useful kind of extrinsic material is that in which the precise statutory provisions requiring judicial interpretation were discussed by the legislators with reference to the

factual situation before the court. In this situation, the extrinsic evidence in the form of a Committee Report or Hansard Debate addresses itself to the specific problem before the court and provides an answer.

Less relevant, but still useful evidence of legislative intention, is provided by material in which the meaning of a specific provision in a statute is discussed in some detail but not necessarily with regard to the precise factual situation that has subsequently arisen before the Court. In these circumstances the material or legislative debates do provide clear evidence of the meaning that was thought conveyed by a particular verbal formula, although they did not discuss the applicability of that formula to the factual situation in question. Perhaps of somewhat less value, in terms of relevancy, are legislative interchanges in which the participants discussed the specific question relating to a particular provision of the statute but stopped short of providing a clear answer. The Court, in this situation, would have to make reasonable inferences from the evidence of legislative intention provided by the material and determine the meaning of the provisions in question in relation to the facts in the case before the Court. In other circumstances, the words of a section might have been the subject of discussion in a general way in the legislature or the purpose of a section or of the statute as a whole might have been made the focus of a Minister's explanation. Here again, the evidence provided by the legislative debates would not bear directly on

the problem of interpretation confronting the courts but would merely provide evidence from which inferences would have to be drawn.

In some cases, no doubt, the legislative history could prove to be completely worthless in terms of providing any insight whatever as to the legislative intention. In these circumstances, the legislative discussion, although relevant in the sense that it related to the sections of the statute being interpreted, might provide no guidance at all because of its ambiguous nature.

In all the foregoing cases, the legislative debates could be said to be relevant but the usefulness of the discussion, in terms of providing the court with a clear answer to the problem of interpretation with which it was struggling, might be very consid-erable or it might be very little.

Although doubts have been expressed about the value of extrinsic evidence there is very little empirical evidence to prove the point one way or the other. One study recently completed in England and involving 34 cases, produced some interesting results and insights into the legislative process and the usefulness of extrinsic material.(49) The results were dis-appointing for proponents of a more extensive use of Hansard Debates particularly since in not one case did discussion by the Minister responsible for the Bill or other members of Parliament provide a clear answer to the issue or problem of interpretation confronting the court. This, in spite of pleas, in many cases by

members of Parliament, for clarification from the Minister. In every situation studied, the disputed clause or provision was either undebated or received obscure or confusing replies from the Minister. As the author of the study, Professor Vera Sacks points out, the result was to leave members, in many cases, by their own admission, confused and bewildered as to the meaning of the provision being questioned. The Committee stage in the author's view, often amounted to no more than a general discussion of principle rather than a detailed examination of specific provisions.

Another interesting insight revealed by the study is that the difficult problems of interpretation were caused not by the arising of unforeseen situations but, rather, the enactment of unintelligible legislation which resulted from either a deliberate attempt to avoid controversy or a failure of the government to begin with clearly defined statutory objectives. These uncertainties could not be corrected apparently, in the author's opinion, for a number of different reasons. Lack of time in the legislative process, inadequate research facilities and general expertise as well as procedural rules that allowed the proponents of the legislation to avoid answering questions all contributed to the failure to clarify the legislative language.

But, although reference to legislative history failed to provide clear answers to specific questions, it did, in the author's opinion, provide additional general insights into the

broad legislative purpose(s) that could not have been gleaned from the statutory text alone. This kind of benefit is obviously important when the disputed clause or provision has not been debated or discussed specifically. Ms. Sack's study also revealed one or two situations where reference to Hansard showed that Parliament, after extensive debate, had decided to leave the problem of clarification to the courts.

Some ten years ago I also had occasion to do an empirical study of the value of extrinsic evidence, primarily legislative history.(50) The study covered forty-five cases decided by the Supreme Court of Canada over a twelve year period. It was restricted to a consideration of cases involving federal legislation because of the greater availability of recorded legislative history. The forty-five case sample therefore contains a significant number of cases involving the Criminal Code of Canada. However, there is a sprinkling of cases dealing with the Evidence Act, the Indian Act, the Lord's Day Act and the Excise Act. The results can be summarized as follows:

Of the forty-five cases subjected to study, representing 57.8% of the total, proved to have legislative history that was relevant to the problem of statutory interpretation being dealt with by the Supreme Court. This percentage is significant in itself and would probably surprise those who have opposed the use of legislative history on the basis it is not relevant. Even more significant perhaps is the fact that of these 24 cases, 15 provided examples of legislative discussion directly on point and

concerned with the precise question of interpretation before the Court. In these cases the evidence of legislative intent was clear and direct. Two of the fifteen cases were excellent examples of the federal legislature using vague and imprecise language in order to give provincial courts an opportunity of moulding the statutory language so as to most appropriately reflect regional attitudes in relation to social issues having heavy moral overtones.

