

**PARLIAMENTARY DEBATES AND STATUTORY
INTERPRETATION:**

**SWITCHING ON THE LIGHT OR RUMMAGING IN
THE ASHCANS OF THE LEGISLATIVE PROCESS**

Gordon Bale*
Kingston

Effective communication is context-dependent. Yet until recently the prevailing view was that courts could not use legislative debates to interpret a statute. This exclusionary or non-recourse rule diminished the competence of Canadian and British courts to construe statutes in accordance with the intent of the legislators. This article examines the frail roots of this purported rule and the undemocratic values that it espoused. Reasons for the longevity of the rule are discussed as are the reasons for its imminent demise.

*Once purposive construction superceded the literal or plain meaning rule, the non-recourse rule became anomalous. This article contends that an 1849 statute of the former Province of Canada mandated purposive construction and that the exclusionary rule should have been rejected by our courts at that time or by 1880 when official verbatim reports of debates in the Canadian House of Commons began. The exclusionary rule survived but in recent years the Supreme Court of Canada has greatly eroded the rule in constitutional and to a lesser extent in criminal cases. The rejection of the exclusionary rule in Australia, New Zealand and now in Britain by the House of Lords in *Pepper v. Hart*, it is submitted will accelerate a definite erosion of the rule that was already well advanced in Canada. The article contends that there is an emerging convergence in the appropriate use of legislative history in statutory interpretation within the common law world which will also bring us closer to the approach of civil law jurisdictions.*

La communication efficace est dépendante du contexte. Jusqu'à récemment, l'attitude courante était que les cours ne pouvaient utiliser des débats législatifs pour interpréter une loi. Cette règle d'exclusion et de non-recours diminue la

* Gordon Bale, of the Faculty of Law, Queen's University, Kingston, Ontario. I wish to thank my colleagues, Denis Magnusson, K. Venkata Raman, Donald Stuart and particularly, John Whyte, for their helpful comments and criticism. I am also grateful to Stan Corbett and Jennifer Chandler for their editing assistance and suggestions.

compétence des cours **canadiennes** et britanniques à interpréter la loi conformément à l'intention **des législateurs**. Cet article examine les racines fragiles de cette prétendue **règle** et les valeurs antidémocratiques qu'elle épouse. Les raisons de la **longévité** de cette règle sont discutées ainsi que les raisons de sa fin prochaine.

Une fois que l'analyse **téléologique** a remplacé la règle du sens ordinaire, la règle de non-recours est devenue **anormale**. Cet article prétend qu'une loi de 1849 de l'ancienne Province du Canada commandait l'analyse téléologique et que la règle d'exclusion aurait dû être **rejetée** par nos cours, lorsque débuta les rapports officiels des débats **dans la Chambre des Communes du Canada**. Cette règle d'exclusion a survécu **mais dans** les récentes années, la Cour Suprême du Canada l'a considérablement réduite **dans** les affaires constitutionnelles, et à un moindre degré, dans les affaires criminelles. Le rejet de la règle d'exclusion en Australie, en Nouvelle-Zélande et **maintenant** en Grande-Bretagne par la Chambre des Lords dans l'arrêt *Pepper c. Hart*, devrait d'après l'auteur, accélérer l'affaiblissement certain de la règle qui était déjà très avancé au Canada. Cet article prétend qu'il se dégage **une** tendance dans l'utilisation appropriée de l'histoire législative dans l'**interprétation** de la loi à l'intérieur du monde de la common law et qui va aussi nous **amener** plus près de l'approche des juridictions du droit civil.

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Introduction

The House of Lords in *Pepper v. Hart*¹ decided that when a statute is unclear, ambiguous or leads to an absurdity, parliamentary debates may be consulted as an interpretive aid. This decision finally modified the exclusionary rule which prohibited recourse to parliamentary debates in interpreting a statute, a rule which had held sway, with several notable lapses, for more than two hundred years. The non-recourse rule, lacking a strong justification in either logic or history, finally became too anomalous to survive into the twenty-first century. While its demise might be regarded as inevitable because of the undemocratic value which it espoused, what is of interest is why the rule survived for as long as it did. After briefly discussing the origin of the rule and considering some of the possible reasons for its longevity, I will examine *Pepper v. Hart* and the factors which brought about the change. I will also contend that the rule should not have survived in Canada beyond 1849, or 1880 at the latest, and then discuss its present status in Canada. The abolition of the exclusionary rule in Australia and New Zealand will be briefly mentioned and developments in the United States noted.

I. Origin of the Rule

The rule excluding parliamentary history as an aid to interpretation is derived from *Millar v. Taylor* — a 1769 case involving the interpretation of the *Copyright Act* of 1709 — in which Willes J. stated that: “[t]he 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.”² This statement can be regarded as no more than *obiter dictum*. Willes J. cited no authority other than saying such “history is not known to the other house, or to the Sovereign.”³ He then promptly proceeded to ignore his own *dictum* by referring to the bill’s history, indicating that the original preamble was “infinitely stronger” and that “objections arose in the committee ... which ended in securing the property of copies for a term.”⁴ Aston J. also referred to the statute’s legislative history and cited the volume of the *Journal of the House of Commons* in which the petition appeared. He stated:

This Act was brought in at the solicitation of authors, booksellers and printers but principally of the two latter; not from any doubt or distrust of a just and legal property in the works or copyright, (as appears by the petition itself, pa. 240, vol. 16, of the *Journals of the House of Commons*)⁵

and he concluded that authors still retain a perpetual copyright in their published works which the statute does not abrogate.

¹ [1993] A.C. 593, [1992] 3 W.L.R. 1032.

² (1769), 4 Burr. 2302, 98 E.R. 201 at 217.

³ *Ibid.*

⁴ *Ibid.* at 217-218.

⁵ *Ibid.* at 227.

Yates J., dissenting, thought that parliament had no notion of perpetual copyright at common law and wished to give authors some security. This he noted was "plainly discoverable from the debate before it passed into law".⁶ Not only did Yates J. consult debates in the House of Commons but he went on to assert:

And afterwards, when the Lords would have struck out the clause restraining the authors with regard to the price, they came to a conference. The Commons said, they thought it reasonable that some provision should be made, "that extravagant prices should not be set on useful books." And the Lords gave it up.⁷

Finally, Lord Mansfield also briefly referred to proprietors initiating the bill "to secure their property for ever, by penalties" and that "an alteration was made in committee, to restrain the perpetual into a temporary security".⁸

Thus, the *dictum* that legislative history must not be consulted to interpret a statute was ignored by all four judges in the very case regarded as the font of the exclusionary rule. In addition, the only reason given by Willes J. for the *dictum*, namely that legislative history was not known to the "other house, or to the sovereign", was shown to be false, at least with regard to the "other house", by Yates J. who discussed the conference on the bill which took place between some members of the Lords and the Commons. It would appear that if *Millar v. Taylor* is to stand for any canon of construction it would be that common law rights are not to be abrogated except by clear statutory language. As Lord Mansfield stated, "[h]ad there been the least intention to take or declare away every pretence of right at the common law, it would have expressly enacted."⁹

Willes J.'s *dictum* was a frail and dubious foundation on which to construct a rule excluding legislative history as an aid to statutory interpretation. The only fair inference from *Millar v. Taylor* is that the supposed rule of exclusion of legislative history is not a canon of construction but simply a counsel of caution.¹⁰ All four judges resorted to legislative history, yet the court split three to one in holding that authors have a perpetual copyright with the *Copyright Act 1709* simply supplementing the owner's protection. As this case demonstrates, such history will often not solve difficult interpretational problems. Hard thinking about the meaning of statutes usually cannot be avoided by resort to debates and other legislative history.

⁶ *Ibid.* at 248.

⁷ *Ibid.*

⁸ *Ibid.* at 256.

⁹ *Ibid.*

¹⁰ This is the conclusion that D.G. Kilgour reached in "The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution" (1952) 30 Can. Bar Rev. 769 at 789. In *Mountain Park Coals Ltd v. M.N.R.*, [1952] Ex. C.R. 560 at 565, Thorson P. states: "While there are many instances where the Courts have resorted to the parliamentary history of an enactment in aid of its construction and while on grounds of principle it may be argued that the so-called rule should be regarded as a counsel of caution rather than a canon of construction, the weight of judicial authority supports the statement in Maxwell."

In 1774 the House of Lords, in *Donaldson v. Becket*,¹¹ declared common law copyright to have been superceded by statutory copyright. Thus, the ratio of *Millar v. Taylor* survived for only five years. Ironically, a fragile *dictum* enunciated by a single judge lasted for an additional two hundred and nineteen! Although the alleged rule excluding legislative history as an aid to statutory interpretation began its life as a counsel of caution, at least with reference to debates in the legislature, it had hardened into a clear rule before the end of the nineteenth century. Some of the possible explanations for this transition will be examined in the next section. Before proceeding, however, attention should be focused on two irreconcilable rules of construction.

