

10-1-1983

## Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context

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### Recommended Citation

W. H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1982-1983) 7:3 DLJ 7.

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# Articles

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W. H. Charles\*

Extrinsic Evidence and  
Statutory Interpretation:  
Judicial Discretion in Context

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## 1. Introduction

*...the Supreme Court of Canada recently signalled an increasing receptiveness to the use of extrinsic materials in the Anti-Inflation Reference. Accordingly, I expect that we will see an increasing use by appellate courts of extrinsic evidence.*<sup>1</sup>

This prediction was made by the Honourable Brian Dickson, a Justice of the Supreme Court of Canada, in an address in 1979. His statement concerns a problem that has haunted Canadian, English, and commonwealth courts for years, namely, how far beyond the actual words of the statute itself is it permissible for courts to roam in their efforts to interpret legislation? Put another way, what is the proper context in which to interpret legislative directives? It is a question that is unavoidably intertwined with the more general problem of the proper approach to statutory interpretation, which in turn raises questions about the proper constitutional function of a court and the exercise of judicial discretion. For example, if Justice Dickson is correct that the Supreme Court of Canada has indicated a new approach to the use of extrinsic materials in the interpretation of statutes, what is the reason for such a change and what is its significance in relation to some of the other questions mentioned above? Does a willingness to broaden the statutory context by consulting extrinsic materials mean that the Supreme Court is advocating a change in the courts' function vis-à-vis the legislature and the executive?

In the following discussion, an attempt will be made to clarify and delineate some of the underlying concerns that have supported the historically limited use of extrinsic evidence and have resulted in a limited context for interpretive purposes. This paper will also look at what some Canadian courts actually do in spite of the

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1. Dickson, *The Role and Function of Judges* (1979), *The Law Soc. Gaz.* 138 at 163.

exclusionary rules. Finally, the significance of a more liberal use of extrinsic materials will be considered.

## II. *The Traditional Approach of Commonwealth Courts to Extrinsic Evidence*

The traditionally accepted approach of common law courts to extrinsic evidence has been to restrict reference to materials that are considered external to the words of the legislative enactment being interpreted. This so-called extrinsic material can include such items as prior versions of the same statute, statutes in pari materia, Royal Commission and Law Commission reports, reports of select committees of the legislature, and Hansard debates. Although it is now generally acknowledged that statutes in pari materia and previous versions of the same statute are admissible in appropriate circumstances,<sup>2</sup> Canadian, English, and commonwealth courts continue to prohibit reference to materials involving the legislative history of statutory provisions. Thus, consideration of legislative debates as recorded in Hansard is absolutely prohibited.<sup>3</sup>

However, the pressure to have courts change their long-established exclusionary rule with regard to extrinsic evidence has been increasing for some time. One important factor that has emerged in the last fifteen years has been the creation of Law Reform Commissions in many jurisdictions and the resulting publication of numerous Law Reform Commission reports. Courts have found it increasingly difficult to ignore the guidance and assistance provided by Law Reform Commission studies and reports when called upon to interpret the provisions of a statute enacted pursuant to such a report. The difficulty increases considerably when the Law Reform Commission report includes a draft statute which, upon comparison, is found to follow very closely the words

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2. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 131-132. For recent examples of the application of this rule by the Supreme Court of Canada, see *Nova Omoca Canada Petroleum Co. Ltd. et al* (1981) 38 N.R. 381 per Estey J. for the court at 392; *Saskatchewan Power Corp. v. Trans Canada Pipelines and Natural Energy Bd.* (1982) 39 N.R. 595; *Langille and Langille v. Toronto Dominion Bank* (1982) 40 N.R. 67; and *R. v. Hutt* (1978) 19 N.R. 331.

3. The exclusionary rule was first developed and applied in 1769 by an English court in the case of *Miller v. Taylor*, 4 Burr 302, 98 E. R. 201 at 217. It has since been adopted in Canadian and commonwealth courts but has been rejected by American judges. See, for example, *A. G. Can. v. Readers Digest Assn.*, [1961] S.C.R. 775, 30 D.L.R. (3d) 296, and *South Australia v. The Commonwealth*, [1942] 65 C.L.R. at 410.

of the statute enacted in response to that report. The result in Canada has been a growing number of cases, in recent years, in which the courts have permitted reference to Law Commission and Royal Commission reports for limited purposes.<sup>4</sup>

### III. *The Underlying Problem — Proper Context*

As societies grow more complex, the need for legal regulation appears to increase in proportion. The primary source of new laws in a modern state is the legislature. Theoretically reflecting a social consensus, Parliament enacts laws that are deemed to be in the public interest and for the public good. These laws and regulations may confer benefits or privileges upon certain individuals or groups within society, or, conversely, may impose duties and responsibilities as well. In an era of statutes, clear statements of the law by the promulgating institution are obviously of prime importance. Unfortunately, modern social problems are often complex and require complicated legislative solutions. Drafting techniques currently in use by most common law jurisdictions further exacerbate the problem by creating statutes that abound in detail, so much so that the basic thrust of the legislative enactment is often difficult to determine.

In cases where a dispute arises concerning the meaning of a statutory provision, it falls to the courts to render authoritative pronouncements as to the meaning of the words in question. An analysis of the workloads of Courts of Appeal in particular would indicate that they spend a significant amount of their time hearing cases that involve questions about the proper meaning of statutory provisions. It would be comforting to think that because so much of their time is devoted to interpreting statutory language, our common law courts have developed a well-defined and well-understood uniform process of interpretation. The existence of such a uniform approach to interpretation would be extremely helpful to citizens and their advisers in their attempts to understand legislative directives. Unfortunately, the principles of statutory interpretation do not form “the most stable, consistent, or logically satisfying part

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4. *Home Oil Distributors Ltd. v. A.G.B.C.*, [1940] S.C.R. 444, [1940] 2 D.L.R. 609; *A.G. Can. v. Readers Digest Assn., Id.*; *Gaysek v. The Queen*, [1971] S.C.R. 888; *Can. Indemnity Co. et al v. A.G.B.C.*, [1975] 3 W.W.R. 224, B.C.S.C. (Aikens J.); *Reference Re Anti Inflation Act*, [1976] 2 S.C.R. 373; *Laidlaw v. The Municipality of Metro Toronto* (1978) 30 M.R. 515; and *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714.

of our jurisprudence. . . ."<sup>5</sup> The difficulty stems from the fact that rules of statutory interpretation, although reasonably clear when they stand alone, are often difficult to apply. The problem is compounded by the fact that there are other rules of interpretation that appear to be in conflict, and yet we lack any accepted hierarchy of rule importance or application.

The jurisprudential deficiency suggested here has been recognized by the United Kingdom Law Commission in their report covering the interpretation of statutes.<sup>6</sup> One particularly difficult problem addressed by the commission, and one that may very well be fundamental to the whole problem of statutory interpretation, concerns the proper use of extrinsic material by judges in the interpretive process. What material, apart from the statute itself, can be legitimately consulted by a court of law in its attempt to give an authoritative meaning to the words of Parliament? This is basically a problem of context. As one member of the American judiciary framed the question, "What is below the surface of the words and yet fairly a part of them?"<sup>7</sup>

The availability of an ever-increasing number of reports from Law Reform Commissions has done much to emphasize the need for a clear policy with regard to this important aspect of the interpretive process. Canadian courts have fairly consistently followed the practice of English courts and have adopted English precedents when making rulings concerning the use of extrinsic materials. Unfortunately, neither our Canadian courts nor those of England have adopted a consistent and uniform approach to the use of extrinsic materials in the sense of determining what aids to interpretation, external to the statute under consideration, are legitimate and permissible, and the purposes for which this material might be used.<sup>8</sup> Nor have the legislatures of Canada, except for that of Nova Scotia,<sup>9</sup> provided guidance through the various interpreta-

5. Allen, *Law in The Making*, 7th ed. (1964) at 526.

6. The Interpretation of Statutes, (1969) Law Commission No. 21 and Scot. Law Comm. No. 11.

7. Mr. Justice Frankfurter, "Some Reflections on the Reading of Statutes," (1947) 2 The Record of the Assoc. of the Bar of the City of N.Y. 213 at 220.

8. Lord Scarman, a member of the House of Lords, has noted that "... judicial practice (in the U.K.) in regard to referring to material outside the words of the statute in order to discover its meaning is very divergent ... and we have not as a body of judges as yet established what are legitimate aids to interpretation outside the statute and for what purposes they may be used." House of Lords Debates on Interpretation of Legislation Bill, 13 February 1980 at p. 280.

9. Interpretation Act, R.S.N.S., 1967, c. 151, s. 8(5).

tion acts as to what material might be utilized by the courts and how it might be used.

