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# Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?

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The exclusionary rule which prohibits references to parliamentary materials as an aid to statutory interpretation has been applied for decades in most common law jurisdictions. The House of Lords handed down its fundamental decision in *Pepper v. Hart* which allowed reference to parliamentary debates in limited circumstances.

The author first examines the English origins of the exclusionary rule as well as its application in other common law jurisdictions, including Australia, New Zealand, the United States and Canada. The author also comments on the situation prevailing in Quebec's civil law system. The exclusion of parliamentary debates is then considered in the broader context of the methods and principles of statutory construction.

The author contends that the issue of parliamentary debates in statutory interpretation is a question of weight and not of admissibility. To support this position, the rationales underlying the exclusionary rule are analysed and, for the most part, refuted. After demonstrating that parliamentary debates should play a role as an interpretative aid to ascertain legislative intent, the author concludes by suggesting factors to consider in determining their persuasive force.

La règle qui exclue l'utilisation des débats parlementaires comme outil d'interprétation législative a été appliquée pendant des décennies dans la plupart des juridictions de common law jusqu'à la décision de principe du comité d'appel de la *House of Lords* dans *Pepper c. Hart*. L'auteur examine d'abord les origines anglaises de la règle d'exclusion ainsi que ses applications dans d'autres juridictions de common law telles l'Australie, la Nouvelle-Zélande, les États-Unis et le Canada. L'auteur commente aussi la situation dans le système de droit civil québécois. L'exclusion des débats parlementaires est ensuite considérée dans le contexte plus global des méthodes et des principes d'interprétation législative.

L'auteur soutient que l'utilisation des débats parlementaires dans l'interprétation législative est une question de poids plutôt que d'admissibilité. Afin de démontrer ceci, les justifications qui sous-tendent la règle d'exclusion sont analysées et, pour la plupart, réfutées. Après avoir démontré que les débats parlementaires devraient jouer un rôle dans la détermination de l'intention du législateur, l'auteur conclue en suggérant des facteurs qui pourraient être considérés dans l'évaluation du poids devant leur être attribué.

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## Introduction

### I. The Exclusionary Rule in England

### II. The Exclusionary Rule in Other Common Law Jurisdictions

- A. *Australia*
- B. *New Zealand*
- C. *The United States*
- D. *Canada*

### III. Principles of Statutory Interpretation

### IV. Parliamentary Debates: A Question of Admissibility or of Weight?

- A. *Historical Reasons*
- B. *Theoretical Reasons*
- C. *Practical Reasons*

## Conclusion

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*"Hansard is for the Judges a closed book.  
But not for you."*

*- Lord Denning M.R.<sup>1</sup>*

## Introduction

Parliamentary debates — Hansard<sup>2</sup> — form part of the history of legislation. They constitute *extrinsic aids* to statutory construction, that is, "materials that are considered to be external to the words of the legislative enactment."<sup>3</sup> Extrinsic aids include dictionaries, statutes *in pari materia*, interpretation acts, the prior state of the law, as well as other legislative history materials. In contrast, the sources of interpretation that lie within the four corners of the statute, "written in ink discernible to the critical eye,"<sup>4</sup> are known as *intrinsic aids*. Intrinsic aids include materials such as preambles, headings, punctuation, definition sections and marginal notes which can provide insights to interpret the words of the provision at issue.

The leading authorities do not provide a precise meaning of the term "legislative history."<sup>5</sup> In this article, the term is used to denote documents relating to events that occurred during the conception, preparation, and passage of the enactment. Peter Hogg considers legislative history to include the following materials:<sup>6</sup>

1. the report of a royal commission or law reform commission or parliamentary committee recommending that a statute be enacted;
2. a government policy paper (whether called a white paper, green paper, budget paper or whatever) recommending that a statute be enacted;
3. a report or study produced outside government which existed at the time of the enactment of the statute and was relied upon by the government that introduced the legislation;

<sup>1</sup> Lord A.T. Denning, *The Discipline of Law* (London: Butterworths, 1979) at 10.

<sup>2</sup> In 1812, T.C. Hansard took over the work of reporting the debates of the House of Commons, first undertaken by W. Cobbett in 1803. His name is now the eponym for what, in 1908, became the official parliamentary reports, and has been adopted to refer to parliamentary reports throughout the Commonwealth.

<sup>3</sup> W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983) 7:3 *Dalhousie L.J.* 7 at 8. See also R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Scarborough: Butterworths, 1994) at 427.

<sup>4</sup> F. Frankfurter, "Some Reflections on the Reading of Statutes" (1947) 47 *Colum. L. Rev.* 527 at 529.

<sup>5</sup> See J. Bell & Sir G. Engle, ed., *Cross on Statutory Interpretation*, 3d ed. (London: Butterworths, 1995) at 152; F.A.R. Bennion, *Statutory Interpretation: A Code*, 2d ed. (London: Butterworths, 1992) at 445; R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown, 1975) at 137; and Sullivan, *supra* note 3 at 431.

<sup>6</sup> P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1283-84.

4. earlier versions of the statute, either before or after its introduction into Parliament or the Legislature;
5. statements by ministers or members of Parliament and testimony of expert witnesses before a parliamentary committee charged with studying the bill; and
6. speeches in the Parliament or Legislature when the bill is being debated.

Absent from the foregoing list are explanatory memoranda — frequently used in some common law jurisdictions, such as Australia<sup>7</sup> — which are documents explaining the contents and objects of the bill to members of the house.<sup>8</sup> These materials are also considered to be part of legislative history.

This article will be limited to the examination of parliamentary debates, that is, speeches made in parliament during the enactment of a statute. The question of whether it should be permissible to utilise them in the construction of statutes will be the primary focus of this discussion. Explanatory memoranda, which are also public documents pertaining to the enactment of a statute, will be treated as sources akin to parliamentary debates. The situation regarding commission reports, in so far as it may differ, will not be examined *per se*,<sup>9</sup> although such materials are often considered, together with parliamentary debates, as part of legislative history.<sup>10</sup>

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<sup>7</sup> See D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, 3d ed. (Sydney: Butterworths, 1988) at 41.

<sup>8</sup> For more detail on explanatory memoranda, see Bennion, *supra* note 5 at 454.

<sup>9</sup> In England, the rule used to be that such materials could be looked at only for the purpose of ascertaining the mischief that the statute was intended to cure, but not for the purpose of interpreting the statutory text to effect such remedy: see *Herron v. Rathmines Improvement Commissioners*, [1892] A.C. 498, 67 L.T. 658 (H.L.) [hereinafter *Herron*]; *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trademarks*, [1898] A.C. 571, 15 R.P.C. 476 (H.L.) [hereinafter *Eastman Photographic Materials*]; and *Assam Railways and Trading Co. v. Commissioners of Inland Revenue* (1934), [1935] A.C. 445, [1934] All E.R. Rep. 646 (H.C.) [hereinafter *Assam Railways*]. Such distinction is now obsolete and commission reports can now be used for the purpose of constructing statutes: see *R. v. Secretary of State for Transport, Ex parte Factortame Ltd.* (1990), [1991] 1 A.C. 603, [1991] 1 All E.R. 70 (H.L.) [hereinafter *Factortame*]; and, unequivocally, *Pepper v. Hart* (1992), [1993] A.C. 593 at 635, [1993] 1 All E.R. 42 (H.L.) [hereinafter *Pepper* cited to A.C.]. Similarly, in Canada, the initial rule was that commission reports could be used only to identify the mischief — see *Laidlaw v. Toronto (City of)*, [1978] 2 S.C.R. 736, 87 D.L.R. (3d) 161; and *Morguard Properties v. Winnipeg (City of)*, [1983] 2 S.C.R. 493, 3 D.L.R. (4th) 1. But they can now be considered to ascertain the remedy of the statute: see *Hills v. Canada (A.G.)*, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193; and *R. v. Mailloux*, [1988] 2 S.C.R. 1029, 45 C.C.C. (3d) 193. In Australia, see *Bitumen and Oil Refineries (Aust.) Ltd. v. Commissioner for Government Transport* (1955), 92 C.L.R. 200, online: LEXIS (Aust, AUSMAX); and *Dillingham Constructions Pty. Ltd. v. Steel Mains Pty. Ltd.* (1975), 6 A.L.R. 171, 132 C.L.R. 323. In New Zealand, see *N.Z.E.I. v. Director-General of Education*, [1982] 1 N.Z.L.R. 397. The N.Z.L.R. is available online: LEXIS (Nz, NZCAS).

<sup>10</sup> In the discussion that follows, the term most often referred to will be “parliamentary debates” which includes explanatory memoranda. “Legislative history” will sometimes be used to comprise parliamentary debates and commission reports. The term “extrinsic aids” will seldom be utilised and will refer to all the materials external to the legislative enactment.

The parliamentary procedure is similar across most common law jurisdictions,<sup>11</sup> except for the United States.<sup>12</sup> After the draft legislation has been accepted by the government, it is introduced in the Parliament. It then proceeds through the normal stages of first and second readings, reference to committee, report stage, and final reading of the bill. House members' commentary on the bill during the three readings is recorded in *Hansard*, the official reporter of parliamentary debates. The vast majority of drafts are public bills introduced by the government; there are also private bills and private members' bills. The main concern of this article, however, is parliamentary debates on public bills.

It is noteworthy that speeches in Parliament on a statute made subsequent to its enactment — such as parliamentary statements during the debate on an unsuccessful amendment to the statute — cannot be considered part of its legislative history.<sup>13</sup> Such speeches did not occur during the enactment, and are not antecedent to the crystallisation of the words in the statute. Therefore, although they are recorded in *Hansard*, they cannot be regarded as parliamentary debates on that particular legislation.

As a final preliminary remark, parliamentary debates — or, more broadly, legislative history — must be distinguished from the so-called social-science data and other factual materials that have played no role in the legislative process. Social-science data can be introduced as evidence in certain courts, particularly in the United States, in the form of a “Brandeis brief.”<sup>14</sup> They are, however, distinct from (and cannot be considered part of) the legislative history of a statute.<sup>15</sup> Although they can have bearing on the construction of a statute, social-science data are, in effect, facts submitted

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<sup>11</sup> See generally J. Redlich, *The Procedure of the House of Commons* (London: Archibald Constable, 1908); and Sir D. Limon & W.R. McKay, eds., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed. (London: Butterworths, 1997). On the materials recorded in the preparation and passing of a bill in Canada, see E.A. Driedger, “The Preparation of Legislation” (1953) 31 Can. Bar Rev. 33.

<sup>12</sup> See J.A. Corry, “The Use of Legislative History in the Interpretation of Statutes” (1954) 32 Can. Bar Rev. 624 at 633. For more detail on the American process of law-making in Congress and in state legislatures, see S. Breyer, “On the Uses of Legislative History in Interpreting Statutes” (1992) 65 S. Cal. L. Rev. 845 at 858-59.

<sup>13</sup> See the Australian case of *Hunter Resources v. Melville* (1988), 62 A.L.J.R. 88 at 90, 164 C.L.R. 234, Mason C.J. and Gaudron J. See also P. Brazil, “Reform of Statutory Interpretation — The Australian Experience of Use of Extrinsic Material: With a Postscript on Simpler Drafting” (1988) 32 Australian L.J. 503 at 509-10. In the United States, although the official position is against the use of subsequent legislative history, courts nevertheless do sometimes consider it: see W.N. Eskridge, “The New Textualism” (1990) 37 U.C.L.A. L. Rev. 621 at 635-36.

<sup>14</sup> This appellation originates from the case of *Muller v. Oregon*, 208 U.S. 412 (1908), where L.D. Brandeis, when he was an attorney, filed a brief in the United States Supreme Court which included social-science data from books, articles and reports. The best known use of a Brandeis brief was in the famous school desegregation case of *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954).

<sup>15</sup> See Hogg, *supra* note 6 at 1284.

to the general rules of evidence. In contrast, legislative history materials are not facts — neither adjudicative nor legislative — but rather interpretive aids.<sup>16</sup>

Having defined the problem, the substantive elements of this article shall now be outlined. Section I will examine the origin of the exclusionary rule on parliamentary debates and its application in England. Then, Section II will give a brief account of the situation in the common law jurisdictions of Australia, New Zealand, the United States, and Canada. A broader perspective on the issue will follow in Section III, which will look at the general methods of statutory construction and where parliamentary debates fit in the picture. It will then be argued, in Section IV, that the central question of the use of parliamentary debates in statutory interpretation is one of weight and not of admissibility. For this purpose, the various rationales supporting the exclusionary rule will be systematically examined. In conclusion, a guideline will be proposed to help determine how much weight parliamentary debates should be given in particular cases of statutory construction.

## I. The Exclusionary Rule in England

In England, the traditional exclusionary rule on parliamentary debates prohibited reference to parliamentary material as an aid to statutory interpretation. This rule was judge-made,<sup>17</sup> and has not always applied. There are cases in the seventeenth and nineteenth centuries where English courts used parliamentary materials in interpreting a statute.<sup>18</sup>

What appears to be the first explicit statement of the exclusionary rule was made in the 1769 case of *Millar v. Taylor*,<sup>19</sup> which involved the interpretation of the *Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*<sup>20</sup> of 1709. Justice Willes said, in *obiter dictum*:

The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the Sovereign.<sup>21</sup>

This proposition, however, was not followed by Willes J. himself, as he subsequently referred to the bill's history, holding that the original preamble was "infinitely

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<sup>16</sup> See Section IV, below.

<sup>17</sup> See *Pepper*, *supra* note 9 at 617, *per* Lord Griffiths, and at 630, *per* Lord Browne-Wilkinson. See also D. Oliver, "Comment — *Pepper v. Hart*: A Suitable Case for Reference to Hansard?" [1993] Pub. L. 5 at 7.

<sup>18</sup> See *Ash v. Abdy* (1678), 3 Swans. 663, 36 E.R. 1014; and *In Re Mew and Thorne* (1862), 31 L.J. Bank. 87, online: LEXIS (Enggen, CASES).

<sup>19</sup> (1769), 4 Burr. 2303, 98 E.R. 201 [cited to E.R.].

<sup>20</sup> (U.K.) 8 Anne, c. 19 [known as the *Copyright Act of 1709*].

