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Hansard as an Aid to Statutory Interpretation in Canadian Courts from 1999 to 2010

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ABSTRACT

This thesis employs qualitative and quantitative methods to provide a comprehensive picture of the judicial use of Hansard as an extrinsic aid to statutory interpretation in the courts of Canada from 1999 to 2010. The qualitative portion of the thesis examines all Supreme Court of Canada judgments in 2010 that make reference to Hansard and Hansard-like materials. The findings are compared with the findings of Professor Stéphane Beaulac, who studied the phenomenon in 1999. The quantitative portion of the research examines the prevalence and distribution of judgments that make reference to Hansard in the Courts throughout Canada from 1999 to 2010.

KEYWORDS

Hansard, Legislative History, Extrinsic Aid, Statutory Interpretation, Canada, Supreme Court of Canada,

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CHAPTER 1

1.1 Introduction

Once upon a time, Hansard[1] was forbidden fruit in Canadian courts. Although the pendulum has been swinging back and forth for a century now, and many doubts still linger about the particulars, the Supreme Court of Canada [*SCC*] has now established that Hansard excerpts are admissible as evidence of legislative intent.[2] In the UK, *Pepper v Hart*[3] delineates when such evidence is admissible and how it is to be assessed for weight. In Australia, there is a statute that determines many of these issues.[4] In Canada, however, there was a waffling creep towards the admissibility of this evidence that culminated in the 1998 *Rizzo & Rizzo Shoes*[5] decision which established that Hansard evidence is admissible as an

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1 "HANSARD. *n.* A record of speeches made in the House of Commons and answers to written questions from the Order Paper. 2. Also refers to the similar record of debates in a legislative assembly or legislature." *The Dictionary of Canadian Law*, 3rd ed.

2 The most well-known precedent for this principle is *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at paras 20-23. [*Rizzo*]. It should be noted that the term "evidence" could be misleading. Evidence as a legal term of art refers to anything that is admissible in court for the purpose of proving or disproving facts. Hansard is an aid to statutory interpretation and is not evidence, strictly speaking. However, Hansard is evidence of the intended meaning of the text in a statute, and the term "evidence" is being used in this manner throughout this paper. As well, the concept of legislative intent is controversial. Some have argued that it is an absurdity, others have argued that it is a useful legal fiction. See for example, M.W.B. Sinclaire "Legislative Intent: Fact or Fabrication" Book Review of *Dynamic Statutory Interpretation* by William N. Eskridge (1996-97) 41 NYL Sch L Rev 1329; also see Richard L. Hasen, "Bad Legislative Intent" (2006) Wis L Rev 846. More will be said about this controversy at page 49 where the debate over textualism is explored.

3 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL) [*Pepper*]; also see J. H. Baker "Statutory Interpretation and Parliamentary Intention" (1993) 52:3 Cambridge L J 353; also see Girvin *supra* note 8; also see Scott C. Styles "The Rule of Parliament: Statutory Interpretation after Pepper v Hart" (1994) 14:1 Oxford J Legal Stud 151.

4 *Acts Interpretation Amendment Act 1901* (Cth), online: Commonwealth of Australia Law <http://scaleplus.law.govau/ComLaw/Legislation/ActCompilation1.nsf/framelodgmentattachments/371FC0D084ACB5D0CA25767F0081C27C>; *Interpretation Act 1987 No 15* (NSW), Online: New South Wales Government <http://www.legislation.nsw.govau/scanview/inforce/s/1/?TITLE=%22Interpretation%20Act%201987%20No%2015%22&nohits=y>; *Interpretation of Legislation Act 1984* (Vic), Online: Australasian Legal Information Institute <http://www.austlii.edu.au/au/legis/vic/consol_act/iola1984322/>; *Interpretation Act 1984* (WA), Online: Australasian Legal Information Institute <http://www.austlii.edu.au/au/legis/wa/consol_act/ia1984191/>; also see Stéphane Beaulac "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or Weight" (1997-1998) 43 McGill L J 287 at 296-298.

5 *Supra* note 2.

extrinsic aid to statutory interpretation.[6] *Rizzo* did not, however, set out any criteria for determining when Hansard evidence should be considered or how its weight and influence on interpretive outcomes should be assessed. Given the lack of guidance, it is perhaps unsurprising that Canadian courts used Hansard in a rather unprincipled fashion in the wake of *Rizzo*.[7]

The use of Hansard evidence as an aid to statutory interpretation has attracted limited scholarly attention in Canada. Stéphane Beaulac has penned the only articles to focus directly on this subject, the most recent of which was published in 2000. In this article entitled "Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates", Beaulac examined the twelve *SCC* judgments in 1999 in which the Court made reference to Hansard.[8] This study was a qualitative analysis of the judicial use of Hansard at the *SCC* which focused on the issues surrounding admissibility and weight.

Eleven years have passed since Beaulac's research was published. Given the absence of scholary attention, it is an open question whether or not consistent methods for the use of Hansard have evolved at the *SCC*. This thesis seeks to determine whether or not there has been any change in judicial practice since the last study of this phenomenon. With this goal in mind, this study focuses on two basic research questions:

Question #1: *How was Hansard evidence being used by the SCC justices in 2010?*

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6 For a brief history of Hansard use in Canadian Courts, see Beaulac, *supra* note 4 at 300-308.

7 Stéphane Beaulac " Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates" (2000) 63 Sask L J 581. The issue is discussed in further detail in Chapter 2 at page 36.

8 *Ibid.*

Question #2: *Has the use of Hansard by the SCC justices changed since 1999?*

When this study was originally conceived, the plan was to trace back through the lower court decisions that preceded the *SCC* judgments to find out how Hansard was finding its way into the highest court in Canada. Once the research began, it became apparent that the decisions from the courts below were very unlikely to make reference to Hansard at all. More significantly, it turned out that six of the ten 2010 judgments citing Hansard came to the *SCC* from the Quebec Court of Appeal. As a result, a third research question was considered:

Question #3: *Are there some jurisdictions where justices are more likely to use Hansard?*

There are two parts to this study. The first consists of an exhaustive qualitative analysis of all judgments of the *SCC* made in 2010 in which reference was made to Hansard evidence.[9] This part of the study is a direct follow-up to Beaulac's 1999 research. The objective is to explore the same substantive issues explored by Beaulac, including the way that judges used authorities to justify recourse to Hansard; what information was provided about Hansard when it was cited; and how the judges appear to have assigned weight to particular Hansard excerpts. A significant component of this portion of the study arises from the ability to compare the findings in 2010 with the findings in 1999. Although the inherent limitations of both the method and the small sample size must be kept firmly in mind, comparison reveals changes that might otherwise go unnoticed.

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9 The reasons for choosing the year 2010 along with the host of related decisions concerning the design of this research are explained in the section on Methodology at page 11.

The second part of the study is quantitative. It is an effort to ascertain the prevalence of references to Hansard at the *SCC* in the study period, and to also determine the prevalence of Hansard use in the various courts throughout Canada in the study period. While the primary purpose of this part of the study was to determine whether or not Quebec is the source jurisdiction of a disproportionate amount of Hansard use, it was necessary to look at Hansard use in general across Canada in order to make such a determination. This quantitative look at judicial reference to Hansard throughout Canada is an interesting study on its own. This represents the first attempt to empirically measure Hansard use in Canadian courts.

The insights gained by the qualitative and quantitative components of this thesis provide a comprehensive picture of Hansard in the courts of Canada. It provides an in-depth examination of the current practices at the *SCC* with insight into what has changed and what has remained the same over the past eleven years. As well, it provides insight into the prevalence and distribution of Hansard use throughout the courts of Canada over the study period. Some of the findings are quite surprising to say the least.

As it turns out, there has been considerable evolution in the Court's practices over the study period as the practices of the Justices have had time to mature. Issues surrounding admissibility have largely been resolved while issues concerning use of materials that have questionable weight remain an ongoing problem. Meanwhile, the prevalence of Hansard appears to be fairly stable over time. Fears of opening the floodgates appear to be unwarranted although there are some problems should be addressed going forward.

1.2 The Nature of Hansard Evidence

Hansard refers to published transcripts of proceedings of elected assemblies. Excerpts from "the Hansard" are occasionally presented in court to support or oppose particular interpretations of a statute, and when used in this manner, Hansard evidence is an extrinsic aid to statutory interpretation. To put this in perspective, there are three types of material that can be used in the act of interpretation, loosely speaking.[10] First, there is the actual text of the statute which constitutes the "intrinsic" component. Second, there are components of statutes which are typically included in formal statutory documents but are not part of the official statutory text. This includes items like preambles, headings, and marginal notes.[11] This second set of elements is readily identifiable as a class of interpretive aids that is extrinsic, from a technical perspective, yet very nearly intrinsic due to the close proximity to the statutory text. Finally, there is a third class of items which do not form part of the statute yet are consulted to facilitate the process of interpretation. These are the items most readily identifiable as extrinsic aids to interpretation. The most typical example is a dictionary, but it could also include scholarly works and government documents. Among the many government documents

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10 These are not formal scholarly classifications, but merely convenient characterizations for the purpose of understanding Hansard and Legislative history in the context of this study. For a more exhaustive look at the components of statutes and the various types of extrinsic aids to interpretation, see J. Bell & Sir G. Engle, ed. *Cross on Statutory Interpretation,* 3d ed. (London: Butterworths, 1995) at 152; also see Francis Bennion, *Statutory Interpretation:A Code,* 2d ed. (London: Butterworths, 1992) at 445; also see R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown, 1975) at 137.

11 Surprisingly, this can include punctuation (according to some jurists). See for example, *R v Jaagusta* [1974] 3 WWR 766 (BC Prov Ct.); for commentary on this judgment and more about punctuation as an extrinsic aid, see Randal N. Graham, *Statutory Interpretation: Cases, Text and Materials* (Toronto: Emond Montgomery, 2002) at 162-164. The disregarding of punctuation is exceptional, and generally punctuation is considered part of the statutory text. See for example V. C. R. A. C. Crabbe, *Understanding Statutes* (London: Cavendish, 1994) at 25.

The Interpretation Acts in most Canadian jurisdictions often prescribe which components of a statute count as "intrinsic" and which count as "extrinsic". For example, in Ontario, the preample is intrinsic while the tables of contents, marginal notes and headings are extrinsic. *Legislation Act*, 2006, SO 2006, c 21, Sch F, ss. 69, 70.

that might be consulted, there is a class of documents that are created by the law-makers themselves throughout the process of drafting and enacting legislation. This subclass is referred to as the legislative history.[12]

Legislative history includes such items as Committee Reports, Commission Reports, Bills, journals of proceedings, transcripts of proceedings and government policy papers (for example white papers, green papers or budget papers).[13] The term "Hansard"

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12 According to Hogg:

> [t]he term "legislative history" does not have a precise meaning. ... I use the term to mean the documentary evidence of the events that occurred during the drafting and enactment of a statute. It may include the following elements:
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> 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;
> 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."

Peter Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 2009) at 60.1(b) 1-2. It should be noted that item number four excludes "the state of the law, whether common law or statutory, before the enactment of the statute". Many scholars including Beaulac draw a sharp distinction between legislative history and the law in its prior state (i.e. before amendment or repeal). See for example, Beaulac, *supra* note 7 at 596. The use of the prior state of the law is uncontroversial, and the distinction has been justified on those terms. As legislative history becomes acceptable in court, this distinction can seem rather arbitrary. Previously enacted statutory provisions will inevitably be considered in conjunction with legislative history in the process of statutory interpretation. Like all extrinsic materials, the prior state of the law is not the law. It is merely information that might assist in determining the meaning of the currently enacted statute.

13 For a more thorough description, see Beaulac, *supra* note 4 at 289.

refers to transcripts of proceedings of the legislative bodies such as Parliament, the Legislatures and the Senate.[14] It is a small subset of the legislative history.[15]

Hansard evidence has always been controversial.[16] A host of practical and philosophical considerations come to bear on arguments for and against its use in court. First and foremost, Parliament enacted the words in the statute; anything said about the text of proposed legislation in the House is not law. Reasons to oppose the use of quotes from parliamentary debates in court often raise concerns that judges might be misled by politicking.[17] If a statute is being pushed through Parliament, statements might be made that exaggerate or downplay certain aspects in order to sell the Bill to the opposition members. Statements might be made based on a poor understanding (or even a total misunderstanding) of the text. MPs might not take the time to properly inform themselves before speaking. There is also the more fundamental problem of equating the opinion of one person with the intention of Parliament as a whole. Indeed, many scholars have

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14 The Hansard family produced and published the debates in the English Parliament privately from 1812 to 1888. The name Hansard appeared at the top of each page in the publication and it became synonymous with the publication. When Parliament began to publish the official record of debates internally, they adopted this name for the records. See, for example Gordon Bale, "Parliamentary Debates And Statutory Interpretation: Switching On The Lights or Rummaging In The Ashcans of the Legislative Process" (1995) 74 Can Bar Rev 1 at 7.

15 It will become clear through the course of this study, that Hansard is intimately connected with the rest of the legislative history. Any study of Hansard will end up including Bills and Committee Reports in the analysis.

16 According to Girvin, documented judicial comment on the use of Hansard dates as far back as *Millar v Taylor* (1769), 4 Burr 2303, 98 ER 201, see Stephen V. Girvin "Hansard and the Interpretation of Statutes" (1993) 22 Anglo-Am L Rev 475 at 476. This predates formal record-keeping by two centuries.

17 See e.g. Richard A. Danner "Justice Jackson's Lament: Historical And Comparative Perspectives On The Availability Of Legislative History" (2003) 13 Duke J Comp & Int'l L 151; Francis Bennion "Hansard - Help of Hindrance: A Draftsman's View of *Pepper v Hart*" (1993) 14 Statute L Rev 149; Michael P, Healy, "Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v Hart" (1999) 35 Stan J Int'l L 231; and William T. Mayton "Law Among the Pleonasms: The Futility and Constitutionality of Legislative History in Statutory Interpretation" (1992) 41 Emory L J 113.

argued that there is no such thing as legislative intent in the first place.[18] There is also a fear of opening the floodgates. Hansard and the accompanying record of Bills, journals of proceedings, etc. comprise an enormous volume of information to search through with no guarantee that there will be any useful information therein. This could increase the cost of litigation while providing little benefit.[19] As well, there is the potential for clever lawyers to complicate otherwise simple interpretive matters. Finally, there is the argument of uncertainty. Citizens are supposed to know what the law is, and if further background information is required in order to understand statutes, this fundamental pillar of justice is eroded.[20] Supporters of textualism and formalism are aligned with this position, generally.[21]

The other side of the debate is fueled by the various complexities that inevitably surround the language-based application of rules.[22] The chronic underdeterminacy of language, problems arising from vagueness and incoherence, and results that appear

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18 See for example, Sinclaire and Hasen, *supra* note 2.

19 Baker notes that this argument had more force in 1969 when Hansard was not available online. See J. H. Baker "Statutory Interpretation and Parliamentary Intention" (1993) 52 Cambridge L J 353 at 354.

20 These arguments are listed in a number of different works. See for example, Law Commission & Scottish Law Commission, *The Interpretation of Statutes* (Law Com. No. 21, Scot. Law Com. 11) (London: Her Majesty's Stationary Office, 1969); also see Beaulac, *supra* note 4 at 315-318; also see Bennion, *supra* note 17 at 151 - 155.

21 Formalism is a doctrine that prescribes following rules strictly for essentially economic reasons. Exceptions add complexity and dilute the effectiveness and simplicity of rules. According to Black's Law Dictionary, 9th ed, textualism is "[t]he doctrinal view of judicial construction holding that judges should interpret a document or statute ... according to its literal terms, without looking to other sources to ascertain the meaning." Textualism is a doctrine championed by Scalia J. that eschews the use of legislative history and emphasizes the primacy of statutory text. The two schools of thought are related. See Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U Chicago L Rev 1175. Also see John F. Manning "Constitutional Structure and Statutory Formalism" (1999) 66 U Chicago L Rev 685. Also see Fred Schauer, "Formalism" (1988) 97 Yale L J 509.

22 See for example, Johan Steyn "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25:1 Syd L Rev 5; also see Stanley Fish "There Is No Textualist Position" (2005) 42 San Diego L Rev 629; also see Michael Rawlinson "Tax Legislation And The Hansard Rule" (1983) Brit Tax Rev 274 at 288.

blatantly at odds with the purpose of a statute are simply unavoidable.[23] The text of any statute will inevitably fall short of its intended (ideal) objective, which is to provide clear answers about what the law is in all possible circumstances. Recourse to all sorts of extrinsic considerations is inevitable.[24] Considerations of social context, comparison to previous versions of statutes, policy arguments, etc. are brought to bear as a matter of routine. As Beaulac notes:

> Before initiating the interpretative process ... practically all statutory provisions are susceptible to more than one meaning and, accordingly, may be viewed as unclear. ... The truth of the matter is that ambiguity is an inference that can be drawn only after a full assessment of legislative intention, using canons and tools of statutory interpretation, including parliamentary materials.[25]

Although this statement was made to criticize the *ambiguity requirement* (discussed below at page 64), it is representative of the general position of those who tend to favour recourse to legislative history.[26]

Another factor concerns legislative pronouncements in Canada about statutory interpretation. The federal government and most provincial governments have enacted

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23 See for example Randal N. Graham, Statutory Interpretation: Theory and Practice (Toronto: Emond Montgomery, 2001) at 45-84; also see Allan C. Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication*, (Durham, NC: Duke University Press, Durham); Also see James Boyle, "The Politics of Reason: Critical Legal Studies and Local Social though" (1985) 133 U of Penn L Rev 687.

24 Indeed, all of the memories and knowledge that judges use to understand language in general is an extrinsic aid to interpretation. Within linguistics, the study of the role that knowledge, memory and inference play in the comprehensive of language is called pragmatics. See for example Lawrence R. Horn & Gregory L. Ward, eds, *The Handbook of Pragmatics* (Malden, MA: Blackwell, 2004); also see Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication* (2002: Blackwell: Maiden MA); also see Rebecca Fincher-Kiefer, "The Role of Prior Knowledge in Inferential Processing" (1992) 15(1) J of Research in Reading 12; also see J. Aakerman, "A Plea For Pragmatics" (2009) 170 Synthese 155.

25 See for example Beaulac, *supra* note 7 at 605-607.

26 The ambiguity requirement is a rule which precludes recourse to extrinsic aids in the absence of ambiguity or some other defect in the statutory text such that it does not have a plain meaning. More will be said about this at 64.

interpretation acts mandating purposive interpretation.[27] These statutes are silent on the use of legislative history. Although the use of legislative history is not necessary for purposive interpretation, its use is consistent with purposive interpretation in the sense that Hansard materials are likely to cast light on the purposes pursued through the enactment of the law. Permitting more types of materials to be considered facilitates a more enlightened consideration of legislative purpose.[28]

Hansard exists within these tensions. There are scholars who remain firmly on one side of the debate or the other, and loosely speaking, the debate coincides with deeper ideological divisions in legal theory between formalism and pragmatism.[29] It should be kept in mind that legal philosophy is a component of policy argument. Appellate court judges are all legal philosophers to some extent.[30]

The law in Canada, as received from the UK, upheld the 'exclusionary rule' that Hansard (and legislative history) should not be considered by the courts.[31] In 1903 the *SCC* described the rule as a principle that would tolerate exceptions in *R v Gosselin*,

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27 See e.g. *Interpretation Act*, RSC 1985, c. I-21 s.12; *Interpretation Act*, RSA 2000, c. I-8 s.10; Interpretation Act, RSBC 1996, c-238 s.8; *Interpretation Act* RSNB 1973, c. I-13 s. 17; *Interpretation Act* RSNL 1990, c. I-19 s. 16; *Legislation Act*, 2006 SO 2006, C-21 s.64.

28 See e.g. R. S. Geddes "Purpose and Context in Statutory Interpretation" (2005) 2UNELJ 5 at 21-25; also see Geoff R. Hall "Statutory Interpretation in the Supreme Court of Canada: The Triumph of the Common Law Methodology" (1998-1999) 21 Advoc. Q. 38 at 56-59; also see William N. Eskridge, Jr. "The Circumstances of Politics and the Application of Statutes" (2000) 100:2 Colum L Rev 558-581.

29 See for example Fish, *supra* note 22; also see Richard Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution" (1986-87) 37 Case W L Rev 179; Also see Manning and Schauer, *supra* note 21.

30 The notion that judges are all legal philosophers to a certain extent is obvious and uncontroversial to me, but it is a topic that is much too large for a footnote for those who challenge the issue. Although Legal theory is rarely addressed directly in appellant court decisions, it is an essential component of legal disputes. See for example Henry J. Friendly, "Reactions of a Lawyer – Newly Become Judge" (1961) 71 Yale L J 218; also see Francis P. McQuade & Alexander T. Kardos, Mr. Justice Brennan and His Legal Philosophy (1957-58) 33 Notre Dame L. 321. Indeed, issues pertaining to legal philosophy are engaged merely by considering the concept of legislative intent. See *supra* note 2.

31 Beaulac, *supra* note 4 at 300-304.

judicial use of Hansard by the *SCC*, and the quantitative analysis provides a broad overview of the prevalence of judicial reference to Hansard in the Courts of Canada. The combination brings about a comprehensive study of Hansard in the Canadian Courts from 1999 through to 2010.

(a) Part One: Qualitative Study of 2010 *SCC* Judgments

This part of the study is an effort to build on and add to research conducted by Stéphane Beaulac that was published in 2000.[37] Beaulac conducted an exhaustive qualitative analysis of all *SCC* judgments in 1999 that made reference to Hansard. This thesis centres around a parallel exhaustive qualitative study of the 2010 *SCC* decisions that make reference to Hansard.[38]

In 2000, Beaulac found that the court's approach to Hansard lacked consistency in four distinct areas. These areas will be revisited in 2010, and attention will be focused on whether there have been any changes in these areas of inconsistency after the passage of eleven years. The areas of inconsistency were as follows:

(i) **When is Hansard evidence admissible?**[39] Prior to *Rizzo* there were three separate justifications for considering Hansard evidence based on the adjudicative context. Such evidence was held to be permissible for determining the constitutional character of statutes, for interpreting the language of the

37 Beaulac, *supra* note 7.

38 2010 was chosen for a practical reason. Arguably, there is an elegant symmetry to 2009 as the year of study. This would make the study period an even decade in duration. However, there are more cases in 2010 than in 2009. With such a small number of judgments to study, every one counts. It carries with it the perception of being more current. It seems unlikely that much would change with respect to such a complex phenomenon in a single year, so timeliness is likely more of a perception than a reality as a distinguishing factor between these two years.

39 Beaulac referred to this as the "purpose of the use parliamentary debates"; *supra* note 8 at 597.

Constitution and (in certain poorly defined and relatively rare circumstances[40]) for construing specific provisions in statutes.[41] The use of Hansard in the context of Constitutional issues was well-established by 1998 however the use of Hansard for pure statutory interpretation was unsettled at that time. Arguably, *Rizzo* resolved this matter decisively, and as a result, Hansard was admissible regardless of context.[42] Several decisions in 1999 held that Hansard should be restricted to one of the three compartmentalized purposes. *Rizzo* eliminated the need for a compartmentalized approach to the admissibility of Hansard, but old habits die hard. Given the passage of eleven years, it would be reasonable to expect that the Justices will have moved forward and dropped references to those obsolete rules.

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40 The rare and poorly defined circumstances in which courts sometimes permitted the use of Hansard for the interpretation of ordinary enactments (prior to Rizzo) is discussed in chapter 2 at 36.

41 *Supra* note 34. The combined effect of the judgments available as precedents meant that Hansard was admissible regardless of context. This was the case since the mid 1980's when the rule against using Hansard to interpret the language of the constitution became diluted to the point where it was no longer a rule with any teeth (although there were decisions which continued to uphold this rule). See for example *Reference re: Upper Churchill Water Rights Reservation Act 1980 (Newfoundland)*, [1984] 1 SCR 297 at 318 [*Upper Churchill*]. Nonetheless, the use of Hansard in the absence of Constitutional issues was unsettled. As a result, the value judgments like *Vasil* and *Stevenson, supra note 35,* as authorities for the use of Hansard for pure statutory interpretation was in doubt. Indeed, *R. v G. (B.)*, [1999] 2 SCR 475, 1999 CanLII 690 [*R v GB*], a post-*Rizzo* judgment, held that Hansard was generally not admissible in the absence of Constitutional adjudication. In hindsight, the compartmentalized approach seems rather absurd and *Rizzo* brought about a logical conclusion to an irrational approach to admissibility based on context of use. However the admission of Hansard represented the overturning of a rule that had ostensibly been in place for two-centuries, and the judiciary is conservative. it is understandable that judges would take an incremental approach over twenty years when making such a significant change in the law. Judges interpreted precedents in a narrow fashion and were quick to reject Hansard in the 1980's. See for example *Evans v British Columbia (Employment Standards Board)*, 1983 CanLII 463 (BC SC); also see *contra McDonald and The Queen, Re,* 1985 CanLII 162 (Ont CA). There was a gradual shift from the cautious approach of the early 1980's towards a general acceptance of Hansard in 1999 which was accompanied by contradictory and inconsistent pronouncements about admissibility.

42 It is entirely possible that too much emphasis is being placed on *Rizzo* as a precedent concerning the use of Hansard. Arguably, *Rizzo* was merely one incremental step in a gradual shift over twenty-five years. From another perspective, *Rizzo* was a judgment that explicitly eliminated a rule that had been implicitly eliminated years earlier. Whether or not *Rizzo* was pivotal on this point, by 1999 there was no need for a compartmentalized approach.

(ii) Is there an ambiguity requirement?[43] Many decisions in 1999 implied that Hansard should be considered only when there is ambiguity or some sort of obvious interpretive problem to be resolved. Beaulac argued that there should not be such a requirement, however the judicial process requires economy. Judges have good reason to limit the use of extrinsic aids to interpretation simply because there could be no end to it if there are no restrictions for limiting the circumstances of their use. Lawyers are duty-bound to raise every argument in favour of their client. In the absence of further considerations, Hansard is necessary if it is even remotely helpful.[44] There is an ambiguity requirement in the UK as established by *Pepper v Hart*.[45] There is an ambiguity requirement for the use of any extrinsic aids to interpretation in the courts of several US states.[46] Although the matter is not entirely settled in Australia, Federal legislation restricts the use of legislative history in the context of plain language.[47] Before conducting research into this issue, it was impossible to predict what the current practice would be at the *SCC*.

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43 The term "ambiguity" is ambiguous, ironically. In this context the word refers to ambiguity, vagueness, incoherence, or any interpretive problem that cannot be resolved easily by consulting intrinsic aids. The term was used extensively in the *Pepper* decision and legal scholars appear to be following suit.

44 See for example The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto, Law Society of Upper Canada, 2000, Commentary under subrule Rule 4.01(1); online: <http://www.lsuc.on.ca/with.aspx?id=671>.

45 *Pepper, supra* note 3 at 635. More will be said about this judgment at 38.

46 According to Gluck, Wisconsin has a plain meaning rule established by precedent; Connecticut has enshrined a plain meaning rule in a statute; and in Oregon, a plain meaning rule was established by a precedent that was followed religiously and proved resistant to modification by legislation. Abbe R. Gluck "The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism" (2010) 119 Yale L J 1750; *Kalal*, 2004 WI 59, 681 NW 2d at 126; Connecticut General Statute section 1-2z; OR REV STAT § 174.020(3) (2009).

47 *Supra* note 4 at 296-297. The circumstances in Australia are discussed in greater detail at 72.

(iii) Is Hansard treated as a stand-alone form of evidence, or is it only considered as a corroborative component in conjunction with other types of evidence? Beaulac found several statements in the 1999 judgments which suggest that Hansard is somehow more compelling if it confirms a finding that is supported by other interpretative means. The implication is that Hansard is somehow a second-class interpretive aid that cannot be used alone. Beaulac could find no reason for confining Hansard to such a secondary role, and argued that the weight and role of any particular quote from sessions of Parliament should be decided based on the circumstances of the case. The same arguments that justify an ambiguity requirement can also justify confining Hansard to the secondary role of corroborative evidence. Meanwhile, whenever its weight as contradictory evidence is doubtful, a judge can justify disregarding Hansard based on lack of corroboration as an exclusionary principle. It does not necessarily follow that there is a formal rule which holds that Hansard will never be compelling enough to stand on its own, and for this reason, this issue is difficult to assess with any certainty when analyzing judgments. Nonetheless, a best-efforts approach was taken to follow up on this element.

(iv) Is there evidence of a methodological approach to the assignment of weight to Hansard? There are essentially two components to this issue. The first concerns providing enough information about any quote from Hansard to properly understand its value as evidence of the intended meaning of a statute. The second component concerns a circumspect analysis of the Hansard excerpts referred to in the *SCC* decisions to assess just how authoritative they are, and how much weight

ought to be assigned to them. The tool of assessment consists of a list of four criteria put forward by Beaulac in 1998 which will be referred to as the Beaulac Test.[48] The four criteria are:

1. The reliability of the source of information;
2. The contemporaneity with the legislative process;
3. The proximity to the legislative process; and
4. The trustworthiness of the records

These four criteria are the elements that Beaulac regarded as essential for assessing how much weight should be assigned to Hansard and most other types of materials that comprise the legislative history. Given that the *Rizzo* decision was new in 1999, it is not surprising that no formal method for assessing Hansard had been developed by that time.[49]

The comparison of the 2010 findings with the 1999 findings revealed some fascinating changes in the way that judges have been referring to Hansard in their judgments.

(b) Part Two: Quantitative Study of Hansard in the Courts of Canada

In the 2000 study, Beaulac did not look at Hansard use in the lower courts. Out of curiosity, I traced back through the lower court judgments to see if there was any pattern

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48 See Beaulac, *supra* note 4. Also see Beaulac, *supra* note 7 at 609. This will be explained further at 96.