The need for legislative guidance has been recognized in the United Kingdom with regard to both a recommended general approach to interpretation and the use of extrinsic material by a court. Lord Scarman, in an attempt to give effect to earlier recommendations of the Law Reform Commissions of the United Kingdom and Scotland and the Renton Committee on the Preparation of Legislation, introduced an Interpretation Bill into the House of Lords in 1980 and 1981.<sup>10</sup> The bill would have permitted a court to refer to extrinsic materials in the form of international agreements relevant to the statute, as well as to Royal Commission or Law Commission reports. The proposed bill did not make it clear whether the statutory language first had to be found to be ambiguous before the extrinsic material could be consulted.

Although the bill itself survived the House of Lords debates, those parts of it dealing with the admissibility of extrinsic evidence were deleted, a position supported by the Law Society and by the Law Reform Committee of the Senate. Members of the British Bar expressed concern that if the admission of extrinsic materials were permitted, litigation costs would increase and trials would be lengthened by the introduction of great masses of only marginally relevant material. The bill, as a whole, did not survive second reading in the Commons. Thus, the first tentative steps towards providing English courts with legislative guidance about extrinsic materials were thwarted. English courts were left to struggle in their own morass of judicial doubt and uncertainty. But they are not alone. As we shall see, the practice of Canadian courts reveals the same uncertainty and ambivalence when faced with extrinsic materials in the interpretive process.<sup>11</sup>

#### IV. *The Appropriate Context: A Matter of Judicial Discretion?*

Questions about the kind of extrinsic materials that a court may properly consult and the purposes for which they may be used are really questions about context. What is the appropriate context within which the court should interpret the statutory provisions? How much discretion should a court have to determine that

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10. House of Lords Debates, *supra*, note 8 at 275-306, and 9 March 1981, p. 63-84.

11. See Part II of this paper, where individual cases are discussed.

context?<sup>12</sup> These questions tend to focus attention upon the main issue involved, which is that of judicial discretion and its proper limitations in a democratic society. Are there limits upon this judicial discretion, and if so, how are they set? If the legislature is not prepared to outline what should be the proper context for interpretation purposes, what factors should a court take into account when exercising its judicial discretion?

(a) *The Proper Context from Different Points of View*

(i) *The Reader — Language and Communication Theory*

Before looking at the factors a court might consider important in the course of exercising its discretion concerning extrinsic materials, let us examine the question of "proper context" from other points of view. From the standpoint of language and communication theory, the more extensive the context that the receiver of the information of a communication has, the more likely it is that the message or thought or meaning that is intended to be conveyed will be accurately received. If a reader of a statute were able to read the finished product after having taken part in the entire manufacturing process, from tentative policy proposal to final draft statute, he or she might have a reasonably good understanding of the statute as a whole. Its general purpose or purposes would be known and appreciated, as well as the scheme or structure of the statute and the rationale for individual sections. But in actual practice, there are very few individuals who are involved in every phase of a statutory enactment. If the item being interpreted is a recently enacted piece of legislation, the citizen may have read about the statute and followed its progress through the legislative machinery as reported in the media. Some may even read the statute itself. The really interested citizen can expand that context by tracing the history of a particular bill through the legislative journals or Hansard. But, for all practical purposes, the average reader of the legislative directive will be reading specific legislative provisions in a context that is limited to the confines of the statute itself.<sup>13</sup>

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12. This question confronted the House of Lords in *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251. Their Lordships were urged to examine "travaux préparatoires" as an aid to the interpretation of an International Convention. Lord Scarman admitted that the court had a discretion and observed that "the exercise of this discretion is the true difficulty raised by the present case", at 294.

13. Although Lord Denning seems to assume that both ordinary citizens and

It should be kept in mind, however, that the reader of the statute, in many cases, will not be the citizen, but will be an intermediary specialist or expert, such as lawyer or an accountant, who, having read the statute, will then advise his client. It is possible, of course, that the statute will be read by either the specialist or the citizen just for interest's sake, but more often it will be read with certain factual situations in mind which involve certain kinds of activities. For example, if examined at the planning phase, the words of the statutes will be read with the client's interest in mind and the provisions will be interpreted as favourably as possible, so as to allow the client to do what is desired. If the statute is read after the fact and after the client has already acted, the pressure or inclination to put on the words a meaning that would be favourable to the client will be increased considerably. But in some situations, the language of the statute may be so clear and precise that only one meaning is possible. Expanding the context may not point to an alternative meaning.

(ii) *The Draftsman*

The draftsman should approach the statute with a perspective that involves a broader context than that available to the ordinary citizen and with a more detailed understanding of the statutory provisions. It is the draftsman who has been informed by the proponents of the statute as to the reasons for the proposed legislation or its social purpose, and it is he who has endeavoured to draw up a legislative scheme that will, it is hoped, effectively carry out the assigned purpose or purposes. He has also carefully chosen appropriate language to communicate specific thoughts, ideas, information, directions, principles, or concepts. Working as he is from the inside, the draftsman, as creator of the statute, should have a detailed and comprehensive understanding of his legislative product. The product may undergo changes in the legislative mill as the result of political compromises, and the effect of this process on the statute may be to require the elimination or addition of some provisions or the modification of others. Political accommodation may even require that specific provisions, initially included in the statute, be changed so that they are purposely vague and

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lawyers, being "men of affairs", will "have their own feeling for the meaning of the words and know the reason why the Act was passed — just as if it had been fully set out in a preamble." *The Discipline of Law* (London: Butterworths, 1979) at 10.



general. Even so, the draftsman, if anyone, should have the most complete background understanding of the new legislation. Even individual members of Parliament and the minister responsible for this new law will not be as fully conversant with all its provisions as will the draftsman. When the draftsman selects words with a particular meaning in mind, he will be doing so with the benefit of a context that is quite different from that available to the ordinary legislator, citizen, lawyer, or judge.

### (iii) *The Court*

If we accept the fact that readers of the statute will come to it with different degrees of understanding and information about it and its background, how do we answer the question of what the proper context is in which a court should seek to interpret a statute? Should the court confine itself to the narrowest possible context, interpreting the words before it in the context of their immediate section or subsection? If the words are clear and convey a meaning that seems to be reasonable to the reader, should the court accept that meaning without looking further? Most courts, including Canadian courts, respond negatively to this question and emphasize that particular words or provisions in a statute should be read in the context of the whole act, and not in isolation.<sup>14</sup> If the court reads the specific words in question in the context of the entire statute, it may also try to discover the general legislative purpose of the statute as a whole or the more particular purpose of the individual section or subsection. With this information at hand, the court may then try to place a meaning upon the specific words in dispute. However, there is also contemporary and judicial authority of considerable vintage that permits a court to expand the context beyond the statute itself and to look at material external to the statute in order to interpret the legislative language.<sup>15</sup>

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14. See, for example, the comments of Mr. Justice Ritchie, speaking for the Supreme Court of Canada in a recent case, *Yellow Cab Ltd. v. Ind. Rel. Bd.* (1980) 33 M.R. 585 at 592, who cautioned, "It must be remembered that the act can only be properly construed when it is read as a whole. . ."; see also the admonition of Viscount Simonds of the House of Lords in *A. G. v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436 at 463, who exclaimed that it was an elementary rule "that no one should profess to understand any part of a statute or any other document before he has read the whole of it. Until he has done so, he is not entitled to say that it or any part of it is clear or ambiguous."

15. In the case of *Hawkins v. Gathercole* (1855) 6 De & G.M.A.G. 1, 20, Turner L.J. advised that "In construing acts of Parliament, the words which are used are not alone to be regarded. Regard must also be had to the context and meaning of the

When approaching these questions about the proper context for their interpretive endeavours, some judges have emphasized the fact that their constitutional function restricts them to discovering and applying the law as enacted by the supreme lawmaker, Parliament.<sup>16</sup> These judges view their primary role to be that of uncovering Parliament's intention as that intention is revealed by the words of the statute. If the language is ambiguous, the court can clarify it by seeking guidance from the general legislative purpose of the statute, as found in the statute itself.<sup>17</sup> Courts adopting this approach do so because they feel that it is democratic and fair to the citizen, it recognizes the supremacy of parliamentary doctrine, and it contributes to certainty in the law. Other courts, searching for the same legislative intent, have concluded that an external context must be consulted if the true legislative intention and statutory purpose are to be revealed. Although the courts taking this approach may not openly discuss the conflicting considerations, they will emphasize the importance of discovering the actual legislative intention and will ignore or tend to treat as subordinate the certainty of law argument and the impact on the citizen of consulting extrinsic material. Other factors which are seldom articulated by courts, regardless of the approach they take, involve

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legislator . . . we have therefore to consider not merely the words of this act of Parliament, but the intent of the legislature, to be collected from the cause and necessity of the act being made, from a comparison of its several parts and from foreign (meaning extrinsic) circumstances, so far as they can justly be considered to throw light upon the subject." This statement has often been cited as authoritative and is said to be a modern statement of the rule laid down in *Stradling and Morgan* (1560) 1 Plowden 199, and *Heydon's* case. See also *A.G. v. Prince Ernest Augustus of Hanover*, *supra*, note 14, in which Viscount Simonds explained that to interpret legislative words in their context meant ". . . 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes *in pari materia* and the mischief which I can by those and other legitimate means discern the statute was intended to remedy" (at p. 461). Professor Driedger has suggested that the modern principle of construction involves reading the words of an act "in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the Intention of Parliament." *Op cit.*, note 2 at p. 67. By "entire context", Driedger seems to include a context beyond the four corners of the act; see p. 123.