Lord Coke's report of the Barons of Exchequer decision in *Heydon's Case* (1584) gave expression to what has become known as the mischief rule. Judges were to determine the pre-existing common law, the defect in the common law, the parliamentary remedy and the true reason for the remedy. Having done this "then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, ... and to add force and life to the cure and remedy, according to the true intent of the makers of the Act."¹² *Heydon's Case* does not condone a mere contextual analysis of the words of a statute to infer its meaning; rather it commands a purposive approach with the use of extrinsic aids to determine the true intent of the makers of the statute. In the nineteenth century, the literal rule largely displaced the much older mischief rule even though *Heydon's Case* continued to be cited.¹³ Thus while both rules require judges to determine the intent of the legislature when interpreting a statute, they discern that intent differently. Under the mischief rule one seeks to ascertain the subjective intent of the legislators and therefore parliamentary proceedings leading up to the enactment of the statute are relevant. Conversely adherents of the literal rule are interested in the objective legislative intent to be inferred primarily from the four corners of the statute and thus legislative history is regarded as irrelevant. Judges who adhered to the literal rule which triumphed in late nineteenth century England had an incentive to regard *Millar v. Taylor* as a rule of exclusion because this suggested that only an objective legislative intent could be effectively pursued. Thus their belief in the literal rule was reinforced. I will have occasion to return to the mischief rule and its modern counterpart, the purpose rule, a little later.

¹¹ (1774), 2 Bro. P.C. 129, 1 E.R. 837. The judges split 6 to 5 against a perpetual copyright at common law surviving the *Copyright Act 1709*. The tally may have been inaccurate. See M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard U. Press, 1993) at 99.

¹² (1584), 3 Co. Rep. 7a, 76 E.R. 637 at 638.

¹³ Law Commission and the Scottish Law Commission Report No.21 and No.11, *The Interpretation of Statutes* (London: H.M.S.O., 1969) at 15.

II. *What Gave Birth to the Exclusionary Rule and What Accounts for its Longevity*

A. *Publication of Debates was Illegal*

Among those reasons that have been given to explain the hardening of a counsel of caution into the rule of exclusion, the most significant would seem to be that "in England from 1628 to 1908 the reporting of debates in Parliament was forbidden".¹⁴ Surprisingly the British House of Commons did not publish official debates until 1909. However, from 1681 *Votes and Proceedings*, a daily record of things done rather than words spoken, has been published.¹⁵ It is readily understandable why during the Tudor and Stuart times the Commons needed the protection of secrecy. Disclosure of what was said in parliament could, and did, result in the imprisonment of members by monarchs who believed that they ruled by divine right and did not easily brook criticism. Nonetheless, freedom of debate was secured following the revolution of 1688. Article 9 of the *Bill of Rights* declared 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."¹⁶ The need for secrecy had disappeared but secrecy continued as the House came to regard the reporting of debates as a breach of privilege. There is an important difference, however, between reporting what is said in parliament and holding members to account outside parliament for what was said in parliament. The latter would clearly constitute a breach of privilege but it is difficult to understand the threat posed by the former, especially in a political community that was slowly becoming more democratic. Indeed, it may well have been the growing demand for democratic responsibility that simultaneously fuelled the public appetite for news of parliament and strengthened the resolve of parliamentarians to protect themselves from those whose displeasure might unseat them.

Without formal permission the press carried reports of debates based on notes surreptitiously recorded in the gallery of the house. In 1738, the House discussed this breach of privilege and prohibited further publication both during and following the session.¹⁷ However, in 1771, freedom of the press to report debates was effectively won by John Wilkes who rallied the London populace in his support. While the House continued to regard publication of debates as a formal breach of privilege no further attempts were made to prevent it.¹⁸ The reporting of debates had become so much a part of the routine of parliament that in 1803 the Speaker of the House assigned a fixed part of the gallery for press

¹⁴ K.C. Davis, "Legislative History and the Wheat Board Case" (1953) 31 Can. Bar Rev. 1 at 8.

¹⁵ Kilgour, *supra* footnote 10 at 784.

¹⁶ 1688, 1 Will. & Mar. sess. 2, c.2.

¹⁷ J. Redlich, *The Procedure of the House of Commons* vol. 2 (London: Constable & Co., 1908) at 37.

¹⁸ T.E. May, *The Constitutional History of England*, vol. 1 (London: Longmans, Green & Co., 1912) at 336-41.

reporters.¹⁹ With the 1803-4 session the Cobbett-Hansard series of parliamentary reports commenced and continued until displaced by the official reports in 1909.²⁰ In 1868 Chief Justice Cockburn in *Wason v. Walter* noted that:

[E]ach house of parliament does, by its standing orders, prohibit the publication of its debates. But practically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail.²¹

In the light of the foregoing it is apparent that only by elevating form over substance could it be said that the reporting of debates was forbidden after 1771.

B. *Deficiencies of Hansard*

A more robust historical reason for refusing to consult parliamentary debates would be their inaccuracy and incompleteness, at least before 1909. To cite but one well known example, Dr. Samuel Johnson, who reported parliamentary debates from 1740 to 1743, allegedly told his dinner companions when a speech made by Pitt was under discussion that he had written it in Exeter Street, having himself been in the gallery of the house but once. Dr. Johnson informed them that he had "composed the speeches in the form which they now have in the parliamentary debate" based solely on notes from employees of the newspaper present in the gallery. They "brought away the subject of discussion, the names of the speakers, the side they took and the order in which they rose, together with notes of the argument advanced in the course of debate."²² A staunch Tory, Dr. Johnson is also reported to have confessed that in his creative reconstruction of the debates "he took care that the Whig dogs should not have the best of it."²³ As recently as 1888, Lord Halsbury, the Lord Chancellor, thought that "some of the speeches which appear in Hansard never were really delivered as they appear in Hansard at all".²⁴

The Hansard family produced the Parliamentary Debates from 1812 to 1888 and, except for the final decade, relied entirely upon a collation of newspaper reports, mainly from *The Times*. Only in 1878 did Hansard employ a reporter in the gallery to supplement what was basically a clipping service.²⁵ Thus before 1909 there was nothing approaching a verbatim record of the speeches in the British House of Commons. Concern about the quality and

¹⁹ Redlich, *supra* footnote 17 at 38.

²⁰ H.D. Jordan, "The Reports of Parliamentary Debates 1803-1908" (1931) 34 *Economica* 437.

²¹ (1868), 4 L.R.Q.B. 73 at 95.

²² C. Ilbert, *Parliament: Its History, Constitution and Practice*, 3d ed. (London: Oxford U. Press, 1964) at 162.

²³ May, *supra* footnote 18 at 333.

²⁴ Jordan, *supra* footnote 20 at 439.

²⁵ *Ibid.* at 440.

incompleteness of the record might have helped to harden a rule of caution into a rule of exclusion. But this explanation of the change appears inadequate because the quality of the reporting undoubtedly was improving over time. For example, shorthand came into use in about 1812.²⁶ By 1836 only about one-third of the press reporting on parliament were shorthand writers, but by 1860 the longhand reporter had probably disappeared.²⁷ During the same period conditions in the gallery improved, thus facilitating better reporting. Yet another significant change occurred in 1875. Until that date a single member could, simply by informing the Speaker that he "espie(d) strangers", exclude the public, including press reporters, thereby causing a secret sitting. This practice effectively ceased in 1875. When taken together, rather than converting a counsel of caution into a rule of exclusion, these various developments should have led in precisely the opposite direction. The need for caution should have diminished as the quality of the reporting improved. However, throughout this period the courts became ever more strongly wedded to the exclusionary rule. It is to the courts themselves therefore that one must look if one is to understand the reasons for this change.

C. *Web of Connections*

The exclusion of parliamentary history may have appealed to the judiciary because it was compatible with certain other dominant themes in nineteenth century English legal and political culture. Chief among these would have been the idea of parliamentary sovereignty, the doctrine of the rule of law, the difficulty in determining legislative intent and, more generally, the rise of positivism. Indeed, one can clearly perceive these elements in an article by J.A. Corry who wrote:

Rules are binding because they emanate from the will of the legislature, and so we are inevitably preoccupied with the intention of Parliament. So long as we hold to this theory of law and political democracy, then, leaving aside interstitial law-making by judges, any new rule which is to have the imperative character of law must be attributed to this source, to the will and intention of Parliament.²⁸

Corry then emphasized that the will of parliament is a fiction and that "the furthest we can go without pretending that the fiction is true is to take the words deliberately and formally adopted by a majority in Parliament as embodying the will and intention of Parliament."²⁹ He contended that this justifies both the

²⁶ A. Aspinall, *Politics and The Press c.1780-1850* (London: Home & Van Thal, 1949) at 36.