49 Within the common law realm, Canada and New Zealand were at the "no method" end of the spectrum in 2000. The UK was at the other end of the spectrum: *Pepper* established an ambiguity requirement and a number of precise contextual requirements for the admissibility of Hansard. For example, only statements made by the Minister responsible for the statute could be considered, and the statement must have been made during a debate leading up to enactment of the statute. See *Pepper*, *supra* note 3 at 635. Australia was in the middle: there was a method set out by precedent and legislation, although the approach was open-ended. There was a list of very general criteria that must be met for the evidence to be regarded as persuasive in Australia. See Beaulac, *supra* note 4 at 296-298. There was no ambiguity requirement as such in Australia, although the federal Acts Interpretation Act did restrict the use of Hansard to the role of confirming and not contradicting the meaning of statutory text that has a plain meaning. Arguably, this is a type of plain meaning rule. *Supra* note 4 s. 15AB. Within the US there has been a great deal of variation among the states. According to a recent study of the appellant courts of five US states by Gluck, methods for statutory interpretation with respect to legislative history have evolved and have been overturned over time in some states. Gluck, *supra* note 46.

with respect to the level of court where Hansard was being introduced into the judgments. It turned out that Hansard was unlikely to be mentioned in the lower court judgments. Meanwhile, because the issues that are dealt with in judgments change so dramatically as a "case" moves up to higher courts, there were no obvious patterns or trends to analyze. However, this research turned up an intriguing fact: six of the ten judgments in 2010 came from Quebec.[50]

This was an issue that deserved some further research. Unlike the other jurisdictions in Canada, the Quebec legal system has civil code roots. It is a live question whether or not there is a cultural legacy that renders Quebec courts more likely to consider legislative history or *travaux preparatoires*. In pursuit of this, a series of qualitative analyses were conducted to answer the following general research question: Is Quebec the source of a disproportionate share of judgments referring to Hansard?

In order to answer this question properly, the source jurisdictions of *SCC* judgments had to be considered, but the provincial courts had to be looked at as well. As a result, the prevalence of Hansard references in judgments was assessed for the provincial superior courts, the provincial appellate courts, and the federal courts of Canada. Because the necessary data was available, it was a simple additional step to assess the prevalence of Hansard at the *SCC*. This provided for a comprehensive assessment of the prevalence of judicial references to Hansard throughout the courts of Canada.

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50 *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41, [2010] 2 SCR 592 [*Globe & Mail*]; *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281 [*Németh*]; *Quebec (Attorney General) v Canadian Owners and Pilots Association* 2010 SCC 39 [*COPA*]; *Quebec (Attorney General) v Lacombe* 2010 SCC 38 [*Lacombe*]; *Reference re Assisted Human Reproduction Act* 2010 SCC 61 [*Re AHRA*]; *Syndicat de la fonction publique du Québec v Quebec (Attorney General)*, 2010 SCC 28, [2010] 2 SCR 61 [*Syndicat*].

First, I assembled the complete list of *SCC* judgments that referred to Hansard over the study period of 1999 through to 2010.[51] Then the proportion of judgments making reference to Hansard in *SCC* judgments was calculated as a percentage of the total number of judgments published for each year over the study period.[52]

The source jurisdictions for each judgment from the list of *SCC* judgments were assembled into a table, along with the percentage of judgments coming from each jurisdiction over the study period.[53] If any jurisdiction had a greater probability of being the source of *SCC* judgments, it would show up in the percentages, based on the relative size of the jurisdiction.[54]

As a follow-up step, the prevalence of judicial reference to Hansard was considered for the appellate courts, provincial superior courts and federal courts. Surely if there were a "Quebec phenomenon" it would show up in the provincial courts as well. The research question was this: What is the prevalence of judgments making reference to

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51 Given that recourse to Hansard was predominantly justified using a compartmentalized approach prior to *Rizzo* in 1998, the period of 1999 through to 2010 was the most appropriate time frame to consider. It also dovetails nicely with the qualitative study. The complete list of judgments is attached as Appendix 1 at page 153.

52 See Table #4: Judgments Referring to Hansard at the SCC from 1999 to 2010 at page 127 .

53 It should be noted that 2010 was deliberately excluded from the study period. If 2010 is an anomaly with respect to Quebec, then its inclusion would tend to distort the overall average in a manner that reduces the difference between Quebec and the other jurisdictions since the data set is so small. On the other hand, if Quebec is genuinely the source of a larger share of *SCC* judgments over time, then the exclusion of 2010 would make no significant difference. The exclusion enables a more robust comparison: 2010 is compared with average of years other than 2010. See Table #5: Source Jurisdictions of *SCC* judgments from 1999 – 2009 at 130.

54 For example, according to Statistics Canada, Quebec had approximately 23% of Canada's population in 2010, and would therefore be expected to be the source jurisdiction for something in the neighbourhood of 23% of the judgments, if there is no other factor at play, although perhaps the number would be a bit less since the Federal Courts would also take a share. Of course, fairly wide room should be left for variation given the relatively small number of judgments at issue. As well, a certain amount of leeway must be left for differences in provincial court structures and case management practices between different jurisdictions. Population information was taken from Statistics Canada online: <http://www40.statcan.gc.ca/l01/cst01/demo02a-eng.htm>.

Hansard in the provincial superior courts, provincial appellate courts and the federal courts of Canada?

The complete list of judgments that make reference to Hansard was assembled for all but the provincial non-s. 96 courts of Canada for both 1999 and 2010.[55] For the jurisdictions that had larger volumes of judgments, the total number of judgments in 1999 and 2010 were determined; and, as with the data from the *SCC*, the proportion of judgments referring to Hansard was calculated as a percentage of the total judgments for each level of court in each jurisdiction.[56] This data provided a snapshot of Hansard use at

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55 Section 96 courts are enshrined in s. 96 of the Canadian Constitution and have constitutionally protected jurisdiction over trials of first instance concerning matters like property and civil rights. *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.) [*Canadian Constitution*]. These courts go by different names in different provinces, however, all share the same Constitutionally protected authority within their respective provinces. Most provinces have created statutory provincial courts to reduce the case loads on the s. 96 courts. These statutory provincial courts are not permitted to infringe upon the jurisdiction of the s. 96 courts. The non-s.96 provincial courts were left out for two reasons. First, there were very few jurisdictions that published any judgments from these courts in 1999. Meanwhile, when judgments from these courts were published, this generally represented a small percentage of the total number of judgments heard. This would have prevent a meaningful percentage from being calculated.

The selection of the first and last year as samples was a choice based on economy. It was time-consuming to assemble the complete list of judgments therefore a study of 1999 through to 2010 was simply not possible. In hindsight, the choice of 1999 was unfortunate. The available databases of decisions for 1999 were not complete for the Ontario and Quebec Provincial Superior Courts. Given that Quebec is the jurisdiction of interest, this is unfortunate. However, because of differences in case management and publishing practices, apples-to-apples comparisons between provinces is doubtful in the case of Quebec, as will be shown. Meanwhile, even when the database of cases is complete, these numbers are nothing more than indications from which some insight can be gained. The entire quantitative study is based on small samples and provides only a glimpse. It was decided that the amount of time required to assemble a complete list of cases from these jurisdictions for another year would not yield sufficient benefit to be justified. Despite the shortcomings of the data (and by respecting the shortcomings), valuable insights can be gained into the judicial use of Hansard across Canada. By examining 1999 and 2010, the quantitative study parallels the qualitative analysis of SCC judgments, and therefore makes the entire study cohesive and consistent.

56 The assessment of the percentage of judgments referring to Hansard was limited to Alberta, British Columbia, Ontario, Quebec and the Federal Courts, again for the sake of economy. There was no easy way to find the total number of judgments. The number of entries in the Canlii database had to be counted. Meanwhile, in smaller jurisdictions there is a low probability of there being any relevant judgments in any given year; therefore the percentage of judgments in a single year is not a particularly meaningful piece of information. The complete list of judgments that make reference to Hansard from the various appellate courts in 1999 are shown in Appendix 2: Appellate Court Judgments Referring to Hansard in 1999 at page 156. The complete list of judgments that make reference to Hansard in 2010 are shown in Appendix 3: Appellate Court Judgments Referring to Hansard in 2010 at page 157. The list of judgments for the Provincial Superior Courts and the Federal Court in 1999 is shown in Appendix 4: Provincial Superior Court and Federal Court Judgments Referring to Hansard in 1999 at

the appellate and provincial superior courts, as well as at the federal courts. From this data, it can be determined if any particular jurisdiction is more likely to make use of Hansard. As well, it provides some insight into just how often Hansard is being referred to in judgments. Prior to this research, this was entirely a matter of speculation.

(c) The Subject Matter of this Study

In a perfect world, this study would begin by searching a database containing all submission to the courts by counsel. Then all decisions in which Hansard excerpts we presented could be analyzed. Primary literature research does not reveal decisions where Hansard was presented by counsel but no comment was made about it in the court's judgment. Meanwhile, there is no searchable database of submissions to facilitate such research. In the absence of such a database, and with the relatively small list of cases at issue in this study, it would have been preferable to consult the submissions for each case. However, within the timetable of an LL.M. thesis there are only a few short months available for research, and a review of counsel's submissions in every case in in this study was simply not possible.

The use of the primary literature was therefore a compromise, and its limits must be respected. This is a study of the judicial comment on Hansard. All conclusions drawn must bear this fact in mind. Given the inability to consider submissions, the primary literature is the information source most closely connected to the phenomenon at issue. Interviews with judges and lawyers, for example, are more remote. Because the subject is controversial and there are political, ideological and philosophical dimensions to the

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page 159. The list of judgments for the Provincial Superior Courts and the Federal Court in 2010 is shown in Appendix 5: Provincial Superior Court and Federal Court Judgments Referring to Hansard in 2010 at page 161.

controversy, personal accounts about the use of Hansard might not reflect realities of judicial decision-making. Meanwhile, political considerations that come to bear on judicial decision-making are embedded within the decisions themselves, for the most part.

Given that the previous study upon which this current research is based[57] also examined only judicial comment on Hansard, the current study represents an effort to build on the body of knowledge in this area of law in the most efficient manner possible. Despite the limits of this approach, much can be learned through the study of judicial pronouncements.

For a number of reasons, a qualitative approach is essential for a meaningful study of Hansard in court. This is an unusual type of evidence that plays a unique role in each case where it is admitted. Since Hansard is but one element in a complex process that lacks the kinds of controls that would make quantitative study a straightforward activity, attempts at quantitative analysis face substantial obstacles. The only metric that lends itself to quantitative study is judicial reference to Hansard. Quantitative analysis of this very phenomenon can provide an assessment of the prevalence of judicial use of Hansard, but not much more. Analogous attempts to assess more complex matters via quantitative studies, for example the ideological leanings of judges, have been the subject of significant controversy and scholarly criticism.[58] Meanwhile, judicial use of Hansard in

57 Beaulac, *supra* note 7.

58 See e.g. Frank B. Cross and Stefanie A. Lindquist "The Scientific Study of Judicial Activism" (2006) 91 Minn L Rev 1752-1784; Jack Knight, "Are Empiricists Asking the Right Questions About Judicial Decision-making?" (2009)58 Duke L J 1531-1542 ; also see William N. Eskridge, Jr. & Lauren E. Baer "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*" (2008) 96 Geo L J 1083-1226. Many problems and criticisms are cited in the paper; also see Eric R. Claeys "The Limits Of Empirical Political Science and the Possibilities of Living-Constitution Theory for a Retrospective on the Rehnquist Court" (2003) 47 St Louis U L J 737-752; and see Herbert A. Simon "Human Nature in Politics: The Dialogue of Psychology with Political

Canada has not received widespread scholarly attention, so it is not as well-understood as other elements of law in Canada.

(d) The Search Criteria Used to Assemble the List of Judgments

The search for relevant cases was a matter of diligent preparation and ongoing research during the study. There are a variety of different names used for what is loosely called "the Hansard" throughout Canada over time. For example, in Nova Scotia, the publication was originally called *Assembly Debates*, then changed to *Debates and Proceedings of the House of Assembly* in the 1900's, then changed again to *House of Assembly Debates and Proceedings* in 1971. In Quebec the publication was called *Débats De L'Assemblée Législative* for many years and then changed to *Assemblée Nationale Journal des Débats*.[59] To begin, a complete list of the publications for each jurisdiction was created by looking at the hard copies in the library. Keyword searches were conducted to catch all of the titles for the target years on *Canlii*. In conjunction with this, certain commonly used non-technical terms were used for searches as well, like "parliamentary debates" and "legislative debates" and "legislative history". Each case that turned up was vetted for false positives, and decisions that positively met the criteria were downloaded.[60] When reading and analyzing cases, other terms that appeared in decisions that had not previously been considered were noted. Further searches were

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Science" (1985) 79 Am Pol Sci Rev 293-304; also see Maksymilian Del Mar "The Spectre of Max Weber: From Objectivity in Social Science and Social Policy to a Theory of Evidence-Based Normative Design for Statutory Interpretation" (2006) [unpublished, online: <http://ssrn.com/abstract=946122>].

59 There is a significant difference between journals of proceedings and transcripts of proceedings insofar as journals do not include the verbatim record of statements made. However Journals were included in the search criteria because it made the search process more comprehensive.

60 "Hansard" was a particularly noisy term because of several lawyers named Hansard and a BC Case called *re: Hansard Spruce Mills* that is apparently a well-established precedent about comity. In the end, the word "debate" proved to be the most useful key-word despite the high incidence of non-Hansard related usage in judgments. *Re Hansard Spruce Mills Ltd.*, [1954] 4 DLR 590 (BCSC)

conducted on an ongoing basis to ensure that the list was as complete as possible. The Westlaw Canada database was also searched.[61] On an ongoing basis, the search criteria were used on the 1999 *SCC* judgments to ensure that the method uncovered the same judgments that Beaulac considered.

This study was not strictly limited to Hansard. Instead, criteria were used to parallel Beaulac's list of cases from 1999 which treated the transcript of proceedings before a legislative committee as equivalent to Hansard. As well, the mere statement of the word "Hansard" with respect to extrinsic aids to statutory interpretation was sufficient to warrant inclusion. As a result, certain cases do not actually involve the use of Hansard but only involve discussion about Hansard. In some of these cases, there is an unusual type of extrinsic interpretive aid drawn from the collection of materials that comprises the legislative history.[62]

As a result, the quantitative data in particular must be understood for what is actually being measured. This is a study of judicial comment on Hansard and Hansard-like materials. This will include judicial comment on the phenomenon whether or not such materials are used in the judgment. The number of judgments where Hansard is actually used in the judgments is therefore somewhat less than the total number of judgments counted in the study. Based on the judgments in the qualitative study, it seems

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61 Online: <http://www.westlawecarswell.com/home>. No cases turned up on Westlaw's database that did not appear in Canlii's database.

62 Beaulac included a judgment where Orders-in-Council were discussed as aids to interpretation. This was regarded as sufficient to warrant inclusion in his study: *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 1999 CanLII 649 [*Delisle*]. The 2010 *SCC* judgments in the current study included a judgment where a statement under oath by an elected municipal official about the purpose of a municipal by-law was used as an aid to interpretation.

likely that the number of cases where such materials are actually used comprises a large proportion of the judgments that make reference to Hansard.[63]

63 One of the ten judgments in 2010 made reference to Hansard without making use of such evidence, *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 is another judgment of this ilk [*Kitkatla*]. As an educated guess, it is plausible that this type of judgment comprises roughly ten percent of the judgments.

CHAPTER 2

2.1 The History of Hansard

Without knowledge of the international historical context, it would be easy to conclude that the use of Hansard excerpts as aids to statutory interpretation in court is a marginal phenomenon undeserving of serious scholarly attention in Canada. Hansard has a relatively low probability of appearing in any particular judgment.[64] This makes intuitive sense since the various legislative bodies in Canada sit for a limited number of hours per year and have busy agendas dominated by partisan politicking. As if in concurrence with this line of thinking, Canadian scholars have devoted little attention to this phenomenon over the past decade.

Despite the absence of consideration in Canada, the use of Hansard (and the US equivalent) in court is extremely controversial in the UK and US.[65] A heated debate rages with an intensity and passion comparable to the blood-feud over originalism, and every year new contributions are made to the substantial volume of scholarly work devoted to the subject.[66] Through the absence of scholarly attention, Canada has become an outsider to this highly charged international dialogue when only a decade ago our scholars were vibrant contributors. This noticeable absence has occurred even though the Canadian context is unique and research could provide meaningful insights for those seeking a larger understanding of the phenomenon.

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64 Although this is a fair statement to make, until the research in this study was performed, the actual amount of judgments that referred to Hansard was entirely a speculative matter with the sole exception of *SCC* judgments in 1999.

65 In the United States, the federal transcript of proceedings is included in the *Congressional Record.*

66 Danner cites 40 journal articles on the use of legislative history in US courts published from 1988-2003. *Supra* note 17 at 158, footnote 30.

If the various views with respect to the use of extrinsic aids to statutory interpretation were to be plotted on a spectrum, with the textualist stance[67] at one extreme, where only the language of the statute is to be considered and no recourse to interpretive aids is permitted, the use of Hansard evidence would sit on the other end of the spectrum as the extreme outlier of interpretive aids. Those who argue for firm restrictions on the use of extrinsic aids to interpretation tend to preclude this type of evidence first, although the list of prohibited sources will likely include other types of aids as well.[68] Meanwhile, the controversy aroused by the use of Hansard in court far outstrips the actual impact of this occasionally useful source of interpretive guidance. In this respect, Hansard is something of a barometer. Its treatment is a reflection of a much larger jurisprudential debate about how statutes should be interpreted. What follows is a brief history of the use of legislative history in court followed by an exploration of the controversy surrounding the use of Hansard, highlighting where Canada fits in and why the use of Hansard in court needs to be studied more closely in Canada.

The "exclusionary rule" is central to any exploration of the history of Hansard. This is the rule that forbade the use of legislative history for several centuries throughout most of the common law realm. Various cultural forces influence the nature and enforcement of the exclusionary rule, ultimately determining whether or not legislative history is admitted by judges engaged in the construction of legislation.

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67 See *supra* note 20.

68 There is at least one exception: see George A. Costello, "Average Voting Members and Other 'Benign Fictions': The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History" (1990) 39 Duke L J 39. Essentially, Costello argues that floor debates are more closely tied to voting by elected members and are therefore more a more trustworthy reflection of legislative intent than committee reports. His position is nuanced. In his conclusions he asserts that "[e]xcept at the most general level of theory ... the case has not yet been made for customarily valuing floor debates ahead of committee report explanations." Nonetheless, he begins his conclusions by stating "[p]erhaps a good case can be made for reordering the interpretational hierarchy." At 72.

(a) England: The Birthplace of the Exclusionary Rule

The earliest documented judicial discussion of Hansard appears to be in the English case of *Millar v Taylor* in 1769.[69] Ironically, all the judges for the majority stated that the proceedings of the House of Commons are not to be consulted, but expressly made reference to legislative history and parliamentary debates in their reasons.[70] Shortly thereafter, this case became entrenched as authority for the 'exclusionary rule' that Hansard and any documents pertaining to the preparation and enactment of a statute were not to be used in court as an aid to statutory interpretation. This rule was reiterated in decision upon decision in the UK throughout the 20th century. In 1983, Lord Diplock stated that "[t]here are a series of rulings by this House, unbroken for a hundred years and more recently affirmed emphatically and unanimously in *Davice v Johnson* that recourse to proceedings in either House of Parliament during the passage of a Bill ... is not permissible as an aid to its construction"[71].

The exclusionary rule functioned as a prohibition against litigants using materials pertaining to legislative history in court, rather than as a prohibition against judicial recourse to legislative history. The rule prohibited litigants and their counsel from presenting legislative history materials in their submissions, while judges were free to

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69 *Millar v Taylor* (1769), 4 Burr. 2302, 98 ER 201 [*Millar*]. In this case, an author named Millar argued that he was the copyright holder of a book called *The Seasons*. He sought an injunction to prevent a publisher from making and selling copies of the book without his permission.This judgment held that there was a common law copyright to a work that preceeded the Statute of Anne. A multitude of legislative history materials were presented and considered concerning whether or not the Statue of Anne was merely the encoding of the common law copyright at that time. *Copyright Act* 1709 (UK) 8 Anne c.21.

70 *Ibid*; Bale, *supra* note 14 at 3; Beaulac, *supra* note 4 at 293; Danner, *supra* note 17 at 160; Theodore F. T. Plucknett, *A Concise History of the Common Law* (5th ed) (Boston: Little, Brown & Company, 1956) at 335.

71 *Hadmor Productions v Hamilton,* [1983] AC 191, [1982] 1 All ER 1042, 45 MLR 447, 11 ILJ 111, 2 WLR 322 at 337 [*Hadmor*]; quoted from David Miers "Citing Hansard as an Aid to Interpretation" (1983) 4 Stat L Rev 98 at 98.

seek out and consider these materials of their own volition. The judges in *Millar* treated the rule in this manner. As well, there were many occasions during the reign of the exclusionary rule when judges consulted Hansard for the purpose of understanding a statute, although the Hansard was not always mentioned in the judgment.[72]

There were very practical reasons for establishing the exclusionary rule in England in the 1700's. At that time, the proceedings of the assemblies were not documented through formal internal procedures of Parliament. Speech in Parliament was privileged: things said in the House were not to be used against MLAs (or for any other purpose) by persons outside of the House. Because England was a monarchy and historically there had been attempts by Kings to interfere with the activities in the House of Commons, the cultural import of parliamentary privilege was not based solely upon the need to protect parliamentarians from defamation suits. Privilege was regarded as necessary to protect elected officials, and therefore democracy, from interference by the Crown, nobility and other non-democratic political forces.[73] Publishing the proceedings of Parliament was prohibited.[74] However, in a system based on 'responsible' governance,

72 Danner, *supra* note 17 at 161; Lord Lester of Herne Hill "Pepper v Hart Revisited" 15 Stat L Rev 10 at 10-11; Robert G. Vaughn, "A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation" (1996) 7 Ind Int'l & Comp L Rev 1 at 9. Also see *Davis v Johnson*, [1979] AC 264 at 276-7; R v *Local Commissioner [or Administration, ex p. Bradford Metropolitan City Council*, [1979] 2 All ER 881 at 898; and *Hadmore, supra note 71*. In 1981, the then Lord Chancellor, Lord Hailsham, admitted to consulting Hansard: see UK, HL, *Parliamentary Debates*, vol 408, col 1346 (26 Mar 1981). In Australia, Mr Justice Lionel Murphy also admitted to consulting Hansard. See *Symposium on Statutory Interpretation,* above, n. 13, at 39. See, also, Mr Justice Anthony Mason, also speaking in an extra-judicial capacity: *ibid*, at 83. In Robert C. Beckman & Andrew Fang, "Beyond Pepper v Hart: The Legislative Reform of Statutory Interpretation in Singapore" (1994) 15 Stat L Rev 69 at footnote 22. The legislative history materials were not necessarily mentioned in the judgments.

73 According to Bale, "[i]t 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 ... . Freedom of debate was secured following the revolution of 1688." Bale, *supra* note 14 at 6. Rawlinson notes that leave was never required to present extracts from proceedings of the House of Lords in court. See Michael Rawlinson, "Tax Legislation and the Hansard Rule" (1983) Brit Tax Rev 274 at 286.

74 1688, I Will & Mar Sess 2 c 2.

the public has a right to know what is going on in Parliament, and reporting had evolved through the actions of private reporters who were given the tacit support of the House. At the time of *Millar*, there were records which appeared to be complete, however their integrity was suspect. Anecdotal evidence suggests that some debates were documented in a partisan fashion in accordance with the politics of the author, and occasionally they were fabricated by authors who did not witness the proceedings first-hand.[75] Because of the prohibition and the doubtful integrity of the records, it was quite reasonable for the judges in *Millar* to hold that "[t]hat history is not known to the other house or to the sovereign."[76]

Another political undercurrent at work at the time was the judicial mistrust of statute law. The mischief rule established by *Heydon's Case* in 1584,[77] often cited as the beginning of purposive interpretation, was really a method of narrowing what many judges and scholars perceived to be Parliament's ham-fisted meddling with the highly evolved judge-made common law.[78]

The circumstances were quite different by the middle of the 20th century. The proceedings of Parliament were published officially, and the integrity of the information

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75 Bale, *supra* note 14 at 7, citing T. E. May, *The Constitutional History of England*, vol I (London: Longmans, Green & Co, 1912). Also see Sir Courtney Ilbert, *Parliament: Its History, Constitution and Practice* (New York: Henry Holt & Co, 1951).

76 *Millar supra* note 69 at 217.

77 *Heydon's Case*, 76 Eng Rep 637.

78 This type of thinking persists even today. In the words of Graham, "[m]any judges are somewhat skeptical of the legislator's ability to respond to the needs of justice, and see an Act of Parliament as an ill-conceived political tool that does little more than erode the genius of the common law." Randal Graham "Good Intentions" (2000) 12 SC L Rev (2d) 147 at 148; also see Bale, *supra* note 14 at 11-12. According to scholars like Bale, this type of thinking is less prevalent now than it was two centuries ago. See Bale, *supra* note 14.

was no longer suspect.[79] As well, Parliament was generally recognized as the supreme law-making authority. The notion that statutes were to be treated with suspicion had given way to the notion of parliamentary supremacy which mandated judges to uphold the will of Parliament, generally speaking.[80] The very practical impediments to the reception of Hansard in court no longer existed. At the same time, the modern regulatory state was evolving. The common law was supplanted by ever-increasing layers of statutory law.[81] Along with it, the task of legislative drafting was delegated to an increasing number of committees, and dispute resolution was gradually delegated to an expanding variety of specialized tribunals.[82]

The enunciation of the rule in *Millar* did not include explanations or justifications. It appears to be the case that, over time, justifications were advanced by judges and scholars, some of which were political and philosophical in nature, and these justifications enabled the rule to survive well beyond the circumstances in which the rule was established. In the joint report by the UK and Scottish Law Commissions, for

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79 The Official Report of parliamentary proceedings was published by parliament commencing in 1909. See UK, HC, *Factsheet G-17 General Series, House of Commons Official Report* (London: House of Commons Official Information Office, 2010) online: <http://www.parliament.uk/documents/commons-information-office/g17.pdf>. Also see Bale, *supra* note 14 at 7.

80 See for example John Burrows "Changing Approaches to the Interpretation of Statutes" (2002) 33 Victoria U Wellington L Rev 561 at 564. According to Blatt, the stated objective of the US judiciary became legislative intent in late the 1800's. See William S. Blatt, "The History of Statutory Interpretation: A Study In Form and Substance" (1984-1985) 6 Cardozo L Rev 799 at 805-808. In the exchange between Radin and Landis on statutory interpretation, the discussion is focused on the proper method for determining legislative intent. Parliamentary sovereignty is presumed: Max Radin, "Statutory Interpretation"(1930) 43 Harv L Rev 863; James M. Landis, "A Note On 'Statutory Interpretation'"(1930) 43 Harv L Rev 886. The English Law Commission Report in 1969 also presumes that legislative intent is the objective of statutory interpretation. see Law Commission, *supra* note 20 at 60: "The judiciary has remained a protector of citizens' legal rights, for example rights of the accused in criminal prosecutions, and the tension remains between the judiciary and parliament on certain matters, however the overarching narrative is that parliament has the legitimate authority to make law and the judiciary's role is to enforce it." Also see Bale, *supra* note 70 at 12-13.

81 See for example, Danner, *supra* note 17 at 182-183.

82 *Ibid* at 183-185.

example, the reliability of Hansard was challenged because of the inherently political nature of parliamentary debate. However practicality remained the dominant concern: "The citizen, or the practitioner whom he consults, may have a heavy burden placed upon him if the context in which a statute is to be understood requires reference to materials which are not readily available without unreasonable convenience or expense."[83] The Commission argued that "specially prepared explanatory material", enacted for the express purpose of aiding interpretation of statutes, would be a more appropriate way to meet the need for which lawyers are seeking permission to use legislative history. The Commission concluded that the exclusionary rule should be preserved and that the production of explanatory material should be encouraged.[84]

The exclusionary rule prohibited legislative history in submissions to the court, but there was a procedural route for exceptions. Upon request, Parliament could grant leave for the records to be used in court. Leave was requested at least four times in the past century and two of these requests were refused.[85] In 1980 the UK legislature amended the *Bill of Rights* to remove the requirement of leave for the use of legislative history in court.[86] The parliamentary committee driving the resolution described the amendment as the aligning of the law with long-standing practice.[87] This reasoning is

83 See Law Commission, *supra* note 20 at 60. There were several reasons considered both for and against admitting legislative history in this report. The issue of availability of the records was the final reason stated as justification for retaining the exclusionary rule, and appears to be a reason that the authors felt to be particularly compelling.

84 *Ibid* at 61 and 81. The fact that the enactment of supplemental information as an aid in statutory interpretation was a formal recommendation of the English and Scottish Law Commissions is itself an interesting point. To use the language of economics, this suggests that there is a demand for more information to facilitate the process of statutory provisions than what is provided within the four corners of the statute. Arguably, this demand was a key source of pressure to relax and eliminate the exclusionary rule.

85 Miers, *supra* note 71 at 101-102.

86 UK, HC, *Parliamentary Debates*, Vol 991 (31 October 1980) cols 879-916; from Miers, *supra* note 71.

87 Miers, *supra* note 71.

suspect given that leave had been refused as recently as 1975;[88] however, this amendment coincides with the increased use of legislative history in UK Courts and throughout former British colonies around the world.

In the infamous case of *Pepper v Hart*, the House of Lords overturned the long-standing exclusionary rule in 1992.[89] The case concerned the valuation of taxable benefits received by employees of Malvern College. The children of high-ranking employees at the College were permitted to attend the school at a 20% discount off the standard tuition amount. This was a taxable benefit, and s 63(1) of the *Finance Act 1976* stated that "[t]he cash equivalent of any benefit ... is an amount equal to the cost equivalent of the benefit, less so much (if any) of it as is made good by the employee to those providing the benefit."[90] Subsection (2) states that "the cost of a benefit is the amount of any expense incurred in or in connection with its provision, and (here and in those subsections) includes a proper proportion of any expense". The employees argued that the "cost" of the benefit was the marginal cost of the additional students. The school had excess capacity, and the marginal cost was therefore negligible. Her Majesty's Revenue argued that the cost should be the average cost per student (i.e. the total annual cost of running the school divided by the number of students). The tax tribunal decided in favour of the employees, but the decision was reversed by the High Court and the reversal was upheld by the Court of Appeal. The House of Lords was made aware of highly relevant statements made about the intended meaning of s 63 in the House of Commons,[91] which

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88 See UK, HC, *Parliamentary Debates*, Vol 895 (18 July 1975) cols 1922-1937; quoted from Miers, *ibid* at 101, footnote 19.

89 *Pepper, supra* note 3.

90 *Finance Act*, 1976 c 40.

91 The Financial Secretary was asked about the exact scenario before the court: What would be the cost for teachers whose children attend their employer's school at a reduced rate of tuition. His response:

favoured the taxpayers, and the litigants were permitted to present arguments about whether Hansard could be used as an aid to statutory interpretation.