16. Duff, J., *Corporation of Point Greg v. Shannon* (1922) 63 S.C.R. 556; Anglin J., *Arnold v. Dominion Textile Co.*, (1918) 56 S.C.R. 433; Davies J., *Gosselin v. The King* (1903) 33 S.C.R. 255; and Ritchie J., *London Life Insurance Co. v. Wright* (1880) 5 S.C.R. 466 at 474.

17. In *McBratney v. McBratney* (1920) 50 D.L.R. 132 at 140, Duff J. went further and declared that if the language was capable of two or more meanings, the court was obliged to seek the objection or principle of the statute if the object or principle could be collected from its language.

concerns about increasing government regulation, on the one hand, and, on the other, the need to make legislative solutions as effective and workable as possible if complex societal problems are to be cured.

As already suggested,<sup>18</sup> communications theory requires that legislative provisions in dispute be interpreted within a very broad context, so as to obtain the greatest accuracy in terms of what the communicator — in this case, the legislature — meant. Guided by this consideration, the court should strive to place itself in the shoes of the draftsman, if at all possible. This approach, however, might be considered to be unfair to the ordinary citizen who is unable to do the same thing and, for practical reasons, is limited to a much narrower context when reading the statute. It might also be relevant to consider what the expectations of the legislators were when they approved the draftsman's handywork. Would they have expected the statute to be read without the aid of extrinsic materials and, therefore, in a narrow historical context, or would they, as Lord Denning has suggested,<sup>19</sup> expect that citizens would have a somewhat broader context against which to interpret the statutory words? Before considering how these questions might be answered, we should examine the extent to which judicial discretion exists in the interpretive process.

#### *(b) Judicial Discretion in the Interpretive Process Generally*

When a case involving the interpretation of a statute comes before a court, different problems of interpretation may be involved. In the most common situation, opposing counsel are urging the court to accept different clear meanings. One counsel, for example, may argue that the words of the statute be given their ordinary and primary meaning, while opposing counsel may argue for a secondary meaning which is of a technical nature. In many situations, the question appears to be one of the application of the statute, in the sense of words being given a narrow, rather than a broad, meaning, or vice versa. In all these cases, it is argued, the language is grammatically capable of two or more meanings, and the court is being asked to determine which meaning is correct in terms of the legislative intent.

There are, however, other situations where the problem of interpretation presented to the court does not involve the court making a choice between possible meanings, but involves an

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18. *Supra*, at p. 7.

19. *Supra*, note 13 at 10.

argument that the court should amend the words of the statute by reading words into the act or, conversely, by ignoring words that are there or substituting one word for another. In these cases, the amendments are requested in order to carry out what is alleged to be a clear purpose of the act, which requires the court to fill in a gap in the statute or to correct what is clearly a drafting error. The type of interpretation problem presented to the court is important because it may affect the extent to which the court is being asked to legislate.<sup>20</sup>

The foregoing discussion also serves as a reminder that a court approaches a problem of interpretation with legal arguments which have been made by counsel, and that these arguments normally urge the court to accept two different meanings. When reading the act for the first time, the court will, of necessity, have to place some meaning on individual words, and in so doing, the judges will usually give the words their ordinary and usual, or primary, meaning. The first decision a court will have to make is whether, having given the words their usual and ordinary meaning in the narrow context of the section or subsection, they should also declare the words to be clear or plain and capable of only one meaning. If the court decides to adopt this literal approach, it may be doing so when it does not have a clear understanding of the purpose of the act as a whole, or even of the purpose of the particular section or subsection in dispute. Courts adopting this approach are generally considered to be taking an unusually narrow view of context, and one which is not warranted.<sup>21</sup> It is more usual for the court to read the provisions in dispute in the context of the statute as a whole, thus giving meaning to the language in a broader context. By so doing, the court may be able to obtain some insight into the general purpose of the legislative enactment and the scheme of the act, as well.

When the court declares that the words of a section or subsection are plain and clear, it has usually, at a minimum, read them in the context of the act as a whole and, in the situation where several meanings are possible, has chosen one meaning over another. The basis for that choice may be that the meaning fits with the general purpose of the act or the particular purpose of that section of the act,

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20. In a recent decision, Chief Justice Laskin warned that a court could not add words to a statute unless they were implicit. See *B.C. Provincial Ct. v. B.C. Packers* (1978) 19 N.R. 320 at 325. This approach at least indicates a judicial willingness to legislate if the legislative intention is clear enough.

21. As previously noted, *supra*, at p. 10.

as read in the context of other sections, or that the meaning selected is compatible with the general principles of the common law and does not produce a result that appears to the court to be unfair, unjust, or anomalous. A result is sometimes considered to be anomalous or startling when it is looked at in light of the general purpose of the act, as perceived by the court, or in light of general, basic principles of the common law, or in light of the judge's own sense of justice in a given situation.

If, after looking at the words in question in the context of the act as a whole, the court is undecided as to which meaning was intended by the legislature, or if, in the case of correcting errors or filling gaps, the interpreter is unable to sufficiently grasp the purpose of the act, the court is faced with a further decision involving context: should the context be broadened even further so that material external to the statute itself is considered? This wider context may provide the court with a clear appreciation of the purpose of the statute, or the so-called mischief. We must remember that counsel may have argued for the context to be widened and may have presented in their brief or oral argument some of this external material. If this is the case, then the context has, in fact, already been broadened and the court is really making the decision of whether or not it will pay any attention to the material placed before it by counsel. It is the decision to look outside the statute that actually involves other issues that must be seriously considered by the court. Before examining these, however, it might be useful to remind ourselves of some practical general assumptions that underlie judicial interpretation of statutes. These might include the following:

1. The legislature enacting the statute had some general purpose or purposes in mind. Certain social consequences were planned for and anticipated. These, although perhaps short term in light of historical common law legal principles, were nevertheless deemed to be in the best interest of the public at the time they were enacted.
2. The draftsman was aware of the general purpose or purposes of the statute, and he prepared a statutory framework or scheme and selected the most appropriate language to accurately communicate the legislators' directive and to accomplish the designated purpose or purposes of the enactment.
3. The English language, given the proper context, is sufficiently precise and unambiguous to allow the legislative directives to be communicated accurately in the majority of cases.

4. The communicator and the receiver had in common a set of understandings involving language and its use, social values, etc. In other words, both parties share a common, general social context.
5. In most cases, the purpose or purposes of the statutes can be discovered by reading the statute itself.

*V. The External Context: To Look or Not to Look —  
Judicial Considerations*

Returning to the question of whether a court should look outside the statute for assistance and the issues that are raised by this question, I have already indicated that communications theory dictates that a broad context will best insure that specific provisions are interpreted accurately in terms of the intended meaning. This would suggest that if the court sees its primary function as that of determining and applying the will of the legislature,<sup>22</sup> then it should make every effort to place itself in the shoes of the draftsman.<sup>23</sup> The supremacy of parliamentary

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22. The attempt to discover the actual intention of Parliament, insofar as such a collective body can be said to have a collective intention, is seen by continental jurists as a subjective approach to interpretation. This view can be found in the writings of several Scandinavian authors. See, for example, Thornsedale, *The Principles of Legality and Teleological Construction of Statutes in Criminal Law*, 4 Scandinavian Studies in Law 211 at 238 (1960), and Stramholm, *Legislative Material and Construction of Statutes; notes on the Continental Approach*, 10 Scandinavian Studies in Law 175 (1966). See also Lenhoff, *Interpretive Theories: A Comparative Study in Legislation*, 27 Text. Rev. 312 (1927).

23. This approach has been advocated recently by several members of the House of Lords. See the remarks of Lord Simon of Glaisdale in *Maunsell v. Olins*, [1975] A.C. 373 at 395, and in *Black-Clawson International Ltd. v. Papierwerk Walhof Aschaffenburg A.G.*, [1975] A.C. 591 at 646. Lord Reid went further in the latter case and suggested that:

The general rule in construing any document is that one should put oneself in the shoes of the maker or makers and thus take into account relevant facts known to them when the document was made. The same must apply to acts of Parliament subject to one qualification. An act is addressed to all the lieges and it would seem wrong to take into account any thing that was not public knowledge at the time.