²⁷ Jordan, *supra* footnote 20 at 445.

²⁸ J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954) 32 Can. Bar Rev. 624 at 625. At 627, Corry does acknowledge that this accepted theory of law "does less than justice to the subtleties of law-making in a complex society."

²⁹ *Ibid.* While conceding that the concept of legislative intent abounds with problems, I do not believe that Corry's dismissal of it can be accepted. See G. C. MacCallum, Jr., "Legislative Intent" (1966) 75 Yale L.J. 754 for a discussion of the Radin-Landis dispute about the existence and discoverability of legislative intent.

canon of literal interpretation and the related rule that excludes legislative history in the interpretation of statutes. In the heyday of positivism in the decades around the turn of the last century this kind of justification for excluding legislative history would have had a willing judicial following. This may be why the rule excluding legislative history does not become unassailable until about 1900.³⁰ It was during this same period after all that the pursuit of certainty which typified the late Victorian period led to a hardening in the rule of *stare decisis*.

Around the turn of the last century, the rule became gospel and was accordingly applied without discussion. Its best rationale had to await a time when the rule was under attack. Thus in 1975 Lord Wilberforce gave a clear justification based on the separation of powers and the rule of law stating:

Legislation in England is passed by Parliament, and put in the form of written words. This legislation is given legal effect upon subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has been devolved on the judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the rule of law — as distinct from the rule of the King or the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say.³¹

Although written by one of their twentieth century successors, this basis for the exclusionary rule would certainly have appealed to nineteenth century judges. Parliaments were to legislate and courts were to construe the statutes as enacted. More recently, Francis Bennion has insisted that the non-recourse rule is based on "comity, that is the courtesy and respect that ought to prevail between two prime organs of state: the legislature and the judiciary."³²

D. *Parol Evidence Rule*

Within the context of a general attitude toward the difference between parliament and the courts, there are more specific reasons which might account for the appeal of the rule. One of these may be seen in the remark by Byles J. in *Shrewsbury v. Scott*: "I do not think it is competent to a court of justice to make use of the discussions and compromises which attend the passing of the act; for that would be to admit parol evidence to construe a record."³³

This remark, which is consistent with the literal rule approach to statutory interpretation, allowed the courts to exclude legislative history by regarding it as analogous to parol evidence, thereby equating a statute with an ordinary commercial contract. Yet, such an equation requires one to ignore the possibility

³⁰ P. Brazil, "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1964) 4 U. of Queensland L.J. 1 at 5.

³¹ *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenberg A.G.*, [1975] A.C. 591 at 629, 2 W.L.R. 513 at 553 (H.L.).

³² F.A.R. Bennion, *Statutory Interpretation* (London: Butterworths, 1984) at 530.

³³ (1859), 6 C.B.N.S. 160, 141 E.R. 350 at 434.

that the differences between a statute and a private contract may be far more significant than their similarities. C.K. Allen, for example, contended that excluding legislative history deprives a statute "of all its clothing and leave(s) only its naked, bony frame for clinical examination."³⁴ Noting that private written transactions were governed by strict rules of evidence, Allen stated that: "[i]t may well be questioned whether instruments of government are not of too wide import to be bound with the same trammels as private transactions."³⁵ Kilgour also concluded that considerations making the parol evidence rule rational when applied to private written documents "lose much of their weight when the rule is applied to statutes."³⁶

The parol evidence rule should probably not have been a very persuasive factor in excluding legislative history but it did appeal to the judiciary. Nineteenth century judges may have become convinced, however, that part of the judicial function was to preserve the integrity and reliability of the statute book in order to promote the rule of law. Lord Diplock gave a recent expression from this perspective when he said:

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. That any or all of the individual members of the two Houses of the Parliament that passed it may have thought the words bore a different meaning cannot affect the matter. Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed.³⁷

Allowing the intention of legislators to bestow meaning on language which it cannot fairly bear admittedly undermines the rule of law. But equally the reliability of statutes is jeopardized by permitting a professional code of interpretation to prevail if this code is foreign to the way ordinary citizens give meaning to statutes.

The problem of the exclusion of legislative history in order to secure the integrity of statutes is presented in acute form when the judge has drafted a statute which must be interpreted. Lord Westbury in *Re Mew & Thorne* wrote:

I have endeavoured, so far as possible for one who wrote the words and knew the meaning intended to be conveyed to divest my mind of all impressions received from the past, and to consider the language as if it were now presented to me for the first time.³⁸

Presumably this impossible psychological feat would only be attempted by a person who placed paramount importance on preserving the reliability of

³⁴ C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964) at 511.

³⁵ *Ibid.* at 512.

³⁶ Kilgour, *supra* footnote 10 at 789.

³⁷ *Supra* footnote 31 at 638 (A.C.), 541 (W.L.R.).

³⁸ (1862), 31 L.J. Bky. 87 at 89.

statutes. Lord Halsbury who had been involved in drafting the *Companies Act* said that “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.”³⁹ The value implicit in this is that the citizen should be entitled to rely upon the authoritative text. However, this argument can hardly persuade where the statute itself is unclear. In such cases there can be no reliance interest; therefore the exclusion of legislative history cannot be justified on this ground in precisely those cases in which it is most likely to be helpful.

E. Antipathy to Statute Law

Another explanation for the hardening of the non-recourse rule may be found in the earlier judicial antipathy to statute law — an antipathy with a long tradition dating back to Sir William Blackstone. His *Commentaries on the Laws of England*, first published between 1765 and 1769 celebrated and glorified the perfection of the common law. Even as a student at the Middle Temple, at a time when there was comparatively little legislation, Blackstone complained of the coarse workmanship of statutes which were destroying the harmony of the common law. Writing to a relative he said:

I have sometimes thought that ye Common Law, as it stood in Littleton's Days, resembled a regular Edifice: where ye Apartments were properly disposed, leading one into another without Confusion; where every part was subservient to ye whole, all uniting in one beautiful Symmetry: and every Room had its distinct Office allotted to it. But as it is now, swoln, shrunk, curtailed, enlarged, altered & mangled by various & contradictory Statutes &c; it resembles ye same Edifice, with many of its most useful Parts pulled down, with preposterous Additions in other Places, of different Materials & coarse Workmanship: according to ye Whim, or Prejudice, or private Convenience of ye Builders. By which means the Communication of ye Parts is destroyed, & their Harmony quite annihilated.⁴⁰

Sir Frederick Pollock writing in 1882 also indicated that judges continued to regard statute law as an unwelcome intruder into the perfect domain of the common law. In referring to rules of statutory interpretation he said: “Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.”⁴¹ With the great increase in social legislation and the resort to administrative tribunals which has occurred in this century, some judges who were unsympathetic to these developments may have hidden their prejudice behind the selective use of conflicting canons of construction in their attempt to emaciate such legislation. The non-recourse rule aided them in this endeavour.

³⁹ *Hilder v. Dexter*, [1902] A.C. 474 at 477 (H.L.).

⁴⁰ Letter dated 28 Jan 1745 which is reprinted in (1918-19) 32 Harv. L. Rev. 974 at 975-76.

⁴¹ F. Pollock, *Essays in Jurisprudence and Ethics* (London: Macmillan, 1882) at 85.

Some judicial antipathy to administrative law and to government bureaucracy surfaced in the 1920's and 30's as exemplified by Lord Hewart's book *The New Despotism*.⁴² Ivor Jennings writing in the 1930's thought that the "rules of interpretation are inextricably confused"⁴³ and permitted judges to conceal their bias against social reform. He advocated a return to *Heydon's Case* and the mischief rule. John Willis, noting that *Hansard* could not be used as an interpretive aid, wrote that a judge's reference to legislative intent was simply polite notice that he was about to speculate on the social policy of the statute. He continued, "[a] court's speculation about the policy of statutes dealing with 'lawyer's law' is very likely to be right: about the policy of social reform statutes, of which it is almost certainly ignorant, and to which it is probably hostile, very likely to be wrong."⁴⁴

F. *Role as Protector of Citizens*

Canons of interpretation can be manipulated to defeat the purpose of the statute by an unsympathetic court. However, they can equally be used to protect what the judiciary regards as fundamental rights. If one has no entrenched bill of rights, important values can be protected by the judiciary assuming that parliament could not have intended to oust the jurisdiction of the court or take away important common law rights. By requiring clear and specific laws, courts traditionally could and did provide the citizen with important protection. A court perceiving its chief role to be the protector of the citizen from unwarranted government action would tend to endorse the exclusion of parliamentary debates. The exclusion permits such a court to uphold fundamental principles whether or not parliament intended such principles to continue. Resort to *Hansard* would make the provision of this protection more difficult — certainly in those cases where the responsible minister had so informed the House that the purpose of the bill was in fact to modify certain basic principles. This, I believe, is perhaps the major reason that the courts have for so long perpetuated the exclusionary rule. This rule enhanced the ability of the court to check the power of parliament and that of a cabinet which dominates parliament through party discipline. But such protection, lacking a firm constitutional foundation, was often uncertain and arbitrary. An entrenched *Charter of Rights* renders this protective technique superfluous.