The standard objections were raised by counsel on behalf of Her Majesty's Revenue.[92] Use of Hansard violates parliamentary privilege; it would make litigation unduly complicated and therefore very expensive and time-consuming; and the rule preserves the "constitutional proprieties of leaving Parliament to legislate in words and the courts (not Parliamentary speakers) to construe the meaning of the words finally enacted".[93] Of the seven Law Lords presiding, only one was convinced that the exclusionary rule should be upheld. In the reasons, the House of Lords concluded that the words of MPs were not being impeached and therefore privilege was not at issue.[94] Indeed, their words were being used to confirm the will of Parliament. If the relaxation of the rule is properly limited, given the low probability of debate directly on point about the meaning of particular statutory provisions, it was concluded that such a change would be unlikely to cause a significant increase in the cost of litigation. Meanwhile, where there is evidence in Hansard that provides clear resolution to a dispute, the cost of litigation is eliminated altogether.[95] The issue of "constitutional propriety" was therefore trumped by the propriety of determining the will of Parliament when the words of a statute are ambiguous or otherwise unclear.[96]

"The benefit will be assessed on the cost to the employer, which would be very small indeed in this case." UK, HC, *Parliamentary Debates*, vol 913 (22 June 1976) col 1095.

92 For a complete discussion of the objections to the use of Hansard see Bennion, *supra* note 17.

93 As per Lord Brown-Wilkinson, *Pepper*, *supra* note 3 at 645-646.

94 See for example, the concurring decision of Lord Browne-Wilkinson, *Pepper*, *ibid.*

95 See the concurring decision by Lord Bridge of Harwich, *supra* note 3 at 617.

96 See for example, the Lord Browne-Wilkinson, *ibid* note 3 at 635. Also see the concurring decision of Lord Oliver of Aylmerton, *ibid* at 620.

As often occurs when a long-standing precedent is overturned, the House of Lords went to great lengths to couch the decision as a slight change rather than a sweeping revolution. The exclusionary rule was not cast aside, but merely experienced a "limited relaxation" for those rare occasions where the words spoken in the house provide valuable insight into the intended meaning of legislation. But restrictions and guidance were provided.[97] Statutory text must suffer from ambiguity or lack of clarity as a precondition for considering evidence from the legislature, and only material that "clearly discloses the mischief aimed at or the legislative intention" can be considered.[98] As well, quotes from Hansard must be from an MP in a position of knowledge with respect to the statute, for example the Minister in charge of the Bill or the Bill's promoter.[99] Despite these restrictions, *Pepper* marked a watershed moment in the United Kingdom. This was a decidedly abrupt shift from exclusion to admission. As the lead judgment made clear, not only Hansard, but the entire set of documents that comprise legislative history were now available to litigants when a dispute revolved around the interpretation of statutory text.[100]

(b) The Exclusionary Rule in the United States

In the US, the circumstances were quite similar to the UK initially. There was a received exclusionary rule and unreliable records. However, use of legislative history in court occurred much sooner than in the UK. The federal courts began using legislative

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97 *Ibid.*

98 *Supra* note 3 at 634.

99 *Pepper, supra* note 3 at 640.

100 *Ibid* at 634-635.

history in the 1890's, and it became a common practice within a few decades.[101] *Rector of Holy Trinity Church v United States* established the precedent in 1892 that permitted recourse to legislative history, including the Congressional Record, for the purpose of interpreting statutes.[102]

There were some important differences between the US and UK contexts. There was no monarchy in America so there was never any justification beyond privilege for resisting publication of the proceedings of the various elected bodies.[103] Perhaps as a result of this difference, both federal Houses were publishing official reports of proceedings by 1850, six decades earlier than in England.[104] As well, the use of committees in the US was much more extensive and the volume of materials was much larger than in England.[105] Meanwhile, American legal scholarship in the 19th century was dominated by the hermeneutical theories of scholars like Francis Lieber who championed purposive interpretation based on the concept of legislative intent.[106] Although there is no logic that necessarily connects recourse to legislative history with purposive

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101 Hans W. Baade, "'Original Intent' in Historical Perspective: Some Critical Glosses" (1991) 69 Tex L Rev 1001 at 1079-1081. *See also* Lawrence M. Solan, "Law, Language,and Lenity" (1998) 40 Wm & Mary L Rev 57 at 97.

102 *Church of the Holy Trinity v United States,* 143 U.S. 457 (1892). There are some scholars who take a different view of this case. Baade, for example cites this case as one of a trilogy of decisions from 1892 to 1904 which established judicial use of legislative history. See Danner, *supra* note 17 at 178.

103 There was never a ban on the publication of the proceedings of the Houses in the US. Instead, Congress had historically been concerned with publication and distribution of documents pertaining to its activities because of their "growing importance and permanent value of its ... transactions". See *Act of Dec. 27, 1813,* 3 Stat. 140 (1814) which mandated publication and distribution of particular documents to state libraries. Also see Danner, *supra* note 17 at 185-186. Also see US, Senate, *Public Documents of the First Fourteen Congresses, 1789-1817* (S Doc No 428- 6) (Washington DC: US Government Printing Office, 1900).

104 Of course, it is impossible to know for sure what the various differences were between the two contexts that brought about the earlier publication of the records in the US. The years that publication commenced are from Danner, *supra* note 17, citing Elizabeth G. McPherson, "Reporting the Debates of Congress" (1942) 28 Q J Of Speech 141 at 147.

105 Danner, *supra* note 17 at 163.

106 *Ibid* at 173-175.

interpretation, whenever a statutory text is unclear and it is presupposed that the legislative body had some particular purpose in mind when enacting that legislation, it does make sense to look deeper into the legislative process for enlightenment. Many scholars argue that the acceptance of purposive interpretation has played a role in judicial acceptance and use of legislative history.[107]

Use of legislative history in US courts increased until the 1980's when the pendulum began to swing in the opposite direction. This turning point coincided with the appointment of a self-described textualist,[108] Justice Scalia, to the US Supreme Court.[109] Despite a modest decline in the use of legislative history and the impassioned arguments of textualists, the use of legislative history in the US appears to be entrenched.[110] However, the doctrine of textualism, and along with it, a heated debate about how to interpret the statutes (and constitutions) has inspired volumes of scholarly work. The US is the global hotspot for the textualism debate.

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107 See, for example *ibid*; also see Scott C. Styles "The Rule of Parliament: Statutory Interpretation after Pepper v Hart" (1994) 14 Ox J Leg Stud 151 at 152; also see Bale *supra* note 14 at 17; also see John Burrows "Changing Approaches to the Interpretation of Statutes" (2002) 33 Victoria U Wellington L Rev 561 at 563.

108 Textualism is the doctrine that eschews the use of legislative history when interpreting statutes. See *supra* note 36.

109 Beaulac, *supra* note 4 at 299; also see J. L. Carro & A. R. Brann, "The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analaysis" (1982) 22 Jurimetrics J 294 at 298. In a recent empirical study of legislative history in the US, Law and Zarring are skeptical that Scalia has caused the decline in use of legislative history: "we reject the oft-expressed hypothesis that Justice Scalia's vocal criticism of legislative history helps explain the overall decline in legislative history usage since the Burger Court. The decline is more likely attributable to the overall rightward shift in the composition of the Court, for which no single justice can be assigned either credit or blame." David S. Law & David Zaring, "Law Versus Ideology: The Supreme Court and the Use of Legislative History" (2010) 51 Wllm & Mary L Rev 1653 at 1654.

110 See Gluck, *supra* note 46 at 1758; also see Law & Zaring, ibid at 1653 at 1655.

(c) The Exclusionary Rule in Canada

The story in Canada is temporally aligned with the story in England, loosely speaking. The exclusionary rule was law until 1976 when the first exception was made.[111] In the *Anti-Inflation Reference*, legislative history including Hansard formed part of the submissions.[112] In the decision by Laskin, CJ, committee reports and Hansard were considered "not to construe and apply the provisions of the *Anti-Inflation Act,* but to ascertain its constitutional pivot."[113] Around 1980 trial courts began accepting these materials on occasion when such information "might settle the matter immediately, one way or the other".[114] In 1981 the Supreme Court of Canada found it acceptable to use Hansard and other preparatory materials to illuminate the historical background against which legislation was enacted if the information was "relevant".[115] Under this decidedly

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111 Hogg notes that there were three decisions by the Judicial Committee of the Privy Council in the 1930's in which recourse was made to legislative history: *P.A.T.A. v AC Can,* [1931] AC 310, 317; *AG BC v AG Can* [1937] AC 368, 376; *Ladore v Bennett,* [1939] AC 468, 477. However, there were subsequent decisions that upheld the exclusionary rule. See for example *Texada Mines v A.G. B.C.* [1960] SCR 713, 720. The consensus among scholars is that the rule was law until the late 1970's. See Peter Hogg, *The Constitutional Law of Canada* (5th Ed.) (Carswell: Toronto, 2009). Also see Beaulac, *supra* note 4 at 301. Also see Bale, *supra* note 14 at 21.

112 *Re: Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation Reference*].

113 *Ibid* at 379. Before the *Charter*, this would invariably be a pith and substance analysis. It appears that the courts were attempting to draw a line between interpreting specific provisions and generally understanding the subject matter affected by a law. The underlying premise is that use for specific interpretations was too problematic while use to acquire a more general understanding was somehow insulated from the dangers. This distinction was blurred by *Upper Churchill, supra* note 42 at 484, when Sopinka J. held that "provided 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 the legislation."

114 *Supra* note 35. From Beaulac *supra* note 4 at 301. In this unanimous judgment, Martin, Houlden and Morden, JJ.A. rely on a quote from Lord Reid in *Warner v Metropolitan Police Cmm'r*, [1962] 2 AC 256 at 279 to justify an exception to the exclusionary rule "where examining the proceedings in Parliament would almost certainly settle the mater immediately one way or the other". Ironically, the Hansard was found to "not meet the standard enunciated by [Lord Reid] ... and they are, therefore, of no assistance in resolving the issue before us". Nonetheless, this judgment became an authority for trial courts to consider Hansard according to Beaulac.

115 Lamer J, as he then was, stated "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" *Vasil, supra* note 35; This is the judgment where Hansard was explicitly used as an aid to interpretation for a non-constitutional matter by the *SCC*

vague exception, trial courts began using Hansard and other preparatory materials mainly to interpret clauses of the *Criminal Code of Canada*.[116] The exception for determining the constitutional characterization of a statute was essentially created anew by the *SCC* in 1982 in *Reference Re Proposed Federal Tax on Exported Natural Gas* and *Schneider v British Columbia (AG)*.[117] Instead of relying on the *Anti-Inflation Reference*, both cases cite *Reference Re Residential Tenancies Act 1971 (Ontario)* as the authority although the judgment upholds the exclusionary rule.[118] Meanwhile, the precedent established in *Anti-Inflation Reference* allowing legislative history to determine the constitutional character of a statute was expanded to include interpreting the *Charter of Rights and Freedoms* in the *Motor Vehicle Reference* in 1985.[119]

Depending on how you parse the exceptions, there were essentially two possible uses for legislative history. First, to illuminate the meaning of a statute within a Constitutional determination (which includes both Charter rights and divisions of power issues), and to illuminate the meaning of a statutory provision in the absence of a Constitutional challenge.[120] The *SCC* continued to use these categories in a rather

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according to Beaulac, *supra* note 4 at 301.

116 Based on cases like *R v Stevenson*, *supra* note 114, trial courts were already using legislative history for this purpose, and arguably *Vasil*, *ibid*, merely affirmed a pre-existing practice.

117 *Reference Re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 SCR 1004 at 1048; *Schneider v British Columbia (A.G.)*, [1982] 2 SCR 112 at 130-31.

118 Ironically, in *Reference Re Residential Tenancies Act*, Dickson, J. stated that "speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight". *Reference Re Residential Tenancies Act* 1971 (Ont) [1981] 1 SCR 714 at 721. Quoted from Beaulac *supra* note 4 at 303.

119 *Canadian Charter of Rights and Freedoms; Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 508-509.

120 Beaulac describes three categories: 1. as an aid to interpreting legislation; 2. for constitutional characterization of statutes; or 3. to help construe the Canadian Constitution. Beaulac, *supra* note 4 at 300.

haphazard manner, expanding and narrowing their application until *Rizzo* in 1998.[121] Depending on how you look at it, either *Rizzo* overturned the exclusionary rule in Canada altogether, or it simply eliminated the need for justifications based specifically on constitutional and non-constitutional contexts.[122] Citing *R. v Morgentaller*, where Hansard was used to construe the constitutional character of legislation, Iacobucci, J. ruled that, "[a]lthough the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation."[123] This statement was made without the fanfare and detailed explanation that accompanied *Pepper*. Significantly, there was no formal guidance in the judgment; no ambiguity requirement, and no mention of specific methods or approaches to narrow the ruling.

The use of Hansard in court has not stirred up controversy in Canada the way that it has in the United States and the United Kingdom.[124] Recourse to Hansard is relatively uncommon, and the handful of Canadian scholars who have considered the matter like

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121 For example, in *Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080, McLachlin states (albeit in a dissenting opinion) that "[r]ecognizing that reference to legislative debates has sometimes been said to be of limited assistance and that it is the wording of the statute which must prevail (see *Re Residential Tenancies Act*, 1979, [1981] 1 SCR 714, *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297), the debates may nevertheless serve to confirm the appropriateness of a particular statutory interpretation (see *R v Sullivan*, [1991] 1 SCR 489, per Lamer C.J., for the majority, at p. 503; *R v Mailloux*, [1988] 2 SCR 1029, per Lamer J. for the Court at p. 1042; *Vasil*, *supra* note 35, per Lamer J. for the majority at para 487)." In *R v Heywood*, it was noted that "Despite the apparent merits of the rule that legislative history is inadmissible to determine legislative intent in statutory construction, this Court has on occasion made use of such materials for this very purpose: see *R v Vasil*, [1981] 1 SCR 469, at p. 487, and *Paul v The Queen*, [1982] 1 SCR 621.

However, it is not necessary in this case to determine the admissibility of the debates for the purpose of determining legislative intent." *R v Heywood*, [1994] 3 SCR 761 at 788-789. Meanwhile, it can be argued that *Rizzo* did not entirely settle the matter. In *R v GB*, *supra* note 42 at para 37, it was stated that "In fact, it is settled that when courts are called upon to consider the constitutionality of an enactment, they may take into account the parliamentary history, which is generally not the case for the ordinary interpretation of an enactment."

122 *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713; *Rizzo, supra* note 2.

123 R *v Morgentaler*, [1993] 3 SCR 463.

124 Arguably, the controversy in the UK made the guidance provided in *Pepper* necessary. Where there is no controversy there is no need to explain, justify and narrow such a ruling.

Bale, Beaulac, Hall, Graham and Sullivan, accept the practice and provide no impassioned opposition to it.[125]

Some additional aspects of of Hansard's history in Canada are discussed in the following section along with a comparison to the history of other British colonies.

(d) The Colonial Perspective: Canada, Australia and New Zealand

The histories in Australia and New Zealand are temporally quite similar to history in Canada with respect to Hansard use in court. Both nations followed the exclusionary rule until the 1980's, at which time exceptions began to appear. In both nations, the rule was relegated to a cautionary principle at best before the turn of the millennium. In fact both New Zealand and Australia set aside the exclusionary rule before Canada and the UK. In Australia, the Federal *Interpretation Act* was amended to permit the use of legislative history in 1984, which is eight years prior to *Pepper* and fourteen years prior to *Rizzo*.[126] Most Australian States and Territories followed suit.[127] A 1985 New Zealand

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125 Beaulac, *supra* note 7; Bale, *supra* note 14; hall *supra* note 28; Graham issues warnings about use of statements by MLAs as evidence of the precise meaning of a specific statutory provision but is generally supportive of the use of legislative history for illuminating the meaning of a statute in a more general sense. See Graham *supra* note 78 at 155-162; also see Graham, *supra note 11* at 176-181. Ruth Sullivan, "Some Implications of Plain Language Drafting" (2001) 22:3 Stat L Rev 145.

126 *Acts Interpretation Act*, *supra* note 4.

127 The Australian Capital Territory, New South Wales, Victoria and Western Australia had amended their respective Interpretation Acts to permit legislative history at the time of Beaulac's research in 1998. The relevant provisions have not been amended since: *Legislation Act* 2001 A2001-14 (ACT) s. 142, online: <http://www.legislation.act.govau/a/2001-14/current/pdf/2001-14.pdf>; *Interpretation Act 1987* (NSW) s. 34, online: <http://www.austlii.edu.au/au/legis/nsw/consol_act/ia1987191/>; *Interpretation of Legislation Act 1984* (Vic) s. 35, online: <http://www.austlii.edu.au/au/legis/vic/consol_act/iola1984322/s35.html>; *Interpretation Act 1984* (WA) s. 19, online: <http://www.austlii.edu.au/au/legis/wa/consol_act/ia1984191/s19.html>. Since that time the Northern Territories, Queensland and Tasmania have made similar amendments: *Interpretation Act* (NT) s.62B, online: <http://www.austlii.edu.au/au/legis/nt/consol_act/ia191/s62b.html>; *Acts Interpretation Act 1954*, (Qld) s. 14B, online: <http://www.legislation.qld.govau/legisltn/current/a/actsinterpa54.pdf>; Acts Interpretation Act 1931 (Tas) s. 8B, online: <http://www.austlii.edu.au/au/legis/tas/consol_act/aia1931230/s8b.html>. Southern Australia is the only jurisdiction that has not enacted legislation permitting the use of legislative history, including Hansard as an interpretive aid.

Law Commission Report stated that there never was an exclusionary rule in New Zealand.[128] Almost immediately, the New Zealand courts began to accept legislative history.[129]

The forces that motivated the rapid and nearly simultaneous change among the former British colonies did not include UK court decisions. Beaulac argues that trends in international law were influential.[130] In accordance with principles agreed upon in the *Vienna Convention on the Law of Treaties* in 1969, the use of treaties and related preparatory materials was recommended to aid in the interpretation of statutes enacted to enforce domestic obligations with respect to international treaties.[131] Having been exposed to the benefits of the background information provided by these materials, it is plausible that judges became more willing to use this method for all domestic legislation.

Another source of influence was secondary literature. Works like Stanley Edwards' famous article about the *Companies' Creditors Arrangement Act* and *Crankshaw's Annotated Criminal Code* relied on Hansard and legislative history to arrive at more enlightened understandings of the respective statutes.[132] Indeed the Crankshaw Code was responsible for the use of Hansard in *R v Vasil*, which was the first *SCC*

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128 NZ, Law Commission, *A New Interpretation Act* (Report No. 17) (Wellington: The Commission, 1990).

129 *Proprietors of Atihua-Wanganui v Malpas* [1985] 2 NZLR 468; from Beaulac, *supra* note 4 at 289.

130 Beaulac, *ibid* at 297; also see Stéphane Beaulac, "No More International Treaty Interpretive Methods in Canada's Statutory Interpretation: A Question of Access to Domestic Travaux Preparatoires" (2010) *University of Edinburgh School of Law Working Paper Series*, 2010/23.

131 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37.

132 Stanley E. Edwards, "Reorganization under the Companies' Creditors Arrangement Act" (1947) 25 Can Bar Rev 587; James Crankshaw, *The Criminal Code of Canada and the Canada Evidence Act* (Montreal: Whiteford & Theoret, 1894). There are many examples of scholarly legal works that rely heavily on Hansard. See for example, Marguerite E. Ritchie, Q.C. "Alice Through the Statutes" (1975) 21 Mcgill L J 685.

decision to use Hansard in the absence of a Constitutional challenge.[133] No doubt there were many forces which collectively put pressure on the exclusionary rule over time. However, the almost simultaneous overturning of the exclusionary rule throughout the UK and the former colonies remains something of a mystery.

The trend towards permissive use of legislative history is a global phenomenon. Recourse to such materials has been a long-standing practice in most continental civil code jurisdictions.[134] The UK and the former colonies of Canada, New Zealand and Australia are now on board. Courts in Singapore began using legislative history following amendments to the *Interpretation Act* mandating purposive interpretation.[135] On the advice of the Hong Kong Law Commission, Hong Kong attempted to pass similar legislation in 2000.[136] Even in the US, where textualists appear to be gaining ground intellectually, the use of legislative materials in court is only facing restrictions and not prohibition.[137] History suggests that, once a legislative assembly publishes official

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133 *Vasil*, *supra* note 35. In this judgment, Lamer J relied upon quotes from Canadian Hansard to show that Parliament adopted the wording of the English Draft code with respect to a specific provision in the Canadian Criminal Code and that Parliament did so with knowledge of the reasons for the provision as explained in the Commission Report within which the Draft Code appeared. More will be said about this judgment at 264. UK, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners* (London: Her Majesty's Stationary Office, 1879) [*English Draft Code*].

134 See for example Dr. Christian Rumpf, "The Importance of Legislative History Materials in the Interpretation of Statutes in Turkey" (1993-1994) 19 N C J Int'l L & Com Reg 267; Also see Claire M. Germain, "Approaches to Statutory Interpretation and Legislative History in France" (2003) 13 Duke J Comp & Int'l L 195; Ironically, Quebec did not follow suit but remained harmonious with the rest of Canada according to Beaulac, *supra* note 4 at 307-308.

135 *Interpretation Act* (Cap 1, 1985 Rev Ed Sing) ss 9A(1)-9A(4). See Anton Cooray and Anthony Law, "Legislative Guidelines on the Use of Extrinsic Materials on Statutory Interpretation: Is Hong Kong Ready?" (2001) 9 Asia Pac L Rev 23 at 26.

136 Cooray, *ibid.* The authors conclude that the decision to reject the bill was because of political concerns i.e. that some undesirable practices of Chinese courts would be introduced, and that in the absence of this fear, the bill would have been passed and that legislative history would be permissible in Hong Kong courts. The title of the article implies that it is only a matter of time until Hong Kong will be ready.

137 See Gluck, *supra* note 46 at 1758; also see Law & Zaring, *supra* note 109.

transcripts, committee reports and related documents, judges and lawyers will inevitably seek to use them in court, and if given enough time, any rule against their use will be overturned.

Within this global trend, the Canadian context is unique. As a British colony, it was separated from the English crown by an ocean. The proceedings of the Canadian Parliament were never subject to a formal prohibition on publication.[138] Meanwhile, the legislative process is similar to that of England with its smaller volume of legislative materials relative to the United States. Unlike in the UK, however, the shift towards permissive use of legislative history occurred in a gradual, almost evolutionary manner spanning a period of fourteen years. When the exclusionary rule was finally overturned completely, there was little guidance beyond a vague warning about the potential frailties and risks. The only other place where a similar confluence of circumstances has occurred is New Zealand, where, as in Canada, few scholars are paying attention.

2.2 The Textualism Debate

The reasons both in favour of, and opposed to, the use of legislative history, are mired in rhetoric. A common misunderstanding concerns textualists' belief in the primacy of plain meaning. The textualist commitment to plain meaning is often overstated, with opponents suggesting that textualists adhere to plain meaning regardless of any other concerns. To be fair, there are some judges who occasionally base decisions on the plain meaning of a statutory provision despite the fact that the interpretation brings about

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138 Online: Canadian Hansard Society <http://www.hansard.ca/hansardincanada.html>. Publication of official records commenced in 1880. According to this source, some members of Parliament attempted to eliminate publication of the debates in 1881. In response, John A. McDonald argued that, without Hansard, "we have no means of tracing out the very groundwork of all our legislation -- the motives and impulses of those petty municipal questions which were the chief subjects of interest in the early days and which have expanded into the larger subjects which are now engaging the attention of the people and the Legislature of Canada."

absurd results, and there are some theorists who argue that there is merit to this position.[139] However, textualists generally approve of a strained interpretation of a statutory provision if the apparent plain meaning brings about absurd results, or conflicts with or is incoherent with the surrounding body of law.[140] Most textualists do not argue for what could be described as a tyranny of plain meaning.

As well, scholars on both sides of the debate tend to use similar reasoning to reach opposite conclusions. For example, the UK Law Commission Report argues that larger volumes of materials that result from the more complicated committee structures in places like Germany, Sweden and the US provide better materials for evidence of legislative intent than the more sparse UK materials.[141] In the US, the opposite argument is raised: the larger volume of materials generated makes them ill-suited as extrinsic aids to interpretation because of the time and complexity involved in the research.[142]

More fundamentally, both sides contend that the use or non-use of legislative history by litigants in court permits judges to better determine the legislative intent. Some scholars might take issue with the assertion that textualists argue that the non-use of legislative intent permits judges to better determine the legislative intent. Nevertheless, there is support for this position in the textualist literature. Textualists often comment on the absurdity of attributing intent about the meaning of a statute to a group of people as a

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139 A well-known Canadian example is the decision by Lamer C.J. *R v McIntosh*, [1995] 1 SCR 686: "Even though I agree with the Crown that the interpretation of s. 34(2) which makes it available to initial aggressors may be somewhat illogical in light of s. 35, and may lead to some absurdity, I do not believe that such considerations should lead this Court to narrow a statutory defence. Parliament, after all, has the right to legislate illogically", at 41. Also see Schauer, *supra* note 29.

140 See for example Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (Princeton: Princeton University Press, 1997) at 20-21.

141 Law Commission, *supra* note 20 at 58 to 60.

142 Danner, *supra* note 17 at 193.

whole when that group is comprised of politicians deeply divided along partisan lines, most of whom have only cursory knowledge of the contents of any particular Bill before Parliament.[143] As a result, textualists do believe that resort to non-statutory materials that were produced in the course of enacting legislation actually muddy the waters of an Act's true meaning rather than revealing an Act's true meaning. Yet textualists must believe that the words of statutes were intended to mean something. Scholars on both sides of the debate, who consider the mechanics of how language works, generally concede that the process of interpreting a statute requires the presumption that there is 'legislative intent' as a figurative tool in order to make rational sense of the text.[144] If the use of fictions is a fault, then the textualist position is in no better position than purposivists and intentionalists since textualism looks for the meaning that a fictional "ordinary reasonable public person fully versed in the language and legal context" would attribute to the text.[145] There are plenty of fictions to go around. The substance of the debate lies elsewhere.

The following exploration of textualism and the debate over the use of Hansard in court is divided into two sections. First, politically-rooted and ultimately ideologically-

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143 See for example Frank H. Easterbrook, "The Role of Original Intent in Statutory Construction" (1988) 11 Har J L & Pub Pol'y 59; also see Radin, *supra* note 80; also see Kenneth A. Shepsle, "Congress is a 'they' and not an 'it': Legislative Intent as an Oxymoron" (1992) 12 Int Rev L and Econ 239. It should be noted that some proponents also criticise the concept of legislative intent. See for example William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994) at 18-25.

144 For proponents conceding the necessity of 'legislative intent' see Lawrence M. Solan "Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation" (2004-05) 93 Geo L J 427; also see Costello *supra* note 68; For textualists conceding the necessity of 'legislative intent' see John F. Manning, "Textualism as a Nondelegation Doctrine" (1997) 97 Col L Rev 673 at 691-692, quoting Scalia J; Also see John F. Manning "Textualism and Legislative Intent" (2005) 99 Va L Rev 419 at 424 "textualists necessarily believe in some version of legislative intent"; also see Michael P. Healy "Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the impact of Pepper v Hart" (1999) 35 Stan J Int'l L 231. Also see Law Commission, *supra* note 20 at 54-56.

145 See for example Manning, *supra* at 144 also see Scalia, *supra* note 45 at 43, "a sort of 'objectified' intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*" Textualism and legislative intent at 421.

based issues will be considered, and then the more practical and logistical issues will be discussed.

Before proceeding, the distinction between Hansard and the other items that comprise the legislative history must be kept clearly in mind as well as the intimate connection between these materials. Proponents of recourse to Hansard will typically support recourse to the supporting documents as well, because MLAs will typically rely on the committee reports and white papers, at least in part, to understand and advocate for (or against) legislation.[146] If there is to be recourse to one, there will be many circumstances where there must also be recourse to the other in order to provide the complete context.[147]

(a) Ideological Issues Surrounding the Textualism Debate

Opponents of recourse to legislative history consider the nature of each type of evidence, and criticize accordingly. Committee reports are regarded as inadmissible because they come from non-elected persons and therefore lack the legal authority to influence what constitutes the law.[148] However, the non-elected status of the authors is not the real problem. MPs are elected, but their speeches in Parliament are suspect because any individual MP will only express a personal opinion whereas the statute is a statement ratified by the majority of MPs, and therefore represents, figuratively speaking, the

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146 According to the Government of Canada website, "the term white paper is ... commonly applied to official documents presented by Ministers of the Crown which state and explain the government's policy on a certain issue." Online: <http://www.parl.gc.ca/Parlinfo/pages/WhitePapers.aspx>. Typically elected members will rely on reports by committees or commission when drafting proposed legislation. These reports are public documents. They might be quite lengthy, however it is customary for such reports to have summary conclusions. White Papers are typically written and made available to all members of the House when Bills are put before the House for debate.

147 For examples and more discussion about this, see the section on "Shoehorning" in Chapter 3 at page 82.

148 See for example, Manning, *supra* note 144 at 689; also see Miers, *supra* note 71 at 105.

opinion of the House as a collective. This argument gets closer to the substance of the matter. Textualists argue that committee reports and other preparatory materials should not be equated with "congressional ascent to their contents";[149] and, the words of one MP should not be equated with the words of the House collectively.[150]

Ironically, proponents agree that the words of MLA's should not be given the same weight as words in statutes. The disagreement concerns how each side believes the evidence will be used by judges. Proponents believe that statements of the Minister in charge of a Bill are to be construed as nothing more than potentially relevant information that might or might not shed light on the meaning of a statute. They do not believe that the words of MLAs will be put on an equal footing with the text of statutes. Textualists argue that, by gleaning information about the meaning of words in statutes by consulting legislative history, the words of a Bill's sponsor spoken in the House will become determinative in court, and thus be put on an equal footing as words in a statute.[151] Manning goes so far as to argue that this amounts to a delegation of law-making authority that is *ultra vires* the US Constitution.[152]

There is an English equivalent for this argument. According to Steyn and Styles, use of Hansard in court alters the constitutionally-ordained balance of power in Parliament by giving too much authority to the executive.[153] If it is known that judges will

149 Manning, *supra* note 144 at 683.

150 Styles, *supra* note 3 at 154.

151 This is an argument raised by Johan Steyn and Jeremy Waldron. See Johan Steyn, "Pepper v Hart; A Re-examination" (2001) 21 Ox J Leg Stud 59 at 64; Also see Manning, *supra* note 109 at 683; Jeremy Waldron "Legislators' Intentions and Unintentional Legislation" in Andrei Marmor (ed.), *Law and Interpretation* (Oxford: Clarendon Press, 1995) at 355.

152 Manning, *supra* note 109 at 695.

153 Styles, *supra* note 3 at 157; Steyn, *supra* note 151 at 68. In *Pepper*, Lord Wilkinson-Browne alluded to this argument in his statements about the "constitutional propriety" of considering Hansard. See *Pepper*, *supra* note .

consider Hansard, the executive will make pronouncements in the House to promote their preferred meaning of a statute. Meanwhile, since the views of MLAs who are not directly involved in the promoting of the Bill are ignored, the views of opponents will be shut out. Thus the executive is given an unfair amount of legislative authority.