<sup>21</sup> *Supra* note 19 at 217.

stronger”.<sup>22</sup> Consequently, the very founding case on the exclusionary prohibition seems to be of somewhat dubious origin.<sup>23</sup>

Although the exclusionary rule was subsequently relaxed in regard to the use of commission reports<sup>24</sup> (yet limited to elucidating the mischief at which legislation was aimed, and not the legislative intent), it was upheld with respect to parliamentary debates in *Viscountess Rhondda’s Claim*<sup>25</sup> and *Assam Railways*.<sup>26</sup> In the second half of this century, the rule came under attack, but was unequivocally reiterated, in 1968, by the House of Lords in *Beswick v. Beswick*,<sup>27</sup> per Lord Reid.

Later that year, however, Lord Reid himself opined that there was “room for exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or another.”<sup>28</sup> As has been suggested this tentative exception was highly unsatisfactory, as it required that parliamentary materials be consulted in every case in order to know whether they “settle the matter one way or the other.”<sup>29</sup> After consultation, there is no reason to use the debates only if they are compelling and not if they are just persuasive.

In 1969, the English and Scottish Law Commissions considered the appropriateness of the exclusionary rule.<sup>30</sup> Primarily for practical reasons, they recommended that the rule be maintained: “In considering the admissibility of Parliamentary proceedings, it is necessary to consider how far the material admitted might be relevant to the interpretive task of the courts, how far it would afford them reliable guidance, and how far it would be sufficiently available to those to whom the statute is addressed.”<sup>31</sup> The Renton Committee, in 1975, also recommended that the exclusionary prohibition on parliamentary debates not be modified.<sup>32</sup> In 1980 and 1981, two interpretation bills were introduced into the House of Lords to change the rule, both of which were

<sup>22</sup> *Ibid.* at 217-18. See also the speech of Aston J., who referred to parliamentary debates as well. Mansfield and Yates JJ., dissenting, did likewise.

<sup>23</sup> See P. Brazil, “Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular” (1964) 4 U. Queensland L.J. 1 at 6; G. Bale, “Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process” (1995) 74 Can. Bar Rev. 1 at 4; and Charles, *supra* note 3 at 34.

<sup>24</sup> See *Herron*, *supra* note 9; and *Eastman Photographic Materials*, *supra* note 9.

<sup>25</sup> [1922] 2 A.C. 339 (H.L.).

<sup>26</sup> *Supra* note 9.

<sup>27</sup> [1968] A.C. 58 at 74, [1967] 2 All E.R. 1197 [cited to A.C.].

<sup>28</sup> *Warner v. Metropolitan Police Commissioner*, [1969] 2 A.C. 256 at 279, [1968] 2 All E.R. 356 (H.L.) [hereinafter *Warner* cited to A.C.].

<sup>29</sup> P.W. Hogg, “Legislative History in Constitutional Cases” in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 131 at 136.

<sup>30</sup> See U.K., Law Commission, *The Interpretation of Statutes* (Law Commission No. 21) (London: H.M.S.O., 1969); Scottish Law Commission, *The Interpretation of Statutes* (Scottish Law Commission No. 11) (London: H.M.S.O., 1968).

<sup>31</sup> U.K., Law Commission, *ibid.* at para. 53.

<sup>32</sup> See U.K., H.C., “The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council”, Cmnd 6053 in *Sessional Papers*, vol. 12 (1974-75) 545 (President: D. Renton).

aborted. The first bill was withdrawn during the second reading, while the second bill passed all the stages in the House of Lords but did not prove successful in the Commons.<sup>33</sup>

Meanwhile, the Appellate Committee of the House of Lords expressly reaffirmed the prohibition against the use of parliamentary debates as an aid to statutory interpretation in two cases: *Davis v. Johnson*<sup>34</sup> and *Hadmor Productions Ltd. v. Hamilton*.<sup>35</sup> The exclusionary rule could hardly have been stated more explicitly than in the latter case, *per* Lord Diplock:

There are a series of rulings by this House, unbroken for a hundred years, and most recently affirmed emphatically and unanimously in *Davis v. Johnson*, that recourse to reports of proceedings in either House of Parliament during the passing of a Bill which upon the signification of the Royal Assent became the Act of Parliament which falls to be construed is not permissible as an aid to its construction.<sup>36</sup>

In 1989, the House of Lords again considered the question of the exclusionary prohibition on parliamentary debates,<sup>37</sup> but the rule remained unchanged.

Thus, despite the repeated attacks on the exclusionary prohibition in its absolute form, the prospect of any change to the rule — whether statutorily or judicially — appeared to be slim.<sup>38</sup> Indeed, the rule was described as “one of the best established of our rules of statutory interpretation.”<sup>39</sup> Accordingly, the English legal community was, to say the least, astonished by the paradigm-shift of the House of Lords in *Pepper v. Hart*.<sup>40</sup>

The case of *Pepper* arose out of a benefits scheme for teachers employed at Malvern College under which members of staff were entitled to have their children educated at twenty per cent of the fee charged to the public. The issue concerned two possible rival interpretations of income tax enactments contained in the *Finance Act 1976*,<sup>41</sup> subjecting such benefits to income tax. The interpretation question revolved around the meaning of the word “cost” in section 63 and, in particular, whether the benefit should be taxed on the marginal cost of educating those children — which would be a small sum — or on the average cost for each pupil. The special commis-

<sup>33</sup> See, for the first bill, U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 405, col. 151 at col. 306 (13 February 1980) and, for the second bill, U.K., H.C., *Parliamentary Debates*, 6th ser., vol. 6, col. 643 at col. 704 (12 June 1981). See also F.A.R. Bennion, “Another Reverse for the Law Commission’s Interpretation Bill” (1981) 131 *New L.J.* 840.

<sup>34</sup> (1978), [1979] A.C. 264, [1979] 1 All E.R. 1132 (H.L.) [cited to A.C.].

<sup>35</sup> (1982), [1983] 1 A.C. 191, [1982] 1 All E.R. 1042 (H.L.) [cited to A.C.].

<sup>36</sup> *Ibid.* at 232 [footnotes omitted].

<sup>37</sup> See U.K., H.L., *Parliamentary Debates*, [10th ser.], vol. 503, col. 278 (18 January 1989).

<sup>38</sup> See A. Lester, “English Judges as Law Makers” [1993] *Pub. L.* 269 at 274; and S.A. Girvin, “Hansard and the Interpretation of Statutes” (1993) 22 *Anglo-Am. L. Rev.* 475 at 481.

<sup>39</sup> S.C. Styles, “The Rule of Parliament: Statutory Interpretation after *Pepper v. Hart*” (1993) 14 *Oxford J. Leg. St.* 151 at 151.

<sup>40</sup> *Supra* note 9.

<sup>41</sup> (U.K.), 1976, c. 40.

sioner found in favour of the taxpayer, holding the marginal cost basis applicable, but this decision was reversed by Vinelott J.<sup>42</sup> in a judgement later confirmed by the Court of Appeal.<sup>43</sup>

*Pepper* was first argued before the Appellate Committee in November 1991. In February 1992, prior to judgement, it was decided that there should be a further hearing before an Appellate Committee of seven Law Lords for the specific purpose of considering whether to depart from the rule prohibiting the use of parliamentary debates as an aid to statutory interpretation. Here, the relevant passages in Hansard were statements made by the Financial Secretary when he withdrew a sub-clause from the bill.<sup>44</sup> In reply to a specific question, he said that removing the sub-clause “will affect the position of a child of one of the teachers at the child’s school, because now the benefit will be assessed on the cost to the employer, which would be very small indeed in this case.”<sup>45</sup> In November 1992, the House of Lords reversed the Court of Appeal and unanimously found in favour of the taxpayer, holding that the benefit should be taxed on the marginal cost basis. However, neither Lord Mackay nor Lord Griffiths made reference to parliamentary materials in constructing their interpretation of the *Finance Act 1976*.

With the exception of Lord Mackay, who dissented solely on the basis of practical objections and not on principle, the Law Lords decided that the exclusionary prohibition on parliamentary debates should be relaxed and reference to Hansard permitted in certain limited circumstances. Lord Browne-Wilkinson delivered the main speech and set out the test as follows:

I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.<sup>46</sup>

In the case at hand, the statements made by the Financial Secretary clearly resolved an ambiguity in the *Finance Act 1976* and, as a consequence, it was appropriate to use them as an aid to construction.

The rationales behind the exclusionary rule, the reasons to repudiate it, and the pivotal speech of Lord Browne-Wilkinson will be explored in more detail in Section IV. In passing, the numerous notes and comments<sup>47</sup> on *Pepper* undoubtedly bear wit-

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<sup>42</sup> See *Pepper v. Hart*, [1990] 1 W.L.R. 204 (Ch.).

<sup>43</sup> See *Pepper v. Hart*, [1991] Ch. 203, [1991] 2 All E.R. 824 (C.A.).

<sup>44</sup> The said passages are reproduced in the reason of Lord Browne-Wilkinson in *Pepper*, *supra* note 9 at 626-29.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Pepper*, *ibid.* at 640.

<sup>47</sup> See T.S.J.N. Bates, “Parliamentary Material and Statutory Construction: Aspects of the Practical Application of *Pepper v. Hart*” (1993) 14 Stat. L. Rev. 46; D. Miers, “Taxing Perks and Interpreting Statutes: *Pepper v. Hart*” (1993) 56 Mod. L. Rev. 695; F.A.R. Bennion, “Hansard — Help or Hin-

ness to how much this decision constitutes a break point, a paradigm shift, a *volte-face*, in English law.<sup>48</sup>

The next Section will provide a brief account of the situation in other common law jurisdictions regarding the use of parliamentary debates in statutory interpretation.

## II. The Exclusionary Rule in Other Common Law Jurisdictions

Australia, New Zealand, the United States, and Canada, all inherited, and originally applied, the British exclusionary prohibition. The following discussion will emphasise the particularities of each country in developing their own rule on parliamentary debates.

### A. Australia

Prior to the legislative reform of 1984, the common law rule in Australia prohibited the use of parliamentary debates for the construction of statutes.<sup>49</sup> In 1977, Mason J. (as he then was) wrote, in *Commissioner for Prices & Consumer Affairs (S.A.) v. Charles Moore (Aust.) Ltd.*,<sup>50</sup> that the exclusionary rule “is so firmly entrenched that the courts should not depart from it, notwithstanding that it may in isolated cases produce unintended results. It is, I think, peculiarly a matter for Parliament to decide.”<sup>51</sup> This is, indeed, what the Australian legislature did.

The Commonwealth of Australia, as well as the states of New South Wales, Victoria, Western Australia and the Australian Capital Territory, have all enacted legislation altering the rule on the use of extrinsic materials, including parliamentary debates, in statutory interpretation. Queensland, South Australia, Tasmania and the Northern Territory have not yet amended their legislation in similar respects; and thus the common law rule — most likely as modified by *Pepper* — is still applicable.

Except for the State of Victoria — whose legislation does not prescribe the purposes for which reference to extrinsic aids may be made — the provisions of these various interpretation acts are substantially similar. At the federal level, section 15AB was inserted in the *Acts Interpretation Act, 1901* by the *Acts Interpretation Amendment Act 1984*, section 7.<sup>52</sup> Both the underlying philosophy and the drafting of section

drance? A Draftsman’s View of *Pepper v. Hart*” (1993) 14 Stat. L. Rev. 149 [hereinafter “Hansard — Help or Hindrance?”]; J.H. Baker, “Case and Comment — Statutory Interpretation and Parliamentary Intention” (1993) 52 Cambridge L.J. 353; Oliver, *supra* note 17; and Styles, *supra* note 39.

<sup>48</sup> See Girvin, *supra* note 38 at 494.

<sup>49</sup> See *South Australia v. Commonwealth*, [1942] C.L.R. 373, online: LEXIS (Aust, AUSMAX); and *Dugan v. Mirror Newspapers Ltd.* (1978), 142 C.L.R. 583, 22 A.L.R. 439. See also D. Gifford, *Statutory Interpretation* (Sidney: Law Book, 1990) at 130; Brazil, *supra* note 13; and Pearce & Geddes, *supra* note 7.

<sup>50</sup> (1977), 51 A.L.J.R. 715, 14 A.L.R. 485 [cited to A.L.J.R.].

<sup>51</sup> *Ibid.* at 729.

<sup>52</sup> *Acts Interpretation Act, 1901* (Austl.), online: Australasian Legal Information Institute <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/aia1901230/index.html](http://www.austlii.edu.au/au/legis/cth/consol_act/aia1901230/index.html)> (date accessed: 14 July 1998); *Acts Interpretation Amendment Act 1984* (Austl.), online: Australasian Legal Information In-

15AB were highly influenced by articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.<sup>53</sup> Section 15AB allows the consideration of extrinsic materials for two purposes. First, to confirm that the meaning of the provision is the ordinary meaning conveyed by the text, taking into account its context and the purpose of the act. Second, to determine the meaning of the provision when it is ambiguous or obscure, or when the ordinary meaning leads to a result that is manifestly absurd or unreasonable. The provision then provides a non-exhaustive list of eight categories of materials which may be considered, including explanatory memoranda and parliamentary debates (or, more specifically, the second-reading speech of the minister). In determining whether or not to use such materials and in deciding the weight to assign to them, due regard must be paid to: i) the desirability of people being able to rely on the ordinary meaning of the text, and ii) the need to avoid prolonging proceedings without compensating advantages.<sup>54</sup>

Two further points are worth making at this stage. First, under section 15AB of the *Acts Interpretation Act, 1901*,<sup>55</sup> extrinsic materials may be taken into account even if the statutory provision is “clear on its face.”<sup>56</sup> In other words, there is no formal requirement to establish the existence of an ambiguity before resorting to extrinsic aids. In such cases, however, extrinsic materials can only be used to confirm the literal meaning of the provision, they cannot contradict the language used in the statute.<sup>57</sup> Second, even in situations where the use of extrinsic aids is appropriate, they can only be persuasive, and not determinative.<sup>58</sup> This makes it clear that extrinsic materials, such as parliamentary debates, are just another interpretive tool to ascertain legislative intent.

## B. New Zealand

In 1990, the New Zealand Law Commission reported that “a prohibitory rule has never been clearly established in New Zealand.”<sup>59</sup> To confirm this statement, the Commission cited several decisions.<sup>60</sup> It further opined that “[a]ccess to legislative

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stitute <[http://www.austlii.edu.au/do/disp.pl/au/legis/cth/num\\_act/aiaa1984310/s7.html](http://www.austlii.edu.au/do/disp.pl/au/legis/cth/num_act/aiaa1984310/s7.html)> (date accessed: 14 July 1998).