The traditional antagonism toward statutory law and the desire to protect the rights of the individual are, in effect, two sides of the same coin. In both cases the relationship between the courts and the legislature is basically one of mistrust. As noted above, the nineteenth century saw a hardening of the boundary between parliament and the courts and the exclusionary rule fits within this general trend. The relationship between parliament and the courts

⁴² G. Hewart, *The New Despotism* (London: Benn, 1929).

⁴³ W.I. Jennings, "Courts and Administrative Law — The Experience of English Housing Legislation" (1936) 49 Harv. L.R. 426 at 452.

⁴⁴ J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1 at 4.

has been changing throughout the present century as courts have become increasingly involved in the governmental process. Once courts recognize that they have an obligation to make statutes as workable and effective as possible the argument in favour of admitting debates becomes compelling. Consideration will now be given to the House of Lords' decision in *Pepper v. Hart*.

III. *Pepper v. Hart*

Pepper v. Hart was initially a run of the mill tax case involving the valuation of a fringe benefit. The taxpayers were nine teachers and the bursar of Malvern College who took advantage of a scheme which permitted staff members to have their children educated at the school for only 20% of the fees payable by the public. As higher-paid employees they were required to include in their income, as a benefit of employment, the cash equivalent of the benefit which s. 63(1) of the *Finance Act 1976* defined as "an amount equal to the cost of benefit less so much (if any) of it as is made good by the employee to those providing the benefit." The taxpayers contended that the cost of the benefit was the additional or marginal cost of educating an additional student in a school that had surplus capacity and, since this was less than the concessionary fees paid by them, the cash equivalent of the benefit was nil. The Revenue contended the cost of the benefit was the same for all pupils, namely, the average cost of educating each pupil. The taxpayers won before the special commissioner but the decision was reversed by Vinelott J., and that decision was affirmed by the Court of Appeal. The taxpayers then appealed to the House of Lords. After the first hearing before a panel of five Law Lords, three supported the assessment made by the Revenue and two would have held for the taxpayers. However, before the Lords rendered their decision, the debate in the House of Commons in 1976 concerning the Finance Bill came to their attention. The Financial Secretary in reply to a specific question about the tax treatment of concessionary fees for children of school staff stated that "the benefit will be assessed on the cost to the employer, which would be very small indeed in this case."⁴⁵ Hansard clearly indicated that in determining the benefit to the employee the marginal cost and not the average cost was intended under the *Finance Act 1976*.

The litigants were invited to consider whether they wished to argue that this was an appropriate case to depart from previous authority forbidding reference to Hansard. They did, and the case was listed for rehearing before a committee of seven, including the Lord Chancellor. For the first time the Law Lords considered detailed arguments on the extent to which Hansard could be used in the courts of the United Kingdom. All but the Lord Chancellor held that debates can be used as an aid to statutory construction but only 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;

⁴⁵ H.C. Debates, 22 June 1976, col.1095 (U.K.).

c) the statements relied upon are clear.⁴⁶

The surprising feature of the decision is the degree of consensus that existed among the Law Lords. Only the Lord Chancellor dissented and he did so solely on the basis of a practical objection and not one of principle. He was concerned about the possibility of an immense increase in the cost of litigation involving statutory construction. He emphasized that the costs of litigation were a matter of public concern and that he was unwilling to depart from the exclusionary rule unless assured by an inquiry that no substantial increase in costs would result. He did not, however, find the objections in principle to be strong and was prepared to depart from the rule but for his concern about costs. He agreed with the submission of Mr. Lister, counsel for the taxpayers, that consulting *Hansard* was

a way of making more effective proceedings in Parliament by allowing the court to consider what has been said in Parliament as an aid to resolving an ambiguity which may well have become apparent only as a result of the attempt to apply the enacted words to a particular case.⁴⁷

Thus, the Lord Chancellor saw no merit in the Attorney-General's argument that using *Hansard* in court was an infringement of article 9 of the *Bill of Rights 1688* which provides 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." He specifically agreed with Lord Browne-Wilkinson's majority judgment on this issue.

The only Law Lord, among the six in the majority, who confessed to being a "reluctant convert" to referring to *Hansard* as an aid to interpreting a statute was Lord Oliver of Aylmerton. His reluctance stemmed from the rule of law argument that a citizen had a right to rely upon a statute as enacted. He thought caution was required "in opening the door to the reception of material not readily or ordinarily accessible to the citizen".⁴⁸ However, he acknowledged that language "is not always a reliable vehicle for the complete or accurate translation of legislative intention" and as a result he was persuaded that "there is both the room and the necessity for a limited relaxation of the previously well-settled rule which excludes reference to Parliamentary history as an aid to statutory construction."⁴⁹ Although he stressed the limited nature of the modification of the exclusionary rule he entirely agreed with the chief majority decision. He

⁴⁶ *Supra* footnote 1 at 640 (A.C.), 1061 (W.L.R.). The law lords unanimously held for the taxpayers. The Lord Chancellor, without resorting to *Hansard*, stressed that the college made available only surplus places to the taxpayers' sons and consequently incurred no expense in providing the benefit. Alternatively, he maintained that the taxpayers should win as his construction was a possible one and any ambiguity should be resolved in their favour. However, the old black letter rule that any ambiguity in a tax statute should be resolved against the Crown is totally inconsistent with all the other law lords who accept a purposive construction for all statutes.

⁴⁷ *Ibid.* at 614 (A.C.), 1037 (W.L.R.).

⁴⁸ *Ibid.* at 620 (A.C.), 1042 (W.L.R.).

⁴⁹ *Ibid.*

concluded that the relaxation of the rule would not lead to any significant increase in litigation costs or in the burden of research necessary to render legal advice.

Lord Bridge of Harwich supported the Revenue's assessment after the first hearing but when the Hansard material came to his attention he thought it could not be right to impose a tax when the Financial Secretary to the Treasury had assured Parliament this was not the purpose of the *Finance Act*. He held the opinion that seldom would the promoter of the legislation clearly address the interpretational problem subsequently faced by the court. With a limited relaxation of the exclusionary rule, he thought that neither the additional litigation costs nor any other basis of objection could "justify the court continuing to wear blinkers which ... conceal the vital clue to the intended meaning of an enactment".⁵⁰ He conceded that practitioners might incur fruitless costs looking for a non-existent vital clue but "where Hansard does provide the answer, it should be so clear to both parties that they will avoid the cost of litigation".⁵¹

Lord Griffiths in his concurring opinion stated that he had long thought there was a need to change the self-imposed rule excluding legislative history. An ever increasing volume of statutes must inevitably produce more unanticipated ambiguities. Where the language proved to be ambiguous, Lord Griffiths said, there was "no sound reason not to consult Hansard."⁵² Since the courts have long abandoned a strict constructionist view in favour of a purposive approach therefore, "[w]hy then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?"⁵³ He also gave no credence to the Lord Chancellor's opinion that consulting Hansard would "add so greatly to the cost of litigation, that on this ground alone we should refuse to do so".⁵⁴ He confessed that on many occasions he had consulted Hansard but "only to check if my interpretation had conflicted with an express Parliamentary intention."⁵⁵ Such research he insisted did not take long and modern technology would assist in the recall and display of such material. If research resolves an ambiguity "it will in future save all the expenses that would otherwise be incurred in fighting the rival interpretations through the courts."⁵⁶ Lord Griffiths thought "this case provides a dramatic vindication of the decision to consult Hansard"⁵⁷ because otherwise a heavy burden of taxation would have been imposed contrary to the intent of parliament.

⁵⁰ *Ibid.* at 617 (A.C.), 1040 (W.L.R.).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 618 (A.C.), 1040 (W.L.R.).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at 619 (A.C.), 1042 (W.L.R.). The remaining two law lords simply concurred with Lord Browne-Wilkinson.