The notion of giving too much power to the executive does not appear very persuasive in the context of the Canadian first-past-the-post electoral system. When a majority government presides, the executive controls the House. If the process of voting in Parliament to enact legislation was the only force preventing self-serving partisan legislation, then majority governments would surely have enacted the most brazenly partisan of statutes during all of the majority governments throughout the nation's history, both federally and provincially. There would be no need to plant self-serving information into the legislative history since the content of statutes is effectively under executive control. Let it suffice to say that there is an air of unreality to these arguments. After a century in the US, and nearly three decades in most other common law jurisdictions, it is rather extreme to suggest that use of legislative history in court poses a genuine threat to democracy.

These arguments are a reflection of the philosophical tensions inherent in a parliamentary democracy. The notion that the process of statutory interpretation must be insulated from the process of drafting reflects the desire to prevent unlawful usurping of political power, and carries with it an implied distrust of the individual people involved in the law-making process. It has been argued that Parliament enacts statutes with full knowledge that any ambiguities and vaguenesses will be resolved by the judiciary, an

independent body beyond their control by constitutional design.[154] However, the nature of language (and therefore the nature of statutory language) is such that the full extent of the ambiguities and vaguenesses are not knowable in advance. Provisions whose meanings appear plain and obvious to the drafters could end up being interpreted in a manner contrary to the their understandings simply because the reader did not have shared assumptions about the meanings of various words.[155] This imputing of full knowledge of all textual shortcomings is really a fiction.[156]

It is rather extreme to summarily reject all information surrounding the enactment of a statute. Although committees might consult lobbyists, and various individuals might have differences in opinions, there is a process that moves towards consensus and brings about the final choice of words in statutes. There is some intended meaning to the enacted words.[157] Therefore it is reasonable to consider that, out of respect for those who painstakingly worked towards drafting and enacting those words into law, one might consult the various communications involved in the process to gain a better understanding of how the words were understood by those involved in the process. After

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154 See for example, John F. Manning. "Putting Legislative History To A Vote: A Response to Professor Siegel" (2000) 53 Van L Rev 1529 at 1531. See *contra* Reed Dickerson "The Diseases of Legislative Language" (1964) 1 Harv J on Legis 5; also see *contra* Graham, *supra* note 23 at 179-182. Both Graham and Dickerson believe that ambiguity is always unintentional and unanticipated while vagueness is always intentional.

155 A full explanation would require a lengthy discussion of linguistics. As a single but compelling example, see *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486. The phrase "principles of fundamental justice" was interpreted to include substantive justice when the drafters intended the phrase to be synonymous with "natural justice" and would therefore only include procedural elements.

156 See Dickerson, *supra* note 154; also see Graham, *supra* note 23 at 122-138.

157 This is not to say that there will necessarily be a surgically precise meaning that can be enunciated with respect to all statutory text. The point is much more general. There will always be one or more reasons motivating a change in the law, and one or more issues that the law seeks to address when Bills are proposed, and subsequently enacted into law.

all, the enacting of a statute is a deliberate attempt by a large group of people to shape judicial interpretation.[158]

Textualists point out that Parliament can enact supplementary materials for the express purpose of aiding interpretation, for example, by incorporating a document by reference if the legislators feel it is necessary.[159] Indeed, the English Law Commission report in 1969 concluded that Parliament should formally enact supplemental materials as interpretive aids.[160] However, within Canada, the US and the UK, incorporation by reference has rarely occurred. At best, some statutes might have a preamble or a purpose clause. Although some have argued that by not enacting supplementary materials, legislative assemblies demonstrate their satisfaction with the completeness of statutes as enacted, there are competing reasons why this might be so. The most common explanation is a lack of legislative resources.[161] Parliament has a busy agenda and a limited number of hours per year to get things done. The process of enacting legislation is complex enough without incorporating supplementary documents.

As a less resource-intensive alternative to enacting interpretive supplements, legislatures can make laws governing statutory interpretation. In Australia, the federal government and some provincial governments have stipulated that recourse to Hansard and preparatory materials is permissible in court as aids to interpretation.[162] In Texas, the

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158 Solan makes this argument. Groups of people delegate tasks all of the time, and this includes the task of drafting legislation. When a task is so delegated, it is perfectly rational to ask those upon whom the responsibility fell for further elaboration about the task. See Lawrence M. Solan, *The Language of Statutes* (Chicago: University of Chicago Press, 2010) at 82 - 119.

159 See for example, Manning, *supra* note 109 at 723-724. Also see Johnathan R.Siegel, "The Use of Legislative History In a System of Separated Powers" (2000) 53 Vand L Rev 1457 at 1480-1505.

160 *Supra* note 298.

161 See for example, Manning, *supra* note 109 at 722; also see Seigel, *supra* note 159.

162 *Supra* note 4.

legislature went so far as to ordain that there is no ambiguity requirement in order for courts to consider legislative materials.[163] According to Gluck, there have been instances of 'dialogue' between the state supreme court and the state legislature in both Texas and Connecticut where a statute was enacted, in response to dissatisfaction with the judicial approach to legislative history, then the statute was amended in response to the court's refusal to abide by the statute.[164] This approach has been deployed around the world. It is interesting to note that such statutes are much more likely to permit and regulate the use of legislative history than to prohibit it.[165]

The claim that the lack of enacted interpretive aids is evidence that legislators are satisfied with completeness of a statute as enacted cannot be entirely supported or refuted with any certainty in Canada, where the interpretation acts do not expressly permit the use of legislative history. This argument carried more weight when the exclusionary rule was in place, and tacit consent could be imputed based on the legislators' knowledge of the exclusionary rule. Now, with the permissive environment, the opposite argument can be made: legislators make laws knowing that the preparatory materials can be used as interpretive aids, and can include an exclusionary clause in the act if they disagree with the practice. However, the reality is that neither argument is particularly convincing. It is

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163 "In construing a statute, *whether or not the statute is considered ambiguous on its face*, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history" Tex Gov't Code Ann § 311.023 (Vernon 2005). The courts refused to follow the statute: See *Boykin v State*, 818 SW 2d 782 (Tex Crim App 1991) ; see also, *eg*, *Williams v State*, 273 SW 3d 200, 215 (Tex Crim App 2008); *Ex parte Noyola*, 215 SW 3d 862 (Tex Crim App 2007) (quoting *Ex parte Spann*, 132 SW 3d 390 at 393 (Tex Crim App 2004); *Ex parte Medellin*, 223 SW 3d 315 (Tex Crim App 2006) (same); *Ex parte Spann*, 132 SW 3d 390 (Tex Crim App 2004) (same). In Gluck, *supra* note 46 at 1787.

164 *Supra* note 98 at 1784-1791 & 1824-1829.

165 Jurisdictions permitting recourse by statute include Texas, *supra* note 123; Connecticut, 2003 Conn Pub Acts 154 (codified at CONN GEN STAT § 1-2z (2003)); and Australia, *supra* note 89. Research for this paper uncovered no jurisdiction with a statutory prohibition on recourse to legislative history.

an attempt to use current practice to justify the current practice; and, it only serves as a reason to preserve the status quo.

Dialogue theory,[166] alluded to above, is another argument that provides no concrete justification for or against the use of legislative history, although it is another reason for presuming that the statute can be regarded as complete as enacted. According to dialogue theory, if the law-makers do not like a judicial interpretation, they have a remedy: they can amend the legislation (or repeal it and enact something else). However the reality seems to accord with the view that legislative resources are scarce. Amendments tend to follow significant constitutional decisions, but lesser yet obviously problematic statutory language can remain unrevised for decades.[167]

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166 According to Bushell & Hogg, "[w]here a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue." Peter W. Hogg and Allison A. Bushell "The Charter Dialogue Between The Courts And Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)" 35 Osgoode Hall L J 110. This matter has been the subject of significant scholarly debate. See, for example, Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L J 513; also see Andrew Petter "Taking Dialogue Much Too Seriously (Or Perhaps Charter Dialogue Isn't Such A Good Thing After All)" (2007) 45 Osgoode Hall L J 147.

167 *Halpern v. Canada (Attorney General)* (2003), 36 RFL (5th) 127, 172 OAC 276 (Ont CA) is an excellent example of significant Constitutional decisions that brought about relatively rapid amendments. The common law definition of marriage was declared to be ultra vires the *Charter.* At the federal level, several provisions of the *Divorce Act* became unconstitutional, and the *Civil Marriage Act* was enacted to remedy the statute. The statute was later amended to make changes to seven other statutes including the *Income Tax Act*, the *Federal Law and Civil Law of the Province of Quebec Act*, and the *Modernization of Benefits and Obligations Act*. The Ontario legislature enacted the *Spousal Relationship Statute Law Amendment Act* which amended seventy one provincial statutes including, among others, the *Accumulations Act*, the *Business Corporations Act*, the *Commercial Tenancies Act*, the *Courts of Justice Act*, the *Evidence Act*, and the *Fuel Tax Act*. The *Federal Law and Civil Law of the Province of Quebec Act* is currently enforced as *Federal Law—Civil Law Harmonization Act*, No. 1, SC 2001, c 4; *Modernization of Benefits and Obligations Act* SC 2000, c 12; *Spousal Relationships Statute Law Amendment Act*, 2005, SO 2005; Accumulations Act, *supra* note 61; *Business Corporations Act.* RSO 1990, c B.16; *Commercial Tenancies Act.* RSO 1990, c L.7; *Courts of Justice Act.* RSO 1990, c C.43; *Evidence Act.* R.S.O. 1990, c E.23; *Fuel Tax Act.* RSO 1990.

Examples of lesser statutory provisions which have obvious problems, consider s. 34 of the *Criminal Code*. This is the self-defence provision, and as a very high profile SCC judgment made clear, an accused person who kills an alleged attacker has more grounds to rely upon under the self-defence provisions than if the attacker was merely injured. *R v McIntosh*, [1995] 1 SCR 686; This decision is discussed by Graham, *supra* note 11 at 116-118.Section 1 of the Accumulations Act is another glaring example of textual uncertainty persisting in a statute over time. *Accumulations Act* RSO 1990, c A.5.

The range and sophistication of the arguments both for and against judicial recourse to legislative history are testament to the importance of this issue. It touches on fundamental questions about how legislative power should be controlled and distributed between the legislature and the judiciary. Thus, a fundamental question about how statutes should be interpreted becomes a question about how democracy should work. With this issue, as with most of the problematic details lurking beneath the visionary concepts of democracy and justice, our society moves forward in a grand experiment in institutional evolution while the individuals within the society remain locked in intractable ideological disputes. If the discussion remains focused on the "right" way to do things, nothing more will be accomplished than an exchange of justifications for entrenched positions. If forward movement is to be made on this issue, the attention must turn to the logistical issues and practical matters involved in the use of Hansard in court.

(b) Practical Matters

At bottom, all textualist arguments against the use of Hansard in court essentially rely on one of two claims:

1. The information is very unreliable and might mislead judges; or

2. The practice is impractical because of the complexities it introduces to the process of statutory interpretation.[168]

This is where the rubber meets the road. Even proponents acknowledge that reliability is a serious issue. The information must be used very cautiously since it would be easy to take statements out of context. However caution is the salve. It is the second claim that has some genuine traction.

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168 No doubt there will be many who choose to disagree on this point. I stand by this assertion.

Given the limited time that Parliament sits, there is a relatively low probability that any particular enactment or amendment will be discussed in any meaningful way in Canada. Meanwhile, the cost of permitting recourse to Hansard in court is arguably quite high. The records are lengthy and full of impassioned speeches. It is a time-consuming affair to dig through the records for meaningful quotes. In conjunction, the Bills, white papers and various reports must also be consulted so that statements made in the House can be properly contextualized. The question arises: Do the costs exceed the benefits?

If such searches become a matter of due diligence, this could put an onerous burden on litigants. Given the low probability of finding relevant information, this would hardly seem worth it. At present the practice is not a matter of due diligence in Canada, and the use of Hansard in court is unusual.[169]

Nonetheless, there is a compelling simplicity to the assertion that the statute is the statute, and that the text should be interpreted without intensive background research into the parliamentary records. The statute is what Parliament enacted, and that is the only thing that should be consulted to determine the meaning of the statute. The ordinary meaning as interpreted by someone competent in the use of the language and familiar with the context of the law is what should carry the day.

However, this 'ordinary meaning' is no less likely to be mired in ambiguities, vaguenesses, incoherences and absurdities than in any other 'type' of meaning. Meanwhile, the process of statutory interpretation is fraught with complexities and it

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169 The opposite holds true in many US jurisdictions like California and Kentucky where searches of legislative history are required under the duty of due diligence, and the immense volume of materials available mean that there is a relatively high probability of uncovering relevant information with respect to an enacted statute. This might account for some of the support that textualism enjoys in the US. The issue of just how often Hansard is turning up in Canadian courts will be discussed in the quantitative analysis of Hansard at pages 125 – 134.

seems rather disingenuous to assert that preparatory materials needlessly complicate the process of interpretation. Legal experts are deployed at every stage of enactment, litigation and adjudication. The text is considered in light of the body of law within which it exists. There is no getting around the complexities of statutory meaning.[170]

When a judge presides over a case that hinges upon statutory interpretation, the judge must use the cognitive processes necessary to perform the act of interpreting language. This depends upon a contextual understanding of the words in the statute, and this contextual understanding is derived exclusively from sources that are external to the text.[171] The bulk of this understanding will come from the sum total of knowledge in the judge's mind. This might be supplemented by dictionary definitions (whether Oxford, Blacks or another), scholarly works, submissions and other precedents, and anything else that the judge might feel is helpful. This will include legislative history if the judge feels so inclined.

Given all of the externalities, why is it that the sources in closest proximity to the creation of statutory language, and which are arguably most likely to shed light on the meaning of words in a statute, should be precluded from arguments made by litigants? Particularly, if judges are permitted to make use of these materials on their own, why should litigants be deprived of the ability to make use of those materials?[172]

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170 Indeed, the notion that an ordinary citizen should be able to know what the law is by reading the statutes is utterly absurd.

171 See *supra* note 24.

172 This was a significant consideration for the Irish Law Reform Commission when they recommended amendments permitting use of legislative history in the Irish Interpretation Act. I, *Law Reform Commission Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC-61-2000) (Dublin: The Commission, 2000) at 66-69.

There is a broader principle involved. It is a question of whether or not the courts should be summarily closing the door on potentially relevant sources of information because the matter is complex and the information could therefore be misleading if it is not treated in a circumspect manner with due consideration for the risks? Arguably this risk is present for all information brought to court.

An analogous dispute is currently being debated within a completely different area of law. It concerns judicial interviews of children involved in custody disputes. Opponents of the practice argue that judges will end up using the words of 10-year old children as highly probative evidence with the absurd result that young children will be determining matters like parental custody which are the proper domain of mature responsible adults.[173] Proponents of the judicial interview argue that the information is not intended to be probative, but merely useful to supplement the information provided by the parents and various experts before making a decision that has significant consequences for the child.[174] Essentially, the opponents argue that judges cannot be trusted with such controversial information, while proponents argue that more information is better.

With respect to the issue of legislative history as an interpretive aid, it is respectfully submitted that more information is better. Judicial decision-making is supposed to be an intellectual task based upon reason. If there are to be rules which limit

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173 For example, see Barbara House, Considering the Child's Preferences in Determining Custody: Is It Really In the Child's Best Interest? (1998) 19 J Juv L 176; also see Cynthia Starnes, "Swords In The Hands of Babes: Rethinking Custody Interviews After *Troxel*" (2003) 2003 Wis L Rev 116.

174 For example, see Christine Davies, "Access to Justice for Children: The Voice of the Child in Custody and Access Disputes" (2004) 22 Can F L Q 153.

the amount of materials submitted by litigants, they should be based upon relevance rather than on the source's proximity to the law-making process.

On this issue, the courts in Canada have chosen to be inclusive, and there has not been any noticeable backlash from politicians or scholars. Indeed there has been a blissful scholarly ignorance. The last time that the use of Hansard in Canadian courts was examined was in 2000 by Stéphane Beaulac.[175] At that time the *Rizzo* decision was new, and the Supreme Court of Canada was dealing with Hansard in a decidedly unprincipled manner. In certain cases, judges were citing pre-*Rizzo* justifications for permitting Hansard. Statements were being considered by opposition MLAs who were not directly involved in the drafting and sponsoring of the bill. Some cases posited an ambiguity requirement while other cases suggested that there was no such requirement. In some cases, the contextual information provided in the judgment was so brief that little insight could be gleaned from it beyond the fact that some Hansard evidence was presented to the court.

It is plausible that things have changed with the passage of eleven years. The judiciary might have effectively grappled with the problems, educated themselves and moved forward in a principled manner, so that Hansard is being handled consistently and rationally, with due consideration for the risks, and respect for the need to provide an adequate explanation of the context. If so, the Canadian legal community could benefit from an understanding of this approach. Lawyers could learn how to make better use of Hansard, judges could refine their methods for dealing with it, and scholars could praise or criticize as they saw fit.

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175 Beaulac, *supra* note 7.

It is equally possible that a principled approach has not been developed and that Hansard is still being treated in a rather haphazard manner. If this is so, the matter should be brought into the light. If a close examination uncovers some troubling decisions, it could be the spark that ignites a more spirited debate. In a less glamourous light, perhaps such a finding would indicate a need for guidance, whether by courts or legislatures, to address any shortcomings in the judicial treatment of this information.

The evolution of the judicial handling of Hansard (or lack thereof) in Canada is an important part of the story of Hansard in court. Although it is a rarely used and often challenging tool in litigation, it has demonstrated itself over centuries around the world to be important enough to warrant serious scholarly and judicial consideration. The Canadian context is unique because of the evolutionary forces that brought it to the current situation as a former British Colony; and also because of the current state of the law which provides no formal guidance or statutory requirements governing how Hansard is to be used in court. Meanwhile, the current of affairs in Canada has not been studied comprehensively for eleven years. We do not know what is going on with respect to Hansard in Canadian courts. It's time to bring judicial use of Hansard into the light.

CHAPTER 3:

Qualitative Analysis of Hansard Use in *SCC* Judgments

The qualitative analysis undertaken in this thesis involves revisiting the issues that Beaulac examined in 2000. This will be done using the same the same headings and in the same order as Beaulac's study. Emphasis will be placed on the 2010 findings in comparison with the 1999 findings. The headings are as follows: [176]

a) Purpose of Use of Parliamentary Debates
b) Ambiguity Requirement
c) Autonomous Interpretative[177] Means
d) Persuasive Force

There were thirteen judgments that made reference to Hansard in 1999 while there were ten decisions in 2010.[178]

The 1999 judgments are as follows (in alphabetical order):

1. *Delisle v Canada (Deputy Attorney General)*[179]
2. *Dobson (Litigation Guardian of) v Dobson*[180]
3. *Francis v Baker*[181]
4. *Law v Canada (Minister of Employment and Immigration)*[182]

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176 These are the headings used by Beaulac. See Beaulac, *supra* note 7.

177 Up to this point, the word "interpretive" has been used. Beaulac preferred the word "interpretative" in his work, and this preference will be followed in the context of the qualitative analysis.

178 Beaulac reported twelve judgments. It would appear that his research missed *M & D Farm Ltd. v Manitoba Agricultural Credit Corp.*, [1999] 2 SCR 961, 1999 CanLII 648 [*M&D Farm*], in which a statement made by the Minister of Agriculture was used as an aid to determining the meaning of a provision in the *Farm Debt Review Act*; at 19; *Farm Debt Review Act,* RSC, 1985, c 25 (2nd Supp), s 23. This fact is pointed out with all due respect to Dr. Beaulac, who no doubt, took great care in his research. Advances in computer databases and computer-based research technology has made this kind of research much easier than it was in 2000. Although an excellent exercise in due diligence, the primary reason for searching the 1999 SCC judgments was to verify that the search criteria found the same judgments as Beaulac's and would therefore capture an equivalent list of judgments in other years.

179 *Delisle*, *supra* note 62.

180 [1999] 2 SCR 753, 1999 CanLII 698 [*Dobson*].

181 [1999] 3 SCR 250, 1999 CanLII 659 [*Francis*].

182 [1999] 1 SCR 497, 1999 CanLII 675 [*Law*].

5. *M & D Farm Ltd. v Manitoba Agricultural Credit Corp*[183]
6. *M. v H.*[184]
7. *Perron-Malenfant v Malenfant (Trustee of)*[185]
8. *R v Beaulac*[186]
9. *R v Davis*[187]
10. *R v G. (B.)*[188]
11. *R v Gladue*[189]
12. *U.F.C.W., Local 1518 v KMart Canada*[190]
13. *Winko v British Columbia (Forensic Psychiatric Institute)*[191]

The 2010 judgments are as follows:

1. *Canada (Attorney General) v TeleZone Inc*[192]
2. *Century Services Inc. v Canada (Attorney General)*[193]
3. *Globe and Mail v Canada (Attorney General)*[194]
4. *Németh v Canada (Justice)*[195]
5. *Quebec (Attorney General) v Canadian Owners and Pilots Association*[196]
6. *Quebec (Attorney General) v Lacombe*[197]
7. *R v Morelli*[198]
8. *Reference re Assisted Human Reproduction Act*[199]
9. *Syndicat de la fonction publique du Québec v Quebec (Attorney General)*[200]

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183 *M & D Farm*, *supra* note 178.

184 [1999] 2 SCR 3, 1999 CanLII 686 [*M v H*].

185 [1999] 3 SCR 375, 1999 CanLII 663 [*Malenfant*].

186 [1999] 1 SCR 768, 1999 CanLII 684 [*R v Beaulac*].

187 [1999] 3 SCR 759, 1999 CanLII 638 [*Davis*].

188 *R v GB*, *supra* note 41.

189 [1999] 1 SCR 688, 1999 CanLII 679 [*Gladue*].

190 [1999] 2 SCR 1083, 1999 CanLII 650 [*KMart*].

191 [1999] 2 SCR 625 [*Winko*].

192 2010 SCC 62 [*Telezone*]

193 2010 SCC 60 [*Century*].

194 *Globe & Mail*, *supra* note 50.

195 *Németh*, *supra* note 50.

196 *COPA*, *supra* note 50.

197 *Lancombe*, *supra* note 50.

198 2010 SCC 8, [2010] 1 SCR 253 [*Morelli*].

199 *Re AHRA*, *supra* note 50.

200 *Syndicat*, *supra* note 50.

10. *Toronto Star Newspapers Ltd. v Canada*[201]

3.1 Purpose of Use[202]

With respect to the purpose for which Hansard was used in 1999 by the *SCC*, Beaulac noted that there was a tendency to discuss Hansard as if it should be treated differently depending on the context of use.[203] This resulted in a compartmentalized approach that tended to distinguish between three different contexts of use:

1. Use for the constitutional characterization of a statute for pith and substance in the context of a division of powers determination,[204]
2. Use for the constitutional characterization for the Oakes analysis in the context of Charter-based decisions; and,
3. Use for the interpretation of a statutory provision in a non-constitutional context.

This approach was essentially a hangover from the various precedents in the 1970's and 80's that led to the overturning of the exclusionary rule. The first exception permitted use only for determining the "Constitutional characterization" of legislation.[205] Beaulac regarded this approach as unnecessary for two reasons. The recent jurisprudence had tended to disregard the difference insofar as the precedents used to justify recourse to Hansard in any particular case would tend to be from both constitutional and non-

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201 2010 SCC 21, [2010] 1 SCR 721 [*TorStar*].

202 Beaulac use the phrase "purpose of use" to refer to the compartmentalized approach to justifying recourse to Hansard based on particular Constitutional and non-Constitutional contexts.

203 Beaulac, *supra* note 7 at 597-600.

204 The Constitution sets out various head of power which are exclusively federal and provincial. If a law made by one level of government is impugned as being an infringement of the other level of government's exclusive head of power, the courts will embark upon an analysis of the pith and substance of the law (which considers what the law purports to do and what it actually does). See for example *General Motors of Canada Ltd. v City National Leasing,* [1989] 1 SCR 641.

205 *Re: Anti-Inflation Act, supra* note 112 at 387: "All extrinsic materials filed in this reference ... were addressed not to the construction of the terms of the Anti-Inflation Act, but to its constitutional characterization".

constitutional cases; more importantly, the purpose of use is the same for all of the contexts – to determine the intention of Parliament. There is no need to differentiate.[206]

This particular issue is difficult to address in the 2010 judgments for the simple reason that the *SCC* no longer feels the need to justify recourse to legislative history, for the most part.[207] The most direct statement concerning the justification for use of these extrinsic materials appears in *Németh v Canada.*[208] In this unanimous decision, Cromwell J. stated that "[r]esort to this material is appropriate where, as here, it is relevant and reliable and provided it is used with caution and not given undue weight".[209] This echoes earlier decisions like *R v Vasil* which point to relevance in general as the criterion that matters.[210] As authority for this proposition, Cromwell cites a textbook (*Sullivan on the Construction of Statutes)* and three precedents (*Reference re Firearms Act (Can.)*; *Castillo v Castillo; and Canada 3000 Inc. (Re)*).[211] This is the most comprehensive statement concerning the use of legislative history as extrinsic interpretive aids among the

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206 There is room to challenge this point. In the case of a Constitutional challenge, the issue is whether or not the statute is permissible, whereas in a non-constitutional case, the issue is merely what a statutory provision means. In general, the inquiry is more broad in a Constitutional judgment insofar as the intended meaning and effect of a number of provisions will be considered rather than interpretation of a provision within a very specific set of circumstances. Although it is plausible to assert that the actual role that Hansard plays in both circumstances is identical, there is room for deeper inquiry. Such an inquiry is beyond the scope of this discussion.

207 This in itself is a significant finding. It will be elaborated upon in the section on Hansard as a Second-Class Interpretative Means at page 71.

208 *Németh, supra* note 195.

209 *Ibid* at 46.

210 *Vasil, supra* note 35.

211 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 609-14; *Reference re Firearms Act (Can.)*, 2000 SCC 31 [*Firearms*], [2000] 1 SCR 783 at para 17; *Castillo v Castillo*, 2005 SCC 83, [2005] 3 SCR 870 at para 23 [*Castillo*]; *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 SCR 865 at paras 57-59 [*Canada 3000*].

2010 *SCC* judgments in this study. It is one of three judgments that cites any authority at all concerning admissibility.[212]

Among the cases cited for authority, *Firearms* concerns the federal-provincial division of powers, while the remaining cases involve statutory interpretation in the absence of constitutional issues. Beaulac observed the same phenomenon in 1999 where authorities were cited from different contexts. What is more important, however, is the unqualified nature of the statement. It suggests that relevance and reliability are the criterion that matter when considering legislative history. The purpose of use does not matter.

The other two judgments which cite authority for Hansard are *COPA* and *Lacombe.* Both contain nearly identical statements about statutory interpretation, which hold that recourse to various extrinsic aids including Hansard, are permissible. Both cite *Kitkatla* for the proposition that Hansard is admissible as an aid to statutory interpretation.[213]

Within these decisions there are no statements which directly suggest any lingering remnants of the pre-*Rizzo* approach. This can be contrasted with 1999 when there were some statements to that effect. For example, in the 1999 judgment *R v G (B)*,

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212 *COPA*, *supra* note 50, and *Lacombe, supra* note 50 cite authority for using Hansard as an extrinsic aid to interpretation in Court.

213 In *COPA*, McLachlin CJ. states that "the purpose of a law may be determined by examining extrinsic evidence like purposive clauses and the general structure of the Act, as well as extrinsic evidence, such as Hansard or other accounts of the legislative process: *Kitkala, at para 53." COPA*, *supra* note 50 at para 18; *Kitkatla*, *supra* note 63. In *Lacombe*, McLachlin CJ. states that "The purpose of a law may be determined by examining intrinsic evidence, like purposive clauses and the general structure of the act. It may also be determined with reference to extrinsic evidence, such as Hansard or other accounts of the legislative process: *Kitkatla*, at para. 53." *Lacombe*, *supra* note 50 at para 20. Ironically, no legislative history is used in *COPA*, although Hansard-like evidence was used in *Lacombe*. More will be said about this at 118. *Kitkatla* is also an interesting precedent to cite as authority because, as with *COPA*, neither legislative history nor any other hansard-like materials were used in that judgment.

Bastarache J. stated, for the majority, that "[i]n fact, it is settled that when courts are called upon to consider the constitutionality of an enactment, they may take into account the parliamentary history, which is generally not the case for the ordinary interpretation of an enactment."[214]

It would appear that the courts have settled on the principle that legislative history is admissible as an aid to statutory interpretation regardless of purpose of use.

(a) The Distribution of Judgments Between Constitutional and Non-Constitutional Contexts

In Beaulac's study, Hansard was used or discussed in the context of Constitutional adjucation in six of the thirteen judgments. (There were five *Charter* analyses and one division of powers analysis.) Of the seven judgments that used Hansard in the absence of Constitutional adjudication, six involved statutory interpretation.[215] This means that 46% of the references to Hansard were made in the context of pure statutory interpretation in 1999. In 2010, the Hansard was only used for one Charter analysis and three division of power disputes. In the remaining six decisions, Hansard was involved in statutory interpretation in the absence of Constitutional issues. This means that 60% of the decisions made reference to Hansard in a purely statutory context. These numbers suggest Hansard use is being split between constitutional and non-constitutional matters.

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214 *R v GB, supra* note 42 in Beaulac, *supra* note 7 at 589.

215 In the 1999 judgment *Dobson*, Hansard from the English Parliament was used (unsuccessfully) to persuade the Court that mothers of unborn children should be liable for prenatal injuries. This is not a matter of statutory interpretation. Meanwhile, it is difficult to categorize the instances of Hansard use as Constitutional or non-Constitutional. In *TorStar*, there was a *Charter* challenge, but Hansard played no role in it. Instead, Hansard was used to interpret the *Quebec Charter*, the *Quebec Labour Code* and the *Quebec Professional Code*. This decision was therefore categorized as a pure statutory interpretation decision with respect to the role of Hansard.

There is no indication of a tendency for Hansard to be used more in the context of Constitutional matters or in pure statutory matters.

3.2 The Ambiguity Requirement

The ambiguity requirement is something of a winnowing fan based on the plain meaning rule. The rule (if it is, in fact, a rule) requires some sort of ambiguity or uncertainty with respect to the text of a statutory provision in order to justify consideration of Hansard and other extrinsic materials. By prohibiting the use of legislative history when statutory text has an obvious meaning, the number of cases where legislative history would be admissible is reduced.