<sup>53</sup> 23 May 1969, Can. T.S. 1980 No. 37, 1155 U.N.T.S. 332. See generally Pearce & Geddes, *supra* note 7 at 45.

<sup>54</sup> See J. Evans, *Statutory Interpretation: Problems of Communication* (Auckland: Oxford University Press, 1988) at 279-80; Gifford, *supra* note 49 at 126-29; and Brazil, *supra* note 13 at 503-04.

<sup>55</sup> *Supra* note 52.

<sup>56</sup> See *Commissioner of Australian Federal Police v. Curran* (1984), 55 A.L.R. 697 at 706-07, 3 F.C.R. 240 [hereinafter *Curran* cited to A.L.R.].

<sup>57</sup> See *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986), 68 A.L.R. 416 at 420, online: LEXIS (Aust, AUSMAX) [cited to A.L.R.]; and *Mills v. Meeking* (1990), 91 A.L.R. 16 at 21, 169 C.L.R. 214 [cited to A.L.R.].

<sup>58</sup> See *R. v. Bolton; Ex parte Beane* (1987), 70 A.L.R. 225 at 227-28, 162 C.L.R. 514.

<sup>59</sup> New Zealand Law Commission, *A New Interpretation Act* (Report No. 17) (Wellington: The Commission, 1990) at 50.

<sup>60</sup> See *Re A.B.* (1905), 25 N.Z.L.R. 299; *Monk v. Mowlem*, [1933] N.Z.L.R. 1255; *Police v. Thomas*, [1977] 1 N.Z.L.R. 109; and *Levave v. Immigration Department*, [1979] 2 N.Z.L.R. 74.

History is now beyond doubt part of the law and practice of the interpretation of legislation in New Zealand.<sup>61</sup> The situation may not, however, be as clear as the Commission believes.

Early judgements by New Zealand courts held that parliamentary debates could not be used as an aid to statutory interpretation.<sup>62</sup> As one commentator notes, however, a trend towards allowing the use of parliamentary debates as an aid to statutory interpretation commenced in 1985.<sup>63</sup> This shift occurred without any legislative reform and was the product of a series of decisions rendered by the New Zealand Court of Appeal.<sup>64</sup> Even then, as the following excerpt shows, the use of parliamentary debates to construe statutes was not without limits:

Whilst the Court is prepared to look at reports of Parliamentary debates in some cases, this development is certainly not intended to encourage constant references to Hansard and indirect arguments therefrom. Only material of obvious and direct importance is at all likely to be considered; and the Court will not allow such references to be imported into and to lengthen arguments as a matter of course.<sup>65</sup>

In any event, for present purposes, it is sufficient to acknowledge that in New Zealand the modification of the exclusionary prohibition on parliamentary debates has been more or less achieved, not through legislative reform, but through judicial decisions.<sup>66</sup> In fact, the New Zealand Law Commission recommended that the interpretation act not be amended to include provisions comparable to section 15AB of the *Acts Interpretation Act, 1901* in Australia, and that the courts be allowed to continue to develop its own rule on the use of parliamentary debates as an aid to statutory construction.<sup>67</sup>

### C. The United States

Initially, the United States adhered strictly to the English rule prohibiting the use of parliamentary debates in statutory interpretation.<sup>68</sup> In 1860, the United States Supreme Court relied on congressional debates for the first time.<sup>69</sup> Throughout the re-

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<sup>61</sup> New Zealand Law Commission, *supra* note 59 at 50.

<sup>62</sup> See *Otago Land Board v. Higgins* (1884), N.Z.L.R. 3 at 80 (C.A.); *Hamilton Gas Co. v. Mayor of Hamilton* (1908), 27 N.Z.L.R. 1020 at 1030-31.

<sup>63</sup> See Evans, *supra* note 54 at 280.

<sup>64</sup> See *Proprietors of Atihau-Wanganui v. Malpas*, [1985] 2 N.Z.L.R. 468; *Marac Life Assurance v. Commission of Inland Revenue* (1986), 1 N.Z.L.R. 694; *Maori Council v. A.G.* (1987), 1 N.Z.L.R. 641.

<sup>65</sup> *A.G. v. Whangerei City Council*, [1987] 2 N.Z.L.R. 150.

<sup>66</sup> See Evans, *supra* note 54 at 280.

<sup>67</sup> See New Zealand Law Commission, *supra* note 59 at 50-51.

<sup>68</sup> See *Mitchell v. Great Works Milling Co.*, Fed. Cas. No. 9662, (1843) online: LEXIS (Genfed, US); and *Aldridge v. Williams*, 44 U.S. (3 How.) 9 (1845). See also J. TenBroek, "Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court" (1937) 25 Cal. L. Rev. 326.

<sup>69</sup> See *Dubuque & Pacific Railroad Co. v. Litchfield*, 64 U.S. (23 How.) 66 (1860).

mainder of the nineteenth century, judicial willingness to consult legislative history increased, although contradictory views were expressed.<sup>70</sup> Slowly, it was becoming the rule, rather than the exception, for American courts to consult legislative materials.

In 1892, the Supreme Court explicitly allowed itself to resort to congressional debates as an aid to interpret an ambiguous statutory provision.<sup>71</sup> The next step, permitting the use of such materials for unambiguous statutes, was predictably endorsed by the Supreme Court in 1928.<sup>72</sup> This culminated in 1940 with the repudiation of the exclusionary rule in *United States v. American Trucking Associations*,<sup>73</sup> where Reed J., in a majority judgement, stated: “[T]here certainly can be no ‘rule of law’ which forbids [the use of legislative history], however clear the words may appear on ‘superficial examination.’”<sup>74</sup> It appears, therefore, that ever since the nineteenth century, there was a definite increase in the consultation of congressional debates by the judiciary in the United States.<sup>75</sup>

As statistical surveys of Supreme Court opinions demonstrate, the use of all forms of legislative history has increased exponentially. In 1938, the Court consulted legislative history nineteen times; by the 1970s, three to four hundred references were made each term.<sup>76</sup> In 1983, Wald J. wrote that “no occasion for statutory construction now exists when the court will *not* look at the legislative history.”<sup>77</sup> The American practice inspired the sarcastic comment that “only when legislative history is doubtful do you go to the statute.”<sup>78</sup>

The situation has produced a ricochet in academic circles,<sup>79</sup> which now discuss a return to a stricter rule on the use of legislative history in statutory construction.<sup>80</sup> Recent complaints about the overuse of such materials were heard by Scalia J.

<sup>70</sup> See e.g. *United States v. Union Pacific*, 91 U.S. 72, L. Ed. 224 (1875); and *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 17 S. Ct. 590 (1897).

<sup>71</sup> See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S. Ct. 511 (1892).

<sup>72</sup> See *Boston Sand & Gravel Co. v. United States*, 275 U.S. 519, 48 S. Ct. 121 (1928).

<sup>73</sup> 310 U.S. 534, 60 S. Ct. 1059 (1939).

<sup>74</sup> *Ibid.* at 545.

<sup>75</sup> See H.W. Jones, “Extrinsic Aids in the Federal Courts” (1940) 25 Iowa L. Rev. 737 at 743-50.

<sup>76</sup> See J.L. Carro & A.R. Brann, “The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis” (1982) 22 *Jurimetrics J.* 294 at 298.

<sup>77</sup> P.M. Wald, “Some Observations on the Use of Legislative History in the 1981 Supreme Court Term” (1983) 68 Iowa L. Rev. 195 at 195 [emphasis in original]. For further statistics, see P.M. Wald, “The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court” (1990) 39 Am. U. L. Rev. 277 [hereinafter “The Sizzling Sleeper”].

<sup>78</sup> Frankfurter, *supra* note 4 at 543. Despite that this quip was first formulated by an American author, many believe that it comes from Corry, *supra* note 12 at 636. See K.W. Starr, “Observations About the Use of Legislative History” [1987] *Duke L.J.* 371 at 374; and Wald, “The Sizzling Sleeper”, *ibid.* at 281. For a Canadian commentator, see Dickerson, *supra* note 5 at 164.

<sup>79</sup> See especially Dickerson, *ibid.* at 174-75; R. Dickerson, “Statutory Interpretation: Dipping into Legislative History” (1983) 11 *Hofstra L. Rev.* 1125 at 1131-33; and Eskridge, *supra* note 13 at 641-42.

<sup>80</sup> See N. Zeppos, “Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation” (1990) 76 Va. L. Rev. 1295; H.W. Baade, “Original Intent in Historical Perspective: Some Critical Glosses” (1991) 69 *Tex. L. Rev.* 1001; W.D. Slawson, “Legislative

of the United States Supreme Court who has taken a forceful stand against its consideration. He has argued for the disregard of congressional debates in the great majority of cases, except on the rare occasion when the statutory text is absurd on its face.<sup>81</sup> Other members of the Court, in particular Kennedy J., have occasionally endorsed Scalia J.'s view. This attitude regarding legislative history falls within the approach to statutory interpretation called "new textualism",<sup>82</sup> which shares both the philosophy and the partisans of the "originalist" method of constitutional interpretation.<sup>83</sup>

Thus, the American position on the role of congressional debates in statutory interpretation remains highly permissive,<sup>84</sup> although the textualists are on the march. In effect, their use is in decline and a certain tone of caution can be detected in almost every case where the Supreme Court resorts to legislative history.<sup>85</sup> This gradual swing of the pendulum to a more exclusionary approach should be regarded as a warning for other common law jurisdictions to take notice in monitoring the scope of *Pepper*.<sup>86</sup>

#### D. Canada

In Canada, the judicial consideration of parliamentary debates in statutory interpretation is typified by its evolution through constitutional challenges of legislation. At first glance, the treatment of parliamentary debates by Canadian courts seems to depend on whether they are used i) as an aid to interpreting legislation; ii) for constitutional characterisation of statutes; or, iii) to help construe the Canadian Constitution. Each of these classes of cases will be examined in turn.

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History and the Need to Bring Statutory Interpretation under the Rule of Law" (1992) 44 *Stan. L. Rev.* 383; W.D. Slawson, "Why Learned Hand Would Never Consult Legislative History Today" (1992) 105 *Harv. L. Rev.* 1005; P.C. Schanck, "The Use of Legislative Histories in Statutory Interpretation: A Selected and Annotated Bibliography" (1993) 13 *Leg. Ref. Ser. Q.* 5-14; Starr, *supra* note 78; Breyer, *supra* note 12.

<sup>81</sup> For a list of these cases, see Eskridge, *supra* note 13 at n. 116.

<sup>82</sup> See *ibid.* at 650-56; and "The Sizzling Sleeper", *supra* note 77 at 281-86. The following excerpt from Scalia J.'s reasons in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989), summarises well the "textualist" approach:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind (*ibid.* at 528 [emphasis in original]).

<sup>83</sup> The originalist approach will be examined in more detail at the end of Section III, below.

<sup>84</sup> The United States Supreme Court reaffirmed the more conventional approach towards the use of legislative history in *Public Citizen v. Department of Justice*, 491 U.S. 440, 109 S. Ct. 2558 (1989), and has still not departed from it.

<sup>85</sup> See "The Sizzling Sleeper", *supra* note 77 at 309-10.

<sup>86</sup> *Supra* note 9; see Girvin, *supra* note 38 at 486.

For the construction of statutes, the English exclusionary rule on parliamentary debates still appears to be officially applicable in Canada.<sup>87</sup> The Supreme Court of Canada first enunciated the exclusionary prohibition in *R. v. Gosselin*,<sup>88</sup> albeit in a somewhat equivocal matter, when Tachereau C.J. wrote: “I did not feel justified in departing from the rule so laid down, though, personally, I would not be unwilling, in cases of ambiguity in statutes, to concede that such a reference might sometimes be useful.”<sup>89</sup> In *Canadian Wheat Board v. Nolan*,<sup>90</sup> both the Supreme Court and the Judicial Committee of the Privy Council refused to consider the speech of the Minister of Agriculture in interpreting an order-in-council adopted pursuant to a statute.<sup>91</sup>

The exclusionary rule was then gradually relaxed in Canada, first by lower courts,<sup>92</sup> and ultimately by the Supreme Court in *R. v. Vasil*.<sup>93</sup> In this case, Justice Lamer (as he then was) used parliamentary materials to interpret the phrase “unlawful object” in section 212(c) of the Canadian *Criminal Code*.<sup>94</sup> Speaking for the majority, he said:

*Reference to Hansard is not usually advisable.* However, as Canada has, at the time of codification, subject to few changes, adopted the *English Draft Code of 1878*, it is relevant to know whether Canada did so in relation to the various sections for the reasons advanced by the English Commissioners or for reasons of its own.

Indeed, a reading of Sir John Thompson’s comments in Hansard of April 12, 1892, (House of Commons Debates, Dominion of Canada, Session 1892, vol. I, at pp. 1378-85) very clearly confirms that all that relates to murder was taken directly from the *English Draft Code of 1878*. Sir John Thompson explained the proposed murder sections by frequently quoting verbatim the reasons given by the Royal Commissioners in Great Britain, and it is evident that Canada

<sup>87</sup> See P.A. Côté, *Interprétation des lois*, 2d ed. (Cowansville: Yvon Blais, 1991) at 414; and Sullivan, *supra* note 3 at 435.

<sup>88</sup> (1903), 33 S.C.R. 255, 7 C.C.C. 139 [cited to S.C.R.].

<sup>89</sup> *Ibid.* at 264.

<sup>90</sup> [1951] S.C.R. 81, [1951] 1 D.L.R. 466, rev’d (*sub nom. Canada (A.G.) v. Hallet & Carey Ltd.*) [1952] A.C. 427, [1952] 3 D.L.R. 433 (P.C.).

<sup>91</sup> See K.C. Davis, “Legislative History and the Wheat Board Case” (1953) 31 Can. Bar Rev. 1. Davis forcefully argued, however, that had the Judicial Committee considered the legislative history in question, it could not have arrived at the conclusion it reached. For a contrary view of the case, see D.G. Kilgour, “The Rule Against the Use of Legislative History: ‘Canon of Construction or Counsel of Caution?’” (1952) 30 Can. Bar Rev. 769 at 779; see also J.T. MacQuarrie, “The Use of Legislative History” (1952) 30 Can. Bar Rev. 958.