Lord Browne-Wilkinson in the main opinion covered all the points that were raised. He reviewed the case law to determine reasons for adhering to the exclusionary rule which he summarized as:

[F]irst, that it preserves the constitutional proprieties leaving Parliament to legislate in words and the courts (not Parliamentary speakers) to construe the meaning of words finally enacted; second, the practical difficulty of the expense of researching Parliamentary material which would arise if the material could be looked at; third, the need for the citizen to have access to a known defined text which regulates his legal rights; fourth, the improbability of finding helpful guidance from Hansard.⁵⁸

He saw some merit in all these arguments but concluded that “as a matter of law, there are sound reasons for making a limited modification to the existing rule.”⁵⁹ His reason for reaching this decision he said was based on principle — the duty of the court to give effect to the true intentions of the legislature. He indicated that where words are capable of two possible meanings which cannot be resolved by a careful contextual reading with other parts of the legislation, the courts are presently compelled to select one meaning using highly technical rules of construction. After conceding that often Hansard will not throw any light on the matter, although in a few cases it may, he asked two compelling rhetorical questions:

Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? 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?⁶⁰

The Attorney-General advised the Law Lords that the Clerk of the House of Commons had suggested in a letter addressed to him that referring to Hansard to construe a statute might be a breach of the privileges of that House.⁶¹ This would appear to be a peculiar privilege — a privilege to have its legislation misconstrued even though resort to Hansard might prevent this from occurring. However, it might also indicate that the House of Commons was satisfied with the current division of functions between the legislature and the courts. Lord Browne-Wilkinson insisted that the relaxation of the rule of exclusion would not involve impeaching or questioning what was said in parliament contrary to the *Bill of Rights 1688* because

[t]he purpose of looking at Hansard will not be to construe the words used by the minister but to give effect to the words used as 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.⁶²

⁵⁸ *Ibid.* at 633 (A.C.), 1054 (W.L.R.).

⁵⁹ *Ibid.* at 634 (A.C.), 1056 (W.L.R.).

⁶⁰ *Ibid.* at 635 (A.C.), 1056 (W.L.R.).

⁶¹ Formerly, the House of Commons held the view that a reference to its debates in judicial proceedings constituted a breach of its privileges and required a petition for leave in each case. On 31 October 1980, the House resolved to give leave for references to be made to its debates in court proceedings without a prior petition. This explains the puzzling insistence by Lord Scarman in *Davis v. Johnson*, [1979] A.C. 264 at 350 that the non-recourse rule is “not the creation of the judges” but a rule “maintained by Parliament.”

⁶² *Supra* footnote 1 at 638 (A.C.), 1060 (W.L.R.).

The Attorney-General argued that such an interpretation of article 9 did not conclude the issue. He insisted that "the House of Commons would regard a decision ... to use Hansard to construe a statute as a grave step."⁶³ However, because neither the Clerk of the House nor the Attorney-General were able to identify the specific nature of the reputed privilege extending beyond article 9 of the *Bill of Rights*, the judge admitted Hansard for "[t]he purpose is to give effect to, not thwart, the intentions of Parliament."⁶⁴

This case represents a remarkable about turn in that less than ten years before the House of Lords had reaffirmed the exclusionary rule.⁶⁵ But in a sense *Pepper v. Hart* was an easy case. A bureaucracy, the Revenue, was administering a law in a way inconsistent with the assurances the financial secretary had given to parliament. Referring to Hansard permitted the Law Lords to don the mantle of protectors of the citizen while at the same time deriving guidance from Hansard. This fortunate coincidence will not always occur. This case therefore may turn out to be yet another step towards making an entrenched charter of rights probable for Britain.

IV. *Reasons for the Demise of the Exclusionary Rule in Britain*

A number of reasons combined to bring about the demise of the exclusionary rule. Perhaps the most important is the move toward a purposive approach to statutory interpretation that has gained momentum in Britain in the last four decades. Also the volume and complexity of modern statutes has required the judiciary to seek greater knowledge of the legislative context in order to construe them properly. There has been growing realization that the canons of interpretation are simply a grab bag of conflicting presumptions that offer little guidance to the proper interpretation of statutes. The powerful European influence exerted through greater contact with decisions of the European Court of Justice and the European Court of Human Rights has reinforced the advantage of a purposive approach to legislation in place of literal interpretation. Commonwealth countries, particularly Australia and New Zealand, have thrown out the traditional exclusionary rule. That this has been achieved without adverse consequences has exerted an influence in Britain. Another factor is that in spite of the rule judges frequently do look to the debates for guidance or to check that their interpretation accords with the purpose of the statute. Many counsel regarded this surreptitious peek at Hansard to be unfair to litigants because the exclusionary rule prevented them from making any submissions about the relevance and weight to accord the parliamentary record. Finally courts do not focus solely on the statute but look to extrinsic aids such as Reports of Royal Commissions, Law Commission Reports and White Papers at least to perceive the problem with which the statute was intended to cope. Admitting these extrinsic aids while excluding the sometimes more relevant parliamentary

⁶³ *Ibid.* at 645 (A.C.), 1066 (W.L.R.).

⁶⁴ *Ibid.* at 646 (A.C.), 1067 (W.L.R.).

⁶⁵ *Hadmor Productions Ltd. v. Hamilton*, [1983] 1 A.C. 25, [1982] 2 W.L.R. 322 (H.L.).

debates became logically indefensible.⁶⁶ In view of the purposive approach to statutory interpretation the highly artificial distinction between looking for the mischief and not the intent appeared increasingly technical and inappropriate. Finally, counsel by wisely arguing for only limited modification of the exclusionary rule finessed the rule of law requirement that the statute book must remain a reliable guide to the citizen. *Hansard* will only be consulted when legislation is ambiguous, obscure or leads to an absurdity.⁶⁷ The courts as interpreters will still be confined by the text but in the case of ambiguity they will not be confined to it. The appropriate separation of powers between parliament and the courts will be preserved.

V. Debates Should not have been Excluded in Canada

I contend that in Canada the rule excluding parliamentary debates should not have persisted beyond 1849 or 1880 at the latest. In 1849 the legislature of the United Province of Canada enacted the *Interpretation Act*, containing the first statutory codification of the mischief rule which may perhaps be more accurately called the purpose rule as statutes now do far more than correct defects in the common law. It provided that every Act and every provision

shall be deemed remedial, whether its immediate purport be to direct the doing of any thing which the Legislature may deem to be for the public good or to prevent or punish the doing of any thing which it may deem contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to their true intent, meaning and spirit.⁶⁸

This statute was prepared by the second reform administration, the La Fontaine-Baldwin ministry. Although the bill was first introduced into the Legislative Council by James Leslie, the provincial secretary, and then into the Legislative Assembly by Robert Baldwin, the Attorney-General for Canada

⁶⁶ The illogicality has not been perceived by everyone. Lord Hailsham in "Obstacles to Law Reform" (1981) 34 Current Leg. Prob. 279 at 289 stated: "Having now some judicial experience myself I do not believe that in all cases it is possible to construe a complex modern statute in a field in which one is not already an expert without some knowledge of the legislative context, and, whilst I would forbid the use of *Hansard* almost over my dead body, Blue Books and textbooks, and learned articles in the Press, although they are to be used with the utmost caution, are almost necessary adjuncts to the proper understanding of the subject."

⁶⁷ My colleague, John Whyte, insists that the trick is to distinguish between using legislative history to *resolve* ambiguity and using legislative history to *reveal* ambiguity. I would agree that once litigation begins the distinction becomes exceedingly fine because lawyers by training and culture seek out and exploit all possible ambiguities for the benefit of their clients. We should also recognize that courts will not comfortably reject evidence that demonstrates latent ambiguity in a statute.

⁶⁸ (1849) 12 Vict. c.10, s. 5-28. Canada, its provinces and territories all have a provision in their *Interpretation Act* based on this 1849 statute. However, but for those of Ontario and Quebec, the section has been so modified that it can now be read as not inconsistent with objective intention.

West and co-premier, there can be little doubt that it was the work of the latter.⁶⁹ Robert Baldwin and the reform ministry probably anticipated that the judiciary, in 1849 still largely in the camp of the Family Compact, would be ill-disposed towards their legislative initiatives. Thus the codification of the mischief rule constituted a statutory exhortation to judges to set aside their predispositions and to interpret legislation according to its true intent and spirit.