Beaulac points out that this rule is problematic because the determination that the language in a statute is clear is the result of interpretation and not a preliminary step to interpretation.[216] In order to decide whether or not there is any uncertainty surrounding the meaning of a statutory provision, one must consider the meaning of text in the context of the entire statute and the surrounding body of law, including all relevant information that sheds light on this context.[217]

Despite criticism, this rule was established in England in *Pepper v Hart*.[218] Textualist judges like Scalia J. often make remarks to this effect, although this rule has not carried the day in the US Supreme Court.[219] The federal *Acts Interpretation Act* of

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216 Sullivan is cited in support of this point. Beaulac, *supra* note 7 at 604 ; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 430.

217 "[I]t is illogical and indeed erroneous to require that an enactment be obscure as a preliminary threshold text to interpretation or, by the same token, as a precondition to invoking parliamentary debates." Beaulac, *supra* note 7 at 604.

218 *Pepper*, *supra* note 3. There is some doubt about whether the rule has been followed. See for example, Michael Healy, *supra* 144 at 247-250.

219 Several empirical studies have found widespread use of legislative history over the past 30 years. See for example, Law & Zaring, *supra* note 109; also see Patricia M. Wald, "The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court"

Australia provides a nuanced approach which does not exclude legislative history in the context of plain statutory language, but limits its use to corroboration in the absence of ambiguity.[220] Put another way, in Australia, it is not permissible to use legislative history to contradict the plain meaning of a statutory provision.

In 1999, the issue of whether or not there was an ambiguity requirement was unsettled, according to Beaulac:

> in M. v H., Justice Gonthier expressed the following view in his dissenting reasons: "Where the statutory language, in the context of the statute as a whole, is unclear or ambiguous, resort may then be had to other indicia of legislative intent, such as statements made in the legislature". Similarly, in *Delisle*, Bastarache J. wrote for the majority: "Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance". In *Baker*, however, the court explicitly stated that the term "inappropriate" in s. 4(b) of the [Federal Child Support] Guidelines suffered no ambiguity, but nevertheless proceeded to examine in some detail the enactment's parliamentary debates to support the given interpretation.[221]

In the 2010 judgments, there is a decided absence of comment about the admissibility of legislative history. However there are judgments where legislative history was considered to assist with the interpretation of statutory text that was relatively clear

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(1990) 39 Am U L Rev 279. Some studies have found a decline in references to legislative history in the 1980's. See for example Michael H. Koby, "The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique" (1990) 36 Harv J Legis 369.

220 *Acts Interpretation Act*, *supra* note 4. It should be noted that Beaulac kept his discussion of the ambiguity requirement and the corroboration requirement separate. He only discussed the rule against using Hansard to contradict statutory text in the context of legislative history as an autonomous interpretative means.

221 Beaulac, *supra* note 7 at 601-602. Note that "Baker" refers to *M v H*, *supra* note 184. None of these statements clearly enunciate an ambiguity requirement. Although Beaulac does not address this point directly, the wording is such that it could be construed as implying that there is an ambiguity requirement. Based on the (admittedly very remote) possibility that the words could be interpreted in such a manner, there is a slight lacking of clarity. This issue is hotly debated elsewhere, and as a result, it is significant in Canada.

and uncontroversial, and this suggests that the *SCC* has settled the matter in favour of no ambiguity requirement.

Syndicat de la fonction publique du Québec v Quebec (Attorney General) is an excellent example.[222] One of the key points of law in this case concerned the impact of s 93 of the *Act respecting labour standards* which states that "[i]n an agreement or decree, any provision that contravenes a labour standard or that is inferior thereto is absolutely null."[223] Based on a literal interpretation of this provision, clause 4-14.28 of the collective agreement, which precluded part-time and seasonal employees from filing a grievance in contravention of express provisions of the *ARLS*, was "deemed unwritten" leaving the provision setting out the grievance procedure to apply.[224] Deschamps J. did not agree with this reasoning and turned to Hansard as well as provisions of the Quebec *Labour Code* to demonstrate that the legislature did not intend for arbitrators to have exclusive jurisdiction over labour disputes involving unionized employees in Quebec. She argued that exclusive jurisdiction was the result of the majority's interpretation of s 93.[225] Arguably, Deschamps J. was using Hansard to justify an interpretation that strayed from the apparent plain meaning of a statutory provision.

Another case where Hansard was referred to with respect to relatively straight forward statutory language was *Toronto Star Newspapers Ltd. v Canada.*[226] At issue was the mandatory publication ban of bail hearings at the request of the accused under s 517

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222 *Syndicat*, *supra* note 50.

223 *Act respecting labour standards*, RSQ, c N-1.1 [*ARLS*]; quoted from *ibid* at para 40.

224 *Syndicat*, *supra* note 50 at para 50.

225 *Ibid* at 115.

226 *Syndicat*, *supra* note 50.

of the *Criminal Code*.[227] The wording of the provision was uncontroversial, yet recourse was made to the legislative history to uncover its purpose.[228] In the wake of the *Ouimet Report*, the relevant provision had been enacted with only a discretionary ban in 1971.[229] The mandatory ban at the request of the accused, which was recommended in the report, was enacted in a subsequent amendment in 1976. The Court noted that the legislative history provided absolutely no information about why the recommendation was not included in the initial amendment and why Parliament chose to do so later on.[230] This judgment settled two different cases, one from Alberta, and the other from Ontario. The delay in the enactment and the absence of information about it in Hansard was noted by Durno J. for the Ontario Superior Court, and by Booker J. for the Court of Queen's Bench for Alberta.[231]

In *R v Morelli*, Hansard was used to elaborate on the purpose of s 163(4.1) of the *Criminal Code* which stipulates that anyone who "accesses ... child pornography" is guilty of an offense.[232] It was enacted to catch cases of Internet downloading where it might be difficult to prove possession. As with the other decisions discussed, not a word

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227 *Criminal Code*, RSC 1985, c C-46.

228 It might be more accurate to say that Hansard was being used to link a provision in the *Criminal Code* with the purposes enunciated in a 1969 committee report. This issue will be discussed in the section entitled Shoehorning at 82.

229 Canada, *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections,* (Ottawa: Queen's Printer, 1969) [*Ouimet Report*].

230 *TorStar, supra* note 201 at 29.

231 *R v Toronto Star Newspapers Ltd.*, 2007 CanLII 6249 (ON SC) at 16 "However, in 1972, the *Bail Reform Act* was enacted, with a discretionary ban, regardless of who sought the ban at the bail hearing. In 1976, the section was amended to provide for the current wording, a mandatory ban upon application of the accused, and discretionary if sought by the prosecution. Counsel were unable to provide any reference in *Hansard* or other documentation to explain why the *Ouimet Report* recommendation was not enacted in 1972, or why it was in 1976; *R v White*, 2007 ABQB 359 at 28: "These amendments were not debated in Parliament."

232 *Morelli, supra* note 198.

is said about admissibility or restrictions in any manner that suggested an ambiguity requirement.

Within these three judgments, Hansard was considered in the context of relatively plain language. When judges dissented (and there was dissent in all three of these cases,) the use of Hansard in the absence of ambiguity was never criticized. Instead, they focused their dissent on other aspects of the decision. Given these examples and the general absence of comment about admissibility in the 2010 judgments, it would appear that recourse to legislative history is presumed to be acceptable at the *SCC* even in the absence of ambiguity.

The final point with respect to the ambiguity requirement concerns one of the authorities cited to justify recourse to legislative history in *Németh*. On behalf of a unanimous court, Cromwell J. cites paragraph 23 of *Castillo*:

> The appellant contends that where the plain language of a legislative provision is clear and unambiguous, extrinsic evidence of legislative intent should not be admissible. I do not find the ordinary meaning of s. 12 to be clear and unambiguous. I would also question whether statutory interpretation should ever proceed solely on the basis of the plain language of the legislation, without consideration of the entire context, including the purpose and the scheme of the Act. In approving of Professor Driedger's approach to statutory interpretation, Iacobucci J. recognized that "statutory interpretation cannot be founded on the wording of the legislation alone" (*Rizzo & Rizzo Shoes*, at para. 21; see also R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 9-18). It is now well accepted that legislative history, Parliamentary debates and similar material may be quite properly considered as long as they are relevant and reliable and not assigned undue weight: *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, 2000 SCC 31, at para. 17.

This quote is from a concurring opinion by Bastarache J., for a court that is unanimous with respect to the outcome, but not entirely on the reasons. Yet, it has the endorsement of

a unanimous court in *Németh*. Meanwhile, it says explicitly what the court appears to be doing in 2010. There is no ambiguity requirement. There is no compartmentalized approach. There is only a principled approach to legislative history which treats such materials as admissible where relevant and reliable, and the usefulness of the materials is assessed in the circumstances of each case.

3.3 Autonomous Interpretative Means

This criterion concerns whether or not legislative history is a subordinate evidence of statutory meaning relative to other extrinsic aids like dictionaries, statutes in related areas of law, and canons of interpretation. The most common ways to relegate legislative history to the status of a second class interpretive method is by requiring corroboration, or by only permitting such materials to confirm but not to contradict the meaning of statutory text. Whenever this material is confined to a narrow scope of use in comparison to other extrinsic aids, legislative history is being denied status as an autonomous interpretative means.

Beaulac argued that "these materials are no different than other interpretive elements extrinsic to the enactment" and that as long as appropriate weight is given to these materials, there is no reason to treat legislative history differently.[233]

Beaulac's study revealed some inconsistency among the 1999 decisions on this point. In *R v Gladue*, Cory and Iacobucci JJ. stated that, although not decisive, such materials "are nonetheless helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision".[234] Beaulac also cites the 1997 decision of *Construction Gilles Paquette ltée v*

233 Beaulac, *supra* note 7 at 607.

234 *Gladue*, *supra* note 189; also see Beaulac, *ibid* at 606.

Entreprises Végo ltée.[235] As discussed earlier, this is the authority cited in *Malenfant* . In this decision, Hansard was used to "confirm that the interpretation given was correct".[236] Beaulac also cites "Bastarache J.'s concurrence in *M v H* which states that, although legislative history is often helpful, "the ultimate standard ... is the provisions of the legislation itself".[237]

Beaulac could be accused of overreaching on this point. These statements could be rather innocuous statements about the usefulness of Hansard (or the lack thereof) in the particular instance rather than a statement about the circumstances that restrict the use of Hansard. Indeed, Justice Bastarache's statement in *M v H* appears to be an insistence upon the primacy of statutory language rather than an attempt to subjugate the role of Hansard. The text of the statute is what Parliament enacted and nothing else. It deserves the privileged position as that which is the subject of interpretation, while all other tools of interpretation are supplementary to it.

However, given the efforts in several nations to restrict Hansard to the role of supporting and not contradicting language that has a plain meaning, it is reasonable to scrutinize judgments for language that might contain the raw materials from which such a rule could be constructed.[238] Meanwhile, answering the question of whether or not Hansard is treated as an equal among extrinsic interpretive aids involves more than

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235 *Supra* note 190 at para 20.

236 *Supra* note 189.

237 Beaulac, *supra* note 7 at 606; *M v H, supra* note 184.

238 As stated in Chapter 2, several US states, and all jurisdictions but one in Australia have legislated a plain meaning rule that confines the role of Hansard. The UK has a judicially created plain meaning restriction. In 2000 the Irish Law Commission recommended an amendment to the Irish Interpretation Act which confined the use of Hansard to statutory text that was ambiguous or brought about absurd results, and only if it corroborated a meaning that can be "gathered from the Act as a whole". See Law Reform Commission Report, *supra* note 172 at 70. It is therefore necessary to look very closely at this issue in Canada, even though it might seem obvious at first glance that there is no restriction.

scrutiny for restrictions in the context of plain meaning. It is a deeper question that points to some surprising changes in the way that legislative history is being used by the *SCC*.

The issue of Hansard as an autonomous interpretative means can be broken down into two sub-issues. First, is this material treated as subordinate to other interpretive tools? Second, is this material used as a stand-alone interpretive tool?

The first sub-issue is addressed in the following section titled "Legislative History as a Second-Class Interpretative Means." The second sub-issue concerning the use of Hansard in the absence of corroborating extrinsic materials will be discussed later in a section titled "Hansard as a Stand-alone Intepretative Means."

(a) Legislative History as a Second-Class Interpretative Means

Based on the instances of use in 2010, it appears that the judges at the *SCC* treat Hansard as an equal to all other extrinsic interpretive aids. As *Syndicat* demonstrates, there is no requirement that the evidence must support and not contradict the plain meaning of text in order for it to be useful. However, changes in the way the court cites authority for extrinsic materials between 1999 and 2010 reveal a more subtle and powerful change in judicial behaviour towards legislative history.

The cases of *Lacombe*, *COPA* and *Németh* represent the total number of decisions of the *SCC* in 2010 where any authority is cited that justifies the use of legislative history. In terms of numbers, there has been a relatively minor change in the Court's tendency to cite authority in comparison to 1999. In 1999 there were five decisions citing authority for recourse to legislative history. Given the larger number of

cases in 1999, the change is negligible.[239] However, a closer inspection reveals that there has been a substantial change with respect to citing authority if Hansard is distinguished from other more unusual types of extrinsic aids. Of the five decisions where authority was cited in 1999, four involved Hansard in its archetypical form, quotes of statements made by members in the House of Assembly, while the fifth likely involved Hansard or something very closely related to it.[240] In 2010, only one of the cases involved Hansard. In the second case, no extrinsic materials were considered, and in the third case, the authority was used to justify a very unusual type of extrinsic evidence. By this measure, authority was cited for one of ten cases in 2010 as compared with four and potentially five of thirteen cases in 1999. The numbers speak very clearly: Hansard is presumed to be admissible. Authority is not required to justify its use in court.

Furthermore, the three judgments in 2010 represent the total number of judgments in which general statements were made about the usefulness of legislative history materials. This too marks a departure from 1999 where six judgments contained discussion about the use of legislative history in general, however brief.[241] In all, eight judgments either cited authority for recourse to legislative history, or made a comment about the use of legislative history in general, or both.[242] The shift away from citing authority and commenting on the use of legislative history suggests that the *SCC* has

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239 5 of 13 cases in 1999 amounts to 38%. 3 of 10 cases in 2010 amounts to 30.%. Given such a small number of cases in the data set, this difference could easily be regarded as insignificant.

240 *Francis, supra* note 181; *Malenfant, supra* note 185; *R v GB, supra* note 42; *Gladue, supra* note 189. All involved quotes of statements by MLAs. In *Davis, supra* note 187, some sort of evidence from the legislative history was put forward, but the evidence was rejected as unhelpful, and Lamer did not feel the need to reveal its precise nature.

241 *Gladue, M v H, R v GB, supra* note 42, *Delisle, supra* note 62, *Perron* and *Davis* contained general comments about the use of legislative history.

242 Four judgments cite precedents to justify recourse to legislative history: *Francis, supra* note 181; *Malenfant, supra* note 185; *Davis, supra* note 187; and *KMart, supra* note 190. In *R v GB, supra* note 188 a textbook is cited to justify recourse to legislative history.

grown to accept legislative history. The judges no longer feel that justification or comment is necessary.

It is difficult to find any evidence that legislative history was regarded as inherently problematic in 2010. Based on the judgments, it was considered on its merits when it was presented. It was included without qualification in the judgment alongside the traditional methods of interpretation like precedents, canons of interpretation, related statutes, etc.. It would appear that legislative history was not regarded as a second-class interpretive tool in 2010. It was merely one of the various interpretive aids available to litigants and judges alike when a legal problem involving statutory interpretation was presented in court.

(b) Explicit Rejection of Hansard

Before considering Hansard as a stand-alone interpretive tool, there is another aspect about the *SCC*'s treatment of legislative history which deserves attention. In 1999 there were four cases where Hansard was cited and discussed but the decision did not concur with the interpretation suggested by the Hansard.[243] In 2010, a very different approach was taken. With one sole exception, judges did not comment on Hansard or legislative history with the express purpose of rejecting it. Instead, silence was the preferred approach when the evidence was regarded as unpersuasive. This pattern becomes all the more obvious when the various majority and dissenting opinions are

243 In *Dobson*, *supra* note 180, Cory J. discusses a passage from the UK Parliament and the point of law that the evidence was intended to support was denied. In *Law*, *supra* note 182 at para 97, Cory and Iacobucci JJ. reject the notion that the impugned legislation was founded upon stereotypical presumptions. In *Davis*, *supra* note at 50, Lamer J. notes that the Hansard and Committee Reports provide no useful information with respect to the issue in need of resolution. In Delisle, *supra* note 62, legislative history materials including Orders-In-Council were presented to impugn the purpose of demonstrate the purpose of the *Public Service Staff Relations Act*, RSC, 1985, c P-35 [*PSSRA*]. At para 20 L'Heureux-Dubé J., for the majority, discusses the Orders-In-Council and decides that they are irrelevant since they were revoked before the *PSSRA* was enacted.

compared. For example, in *Morelli*, Fish J. for the majority finds some quotes from Hansard to be helpful in determining the legislative intent of s 163.1(4) of the *Criminal Code* and therefore makes reference to the materials. In her dissent, Deschamps J. makes no reference to the materials, even when citing and analyzing Fish J.'s opinion to point out his reasons for disagreeing with them.[244]

The following tables show the pattern. The first pair of columns indicate whether or not an opinion made reference to Hansard. For opinions that made reference to Hansard, the second pair of columns indicate whether or not the decision concurred with the Hansard for the particular reason(s) for which it was put forward. It is this second pair of columns that tracks the phenomenon, and in particular, it is the column furthest to the right that tracks the relevant phenomenon. This column points out all judgments where Hansard was discussed but the opinion did not concur. Note the number of opinions that do not concur with the Hansard in 1999 compared with 2010.

244 *Morelli*, *supra* note 198.

Table # 1: Opinions Referring to Hansard for Support in 1999

1999 Judgments	Hansard Considerd		Decision Concurred	
	Yes	No	Yes	No
Delisle v. Canada (Deputy Attorney General)				
Bastarache (majority)		X		
Cory & Iacobucci (dissent)	X		X	
L'Heureux-Dube (concurring)	X			**X**
Dobson (Litigation Guardian of) v. Dobson				
Cory (majority)	X			**X**
Major (dissent)		X		
Francis v. Baker				
Bastarache (unanimous)	X		X	
Law v. Canada (Minister of Employment and Immigration)				
Iacobucci (unanimous)	X			**X**
M. v. H.				
Cory & Iacobucci (majority)	X		X	
Gonthier (dissent)	X		X	
Major (concurring)		X		
Bastarache (concurring)	X		X	
Perron-Malenfant v. Malenfant (Trustee of)				
Gonthier (unanimous)	X		X	
R. v. Beaulac				
Bastarache (majority)	X		X	
Lamer & Binnie (dissent)		X		
R. v. Davis				
Lamer (unanimous)	X			**X**
R. v. G. (B.)				
Bastarache (majority)	X		X	
McLachlin (minority)		X		
R. v. Gladue				
Cory & Iacobucci (unanimous)	X		X	
U.F.C.W., Local 1518 v. KMart Canada				
Cory (unanimous)	X		X	
Winko v. British Columbia (Forensic Psychiatric Institute)				
McLachlin (majority)	X		X	
Gonthier (dissent)		X		
M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.				
Binnie (unanimous)	X		X	

Table #2 - Opinions Referring to Hansard for Support in 2010

2010 Judgments	Hansard Considerd		Decision Concurred	
	Yes	No	Yes	No
Quebec (Attorney General) v. Lacombe				
McLachlin CJ. (majority)	X		X	
Deschamps J. (dissenting)	X		X	
Century Services Inc. v. Canada (Attorney General)				
Deschamps J. (majority)	X			X
Abella J. (dissenting)	X		X	
Reference re Assisted Human Reproduction Act				
McLachlin J. (split)		X		
LeBel & DesChamps JJ. (split)	X		X	
Cromwell J. (controlling)		X		
R. v. Morelli				
Fish J. (majority)	X		X	
Deschamps J. (dissenting)		X		
Canada (Attorney General) v. TeleZone Inc.				
Binnie J. (unanimous)	X		X	
Németh v. Canada (Justice)				
Cromwell J (unanimous)	X		X	
Toronto Star Newspapers Ltd. v. Canada				
Deschamps J. (Majority)	X		X	
Abella J. (dissenting)		X		
Globe and Mail v. Canada (Attorney General)				
LeBel J. (unanimous)	X		X	
Syndicat de la fonction publique du Québec v. Quebec (A.G.)				
LeBel J. (majority)		X		
Deschamps J.(dissenting)	X		X	

Note that the only opinion in 2010 that makes reference to Hansard that is not regarded as probative is the majority opinion by Deschamps J. in *Century*.[245] Presumably these materials were submitted by the litigants and were therefore appropriate targets for judicial comment. Ironically, in *Lacombe*, McLachlin CJ. and Deschamps J. cite the same Hansard-like evidence to reach the opposite conclusion. Both claim to find the evidence compelling. This pattern runs through the 2010 decisions. Generally, judges will only mention legislative history in support of points to be made in their opinions.

Re AHRA provides another instructive example.[246] In this decision there is a strong disagreement between McLachlin CJ. on the one hand, and LeBel and Deschamps JJ. on the other, who each write opinions for a 4-4 split, leaving Cromwell J. with the

245 *Century*, *supra* note 193.

246 *Re AHRA*, *supra* note 50.

controlling opinion. At issue is whether it is acceptable for criminal laws (under federal jurisdiction) to restrict medical practitioners by way of a licencing scheme with respect to assisted human reproduction (eg. *in vitro* fertilization) and stem cell research. The regulation of professions is exclusively a provincial matter while criminal law is exclusively federal.[247] In her reasons, McLachlin CJ. makes reference to a particularly significant Commission report, but in all other respects, her reasoning is decidedly textualist in nature, relying almost entirely on precedents and the text of the impugned statute.[248]

In contrast, LeBel and Deschamps JJ. make extensive use of an entire laundry list of legislative history materials including four Hansard citations, three citations of Evidence of the Standing Committee on Health, six Bills (five of which died on the order paper), "an affidavit filed in evidence during the hearing in the Court of Appeal, Francine Manseau, Senior Strategic Policy Advisor, Assisted Human Reproduction Implementation Office, Department of Health Canada" (concerning the mandate she was given by the Minister of Health) and a news release from Health Canada (as evidence of

247 *The Canadian Constitution, supra* note 55, s. 91(27): "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

248 Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) [*Baird Report*].

"a moratorium on certain reproductive technologies and practices").[249] This opinion leaned heavily on legislative history and on the *Baird Report*, in particular.[250]

McLachlin CJ. criticizes the reasoning of LeBel and Deschamps JJ. because "it treats the *Baird Report* as proof of the purpose behind the Assisted Human Reproduction Act."[251] In effect, she is accusing LeBel and Descamps of giving too much weight to the report. In response, LeBel and Deschamps JJ. argue that:

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249 *House of Commons Debates*, 37th Parl, 1st Sess, vol 137, No 188 (21 May 2002); *House of Commons Debates*, 37th Parl, 1st Sess, vol 137, No 192 (27 May 2002); *House of Commons Debates*, 37th Parl, 2nd Sess, vol 138, No 047 (28 January 2003); *House of Commons Debates*, 37th Parl, 2nd Sess, vol 138, No 072, (18 March 2003) at 4335; House of Commons, *Evidence of the Standing Committee on Health*, 37th Parl, 1st Sess (3 May 2001), online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040776&Mode=1&Parl=37&Ses=1&Language=E.>;

House of Commons, *Evidence of the Standing Committee on Health*, 37th Parl, 1st Sess, (17 May 2001), online: <http://www2.parl.gc.ca/HousePublications/ Publication.aspx?DocId=1040839&Language=E&Mode=1 &Parl=37&Ses=1>;

House of Commons, *Evidence of the Standing Committee on Health*, 37th Parl, 2nd Sess, No 013 (9 December 2002), online: ,http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=628385&Language=E&Mode= 1&Parl=37&Ses=2>;

supra note 183 at paras 161-163:

> "Several bills were introduced before the AHR Act. They can be divided into two groups. The scope of the first group of bills was limited to the prohibition of certain activities: Bill C-47, An Act respecting human reproductive technologies and commercial transactions relating to human reproduction, 2nd Sess, 35th Parl., 1996; Bill C-247, An Act to amend the Criminal Code (genetic manipulation), 1st Sess, 36th Parl., 1997; Bill C-336, An Act to amend the Criminal Code (genetic manipulation), 1st Sess, 37th Parl., 2001. The second group of bills purported to regulate certain activities associated with assisted human reproduction and to create an agency that was to be responsible for administering the Act. The purpose of each of the bills in the second group was to implement both the recommendations of the Baird Report: Bill C-56, An Act respecting assisted human reproduction, 1st Sess, 37th Parl., 2001-2; Bill C-13, An Act respecting assisted human reproduction, 2nd Sess, 37th Parl., 2002.
>
> All five of these bills died on the Order Paper at the end of the sessions of Parliament in which they were introduced.
>
> Finally, Bill C-6 respecting assisted human reproduction and related research, the source of the current legislation, was introduced on February 11, 2004."

Supra note 183 at para 177; Health Canada, News Release 1995-57, "Health Minister Calls for Moratorium on Applying Nine Reproductive Technologies" (27 July 1995).

250 *Supra* note 183 at para 177, LeBel and Deschamps JJ. state that "[i]n sum, the substantive and formal distinctions between controlled activities and activities that are prohibited completely stem from the legislative history, from the nature of the activities and from how they are presented in the AHR Act."

251 *Ibid* at 29.

> The Chief Justice interprets the *AHR Act* very differently. She disregards its legislative history, even criticizing us for attaching importance to the Baird Report. She takes no account of the distinction the Commission drew in its report between prohibited activities and controlled activities. In this regard, she asserts that the fact that the Commission recognized the positive aspects of assisted human reproduction does not mean that Parliament shared the Commission's concerns. We can only emphasize that there is no factual basis whatsoever for the Chief Justice's interpretation. Her approach is contrary to the usual approach to constitutional analysis.[252]

It is interesting that the entire disagreement was couched on the language of weight; the notion of admissibility of the legislative history was not questioned. This is the approach that Beaulac advocated in 2000. Within this evolution, the judges have settled on the practice of only commenting on those elements of legislative history that they feel have weight. The materials will only be discussed in an opinion if the judge concurs with the point supported by the materials.

The claim that the "usual approach to constitutional analysis" involves a circumspect consideration of all available information surrounding the impugned enactment shows how far the court has come with respect to legislative history. For LeBel and Deschamps JJ., it is regarded as normal, at least in the context of Constitutional analysis. The fact that one Supreme Court Justice would fault another for disregarding legislative history is equally revealing.[253]

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252 *Supra* note 183 at para 177.

253 This point could be used to argue for a compartmentalized approach with respect to legislative history, but in the opposite sense that was discussed by Beaulac, i.e. that in Constitutional cases there is a heightened need to consider such evidence. This decision represents the only explicit evidence for this, and it is in a split decision. The controlling decision by Cromwell J. does not cite any legislative history, and none of the paragraphs by LeBel and Deschamps JJ. that he claims to agree with contain any references to legislative history. Meanwhile the Court has demonstrated an equal willingness to consider all manner of legislative history materials in the context of non-constitutional cases. The notion that there is a different treatment of these materials based on category is not compelling. There is, of course, a difference in the type of information about a statute that is relevant in the context of Constitutional analysis because of the nature of such an inquiry, which involves a more general assessment of the purpose and practical effect rather than determining the meaning of a provision with respect to a particular set of facts. There might be a difference in treatment that arises out of this. Such an inquiry is beyond the scope of this study, and would make for an interesting study.

Based on the various factors discussed above, it would appear that legislative history is far from a second-class interpretative means. It is considered on its merits in the circumstances of each case. When it is found to be compelling it will appear in the judge's opinion, and when it is found to be unconvincing, it is disregarded.

(c) Hansard as a Stand-Alone Interpretative Means

In his study, Beaulac argued that Hansard should be an equal among interpretive aids, however, he did not stop there. He insisted that Hansard should "constitute an autonomous and prime weapon in the court's arsenal".[254] The concept of Hansard as a primary tool of interpretation suggests that Hansard should literally be able to stand alone. It should be acceptable to rely upon a single (appropriate) quote from Hansard to justify a particular interpretation of a statutory provision without the support of corroborating evidence of intention. The analysis of this criterion is another area where a comparison between the 1999 and 2010 decisions exposes a significant change in the judicial treatment of Hansard.

With the other issues dealt with thus far, Hansard and other materials that comprise the legislative history have been treated as a collective whole, more or less. It should be noted that Hansard is the sole concern here, which includes transcripts of proceedings both in the legislative assembly and committees for the purposes of this study. The question is simply this: Can transcripts of proceedings be used as an aid to interpretation without the corroboration of other extrinsic aids?

In 1999 there were several instances where Hansard was cited to support a particular point without any other piece of extrinsic material that concurred on that point.

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254 Beaulac, *supra* note 7 at 609.

For example, in *R v GB*, a quote by the then Minister of Justice was used to show that s 672.21(3)(*f*) of the *Criminal Code*, which permits the use of an otherwise inadmissible statement to be used to challenge the credibility of an accused, was an attempt by Parliament to balance between the need to learn the truth against the need to protect the accused.[255] There was no further extrinsic evidence provided for this point. This also occured in *M & D Farms*.[256] A statement by the Ministry of Agriculture was used to determine the purpose behind the Farm Debt Review Act, and this assessment was supported primarily through an examination of various provisions of the Act without any other extrinsic evidence.[257] Similarly, in *U.F.C.W., Local 1518 v KMart Canada*, a quote made before the B.C. Legislature was used to support an interpretation of purpose of the B.C. *Labour Relations Code*, again with no other legislative history materials.[258] This also occurred in *Law v Canada* and in *Francis v Baker*.[259]

This method of citing a single passage from Hansard, accompanied only by jurisprudence and statutory text was found in only two decisions of the 2010 judgments in this study.[260] In all other cases, there were either multiple references to Hansard under different dates and at different stages of a Bill's consideration, or there were references to other pieces of extrinsic evidence. It would appear, therefore that, although legislative history has come to be treated just like any other interpretive aid, the judges have come to prefer the shotgun approach to justifying the various points made in their opinions.

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255 *R v GB*, *supra* note 42 at para 39; *Criminal Code*, RSC 1985, c C-46.

256 *Supra* note 178 at para 19.

257 *Farm Debt Review Act*, RSC, 1985, c 25 (2nd Supp); *Supra* note 178.

258 *KMart, supra* note 190 at para 60; *Labour Relations Code*, SBC 1992, c 82.

259 *Law, supra* note 182 at paras 8 & 97; *Francis*, *supra* note 181 at para 38.

260 *Morelli*, *supra* note 187; *Syndicat*, *supra* note 50.