<sup>92</sup> See e.g. *R. v. Stevenson and McLean* (1980), 57 C.C.C. (2d) 526, 19 C.R. (3d) 74 (Ont. C.A.), where the Ontario Court of Appeal cited with approval the statement by Lord Reid in *Warner*, *supra* note 27 at 279, that parliamentary materials might be used where their consultation might “settle the matter immediately one way or the other.” See also *R. v. Board of Broadcast Governors, Ex parte Swift Current Telecasting Co.* (1961), [1962] O.R. 657, 31 D.L.R. (2d) 385 (Ont. H.C.).

<sup>93</sup> [1981] 1 S.C.R. 469, 121 D.L.R. (3d) 41 [hereinafter *Vasil* cited to S.C.R.]. For a case comment on this decision, see G. Parker, Case Comment (1982) 60 Can. Bar Rev. 502.

<sup>94</sup> R.S.C. 1985, c. C-46.

adopted not only the British Commissioners' proposed sections but also their reasons.<sup>95</sup>

Although reference to parliamentary debates "is not usually advisable", lower courts have liberally followed this new line of jurisprudence.<sup>96</sup>

It appears that the willingness to consider parliamentary debates in statutory construction was strongly influenced by the development and the characterisation of statutes for constitutional purposes. There are two contexts in which parliamentary debates may be useful for the constitutional characterisation of statutes: first, in division of legislative competence cases, to help identify the pith and substance of the challenged statute to determine if it comes within the powers of the enacting legislative body; and, second, in cases involving the *Canadian Charter of Rights and Freedoms*, to decide whether the object of the challenged statute infringes a guaranteed right and, if so, whether the infringement is justifiable under the limitation clause in section 1 of the *Charter*.<sup>97</sup>

For a long time, however, the exclusionary prohibition applied *mutatis mutandis* to constitutional cases.<sup>98</sup> In 1961, the Supreme Court of Canada clearly set out the rule in *Canada (A.G.) v. Reader's Digest Association (Canada) Ltd.*, per Cartwright J.:

While I have reached the conclusion that the evidence in question [parliamentary debates] in this appeal is inadmissible as a matter of law under the authorities and on principle and not from a consideration of inconvenience that would result from a contrary view, 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 could be excluded.<sup>99</sup>

In a series of cases on division of legislative competence under the *Constitution Act, 1867*,<sup>100</sup> the Supreme Court of Canada expressed the view that extrinsic aids, in-

<sup>95</sup> *Supra* note 93 at 487 [emphasis added]. See also *R. v. Paul*, [1982] 1 S.C.R. 621, 138 D.L.R. (3d) 455.

<sup>96</sup> See e.g. *Babineau v. Babineau* (1981), 32 O.R. (2d) 545, 122 D.L.R. (3d) 508 (H.C.), aff'd (1982), 37 O.R. (2d) 527, 133 D.L.R. (3d) 767 (C.A.); *New Brunswick Broadcasting Co. v. Canadian Radio-Television and Telecommunications Commission*, [1984] 2 F.C. 410, 13 D.L.R. (4th) 77 (C.A.); *Canada (A.G.) v. Young*, [1989] 3 F.C. 647, 100 N.R. 333 (C.A.); *Swan v. Canada (Minister of Transport)*, [1990] 2 F.C. 409, 61 D.L.R. (4th) 390 (T.D.); and *Vaillancourt v. M.N.R.*, [1991] 3 F.C. 663, 132 N.R. 133 (C.A.).

<sup>97</sup> The *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*] stipulates that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See Hogg, *supra* note 6 at 1284-85.

<sup>98</sup> See *Texada Mines v. British Columbia (A.G.)*, [1960] S.C.R. 713 at 720, 24 D.L.R. (2d) 81.

<sup>99</sup> [1961] S.C.R. 775, 30 D.L.R. (2d) 296 at 793 [hereinafter *Reader's Digest* cited to S.C.R.]. For a case comment on this decision, see M. Rosenstein, "The Attorney-General of Canada v. The Reader's Digest Association (Canada) Ltd., *Sélection du Reader's Digest (Canada) Ltée.*" (1961-62) 8 McGill L.J. 62.

<sup>100</sup> (U.K.), 30 & 31 Vict., c. 3.

cluding parliamentary debates, should not be excluded as a matter of course. This trend began in 1975 with the *Reference Re Anti-Inflation Act (Canada)*,<sup>101</sup> where La-skin J. (as he then was) urged for a more flexible approach with regard to extrinsic materials. In *Reference Re Residential Tenancies Act 1971 (Ontario)*,<sup>102</sup> Dickson J. (as he then was) reiterated the occasional need to refer to extrinsic aids in interpreting statutes. However, he also stated that “speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight.”<sup>103</sup> This holding appears to confuse the question of whether it is permissible for courts to use parliamentary debates, with the question of the weight that ought to be attributed to them. In 1982, the Supreme Court handed down two decisions citing *Residential Tenancies* as authority for the use of legislative history to constitutionally characterise statutes to determine legislative competence.<sup>104</sup>

In *Re Upper Churchill Water Rights Reversion Act (Newfoundland)*,<sup>105</sup> McIntyre J. stated that extrinsic materials, including parliamentary debates, could be used to show the historical background against which the legislation was enacted, but not as an aid to construction.<sup>106</sup> This distinction between the background and the meaning of legis-lation — similar to that between the mischief and the remedy of a statute, in the con-text of commission reports<sup>107</sup> — was the last vestige of the strict exclusionary rule. The Supreme Court finally eliminated it in *R. v. Morgentaler, per Sopinka J.*:

The former exclusionary rule regarding evidence of legislative history [has] gradually been relaxed ... but until recently the courts have balked at admitting evidence of legislative debates and speeches ... The main criticism of such evi-dence has been that it cannot represent the “intent” of the legislature, an incor-poreal body, but that is equally true of other forms of legislative history. Pro-vided that the court remains mindful of the limited reliability and weight of Hansard evidence, *it should be admitted as relevant to both the background and the purpose of legislation*. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established.<sup>108</sup>

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<sup>101</sup> [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452. For case comments on this decision, see E.G. Hudon, *Case Comment* (1977) 55 Can. Bar Rev. 370; and R.B. Buglass, “The Use of Extrinsic Evidence and the *Anti-Inflation Act Reference*” (1977) 9 Ottawa L. Rev. 182.

<sup>102</sup> [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554 [hereinafter *Residential Tenancies* cited to S.C.R.].

<sup>103</sup> *Ibid.* at 721.

<sup>104</sup> See *Reference Re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004 at 1048, 136 D.L.R. (3d) 385; and *Schneider v. British Columbia (A.G.)*, [1982] 2 S.C.R. 112 at 130-31, 139 D.L.R. (3d) 417.

<sup>105</sup> [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1 [cited to S.C.R.].

<sup>106</sup> See *ibid.* at 318.

<sup>107</sup> See *supra* note 9.

<sup>108</sup> [1993] 3 S.C.R. 463 at 484, 107 D.L.R. (4th) 537 [emphasis added].

The general nature of the above statement regarding parliamentary debates seems to allow their use, not only for constitutional characterisation of legislation, but also to construe statutes.<sup>109</sup>

In cases under the *Canadian Charter of Rights and Freedoms*, the Supreme Court was quick to hold that parliamentary debates could be used to determine whether the object of the challenged statute infringed a guaranteed right and, if so, whether the limit placed upon that right could be justified under section 1 of the *Charter*.<sup>110</sup> This comes as no surprise given that the process of classification for *Charter*-review is very similar to the process of classification for division of legislative competence-review,<sup>111</sup> and the jurisprudential developments in competence-review cases.

The recent decision of the Court in *R. v. Heywood*<sup>112</sup> is very enlightening on the Canadian position. The case examined whether or not section 179(1)(b) of the *Criminal Code*, which prohibits convicted sexual offenders from loitering in school yards, playgrounds and public parks, violated certain *Charter* rights. Although this was a *Charter* case, the Court was asked to use parliamentary debates, not to determine if the object of the provision infringed a guaranteed right or whether the restriction was justifiable under section 1, but rather to decide, as a matter of statutory construction, what the word "loiter" meant in the context of section 179(1)(b) of the *Criminal Code*. In other words, despite its appearance, this was a case of pure statutory interpretation.

Justice Cory, writing for the majority, carried out an extensive review of the case law on the use of parliamentary debates in the context of constitutional characterisation for division of legislative competence and for *Charter*-review purposes, as well as statutory interpretation in general.<sup>113</sup> The Court held that it was not necessary to decide whether parliamentary debates could help interpret the provision at stake because in the instant case they were not conclusive. The irony is that Cory J. then proceeded to examine the said debates in order to support his conclusion.<sup>114</sup> This decision clearly indicates that the Supreme Court of Canada is on the verge of taking the leap and

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<sup>109</sup> Recently, however, in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 242, 127 D.L.R. (4th) 1, La Forest J., dissenting in the result, seemed to go back to a more restrictive rule when he wrote: "I note in passing the well-established principle that a court is entitled, in a pith and substance analysis, to refer to extrinsic materials, such as related legislation, Parliamentary debates and evidence of the 'mischief' at which the legislation is directed."

<sup>110</sup> See *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 749, 35 D.L.R. (4th) 1; *R. v. Whyte*, [1988] 2 S.C.R. 3 at 24-25, 51 D.L.R. (4th) 481; *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 983-84, 58 D.L.R. (4th) 577; and *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1371-72, 64 D.L.R. (4th) 577.

<sup>111</sup> See Hogg, *supra* note 29 at 143-44.

<sup>112</sup> [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348 [cited to S.C.R.].

<sup>113</sup> See *ibid.* at 788-89.

<sup>114</sup> See *ibid.* at 789.

holding that, as for constitutional characterisation, parliamentary debates can be utilised as an aid to statutory construction.<sup>115</sup>

Finally, a brief note on the use of parliamentary debates in the interpretation of the Canadian Constitution itself is in order. As regards the *Constitution Act, 1867*,<sup>116</sup> the issue has seldom arisen, probably because of the sparse records of legislative history.<sup>117</sup> Given the general exclusionary rule on parliamentary debates as an aid to statutory construction, it is not surprising that such legislative history could not initially be used to interpret the *Constitution Act, 1867*.<sup>118</sup> However, in a series of cases starting in 1975, the Supreme Court of Canada did have recourse to such legislative history.<sup>119</sup> For instance, in the *Senate Reference*, the Supreme Court stated:

It is, we think, proper to consider the historical background which led to the provision which was made in the Act for the creation of the Senate as a part of the apparatus for the enactment of federal legislation. In the debates which occurred at the Quebec Conference in 1864, considerable time was occupied in discussing the provisions respecting the Senate.<sup>120</sup>

With regard to the *Constitution Act, 1982*,<sup>121</sup> there are abundant records of the legislative history leading up to adoption of this Act.<sup>122</sup> In light of the decisions regarding the *Constitution Act, 1867*, there is little doubt that such materials can be used as an aid to interpret the *Constitution Act, 1982*.

<sup>115</sup> See also, of similar circumstances and reasoning, *R. v. Mailloux*, [1988] 2 S.C.R. 1029 at 1042, 89 N.R. 222; and *R. v. Sullivan*, [1991] 1 S.C.R. 489 at 502-03, 122 N.R. 166.

<sup>116</sup> *Supra* note 100.

<sup>117</sup> There were three constitutional conferences that led to Confederation: Charlottetown (1864), Quebec (1864), and London, England (1866). The records of them are very scanty indeed. The debates in the British Parliament are available in the United Kingdom Hansard of 1867.

<sup>118</sup> See *Bank of Toronto v. Lambe* (1887), 12 A.C. 575, 56 L.J.P.C. 87, 9 C.R.A.C. 296 (P.C.); and *Ontario (A.G.) v. Canada (A.G.)*, [1912] A.C. 571, 2 C.R.A.C. 89 (P.C.). On the early use of legislative history to interpret the *Constitution Act, 1867*, *supra* note 100, see V.C. MacDonald, "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar Rev. 77; and B. Laskin, *Canadian Constitutional Law*, 4th ed. (Toronto: Carswell, 1975) at 59-65.

<sup>119</sup> See *Jones v. New Brunswick (A.G.)*, [1975] 2 S.C.R. 182 at 194, 45 D.L.R. (3d) 583; *Di Iorio v. Warden of the Common Jail of the City of Montreal*, [1978] 1 S.C.R. 152 at 200, 73 D.L.R. (3d) 491; *Quebec (A.G.) v. Blaikie*, [1979] 2 S.C.R. 1016 at 1017, 101 D.L.R. (3d) 394; *Reference Re Legislative Authority of the Parliament of Canada in Relation to the Upper House* (1979), [1980] 1 S.C.R. 54 at 66-67, 102 D.L.R. (3d) 1 [hereinafter *Senate Reference* cited to S.C.R.]; *Canada (A.G.) v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206 at 226, 3 D.L.R. (4th) 16; *MacDonald v. Montreal (City of)*, [1986] 1 S.C.R. 460 at 494, 27 D.L.R. (4th) 321; and *Reference Re Bill 30 An Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148 at 1173-74, 40 D.L.R. (4th) 18. See also F. Vaughan, "The Use of History in Canadian Constitutional Adjudication" (1989) 12 Dalhousie L.J. 59.

<sup>120</sup> *Senate Reference*, *ibid.* at 66.

<sup>121</sup> Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>122</sup> In fact, there exists the text of no less than seven versions of the *Constitution Act, 1982*. The text of all versions is reproduced in R. Elliot, "Interpreting the Charter — Use of the Earlier Versions as an Aid" (1982) U.B.C. L. Rev. 11. There are also extensive parliamentary debates both in the Federal Parliament and in that of the United Kingdom: see Hogg, *supra* note 29 at 147-48.

This conclusion is supported by several cases dealing with the *Charter* which have allowed reference to legislative history to interpret the language of the *Charter* itself.<sup>123</sup> In the *Motor Vehicle Reference*,<sup>124</sup> the Court held that the proceedings and evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution could be used to assist courts in interpreting the *Charter*. It was made explicit, however, that the Court would not attach much weight to such materials. In the words of Lamer J. (as he then was):

Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, *i.e.*, the intention of the legislative bodies which adopted the *Charter*. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.<sup>125</sup>

The question of weight necessitates a brief discussion of the general principles of constitutional interpretation in Canada. Simply put, legislative history of the Constitution can be either conclusive or indicative. The former view suggests that courts are bound to the original understanding of the constitutional text; this is analogous to what is described in the United States as "originalism".<sup>126</sup> The latter view suggests that legislative history constitutes one of the relevant elements to construe the constitutional provision.