This statutory provision combined with the principle of legislative sovereignty requires the rule of literal interpretation to be totally superceded by the purpose rule. The legislature required judges to give a "fair, large and liberal construction" so as to attain the object of the Act "according to their true intent, meaning and spirit." By so doing the legislature would also appear to have been mandating the use of legislative history, including debates, in order to ascertain intent, meaning and spirit. This could have been read as legislatively overruling *Millar v. Taylor*. But none of this happened. Early Canadian judges may have thought the legislature had no business offering advice about the interpretation of statutes. Alternatively because the Privy Council remained at the apex of the Canadian judicial system for a full century after the codification of the mischief rule in 1849, and no comparable legislative development occurred in Britain, it may have been inevitable that the literal approach of the Privy Council would prevail.⁷⁰ Yet another reason might be the fact that the debates in the colonial legislatures before 1867 were not generally official records and suffered from many defects.⁷¹ If this latter reason constituted the stumbling block to resorting

⁶⁹ The Journals of the Province of Canada indicate that James Leslie introduced the Bill on 1 March 1849 into the Legislative Council and on 12 March 1849 Robert Baldwin moved first reading of the Bill in the Legislative Assembly. On 25 April 1849, Lord Elgin, the Governor-General, gave assent to a number of Bills among them being the Interpretation Bill and the Rebellion Losses Bill. The latter bill provided compensation to Lower Canadians whose property had been damaged in the Rebellion of 1837-38 and was modelled on legislation previously enacted for Upper Canadians. That evening an English-speaking mob in Montreal burned the Parliament buildings. The Interpretation Bill thus had a baptism by fire.

⁷⁰ It would have been anomalous to apply purposive construction to ordinary statutes and to apply a literal interpretation to the constitution because it was an Imperial statute to which our *Interpretation Act* would not reach. However, the constitution was made in Canada and was arguably only in form a British statute and thus domestic rules of interpretation should perhaps have been relevant. Lords Watson and Haldane who have been dubbed the step-fathers of Confederation both fully subscribed to the literal rule of interpretation. Lord Watson in *Salomon v. Salomon & Co.*, [1897] A.C. 22 at 38 stated "what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." Viscount Haldane in *Lumsden v. I.R.C.*, [1914] A.C. 877 at 887 said that the duty of the court is to construe the words "as they stand, with only such extraneous light as is reflected from within the four corners of the statute itself, read as a whole."

⁷¹ See M. McLean "Early Parliamentary Reporting in Upper Canada" (1939) 20 Can. His. Rev. 378 and also J. Ward, *The Hansard Chronicles* (Ottawa: Deneau & Greenberg, 1980) at 26-32 for early reporting in Canada and at 51-54 for reporting in the Maritimes.

to debates, the introduction of official reports for the House of Commons in 1880 should have eliminated this problem at the national level.⁷²

New Zealand in 1888 followed the much earlier Canadian lead in legislatively adopting the mischief rule. However, in 1963, D.A.S. Ward indicated that even though the provision had been in force for 75 years the New Zealand courts had largely ignored it being "so busy cultivating the trees that they lost sight of the pathway provided by Parliament."⁷³ The Law Commission had suggested that the statutory enactment of the mischief rule failed to have an impact because "it makes no contribution to the problem of how the mischief and the remedy envisaged by the legislature are to be ascertained."⁷⁴ This excuses the judiciary too easily. Once the legislature mandates purposive interpretation everything that is logically relevant to determining the intent of the legislature should be admissible and this must include debates. Thus it is my contention that debates in Canada should have been admitted after 1849, or 1880 at the latest, to determine the purpose of a federal statute and, where there was ambiguity, as an aid to interpretation. This is an example of the failure of Canadian judges to establish a distinctive judicial tradition in spite of legislative encouragement to do so.⁷⁵

VI. *The Current Canadian Position*

Driedger said "It is well-established that debates or materials before Parliament are not admissible to show Parliamentary intent."⁷⁶ Gall contends that in interpreting a statute

[a] judge may not examine any of the legislative debates contained in Hansard nor any speeches given by, for example, the minister responsible for the bill, nor any proceedings or reports of a parliamentary committee, nor any other extrinsic aid of that nature.⁷⁷

⁷² Sir John A. Macdonald attached great importance to verbatim reports of debates in the House of Commons. See Ward, *ibid.* at 143-45.

⁷³ [1963] N.Z.L.J. 293 at 296.

⁷⁴ *Supra* footnote 13 at 20. In footnote 79 on that page the Law Commission apparently thought that Canada's original *Interpretation Act* was modelled on that of New Zealand rather than the reverse.

⁷⁵ In *Reference the Certain Titles to Land in Ontario* (1973), 35 D.L.R. (3d) 10 at 40, the Ontario Court of Appeal in a joint judgment said "In our reasons for judgment herein we have cited many English authorities relating to statutory construction. The English *Interpretation Act* does not appear to contain a provision similar to s.10 of the Ontario *Interpretation Act*, R.S.O. 1970, c.225, but it would not appear that the absence of such a provision from the English Act has deterred our Courts from applying substantially the same principles of statutory interpretation as those recognized and applied in England." One can only reply that perhaps it should have been otherwise. However, official reports of debates in the Ontario legislature were not published until 1947. Another factor depriving section 10 of meaning has been the deference Canadian judges have given to English texts such as P.B. Maxwell, *The Interpretation of Statutes* and W.F. Craies, *Statute Law*. Maxwell has gone through twelve editions, the first in 1875, and Craies through seven but it was based on H. Hardcastle, *Statute Law* first published in 1879.

⁷⁶ E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 156.

⁷⁷ G.L. Gall, *The Canadian Legal System*, 3d ed. (Toronto: Carswell, 1990) at 319. Gall indicates that there are exceptions to this rule.

Côté states that until recently legislative history “could not be cited before the courts as proof of the legislator’s intent” but now the situation is uncertain.⁷⁸ Hogg writes that “[l]egislative history has usually been held inadmissible in Canada under the ordinary rules of statutory interpretation.”⁷⁹ He does emphasize that since 1975 the Supreme Court of Canada has permitted citing of the legislative history of the *Constitution Act, 1867*, including debates, for the purpose of interpreting its language and this applies equally now to the *Constitution Act, 1982*. Also when the constitutional validity of a statute is challenged, legislative history, including debates, is admissible. In judicial review focused on federalism issues, debates are used to determine the appropriate classification of the challenged law. In *Charter* challenges debates assist in determining “whether the purpose of the challenged statute was to infringe a Charter right” and where an infringement is found “to determine whether the statute is justified as a reasonable limit under s.1.”⁸⁰

With such extensive use of debates for constitutional law purposes, we should expect a spill-over into other areas where assistance might be needed in determining the meaning of ambiguous statutes. In fact this has occurred on several occasions in the Supreme Court of Canada. In *R. v. Vasil*, Lamer J., in a majority judgment, sought to determine the meaning of section 212(c) of the *Criminal Code* and referred to Sir John Thompson’s remarks recorded in Hansard of April 12, 1892 which “clearly confirms that all that relates to murder was taken directly from the English Draft Code of 1878” and that “Canada adopted not only the British Commissioners proposed sections but also their reasons.”⁸¹ Lamer J. warned that “[r]eference to Hansard is not usually advisable”⁸² but did not indicate clearly when it was permissible. Graham Parker suggested that the reference to Hansard might be rationalized on the ground that the *Criminal Code* is a basic document analogous to a constitution or alternatively, that courts are entitled to look at the speeches of the Ministerial sponsor of a bill but not remarks of back-benchers.⁸³ The second rationale may emerge as a significant qualification to the exclusionary rule.

Brian Dickson, in his Goodman Memorial lecture in 1979, stressed that in the *Anti-Inflation Act Reference*⁸⁴ the Supreme Court of Canada had “signalled

⁷⁸ P.A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1991) at 354.

⁷⁹ P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1285.

⁸⁰ *Ibid.*

⁸¹ [1981] 1 S.C.R. 469 at 487. Lamer J. in the judgment of the court in *R. v. Mailloux*, [1988] 2 S.C.R. 1029 at 1042 quoted a statement made by the Minister of Justice Davie Fulton in the House of Commons to determine whether the role of appeal courts is different when dealing with matters of insanity and to interpret s.613(1)(d) of the *Criminal Code*. Again no constitutional issue confronted the court.

⁸² *Ibid.*

⁸³ G. Parker, Case Comment (1982) 60 Can. Bar Rev. 502 at 504.

⁸⁴ [1976] 2 S.C.R. 373.

an increasing receptiveness to the use of extrinsic materials”⁸⁵ and predicted enhanced use in the future. He noted the traditional judicial reluctance to examine the legislative history of a statute and to ask instead “what does the statute say?”⁸⁶ He then challenged this tradition.