The surgical strike where statutory text is quoted and elaborated upon with a single Ministerial utterance is out of favour.[261]

One excellent example of the shotgun approach is *Telezone*.[262] In this case, the authority of provincial superior courts to hear cases involving tort and contractual liability against the Crown was challenged. The history of the provision in the Federal Court Act which initially granted exclusive jurisdiction for civil cases to the federal court was elaborated upon, including the subsequent amendment which permitted concurrent jurisdiction over contractual and tort-based claims, using quotes from Hansard.[263] Although no other type of extrinsic aid was consulted, there were three separate quotes cited including a lengthy paragraph from the *House of Commons Debates* in 1971, a paragraph from the *House of Commons Debates* in 1989 as well as a passage from the *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38.*

(d) Shoehorning

With respect to the use of Hansard in the judgments considered, there are, loosely speaking, two ways that Hansard is being used. It can be used as a stand-alone piece of evidence insofar as it is not directly related to other pieces of evidence put forward in support of a particular point, or it can be used to inject some other extrinsic aid, like a committee report, into the law-making process by demonstrating that this extrinsic item

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261 There is the possibility that in 1999 it simply turned out that there were no second or third references in support of a particular interpretive issue and that more references would have been presented if such references had been available. Nonetheless, the difference between the 1999 and 2010 judgments is quite striking on this point. Single references to Hansard were common in 1999 without the support of other extrinsic materials whereas Hansard was almost always accompanied by corroborating extrinsic materials in 2010.

262 *Telezone, supra* note at 192.

263 *Federal Courts Act*, RSC 1985, c F-7.

was "on the minds" of the MLAs. This particular strategic use of Hansard will be referred to as "shoehorning".

An early Canadian example of shoehorning occurred in *R v Vasil.*[264] At issue was the phrase "unlawful object" in s 212(c) of the Criminal Code. Lamer J. noted that the wording of the text was identical to the *English Draft Code.*[265] The reasons for choosing this particular phrase was explained in the "British Commissioner's Report", and Hansard was used to show that the members of the Canadian Parliament deliberately chose to use the *English Draft Code* and that they were aware of the the British Commissioner's Report and indeed discussed the report in the House. Thus Hansard is literally used to legitimize the Commissioner's Report.

As *Vasil* shows, shoehorning is a long-standing practice at the *SCC.* However, among the cases in this study, this practice is much more common in 2010 than it was in 1999. The only case where shoehorning appears in 1999 is in *M v H,* where Hansard quotes were used to show that the legislators were motivated to reform the support provisions in the Ontario *Family Law Act* for reasons cited in a 1975 *Law Commission Report.*[266]

In 2010, there were a number of cases where Hansard was used to show that the law-makers relied directly upon a report when enacting and amending legislation. In *Re*

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264 *Vasil, supra* note 35.

265 *English Draft Code, supra* note *133.*

266 *Supra* note 185 at paras 85-94; *Family Law Act,* 1986, SO 1986, c 4; Ontario, Law Reform Commission, *Report on Family Law, Part VI, "Support Obligations"* (Toronto: Ministry of the Attorney General, 1975). It should be noted that M v H is not a classic example of shoehorning. Hansard was being used in a more subtle way to reinforce the reasoning rather than to directly prove that the Minister drew directly from the report.

AHRA, the Baird Report became the centre of attention for the 4-4 split between LeBel and Deschamps JJ. and McLachlin CJ., as explained previously.[267]

In *Németh*, three excerpts from Hansard (including statements by the Parliamentary Secretary to the Leader of the Government and another elected member whose title and relationship to the legislation is not stated) were used in conjunction with statements by a civil servant, the General Counsel, Criminal Law Policy Section, Department of Justice, from the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Human Rights*.[268] The express purpose of these quotes was to show that the legislators were aware of, and based amendments to the *Extradition Act* on the *UN Model Treaty on Extradition* and the *Extradition Convention* for the purpose of fulfilling Canada's international obligations with respect to non-refoulement.[269]

In *TorStar*, the *Ouimet Report* was the government document which recommended a mandatory publication ban on bail proceedings at the request of the accused.[270] The trial court judges all found it puzzling that the initial amendments to the *Criminal Code* which occurred following the report, and which were largely in

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267 *Supra* note 183. Between the Chief Justice and LeBel and Deschamps JJ. the *Baird Report* is referred to, discussed and cited 23 times. Ironically, while he is in substantial agreement with LeBel and Deschamps JJ. concerning the outcome, Cromwell J. disagrees with their reasons. "I respectfully disagree with the results proposed both by the Chief Justice and by Justices LeBel and Deschamps." at 282; "I part company with my colleagues at the first step of the constitutional analysis" at 284. Cromwell J. makes no reference to the *Baird Report*.

268 *Németh*, *supra* note 50 at paras 83-84; *House of Commons Debates*, 36th Parl, 1st Sess, vol 135, No 162 (30 November 1998) at 10591-92 & 10595; House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Human Rights, 36th Parl, 1st Sess, (17 November 1998), at 11:45, 12:05; House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Human Rights, 36th Parl, 1st Sess, (5 November 1998), at 17:10.

269 *Refoulement is the the "direct or indirect removal of refugees to a territory where they run a risk of being subjected to human rights violations." Németh, ibid* at paras 19, 81-86; *Extradition Act*, S.C. 1999, c. 18 [*EA*]; *Model Treaty on Extradition*, GA res 45/116, UNGAOR 68th plen mtg, Supp No 49A, UN Doc A/45/49 (1990) [*Model Treaty*]; *European Convention on Extradition*, 13 December 1957, Eur TS No 24, Art. 3(2) [*European Convention*].

270 *Ouimet Report*, *supra* note 231.

accordance with the recommendations of the report, did not include the mandatory publication ban, but left the ban subject to judicial discretion. The amendment enacting the mandatory ban occurred four years later. This is a case which cried out for shoehorning, yet there was no direct statement in the record which explained why the particular recommendation was not followed in 1971 and why it was enacted in 1976. The statements by the then Minister of Justice were quoted merely to provide an explanation for the reasons behind amendments to the bail process in general.[271] As well, a statement was used to demonstrate that the Minister had argued for mandatory publication bans for preliminary inquiries.[272]

There can be little doubt that the *Ouimet Report* was central to the drafting of Bill C-218. Indeed, when the Bill was being introduced to the House on February 5, 1971, the Hon. Robert McCleave (an opposition member) said the following: "I refer to the remedy that appears in the *Ouimet Report*, which is the backbone of this measure we are

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271 *TorStar*, *supra* note 201 at 13: "The new legislation was promoted as protecting individual rights. John Turner, the then Minister of Justice, declared in the House of Commons:

> I said that as soon as we could, I intended to turn once again along the road of law reform and continuing enhancement and protection of civil liberties. . . . This bill is directed at making that first contact between citizens and the criminal judicial process less abrasive.
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> (House of Commons Debates, vol. III, 3rd Sess., 28th Parl., February 5, 1971, at pp. 3113-14)".

272 *Ibid* at 31: "Furthermore, mandatory publication bans were not unknown at the time of the Ouimet Report. For instance, s. 539 Cr. C. requires that a ban on the publication of evidence adduced at a preliminary inquiry be ordered should the accused apply for one. That ban was discussed by the Standing Committee on Justice and Legal Affairs. Minister Turner justified it as follows:

> We are not talking about a situation of legitimate publicity at an open trial once the jury is empanelled. If the evidence at the preliminary inquiry is then brought into the trial it becomes part of the evidence of the trial. What we are trying to prevent is a preliminary pre-trial by newspaper prior to the time that a magistrate may have bound a man over for trial. He may find that the charges are dismissed but the damage has been done.
>
> (Minutes of Proceedings and Evidence, No. 11, 1st Sess., 28th Parl., March 18, 1969, at pp. 501-2)

These comments go beyond averting jury bias. They address the broader goal of protecting the right to a fair trial."

considering today".[273] Mr. McCleave was criticizing the Bill because it did not follow the Report's recommendation to create a central registry. This was not discussed in the judgment. However, the wording of the mandatory publication ban enacted in 1976 was almost identical to the wording recommended in the Report, and this fact did have some import. Ironically, therefore, this case does not provide a clear-cut example of shoehorning, but it is a case where the Hansard quote was relatively unimportant, whereas the commission report was significant. Meanwhile it was a case where the trial court judges decried the absence of Hansard for the purpose of shoehorning. It was a situation that cried out for it.

In *Globe & Mail*, the ability for courts to compel journalists to disclose confidential information sources was challenged under the *Charter* and the *Quebec Charter*.[274] The *Charter* argument was rejected without recourse to Hansard. Hansard was used to demonstrate that the legislators deliberately excluded journalists from the enumerated list of professionals for whom professional secrecy was protected by law. This is done by quoting the provision in the Quebec *Civil Code*, which protects any "person bound to professional secrecy by law" from compelled disclosure.[275] The list of professionals so bound by law were enumerated in the *Quebec Professional Code*. This was supported by reference to a journal article.[276] LeBel J. stated that "[t]his list does not include journalists, even though their inclusion was contemplated, but yet ultimately rejected, by the National Assembly (see *Journal des débats: Commissions*

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273 *House of Commons Debates*, 28th Parl, 3rd Sess, no III (5 February 1971) at 3119.

274 *Globe & Mail, supra* note 50.

275 *Professional Code*, RSQ, c C-26.

276 *Supra* note 182 at para 35; N. Vallières, "Le secret professionnel inscrit dans la Charte des droits et libertés de la personne du Québec" (1985) 26 C de D 1019 at 1022-23.

parlementaires, 3rd Sess., 30th Leg., No. 6, January 22, 1975, at p. B-322; Ministry of Justice, *Justice Today*, by J. Choquette (1975), at pp. 232-35)."[277]

When the cited materials are examined, some interesting facts become clear. The *Professional Code* was enacted in 1973 and was not the topic of debate in 1975.[278] The Hansard excerpt cited is from the Quebec equivalent to the *Minutes and Proceedings of the Standing Committee on Justice* during deliberations over projet de loi no 50 – Loi concernant les droits et les libertes de la personne, which is the Bill that became the *Quebec Charter*. The pinpoint cites a dialogue between M. Rene Mailhot on behalf of the Fédération professionelle des journalistes de la province de Québec and M. Choquette, the then Minister of Justice. M. Mailhot is arguing for stronger rights to freedom of expression. There is no discussion about including or excluding journalists from the enumerated list of professionals. There is no direct discussion of professional secrecy. In this respect, this citation is hardly an authority for the point for which it is put forward.

The government document cited in conjunction with the Hansard is the item that makes explicit reference to professional secrecy. *Justice Today* is a white paper authored by Choquette, and within the pages cited, he considers professional secrecy with respect to journalists, and concludes that "journalists are entitled to some protection, but that they should not be given absolute professional secrecy."[279] This white paper was a

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277 *Globe & Mail*, *supra* note 50 at para 35.

278 See for example CMAJ, "Quebec National Assembly adopts Professional Code" (1973) 109 CMA J 242.

279 Québec, Ministère de la justice, *Justice Today*, (Québec: Publications du Québec, 1975) at 234 (Jérôme Choquette, Q.C., Ministère de la justice).

prelude to the *Quebec Charter,* and it is an exhaustive examination of the judicial institutions of Quebec.[280]

This combination of Hansard and a white paper is a particularly oblique instance of shoehorning. One must infer from the collected sources, that:

1. Choquette is the Minister in charge of the Bill that became the *Quebec Charter,*
2. Choquette knew that the enumerated list of professionals in the *Professional Code* excluded journalists; and,
3. that this exclusion was deliberate.

The sources make a plausible but not ironclad case. Meanwhile, one further inference must be drawn:

4. that the Quebec Legislature was in agreement with what was in the mind of the Minister of Justice about the *Professional Code* when the *Quebec Charter* was enacted.

This is an enormous amount of inference packed into a few short sentences. All of the analysis presented in this discussion of *Globe & Mail* concerns only one paragraph and occupies half a page. This treatment does not appear to give much consideration to the complexities involved in this combination of extrinsic aids to interpretation. It is an odd way to determine the precise meaning of a vague provision in a quasi-Constitutional statute enacted to serve a function analogous to that of the *Charter.* Arguably, this case demonstrates complacency: the judges have become comfortable with legislative history to the point where the potential sources of problems are disregarded.

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280 *Supra* note 279. One way that this reference supports the point being argued for is by bolstering the reliability of Choquette. It demonstrates that he is both an accomplished lawyer and an accomplished legal scholar who is thoroughly knowledgeable about the law in Quebec with respect to legal theory, Quebec cultural and procedural matters.

(e) Conclusions About Hansard as an Autonomous Interpretative Means

Based on the preceding discussion, it appears that Hansard is not being used as a prime interpretive weapon in court. Instead, it is being used in conjunction with commission reports and committee reports, and often for the sole purpose of bringing the ideas presented in those reports into the interpretive process. As *TorStar* demonstrates, there have been many times where statutes were enacted or amended where there was no statement about it in the transcripts of proceedings. It would appear that, given the admissibility of legislative history in general, litigators are making a greater effort to dig into the knowledge available to law-makers at the time of law making in all of its many varieties rather than focusing on Hansard. If the judgments in this study are representative, there has been a move towards the use of clever combinations of these materials to bolster their rhetorical force. In 2010, the real star of the show is legislative history in general rather than Hansard.

3.4 Persuasive Force and the Beaulac Test

Whenever evidence is tendered in court, the court must determine the weight or probative value of that evidence. The same is true for Hansard. When Hansard is presented as an aid to interpretation, an assessment must be made concerning how much weight ought to be assigned to it. In a 1998 work, Beaulac put forward a set of criteria for determining the appropriate amount of weight that should be given to Hansard.[281] This will be referred to as the Beaulac Test. It consists of four criteria that should be considered when assessing the weight that ought to be given to Hansard, namely:

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281 Beaulac, *supra* note 4.

1. The reliability of the source of information.
2. The contemporaneity with the legislative process.
3. The proximity to the legislative process.
4. The trustworthiness of the records.

These items are general and there is some overlap between them. Indeed Beaulac does not provide a concise point-by-point breakdown. Instead, he elaborates upon the four factors as follows: "[t]hus, for instance, statements of the Minister responsible for the enactment made at the end of the third reading and found in an official report will carry much more weight than ad-lib comments made in parliamentary committee by a member of the Opposition in response to an evasive answer given by the Government and recorded only in the assembly president's manuscript notes."[282]

Reliability relates primarily to the role of the speaker, and the depth of knowledge that a person in that role would likely possess respecting the particular piece of legislation at issue.[283] As noted by Beaulac, the Minister in charge of a Bill would generally be the most authoritative person to make pronouncements about a Bill.[284] They are the ones who stick-handle a Bill from conception, drafting, committees etc.. Of all members of the House, they are presumably the most knowledgeable about the particulars of the Bill, and therefore the most reliable to make pronouncements about the meaning of the text of a Bill.[285]

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282 Beaulac, *supra* note 7 at 609. Beaulac has also described the test as an assessment of "reliability, authoritativeness, proximity and contextual value". Beaulac, *supra* note 4 at 324.

283 Beaulac cites a work by W. K. Hurst as an influence in the development of this test. Hurst uses the term "credibility"to assess what Beaulac refers to as reliability. See W. K. Hurst, "The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria" (1980) 12 Pacific LJ 189. Beaulac also cites 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 as an influence in the development of the criteria in the Beaulac Test.

284 This point was also upheld in *Pepper*, *supra* note 3.

285 This is a presumption that could be challenged. There is no guarantee that a Minister in charge of a Bill is knowledgeable about the Bill and conversely, being a member of the opposition does not guarantee a

Contemporaneity is a straight-forward criterion. Statements made at the time of legislation would obviously be more closely associated with the actual process, while statements made a year later would be coloured by changes in perspective that occur over time with afterthought. Statements made at a very early stage in the process of drafting and enacting would be less authoritative than statements made closer to completion. Of course, if the wording of the provision at issue has not changed from a recommendation of a report, to the Bill at first reading all the way through to enactment, then a statement made early in the deliberations might be contemporaneous with respect to that provision.

Proximity to the legislative process again relates to the role of the person making the statement. An expert speaking in Committee is an outside adviser who does not vote in the assembly and is therefore more remote to the process than an MLA. However proceedings in committee are closer in proximity to the legislative process than a commission studying a Bill. However, there is another way that proximity comes into play. This concerns how directly a statement addresses a statutory provision. Statements that require inference-drawing in order to connect the statement to an alleged interpretation are more remote and therefore less proximate.[286]

The reliability of the records is self-explanatory. This is a non-issue for the official records kept by all legislative assemblies in Canada. Hansard in the UK was written by private journalists in the early 1800's and is therefore not very reliable.

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lesser degree of knowledge about a Bill.

286 Neither Beaulac nor Hurst identify this particular issue as one which pertains to proximity. Indeed, it is not entirely clear how this issue fits into the criteria they put forward for their analyses; however in practice it is essential to account for the clarity of statements and the degree to which they directly apply to the statutory provisions for which they are put forward as evidence of meaning. Arguably this could be regarded as a matter of reliability since a statement which requires inference-drawing is less reliable than a statement which unequivocally addresses a statutory provision. Nonetheless, it fits into the concept of proximity as well, and that is how it will be dealt with in the discussion that follows.

Like most other legal tests, the Beaulac Test is a non-exhaustive list of criteria that cannot be applied in a formalistic manner. Instead, it provides a checklist that points out the most likely sources of potential shortcomings when using Hansard and Hansard-like materials as interpretive aids. It is an entirely subjective assessment of the weight or probative value of the Hansard as evidence of statutory meaning.

Before applying the Beaulac Test to the various Hansard passages that appear in the 2010 judgments, however, the issue of citation must be addressed. This was something that Beaulac dealt with in his research in 1999 for the simple reason that complete information about a passage from Hansard is required in order to apply the Beaulac Test. Proper citation is a necessary precursor to the assessment of weight.

(a) Citation

As Beaulac notes about quotes from Hansard, "before an appropriate weight can be given to them, one must know the details of the materials actually at stake, which was the main problem with the 1999 decisions."[287] At issue is disclosure of the information necessary to assess the value of the evidence. As a basic requirement, one needs to know the name and title of the person speaking as well as the immediate context. The immediate context concerns whether a Bill was being presented for first, second or third-reading (or in committee), and might also include whether the statement is made while introducing the Bill to the House or in response to a question (or anything else that might prove relevant).

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287 Beaulac, *supra* note 7 at 610.

Within his study, Beaulac found that in *Law*, and the majority opinion in *M v H*, neither the name nor title of the person whose statement was referred to was stated.[288] He also found that "In *Gladue* ... although the first references involved the responsible Minister's speeches, we know nothing significant regarding the statements of the other MPs and senators. Similar shortcomings occurred in *R v Beaulac*, *Kmart* and *Malenfant*."[289]

When considering this issue, it makes sense to consider the size and relative importance of a quote, and to provide as much supplemental information as is justified by the circumstances. A quote can be several paragraphs long, and it could be put forward in support of a point that is a relatively significant matter within a judgment, Conversely, the quote might be merely a reference in support of a point that is relatively minor, and for which there are many other justifications like canons of interpretation, precedent, etc.. This distinction is helpful because judges cannot be expected to provide comprehensive information about all of the sources of information that they draw upon for everything touched upon in their decisions. Meanwhile, Hansard is extraordinarily complicated. One might need to explain the Bill, changes in the wording that preceded the debate, the question being responded to, who the answer is directed at, and potentially subsequent changes to the wording in the Bill to properly understand a particular statement. Citation is time-consuming, and given the complexities involved, a sliding scale approach is justified.

Based on the judgments considered in this study, it appears that the *SCC* judges took greater care to provide supplementary contextual information for larger and more

288 *Supra* note 7 at 610.

289 *Ibid.* Beaulac, *supra* note 7 *at 610.*

significant quotes in 2010. One of the few glaring omissions occurs in Deschamps J.'s dissent in *Syndicat*. A statement from the debates of the National Assembly occupies seven lines of text in the opinion. The speaker's name and title are not mentioned, although the Bill number is provided as well as the immediate context.[290]

It was more common in the 2010 decisions for the immediate context to be left out of the explanation. This occurred in *Németh*, *Morelli* and *Globe & Mail*. However, the omission is arguably justified in *Németh.* The wording of the provision of the *Extradition Act* was almost identical to the wording of the non-refoulement[291] provisions in the *European Convention* and the *UN Model Treaty.*[292] One can therefore be fairly certain that the wording of the Bill did not change significantly as it moved through the House and Senate. Meanwhile, several of the references appear merely as footnotes for additional support rather than as primary evidence of the purpose of the provision. Arguably, the citations are as complete as they need to be, given the role the references are serving in the judgment.

Morelli is a bit more challenging on this point, although the quote included in the case was merely used to reinforce a relatively uncontroversial interpretation of s 163(4.1) of the *Criminal Code,* which prescribes the crime of accessing child pornography. At issue was the purpose behind the law against accessing child pornography, which is a relatively tangential issue in this decision. Arguably, the need to supplement a citation is lower for a narrow point that is uncontroversial and plays a relatively insignificant role in

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290 *Syndicat*, *supra* note 50 at para 83. The immediate context is the stage of a Bill's passage during which a statement is made, for example, introducing a Bill to the House for first reading.

291 See refoulement, *supra* note 269.

292 *EA*, *supra* note 269; *European Convention*, *supra* note 269; *Model Treaty*, *supra* note 269.

the judgment. It is not crucial to know the stage in the Bill's passage during which the statement was made in this circumstance.

Globe & Mail is an interesting case because of the multiple inferences required to establish that journalists were not bound by professional secrecy in the *Quebec Professional Code* and that the *Quebec Charter* did not extend protection of professional secrecy to journalists.[293] There is a rather clever weaving together of ideas. From a citation perspective, LeBel J. failed to provide some crucial information as the name and title of the speaker were not stated in the Hansard citation. The white paper that was cited immediately following the Hansard citation for additional support was penned by J. Choquette for the Ministry of Justice. By consulting briefly with the Hansard and the white paper, it becomes obvious that Choquette was the Minister of Justice at the time of publication and was involved in the dialogue cited from the proceedings of the committee. It could be argued that this interpretation is relatively uncontroversial. However, the point being supported by the extrinsic aids is central to the decision.[294] The inclusion of name(s) and title(s) is a rather simple addition to a citation that goes a long way to clarify the relevance and import of the reference. In *Globe & Mail* it cannot be inferred from the citations alone as they appear in the judgment that the person who wrote the document is also the person quoted in Hansard.[295] The connection to the proposition for which it is cited as authority is therefore unclear without extensive research.

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293 See the discussion of shoehorning at 93.

294 Based on the finding that the national assemble deliberately excluded journalists from statutory protection of professional secrecy, LeBel J. concluded that "professional secrecy cannot ground a quasi-constitutional right to the protection of media sources". *Globe & Mail, supra* note 47 at para 35.

295 *Ibid.*

(b) Footnoting

When Hansard is mentioned in judgments, specific passages are not always quoted. Hansard can also be cited to support an interpretation without including a quote, and this type of usage will be referred to as "footnoting". Footnoting was a fairly common occurrence in 2010, and this stands in stark contrast to 1999 when the practice was relatively rare. The only judgment where this occurred in 1999 was in *M v H.*[296] In 2010, references to Hansard were made via footnote-like citations in *Re AHRA*, *Syndicat, Telezone*, *Century Services Inc. v Canada (Attorney General)*, *Németh and Globe & Mail.*[297]

The practice of citing Hansard as an authoritative footnote is related to the phenomenon of Hansard being used in conjunction with multiple corroborative justifications. It is one of the many ways that reasons for a particular interpretation are supported. The addition of Hansard in conjunction with committee reports and commission reports, alongside the pre-existing practice of citing journal articles and textbooks has changed the character of *SCC* judgments in a subtle but interesting way. Arguably, the decisions are slowly coming to resemble scholarly legal works.

When Hansard was cited by way of footnoting in the 2010 judgments, the name and title of the speaker were usually provided. Deschamps J. once again provides a rather noticeable exception, In *Syndicat,* a relatively lengthy passage from the *Journals des*

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296 *M v H, supra* note 184 at paras 84, 94 & 98.

297 *Re AHRA, supra* note 50 at para 216; *Syndicat, supra* note 50 at para 83; *Telezone, supra* note 192 at para 50; *Century, supra* note 193 at para 20, although the reference was for a piece of extrinsic evidence that was rejected, so it was not being used to support a point of law that was relevant to the judgment; *Németh, supra* note 50 at para 83; *Globe & Mail, supra* note 50 at para 35.

débats is quoted followed by two page references from the same session of the legislature in support, without stating the name and title of the speaker(s).[298]

The name and title of the relevant speaker are essential for Hansard citations and judges should take care to provide this much as a baseline. There can be statements from as many as four different people on a typical page in these records, and it is good form to include this essential factual information, if not for the benefit of legal scholars, then in the name of proper disclosure so that the correct source of the justifying information is accurately identified for any member of the public who wishes to achieve a larger understanding of a particular judgment.

As an example of the difficulties that bare references cause, Beaulac pointed to *Kmart*.[299] In that judgment, Cory J. cited a passage where a member of the government, identified as the Hon. L. Hanson stated "yes, that's also my interpretation" in response to a scenario outlined by an opposition member as examples of a union-related activity which was legal under the previous laws and which the new legislation would replace.[300] In the absence of knowing the title of the person quoted, the response "yes, that would be my interpretation also" is a highly ambiguous statement. It could have been said in

298 Syndicat, supra note at para 83.

299 *Kmart*, *supra* note 190.

300 Beaulac, *supra* note 7 at 611-612, quoting *Kmart*, *supra* note 190 at para 60: "In Kmart, Justice Cory, for the Court, used the following extracts from the parliamentary debates on the adoption of an old version of the *Labour Code*:

> Mr. Clark: ... I'll just give you an example: Canadian Tire in Prince George went on strike. There was a campaign to boycott Canadian Tire. There was picketing at other stores of Canadian Tire. That was ruled not to be allowed by the former Labour Relations Board, so what the union did instead was an extensive boycott campaign that involved things like large 4-by-8 signs, almost like election signs, that said "Boycott Canadian Tire." In my riding of Vancouver East alone there were something like 100 4-by-8's up on all the major highways, saying "Boycott Canadian Tire." Can the minister confirm, then – I think it's his intention – that those kinds of acts are still legal under this bill, and not prohibited in any way?
>
> Hon. L. Hanson: Yes, that's also my interpretation.

earnest upon a clear understanding of the Bill, but could just as easily be said by one who knew little about the substance of the Bill but was called upon to answer as a stand in for a Minister who was away. By always including the name and the title of the speaker in the citation, the message is sent that the judges are paying attention to this issue.

On a more positive note, the *SCC* does appear to have settled on a standard format for citing Hansard. In 2010, with only minor variations, the citations were included within the text of the opinion at the end of the relevant sentence(s) in brackets, typically in a format similar to that which is set out in the *Canadian Guide to Uniform Legal Citation*.[301] The citations included the jurisdiction, the official title of the record, the volume, the session and Parliament/Legislature number, the dates and page number. In most cases, the relevant supplementary information was included within the brackets before the citation, and this could include the name of the person speaking and their title (which usually indicated their role relative to the legislation), as well as the Bill number and the stage of passage of the Bill.[302] This format was not consistently used in 1999, and the evolution is a positive one. There is an unfortunate tendency for additional Hansard references to exclude supplementary information.[303] As stated previously, the name and title of the speaker is essential for making use of these references.

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301 *Canadian Guide to Uniform Legal Citation* 7th ed, (Toronto: Carswell, 2010). The order of information is different, but the requirements are nearly identical. For example, in *Németh*, *supra* note 50 at para 83, the citation is was follows: "the Hon. Peter Adams, Parliamentary Secretary to the Leader of the Government, House of Commons Debates, vol. 135, No. 162, 1st Sess., 36th Parl., November 30, 1998, at pp. 10591-92". To conform with the McGill Guide, the citation would be: *House of Commons Debates*, 36th Parl, 1st Sess, vol 135, No 162 (30 November 1998) at 10591-92 (the Hon. Peter Adams, Parliamentary Secretary to the Leader of the Government).

302 Information such as the Bill number, the immediate context (eg. first or second reading) etc. tended to be included in the text of the opinion.

303 In *Re AHRA*, *supra* note 50 at 253 there is a citation to *Evidence of the Standing Committee on Health* followed by three additional references to Hansard which provides the dates but no page numbers.

In general, although there is some room for improvement, the judges have become more consistent and more thorough in providing the name and title of the person whose speech is being cited, as well as mentioning further information with respect to the Bill being debated, the stage of passage, based on the cases in this study (which includes decisions by Deschamps J.).[304]

(c) Application of the Beaulac Test to the 2010 Judgments

Whenever a statement made by a member of an elected body is presented as evidence of statutory meaning, it is crucial to determine how much weight should be given to the statement. The purpose of the Beaulac Test is to facilitate the assessment of weight. It achieves this objective by focusing attention on four key factors:

1. The reliability of the source of information.
2. The contemporaneity with the legislative process.
3. The proximity to the legislative process (which includes: (i) the proximity of the speaker to the legislative process; and, (ii) the proximity of the statement to the statutory provision at issue).
4. The trustworthiness of the records.

Occasionally it becomes clear that the court has given weight to questionable materials. It should be kept in mind that this is a subjective analysis of judicial explanations. The justices are free to assign weight to whatever concepts and information that they see fit, and they are free to explain as much (or as little) as they see fit. The point of this exercise is to cast a critical eye on Hansard, despite the inherently subjective nature of such an analysis and the many surrounding complexities.[305]

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304 Within the cases where footnoting was used, *Telezone*, *Re AHRA*, *Nemeth*, and *Globe & Mail* provided the essential information. In *TorStar*, Deschamps J. included all relevant information.

305 There are a host of ideological issues which lie underneath the presumption that the assignment of weight to evidence of meaning is a productive endeavor. For example, there is a body of scholarship which asserts that judges made decisions based on various factors that are external to the legal process, such as personal values, personal experiences, ideological leanings etc.. Reasons are merely

(i) Hansard Use that Meets the Test Requirements

Telezone and *Morelli* are judgments in which the use of Hansard holds up well under the Beaulac Test. In *Telezone,* the issue to be settled was whether or not provincial superior courts had jurisdiction to hear cases where the the Crown was liable under the law of contract. All quoted passages were statements made by the relevant Minister of Justice, and are therefore reliable. The statements were made contemporaneously with the deliberations that preceded passage of the relevant Bill. As well, the statements were made in the House and in committee, and they directly addressed the issue at hand. Therefore the statements are proximate. For example, when considering the history of the concurrent jurisdiction for tort and contract law that is shared by both the Federal Court and provincial superior courts, a statement was quoted that explains why exclusive jurisdiction was initially granted to the Federal Court in 1971. This statement was made about the Bill that amended the Federal Courts Act and it corroborates the meaning of provisions of the previous version of the Federal Court Act.[306] The text of the relevant

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justifications for decisions arrived at through other means. See for example Stéphane Beaulac and Pierre-André Côté "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization", (2006) 40 RJT 131; also see Randal N. M. Graham, "What Judges Want: Judicial Self-interest and Statutory Interpretation" (2009) 30 Statute L Rev 38; also see Hutchinson and Boyle, *supra* note 23. In accordance with this general school of thought, the analysis of weight is more accurately described as an analysis of rhetorical justification value. An exploration of these ideological issues is beyond the scope of this thesis.