This is not, however, a new approach, having first been advocated over a century ago by Lord Westbury in *re Mew and Thorne* (1862) 31 L.J.K.B. 87, where he supported a decision to look at the report of a commission and the speech of the member who introduced it, by saying: "How I advert to these matters for the purpose of abiding by the rule of interpretation which was approved of by Lord Coke, that in the interpretation of a statute it is desirable first to consider the state of the law existing at the time of its introduction and then the complaints or evils that were existing or were supposed to exist in that state of the law, and I do this for the purpose only of putting the interpreter of the law in the same position in which the legislature itself was placed; and this is done properly for the purpose of gaining assistance in interpreting the words of

doctrine would also support this approach. In the same way, a judge who considers his proper function as a member of the judiciary to be that of promoting the reasoned development of the law may also favour it. However, if the court sees itself as a mediator between the citizen and the state, it may very well invoke the principle of the rule of law to support a position that emphasizes the need for clear and certain law.<sup>24</sup> According to the rule of law approach, the citizen should only be responsible for obeying the law that is communicated to him or her in clear terms. The courts' responsibility is to give effect to what the legislators have said, not to what they meant to say. Such an approach would argue for a narrow context, or at least for one that is no wider than that available to the ordinary citizen. The rule of law approach has particular significance in cases in which the legislation imposes duties or responsibilities upon citizens or adversely affects rights to property or personal liberty.

In support of the "court as mediator" approach is the concern many judges have about their image as adjudicators, rather than law-makers. A common perception of a court is that it is an impartial and unbiased tribunal — one that gives no preference to one party or the other, but decides the issues before it objectively. In addition to being impartial as between the parties, judges must also be careful not to give the impression of usurping the legislative function through creative lawmaking, that is, by giving expression to their own personal policies. Obviously, there is an important difference between a judge making his own law, based on personal values or an assessment of what society needs, and attempting to give effect to the legislative intent by broadening or narrowing the provisions of a statute or even filling in gaps or correcting errors.<sup>25</sup> Both kinds of activities might be

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the law, not that one will be warranted in giving those words any different meaning from that which is consistent with their plain and ordinary signification, but at the same time it may somewhat assist in interpreting the words and in ascertaining the object to which they were directed" (p. 89).

24. Several members of the House of Lords have emphasized this point. Lord Simon has declared that it was incontestible that "[t]he Court is a mediating influence between the executive and the legislature on the one hand and the citizen on the other." *Stock v. Frank Jones (Tipton) Ltd.*, [1978] 1 All E.R. 948 at 953. To the same effect, see the remarks of Lord Diplock in *Fothergill v. Monarch Airlines*, *supra*, note 12 at 279.

25. Lon Fuller has suggested that "it is not the function of courts to create new aims for society or to impose on society new basic directives", because they are unsuited for this kind of task. But it is a legitimate function of the courts, according to Professor Fuller, to decide and even discover on a case-by-case basis what the generally shared aims and authoritative directives of a society (presumably known

considered objectionable on the basis of affording unfair surprise to the citizen, but at least a legitimate attempt to discover the real intention of the legislature is not open to the accusation of unjustified law-making, unless it is used as a screen for a court that wants to impose its own sense of social policy upon the public. There seems to be a general suspicion or fear that courts that adopt a purpose-finding approach to interpretation are prone to overstep the bounds of legitimate law-making and that individual judges may be tempted to refine the meaning of statutes to accord with their own view of acceptable social purposes or objectives. Statutory interpretation can never be wholly objective, and courts cannot avoid some degree of law-making in their role as participants in the process of refining and applying statutory policies. Whether engaged in the interpretation and application of statutes or the common law, the courts must somehow discover what truly are the enduring, shared moral standards and purposes of society, and give effect to them.<sup>26</sup>

The judiciary is, in fact, one of the principal organs of a democratic society, without which government can be carried on only with the greatest difficulty. Should the court see itself as a co-partner with the legislature and its judicial task as that of applying statutes in an intelligent, reasoned, and sometimes even creative manner?<sup>27</sup> Or does this stance detract too much from the principle of judicial independence or offend the doctrine of the separation of powers? Having been trained as lawyers, most judges are psychologically committed to the maintenance of law and order. In this sense, the court will tend to support the executive branch of government in cases where a party before the court is arguing an opposed position.

With the increasing governmental regulation in contemporary societies, courts would seem to face a growing dilemma: how can they act as a cooperative partner with the legislature in the implementation of legislative purposes and strive to preserve social stability through the maintenance of law and order, while, at the same time, playing the role of mediator and protector of citizens in their disputes with the state? Such considerations are seldom

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or apparent to a court) demand for their realization in particular cases. *The Forms and Limits of Adjudication*, [1978] 92 Harv. L.Rev. 353 at 292.

26. Weiler, *Two Models of Judicial Decision-Making*, Vol. XLVI Can. B. Rev. 406 at p. 435 (1968).

27. Kermochon, *Statutory Interpretation: An Outline of Method* (1976) L.J. Vol. 3, No. 2,333 at 346.



discussed openly by members of the judiciary when they decide cases involving the interpretation of legislation. I suspect that, in some instances, judges are not aware that these conflicting principles are at work in the background of their reasoning. But, consciously or not, they are present and they underlie many judicial decisions. The relative weight given to each factor may, in the end, determine the extent to which extrinsic material is admitted in evidence and the purpose for which it is ultimately used by the court.

#### VI. *The Present Position in Canada*

Insofar as extrinsic materials are concerned, Canadian courts have drawn a distinction between constitutional and nonconstitutional cases. Because the courts are trying to characterize statutes and determine their purposes when their constitutional validity is challenged, or, in other words, because the courts are attempting to determine the statutes' pith and substance, they have adopted a more liberal attitude towards the use of extrinsic materials in such situations. But even in nonconstitutional cases, it is now well-established procedure for Canadian courts to look at the history of an enactment, in the sense of prior versions of the same statute, and at statutes in *pari materia* when the court has decided that the language is ambiguous.<sup>28</sup> Canadian courts have also permitted counsel, particularly in constitutional cases, to introduce extrinsic evidence in the form of Royal Commission reports in order to outline the social conditions that existed at the time the legislation was passed. From this wider contextual base, the court is able to draw inferences about the purpose or pith and substance of the statute.<sup>29</sup>

But even in cases involving a question of constitutionality, our Canadian courts have, until very recently, been rather ambivalent and uneasy about the use of evidence in Royal Commission reports. When counsel try to use such extrinsic evidence for purposes other than giving a general picture of the social conditions at the time, as

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28. See note 2, *supra*, for reference to such cases. See also Estey J. in *Re Regional Municipality of Ottawa-Carleton and Township of Goulbourn* (1979) 29 M.R. 267 at 284.

29. *A.B.B.C. v. A.G. Can.* (1889) 14 A.C. 295 at 303, 14 S.C.R. 345 at 361-369; *Re Provincial Fisheries*, [1895] 26 S.C.R. 444 at 456-465; *Re Representation in House of Commons* (1903) 33 S.C.R. 475 at 497 and 581-593; and *C.P.R.V. James Bay R.R.* (1905) 36 S.C.R. 72 at 90, 93, and 99.

by citing the recommendations made by the commission as evidence of the purpose of the statute or the meaning to be attributed to specific provisions, they have met with general resistance on the part of the judiciary. It must be admitted, however, that there are a growing number of instances where individual judges have resorted to extrinsic material for direct evidence of legislative intention. The result is to make it very difficult to pronounce a clear rule or position that has been officially and uniformly adopted in Canadian courts. A clearer understanding of the present position can only be obtained by an examination of some of the important decisions of the Supreme Court of Canada.

(a) *Royal Commission Reports*

In 1940, the Supreme Court of Canada was called upon to review a decision of the British Columbia Court of Appeal in the case of *Home Oil Distributors v. The Attorney General for B.C.*<sup>30</sup> The provincial court had concluded that the report of a sole commissioner, appointed pursuant to the Public Inquiries Act, should be admitted in evidence only insofar as it found facts which were relevant to the alleged purpose and effect of the enactment. The matter in dispute was the validity of The Coal and Petroleum Product Control Board Act (1937) of British Columbia. In the Supreme Court of Canada, two members of the court did not find it necessary to deal with the point, another appeared to be prepared to admit this kind of extrinsic evidence in proper circumstances, and one member did not advert to the problem at all and cannot be said to have expressed a view one way or the other regarding the admissibility of the report. Only Kerwin C. J., with Rinfret C. J. concurring, specifically concluded that the report was admissible as it was a recital of what was present to the mind of the legislature, the evil to be abated, and the suggested remedy.<sup>31</sup> Mr. Justice Kerwin pointed out that the House of Lords had admitted such a report in the case of *Eastman Photographic Materials Co. v. The Controller General of Patents*.<sup>32</sup>

The issue came before the Supreme Court of Canada once again in 1961, through a rather back-handed way in the *Reader's Digest* case.<sup>33</sup>

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30. *Supra*, footnote 4.

31. The approach approved in *Hegdons Case* (1584), 3 Co. Rep. 7a, 76 ER 637.

32. [1898] A.C. 571 at 575.

33. *Supra*, note 3.

In this case, the constitutional validity of part of the Excise Tax Act<sup>34</sup> was attacked on the basis that the legislation was designed to benefit one segment of the publishing industry at the expense of another. Being thus legislation concerning property and civil rights, it was ultra vires the Canadian Parliament. The plaintiff tried to introduce into evidence statements made by the minister on first reading in the House. This evidence was held inadmissible, but, because of the nature of counsel's arguments, the court had to consider the question of the admissibility of Royal Commission reports.