Evidence of legislative intention in the remaining nine cases was not clear or direct but did, or could have, provided a court with additional relevant evidence from which reasonable inferences of a more specific intention might have been drawn by the court. In five of these nine cases the discussion of the general purpose of the statute and factual situations cited as illustrations of the application of that purpose could have provided the court with a more accurate and clearer understanding of what the legislature might have intended the statute to mean with reference to the actual case before the court. In four cases, resort to legislative history would have revealed a similar kind of evidence of legislative intention in the form of a discussion of the general operational scheme of the Act as a whole interspersed with a more particular discussion of procedural matters, all of which, if taken into consideration by the court, could have helped clarify the statute's application to particular situations. In only two cases did the legislative discussion prove of little or no value in clarifying the

legislative intent.

In 42.2% of the cases, representing 19 of the 45, the legislative debates were completely irrelevant and useless in that they contained no reference, direct or indirect, to the legislative provisions being interpreted by the Supreme Court.

In purely quantitative terms, the study shows that in better than half of the cases examined, a consideration of the legislative debates would have proven to be of some use, although the usefulness varied in degree. A clearer conception of the term useful and the differences in degree referred to can only be obtained by a more detailed study of specific cases.

Extrinsic Evidence and Purpose

The same study revealed the use of a purpose approach by one or more justices in 19 of the 45 cases representing 42% of the total cases.

In the preceding study of cases in which the legislative history was found to be useful in some way, instances were recounted in which discussion of the purpose of the enactment in question provided some guidance as to the intended meaning of specific words. In other cases, however, the discussion of purpose was either not helpful or, as in one case, possibly misleading. Would knowledge of the general purpose of the relevant statute being interpreted, acquired by reading the legislative debates, have proven helpful? Clearly, in the twenty-four cases in which the legislative history was directly

on point or provided indirect evidence of intention relating to specific provisions, reliance on the general purpose was not necessary. But in cases where the legislators did not, either directly or indirectly, discuss the particular question in issue, would the legislative debates have provided a general explanation and outline of the statutory purpose that could have been usefully used as a guide by the court? Of the forty-five cases subjected to examination in this part, a study of the legislative history of the statute involved in each of the cases shows that in thirty-five cases the legislative history contains either a discussion of the general purpose of the statute or a discussion of the purpose of specific sections.

As previously mentioned, in nineteen of the forty-five cases, one or more Justices of the Supreme Court referred to the purpose of the statute. In ten of the nineteen cases, the legislative history provided either direct or indirect evidence of legislative intention that could be related to specific statutory provisions. In six of the ten cases, an attempt was made to interpret the statutory provisions in issue by referring to the purpose of the statute as a guide. Unfortunately, being restricted by the existing rule to either the words of the statute or its history, the judicial interpreter was unable to delineate the legislative purpose in sufficiently precise terms to accuratrely determine the legislative intention, insofar as it related to specific provisions of the statute. Had the judicial officer been able to refer to the legislative discussion as

reported in Hansard, the broader context provided by the legislative debates, when combined with a consideration of the general legislative purpose, would have presented the court with a much more accurate picture of the legislative intention. The same difficulty is demonstrated in the remaining nine cases where the legislative history provided only a general discussion of the statute as a whole without specific discussion of the individual legislative provisions that were in some way relevant to the case before the court. It should be noted here, that with the exception of one case, the statutes involved did not include the Criminal Code or taxation legislation in which any general explanation of purpose is normally too broad to be of any use at all.

As revealed by several cases in the study, the purpose and meaning of subsidiary provisions in a statute are not necessarily revealed by the general purpose of the Act. Theoretically, a statute is drafted as a unified whole with individual provisions reflecting the general thrust of the statute. However, political compromises or in some cases, human error, often distort the initial constitent arrangement resulting in a less than perfect legislative scheme being enacted. A survey of legislative debates can alert a court to such a possibility and permit the court to take such changes into account rather than relying totally upon the general purpose of the statute as revealed in the statutory enactment itself or even in the second reading explanation given by the Minister responsible for the Bill upon

introduction. As the nine cases show, an explanation of the general scheme of the Act or its general purpose is frequently not very revealing in terms of the meaning to be given, or intented to be given, to specific legislative provision.