306 *Federal Court Act*, SC 1970-71-72, c 1; *Telezone*, *supra* note 192 at para 50: "This multiple supervision [by the provincial courts], with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them. . . . It is for this reason . . . that the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same nation-wide jurisdiction as the federal boards, commissions and tribunals themselves. The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions.

(House of Commons Debates, 2nd Sess., 28th Parl. March 25, 1970, at pp. 5470-71; see also Factum, at para. 79; Khosa, at para. 34.)"

provision did not change from first reading of the Bill through to the enactment of the statute, so the statements were made concerning the appropriate text.[307]

The current version of the provision grants concurrent jurisdiction "in all cases in which relief is claimed against the Crown" and two passages were quoted in the opinion which explain very directly the intended result of this provision and reasons for the change.[308] The first passage is from the committee stage and the second passage is from the *House of Commons Debates* while introducing the Bill to the house for second reading.[309] Again, the quoted passages directly reinforce the point that "relief against the

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307 Bill C-192, *An Act respecting the Federal Court of Canada*, 2nd Sess, 28th Parl, 1970 (first reading, 2 March 1970); *Federal Court Act*, RSC, 1970 (2nd Supp), c 10.

308 *Federal Courts Act*, RSC 1985, c F-7, s 17, "[Relief Against the Crown] (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown."

309 *Telezone*, *supra* note 192 at 58: "As the Minister of Justice stated in 1989 before the Legislation Committee examining Bill C-38, which resulted in, among other changes, today's version of s. 17:

> [W]e have made provision in the bill whereby ordinary common law and civil law actions for relief against the federal Crown, which are presently the exclusive jurisdiction of the Federal Court, may also be heard by provincial courts. Such provision acknowledges the fact that the Federal Court possesses no unique expertise in areas of ordinary contract and tort law. [The Minister here went on to describe the practical jurisdictional and procedural problems created by the Federal Court's prior exclusive jurisdiction over federal authorities.]";

(Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38, No. 1, 2nd Sess., 34th Parl., November 23, 1989, at pp. 14-15)

On second reading of the Bill, the Minister again emphasized that the purpose of the amendments was to allow the plaintiffs to sue the federal Crown in either the provincial superior courts or the Federal Court:

> For example, a person should be able to sue the Crown in a suitably convenient court for breach of contract to purchase goods or for negligent driving by a Crown employee that causes injuries to another motorist. At the moment, such actions can only be brought in the Federal Court. However, it is not as available as provincial courts.
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> . . .
>
> Moreover, for both citizen and lawyer alike, provincial courts, including their procedures and personnel, are much more familiar. Therefore, the Federal Court is often not the most convenient one for the private litigant. With this in mind, the government has proposed that both the provincial courts and the Federal Court share jurisdiction with respect to such actions, thereby generally giving a plaintiff a choice of forum. [Emphasis added by Binnie J.]

Crown" includes tort and contract-related legal actions. Although not stated in the opinion, the wording of the provision at issue did not change from first reading through to passage, therefore the statements were made with respect to the appropriate statutory text.[310] As a result of all of these factors, the statements are contemporaneous and proximate. Meanwhile, by including two passages at different stages in the process, the point is reinforced that the Minister of Justice was involved throughout the Bill's passage and his reliability is therefore increased. As well, the consistency of the statements reinforce the strength of the Hansard quotes as evidence of meaning. It becomes clear that the reasons motivating the amendments persisted beyond the second reading of the Bill.

In *Morelli*, the Hansard also holds up well under the Beaulac Test. The statement was made by the Minister of Justice during passage of the Bill. The opinion does not indicate what stage of passage the Bill was at when the statement was made; however despite this shortcoming, the nature of the statement is such that there is little doubt about it's relevance to the statutory provision which it is intended to support.

Fish J., for the majority in *Morelli*, quotes Hansard as part of an explanation of the purpose of s 163.1(4.1) of the *Criminal Code*, which makes the act of accessing child pornography a crime.[311] The opinion states that "[p]arliament's purpose in creating the offence of accessing child pornography, as explained by the then Minister of Justice, was to "capture those who intentionally view child pornography on the [Inter]net but where

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(House of Commons Debates, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414).

310 Bill C-38, *An Act to Amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*,Second Session, 34th Parl, 2nd Sess, s. 17 (as passed by the House of Commons Feb 15, 1990); *Federal Courts Act*, *supra* 308 at s 17.

311 *Criminal Code*, *supra* note 255.

the legal notion of possession may be problematic" (Hon. Anne McLellan, *House of Commons Debates*, vol. 137, 1st Sess., 37th Parl., May 3, 2001, at p. 3581)."[312] As stated earlier, the interpretation being supported was not particularly controversial. Nonetheless, the statement was made by an MP in a position of knowledge with respect to the legislation and is therefore reliable (or credible). The statement was made in the House during the act of pushing the appropriate Bill through the House and directly addressed the purpose of the statutory provision at issue.[313] It is therefore contemporaneous and proximate. The Hansard evidence in this case is a salient aid to interpretation with respect to the purpose for which it is quoted.[314]

(ii) Hansard Use that Raises Questions

Among the 2010 judgments examined in this study, several made use of Hansard quotes that suffered from a variety of deficiencies with respect to the Beaulac Test.[315]

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312 *Morelli, supra* note 198 at 26.

313 The language of the provision did not change from first reading through to passage. See Bill C-15, *Criminal Law Amendment Act, 2001*, 37th Parl, 1st Sess, 2001-02, s 11(3). The Bill was severed into two Bills, the relevant provision was included in Bill C-15A, An Act to amend the Criminal Code and to amend other Acts. Bill C-15A received royal ascent on June 4, 2002.

314 The reliability of Ms. McLellan is further supported by a passage quoted by the dissenting judge at the appeal decision that preceded this judgment. Richards JA. cites the words of the Minister of Justice while addressing the Standing Committee on Justice and Human Rights:

> "In speaking to the amendment that put s. 163.1(4.1) in place, the Minister of Justice said this: The bill will create an offence of accessing child pornography to capture those who intentionally view child pornography without legally possessing it because they do not have control over the material. The bill provides that a person would access child pornography when that person knowingly – and this is very important, because I know there have been some concerns raised about the creation of this new offence of accessing – when that person knowingly causes child pornography to be viewed by, or transmitted to, him or her. The definition ensures that inadvertent viewing would not be caught under this offence. [Emphasis added]"
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> *R v Morelli*, 2005 SKQB 381at 109; also see: Proceedings of the Standing Committee on Justice and Human Rights, 1st Session, 37th Parliament; October 2, 2001, p. 1635.

315 Within the following analyses, the amount of weight that judges appear to have assigned to particular Hansard-like materials is not always addressed. The purpose of this section is to critically assess Hansard and there is no larger criticism of the judgments intended here. Where a particular point in a complex judgment is supported by a variety of materials such as precedents, legal reasoning and/or multiple pieces of legislative history, it is often a vexing issue to assess just how much weight has been

TorStar is one such case. At issue was the mandatory ban on publication of bail hearings at the request of the accused. The *Ouimet Report*, published in 1969, recommended such mandatory publication.[316] Amendments to the bail hearing process, which were undoubtedly based on the recommendations in the Report, were enacted in 1971 but the provision governing publication bans did not follow the recommendations, and left the ban up to the discretion of the judge. It was in 1976 that the Criminal Code was amended to provide for a mandatory ban. The evidence therefore suffers from two key shortcomings.

The statements quoted were made by the relevant Minister and are therefore credible, however there is a temporal disconnect since the quotes used were from 1971. This is a shortcoming in contemporaneity. As well, there is the issue of proximity to the legislative process insofar as the Hansard quotes were not directly on point. One quote was cited to explain the very general purpose for the 1971 amendments to the bail process. The other quote was cited to explain the justifications for publication bans on preliminary inquiries, which are similar to bail hearings in certain respects, but not sufficiently so to make the statements directly applicable to bail hearings.

The opinion does not appear to give significant weight to the Hansard, but Dechamps J. does find the information helpful to illuminate the history of the amendments to bail process. Significant weight is given to the *Ouimet Report*, and this too could be criticized for similar reasons.

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assigned to one piece of evidence. For the sake of economy, it is presumed that when Hansard is put forward in a judgment in support of a point, it is being treated as having been assigned some weight. The issue of how much weight appears to have been assigned to any particular piece of Hansard has therefore been disregarded in many (but not all) instances, particularly when such an assessment would have been unduly complex or inconclusive.

316 The matter is discussed at 65.

It is rather puzzling that the judges at all levels (from the trial court through to the *SCC*) felt the need to connect the *Ouimet Report* directly to the publication ban provisions in order to find the reasons for such a ban, as enunciated in the report, to be compelling reasons for upholding the constitutionality of such a ban. Surely provisions which Parliament enacted to protect the rights of the accused could serve the multiple purposes that a larger view of justice requires, even though these purposes were never clearly expressed by the law-makers in the records at the time of enactment. Justice requires a complicated balance between a multitude of factors and principles. This is the nature of justice and judicial systems, regardless of what law-makers specifically say or do not say when enacting and amending laws.

Century is another judgment that involved the use of Hansard that suffers from deficiencies under the Beaulac Test. In this case, Ted LeRoy Trucking Limited attempted a restructuring under the *Companies' Creditors Arrangement Act*.[317] At the time, it had GST withholdings which are deemed to be held in trust for the Crown under s 222 of the *Excise Tax Act*.[318] In accordance with the approved restructuring, this amount was placed in a trust account by the Monitor of the restructuring.[319] When the restructuring failed and proceedings commenced under the *Bankruptcy and Insolvency Act*, the Crown sought to acquire the amount held in trust; however the trust created under s 222(3) of the *ETA* does

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317 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

318 *Excise Tax Act*, RSC 1985, c E-15, s 222(3): "Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ...". Quoted from *Century, supra* note *193* at para 34. *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3.

319 The "Monitor" is the person appointed by the court to oversee a restructuring under the *CCAA*. *CCAA*, *supra* note 317 at ss 11.8 & 23.

not apply to proceedings under the *BIA*.[320] What adds to the complexity, however, is s 18(3) of the *CCAA,* which nullifies statutory deemed trusts under restructurings arising under the *ETA*. It was enacted in 1997 while s 222(3) of the *ETA* was enacted in 2000. Arguably, the provision enacted later in time should supercede the earlier one.[321] However a subsequent amendment to the *CCAA* re-enacted the trust-nullifying provision, albeit with a slight change in wording and renumbered.[322]

In *Century*, Abella J. quotes Hansard to support an interpretation of the trust-nullifying provision of the CCAA in her dissent. Abella J. regards the change in wording and renumbering of the provision as purely technical, and therefore as evidence that it should be treated as if it had not been amended at all:

> During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:
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> > On a technical note relating to the treatment of deemed trusts for taxes, the bill [sic] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [sic] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

Federal legislation must receive majority support in the Senate, and therefore statements made in the Senate should be treated in the same way as statements made in

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320 See *supra* note 318.

321 This would be in accordance with a maxim of interpretation, *leges posteriores priores contrarias abrogant*: It is sometimes referred to as the doctrine of implied repreal. It means "later laws abrogate earlier contrary laws"; see *Human Rights Commission v Workplace Health, Safety and Compensation Commission*, 2005 NLCA 61 at 14; also see *Saumur v City of Quebec*, [1953] 2 SCR 299 at 388; also see *Alberta v Lefebvre*, 1986 ABCA 236 at 71.

322 The 1997 provision of the *CCAA* is s 81.3(1): "Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision."

The provision as amended in 2005 became s 37(1): "Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision." See *ibid* at 37.

the House of Commons. With this in mind, the role of the Deputy Leader with respect to this Bill is unclear, and therefore the depth of his knowledge about the specific provision is uncertain. This casts some doubt upon the reliability of this quote. Meanwhile, this statement does not clearly state that the deemed trust should survive bankruptcy proceedings. It is a much more general statement – that there is no change to the *underlying policy* with respect to the treatment of trusts. In the absence of elaboration about the underlying policy intent, this is less than solid evidence of the legislative intention that the Hansard is cited to prove. It therefore suffers from a deficiency with respect to proximity as well.[323]

In *Globe & Mail*, Hansard was presented in support of the notion that protection of freedom of information, as enshrined in the *Quebec Charter*, did not prevent journalists from disclosing confidential information sources when ordered to do so by the court.

The Hansard occurred in the form of a footnote-style reference to the *Journal des débats: Commissions parlementaires* accompanied by a reference to a White Paper authored by Jerome Choquette, for the purpose of showing that the National Assembly contemplated but rejected the idea of extending protection of freedom of information under the *Quebec Charter* to include journalists.[324]

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323 These deficiencies are apparent deficiencies based on the Hansard as presented in the judgment. The Hansard could, in fact, be very compelling, however this cannot be determined based on the information provided in the judgment. There is no necessary implication here that Abella J. was at fault for relying on the Hansard in this context.

324 *Globe & Mail*, *supra* note 50 at para 35:

> Professional secrecy applies only to those professionals bound to it by law, and is currently restricted to the 45 professional orders subject to the *Quebec Professional Code*, R.S.Q., c. C-26 (see, e.g., N. Vallières, "Le secret professionnel inscrit dans la Charte des droits et libertés de la personne du Québec" (1985) 26 C. de D. 1019, at pp. 1022-23). This list does not include journalists, even though their inclusion was contemplated, but yet ultimately rejected, by the National Assembly (see Journal des débats: Commissions

The evidence cited concerns committee deliberations over projet de loi no 50 – Loi concernant les droits et les libertés de la personne, which became the *Quebec Charter.* For this fact alone, this reference is suspect. The list of enumerated professionals is in the *Professional Code*, not the *Quebec Charter.* If there was any solid evidence that the legislature considered including journalists in this list, deliberations over the Bill enacting or amending the *Professional Code* would be the only truly probative source. This is a significant shortcoming with respect to both proximity and contemporaneity.

Furthermore, the page reference, which did not include the name of the speaker, includes a dialogue between the Minister of Justice and M. Rene Mailhot on behalf of the Fédération professionelle des journalistes de la province de Québec. Mailhot is a lobbyist of sorts, and he makes a rather rhetorical exhortation decrying that there can be no right to information if, for example, journalists are afforded no legal protection for professional secrecy or the police can seize journalists' documents.[325]

Choquette responded by noting that he had no objection to a strong right to information, but questioned how such clear rights were to flow from the general wording of a Charter. This, of course, is a reasonable response given the context. However, as evidence that the legislators enacting the Quebec Charter were aware that the list of professionals in the *Professional Code* excluded journalists, this is decidedly weak. One must infer, from Choquette's response to Mailhot's rhetoric that both are aware of the fact that the laws protecting professional secrecy in Quebec did not cover journalists. Such an interaction between a lobbyist and a Minister which did not directly address the matter at

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parlementaires, 3rd Sess., 30th Leg., No. 6, January 22, 1975, at p. B-322; Ministry of Justice, Justice Today, by J. Choquette (1975), at pp. 232-35).

325 See *supra* note 328.

hand suffers from a serious deficiency in proximity. There is the issue of reliability concerning statements made by a lobbyist. Such a person could hardly be regarded as an authority about the meaning of the Bill.

The white paper is much more clear on the subject, but it was not written in contemplation of the *Professional Code.* On the contrary, it was written as an overarching examination of Quebec's legal institutions.[326] It therefore has deficiencies in both contemporaneity and proximity.

On a more charitable view, the combination of the white paper and the Hansard presents some support for the notion that the Minister who played a central role in the enactment of the *Quebec Charter* knew that journalists had no legally protected professional secrecy, and therefore it can be inferred that there was no intention to extend this protection in the *Quebec Charter.* However, these many inferences are drawn about the beliefs of one person and imputed to the legislature about the meaning of a quasi-constitutional statute. At the very least, it would be reasonable to expect more than a single paragraph to expound such a significant point of law.

In *Syndicat*, Deschamps J. used related statutes and Hansard to conclude that a provision in the *Quebec Labour Code* should not be interpreted literally. Among the reasons, the following point is supported by recourse to Hansard:

> That transcript shows that it was assumed that unionized employees would not necessarily submit every grievance to an arbitrator appointed under their collective agreement — they would sometimes have to turn to the forum designated in the Act. At that time, the Act designated the Labour Commissioner General as the forum for recourses exercised under the

326 *Supra* note 279 at 30: "The main objective of this white paper is to examine judicial institutions; it contains a complete picture of the way in which the justice system functions in Quebec. It also reassesses those reforms already introduced, and examines a great many others needed for the future."

> A.L.S. in respect of dismissals. The C.N.T. Could represent a non-unionized employee if the recourse was based on ss. 122 and 123 (prohibited practices), but not if s. 124 was relied on. The purpose of the proposed amendment (now s. 126.1) was to make up for this deficiency while at the same time trying to limit costs for the C.N.T. The following passage from the National Assembly's debate shows how the procedure was being interpreted at that time:
>
> > [TRANSLATION] According to the Labour Commissioner General's office, representing employees in dismissal cases will have to result in an increased workload. . . . The bill also amends the Act as regards the Commission des normes. It will be amended so that the Commission represents, in recourses against dismissals without good and sufficient cause . . . it will be ensured that employees have to contribute. Employees covered by collective agreements will be defended by their unions; employees eligible for legal aid will be defended by legal aid. [Emphasis added.] (National Assembly, Journal des débats, 2nd Sess., 35th Leg., Bill 31, An Act to amend the Act respecting labour standards (Introduction), May 23, 1996, at p. 1325; see also pp. 1332 and 1334.).

Although not stated in the judgment, the person speaking is M. Matthias Rioux, the Ministre du Travail (Minister of Labour) at the time. This person is in a position of knowledge. The passage cited does support the notion that the Legislature expected that unionized employees would appear before the labour tribunal, however some inference-drawing is required. The passage includes the statement that "Employees covered by collective agreements will be defended by their unions". From this statement, we are to infer that that these employees will be defended by their unions at the tribunal. Given the context of this statement, this is a reasonable inference. In this case, therefore, the evidence does warrant some weight for the assertion for which it is put forward, that the Legislature believed that unionized employees would be appearing before the tribunal (and by implication did not expect unionized employees to always arbitrate).

The second reference to Hansard cites page 1332. This page contains statements made by Liberal member M. Jean-Mark Fournier and Liberal member M. Lawrence S.

Bergman.[327] Both are opposition members and the depth of their understanding of the legislation is questionable. As well, their statements are not directly on point. Instead, they consist of more general criticisms of the Bill, and one must infer that the Legislature expected unions to represent members at the tribunal as implied within on a much larger discussion.[328] Due to the deficiencies in reliability and proximity, this reference is not particularly compelling as an interpretive aid.

In *Lacombe*, a municipal by-law restricted the location of 'aerodromes' for 'float planes' to a particular lake in a region containing several lakes surrounded by cottages.[329] Because the by-law restricted the location of airports, it was challenged on the basis that it interfered with the *Aeronautics Act* and therefore infringed on an exclusively federal head of power. As is typical for most municipal councils, there are no transcripts of proceedings. In lieu of such transcripts, the judges relied upon the attestation of the Director General and Secretary-Treasurer of the Municipality of Sacré-Coeur about the motivations of the council for enacting the by-law. This was justified on the same grounds as recourse to Hansard. When assessing the purpose of the by-law, in the context of the pith and substance analysis, McLachlin CJ. stated for the majority that:

> the municipal council discussed "doing something about the float planes

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327 *Syndicat, supra* note 50 at 84; Quebec, National Assembly, *Journal des débats*, 35th Leg, 2nd Sess, at 1332. Although irrelevant to the current discussion, it is interesting to note that most of M. Bergman's statements are in English.

328 Indeed, both comments make general references to employees being represented by unions. It is not entirely clear that this is a specific discussion of employees being represented in the tribunal rather than a discussion of employees being represented by unions in a more general sense. The page from the transcript is attached as Appendix 6: Québec, Assemblée nationale. Commission permanente de la Justice. Étude du projet de loi no 50 — Loi concernant les droits et les libertés de la personne. Journal des débats: Commissions parlementaires, 3e sess., 30e lég., no 6, 22 janvier 1975 at page 163.

329 Municipality of Sacré-Coeur, By-law No. 260, *Règlement aux fins de modifier le règlement numéro 209 intitulé « Règlement relatif aux permis et certificats, aux conditions préalables à l'émission de permis de construction, ainsi qu'à l'administration des règlements de zonage, de lotissement et de construction », le règlement numéro 210 intitulé « Règlement de zonage », le règlement numéro 211 intitulé « Règlement de lotissement », de façon à créer la nouvelle zone 61-RF* (1995).

> using Gobeil Lake . . . with a view to finding a solution to the incompatibility of that commercial activity of maintaining a float plane base with the use of the lake by vacationers" (solemn affirmation of Sarto Simard, Director General and Secretary-Treasurer of the municipality of Sacré-Coeur, at para. 12).The council crafted a solution that had the effect of prohibiting certain aviation activities — and only those aviation activities — from a significant portion of the municipality (those zones in which water aerodromes are not specifically approved)[330]

This statement was made to emphasize the contrast with the purpose of the by-law as enunciated in the preamble which claims to "find a balance between the activities of summer home owners and more commercial land uses".[331] The Hansard-like attestation was essentially a challenge of the colourability of the by-law.[332] The by-law was impugned for having a hidden agenda – an objective that is different from what it purports to do within the text of the by-law itself. This evidence appears to have been given significant weight in the decision, although, consistent with the observed pattern in the 2010 judgments, corroborating reasons were given in support. The by-law was declared to be ultra vires.

Witness testimony is rather questionable evidence of intent. This person was in a position of knowledge with respect to the by-law, however the solemn statement was made after the enactment of the by-law and was therefore potentially influenced by time, memory, emotion, after-the-fact consideration etc. This was not a verbatim transcript of proceedings at the time but something much more remote. As a result, there are obvious shortcomings in contemporaneity and reliability of the records.

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330 *Supra* note 179 at para 22.

331 *Ibid.*

332 Colourability of purpose is essentially the allegation that a law was enacted for a purpose that was quite different (and typically dubious) from the ostensible purpose stated or implied in the statute.

Ironically, Deschamps J. uses the same evidence in conjunction with related by-laws to support a very different point and to reach the opposite conclusion with respect to the by-law:

> As is clear not only from the Director General's solemn affirmation, but also from both the letter and the spirit of zoning by-law No. 210, aviation activities had been prohibited on Gobeil Lake since 1993. Once again, the relevant passage from the solemn affirmation reads as follows: [TRANSLATION] "the municipality . . . decided . . . to maintain the prohibition on commercial activities involving the use of [the aerodrome] . . . and to specifically authorize . . . commercial activities for the new zone" (emphasis added). On the question of the purpose and effects of by-law No. 260, I therefore attach greater weight to this statement of the Director General of the municipality than to any slightly contradictory comments made by counsel for the A.G.Q. in his factum or at the hearing before this Court.[333]

The use of witness testimony to assess the purpose of a statute is a significant issue. One wonders where this might lead in the future. Consider a case like TorStar where amendments were made to the bail process and there is a significant difference between the recommendations of a commission report and the statutory provision as enacted. If there is nothing in the transcripts of proceedings, in circumstances like TorStar where elaboration would be particularly helpful to the judge, would the testimony of the Minister be acceptable? Would the testimony of a drafting consultant be acceptable? These types of activities would cause impassioned criticism in the United Kingdom. In Canada, as always, no one seems to have any strong opinions about it.

(iii) Hansard Use that Challenges the Beaulac Test

The Beaulac Test is not a mechanistic tool of analysis that yields determinative results. Indeed there are judgments where the analysis suggests that evidence is

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333 *Lacombe*, *supra* note 50 at 197.

questionable when in fact the evidence does provide reasonable support as an interpretive aid. *Németh* provides an example.[334] This unanimous decision by Cromwell J. was a judicial review of a decision by the Minister of Justice to extradite a Roma couple to Hungary despite the fact that these people were admitted into Canada as refugees from Hungary. Canada has international treaty obligations which prohibit refoulement, which is the "direct or indirect removal of refugees to a territory where they run a risk of being subjected to human rights violations."[335]

Cromwell J. concluded that amendments to the *Immigration and Refugee Protection Act* [*IRPA*] and the *Extradition Act* were made "to harmonize the extradition and refugee recognition processes and to entrust to the Minister of Justice the ultimate decision about the extradition of a person claiming refugee status."[336] In support, he mentioned the testimony of Jacques Lemire (Senior Counsel, International Assistance Group, Department of Justice) and Gerry Van Kessel (Director General, Refugees, Department of Citizenship and Immigration).[337] As well, he quoted a lengthy passage by Van Kessel.[338]

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334 *Németh*, *supra* note 50.

335 *Németh*, *supra* note 50 at para 17: "Canada has ratified the 1951 *Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6 ("Refugee Convention")*, as well as the *1967 Protocol Relating to the Status of Refugees, Can. T.S. 1969 No. 29."*

336 *Ibid* at para 47.

337 *Ibid*; Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 36th Parl, 1st Sess, No. 60, (10 March 1999) at 60:6; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Human Rights*, 36th Parl, 1st Sess (November 17, 1998).

338 *Ibid*: "As Mr. Van Kessel put it during his testimony:

> . . . the basic question we believe we face is how to deal with persons who are facing extradition and make refugee claims. At the present time they are separate processes.
>
> . . .
>
> Bill C-40 [which became the 1999 Extradition Act] changes will legislate the rules for the interaction between the extradition process and the refugee determination process for the first time.

By Beaulac's criteria, these statements should be viewed with skepticism. Both Jacques Lemire and Van Kessel are civil servants, not elected officials. Yet, upon reading the judgments, one is left with the impression that this passage was influential. It was the first and the most lengthy justification for the proposition that the Minister of Justice is the person who Parliament intended to have authority over decisions concerning extradition of refugees.[339] Yet, arguably, this point is a small part of a larger decision made in this case. Cromwell J. decided that the *IRPA* was not applicable to persons who have completed the process of claiming refugee status (despite submissions by Mr. Németh). In the context of this larger decision, the Hansard only addresses one of several sub-arguments within the decision. Meanwhile, the statement addressed the matter for which it was put forward very directly. Furthermore, Dr. Van Kessel is well-respected, knowledgeable and highly accomplished in the area of international law that concerns refugees.[340]

Upon citing the passage by Van Kessel, Cromwell J. asserted that

> [t]his evidence is consistent with the text and scheme of the *EA* and the *IRPA*: the Minister of Justice was intended to take the lead when a refugee's rights are implicated in an extradition decision. In addition, the reference in the

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> . . .
>
> Bill C-40 also says protection [i.e. of refugees] remains an issue and a concern that the Minister of Justice needs to deal with, and that is also dealt with in Bill C-40. The choice made there is that the Minister of Justice, before making a final decision on extradition or surrender order, shall refuse to make a surrender if the refugee definition applies . . . . In a sense, what has really changed here is who the decision-maker is. [Emphasis added; at 11:45 and 12:05.]

339 Judges are not bound by any rules of form regarding the order of ideas presented or the length of descriptions. This is not a scientific analysis, only a justification for the impression that the quote appears to have been persuasive and influential.

340 Dr. Van Kessel served as the Coordinator of Intergovernmental Consultations (IGC) on Asylum, Refugees and Migration Policies in Europe, North America and Australia (a UN initiative). He was invited to speak at the 2004 Universal Forum of Culture in Barcelona: <online: http://www.barcelona2004.org/www.barcelona2004.org/eng/banco_del_conocimiento/personajes/ficha9771.html?cod_personaje=3595 >

> evidence to the Minister's *duty to refuse* surrender "if the refugee definition applies" clearly refers to s. 44 of the *EA*, not to s. 115 of the *IRPA*."[341]

Cromwell J. regarded the Hansard as a supplement to an otherwise textualist analysis.

This case highlights the complexities faced when assessing legislative history for weight. Upon strict application, Beaulac's test would suggest that this evidence should be disregarded or given very little weight, yet the statement by Van Kessel does appear to be relevant. It shows what the law-makers were being told by the experts about the purpose of proposed legislation in committee. It does not prove that the MLAs understood that, by enacting the *EA*, the Minister of Justice would have authority over decisions concerning the extradition of status refugees. Yet in the context of this case, the evidence is compelling, particularly in light of the similarities in the texts of s 44 of the *EA* and the provisions concerning refoulement in the *Model Treaty* and the *European Convention.*[342] The notion that s 44 of the *EA* was the domestic provision enacted to secure compliance with an international treaty for the specific purpose of prohibiting refoulement appears to be very well-supported by the arguments.

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341 *Nemeth, supra* note 195 at 48.

342 *Supra* note 269. Section 44 of the *Extradition Act* is as follows:

> (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that
>
> ...
>
> (b) The request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex sexual orientation, age, mental or physical disability or status or *that the person's position may be prejudiced for any of those reasons.* [*Emphasis added*]

Article 3(2) of the UN Model Treaty prohibits extradition "if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons".

Article 3(b) of the Extradition Convention states that extradition is prohibited "[i]f the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons".

(iv) Hansard Use that Defies Analysis

Re AHRA involved the constitutional challenge of a federal Criminal Law statute that created a licencing scheme which regulated medical practices involving assisted human reproduction (eg. in-vitro fertilization) and related research. Regulation of professions is a provincial matter. The main issue concerned whether the licencing scheme was justified under the federal jurisdiction over criminal law or whether it was an infringement of the provincial jurisdiction over the regulation of professions.

LeBel and Deschamps JJ. noted the distinction between those activities that the legislators regarded as categorically "morally reprehensible" (like receiving payment for being a surrogate mother, the cloning of humans and experiments which mixed human DNA with non-human DNA) that were prohibited by the legislation, and the various activities that were "regulated" via the licencing scheme which were not universally regarded as morally reprehensible by the legislators, but indeed were regarded as beneficial.[343] This distinction was discussed by the *Baird Report* at great length. Hansard was used by LeBel and Deschamps JJ. in conjunction with a variety of other extrinsic aids to support the notion that Parliament had a much deeper awareness of the distinction between these two types of activities than one might conclude by only considering the *Baird Report*.[344]

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343 What constitutes morally acceptable practices with respect to cloning and stem-cell research are matters that are fraught with controversy and conflicting opinions within society. This thesis takes no position on the propriety of the judges' stances.