Given that legislative history could not traditionally be used in interpreting the Constitution, originalism has never had any support in Canada.<sup>127</sup> Canadian courts have instead favoured a progressive interpretation, that is, a construction which does not freeze the language of the Constitution in time but adapts it to new conditions and new ideas. This approach was eloquently formulated by Lord Sankey in *Edwards v. Canada (A.G.)*:<sup>128</sup> "The British North America Act planted in Canada a living tree ca-

<sup>123</sup> See *R. v. Dubois*, [1985] 2 S.C.R. 350 at 360, 23 D.L.R. (4th) 503; *Reference Re Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 504-507, 24 D.L.R. (4th) 536 [hereinafter *Motor Vehicle Reference* cited to S.C.R.]; *United States v. Cotroni*, [1989] 1 S.C.R. 1469 at 1479-80, 96 N.R. 321; *Mahé v. Alberta*, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.* at 508-509.

<sup>126</sup> See R. Berger, *Government by Judiciary, The Transformation of the Fourteenth Amendment*, (Cambridge: Harvard University Press, 1977) c. 20; R.H. Bork, "Neutral Principles and Some First Amendment Problems" (1971) 47 Ind. L.J. 2; A. Scalia, "Originalism: The Lesser Evil" (1989) 57 U. Cin. L. Rev. 869; R.S. Kay, "Adherence to the Original Intentions in Constitutional Adjudication" (1988) 82 NW. U. L. Rev. 226; and M.W. McConnell, "Originalism and the Desegregation Doctrine" (1995) 81 Va. L. Rev. 947.

<sup>127</sup> See Hogg, *supra* note 6 at 1288; and Laskin, *supra* note 118 at 59-65. In fact, even in the United States, originalism is rejected by a majority of legal scholars: see P. Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 Boston U. L. Rev. 204; R. Dworkin, "The Forum of Principle" (1981) 56 N.Y.U. L. Rev. 469; H.J. Powell, "The Original Understanding of Original Intent" (1985) 98 Harv. L. Rev. 885; R.A. Posner, "Bork and Beethoven" (1990) 42 Stan. L. Rev. 1365; and Symposium, "Originalism, Democracy and the Constitution" (1996) 19 Harv. J. L. & Pub. Pol'y 237ff, especially C.R. Sunstein, "Five Theses on Originalism" (1996) 19 Harv. J. L. & Pub. Pol'y 311.

<sup>128</sup> [1930] A.C. 121 at 136, [1930] 1 D.L.R. 98 (P.C.).

pable of growth and expansion within its natural limits.”<sup>129</sup> As Hogg phrases it, “The principle of progressive interpretation is flatly inconsistent with originalism, the whole point of which is to deny that the courts have the power to adapt the Constitution to new conditions and new ideas.”<sup>130</sup> Accordingly, as illustrated by Lamer J.’s reasons in the *Motor Vehicle Reference*,<sup>131</sup> legislative history of the Canadian Constitution plays a minimal role in its interpretation.

In summary, the practice in Canada with regard to the use of parliamentary debates as an aid to statutory interpretation has been strongly influenced by the consideration of such debates for the characterisation of statutes in constitutional challenges. Perhaps it is time that the Supreme Court address the issue of whether it is permissible to refer to parliamentary debates to ascertain the meaning of statutory provisions. Although this step seems imminent — in view of Cory J.’s reasons in *R. v. Heywood*<sup>132</sup> — leaving the question unresolved undoubtedly inhibits legal certainty, especially as it relates to the methodology of statutory interpretation and not merely to a substantive law principle.<sup>133</sup>

Analysis of the Canadian approach would be incomplete without a word on the contended differing approach prevailing in Quebec, the province whose private law is based on a French-style civil law system. Briefly, the traditional civil law permits unlimited use of legislative history — the so-called *travaux préparatoires* — in interpreting statutes and accords to this extrinsic material considerable persuasive force.<sup>134</sup> Although this position is generally accepted in construing Quebec private law legislation,<sup>135</sup> the Supreme Court of Canada recently warned, in *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée*, that “[p]arliamentary debates surrounding the enactment of legislation must be read with caution, because they are not always a reliable

<sup>129</sup> This illustration has been recently reiterated by McLachlin J. in *Reference Re Electoral Boundaries Commission Act (Saskatchewan)*, [1991] 2 S.C.R. 158 at 180, 81 D.L.R. (4th) 16.

<sup>130</sup> Hogg, *supra* note 6 at 1290.

<sup>131</sup> *Supra* note 123 at 508-09.

<sup>132</sup> *Supra* note 112.

<sup>133</sup> L’Heureux-Dubé J., dissenting in 2747-3174 *Québec Inc. v. Québec (Régie des permis d’alcool)*, [1996] 3 S.C.R. 919 at 995, 140 D.L.R. (4th) 577 [hereinafter *Régie des permis* cited to S.C.R.], acknowledges the importance of setting out the rules of statutory construction in order to avoid “a Humpty-Dumpty-like interpretation exercise” (at 1008-09).

<sup>134</sup> See F. Gény, *Méthode d’interprétation et sources en droit privé positif*, t. 1, 2d ed. (Paris: Librairie générale de droit et de jurisprudence, 1919) at 293ff; and M. Couderc, “Les travaux préparatoires de la loi ou la remontée des enfers” D.1975.Chron.249. It is noteworthy, however, that in 1935, the authoritative French legal scholar Henri Capitant deplored such a situation and praised the English exclusionary rule: see H. Capitant, “L’interprétation des lois d’après les travaux préparatoires” D.H.1935.Chron.77. On the situation in other European civil law countries, see S. Strömholm, “Legislative Material and Construction of Statutes — Notes on the Continental Approach” (1966) 10 *Scandinavian Studies in Law* 173.

<sup>135</sup> See F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Montreal: Wilson & Lafleur, 1907) at 80ff; P.B. Mignault, “Le Code civil de la province de Québec et son interprétation” (1935-36) 1 U.T. L.J. 104 at 114ff; S. Normand, “Les travaux préparatoires et l’interprétation du Code civil du Québec” (1986) 27 C. de D. 347; and Côté, *supra* note 87 at 395. See also A.-F. Bisson, “Préambules et déclarations de motifs ou objets” (1980) 40 R. du B. 58 at 65.

source for the legislature's intention."<sup>136</sup> In another recent case, *Doré v. Verdun (City of)*,<sup>137</sup> the Supreme Court discussed the weight to attribute to the *Commentaires du ministre* on the *Civil Code of Québec*, comments whose status differs somewhat from the usual *travaux préparatoires* given that they were published after the adoption of the C.C.Q.<sup>138</sup> Starting from the premise that such materials could be utilised, Gonthier J., for the Court, stated the following caveat:

Of course, the interpretation of the Civil Code must be based first and foremost on the wording of its provisions. That said, however, and as noted by Baudouin J.A. in the judgment under appeal, there is no reason to systematically disregard the Minister's commentaries, since they can sometimes be helpful in determining the legislature's intention, especially where the wording of the article is open to differing interpretations. However, the commentaries are not an absolute authority. They are not binding on the courts, and their weight can vary, inter alia in light of other factors that may assist in interpreting the Civil Code's provisions.<sup>139</sup>

These two recent cases show that the position of the Supreme Court of Canada on the use of *travaux préparatoires* to interpret Quebec private law does not substantially vary from the approach adopted for common law statutes: consider them, but with parsimony.

Having completed this review of the use of parliamentary debates, this article will now explore the question of whether the use of such materials in statutory construction should be prohibited as a rule, or whether the issue should be one of the appropriate weight to be assigned to them. Prior to this analysis, it will be useful to survey the role of parliamentary materials in the general framework of statutory interpretation.

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<sup>136</sup> [1997] 2 S.C.R. 299, 146 D.L.R. (4th) 193, per Gonthier J., dealing with the interpretation of article 503.1 of the Quebec *Code of Civil Procedure*.

<sup>137</sup> [1997] 2 S.C.R. 862, 150 D.L.R. (4th) 385 [hereinafter *Doré* cited to S.C.R.], relating to the interpretation of article 2930 of the *Civil Code of Québec*, dealing with the three-year extinctive prescription for bodily injury actions.

<sup>138</sup> Québec, Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. 1 (Québec: Publications du Québec, 1993). Gil Rémillard, the Minister of Justice at the time of the adoption of the *Civil Code*, described the objectives of these documents as follows:

Les commentaires du Code civil du Québec visent à fournir certaines indications sur les motifs du législateur, sur le contexte des dispositions législatives nouvelles et sur les sources qui ont été directement considérées (*ibid.* at viii).

See C. Masse, "Le recours aux travaux préparatoires dans l'interprétation du nouveau Code civil du Québec" in *Le nouveau Code civil: interprétation et application: les journées Maximilien-Caron 1992* (Montréal: Thémis, 1993) 149, treats them as *doctrine*: "La richesse des travaux préparatoires ne sera donc pas perdue et ces commentaires pourront valoir à titre de doctrine" (*ibid.* at 159).

<sup>139</sup> *Doré*, *supra* note 137 at para. 14 [emphasis added].

### III. Principles of Statutory Interpretation

It is an orthodoxy that statutory interpretation at common law is founded on three pillars aimed at ascertaining legislative intent.<sup>140</sup> These three pillars are the literal rule,<sup>141</sup> which gives effect to the plain words of the statute and requires that they be read in their ordinary sense; the golden rule,<sup>142</sup> which permits departure from the literal meaning when it creates an absurd result or some inconsistency with legislative intent; and, the mischief rule,<sup>143</sup> which focuses on the defect in the law addressed by the statute, and applies the meaning that best remedies the problem. In addition to these three canons, there are several other rules of construction, most often referred to by their Latin maxims, that courts may use<sup>144</sup>. These rules include *noscitur a sociis*, *eiusdem generis*, and *expressio unius exclusio alterius*. As seen in the Introduction, there are also various intrinsic and extrinsic interpretive aids which assist in ascertaining the meaning of a statute.

It should also be noted that the interpretation of statutes is a somewhat subjective process.<sup>145</sup> Courts choose to emphasise certain rules of statutory construction, but not others, and make use of certain interpretive aids, but not others. This subjective exer-

<sup>140</sup> See generally Bell & Engle, *supra* note 5; Sullivan, *supra* note 3; Côté, *supra* note 87; Gifford, *supra* note 49; Pearce & Geddes, *supra* note 7; Dickerson, *supra* note 5; J.W. Hurst, *Dealing With Statutes* (New York: Columbia University Press, 1982); A. Samuels, "The Interpretation of Statutes" [1980] *Statute L. Rev.* 86; S.G.G. Edgar, ed., *Craies on Statute Law*, 7th ed. (London: Sweet & Maxwell, 1971); G.C. MacCallum Jr., "Legislative Intent" (1966) 75 *Yale L.J.* 754; and O.W. Holmes, "The Theory of Legal Interpretation" (1898-99) 12 *Harv. L. Rev.* 417.

<sup>141</sup> See *Vacher and Sons Ltd. v. London Society of Compositors*, [1913] A.C. 107, 82 L.J.K.B. 232; *Hill v. East and West India Dock Co.* (1884), 9 A.C. 448, 53 L.J. Ch. 842 (H.L.); *Sussex Peerage* (1844), 11 Cl. & Fin. 85, 8 E.R. 1034.

<sup>142</sup> See *Grey v. Pearson* (1857), 6 H.L.C. 61, 10 E.R. 1216; and *River Wear Commissioners v. Adamson*, [1877] 2 A.C. 743, 1 Q.B.D. 548 (H.L.).

<sup>143</sup> *The Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637 [cited to E.R.], states the mischief rule as follows:

And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

[i] What was the common law before the making of the Act.

[ii] What was the mischief and defect for which the common law did not provide.

[iii] What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

[iv] The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *proprivato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico* (*ibid.* at 638).

<sup>144</sup> For more detail on these rules, see Côté, *supra* note 87 at 293-304 and 315-22; and J.M. Kernochan, "Statutory Interpretation: An Outline of Methods" [1976] *Dalhousie L.J.* 333 at 360-63.

<sup>145</sup> See G.L. Gall, *The Canadian Legal System*, 3d ed. (Toronto: Carswell, 1990) at 385.

cise, however, must be conducted for an objective search of legislative intent.<sup>146</sup> The concept of legislative intent is said to be a “legal fiction”<sup>147</sup> although it serves a useful purpose: providing a guide outside the subjective judgement of the court which gives effect to the role of Parliament and makes the legislative process work.<sup>148</sup> In reality, of course, there can be no single collective legislative intent in any legislative body.<sup>149</sup>

The acknowledgement that Parliament can only express itself through legislative enactments, and not by a unified intention of its members, has traditionally been the justification for the literal rule. This rule provides that the intention of Parliament must be found within the four corners of the act and, consequently, cannot be sought at large by using legislative history and other extrinsic aids.<sup>150</sup> Such an approach is epitomised by the following comments of Lord Reid in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg (A.G.)*, which dealt with the use of commission reports:

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.<sup>151</sup>

The literal interpretive method, otherwise known as the “plain meaning rule”, dates back to the time when it was thought that “Parliament changes the law for the worse”<sup>152</sup> and that a legislative enactment was an “alien intruder in the house of the

<sup>146</sup> See H.W. Jones, “Statutory Doubts and Legislative Intention” (1940) 40 Colum. L. Rev. 957:

[I]n many modern cases, the principle that courts are bound to follow “legislative intention” has been taken to mean that in determining the effect of a statute in cases of interpretative doubt, the judge should decide in such a way as will advance the general objectives which, in his judgment, the legislators sought to attain by enactment of the legislation.... The principle that doubtful questions should be resolved in accordance with “legislative intention” requires, in this signification of “intention” that the judge interpret the statute not in the light of his own personal notions of justice and expediency but in the light of the legislative conceptions of justice and expediency which underlie the policy of the enactment (*ibid.* at 973).