Unless a court is prepared to go beyond the general explanation of the legislative plan or purpose and search for a more specific legislative discussion directed towards the issue before the Court, it will run the risk that specific provisions in the statute may not accurately reflect the legislative purpose. To interpret these provisions so that they reflect to the fullest extent the general legislative purpose may result in a distortion of the actual legislative intention.

Looking at the case study and empirical results in light of the objections to the use of extrinsic evidence generally and legislative history in particular, the following comments seem appropriate.

The results of the case study appear to clearly establish the utility of legislative history, and, particularly legislative debates, in tetermining legislative intention. If the author's assessment of the parliamentary discussion is reasonably accurate, legislative history appears to be relevant in more than fifty percent of the cases studied and of special or particular importance in one third of them. Of even more significance, perhaps, is the fact that in seven of twelve cases in which the legislative history provided clear evidence of legislative intention, the court's decision was completely contrary to the result

intent been discovered and applied. It is hardly comforting to realize that in fifty-eight percent of the cases where the legislator's intention is clearly revealed in the legislative history, the Supreme Court of Canada was unable to determine the real legislative intention by looking only at the statute itself or perhaps its history. Partisan supporters of the more liberal rule might go further and suggest that in the forty-two percent of the cases where the Supreme Court's decision would have been the same had the legislative debates been consulted, the court was just fortunate to have arrived at the right conclusion.

THE CITIZEN'S POSITION

Another argument that is given much weight by those who oppose a more liberal rule is based on the assumption that the citizen who does not have access to the legislative history as revealed in the parliamentary debates, or in other committee reports, will be at a disadvantage when the court interprets the statute applicable to his situation. Using the twelve cases in which the legislative history provided clear evidence of legislative intent as a test sample, we find in only one case, and possibly two, did the discussion of the legislators indicate an intent that would, if followed, have worked to the detriment of the citizen. In the one case, the court held the citizen was not compelled to testify whereas the history indicates it was the legislative intention that he shoud be required to so do. In six

legislative intention that he shoud be required to so do. In six cases the results would have been the same with the citizen winning in four and losing in two. In four cases, had the legislative history been available, it would have revealed that the citizen should hav won, whereas in fact he lost and was convicted by the court of a violation of the statute.

It might be noted at this point that in all twelve cases in which the legislative intention was clearly revealed by the discussion in parliament, the relevant legislative provisions were either sections of the Criminal Code or provisions in statutes that might be classified as quasi criminal or at least related in some way to the Criminal Law. The argument that the citizen might be unfairly surprised if he were not put in the same position as the Court and given the benefit of reading the legislative history before interpreting the Criminal Code, or some other penal statute so as to enable him to determine what his future actions might be, seems particularly strong. However, the results of this study do not show the citizen to be put at a disadvantage when the legislative history is consulted in criminal law cases. Quite the opposite result occurs. In four cases, the legislative history, if acted upon by the Court, would have dictated a victory for the citizen whereas the court, unassisted by the external guide, convicted the citizen.

If we assume that the citizen consulted the statutory provisions prior to embarking on a course of action, and if the citizen had interpreted the language in the same way the court

did, we can only conclude that the citizen in these cases deliberately acted in violation of the statute. If the statutory provisions were truly ambiguouss, it would appear that the citizen cannot rely on the Supreme Court applying the penal presumption and giving him the benefit of the doubt. If this is the situation, then clearly the citizen is in no better position with the exclusionary rule than he would be if the debates were available for consultation. Alternatively, if the citizen has acted without reading the statute he cannot claim to be prejudiced by the fact that the court referred to the legislative history. As the case study indicates, the citizen might even be helped by such consultation.

AVAILABILITY OF LEGISLATIVE HISTORY MATERIALS

In order to trace the historical development of the relevant legislative provisions comprising this study, it was necessary, in many cases, to consult reports of Royal Commissions or other special Parliamentary Committees. A total of thirty-three such reports were referred to in the historical background material. Twenty, representing 60.6% were printed and available to the researcher. Of the remaining 39.4%, 21.2 were not printed and 18.2 were printed but not available. Most of the unprinted or unavailable reports were reports of special committees of the House of Commons or Senate or reports of Standing Committees of the Senate.