Kerwin C.J. referred to the position he had adopted in the *Home Oil* case, and explained that he had taken into consideration a commissioner's report, "but only for the purpose of showing what was present to the mind of Parliament."<sup>35</sup> Justices Taschereau Abbott and Judson J. J. concurred. Justices Cartwright and Locke concluded that there was no Canadian decision requiring Royal Commission reports to be admitted, and, in their opinion, the general rule was that if the report was objected to by opposing counsel, it should be excluded. Mr. Justice Ritchie, with whom Mr. Justice Martland concurred, noted that his remarks were dicta, and then went on to stress the fact 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."<sup>36</sup> Admittedly, the remarks of the Supreme Court Justices in the *Readers Digest* case are technically dicta, but they do represent an important and deliberate effort to deal with the problem. In light of the diverse approaches taken, however, it is difficult to say that a clear rule had emerged.

Ten years later, Mr. Justice Ritchie, speaking for the majority of the Supreme Court of Canada in *Gaysek v. The Queen*,<sup>37</sup> appeared to approve of the position taken by Mr. Justice Cartwright in the *Reader's Digest* case with regard to the Royal Commission report.<sup>38</sup> Although Mr. Justice Ritchie consulted a report, he nevertheless declared that he could not derive any assistance from it. He also appeared to approve of the opinion of the House of Lords in the *Assam Railways* case,<sup>39</sup>

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34. Excise Tax Act, R.S.C. (1952) c. 100.

35. *Supra*, note 3 at 782.

36. *Supra*, note 3 at 796.

37. *Supra*, note 4.

38. *Supra*, note 3.

39. *ASSAM Ry and Trading Co. Ltd. v. Inland Revenue Commrs.*, [1934] A.C. 445.

namely, that the report of a Royal Commission was of less value than the inadmissible remarks of a minister of the Crown which are used to introduce a piece of legislation. The basis for such a position was apparently that the legislatures may not have followed the recommendations of the commissioners and that these recommendations were, therefore, of little value. Thus, the opinion of Mr. Justice Ritchie in the *Gaysek* case hardly represents a vote of confidence as to the usefulness of Royal Commission reports and it appears to suggest that these reports should not be admissible at all. Up to this point, there seems to be very little in the decisions of the Supreme Court of Canada that would encourage counsel to argue for the admissibility of these reports. If they are admissible, they appear to be only barely so, and then only for a limited purpose and subject to objection by opposing counsel.

This was not, however, the conclusion arrived at by Mr. Justice Aikins of the Supreme Court of British Columbia in 1975.<sup>40</sup> After an extensive review of Supreme Court decisions, he suggested that there was “no decision in a constitutional case which laid down a plain rule that a report of the Royal Commission may be admitted in evidence in proper circumstances, or that such a report is not admissible in evidence irrespective of the circumstances.”<sup>41</sup> Mr. Justice Aikins went on to suggest that the weight of authority fell on the side of admissibility, subject to the caveat that the report should not be taken as prohibitive of the fact asserted therein or of the validity of the opinions expressed. He noted that such reports could be used as the material before the legislature which might have revealed the mischief or evil with which the legislature was concerned. The effect of a court consulting such extrinsic material would be to give the legislation a broader context that would otherwise be revealed.

It may be significant that Mr. Justice Aikins did not refer to the decision of Mr. Justice Ritchie in the *Gaysek* case.<sup>42</sup> Had he done so, he might have thought the Supreme Court was suggesting that Royal Commission reports were of no use and should not be admitted into evidence. Having concluded that the weight of authority, apart from the *Gaysek*<sup>43</sup> case, favoured the admissibility of Royal Commission reports, Mr. Justice Aikins went on to declare that, on principle, the same rules should apply to the reports of

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40. *Supra*, note 4.

41. *Supra*, note 4 at 234.

42. *Supra*, note 4.

43. *Id.*

special legislative committees and should be subject to the same limitations.

One year later, in a case that challenged the validity of the federal Anti-Inflation Act, counsel presented a variety of extrinsic evidence to the Supreme Court of Canada for its consideration, including a white paper which was tabled in the House by the Minister of Finance, as well as economic statistics, an economic study, and a speech delivered by the governor of the Bank of Canada.<sup>44</sup> This material was put forth to help the court characterize the nature of the legislation, or, in constitutional terms, its pith and substance. It was not tendered to resolve the construction of terms in the act, but to show the social circumstances that existed at the time the legislation was passed and the evil it was intended to correct.

Chief Justice Laskin concluded that, in a constitutional case in which federal legislation is challenged, extrinsic material relating to the social circumstances in which the legislation was passed could be considered by the court to determine whether or not the legislation was valid. In the process of reaching this conclusion, the Chief Justice expressed the view that "no general principle of admissibility or inadmissibility can or ought to be propounded by this court and that questions of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues on which it is sought to adduce such evidence."<sup>45</sup> Clearly, the emphasis in this case was upon the use of extrinsic evidence in constitutional cases, with the court making decisions of admissibility on an ad hoc basis. There was no reference to the position to be taken in nonconstitutional cases. This approach seems to suggest that the Supreme Court will rule some kinds of extrinsic evidence to be inadmissible, presumably because they are not relevant to the issues to be decided. But, in making their ruling as to relevancy and admissibility, the court will presumably have to examine the material to some extent, unless it is prepared to exclude particular items by virtue of their very nature, such as statements made by ministers or other members of Parliament in the course of legislative debate.

Mr. Justice Ritchie declared that extrinsic evidence, in general, and the white paper, in particular, were not only admissible but were essential in order that the court would have before it the same

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44. *Reference Re Anti-Inflation Act*, *supra*, note 4.

45. *Supra*, note 4 at 389.

material that Parliament had had at the time the statute was enacted. From this material, the court could discover the circumstances which prompted the enactment and, thus, could presumably draw some inference as to the purpose of the legislation. Mr. Justice Beetz was prepared to go further and to consult Hansard, “not to construe and apply the provisions of the Anti-Inflation Act but to ascertain its constitutional pivot.”<sup>46</sup> The decision of the Supreme Court in the *Anti-Inflation* case is important because the court makes it clear that there is no longer a general rule of exclusion prohibiting the admission of extrinsic materials, at least not in constitutional cases. It is not entirely clear, however, just how the court will make its ad hoc decisions on admissibility and how much the court will, of necessity, be exposed to material that may eventually be declared inadmissible.

Although the Supreme Court of Canada was prepared to consult a variety of extrinsic evidence in the case of the Anti-Inflation Act, it clearly did so in the context of trying to resolve a constitutional issue. In order to characterize the nature and purpose of the legislation, the court was prepared to widen the context within which to construe the legislation, but there is little indication in the judgments that the court would be prepared to relax the exclusionary rule in nonconstitutional cases.

#### (b) *Law Reform Commission Reports*

While the Canadian Supreme Court was struggling to reach some kind of consensus about the admissibility of Royal Commission reports, the rapid development of law reform commissions and agencies was to have its impact as well. During the 1960s and 1970s, the research efforts of these agencies began to appear in the form of extensive reports which covered various areas of the law and included recommendations for reform. Many law reform reports were accompanied by draft statutes, which were often used as a starting point or model for subsequent legislative enactments.

It was, no doubt, an appreciation of the great importance of this kind of extrinsic evidence, in the form of legislative history or expanded context, that prompted the efforts by judicial members of the House of Lords to have specific provisions included in several pieces of legislation which were drafted in response to Law Reform

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46. *Id.*, at 470.

Commission studies.<sup>47</sup> If enacted, these provisions would have specifically permitted the courts to consider the content of Law Commission reports when called upon to interpret the statutes in question. However, the efforts of the Law Lords were frustrated by the legislators in the House of Commons who refused to allow the inclusion of these provisions. The basis for their rejection was that such provisions would reduce the authority of Parliament and inflate the authority of the Law Commission, thereby placing it, in a sense, even above the judiciary.

The use of Law Reform Commission reports was first considered in 1978 by the Supreme Court of Canada, in the case of *Laidlaw v. The Municipality of Metro Toronto*.<sup>48</sup> This was a nonconstitutional case in which the report of the Ontario Law Reform Commission, which dealt with the basis of compensation for expropriation, was presented in evidence. Mr. Justice Spence, speaking for the Supreme Court, did not appear to distinguish between Royal Commission reports and those of Law Reform Commissions when he declared, "It has been established that such reports may be considered not by seeking to interpret the statute in accordance with the recommendations in the report but to determine the problem which faced the legislatures and which they must have sought to meet in the new statute."<sup>49</sup> To support this proposition, Mr. Justice Spence referred to one case, although he acknowledged that there were others cited by counsel that could have been used in support as well. The case cited was the 1975 decision of the House of Lords in *Black-Clawson International Ltd. v. Papierwerk Walhof-Aschaffenburg A.G.*<sup>50</sup> In this case, the House of Lords had been urged to consult the report of a special committee which had, some forty years earlier, dealt with the reciprocal enforcement of foreign judgments. In addition to a description of the law as it existed forty years ago, the report included recommendations, a draft bill, other

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47. During the report stage of the Animals Act in the House of Lords, Lord Wilberforce moved an amendment which read, "in ascertaining the meaning of any of the provisions of this Act regard may be had to the Report of the Law Commission on Civil Liability for Animals (Law Commission No. 13)." The amendment was carried by a vote of 44 to 26, with all the Law Lords in favour of it. However, the proposed amendment does not seem to have passed through the Commons. A similar attempt was made when the Matrimonial Proceedings and Property Bill was passed by the House of Lords and suffered a similar fate.