See also Frankfurter, *supra* note 4 at 538-39; J.M. Kernochan, *supra* note 144 at 348; and V. Sacks, “Towards Discovering Parliamentary Intent” [1982] Statute L. Rev. 143 at 143.

<sup>147</sup> See Dickerson, *supra* note 5 at 73-79; Frankfurter, *ibid.* at 538; M. Radin, “Statutory Interpretation” (1930) 43 Harv. L. Rev. 863 at 869-70; and A. Cox, “Judge Learned Hand and the Interpretation of Statutes” (1947) 60 Harv. L. Rev. 370 at 372.

<sup>148</sup> In fact, there are many legal fictions, one of which is the notion of the “reasonable person” in the law of negligence, against which the conduct of the defendant is evaluated.

<sup>149</sup> See Kernochan, *supra* note 144 at 347; and J. Willis, “Statute Interpretation in a Nutshell” (1938) 16 Can. Bar Rev. 1 at 3.

<sup>150</sup> See A. Lester, *supra* note 38 at 273; Sullivan, *supra* note 3 at 436-37; Corry, *supra* note 12 at 625; and R. Munday, “The Common Lawyer’s Philosophy of Legislation” (1983) 14 Rechtstheorie 191 at 193.

<sup>151</sup> [1975] A.C. 591 at 626, 1 All E.R. 810 (H.L.) [hereinafter *Papierwerke* cited to A.C.].

<sup>152</sup> F. Pollock, *Essays in Jurisprudence and Ethics* (London: Macmillan, 1882) at 85.

common law.”<sup>153</sup> It is within this historical context that the following excerpt from *Hilder v. Dexter*, per Lord Halsbury must be understood:

[F]or in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.<sup>154</sup>

The plain meaning rule has been the subject of fierce criticism in England.<sup>155</sup> In the United States, where the Supreme Court is at the avant-garde of statutory interpretation, Holmes J. memorably observed that a word “is not a crystal, transparent and unchanged, it is the skin of a living thought.”<sup>156</sup> In effect, legislative enactments cannot be read in isolation; their meaning is derived from their context, including their parliamentary context.<sup>157</sup> This position is part and parcel of the modern approach toward the interpretation of statutes — which F.A.R. Bennion calls the “informed interpretation” method<sup>158</sup> — which emphasises the purposive and contextual construction of legislation. As Lord Griffiths phrased it in *Pepper*:

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extrane-

<sup>153</sup> H. Stone, “The Common Law in the United States” (1936) 50 Harv. L. Rev. 4 at 15.

<sup>154</sup> [1902] A.C. 474 at 477, 71 L.J. Ch. 781 (H.L.).

<sup>155</sup> Lord Denning, the champion of purposive interpretation of legislation, once wrote, in *Magor and St. Mellons Rural District Council v. Newport Corporation*, [1950] 2 All E.R. 1226 at 1236 (C.A.):

We do not sit here to pull the language of Parliament and Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

The decision was confirmed by [1952] A.C. 189 (H.L.) but the reasons of Lord Denning were criticised. See also: M. Zander, *The Law-Making Process*, 4th ed. (London: Butterworths, 1994) at 121-27.

<sup>156</sup> *Towne v. Eisner*, 245 U.S. 418 at 425, 62 L. Ed. 372 (1919). Learned Hand J., in *Giuseppi v. Walling*, 144 F.2d 608 at 624, 155 A.L.R. 761 (2d Cir. 1944), wrote: “[T]here is no surer way to misread any document than to read it literally.” See also N.J. Singer, *Statutes and Statutory Construction*, vol. 2A, 5th ed. (New York: C.B.C., 1992) at 5-6; and W.N. Eskridge, *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994) at 38-41.

<sup>157</sup> See Lester, *supra* note 38 at 274. See also Kernochan, *supra* note 144, where he writes: “The question in human interchanges is not what the words mean but what the user of the words meant by them” (*ibid.* at 341).

<sup>158</sup> Bennion, *supra* note 5 at 427-29. What Bennion refers to as the “informed interpretation” approach is called the “modern interpretation rule” by Sullivan, *supra* note 3; “pragmatic dynamism” by Eskridge, *supra* note 154; and “modern interpretation” by Gény, *supra* note 134 at 277. For a very thorough analysis of the two interpretation methods — literal rule and modern approach — and of the position in Canada, see the reasons of L’Heureux-Dubé J., dissenting, in *Régie des permis d’alcool*, *supra* note 133 at 996 ff.

ous material that bears upon the background against which the legislation was enacted.<sup>159</sup>

As a result, the increasing use of parliamentary debates, witnessed in all common law jurisdictions, falls squarely within the modern movement towards a more contextual and purposive construction of legislation.<sup>160</sup> What is really at issue is the extent to which parliamentary debates should be considered as part of the appropriate context within which courts should give effect to legislative intent.<sup>161</sup> This is the next question to be discussed.

#### IV. Parliamentary Debates: A Question of Admissibility or of Weight?

The central contention of this paper is that the issue of parliamentary debates in statutory construction is one of weight and not of admissibility.<sup>162</sup> In other words, it is argued that as a rule of statutory interpretation, the attributes of parliamentary debates, as well as the circumstances surrounding their utilisation, do not warrant a total prohibition. Rather, courts should be permitted to resort to parliamentary materials as an interpretive aid, and the question should revolve around the weight accorded to them. To demonstrate this, the rationales supporting the traditional exclusionary rules will be analysed.

There is one preliminary matter to address at this point: the archaic and somewhat artificial distinction made between using legislative history to identify the *mischief* of the prior state of the law and using it to ascertain the Parliamentary *intention* in enacting the legislation (these are the two main steps of the mischief rule).<sup>163</sup> This dichotomy was developed in the context of commission reports, and it meant that such materials could only be used to determine the mischief and not the intention.<sup>164</sup> This restrictive view was repudiated, although initially only with regard to commission reports.<sup>165</sup> In *Pepper*, Lord Browne-Wilkinson made it clear that such a distinction

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<sup>159</sup> *Supra* note 9 at 617.

<sup>160</sup> See Section III, above.

<sup>161</sup> See H.M. Hart & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge: Harvard University Press, 1958) at 1284; Charles, *supra* note 3 at 11; Sullivan, *supra* note 3 at 427; and Hogg, *supra* note 29 at 132-33. See *contra* Dickerson, *supra* note 5 at 138ff, who denies that legislative history qualifies as part of the context of a statute. The reasons would be that: (i) it is unclear whether it was taken into account in the drafting of the statute; (ii) it is not usually as readily available as the statute itself; (iii) it is likely unreliable. Perhaps these arguments may justify the exclusionary rule — see Section V, below — but they can hardly support the position that parliamentary debates do not form part of the context of a statute.

<sup>162</sup> Several Canadian legal scholars share this position: see Corry, *supra* note 12 at 635; Kilgour, *supra* note 91 at 776 and Côté, *supra* note 87 at 417.

<sup>163</sup> See *Heydon's Case*, *supra* note 143 at 638.

<sup>164</sup> See *Eastman Photographic Materials*, *supra* note 9; and *Assam Railways*, *supra* note 9. For a more detailed account of the rule concerning commission reports, see *supra* note 9.

<sup>165</sup> See *Factortame*, *supra* note 9.

between mischief and intention — for both commission reports and parliamentary debates — should no longer be considered as significant:

Given the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature, the fine distinctions between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate.<sup>166</sup>

The reasons for the exclusionary prohibition on parliamentary debates may be grouped under the following headings: historical, theoretical, and practical.<sup>167</sup> Each of these categories will be examined in turn.

### A. Historical Reasons

The historical rationale underlying the exclusionary rule relates to the fact that, between 1628 and 1908, the reporting of parliamentary debates was forbidden in England.<sup>168</sup> This regime had been installed by the House of Commons in order to protect the freedom of speech of its members. Given this context, it is not surprising that a rule against the use of parliamentary debates developed. What is less comprehensible is that the position remained unchanged after the 1688 revolution, when freedom of debate was secured by article 9 of the *Bill of Rights* (1689).<sup>169</sup> The irony is that the prohibition against publishing debates, which had been adopted as a shield against the Crown, was not used as a sword against the publication of debates in Parliament.<sup>170</sup> The House regarded the reporting of debates and, incidentally, their use by courts for construction of statutes as a breach of parliamentary privilege.

In England, parliamentary privileges are largely, if not entirely, codified in article 9 of the *Bill of Rights*.<sup>171</sup> This provision declares that “freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”<sup>172</sup> The contemporary significance of article 9 is that no word spoken in either House by members of Parliament can be held against them.<sup>173</sup> This privilege means that leave must be granted to use documents relating to proceedings

<sup>166</sup> *Supra* note 9 at 635, Lord Browne-Wilkinson.

<sup>167</sup> See *Pepper, ibid.* at 633. See also Côté, *supra* note 87 at 407-11; S.A. Girvin, *supra* note 38 at 494-95; and Oliver, *supra* note 17 at 7.

<sup>168</sup> See Kilgour, *supra* note 91 at 784-86; Davis, *supra* note 91 at 8; and L.-P. Pigeon, “L’élaboration des lois” (1945) 5 R. du B. 365 at 368.

<sup>169</sup> 1 Will. & Mary 2, c. 2.

<sup>170</sup> It was not until 1908 that the British House of Commons started to make official reports of its debates in Parliament; the exclusionary rule on parliamentary debates, though, remained unchanged.

<sup>171</sup> In *Pepper, supra* note 9 at 646, Lord Browne-Wilkinson held that nothing cited in that case had “identified or specified the nature of any privilege extending beyond that protected by [article 9] of the Bill of Rights”.

<sup>172</sup> *Supra* note 169.

<sup>173</sup> See P.M. Leopold, “Freedom of Speech in Parliament — Its Misuse and Proposals for Reform” [1981] Pub. L. 30; and D. Miers, “Citing Hansard as an Aid to Interpretation” [1982] Statute L. Rev. 98 at 99.

of the House of Commons.<sup>174</sup> In *Davis v. Johnson*,<sup>175</sup> Lord Scarman observed that, so long as this practice is maintained, it would be wrong for a court to make any judicial use of parliamentary debates to interpret statutes.

In 1980, the requirement to obtain such leave was repudiated by a House of Commons resolution.<sup>176</sup> This change of practice, however, did not affect whatsoever the exclusionary prohibition on parliamentary debates,<sup>177</sup> which indicates that the rule owes little to the existence of any parliamentary constraint.<sup>178</sup> In *Pepper*, the argument that the use of parliamentary debates to construe statutes would constitute "questioning" parliamentary proceedings, contrary to article 9 of the *Bill of Rights*, was dismissed as follows, *per* Lord Browne-Wilkinson:

In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil, or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament. *The purpose of looking at Hansard will not be to construe the words used by the Minister but to give effect to the words used so long as they are clear.* Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what is said and done there.<sup>179</sup>

In other common law jurisdictions, which do not have a privilege equivalent to that in article 9 of the *Bill of Rights*, this rationale for the exclusionary rule has been translated into the need for comity, that is, the courtesy and respect that ought to exist between the legislature and the judiciary.<sup>180</sup> In light of the above comments in *Pepper*, such an argument in favour of the exclusionary rule should be disregarded.

## B. Theoretical Reasons

The main theoretical explanation for the prohibition pertains to the constitutional principle of the rule of law or, more specifically, the need for citizens to be able to know the legal text by which they are regulated. Lord Diplock appealed to such reasoning to justify the exclusion of commission reports in *Papierwerke*:

<sup>174</sup> See *Stockdale v. Hansard* (1839), 9 Ad. & E. 1 at 114, 112 E.R. 1112; *Bradlaugh v. Gosset* (1884), 12 Q.B.D. 271 at 275, 53 L.J.Q.B. 209; *In re Parliamentary Privilege Act 1770*, [1958] A.C. 331 (P.C.) at 350 [1958] 2 All E.R. 329.

<sup>175</sup> *Supra* note 34 at 350.

<sup>176</sup> See U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 991, col. 879 at col. 916 (31 October 1980). See also P.M. Leopold, "Reference in Court to Hansard" [1981] Pub. L. 316.

<sup>177</sup> In *Hadmor Production Ltd. v. Hamilton*, *supra* note 35, decision rendered in 1983, the House of Lords reiterated the exclusionary rule without even mentioning the 1980 House of Commons resolution.

<sup>178</sup> See Miers, *supra* note 173 at 104.

<sup>179</sup> *Supra* note 9 at 638 [emphasis added]. For a criticism of this holding, see "Hansard — Help or Hindrance?", *supra* note 47 at 152-53. See also Oliver, *supra* note 17 at 10, who argues that this decision will have far-reaching implications for parliamentary practice.

<sup>180</sup> See Bennion, *supra* note 5 at 455.

The acceptance of the rule of law as a constitutional principle 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. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. *In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates.*<sup>181</sup>

Put another way, using parliamentary debates would be contrary to the principle of legal certainty.<sup>182</sup> According to this rationale, it should not be necessary to consult other texts which are less accessible than the statute book.<sup>183</sup>

The maintenance of legal certainty is no doubt the most convincing rationale supporting the exclusionary rule, the reason being that it relates to one of the fundamental tenets of our legal system, that is, the rule of law. It would be illusory, however, to put too much emphasis on the right of citizens “to rely on the text of legislation without having to resort to Hansard.”<sup>184</sup> In comparison, case law interpreting statutes, which is necessary to understand the legislative text, can hardly be said to be more accessible to ordinary citizens than parliamentary debates. Gaining access to statutes themselves is becoming increasingly difficult due to the proliferation of legislation seeking to regulate all areas of social and economic activity, thus, assertions that citizens can readily access statutes are somewhat fallacious. In reality, ordinary citizens ascertain their rights and duties through legal counsel, who examine the different sources of law — which could indeed include parliamentary debates — to advise their clients. The concern increasingly becomes one of practicality, revolving around the time and costs involved in using parliamentary materials, which will be considered shortly.

A second theoretical reason for the exclusionary prohibition is that Parliament is said to be distinct from its composing elements and its members;<sup>185</sup> accordingly, no intention could be discerned simply by looking at one segment of the legislature, such as the House of Commons. Willes J., in *Miller v. Taylor*,<sup>186</sup> was referring to this rationale when he stated that legislative history “is not known to the other house, or to the Sovereign.” The interpreter of a statute should concentrate on the intention of Parliament not on that of the government; the intention of even the responsible minister should not be equated with the intention of Parliament and should not be used as evi-

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<sup>181</sup> *Supra* note 151 at 638 [emphasis added]. See also, to the same effect, the speech of Lord Wilberforce in that case, *ibid.* at 629.