It is worth noting here the fact that Canadian parliamentary procedure, unlike the American, provides for a much more detailed discussion of legislative provisions before Parliament as a whole rather than in committee, as is the case in the United States. Recent changes in parliamentary procedure at the federal level has, however, greatly increased the role of the committees and reduced the amount of detailed discussion taking place on the floor of the House of Commons. Pressure of time and an increasing volume of legislation has made such a change in the Canadian legislative procedure necessary. The less important role traditionally played by committees in the Canadian legislative process is emphasized by the fact that 21% of the federal committee reports were not printed. It might also be reflected in the fact that the truly valuable legislative history was found in either Royal Commission reports or in the legislative debates of the House of Commons and Senate.

The extrinsic material referred to by courts in this study in most cases involved legislative history in the form of some statement by the Minister responsible for the Bill. That statement was made

(a) as part of the explanation of the general purpose and policy of the proposed legislation and, in some cases, involved the Minister reading from a Royal Commission or other report or reading a memorandum from the Department of Justice. or,

(b) Answering a specific question addressed to the Minister from another member of the legislature, or

(c) citing hypothetical situations as illustrations of the kind that, in the Minister's opinion, would be covered by the new legislation.

In other cases, a general impression of the intended scope of the legislation is gained from the general tone of the debate and circumstances described. In one case, the situation later to arise before the court, had been referred to in Committee and that fact was noted in the legislative debates. There were few instances noted where questions were asked but remained totally unanswered.

I am struck by the difference in results between my own study and that of Vera Sacks.[51] Why was there such a difference in the number of instances where legislative history provided a reasonably clear answer to the issue before the court? Both studies involved Criminal Law legislation. Does the parliamentary process differ so much? Is it a matter of scale and time or are Ministers more responsive to Parliament? It would be comforting to think that our governments come to Parliament with well thought through legislative programmes and that this is the key difference. Perhaps it is just a difference in the criteria established by the author of each study as to what constitutes a clear indication of legislative intent or a clear answer to the question posed.

AMERICAN EXPERIENCE

American experience with the use of extrinsic evidence in the form of legislative history shows an evolution from almost complete rejection to an almost absolute acceptance by both state and federal courts.(52) In the Supreme Court of the United States, resort to legislative history occurs in all cases even though the court may find the text clear. In a study conducted of the 1981-82 term of the Supreme Court, the author found that the court always double checked its textual analysis by reference to the legislative history.(53) In only a vew cases was the history found to be controlling. More usually, either the majority or minority of the court considered the history to be inconclusive and seemed to invoke other more general legal presumptions or principles to override the effect the external history might have had.(54)

State courts regularly resort to legislative history to clarify statutory meaning. Indeed, the Supreme Court of Washington has declared it to be an elementary principle of statutory interpretation that legislative intention may be inferred from extrinsic evidence such as legislative history.(55) This court has also declared that resort to legislative history is not only permissible but necessary to determine the purpose behind an ambiguous statute.(56) If the statute is clear on its face, however, reference to the legislative history is prohibited.

Judges of the Oregon Supreme Court have gone so far as to advise Counsel that they would like to see briefs directed more

to legislative history and less to the canons of statutory construction where legislative intent is in issue.[57] This judicial preference for legislative history in Oregon is hard to understand in light of academic assessments of Florida legislative history as of questionable value.[58]

There is a clear difference in the type and amount of legislative history that is available with regard to federal and state legislation. In fact, California, which seems to be America's leading proponent of the use of legislative history, has been driven to accepting and giving considerable weight to post-enactment testimony by individual legislators as evidence of the legislature's pre-enactment statutory intent because of a lack of recorded history.[59]

California courts have permitted state legislators "to testify subsequent to a Bill's enactment as a reiteration of the discussion and events which transpired in the . . . committee hearing" or "within the narrow limits of the content of the legislative debates".[60]

THE CONTINENTAL EXPERIENCE

Continental courts have traditionally adopted a more sympathetic approach to extrinsic evidence in the form of "traveau preparatoires" as an aid to interpretation.[61] Courts in France do not regard the meaning suggested by these materials as binding or decisive and feel free to ignore it in preference to

some other meaning. In Scandinavian courts "traveau preparatoires" are extensively used to determine legislative intent. They are also used as a source of general information in relation to the background of a particular statute. In Germany, "traveau preparatoires" are regarded without suspicion, particularly where the statute is a recent one.(62)