Today, however, I wonder if it is sufficient to accept this approach as an adequate discharge of the court’s duty. In my view, resort to both legislative history, *including Hansard*, committee minutes and White Papers ... might well be considered to be permissible.⁸⁷

He also emphasized that extrinsic evidence should not be confined to cases involving a constitutional challenge but also admitted “where the issue to be resolved is the meaning of the terms of the legislation.”⁸⁸

Emmett Hall had earlier maintained that “the courts and the legislatures are not competitive organs of government, but rather they have a co-operative role to play in furthering the common good.”⁸⁹ From this premise he inferred that the courts should adopt a purposive approach and “if the purpose of the statute cannot be determined by reading it through, then extrinsic aids such as legislative history must be resorted to.”⁹⁰ This surely was what Robert Baldwin attempted to achieve in 1849 by codifying the mischief rule in his *Interpretation Act*. More than 140 years have elapsed but the Canadian judiciary must now be close to a substantial modification of the exclusionary rule applicable to all statutes where there is more than one equally plausible interpretation. The House of Lords’ decision in *Pepper v. Hart* will reinforce and accelerate a definite modification of the exclusionary rule which was already well underway in Canada. Our courts are already ignoring the exclusionary rule in quiet ways. For instance, the rule has been undermined in Canada by the courts obtaining legislative history in a second hand manner through law review articles that cite and discuss *Hansard*.⁹¹ Direct access to debates would seem to be a more reliable route.

⁸⁵ R.G.B. Dickson, “The Role and Function of Judges” (1980) 14 L.S.U.C. Gazette 138 at 163.

⁸⁶ *Ibid.* at 164.

⁸⁷ *Ibid.* (emphasis added)

⁸⁸ *Ibid.*

⁸⁹ E. Hall, “Law Reform and the Judiciary’s Role” (1972) 10 Osgoode Hall L.J. 399 at 408.

⁹⁰ *Ibid.*

⁹¹ See G. Bale, “W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada” (1993) 19 Queen’s L.J. 36 at 56. From 1985 to 1992 there have been 990 citations to legal periodicals and some of these have certainly cited and discussed legislative history including *Hansard*.

VII. *Legislative History in Australia, New Zealand and the United States*

A. *Australia*

In 1984, Australia modified the exclusionary rule by statute for Commonwealth legislation.⁹² Any extrinsic material capable of ascertaining the meaning of a provision may now be considered to confirm the ordinary meaning or to determine the meaning where the provision is ambiguous, obscure or leads to an absurdity. A non-exhaustive list of eight types of extrinsic material is given which includes the narrow category, a speech made to a House of the Parliament by a Minister moving the second reading of the bill, but also the general category, any relevant material from debates in Parliament. But admissibility of extrinsic material and its weight is subject to the desirability of persons being able to rely on the ordinary meaning of the text and the need to avoid prolonging legal proceedings. The House of Lords were obviously influenced in their modification of the exclusionary rule by the Australian statute. *Pepper v. Hart* limits more narrowly the use of debates by excluding the category — to confirm the ordinary meaning of the text — which could justify resorting to Hansard in every case of statutory interpretation.

The 1981 case of *Sillery v. R.*⁹³ had graphically illustrated the advantage of access to debates. The defendant had been convicted of the offence of hijacking an aircraft in violation of a Commonwealth statute of which a subsection provided that "The punishment for an offence against this section is imprisonment for life".⁹⁴ The courts were confronted with determining whether this was a mandatory or simply a maximum penalty. The trial judge and Queensland Court of Appeal held the penalty to be mandatory and refused to take account of the parliamentary debates in which the Attorney-General in his second reading speech had clearly indicated that "the bill provides that the maximum punishment for hijacking is imprisonment for life". The Australian High Court split three to two in holding it to be a maximum penalty with only Murphy J., taking into account the parliamentary debates. A reference to parliamentary history in this case would have eliminated the need for this litigation. It also provided an impetus for modification of the exclusionary rule.

B. *New Zealand*

New Zealand has apparently achieved a similar result to that in Australia but through judicial rather than legislative reform. Identifying the precise date the change occurred is consequently more difficult. The New Zealand Law Commission has taken the position that "a prohibitory rule has never been

⁹² Section 15 AB was added to the *Acts Interpretation Act 1901* by the *Acts Interpretation Amendment Act 1984*, s.7.

⁹³ (1981), 35 A.L.R. 227 (H. Ct. Aust.).

⁹⁴ *Crimes (Hijacking of Aircraft) Act 1972* (Cth), s.8(3).

clearly established in New Zealand.”⁹⁵ Jim Evans provides a different perspective and says that in 1985 the New Zealand Court of Appeal “began to allow counsel to use material from parliamentary debate in arguing cases”.⁹⁶ In one of the early cases to which he refers Cooke J. stated:

A Government statement in the House could not be allowed to alter the meaning of an Act of Parliament in plain conflict with it; but in my view it would be unduly technical to ignore such aid as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act.⁹⁷

The New Zealand Law Commission has taken the view that the courts have signalled their receptivity to parliamentary material and is content to let them continue to develop practices about its admissibility and significance rather than propose legislation.⁹⁸

C. *United States*

The United States originally inherited as part of its common law tradition the rule that courts could not consider legislative debates under any circumstances.⁹⁹ In 1892 the United States Supreme Court referred to both Senate and House Committee reports to construe an ambiguous statute.¹⁰⁰ However, Oliver Wendell Holmes at about that time noted that we treat statutes and contracts similarly and said: “We do not inquire what the legislature meant, we ask only what the statute means.”¹⁰¹ But as a Justice of the U.S. Supreme Court, he modified his view. “It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.”¹⁰²

The use of all forms of legislative history greatly accelerated throughout this century. In *U.S. v. American Trucking Association*, Reed J. in a majority

⁹⁵ N.Z. Law Commission, Report 17, *A New Interpretation Act* (Wellington: The Commission, 1990) at 50.

⁹⁶ J. Evans, *Statutory Interpretation: Problems of Communication* (Auckland: Oxford U. Press, 1988) at 280.

⁹⁷ *Ibid.* citing *Marac Life Assurance Ltd. v. C.I.R.* (1986), 8 N.Z.T.C. 5086 at 5093.

⁹⁸ N.Z. Law Commission, *supra* footnote 95 at 51.

⁹⁹ *Aldridge v. Williams*, 44 U.S. (3 How.) 9 (1845). Taney C.J. at 24 stated: “in expounding this law, the judgment of the court cannot, in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.” But public history of time might be used as an aid.

¹⁰⁰ *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 at 464-65 (1892).

¹⁰¹ O.W. Holmes “The Theory of Legal Interpretation” (1898-99) 12 Harv. L.R. 417 at 419.

¹⁰² *Boston Sand and Gravel Co. v. U.S.*, 278 U.S. 41 at 48 (1928).

judgment said "there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination."¹⁰³ Patricia Wald J. in 1983 said that "no occasion for statutory construction now exists when the courts will *not* look at the legislative history."¹⁰⁴ The tide may be reversing as Scalia J. has taken a vigorous stand against use of this material where the meaning of the statute can be discerned without it. He has expressed doubt about the validity of the concept of congressional will and concern about legislative history being manufactured to influence judicial construction rather than to inform members of Congress.¹⁰⁵ Scalia J. has advocated restricting the admission of legislative history to statutes whose plain meaning would lead to an absurd result. Anthony Kennedy J. would also similarly restrict the admission of legislative history. Stephen A. Girvin states: "it would appear that the U.S. Supreme Court is setting its face against the indiscriminate use of legislative history and there is some empirical evidence which supports the view that its use is in decline."¹⁰⁶ American academics are now debating the appropriate use of legislative history in the construction of statutes.¹⁰⁷ The common law world may be moving closer to a similar stance toward the use of legislative history.

Conclusion

The meaning of statutory texts like all linguistic productions is context-dependent. Since a person's ability to understand what is written is enhanced by context, a rule forbidding recourse to Hansard diminishes such competence and is therefore undesirable. Yet the longevity of the non-recourse rule transmits a powerful signal that important values are involved and academic response to the abolition of the rule in Britain supports this assessment. David Miers notes that *Pepper v. Hart* is "a significant break with tradition" by giving "primacy to ministerial statements in the event of absurdity, obscurity and ambiguity".¹⁰⁸ Francis Bennion has categorized the change as "an unhealthy

¹⁰³ 310 U.S. 534 at 545 (1940).

¹⁰⁴ P.M. Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term" (1983) 68 Iowa L.R. 195. (emphasis in the original at 195).

¹⁰⁵ *Blanchard v. Bergeron*, 489 U.S. 87 at 98-99 (1989).

¹⁰⁶ "Hansard and the Interpretation of Statutes" (1993) 22 Anglo-American L. Rev. 475 at 485.

¹⁰⁷ P.C. Schanck states that "in the past decade statutory interpretation has become a subject of intense interest in legal academia" and "has produced a spate of serious scholarship." He has produced a bibliography focused mainly on recent literature. See "The Use of Legislative Histories in Statutory Interpretation: A Selected and Annotated Bibliography" (1993) 13 Leg. Ref. Ser. Q. at 5-14. An excellent article that is not included is H. W. Baade, "Original Intent in Historical Perspective: Some Critical Glosses" (1991) 69 Texas L.R. 1001. I wish to thank Professor Neil MacCormick for referring me to this article.