48. *Supra*, note 4.

49. *Id.*, at 522.

50. *Supra*, note 23.

instruments intended to embody the recommendations, and comments on what the committee thought the bill would achieve. The matter was further complicated by the fact that legislation, in substantially the same form as the draft bill, had been enacted by the English legislature one year later. The Law Lords were called upon to decide how much of the report was admissible and for what purposes.

All of the Law Lords — Lord Reid, Lord Wilberforce, Lord Diplock, Viscount Dillhorne, and Lord Simon of Glaisdale — agreed that the report could be referred to by the court for purposes of identifying the mischief aimed at and the state of the law as it was then understood to be. However, there were sharp differences of opinion regarding use of the report for other purposes. Lords Reid, Wilberforce, and Diplock expressed the view that the court could not take into account the committee's recommendations or comments on the draft bill. Lord Wilberforce made it clear that none of the material, including the entire report, could be used as direct evidence of what the proposed enactment meant or what the committee thought it meant. However, two of the justices, Viscount Dillhorne and Lord Simon of Glaisdale, were prepared to go further. Viscount Dillhorne declared that it was legitimate to use other parts that were of importance, such as the recommendations, to help interpret the statute. Not only would the other material be helpful in disclosing the object or purpose of the act and Parliament's intention, but the practical difficulty of being selective meant that the court would have to draw "a very artificial line which serves no useful purpose."<sup>51</sup> Viscount Dillhorne did draw the line at Hansard debates, however. It is apparent that Lords Reid, Wilberforce, and Diplock, all of whom were willing to refer to extrinsic evidence, but only for limited purposes, could not avoid reading the material in its entirety.

Lord Simon was prepared to accept the entire report because, by so doing, the court could thereby place itself in the shoes of the draftsman. He felt that in order to ascertain the meaning of the word "use", the court must obtain all of the knowledge that the promulgator of the enactment would have had. While not ruling on the point precisely, Lord Simon indicated that he was not convinced by the objection that the court could not consider the commission's recommendations. As he suggested, usually the court

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51. *Id.*, at 622.



need only look to the statute to determine whether the recommendations had been followed. His Lordship would also have consulted the Commentary, had this been necessary, because "to refuse to consider such a commentary when parliament has legislated on the basis and face of it is for the interpreter to fail to put himself in the real position of the promulgator of the instrument before assaying its interpretation."<sup>52</sup>

The decision of the House of Lords in *Black-Clawson* is important and illuminating, and has been examined in some detail here because the Law Lords attempted in it to justify their position vis-à-vis the admissibility of the various kinds of extraneous material and have thus revealed, to some extent, their underlying concerns. For example, several of their Lordships seemed fearful that undue reliance upon the recommendations or comments of special committees or upon statements made in the House by ministers would somehow restrict their freedom of interpretation.<sup>53</sup> This concern appears in rather strange contrast to the commonly expressed fear that resort to extrinsic material would allow a court too much leeway and discretion in determining parliamentary intent. Other members of the House of Lords expressed concerns of a constitutional nature, involving the problem of unfair surprise to the citizen.<sup>54</sup> If the court establishes a statutory meaning on the basis of the material that is unknown and generally unavailable to the citizen, does this violate the principle of the rule of law which requires that the law be certain and that citizens have notice of it? Just how serious this concern really is must be questioned when we see that some members of the judiciary are prepared to assume that Law Reform Commission reports will be read by the public.<sup>55</sup>

Several members of the House of Lords in *Black-Clawson* also seemed to balk at the thought of the courts amending statutes so as

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52. *Id.*, at 652.

53. Lord Reid, Wilberforce, and Diplock seemed to express such a concern, with Lord Wilberforce expressing it most clearly.

54. Lord Diplock expressed his concern by stating that "the acceptance of the rule of law as a constitutional principal requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it" (at p. 638). Lord Simm also referred to the fact that the interpreter must be concerned with the reasonable expectations of those who may be offended by the legislation (p. 645).

55. Lord Denning has assumed that lawyers can and will consult reports of Royal Commissions and other preparatory works. *Supra*, note 13. Lord Simon, in *Black-Clawson*, considered the commentary in a draft bill to be within the shared knowledge of Parliament and the citizenry. *Supra*, note 23 at p. 651.

to give effect to what the legislatures intended to say, rather than to what they in fact said, either because this would be an unwarranted extension of executive and legislative power or because it would be unfair to the citizen who does not have due notice of the law he is expected to obey.<sup>56</sup> However, if the words are ambiguous, then the court can give effect to the legislative intent and extrinsic evidence can be considered, even though some citizens might have reasonably picked the wrong meaning upon which to act.<sup>57</sup> There is also the efficiency argument, expressed by Lord Simon, which holds that by declaring extrinsic material to be inadmissible, the volume of material is thereby reduced and the court's time is saved for more important work. On the other hand, the desire, expressed by some members of the House of Lords, to put the court in the shoes of the draftsman and thus enlarge the context of interpretation considerably seems to conflict with previously mentioned considerations, such as the citizen's reliance upon what was enacted, judicial efficiency, and judicial freedom to interpret. Whether these reasons are accepted or not, English judges at least seem to be prepared to discuss the respective considerations that affect their rulings on the admissibility of extrinsic evidence.

The most recent pronouncement by the Supreme Court of Canada in relation to extrinsic evidence was that made by Mr. Justice Dickson, speaking for the court in the *Re Residential Tenancies Act* case.<sup>58</sup> In this dispute, the court was concerned with the constitutional validity of provincial legislation. The Attorney General for Ontario presented in evidence a report of the Ontario Law Reform Commission. The Supreme Court declared such a

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56. "We are seeking not what Parliament meant but the true meaning of what they said" (Lord Reid at p. 613). It is sound enough to ascertain, if that can be done, the objectives of any particular measure, and the background of the enactment; but to take the opinion, whether of a Minister or an official or a committee, as to the intended meaning in particular application of a clause or a phrase, would be a stunting of the law and not a healthy development" (Lord Wilberforce at p. 630). "In construing it (the statute) the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates. That any or all of the individual members of the two Houses of Parliament that passed it may have thought the words bore a different meaning cannot affect the matter. Parliament, under our constitution, is sovereign only in respect of what is expressed by the words used in the legislation it has passed" (Lord Diplock at p. 638). "Courts of construction interpret statutes with a view to ascertaining the intention of Parliament expressed therein. But as in interpretation of all written material, what is to be ascertained is the meaning of what Parliament has said and not what Parliament meant to say" (Lord Simon at 645).

57. Per Lord Diplock at 638.

58. *Supra*, note 4.

report admissible to show the factual context and purpose of the legislation, and specifically held that the early exclusionary rule expressed in obiter by Rinfret C.J. in a 1950 decision of the Supreme Court, was no longer a correct statement of the law.<sup>59</sup> The Supreme Court then reiterated its reluctance to enunciate any inflexible rule governing the admissibility of extrinsic material in constitutional reference cases. Mr. Justice Dickson declared that “[m]aterial relevant to the issues before the court and not inherently unreliable or offending against public policy should be admissible, subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction.”<sup>60</sup>

This statement certainly requires some clarification. What is “inherently unreliable material”? Was Mr. Justice Dickson referring here to speeches made in the legislature, which he described as being generally inadmissible because they have little evidential weight? What material offends against public policy? What does public policy mean in this context? The pronouncements made by Mr. Justice Dickson, speaking for the Supreme Court in 1981, should be contrasted with an extrajudicial statement made by his Lordship to the Law Society of Upper Canada in 1979.<sup>61</sup> In his 1979 speech, Mr. Justice Dickson expressed his personal view, indicating that he favoured admitting legislative history, in all its forms, in both constitutional and nonconstitutional cases. He suggested further that the material should be used not only to determine the evil that the statute was designed to correct, but to acquaint the court with the operation and effect of the statute and to interpret its specific terms. While Mr. Justice Dickson seems, in his extrajudicial declarations, to have been directing his attention primarily to legislative history in the form of Hansard debates, committee minutes, and white papers, as opposed to the reports of Royal Commissions or Law Reform Commissions, it seems very clear that this liberal attitude towards legislative history would apply with equal force and even greater validity to reports of such commissions. However, such a personal position seems far in advance of the one expressed by Mr. Justice Dickson on behalf of the Supreme Court in the *Residential Tenancies* case.