We should note at this point that two major studies of legislative history opted for recommendations that legislatures supply specially prepared statements of legislative purpose or intent rather than expand the use of legislative history. California's study(63) recommended testing more elaborate committee reports while Britain's law commissioners recommended tentative preparation of explanatory memoranda on a selective basis.(64) Professor Hammond has noted and described what he considers to be a significant development in Canada recently.(65) The practice of implanting extensive policy statements in statutes such as the Broadcast Act represents "a fumbling towards a new statutory vehicle" which he describes as a "Statutory Management Model".(66) This model "explicitly recognizes the symbolic relationship between all those organs of modern government and notes all these organs responsible for the legislative health of an organic whole. [L]egislative supremacy is not challenged, yet it is sufficiently flexibile to enable the complex adjustment demands of the modern regulatory state to be met. The courts are given a role they can live with".(67)

The policy statements are partly declaratory "but with clear aspirational overtones".[69] As a legislative statement of goals it is necessary that such statements contain some degree of permancy making amendment difficult.[70] In order to achieve the degree of flexibility that may be required if long range goals are to shift at all may require a degree of generality that would provide little guidance to a court.[71] Professor Dickerson who is not enthusiastic about purpose clauses generally, concedes that they might be helpful where a general statute delegates lawmaking powers to a Court.[72]

CONCLUSIONS

In answering the question posed for discussion we should keep in mind that Canadian courts now allow reference to some kinds of extrinsic material for some purposes. Most recently the barriers have been extended to permit reference to Law Reform Commission Reports in nonconstitutional cases to show the social policy underlying the statute or its general aims and purposes. A decision to relax the current boundaries could evolve:

(a) permitting extrinsic material, other than Hansard Debates to be used as direct evidence of legislative intent or

(b) permit reference to legislative debates either as indirect evidence of legislative intention or direct evidence of intention, or

(c) Both (a) and (b).

My personal conclusion, having carefully weighed the pro's and con's is that we should relax the current rules and permit

greater use of extrinsic materials as set out in (a) and (b) above. I have reached this conclusion for a number of reasons. First of all, the impetus and need to enlarge the interpretive context will continue to grow fueled by much factors as an increasing judicial use of the purpose approach to statutory interpretation, and the enactment of more comlex wideranging statutes using imprecise, open ended language and delegating details to other agencies. Conscientious judges, trying to be faitiful to their constitutional mandate will find a certain psychological and, at times practical, reassurance in their resort to legislative history. Some judges do this now. At a minimum they gain a better understanding of the statute, its purposes, and its intended operation. Occasionally the extrinsic material will yield specific answers to particular questions.

Judicial independence is not sacrificed by the admission of extrinsic evidence. Information obtained relative to legislative intent, even in those occasional instances when it relates to a specific legislative intent, is not legally binding upon the court. The judge is still free to disregard the evidence no matter how clear and persuasive it might be should that decision be made. The presentation of the evidence to the court does have the impact of placing a heavier onus upon the judge to justify the decision to disregard the material and its effect. In the majority of cases the evidence will provide only general guidance as to the general statutory purposes and social policy reflected by the legislative text. It will provide the judge with a better

understanding and appreciation of the legislature's purpose in enacting the statute and the range of its intended operation. In many cases the legislative history or other external material will only be used to confirm an interpretation arrived at by other means. Even in cases where the statutory text is prima facie clear on its face, the legislative history can still be used to confirm that initial assessment. If one party to the dispute is urging the use of legislative history materials in an effort to displace apparently clear and unambiguous language they can and should require that party to meet a substantial burden of proof.

Admittedly, there are good and valid reasons for not extending further the use of legislative history, not the least of which is our democratic ideal that the citizen should not be legally affected by laws of which he/she is unaware.

The Consequences of an Extension

Courts will have more material to read, interpret and evaluate but the pervasiveness of Charter use should aclimatize our courts very quickly to the use of extrinsic materials. Obviously, they will have to be on guard for selective use of legislative history by counsel and may have to develop a certain self-reatraint themselves in this regard. If they are to evaluate extrinsic material accurately, the legislative process must be thoroughly understood by both counsel and the judiciary.

In the United States, where legislative history has been used extensively for some time, there is some concern for the fact that courts have not developed uniform criteria for evaluating extrinsic material.[73] As a result, court acceptance or rejection of extrinsic evidence appears quite arbitrary and inconsistent in many cases. Various criteria have been suggested by legal commentators and include a consideration of factors such as: (1) the level of expertise of the person or group that made the statement or prepared the document being referred to by the court, (2) timing - whether the statement or report was produced early in the legislative process or closer to the enactment date, (3) the motives of the person making the statement or preparing the report and (4) compatibility - is the evidence supported by other legislative history material - is it consistent with the rest of the extrinsic material?[74] Not all observers of the American process of judicial interpretation would agree that uniform evaluative criteria can or should be developed. As one such commentatory concluded:

> "Perhaps the most we can expect our courts to do is to bring their generally critical faculties to bear on the totality of the evidence in the legislative record in the same way they deal with other kinds of complex evidentiary records."[75]

A similar approach seems to be taken by Mr. Justice Lambert in a recent decision of the Court of Appeal in British Columbia, Liu v. West Granville.[76] In that case, Justice Lambert expressed a reluctance "to make or adhere to any intricate rules" that would govern the extent to which the report of a special committee

might be considered in interpreting a statute.[77] As to the weight to be given such evidence as an indication of the legislative scheme or the legislative purpose that would depend, in his Lordship's view "on the particular circumstances and on good sense and judgment".[78] I suspect that most members of the judiciary would prefer to approach the use of extrinsic evidence unhampered by express evaluative criteria. In the course of exercising their good sense and judgment most, if not all of the factors referred to above will be considered.

Expanding the legal context within which statutory interpretation can take place by relaxing the current rules and extending present boundaries will, inevitably, increase judicial responsibility. The temptation to pick and choose appealing bits of evidence while ignoring other bits that are inconsistent will increase. The opportunities to build a case that will support a decision which gives effect to personal value judgments of the judge will also increase. But in an era of pervasive Charter litigation where the court is thrust more and more into the policy making arena and forced to evaluate and assess a growing amount of legislative fact evidence, the prospect of having to cope with extrinsic evidence in non Charter litigation should not be too traumatic or overwhelming. I know they can do it!

FOOTNOTES

1. Charles, Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context, (1983) 7 Dal L.J. at 8.

2. Ibid at 22.

3. Laidlaw v. The Municipality of Metro Toronto (1978) 30 N.R. 515 per Spence J.

4. [1976] 2 SCR 373 at 389.

5. Ibid.

6. See Charles, supra note 1 at 26-27.

7. Supra, note 4 at 470.

8. [1981] 1 SCR 714 at 721.

9. Professor Corry has objected to the use of a Minister's statement as an interpretive aid on basis that such a practice would only add to the power of an already powerful cabinet: The Use of Legislative History in the Interpretation of Statutes (1954) 32 Can B. Rev. 624.

10. The direct/indirect dichotomy seems to have originated in the remarks of Lord Wright in Arsam Railways & Trading Co., Ltd. v. Inland Revenue Commissioners [1935] AC 445 at 458 in relation to the use of Royal Commission Reports. Mr. Justice Ritchie in A.G. Can. v. Readers Digest Assn., [1961] SCR 774 noted that "when such reports have been referred to by this court and the Privy Council in cases involving the constitutional validity of a statute, they have been referred to otherwise than as direct evidence of intention", at 796. Professor Rupert Cross has observed that the distinction has survived the Black-Clawson case "but only just". Cross, Statutory Interpretation (London: Butterworths, 1976) at 137.

11. See R. v. Lyons (1984) 56 NR 6 and Interruption of Private Communications Reference (1984) 56 N.R. 43.

12. Ibid.

13. Supra, note 11.

14. [1985] 2 W.W.R. 1 at 46 and at p. 31 of N.R.

15. Supra, note 11 at 52 of N.R.

16. Prof. Reed Dickerson has argued that "material that purports to state what the statute means . . . should be rejected out of hand because it competes with the statute and, if used, undermines the court's role of having the final say on what statutes-in-context mean": Statutory Interpretation: Dipping Into Legislative History (1983) 11 HOFSTA L. Rev. 1125 at 1130.

17. Supra, note 4.

18. Supra, note 8.

19. Supra, note 11.

20. The point has been forcefully made by The Honourable Sir Lawrence Street, Judicial Rule-Making - Some Reflections, 9 Sydney L. Rev. (1982) 535. See also MacLauchlan, Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?, U of Tor. L.J. Vol. xxxvi No. 4 (1986) 343.

21. Some Thoughts on Statutes, New and Stale, (1981) Statute Law Rev. 77 at 82.

22. Lord Denning in David v. Johnson [1978] 1 All E.R. 841 and the Lord Chancellor in H.L. Deb. Vol. 418 col.1346 March 26, 1981. Referred to in Sacks - Towards Discovery Parliamentary Intent (1981-82) Statute Law Rev. 143.

23. The Forum of Principle, (1981), 56 NYUL Rev. 467 at 475 quoted in Hutchinson & Morgan, Book Review of Legislation by Miers and Page Vol. 21 Harv. J. on Legis. (1984) 583 at 594.