<sup>182</sup> See *Fothergill v. Monarch Airlines Ltd*, [1981] A.C. 251 (H.L.) at 279-80, [1980] 3 W.L.R. 209; and *Pepper*, *supra* note 9 at 619-20. See also Bell & Engle, *supra* note 5 at 152-53; Dickerson, *supra* note 5 at 144; Sullivan, *supra* note 3 at 438-39; “Hansard — Help or Hindrance?”, *supra* note 47 at 155; see Charles, *supra* note 3 at 20; Pigeon, *supra* note 168 at 369-70.

<sup>183</sup> See Evans, *supra* note 54 at 281.

<sup>184</sup> See Sullivan, *supra* note 3 at 439.

<sup>185</sup> See *Alberta (A.G.) v. Canada (A.G.)*, [1939] A.C. 117 at 131, 108 C.J.P.C. 1 (P.C.); and *Reader's Digest*, *supra* note 99 at 793, where Cartwright compares Parliament to a corporate entity. See also Sullivan, *ibid.* at 437.

<sup>186</sup> *Supra* note 19 at 217.

dence of the latter's intention.<sup>187</sup> As a result, parliamentary debates should not be used to determine legislative intent.

Although attractive upon initial examination, this rationale supporting the exclusionary rule does not hold much water. To deny that the intention of Parliament can be discerned with the help of members' statements may be compared to denying the existence of Cambridge University because there are only colleges! As an aggregate body, while it may be true that the legislature can express itself only through legislation, it can hear, read and respond to numerous statements and materials put before it. Like the opinions of other interpreters — such as commentators and commissions — such views, although not binding, may have considerable persuasive force and should be considered where appropriate.<sup>188</sup>

### C. Practical Reasons

In *Beswick v. Beswick*, practical considerations were held to be the main objection to the use of parliamentary debates as an interpretive aid:

For purely practical reasons we do not permit debates in either House to be cited: it would add greatly to the time and expense involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in Hansard, and it would often be impracticable for counsel to get access to at least the older reports of debates in Select Committees of the House of Commons; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court.<sup>189</sup>

The chief practical reason for the exclusionary rule stems from the additional research costs that a client would have to incur if lawyers were obligated to consult Hansard prior to giving legal advice on the meaning of legislation.<sup>190</sup> A preliminary comment is that it seems curious that courts single out this particular type of research as improperly time-consuming and expensive when the same criticisms may be applied to case law where the costs may outweigh the benefits.<sup>191</sup>

In *Pepper*, there was much debate on the increase of costs that would result from permitting recourse to parliamentary debates in statutory construction. It was, in fact, the principal reason why Lord Mackay dissented:

Your Lordships are well aware that the costs of litigation are a subject of general public concern and I personally would not wish to be a party to changing a well established rule which could have a substantial effect in increasing these costs against the advice of the Law Commissions and the Renton Committee

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<sup>187</sup> See Baker, *supra* note 47 at 356.

<sup>188</sup> See Sullivan, *supra* note 3 at 439-40; and Kilgour, *supra* note 91 at 774.

<sup>189</sup> *Supra* note 27 at 74.

<sup>190</sup> See Bennion, *supra* note 5 at 451; Côté, *supra* note 87 at 411; Dickerson, *supra* note 5 at 175; Evans, *supra* note 54 at 288-89; Gifford, *supra* note 49 at 126; Bates, *supra* note 47 at 54; and Starr, *supra* note 78 at 377.

<sup>191</sup> See Sullivan, *supra* note 3 at 439.

unless and until a new inquiry demonstrated that that advice was no longer valid.<sup>192</sup>

In contrast, Lord Browne-Wilkinson observed, for the majority, that “it is easy to overestimate the costs of such research: if a reading of Hansard shows that there is nothing of significance said by the Minister in relation to the clause in question, further research will become pointless.”<sup>193</sup> Further, he noted that the relaxation of the exclusionary rule in Australia and New Zealand did not suggest that there would be a substantial increase in litigation costs.<sup>194</sup> On the contrary, as Lord Griffiths pointed out in a concurring speech, if such a search of parliamentary materials “resolves the ambiguity it will in future save all the expense that would otherwise be incurred in fighting the rival interpretations through the courts.”<sup>195</sup> Finally, Lord Browne-Wilkinson warned that if excessive or unnecessary use of parliamentary debates were made to prolong litigation, this could be penalised by the award of costs.<sup>196</sup>

It is doubtful that lawyers would be inclined to embark on a search of parliamentary debates where there is no indication that they would find something relevant to the interpretation of the statutory provision at issue. Such information could be found in annotations to the statute, and in textbooks or articles dealing with such legislation.<sup>197</sup> As one commentator suggested, new reference books could be published, with such titles as “Parliamentary Statements on Statutes” — a kind of statute citator giving the relevant legislative history.<sup>198</sup> Furthermore, with the development of information technology, searches can now be undertaken through electronic forms of Hansard<sup>199</sup> in most common law jurisdictions.<sup>200</sup> There could also be the birth of “professional Hansard search companies” similar to title search companies hired to investigate property status. As the cliché goes “necessity is the mother of invention.”

Another practical reason given in support of the prohibition rule is the alleged problem of accessibility to parliamentary debates. It is argued that Hansard reports are

<sup>192</sup> *Supra* note 9 at 615.

<sup>193</sup> *Ibid.* at 637.

<sup>194</sup> *Ibid.* On the situation in Australia, see Pearce & Geddes, *supra* note 7 at 49. See *contra*, Lord Mackay, rather unconvincingly, rejected the comparison with Australia and New Zealand on the basis that their parliamentary procedure was different from that in the United Kingdom in material respects: see *Pepper, ibid.* at 615.

<sup>195</sup> *Ibid.* at 618. There was no empirical evidence, however, that such a result would necessarily follow from permitting the use of parliamentary debates in statutory construction.

<sup>196</sup> See *ibid.* at 637.

<sup>197</sup> See Bell & Engle, *supra* note 5 at 158.

<sup>198</sup> See G. Cain, “Interpretation of Statutes: Reference to Parliamentary Debates” [1962] *New Zealand L.J.* 207 at 209-10.

<sup>199</sup> See Baker, *supra* note 47 at 354.

<sup>200</sup> A non-exhaustive search on the Internet indicated that there is a web-site for parliamentary debates of at least the following jurisdictions: Australia (<<http://hansard.www.act.gov.au/welcome.htm>> (date accessed: 14 July 1998)), the United States (<[http://www.access.gpo.gov/su\\_docs/dbsearch.html](http://www.access.gpo.gov/su_docs/dbsearch.html)> (date accessed: 14 July 1998)), and Canada (<<http://www.parl.gc.ca/36/1/parlbus/chambus/house/debates/indexe/homepage.html>> (date accessed: 14 July 1998)). Furthermore, Hansard reports are now available on CD-ROM in England.

not readily available to legal practitioners and that they are inadequately indexed.<sup>201</sup> This situation, if true, may be explained by the existence of the exclusionary rule itself: if parliamentary debates cannot be used in statutory construction, then the development of an efficient index system to improve access is pointless.<sup>202</sup> It is untenable to justify the exclusionary prohibition by such logic when the rule itself has created the practical impediment cited as the problem. This alleged difficulty will resolve itself over time as the rule is relaxed,<sup>203</sup> particularly as new reference tools and information technologies are incorporated into legal practice.

Even if parliamentary materials were accessible and not too costly to consider, another practical reason for their exclusion is that, in any event, they do not constitute a reliable source to ascertain legislative intent.<sup>204</sup> In *Papierwerke*, Viscount Dilhorne, who was well-acquainted with the legislative process,<sup>205</sup> had the following to say:

In the course of the passage of a Bill through both Houses there may be many statements by Ministers, and what is said by a Minister in introducing a Bill in one House is no sure guide as to the intention of the enactment, for changes of intention may occur during its passage.<sup>206</sup>

In that respect, the whole process of enacting legislation was said not to be “an intellectual exercise in pursuit of truth; it is an essay in persuasion, or perhaps almost seduction!”<sup>207</sup>

It is on this same principle of unreliability that parliamentary debates were initially held to be inadmissible based on the parole evidence rule. This rule prohibits evidence of what parties to a written contract said or did before its conclusion to explain the written terms on which the parties agreed.<sup>208</sup> The parole evidence rule was held to apply equally to legislative enactments, as statutes are written instruments.<sup>209</sup>

<sup>201</sup> See Bennion, *supra* note 5 at 452.

<sup>202</sup> For the situation on access to parliamentary debates in the United States, where their use to interpret statutes is permitted, see Breyer, *supra* note 12 at 868-69.

<sup>203</sup> See Evans, *supra* note 54 at 289.

<sup>204</sup> See Dickerson, *supra* note 5 at 154-62; “Hansard — Help or Hindrance?”, *supra* note 47 at 154-55; and Corry, *supra* note 12 at 629-31.

<sup>205</sup> Viscount Dilhorne served twenty years as a Member of Parliament in the British House of Commons.

<sup>206</sup> *Papierwerke*, *supra* note 151 at 623. See also *Davis v. Johnson*, *supra* note 34 at 349-50; and, in Canada, *Residential Tenancies*, *supra* note 102 at 721.

<sup>207</sup> J.A. Corry, *supra* note 12 at 631; see also Cain, *supra* note 198 at 209. Even in France, where there is no restriction on the use of legislative history as an aid to interpret legislation, Henri Capitant, probably one of the most authoritative French *auteur de doctrine*, wrote: “il est étonnant que, malgré les leçons de l’expérience, les auteurs et les tribunaux continuent à chercher des éclaircissements là où règne la confusion.” See Capitant, *supra* note 134 at 79.

<sup>208</sup> See *Inglis v. Buttery*, [1878] 3 A.C. 552 at 577 (H.L.); *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381 at 1384, [1971] 3 All E.R. 237; and *Schuler v. Wickman Machine Tool Sales*, [1974] A.C. 235 at 261, [1973] 2 All E.R. 39 (H.L.).

<sup>209</sup> See *Earl of Shrewbury v. Scott* (1859), 6 C.B. N.S. 1 at 213, 141 E.R. 350; *A.G. v. Sillem* (1863), 2 H. & C. 431 at 537, 159 E.R. 178; and *River Wear Commissioners v. Adamson* (1877), 2 A.C. 743 at 763, 47 L.J.Q.B. 193 (H.L.).

There is little doubt that the parole evidence rule had a direct influence upon the development of the exclusionary rule on parliamentary debates.<sup>210</sup> Such an approach, equating a statute with an ordinary contract, is consistent with the plain meaning interpretive method that is now rejected by most courts.<sup>211</sup> C.K. Allen, noting that contracts are submitted to strict rules of evidence, stated that “it may well be questioned whether instruments of government are not of too wide import to be bound with the same trammels as private transactions.”<sup>212</sup> It is noteworthy that the most recent decisions applying the exclusionary prohibition ignored this rationale.<sup>213</sup>

However, in itself it appears that the problem of reliability does not warrant a blanket prohibition on the use of parliamentary debates in statutory interpretation. Rather, the argument should act as a counsel of caution in considering how much weight to give to such interpretive aids.<sup>214</sup> It is, after all, the daily function of a court to interpret legislation in accordance with the rules of statutory construction and to assign weight to a variety of interpretive aids depending on their reliability and persuasiveness.<sup>215</sup> To completely exclude reference to parliamentary debates concerning a legislative provision constrains courts in their efforts to ascertain the intention of Parliament, which is a function constitutionally entrusted to the judiciary.<sup>216</sup> This seems to be the main consideration that motivated the relaxation of the exclusionary rule in *Pepper*, as the following excerpt of Lord Browne-Wilkinson’s speech indicates:

In sum, I do not think that the practical difficulties arising from a limited relaxation of the rule are sufficient to outweigh the basic need for the courts to give effect to the words enacted by Parliament in the sense that they were intended by Parliament to bear. Courts are frequently criticised for their failure to do that. This failure is due not to cussedness but to ignorance of what Parliament intended by the obscure words of the legislation. *The courts should not deny themselves the light which Parliamentary materials may shed on the meaning of the words Parliament has used and thereby risk subjecting the individual to a law which Parliament never intended to enact.*<sup>217</sup>

Connected to the reliability concern, and in light of the American experience, it is further suggested that allowing the use of parliamentary debates to construe statutes may result in them becoming even less reliable, as members of Parliament would try to insert passages designed to influence judicial interpretation. This practice would constitute a manipulation and perversion, not only of the technique of interpretation,

<sup>210</sup> See Kilgour, *supra* note 91 at 787; and Baker, *supra* note 47 at 355-56.

<sup>211</sup> See Section III, above.

<sup>212</sup> C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964) at 512. See also Kilgour, *supra* note 91 at 789.

<sup>213</sup> See *e.g.* *Davis v. Johnson*, *supra* note 34; and *Hadmor Productions Ltd. v. Hamilton*, *supra* note 35.

<sup>214</sup> See Kilgour, *supra* note 91 particularly at 776.

<sup>215</sup> See Gall, *supra* note 145 at 385; and Kernochan, *supra* note 144 at 345-46.

<sup>216</sup> See Evans, *supra* note 54 at 287; Kernochan, *ibid.* at 352; and O. Hatch, “Legislative History: Tool of Construction or Destruction?” (1988) 11 Harv. J. L. & Pub. Pol’y 43 at 47.

<sup>217</sup> *Supra* note 9 at 637-38 [emphasis added].

but of the legislative process itself.<sup>218</sup> In reality, however, it would seem doubtful that members of parliament would deliberately fabricate or falsify parliamentary debates — “cook the books” as some say — in order to influence the judicial interpretation given to a statute.<sup>219</sup> Even if such were the case, it is highly unlikely that such a stratagem would go unnoticed, either by members of the opposition during the enactment, or by courts at the interpretation stage. The bottom line is that this consideration, in so far as it has merits, should go to the weight attributed to parliamentary debates and not to the question of whether they can be used by courts as an aid to statutory construction.