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59. *Reference Re Validity of Warline Leasehold Regulations*, [1950] S.C.R. 124.

60. *Re Residential Tenancies Act* (1979), *supra*, note 4 at 723.

61. *Supra*, note 1.

(c) *Actual Practice in the Courts*

In light of decisions of the Supreme Court of Canada which culminated in the judgment of Dickson J. in *Re Residential Tenancies*, it is reasonably clear that pre-enactment reports can be used in constitutional cases to outline the social conditions prevailing at the time of enactment, to discover the mischief the legislature was trying to remedy, and to illuminate the general purpose of the act. It is equally clear, however, that the same report cannot be used to interpret specific provisions in the statute, and that reference to and reliance upon the recommendations of the commissioners for this purpose or any other is equally prohibited. It has already been noted that Canadian courts have, historically, been generally prepared to take a more liberal approach towards extrinsic evidence in constitutional cases.<sup>62</sup> The situation with regard to nonconstitutional cases has not been as clear, and it was not until Law Reform Commission reports appeared in some quantity that the issue was squarely presented to the court. The *Laidlaw*<sup>63</sup> decision by the Supreme Court supports the use of commission reports in nonconstitutional cases, subject to the same restrictions as applied in constitutional cases. However, there seems to be an additional restriction, that being that the language must first be determined to be ambiguous.<sup>64</sup>

An examination of what Canadian courts actually do is revealing. In several cases, the courts have ignored the imposed restrictions and have used commission reports to interpret provisions in the statutes by considering the recommendations contained in the commission reports. In the *Laidlaw* case itself, Mr. Justice Spence, after enunciating the rule, cited a paragraph from the commission report which advocated a certain course of action and then expressed the view that "the Legislature adopted such a course."<sup>65</sup> In another decision of the Supreme Court of Canada, which involved the interpretation of words in the Criminal Code, Mr. Justice Estey referred to a report of the Royal Commission on insanity, and noted that "these words (know and appreciate) were the subject of comment in the report."<sup>66</sup> He then proceeded to quote

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62. See p. 18.

63. *Supra*, note 4.

64. *Id.*, at 522. This appears to be the thrust of the position taken by the House of Lords per Lord Reid in *Black-Clawson* and relied upon by Mr. Justice Spence.

65. *Id.*, at 523.

66. *R. v. Barnier* (1980) 31 N.R. 273.

from the report and to interpret the statute. In several other cases involving provisions of the Canadian Criminal Code, the Supreme Court has referred to Royal Commission reports for assistance.<sup>67</sup> In *Regina v. Schwartz*,<sup>68</sup> Dickson J., dissenting, used a Royal Commission report not only to reveal the history of the statute in question of the mischief it was intended to cure, but to interpret provisions in the statute itself.

In actual practice, then, Canadian courts and the Supreme Court itself go beyond the principles laid down by the Supreme Court. We should not be surprised at this, because it would seem to be very difficult for a court to admit a report and yet try to confine itself to a consideration of selective parts of that report for limited purposes without also considering comments that might relate to the meaning of certain provisions or to recommendations that might suggest the inclusion of certain provisions. One thing would lead to another; the search for mischief would lead to a determination of purpose, and the court would, no doubt, be looking for specific answers to specific questions, whether they materialized or not.

(i) *Reference to Hansard Debates*

The prevailing position in both Canada and England is that statements made in Parliament, by its members and in relation to a particular piece of legislation, are not admissible before a court that is engaged in the interpretation of that legislation. The rule was enunciated somewhat tenuously over two hundred years ago by J.W. Willes in dicta. In *Miller v. Taylor*,<sup>69</sup> the English court was asked to consider changes made in a bill as a result of committee debates which took place during its passage through Parliament. Mr. Justice Willes refused to do so, on the grounds that neither the sovereign nor the other House would be aware of the changes. Despite his declaration of the rule, Mr. Justice Willes nevertheless proceeded to consider the history of the changes that the bill underwent. And despite the fact that the promulgator of the rule actually ignored it, the exclusionary rule, though subject to some exceptions, had been broadened and strengthened by the end of the nineteenth century so as to apply to a wide variety of extrinsic

67. See, for example, *Beerstrom v. Lauren* (1981) S.C.R. 539; *R. v. Sault St. Marie*, [1978] 2 S.C.R. 1299 at 1320 per Dickson J.

68. [1976] 8 N.R. 585 at 609.

69. *Supra*, note 3.

materials. In a recent confirmation of the rule by the House of Lords,<sup>70</sup> several reasons for the rule were suggested, in addition to the one put forth by Willes in *Miller v. Taylor*. In putting forth that reason, members of the House of Lords explained that what was said in Parliament was not really very helpful and was usually unreliable because “the pressures of executive responsibility . . . are not always conducive to a clear and unbiased explanation of the meaning of statutory language.”<sup>71</sup> In addition, the increased volume of material, if accessible, would add considerably to the time and expense of counsel preparing the case and would impose an additional burden upon the courts. The Law Commission of the United Kingdom and Scotland considered the exclusionary rule in 1969.<sup>72</sup> They concluded that it should be retained because of the difficulty of isolating information that would assist the courts in their interpretive endeavours and of making such information available in a reasonably convenient and accessible form.

There are other objections that might be raised as well, many of which apply to other extrinsic material, such as commission reports. Because the legislative debates are not readily accessible to the general public, it would be unfair to use this material to interpret the basic statute. Its use might also make it too easy for judges to legislate by allowing them to create ambiguities, rather than clarify the statutory provisions. Reference to legislative history might also distract them unduly from a study of the words of the statute. A court’s acceptance of or reliance upon the statements of ministers in effect allows the executive to legislate through Hansard, thus enhancing an already powerful arm of government.

In spite of the general acceptance of the exclusionary rule and the rationale for its application, there is evidence of some judicial support for its relaxation in certain situations. For example, Lord Reid has suggested in dicta that it might be desirable to make an exception to the general rule in those cases where Hansard would almost certainly settle the matter one way or the other.<sup>73</sup> This test has been referred to in several Canadian cases,<sup>74</sup> and Lord Simon has also suggested, on several occasions, that reference to Hansard

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70. *Davis v. Johnson*, [1978] 2 W.L.R. 570.

71. Per Lord Scarman at 582.

72. *Supra*, note 6.

73. *Warner v. Metropolitan Police Commissioners*, [1969] 2 A.C. 256 at 279.

74. *R. v. Stevenson and McLean* (1980) 57 C.C.C. 2d 526, and *Babineau v. Babineau* (1981) 122 D.L.R. 3d 508.

might be permissible in order to determine the purpose of an enactment.<sup>75</sup> As we have already noted, Mr. Justice Beetz would consult Hansard to ascertain the constitutional pivot of legislation alleged to be unconstitutional.<sup>76</sup>

(ii) *What the Courts Actually Do*

In 1961, the Supreme Court of Canada made it very clear in the *Reader's Digest* case that the exclusionary rule would be applied. Mr. Justice Cartwright gave the following reason: "While I have reached the conclusion that the evidence in question in this appeal is inadmissible as a matter of law under the authorities and on principle and not from the consideration of inconvenience that would result from a contrary review, it may be pointed out that if it were held that the minister's statement should be admitted there would appear to be no ground on which anything said in either house between the introduction of the Bill and its final passing into a law would be excluded."<sup>77</sup> Thus, Canadian courts continue to declare that reference to legislative statements are completely prohibited; they cannot be used for any purpose in any kind of case. Even the more liberal approach, adopted by courts in constitutional cases, will not allow their admittance.

It is quite surprising, therefore, to see the number of cases in which courts actually do refer to Hansard without excuse or explanation. For example, in the case of *Re Noah Estate*,<sup>78</sup> Sisson J. referred to the legislative history to determine the defect and mischief the legislature sought to prevent. In the same year, a member of the Alberta judiciary looked at prohibited material in the form of a minister's statement in order to discover the intention of the ministry in issuing a ministerial order.<sup>79</sup> In Ontario in *The Queen v. Board of Broadcast Governors*,<sup>80</sup> Mr. Justice McKuer consulted legislative history to determine the intention of the legislature. More recently, Hansard was consulted by members of the Supreme Court of Canada, not just to determine mischief, but to

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75. In *Crouch v. McMillan*, [1972] 1 W.L.R. 1102 at 1119, and *Dockers' Labour Club v. Race Relations Bd.*, [1974] 3 All E.R. 592 and 600.

76. *Reference Re Anti-Inflation Act*, *supra*, note 4 at 470.

77. *Supra*, note 3 at p. 793.

78. (1962) 32 D.L.R. (3d) 185d 203.

79. *The Queen v. Flemming* (1962) 35 D.L.R. 2d 483 at 490.