24. Posner, Economics, Politics, and the Reading of Statutes and the Constitution (1982) Vol. 49 U of Chi. L. Rev. 263 at 273-75 and Statutory Interpretation in the Classroom and in the Courtroom (1983) Vol 50 U of Chi.L. Rev. 800 at 819.

25. Dickerson, supra, note 16 at 1126.

26. Blatt, The History of Statutory Interpretation: A Study in Form and Substance (1985) 6 Cardozo L. Rev. 778 at 788.

27. Uno and Stapke, Evaluating Oregon Legislative History: Tailoring an Approach to the Legislative Process (1982) Vol. 61 Ore. L. Rev. 421 at 422.

28. Max Radin, A Short Way with Statutes, (1942) 56 H.L. Rev. 388 appears to have advocated this approach when he suggested

> "A statute [should be understood] as an instruction to administrators and Courts to accomplish a definite result, usually the securing or maintaining of recognized social, political, or economic values . . . [W]e may call the statute a grand design, or a plan in which the character and size of a structure are indicated, an in which details are given only so far as they are necessary to ensure the erection of the desired structure".

Quoted in Blatt, supra, note 26 at 829-30.

29. Blatt, supra, note 26 at 832.

30. Dealing With Statutes (1982) at 65.

31. In a study of some 522 cases involving interpretation, the purpose approach was used by one or more Justices in just over 50% of the cases. Charles, Statutory Interpretation in the Supreme Court of Canada (1976) Part II of an unpublished doctoral thesis. Since the completion of that study in 1975 the adoption of a purpose approach has increased even more. In England Lord Denning in 1978 was able to declare that "The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach". . . . "In all cases now in the interpretation of statutes we adopt such a construction as will promote 'the general legislative purpose' underlying the provision" Northam v. Barnet Council [1978] 1 W.L.R. 22. A more conservative academic assessment conceded that the purpose approach was "clearly gaining ground" Samuels, The Interpretation of Statutes, Statute Law Rev. (1980) 86 at 93.

32. See Hunter v. Southam [1984] 2 SCR 145 and Regina v. Big M Drug Mart [1985] 2 SCR 295.

33. See Hutchinson and Morgan, Book Review, supra, note 23 at 590.

34. H. Bloom, J. Derrida, G. Hartman, P. deMan and J. Miller, Deconstruction and Criticism at vii-viii (1979) referred to in Hutchinson and Morgan, ibid.

35. One member of this group is Stanley Fish. Is There a Text in This Class? (1980) 322.

36. This explanation is offered by Cohen, Legisprudence: Problems and Agenda, (1982-83) 11 Hofstra L. Rev. 1163 at 1170.

37. This analogy is suggested by Cohen, ibid., at 1171.

38. The importance of this factor has been stressed by several members of the House of Lords. See for example, Lord Simon in Stock v. Frank Jones (Tipton) Ltd. [1978] 1 All ER 948 and Lord Diplock in Fothergill v. Monarch Airlines [1981] A.C. 251.

39. This point is made in the context of American use of legislative history by Rhodes and Seererter, The Search for Intent Aids to Statutory Construction in Florida - An Update, (1985) 13 Fla. St. U.L. Rev. 485 at 492.

40. Some of the realities and difficulties involved in the communication of new legal rules to the public are discussed in Gifford, Communication of Legal Standards, Policy Development and Effective Conduct Regulation (1971) 56 Cornell L. Rev. 409 and S. Haszagh and W. Haszagh, A Model of the Law Communication Process: Formal and Free Law [1978] 13 Georgia L. Rev. 193.

41. At 836 of 1975 1 All ER 810.

42. A prominent Dutch legal commentator T. Koopmans, now a Judge of the European Court of Justice recently observed:

> "The type of state which we loosely define as the welfare state resulted primarily from legislative activities. The first steps were taken in the area of social policy, by legislation on labour law, health and social security; but state intervention gradually advanced into the economic sphere, by legislation on anti trust, unfair competition, transport and agriculture; it finally brought us to our present situation by extending the public sector, by exercising an overall control of the economy, by assuming responsibility for employment, by framing schemes of social assistance, and by subsidizing non-profit activities like the arts, community work and the renovation of decaying urban centres."

Quoted in Cappellette, The Law-Making Power of the Judge and Its Limits: A Comparative Analysis (1981) 8 Monash U. L. Rev. 15 at 23.