As a final pragmatic consideration, the human factor will be examined which, rather than supporting the exclusionary rule, actually encourages a realistic view of parliamentary debates. Judges, being people, are curious and, notwithstanding a total prohibition on the consultation of parliamentary materials, some of them cannot help but have a peek at the debates to elucidate the meaning of a statutory provision.<sup>220</sup> In *Davis v. Johnson*, at the Court of Appeal, Lord Denning M.R. unremorsefully confessed to have done just that:

Some may say — and indeed have said — that judges should not pay any attention to what is said in Parliament. They should grope about in the dark for the meaning of an Act without switching on the light. I do not accede to this view. In some cases Parliament is assured in the most explicit terms what the effect of a statute will be. It is on that footing that members assent to the clause being agreed to. It is on that understanding that an amendment is not pressed. In such cases I think the court should be able to look at the proceedings....And it is obvious that there is nothing to prevent a judge looking at these debates himself privately and getting some guidance from them. Although it may shock the purists, I may as well confess that I have sometimes done it. I have done it in this very case. It has thrown a flood of light on the position. The statements made in committee disposed completely of Mr Jackson's argument before us.<sup>221</sup>

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<sup>218</sup> See Bell & Engle, *supra* note 5 at 158-59; Bennion, *supra* note 5 at 452; Dickerson, *supra* note 5 at 82; Starr, *supra* note 78 at 376-77; C.P. Curtis, “A Better Theory of Legal Interpretation” (1949-50) 3 Vand. L. Rev. 407 at 411; G.B. Folsom, *Legislative History: Research for the Interpretation of Laws* (Charlottesville: University Press of Virginia, 1972) at 6; S.L. Wasby, “Legislative Materials as an Aid to Statutory Construction: A Caveat” (1963) 12 J. Pub. L. 262 at 264. For the view that ambiguity is sometimes left on purpose, see D. Payne, “The Intention of the Legislature in the Interpretation of Statutes” (1956) 9 Curr. Leg. Probs. 96 at 106.

<sup>219</sup> See Kilgour, *supra* note 91 at 788-89.

<sup>220</sup> See New Zealand Law Commission, *supra* note 59 at 48; Parker, *supra* note 93 at 504; and Samuels, *supra* note 140 at 97. See also M. Krauss, “Interprétation des lois — histoire législative — ‘La queue qui remue le chien’” (1980) 58 Can. Bar Rev. 756, where the author discusses the effect of the “secret law” in the case of *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473.

<sup>221</sup> [1978] 2 W.L.R. 182 at 192-93 (C.A.). See also the admission, to the same effect, of Lord Griffiths in *Pepper*, *supra* note 9 at 618: “[I referred to the Parliamentary materials] of course only to check if my interpretation had conflicted with an express Parliamentary intention.” Chief Judge Breitel, of the New York Court of Appeal, also admitted to have referred to parliamentary debates in a letter to R. Dickerson (21 August, 1978), reproduced in Dickerson, *supra* note 5 at 1134-35.

At the Appellate Committee, although the Lords upheld the Court of Appeal's decision, Lord Denning M.R. received a stern rebuke for his unorthodox views.<sup>222</sup> However, undeterred by such reprimands, he found an indirect way of using parliamentary debates, namely, when they are reproduced in some public documents or legal literature.<sup>223</sup> He even had the audacity to give the following advice in his book, *The Discipline of Law*:

Hansard is for the Judges a closed book. But not for you. You can read what was said in the House and adopt it as part of your argument — so long as you do not acknowledge the source. The writers of law books can go further. They can give the very words from Hansard with chapter and verse. You can then read the whole to the Judges.<sup>224</sup>

It goes without saying that such a practice is unacceptable, as it enables judges to consider parliamentary debates indirectly.<sup>225</sup>

This is an appropriate note on which to conclude this section on the ostensible rationales supporting the exclusionary rule on parliamentary debates: when a rule of law is no longer accepted, not by the citizens it regulates but by the judges themselves, it is probably time to implement change. Such a modification was finally introduced in England by the House of Lords in *Pepper*.<sup>226</sup> In other common law jurisdictions, the move has already been made<sup>227</sup> or is on the way,<sup>228</sup> either through legislative or judicial reform.

## Conclusion

This article began with a discussion of the origin of the British rule prohibiting the use of parliamentary materials as an aid to statutory interpretation, and its application — or rather its modification or simple repudiation — in England, Australia, New Zealand, the United States and Canada. The general principles of statutory construction were examined, and parliamentary debates as an interpretative aid were located in this general picture. Finally, to support the contention of this article — that the issue of parliamentary debates boils down to a question of weight and not of admissibility — the rationales underlying the exclusionary rule were analysed and, for the most part, refuted.

Having demonstrated that parliamentary debates should be permissible as an interpretive aid to ascertain legislative intent, it is appropriate to conclude by proposing

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<sup>222</sup> See *Davis v. Johnson*, *supra* note 34 at 337, *per* Viscount Dilhorne. This view was confirmed by the House of Lords in *Hadmor Productions v. Hamilton*, *supra* note 35 at 201.

<sup>223</sup> See *R. v. Local Commissioner for Administration of the North and East Area of England; Ex parte Bradford Metropolitan City Council*, [1979] 2 W.L.R. 1 at 20, [1972] Q.B. 300. See also Côté, *supra* note 87 at 411-12; and Gifford, *supra* note 49 at 132-34.

<sup>224</sup> *Supra* note 1 at 10.

<sup>225</sup> See Bennion, *supra* note 5 at 452.

<sup>226</sup> *Supra* note 9.

<sup>227</sup> See the section on Australia and the United States, Section II.A and C, above.

<sup>228</sup> See the section on New Zealand and Canada, Section II.B and D, above.

factors which may guide courts in determining the weight to give to statements made in Parliament. Before that, however, there is an aspect of the question that has yet to be discussed, that is whether it must be shown that the language of the statutory provision is ambiguous before using parliamentary materials.

As previously discussed, according to the test in *Pepper* resorting to parliamentary debates is permitted only if the “legislation is ambiguous or obscure, or leads to an absurdity.”<sup>229</sup> In the same case, Lord Oliver of Aylmerton added that “[i]ngenuity can sometimes suggest ambiguity or obscurity where none exists in fact.”<sup>230</sup> Is this requirement of an ambiguity in language essential, or is it merely a vestige of the plain meaning interpretive method?

Many legal commentators support the need to establish an ambiguity before using parliamentary debates to construe legislation based on the rule of law: citizens should be able to rely on the legislative text unless the ordinary language of the statute is ambiguous.<sup>231</sup> The obvious difficulty is deciding whether a statute is ambiguous or unambiguous<sup>232</sup> and this is, in effect, what may lead to legal uncertainty. In fact, the ambiguity requirement is misleading as it perpetuates the empty rhetoric of the plain meaning rule<sup>233</sup> which is now rejected by most courts.<sup>234</sup>

As Justice L’Heureux-Dubé phrased it in *Régie des permis*: “In reality, the ‘plain meaning’ can be nothing but the result of an *implicit process* of interpretation.”<sup>235</sup> Put another way, to hold that a legislative provision is clear or that it is ambiguous already constitutes an interpretation pursuant to statutory construction principles.<sup>236</sup> At the outset, virtually all legislation is ambiguous as it is susceptible to more than one reading. Ambiguity is a conclusion reached at the end of interpretation and it is illogical and fallacious to consider it as a preliminary threshold test. Rather, it is an inference that can only be made after a full assessment of legislative intent, using canons and rules

<sup>229</sup> *Pepper*, *supra* note 9 at 640, Lord Browne-Wilkinson.

<sup>230</sup> *Ibid.* at 620.

<sup>231</sup> See Côté, *supra* note 87 at 417; Bell & Engle, *supra* note 5 at 157; Evans, *supra* note 54 at 281-82; Davis, *supra* note 91 at 10; and Willis, *supra* note 149 at 10. For a review of the different types of ambiguous, obscure or apparently absurd legislation, see T.S.J.N. Bates, “The Contemporary Use of Legislative History in the United Kingdom” (1995) 54 Cambridge L.J. 127 at 139-45.

<sup>232</sup> See C.B. Nutting, “The Ambiguity of Unambiguous Statutes” (1940) 24 Minn. L. Rev. 509; and F.J. de Sloovère, “Extrinsic Aids in the Interpretation of Statutes” (1940) 88 U. Pa. L. Rev. 527 at 531-32.

<sup>233</sup> See Sullivan, *supra* note 3 at 430; and Kernochan, *supra* note 144 at 343-44.

<sup>234</sup> See Section IV, above.

<sup>235</sup> *Supra* note 133 at 997 [emphasis in original].

<sup>236</sup> See Côté, *supra* note 87 at 268; Zander, *supra* note 155 at 121-27; Singer, *supra* note 156 at 5-6; Eskridge, *supra* note 156 at 38-41; Radin, *supra* note 147 at 869; M. van de Kerchove, *L’interprétation en droit — Approche pluridisciplinaire* (Bruxelles: Facultés universitaires St-Louis, 1978) at 37; and F.E. Horach Jr., “In the Name of Legislative Intention” (1932) 38 W. Va. L.Q. 119 at 121.

of statutory construction, and appropriate interpretive aids, including legislative history.<sup>237</sup>

A related, but different, question is whether the information found in parliamentary debates can contradict the ordinary language of a legislative text. In this situation, based on the rule of law requirement that the statute book be a reliable guide to citizens, the language in the provision has to prevail over statements made in Parliament.<sup>238</sup> In other words, while the interpreters should not be confined *to* the text, when using interpretive aids such as parliamentary materials, they must still be confined *by* the text.<sup>239</sup> In *Pepper*, Lord Browne-Wilkinson expressed this view as follows:

The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?<sup>240</sup>

The position adopted by the courts in Australia, pursuant to section 15AB of the *Acts Interpretation Act 1901*,<sup>241</sup> is exactly that suggested here. Extrinsic aids may be referred to even if the statutory provision is "clear on its face,"<sup>242</sup> but these materials can only be used to confirm the literal sense of the language used in a statute and cannot contradict it.<sup>243</sup>

Except for rare cases in which there is a direct clash between the legislative text and the parliamentary debates, the latter should be taken into account — with more or less persuasive force — as an aid to ascertain the intention of Parliament in enacting the statutory provision at issue. However, it must be emphasised that although courts should be allowed to consider parliamentary debates, they must not feel bound by them.<sup>244</sup> Accordingly, what should be the factors to determine how much weight to attribute to statements made during the legislative process?

As a general principle it is submitted that the weight accorded to parliamentary debates should depend upon: i) the reliability of the source of information; ii) the contemporaneity with the actual legislative process; iii) the proximity to the legislative process; and iv) the context in which the information is to be found.<sup>245</sup> A special situa-

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<sup>237</sup> See Sullivan, *supra* note 3 at 430.

<sup>238</sup> See Dickerson, *supra* note 5 at 144; Bale, *supra* note 23 at 18; Kilgour, *supra* note 91 at 788; and Miers, *supra* note 173 at 107.

<sup>239</sup> See Frankfurter, *supra* note 4 at 543.

<sup>240</sup> *Supra* note 9 at 635.

<sup>241</sup> *Supra* note 52. See also Pearce & Geddes, *supra* note 7 at 47.

<sup>242</sup> Curran, *supra* note 56 at 706-07.

<sup>243</sup> See *Re Australian Federation of Construction Contractors; Ex parte Billing*, *supra* note 57 at 420; and *Mills v. Meeking*, *supra* note 57 at 21. See also, for New Zealand, *Real Estate House (Broadtop) Ltd. v. Real Estate Agency Licensing Board*, [1987] 2 N.Z.L.R. 593 at 596.

<sup>244</sup> See Bennion, *supra* note 5 at 467; Pearce & Geddes, *supra* note 7 at 47; and Styles, *supra* note 39 at 158.

<sup>245</sup> See W.K. Hurst, "The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria" (1980) 12 Pac. L.J. 189; and R.M. Rhodes, J.W. White & R.S. Goldman, "The Search for Intent: Aids to Statutory Construction in Florida" (1978) 6 Fla. St. U. L. Rev. 383.

tion is where the act explicitly refers to legislative history materials, most often in its preamble. In such cases, there is no doubt that considerable authority should be given to the information found therein as it is the express will of Parliament that such extrinsic aids be considered in construing the statute.<sup>246</sup>

As a result, speeches made by the responsible minister introducing a bill in the House of Commons will carry more weight than the statement of an opposition backbencher during the question period.<sup>247</sup> Likewise, speeches from the throne, detailed explanatory memoranda, as well as statements and responses made by the responsible minister during debates shall enjoy substantial persuasive force.<sup>248</sup> Whereas, in decreasing order of importance, statements made by other ministers, statements of government members in debate, and statements made by opposition members in debate will enjoy less credibility as to the meaning of the statutory provision. Regardless, the flexibility of any guideline is critical in order to take into account the particular circumstances of each enactment,<sup>249</sup> and the tentative hierarchy proposed here is by no mean absolute.

After having evaluated the extent to which the relevant parliamentary materials possess such qualities (reliability, authoritativeness, proximity and contextual value) to determine their interpretive weight, the balance of the decision is a matter of judicial discretion to ascertain the meaning to confer upon the legislative provision at stake, in light of the canons and rules of statutory construction and other interpretive aids. The likelihood of finding the "crock of gold"<sup>250</sup> in legislative history, as in *Pepper*, is quite slim but in *Themis's* scale of justice even a few carats will often be sufficient weight to tip it to one side.

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<sup>246</sup> See Bennion, *supra* note 5 at 448-49; and Bisson, *supra* note 135 at 64.

<sup>247</sup> See Côté, *supra* note 87 at 417-18.

<sup>248</sup> In *Pepper*, *supra* note 9, Lord Browne-Wilkinson said that it was most likely that only statements by the responsible minister would meet the test permitting limited use of parliamentary debates set out therein: "In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria" (*ibid.* at 634). See also Bates, *supra* note 231 at 145-48.

<sup>249</sup> See Bennion, *supra* note 5 at 473; and Dickerson, *supra* note 5 at 155.

<sup>250</sup> This expression comes from *Pepper*, *supra* note 9 at 637, where Lord Browne Wilkinson wrote: "If the rule is relaxed legal advisers faced with an ambiguous statutory provision may feel that they have to research the materials to see whether they yield the *crock of gold*, i.e., a clear indication of Parliament's intentions" [emphasis added].