80. (1962) 31 D.L.R. (2d) 385 at 398.

help interpret words into statute,<sup>81</sup> and a member of the Ontario Supreme Court has referred to the words of an amending bill, at the stage of first reading, in order to help determine the proper meaning of the words in the statute.<sup>82</sup> It is no wonder, then, that one member of the judiciary came to the conclusion that “there appears to be a broadening reception of political statements, i.e. the statements of Cabinet Ministers of Legislatures and discussion papers at or before introduction of legislation and that this applies to both constitutional and non-constitutional cases.”<sup>83</sup> In this latter case, the Canadian judge suggested that reference to legislative statements might be permissible and possible where a look at Hansard would also most certainly settle the matter, as Lord Reid had suggested in *R. v. Warner*.<sup>84</sup>

It was perhaps with knowledge of such court practices in mind that Mr. Justice Dickson was prompted to suggest, in 1979, that it might now be possible for a court to resort to a broad range of extrinsic matters, including legislative history. In the process of expressing the view that the Supreme Court of Canada had, in the *Anti-Inflation Act Reference*, “signaled an increasing receptiveness to the use of extrinsic materials,”<sup>85</sup> Mr. Justice Dickson also suggested what the purpose and useful limits of such materials might be. From his remarks, it seems that he was approving of and advocating the use of Hansard, committee minutes, and white papers in both constitutional and nonconstitutional cases to determine the purpose of the statute as a step in the process of determining the proper meaning of specific provisions. In his words, “Justice should not be blind to the purpose of Parliament.”<sup>86</sup> Certainly, the actual practices of some Canadian courts support such a position.

In arriving at his conclusion regarding admissibility, Mr. Justice Dickson did consider the usual objections to the use of legislative history, many of which seem to be a reflection of the more general problem that the court is being asked to determine what the legislature meant to say, rather than what it did say. His suggestion that a new,

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81. *R. v. Vasil* (1981) 1 S.C.R. 469 at 487.

82. *R. v. Paul*, [1978] 39 C.C.C. (2d) 129 (C.A.).

83. Grange J. in *Babineau v. Babineau*, *supra*, note 71, affirmed 1982, 133 DLR (3d) 767.

84. *Supra*, note 71.

85. *Supra*, note 1, p. 1.

86. *Id.*, at 164.



liberal approach to extrinsic evidence as an aid to statutory interpretation might be appropriate appears to be based on his views that the court's duty extends beyond the interpretation of the words used in the statute. While this broader view of the court's duty is to be applauded, it is unfortunate that Justice Dickson did not offer a more extensive explanation or analysis of the basis for his conclusion. Unlike judges in English courts, Canadian judges have not openly discussed the competing considerations that determine the courts' approach to statutory interpretation and the use of extrinsic evidence. By advocating a more liberal approach to the use of extrinsic evidence, Mr. Justice Dickson was implicitly declaring that the need to discover the purpose of the legislative enactment overrides other considerations, such as unfair surprise to the citizen and the principle of the rule of law or the certainty of law, as it operates in this regard. English judges have been very concerned about the effects that a more liberal policy with regard to extrinsic evidence might have upon citizens, and one American commentator has suggested that a recent decision of the American Supreme Court to adopt a literal approach to statutory interpretation can be explained on the basis that it is a judicial reaction to expanding government regulation.<sup>87</sup>

There seems to be a growing tendency for English and Canadian courts to broaden the statutory context and to consult extrinsic evidence, but the majority appear to have drawn the line short of using the material as direct evidence of statutory meaning or intention. However, once admitted, attempts to limit the use of extrinsic evidence seem destined to fail. If the legislation is ambiguous, one can more easily rationalize looking at extrinsic evidence on the basis that the citizen is not being unfairly surprised by having relied on the one clear meaning. Instead, he has unfortunately chosen the wrong one of two possible meanings, but, as Lord Reid has observed, "There are comparatively few cases where the words of a statutory provision are only capable of having one meaning."<sup>88</sup>

## VII. *Conclusion*

Decisions of English courts and, in particular, those of the House of Lords reveal a clear inclination to expand the use of extrinsic material for statutory interpretation purposes. Membership in the common

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87. Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court* (1982) 95 HLR 892.

88. *Black-Clawson v. Papierwerk*, *supra*, note 23 at 613.

market and exposure to continental approaches to interpretation may have contributed to the sympathetic attitudes toward the use of external material. But the new development has been accompanied by forthright discussion of important underlying considerations.

Canadian courts appear, by their actions, to be moving in the same direction and towards greater use of extrinsic materials. However, authoritative judicial pronouncements by the Supreme Court of Canada suggest a very cautious loosening of the traditional exclusionary bonds. Whether or not they are intended, the signals are very conservative and give little guidance at this point as to future developments. In nonconstitutional cases, such as *Laidlaw*, the reports of law reform commissions can now be admitted in order to show the court what social problem the legislation was designed to meet, and the remedy. In actual practice, however, pre-enactment material seems to be used for other purposes, including the interpretation of specific statutory provisions.

In the course of this paper, we have looked at several objections that the courts have raised against a more liberal use of extrinsic evidence. English courts, in particular, have suggested that it would be unfair to the citizen to have the court determine the proper meaning of a legislative provision on the basis of extrinsic evidence to which the citizen does not have easy access and which may be unknown to him, such as commission reports or debates in Hansard. It has also been suggested that heavy reliance on this kind of material will enhance the power of the executive branch of government and diminish the power of the court. Interestingly enough, the converse, the concern that resort to such extrinsic material will enable the court to exceed its proper function and allow it to legislate, has also been expressed. In addition, there are the convenience arguments concerning the cost to the litigants and the delay in court operations. Do any of these objections have overriding merit?

With regard to the citizen, courts have, for some time, admitted extrinsic evidence in the form of statutes in *pari materia*, as well as earlier versions of the same statutes, and do not seem to have been concerned with the argument of unfair surprise. If the words in the statute are ambiguous, the citizen may quite innocently choose one meaning while the court determines that another meaning was what the legislature intended. It is questionable just how far the unfair surprise argument can really be taken and still retain its validity. Insofar as the impact such extrinsic evidence would have on the court's functioning is concerned, it is quite clear that the court does

not have to accept any of the evidence that is presented to it and that it is free to make its own determination as to how relevant the evidence is and how much weight should be given to it. Clearly, the court can control the use of this evidence in whatever way it sees fit. Does this give the court too much discretion? The danger that executive powers will thus be enhanced does not appear to be very great, particularly if the court remains cognizant of its role as a mediator between the state and the citizen.

There is, however, some validity to the suggestion that individual judges may use such material to avoid the clear words of the statute in cases where those words produce a result which offends the judge's sense of justice, either in a particular way or in a more general way. However, the need to make the legislation effective would seem to override the risk that particular judges might use their discretion in non-legitimate ways. There is also some weight to the argument that addresses itself to the accessibility of such material and its costs to the litigants. But even in a situation where the material is declared to be inadmissible, as is currently the case with regard to *Hansard* debates, some counsel will still take the time to consult that material in an effort to build an argument about a legislative intention that might prove attractive to a court. In practice, much of this material is being placed before courts now, and the liberalization of the rules will not, I suggest, have a particularly significant impact upon future litigation.

Unfortunately, Canadian courts have not tried to analyze the validity of the exclusionary rules in light of the needs of contemporary Canadian society. Should they do so, such an evaluation would also prompt them to assess the proper function of a court which is faced with a problem of statutory interpretation. Does an expansion of the legislative context by the admission of extrinsic material unfairly prejudice individual citizens or is such a liberalization made necessary by the demands of modern society? Mr. Justice Dickson, in his extrajudicial remarks of 1979, seemed to suggest that the latter consideration is growing in importance and may require the courts to reconsider their proper function. His remarks were made prior to our constitutional amendments, which resulted in the adoption of a new Charter of Rights.

The new amendments to the Canadian Constitution make specific reference in the preamble to the rule of law as a concept embodied in the basic principles upon which Canada, as a nation, is founded. Will such a declaration, emphasizing as it does the importance of

the rule of law, constrain future attempts by counsel and Canadian courts to expand the use of extrinsic material in statutory interpretation? It is possible, of course, that resort to extrinsic material could help predict the rights and freedoms of individuals by clarifying the legislative intention in a given case. However, much will depend upon the particular situation and the kind of legislative enactment being interpreted.

As society increases in its complexity and as the problems created by such a society become more difficult to cope with, the need to make sure that legislative solutions are as effective as possible becomes more and more important. I suggest that this is becoming our overriding concern, one which overshadows other objections, such as court convenience, litigant costs, and fairness to citizens. The practical problems of regulating our modern society overshadow the courts' function as a protector of citizens. This is not to say that the courts will not be able to fulfill their other function, that of protecting citizens from excessive state regulation, but of the two competing values or considerations, the need to make legislative enactments operationally effective seems to be the one that is growing in strength. If this is the case, let us hope that Canada's highest court will articulate its position with a full and open discussion of the competing issues if and when the appropriate opportunity presents itself.