43. Which seemed to be the case in R. v. Lyons and Interruption of Private Communications Reference, supra, note 11.

44. Tucker, The Gospel According to St. Peter, U. of Tor. L.J. (1985) Vol. xxxv No. 113 at 148.

45. Bishin, The Law Finders: An Essay in Statutory Interpretation (1965) S. Cal. L. Rev., at 16.

46. Reed Dickerson, supra, note 16, raises this concern at 141. The reference to California concerns the use of post enactment statement by members of the legislature caused by a lack of recorded material.

47. The Interpretation of Statutes, (1969) U.K. Law Commission No. 21 and Scot. Law Comm. No. 11. Though they considered non availability of external material to be a problem, the Commissioners did foresee one partial solution. ". . . if the legislative history of statutes was admissible, it is probable that the burden on the lawyer and other users of statutes would be lengthened by the inclusion in text books of significant extracts from the legislative history of the statutes with which they deal.", at 35. This practice occurs now in Canada with Martin's Criminal Code. Reference was also made by the Sup. Ct. in R. v. Lyons to a textbook by Manning dealing with the new Protection of Privacy Bill.

48. This problem, as one might suspect, has been the focus of much judicial and academic comment. The English Law Commissioners in their report discuss the usual objections but took particular note of the fact that in the United States "much of the criticism of American Judges and writers has been directed not so much against its (Legislative history materials) use in principle as against its abuse in practice" Ibid., at p. 33.

49. Sacks, supra, note 22.

50. Supra, note 31. Part II of the thesis involved a case study of the use of legislative history by the Supreme Court of Canada.

51. Supra, note 22.

52. This more general assessment of the use of extrinsic evidence by American Courts was made as the result of a more limited statistical evolution of the use of legislative histories by the Supreme Court of the United States. See Carro & Brann, The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis (1982) 19 Notre Dame Law School, Journal of Legislation and reprinted in 22 Jurimetrics J. (1982) 294 at p. 296.

53. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court term, [1983] 68 Iowa L. Rev. 195.

54. Ibid.

55. Wang, Legislative History in Washington, (1984), U. of Puget Sound L. Rev. 571 at 575 quoting the court's decision in Ropo, *Inc.* v. City of Seattle, 67 Wash. 2d 574, 577.

56. Ibid. at 576 referring to State v. Coma, 69 Wash. 2d 177, 182-3.

57. Umo and Stapke, supra, note 27 at 422.

58. See Rhodes, White & Goldman, The Search for Intent: Aids to Statutory Construction in Florida (1978) 6 Fla. St. U. L. Rev. 383. A later study concedes a judicial willingness to rely on external materials and concludes that "statutory history can be a valuable tool in construing an ambiguous provision and confirming a result reached through other means." Rhodes and Seereiter, supra, note 39 at 509.

59. Perman, Statutory Interpretation in California: Individual Testimony as an Extrinsic Aid (1980-81) U. of San Francisco L. Rev. 241 at 247-248.

60. Ibid. at 248.

61. Supra, note 22 at 144.

62. Ibid.

63. Final Report of the Subcommittee on Legislative Intent of the Assembly Committee on Rules, Vol. 28, no. 1, Assembly Interim Committee Reports 30-33 (1961-1963) referred to in Dickerson, supra, note 16 at 1141.

64. Interpretation of Statutes, supra, note 46.

65. Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence, (1982) 5 Hastings Int'l & Comp. L. Rev. 323.

66. Ibid., at 326.

67. Ibid., at 327.

68. Ibid.

69. Ibid., at 331.

70. Ibid., at 372.

71. In his opinion, "studies of general purpose clauses have shown that most of them wind up as pious incantations of little practical value because what little value they have is usually inferable from the working text". Supra, note 16 at 1161.

72. Dickerson, Legislative Drafting, 107-08 (1954).

73. A number of American commentators have discussed the need for criteria and suggested various tests. See, for example, Dickerson, supra, note 16, Rhodes & Seereiter, supra, note 58, Wang, supra, note 55, Wald, supra, note 53, Perman, supra, note 59, and Uno and Stapke, supra, note 27.

74. Uno & Stapke, supra, note 27 make reference to these criteria which appear to have been drawn from a study by Professors Wilkinson and Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" - How long a Time is That? 63 Calif. L. Rev. 601, 634-36 (1975). On the basis of this criteria, material is classified as (1) least reliable, (2) generally reliable, (3) persuasive on some occasions, (4) generally reliable and (5) most reliable. The text of the statute is classified as (5).

75. Wald, supra, note 53.

76. Rendered March 6, 1987, Vancouver, unreported.

77. Ibid., at p. 9.

78. Ibid.