¹⁰⁸ D. Miers, "Taxing Perks and Interpreting Statutes: *Pepper v. Hart*" (1993) 56 Modern L.R. 695 at 709.

and undesirable constitutional development".¹⁰⁹ Scott Styles fears a major constitutional power shift after *Pepper* saying "not only have the courts formally surrendered their powers in favour of Parliament but they have in fact surrendered them to the government — to the executive acting through the legislature."¹¹⁰ J.H. Baker contends that the "government-centred approach" of *Pepper* is "rather chilling."¹¹¹ Dawn Oliver thinks that *Pepper* "may well reinforce the dominance of government in the constitution and reduce the power of the courts to operate checks against the dominant executive."¹¹² Stephen Girvin expresses concern about "the narrowing of the boundaries between the relative roles of Parliament and of the courts" but in general views the decision "with cautious optimism."¹¹³

This academic response to *Pepper v. Hart* reflects perhaps the profoundly conservative nature of the English legal profession. However, the less than enthusiastic response to the decision may have arisen partly because the House of Lords wished to minimize the extent to which they were relaxing the exclusionary rule. By confining the permissible parliamentary material to statements by a minister or other promoter of the Bill, the Law Lords appeared to give an unduly pro-governmental twist to their law making. It might have been advisable to have held that Hansard can be resorted to when the legislation is ambiguous or obscure, or leads to an absurdity — leaving the weight accorded the material to the wisdom and judgment of the judicial interpreter.¹¹⁴ The decision seems to conflate the question of the admissibility of the material with the question of the weight to be given to it. The more pragmatic and evolving Canadian approach¹¹⁵ as exemplified by Sopinka J. in *R. v. Morgentaler* appears preferable. In his judgment for the Court he stated:

¹⁰⁹ F. Bennion, "Hansard-Help or Hindrance? A Draftsman's View of *Pepper v. Hart*" (1993) 14 Statute L.R. 149 at 162.

¹¹⁰ S.C. Styles, "The Rule of Parliament: Statutory Interpretation after *Pepper v. Hart*" (1993) 14 Oxford J. of Legal Studies 151 at 157.

¹¹¹ J.H. Baker, "Case and Comment — Statutory Interpretation and Parliamentary Intention" (1993) 52 Cambridge L.J. 353 at 357.

¹¹² D. Oliver, "Comment — *Pepper v. Hart*: a suitable case for reference to Hansard?" [1993] Public Law 5 at 13.

¹¹³ Girvin, *supra* footnote 106 at 495-96.

¹¹⁴ The Nova Scotia Commissioners to the Uniform Law Conference in 1975 simply recommended that "the rule excluding legislative history should be changed and a court should be permitted to consider statements made inside both the federal and provincial legislatures as well as statements made in committee debates if they are available." *Proceedings of the Fifty-Seventh Annual Meeting of the Uniform Law Conference of Canada* (Halifax, 1974) at 246. This was rejected at their 1977 meeting (*Proceedings* at 30).

¹¹⁵ W.H. Charles in "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983) 7 Dal. L.J. 7 at 38 stated that: "Unlike judges in English courts, Canadian judges have not openly discussed the competing considerations that determine the courts' approach to statutory interpretation and the use of extrinsic evidence." At 41 he expressed the hope that the Supreme Court of Canada will "articulate its position with a full and open discussion of the competing interests."

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 evidence has been that it cannot represent the "intent" of the legislature, an incorporated body, but that is equally true of other forms of legislative history. Provided 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.¹¹⁶

I have propounded the thesis that the exclusionary rule should not have been applied in Canada because of the adoption of the purposive rule in our *Interpretation Act* and the verbatim record of debates in our House of Commons after 1880. I therefore endorse the growing relaxation of the exclusionary rule noted by Mr. Justice Sopinka and see no reason why the trend should be restricted to constitutional law. The survey of developments in Australia, New Zealand and the United States, together with the analysis of *Pepper v. Hart*, indicate an emerging convergence on the appropriate use of legislative history in statutory interpretation in the common law world. This will also bring us closer to the approach of civil law jurisdictions.¹¹⁷ It was a civilian, Henri-Elzéar Taschereau C.J.C., who first enunciated the exclusionary rule in the Supreme Court of Canada in *Gosselin v. The King*. Counsel had attempted to read from the debates in parliament to shed light on the meaning of the *Canada Evidence Act*. The Chief Justice conveyed his lack of enthusiasm for the exclusionary rule when he said "personally, I would not be unwilling, in cases of ambiguity in statutes, to concede that such a reference might sometimes be useful"¹¹⁸ but he bowed to English and American precedent and refused to permit counsel to cite Hansard. He also noted that the reports of the codifiers were admissible in construing the *Civil Code* but then conceded that "these cannot be put upon the same footing in regard to this rule as are the debates in Parliament upon a bill."¹¹⁹ The Chief Justice who had been a member of parliament probably realized that Hansard may sometimes be misleading. Much later, J.A. Corry, a political scientist, forcefully emphasized this point

¹¹⁶ *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 484. In *R. v. Heywood*, [1994] 3 S.C.R. 761 at 788-89, Cory J. writing for the majority acknowledged that there was doubt about the use of legislative debates to interpret a statute but conceded that "this Court has on occasion made use of such materials for this very purpose". After making one reference to Hansard and six references to the Legislative Committee Minutes, Cory J. decided it was unnecessary to determine its admissibility because the debates were "inconclusive with regard to the meaning of loitering" in s.179(1)(b) of the *Criminal Code*.

¹¹⁷ For an international perspective on statutory interpretation see D.N. MacCormick and R.S. Summers, eds., *Interpreting Statutes: A Comparative Study* (Aldershot: Dartmouth, 1991).

¹¹⁸ *Gosselin v. The King* (1903), 33 S.C.R. 255 at 264. The court decided that the spouse of an accused, statutorily made a competent witness, was also a compellable witness. This was contrary to what parliament intended and resort to the debates would have made this apparent. See I. Bushnell, *The Captive Court* (Montréal: McGill-Queen's U. Press, 1992) at 175-78.

¹¹⁹ *Ibid.* at 268.

saying "[t]he process of enacting new legislation is not an intellectual exercise in pursuit of truth; it is an essay in persuasion, or perhaps almost seduction!"¹²⁰ This is a cogent reason for treating debates with caution but does not support exclusion.

Primacy must be accorded the statute for it should be recognized that the courts are the hospitals of the law. The health of the law is determined by the number of people who can avoid going into court. Citizens and their lawyers should be able to rely on an apparently unambiguous statute in settling legal disputes without making further inquiries. However, if after earnest study of a statute ambiguity remains, resort to *Hansard* would seem to be not merely appropriate but mandatory because parliamentary supremacy, except as modified by the *Charter*, is the grundnorm of our system of government. Parliamentary debates cannot be regarded as a meaningless political exercise from which no enlightenment can be derived. One beneficial impact of abolishing the non-recourse rule is to make Ministers more careful about what they say in introducing legislation.¹²¹

Fidelity to such an important principle as parliamentary sovereignty is inconsistent with the non-recourse rule to parliamentary debates. The rule must therefore be abolished or simply reinterpreted as being a counsel of caution and not a rule of evidence. Incautious and wholesale resort to *Hansard*, however, would jeopardize such important values as the rule of law and the separation of powers. Careful and discriminating use of debates should be encouraged and the broader context should promote better interpretation of ambiguous statutes. There is scope for "switching on the light"¹²² without being guilty of the charge of rummaging in "the ashcans of the legislative process".¹²³

¹²⁰ Corry, *supra* footnote 28 at 631.

¹²¹ A concrete example of this beneficial side effect has already occurred in Britain. Lord Henley, a Government Minister, at the Committee Stage of the Educational Bill 1992 said: "In the light of the recent court case *Pepper v. Hart* ... it is very important that I know exactly what I am saying from the Dispatch Box" H.L. Deb., Vol 545, cols. 528-29 (29 April 1993). This is quoted by D. Miers, *supra* footnote 108 at 706.

¹²² Lord Denning in *Davis v. Johnson*, [1979] A.C. 264 at 276 said: "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 that view." The House of Lords in that case chastised Denning but now *Pepper v. Hart* has vindicated his common sense approach to interpretation.

¹²³ C.P. Curtis in criticizing excessive reliance on legislative history by American courts said: "The courts used to be fastidious as to where they looked for the legislative intention ... But now the pressure of the orthodox doctrine has sent them fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention". "A Better Theory of Legal Interpretation" (1949) 4 The Record of the Assn. of the Bar of the City of New York 321 at 327-8.