344 *Re AHRA, supra* note 50 at para 177: "... the substantive and formal distinctions between controlled activities and activities that are prohibited completely stem from the legislative history, from the nature of the activities and from how they are presented in the *AHR Act*. ... In conducting such analyses, this Court gives considerable weight to the legislative facts. Moreover, in an affidavit filed in evidence during the hearing in the Court of Appeal, Francine Manseau, Senior Strategic Policy Advisor, Assisted Human Reproduction Implementation Office, Department of Health Canada, clearly stated that the mandate received from the Minister had been [TRANSLATION] "to analyze the *Baird Report* and develop policy statements consistent with its recommendations and findings" (A.R., at p.

It was noted that the prohibited activities were subjected to a moratorium by Health Canada in conjunction with repeated attempts to pass legislation two years after the Baird Report was published, and eight years before the impugned legislation was debated in Parliament. During this time the regulated activities were left alone.

In support of the proposition that the regulated activities were not regarded as morally repugnant by Parliament, a series of experts were cited:

> ... Dr. Roger Gosden, in testifying before the Standing Committee on Health on May 17, 2001 (11:40), stressed the important role that research plays in enhancing our understanding of the causes of infertility, improving the success rate of infertility treatments and avoiding inherited diseases.
>
> In the course of the debate in Parliament, particular attention was devoted to research involving transgenics. Some members suggested that such research be prohibited rather than being regulated (as it is under s. 11 of the AHR Act). In responding to two proposed amendments, Health Canada representatives explained that such an approach would not be desirable.
>
> Regarding a proposal for a total ban on transgenics, the chair of the Standing Committee on Health asked Rodney Ghali, a science policy analyst from the Special Projects Division of the Department of Health, what the impact of prohibiting all transgenic research would be. Mr. Ghali answered that research in this huge field, which is beneficial for all Canadians, included research into cancer, Huntington's disease and other diseases of the nervous system. The proposed amendment was rejected (*Evidence of the Standing Committee on Health*, House of Commons, 2nd Sess., 37th Parl., No. 013, December 9, 2002, 10:25-10:35).
>
> Similarly, in response to a motion to amend that would have resulted in a ban on transgenics, Jeannot Castonguay, the Parliamentary Secretary to the then Minister of Health, explained in the House of Commons that such a ban "would have the effect of immediately, and permanently, putting an end to the efforts of numerous Canadian researchers and laboratories to develop therapies for the treatment of a number of dread diseases, among them cancer and Alzheimer's." (*House of Commons Debates*, 2nd Sess., 37th Parl., vol. 138, No. 072, March 18, 2003, at p.

6961). We therefore prefer to keep the legislative history and the distinctions between prohibited and controlled activities in mind." Also see *Baird Report, supra* note 248.

4335).[345]

LeBel and Deschamps JJ. incorporated an enormous quantity of materials into their opinion and they should be forgiven for dealing with this information in what could be regarded as a cavalier fashion. This case is strikingly similar to *M v H.* These two judgments represent a genre of *SCC* decision that bares certain identifiable traits including a central moral controversy, a deeply divided court, and in-depth consideration of policy-related matters via commission reports and scholarly literature. The amount of information that the judges had to digest in the submissions must have been massive. In setting about an analysis of the weight that ought to be assigned to various pieces of Hansard, one must be keenly aware that there are limits to what can be addressed specifically in this type of opinion.[346] A piece-by-piece analysis is not feasible. Nonetheless it is preferable that judges be forthright in mentioning all materials that were found to be compelling, even in a cursory way, rather than leaving them out.

It is worth noting that some rather unusual extrinsic aids were referred to in this judgment. Bills that died on the order table, and statements made by expert consultants in committees were being used to prove that Parliament regarded those activities which were regulated as fundamentally different from those activities which were prohibited outright. It is fair to ask if this should be used as compelling evidence of parliamentary intent with respect to the *Assisted Human Reproduction Act.*[347]

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345 *Re AHRA*, *supra* note 50 at paras 213 - 215.

346 The notion that time imposes an "economic" constraint on statutory interpretation is explored further by Graham. See *supra* note 305 at 61-69.

347 SC 2004, c 2.

(d) Conclusions About the *Beaulac* Analysis

As the preceding discussion demonstrates, the Beaulac Test is a valuable guide but not a formalistic tool for the analysis of Hansard and other legislative history materials. Based on the preceding assessment of the 2010 judgments, which is necessarily subjective, it would appear that the *SCC* justices are occasionally using materials of questionable value. In this respect, there has not been a significant change since 1999.[348]

Despite this finding, the preceding analysis does reveal a trend. In 1999 much of the controversy surrounded Hansard in the archetypical form of passages quoted from the debates in Parliament. There was much more use of proceedings of committees in 2010, and in particular, more statements by consultants and civil servants.

This change suggests that there has been a broadening of the scope of evidence of legislative intent since 1999. The testimony of a municipal councillor,[349] failed Bills[350] and statements made by a lobbyist[351] are examples of the more unusual types of extrinsic aids that were considered by judges at the *SCC* in 2010.

It seems quite likely that judicial use of such materials would have inspired heated scholarly criticism in other nations, and this does raise a serious question: what limits ought to be imposed upon extrinsic aids to interpretation? Transcripts are official records. A statement about a law, made years after the law was enacted is entirely different, and *Lacombe* pushes the envelope in a decidedly dangerous direction. In the absence of an exclusionary rule, it is up to judges to make responsible decisions about what sources of

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348 Beaulac found that questionable materials had been used in several judgments in 1999. See Beaulac, *supra* note 7 at 609-613.

349 *Lacombe*, *supra* note 50.

350 *Re AHRA*, *supra* note 50.

351 *Globe & Mail*, *supra* note 50.

information are deserving of weight, and what sources are too doubtful to trust. It is up to lawyers to criticize where appropriate and keep the judiciary in check. The Canadian legal community has a collective responsibility to ensure that these materials are treated in a manner that respects the risks and frailties.[352]

It is fascinating to watch how different judges might treat the same piece of Hansard differently within a judgment. For example, in *Re AHRA*, some Justices were swayed by the various extrinsic materials, but the legislative history was not universally convincing. Indeed, Cromwell, J., who regarded legislative history as quite compelling in *Németh*, comes to a conclusion strikingly similar to LeBel and Deschamps JJ. in *Re AHRA*, but he appears to eschew all of the reasons that are based on legislative history.[353]

This pattern was evident in several of the 2010 judgments. Deschamps J. made use of Hansard in *Lacombe*, *Re AHRA*, *TorStar* and *Syndicat* but left it out of her reasons in *Century* and *Morelli*. McLachlin CJ. referred to Hansard in *Lacombe* but not in *Re AHRA*. All the judges who wrote two opinions or more both used and rejected Hansard; Binnie J. and Fish J. each wrote one opinion, and both referred to Hansard.[354] The following table makes the pattern more visible:

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352 In *Rizzo*, *supra* note 6 at 35, Iacobucci J. noted that "the frailties of Hansard evidence are many". The passage that Iaccobucci J. quoted by Sopinka J. in *R v Morgentaler*, [1993] 3 SCR 463 at 484 cautioned that Hansard should be admitted "[p]rovided that the court remains mindful of the limited reliability and weight of Hansard evidence". Some serious reflection on these frailties would serve the legal community well.

353 His decision is brief, amounting to 12 paragraphs. The paragraphs by LeBel and Deschamps JJ. opinion that Cromwell J. cited in concurrence are ones that do not touch on legislative history. Meanwhile, he assessed the essence of the impugned provisions in a single paragraph, by simply stating that they constitute "regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction". *Re AHRA*, *supra* note 50 at paras 282-294.

354 *Telezone*, *supra* note 192; *Morelli*, *supra* note 198.

Table #3: Opinions that Rely on Hansard in 2010

2010 Judgments	Opinion Made Use of Hansard	
	Yes	No
Quebec (Attorney General) v. Lacombe		
McLachlin CJ. (majority)	X	
Deschamps J. (dissenting)	X	
Century Services Inc. v. Canada (Attorney General)		
Deschamps J. (majority)		X
Abella J. (dissenting)	X	
Reference re Assisted Human Reproduction Act		
McLachlin J. (split)		X
LeBel & DesChamps JJ. (split)	X	
Cromwell J. (controlling)		X
R. v. Morelli		
Fish J. (majority)	X	
Deschamps J. (dissenting)		X
Canada (Attorney General) v. TeleZone Inc.		
Binnie J. (unanimous)	X	
Németh v. Canada (Justice)		
Cromwell J (unanimous)	X	
Toronto Star Newspapers Ltd. v. Canada		
Deschamps J. (Majority)	X	
Abella J. (dissenting)		X
Globe and Mail v. Canada (Attorney General)		
LeBel J. (unanimous)	X	

Apparently there are no textualist judges at the Supreme Court of Canada. Meanwhile, there is no evidence that use of Hansard usurps judicial discretion. The Justices freely accept or reject Hansard independently from each other.

3.5 Conclusions about the Qualitative Analysis

In general, the following changes have occurred since Beaulac's study of the 1999 *SCC* judgments. Based on the judgments in this study, the compartmentalized approach to legislative history is dead. The materials were considered regardless of the presence or absence of Constitutional issues, and there were no statements in the opinions which suggested that admissibility was affected by the context. Meanwhile, Hansard was used for both Constitutional and non-Constitutional issues in a fairly even split.

The Court did not insist upon any ambiguity requirement in 2010, and there were no other class-based rules or cautionary approaches which would suggest that legislative history was treated as a second-class interpretive aid. It is an equal among extrinsic materials. Nonetheless, Hansard is rarely used as a stand-alone interpretive aid. Instead, in 2010 Hansard is typically used in combination with other pieces of legislative history, and often for the purpose of shoehorning committee reports and commission reports into the reasons.

Within the judgments, there was no discernible pattern which suggested that certain judges were more likely to use legislative history than others. Instead, all judges accepted and rejected these submissions depending on the utility of such submissions in justifying each judge's preferred outcome.[355] Furthermore, there was often disagreement between the judges in any particular case about whether or not any particular materials are compelling.

In 2010, the Justices at the *SCC* were much less likely to cite authority for recourse to Hansard than in 1999. The justices were also much less likely to comment on the admissibility of legislative history as an interpretive aid in general. When they commented on any particular piece of legislative history, it was because they found the item compelling. When they did not find it compelling, they did not mention it in their opinion. Significantly, a standard form of citation has evolved which is similar to the format recommended by the *McGill Guide*.

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355 There is no suggestion here that judges are biased in any way or that judges choose personal preferences over the law, so to speak. When issues make it to the Supreme Court of Canada they are such that reasonable people can disagree about the appropriate outcome based on a good-faith assessment of the law and the facts as presented in the submissions. The only point being made is that judges look to the arguments presented in the submissions to support the outcome they find the most appropriate in all the circumstances of any particular case.

Altogether, these findings suggest that recourse to legislative history has reached a new stage of maturity in the past ten years. The judges have become comfortable with these materials, and the law is becoming settled. Along with this, there has been a gradual expanding of the repertoire of interpretive aids. In 1999, statements made by elected members in Parliament and legislatures were the predominant item at issue. In 2010 such things as statements by experts, legal consultants and civil servants in committee were much more common. This shift was perhaps inevitable. When legislative history is admissible, there is an incentive for lawyers to dig into the legislative history and bring up anything that supports the client's position. This practice most certainly does not stop with transcripts of proceedings.

Of course, this is not a conclusion derived from the study, but speculation about the forces behind the trend. This study did not examine the submissions of counsel.[356] It only examined judicial comment on legislative history in judgments. Based on this study, judges are commenting on a wider variety of legislative history materials in more complex combinations, typically involving multiple pieces of corroborating items.

There is need to restate a caveat here. The findings are based on a relatively small set of judgments, and there is always the possibility of anomalous sets of decisions in any particular year. The findings appear to be reasonable and plausible. They are based on the judgments as they appear. It is a strategic snap-shot. It is a calculated glimpse into a phenomenon that is not well-studied in Canada, and more research is needed to support (or refute) the findings.

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356 Given that judges tend to rely on extrinsic aids presented by counsel and rarely present their own 'evidence of meaning' in court, it is reasonable to assume that Hansard finds its way into judgments via submission from counsel. Speculation about the behaviour of counsel as an underlying cause is therefore reasonable.

CHAPTER 4:

Quantitative Analysis of Hansard in the Courts of Canada

The rest of this thesis will focus on the issues that were dealt with via quantitative analysis. In the following discussion, it will become clear that Quebec is no more likely to be the source jurisdiction for an *SCC* judgment referring to Hansard than other jurisdictions in Canada. In order to show that there is no "Quebec phenomenon", the prevalence of Hansard use will be examined at the SCC, the Appellate Courts, the provincial superior courts and the Federal Court of Canada. First, the prevalence of Hansard use at the *SCC* will be considered. Then, the source jurisdictions of the *SCC* judgments referring to Hansard will be examined. Next, the prevalence of judgments referring to Hansard at the appellate courts in Canada will be examined; and finally the prevalence of judgements referring to Hansard at the provincial superior courts and the Federal Court will be examined.

4.1 Hansard in *SCC* Judgments from 1999 to 2010

Given that Hansard and Hansard-like materials appeared in ten judgments in the 2010 study and in thirteen judgments in the 1999 study, it seems fairly obvious that the use of Hansard at the *SCC* represents a relatively small percentage of the total judgments rendered. However, unless calculations are made, the prevalance of Hansard use remains an estimate. The following table shows the total number of judgments rendered by the *SCC* for each year from 1999 through to 2010, along with the total number of judgments that make reference to Hansard, and the percentage of judgments that make reference to Hansard:

Table #4: Judgments Referring to Hansard at the *SCC* from 1999 to 2010[357]

Year	Total # of Judgments	# of Judgments involving Hansard	% of Judgments Involving Hansard
1999	81	13	16.0%
2000	72	8	11.1%
2001	91	5	5.5%
2002	88	9	10.2%
2003	81	8	9.9%
2004	78	4	5.1%
2005	89	7	7.9%
2006	79	8	10.1%
2007	58	8	13.8%
2008	74	5	6.8%
2009	70	8	11.4%
2010	69	10	14.5%
Average	77	8	10.0%

Some things should be kept in mind when digesting this table. First, the search criteria turned up any judgment in which a statement was made that referred to Hansard or to Hansard-like materials. This includes minutes and proceedings in committee. This has caught some other unusual extrinsic interpretive aids in 1999 and 2010; however this was incidental by-catch: The search criteria did not seek this type of material out directly. of the search criteria. There is no guarantee that cases that make use of these outlying phenomena will be included in the list of cases. This does catch cases like *COPA* and *Kitkala*, which discuss Hansard but do not actually consider such materials. Based on the 1999 and 2010 judgments, something in the neighbourhood of 10% of the judgments will refer to Hansard-like materials but not actually use them in the reasoning.[358]

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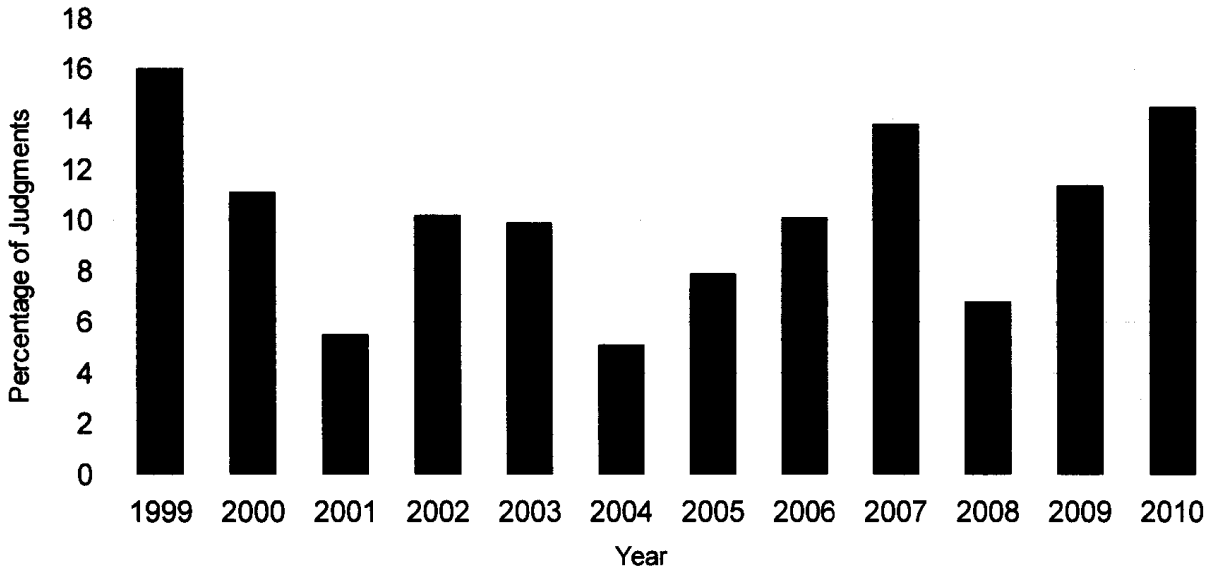
357 The total number of judgments for 2000 through to 2010 were taken from the Supreme Court of Canada Statistics 2000-2010: *Supreme Court of Canada Statistics 2000-2010: Bulletin of Proceedings – Special Edition,* (Ottawa: Supreme Court of Canada, 2011). The CanLII database purports to be complete with respect to SCC judgments in 1999.

358 There was one case in 1999 and one case in 2010. This is a small sample size and the estimate must be understood in light of this.

Based on these numbers, 1999 is the high watermark for Hansard use in terms of the number of decisions in one year and as a percentage of total judgments in one year, over the study period. As can be seen, the number of judgments that refer to Hansard can fluctuate quite dramatically from year to year. This is understandable given the small size of the data set and the complexities surrounding adjudication. However, the percentages range from 5% to 16%, while the average is 10% over the study period, and this is fairly close to the mid-point between the highest and lowest percentages. It would be fair to say that, in any given year Hansard will be referred to in 10% of *SCC* judgments plus or minus 5%.

The following graph shows the percentage of judgments referring to Hansard over the study period:

Figure #1: Percentage of *SCC* Judgments Referring to Hansard from 1999 to 2010



Based on this data, judicial reference to Hansard at the *SCC* is relatively stable over the study period.

4.2 The Source Jurisdictions of *SCC* Judgments Referring to Hansard

During the analysis of the 2010 *SCC* judgments, one particular detail stood out. Among the ten judgments in 2010 caught by this study, six of arose out of issues on appeal from the Quebec Court of Appeal. This raises the potential issue of the influence of the civil code heritage in that province. In order to determine if this was more than just an anomaly, two different research questions were asked. First, was there a pattern to the source of *SCC* decisions that extended beyond 2010? Second, was there a pattern with respect to the lower courts of the provinces? The first question is the most obvious avenue of inquiry. If there is a "Quebec phenomenon", it will persist over time. The second issue is a broader inquiry. If a disproportionate share of decisions at the *SCC* involving Hansard come from Quebec, what is going on in the lower courts? Are the Quebec court judgments more likely to refer to Hansard than courts in other jurisdictions? In the process of answering this question, the prevalence of Hansard use throughout the various courts of Canada was examined.

The following chart provides the answer to the first research question. It shows the source jurisdictions for all *SCC* cases that met the search criteria between 1999 and 2009. The percentage of judgments originating from each jurisdiction over the entire study period is shown in the far right column.

Table #5: Source Jurisdiction of *SCC* Judgments from 1999 – 2009[359]

	99	00	01	02	03	04	05	06	07	08	09	Total	%
Alberta		1			1	1	2	1	1		1	**8**	**9.5%**
B.C.	4	3	2	2	2	1			2		1	**17**	**20.2%**
Federal	1	3		3			1	1	1		2	**12**	**14.3%**
Manitoba	1	1			2			1				**5**	**6.0%**
N.B.	1									1		**2**	**2.4%**
Nfld & Lab.	1		1			1						**3**	**3.6%**
N.S.				1						1		**2**	**2.4%**
Ontario	2		2	1	3	1		3	1	2	1	**16**	**19.0%**
Quebec	3			2			2	3	3	1	3	**17**	**20.2%**
Sask.							2					**2**	**2.4%**

This chart suggests very strongly that 2010 was an anomaly. Quebec is not the source of the majority of decisions that make reference to Hansard at the *SCC* over time. There is a tendency for the curious to ponder the relationship between Hansard use and the Civil Code roots of the Quebec legal system. This historical, cultural legacy could impact any number of issues, but given the fact that the 2010 figures appear anomalous, the use of Hansard at *SCC* judgments does not appear to be among them. Meanwhile, it is interesting to note that P.E.I. is the only province absent from the list. Given the very small population of that jurisdiction, there is no reason to suspect any other cause than probabilities for this absence. Generally, this is a widely distributed phenomenon. As will be seen in the analysis that follows, this wide distribution occurs throughout the courts of Canada.[360]

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359 The total source jurisdictions exceed the total number of SCC decisions in certain years. Occasionally an SCC judgment will settle issues arising from multiple judgments from different jurisdictions. Each jurisdiction was counted separately for those judgments.

360 Although this study did not uncover any SCC judgments for which P.E.I. was the source jurisdiction, there was a decision at the P.E.I. Supreme Court that referred to Hansard. See *CHD Investments Inc. v P.E.I. (The Government of)*, 1995 CanLII 3484 (PE SCTD). The Yukon Territory was the source jurisdiction for an SCC judgment that referred to Hansard. See *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571.

4.3 Judicial Reference to Hansard at the Appellate and Provincial Superior Courts of Canada

Although the issue of Quebec as a source jurisdiction is resolved decisively by examining the source jurisdictions of *SCC* judgments, the prevalence of Hansard use throughout the various courts of Canada remains a compelling subject of inquiry. Thus far, the following insights have been uncovered in the quantitative analysis:

1. Hansard will be referred to in approximately 10% of *SCC* judgments
2. *SCC* Judgments that make reference to Hansard deal with issues on appeal from all jurisdictions in Canada.

The complete picture of Hansard use in Canada can be achieved by looking at the appellate and provincial superior courts.

The following table shows the number of judgments that make reference to Hansard at the appellate courts across Canada. For the courts serving larger jurisdictions, the total number of judgments are indicated for 1999 and 2010, as well as the percentage of cases referring to Hansard.

Table #6: Appellate Court Judgments Referring to Hansard in 1999 and 2010

	1999			2010		
	Total # of Judgments	# of Judgments Involving Hansard	% of Judgments Involving Hansard	Total # of Judgments	# of Judgments Involving Hansard	% of Judgments Involving Hansard
Alberta	369	1	0.27%	394	4	1.02%
British Columbia	774	6	0.78%	570	6	1.05%
Federal Court	326	6	1.84%	348	3	0.86%
Manitoba		1			2	
New Brunswick		0			0	
Nfld & Labrador		1			0	
Nova Scotia		0			2	
Ontario	811	2	0.25%	868	8	0.92%
Quebec	709	5	0.71%	**2414**	2	0.08%
Saskatchewan		0			2	
Total	2989	22		4594	29	
Average %			0.74%			0.63%

The total number of judgments for each court was taken from CanLII, which purports to have all published judgments for both years in their database. The field in gray is problematic. According to CanLII, it is the current policy of the Quebec Court of Appeal to publish all decisions rendered including *procès-verbal d'audience*. This means that judgments concerning administrative matters such as requests for adjournments are being included in the database.[361] The total number of judgments for the Quebec Court of Appeal in 2010 is therefore not suitable for direct comparison with the other numbers provided. The very large number of published judgments is inconsistent with the other jurisdictions, and it is also inconsistent with the total in Quebec for 1999. It seems likely that the "correct" number of substantive decisions (i.e. those touching on genuine issues of fact and law) would be closer to the 1999 number.[362]

Despite the shortcomings in the total number of judgments for 2010, it is clear that the Quebec Court of Appeal does not refer to Hansard more often than the appellate

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361 An explanation was provided via email from Emma Elliott, Gestionnaire de projets/Project Manager at Lexum on April 31, 2011. Two main reasons were given: "Firstly, it is the QCCA's policy to publish all decisions rendered, even those referred to as 'procès-verbal d'audience' ... which are decisions rendered per example by a lone judge about matters as mundane as the rescheduling of hearing dates, requests for extensions of deadlines, etc. This policy is opposed to other Courts of Appeal who are more restrictive in their publications and who will publish only decisions touching directly on the merits of a case.

Also, Quebec is the only province to have a regulation obliging all clerks of the courts and the quasi-judicial tribunals in Quebec to send all decisions delivered with reasons to the Société québécoise d'information juridique (http://soquij.qc.ca/fr/english) with whom an agreement for publication has been entered into. The effect of such a by-law is that in Quebec, the distribution of judgments is more complete than elsewhere in Canada." *By-law respecting the collection and selection of judicial decisions*, RRQ, c S-20, r 1, online: CanLII < http://www.canlii.org/en/qc/laws/regu/rrq-c-s-20-r-1/latest/rrq-c-s-20-r-1.html>.

362 According to Statistics Canada, the population of Quebec was 7,363,262 in 1999 and 7,907,400 in 2010. See *supra* note . This is approximately a 7% increase. Note that a commensurate modest increase in total judgments rendered occurred in Alberta, Ontario and at the Federal Court between 1999 and 2010. It is reasonable to expect that the appropriate number of judgments would be in the neighbourhood of 7% above the number of 1999 judgments. This would be much closer to 709 than 2414.

courts in other jurisdictions. Instead, the data indicates a broad and relatively even distribution throughout the courts.

Also, it would appear that the phenomenon of Hansard use in court is relatively stable throughout the appellate courts, although dramatic changes might occur in any one jurisdiction for any particular year. Within the courts that serve larger populations, any particular court might use Hansard in .2% to 1.8% of judgments, and the overall average remains around 0.7%. This is an interesting figure in comparison with the 10% average at the *SCC*.

The following table provides the equivalent information for the provincial superior courts and the Federal Court for that which was provided previously for the appellate courts.

Table #7: Trial Court Judgments Referring to Hansard in 1999 and 2010

	1999			2010		
	Total # of Judgments	# of Judgments Involving Hansard	% of Judgments Involving Hansard	Total # of Judgments	# of Judgments Involving Hansard	% of Judgments Involving Hansard
Alberta	1058	13	1.23%	727	9	1.24%
British Columbia	2128	7	0.33%	1848	7	0.38%
Federal Court	1707	8	0.47%	1346	4	0.30%
Manitoba		4			2	
New Brunswick		0			0	
Nfld & Labrador		0			1	
Nova Scotia		0			2	
Ontario	353	6	1.70%	3336	6	0.18%
Quebec	N.A.	N.A.		6966	6	0.09%
Saskatchewan		3			3	
Total	5246	41		14223	40	
Average %			0.78%			0.28%

Some things to keep in mind: Only the provincial superior courts (i.e. the s 96 courts) and the Federal Court were included in this study.[363] The figures in gray are problematic. The data for the Ontario Superior Court was incomplete for 1999, and for the Quebec Superior Court the data is lacking entirely.

This table suggests that there may be an "Alberta phenomenon" rather than a "Quebec phenomenon", and only at the trial court level. This is counter-intuitive. One would expect that the tendency to refer to Hansard would occur in both trial courts and appellate courts. More research would be required to confirm that this is more than an aberration. It is an interesting finding nonetheless. Unlike Quebec with its civil code tradition, there is no obvious reason why there might be a difference in Alberta.

As well, the phenomenon demonstrates a wide distribution among the jurisdictions. It should be noted that, although no judgments from P.E.I. or the North West Territories were found for 1999 or 2010, there have been judgments referring to Hansard from these jurisdictions.[364]

Meanwhile, it would appear that, outside of Alberta, the percentage of superior court and federal trial court judgments that make reference to Hansard remains within the 0.2% - 0.4% range, approximately.

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363 There are cases referring to Hansard at the provincial courts of justice in both 1999 and 2010, however the total number of decisions published was very small (for example, there were only 571 decisions of the Ontario Court of Justice in the CanLII database for 2010). There can be little doubt that more judgments are rendered than show up in the database. As a result, this information would tend to inflate the percentages if it were included in the table. It was therefore left out. It is interesting, nonetheless, that Hansard is being used at the provincial court level.

364 See for example, *supra* note 218; also see *Canadian Egg Marketing Agency v Richardson*, 1995 CanLII 6235 (NWT SC).

4.4 Conclusions: The Relationship Between Reference to Hansard and the Level of Courts in Canada

The data suggests that there is a numeric relationship between the various levels of courts in Canada. There is a relatively low probability of Hansard being used at the trial level (~0.3%). There is a higher probability at the courts of appeal (~0.7%), and the highest probability is at the *SCC* (~10%).

This makes sense for a number of reasons. Given that sifting through the legislative records is time-consuming and expensive, it is reasonable to expect that litigants would be more likely to do so as a legal dispute moves up to the higher level courts. As litigants make the decision to follow through with an appeal, they become more invested in the dispute and more willing to devote time and money to the process.

Meanwhile, many of the issues to be settled at the trial court level are likely not to be as complex and challenging as the issues for which leave to appeal is granted. Arguments based on more traditional and less costly materials like precedent and the canons of interpretation are likely sufficient for the majority of the legal determinations at the trial court level. In these types of cases, research into legislative history would be an unnecessary expense.

Furthermore, as the complexity of the legal determinations increases at the higher courts, so too does the demand for justifications by the judges who have the unenviable task of defending their judgments. In economic terms, there is greater demand for justifications in the higher courts, and the prevalence of Hansard use reflects this.

Of course, an economic analysis of Hansard use is merely one possible interpretation of the results, and it is an interpretation that would require more research to

substantiate. First and foremost, this is a study of judicial comment on Hansard. The central finding is this: Judges are more likely to comment on Hansard as decisions move up to higher courts.

Some caution must be taken when assessing the very tiny glimpse at Hansard in the various lower courts. The difference between the trial courts and the provincial appellant courts and the federal counterparts would need further research to confirm the numerical relationships, particularly in light of the findings in Alberta. However, the difference between the various trial and appellate courts in comparison to the *SCC* is clear. Judicial comment on Hansard is much more likely to occur at the *SCC* than at all of the courts below.

4.5 Overall Conclusions

There has been considerable evolution with respect to Hansard use in *SCC* judgments since Beaulac's study in 1999. In 2010 there was no ambiguity requirement and there were no lingering hints of the *pre-Rizzo* compartmentalized approach to admissibility that considered the context of the adjudication. In comparison to 1999, the use of Hansard and Hansard-like materials was rarely justified by precedents in 2010.

Although Hansard and Hansard-like materials were treated as extrinsic aids that are equal to and not subordinate to other extrinsic aids in 2010, these materials were much less likely to have been used in the absence of corroborating materials. This corroboration often occurred in the form of footnote-style citations following a quote from Hansard. As well, there was an expanded repertoire of materials drawn from legislative history that appeared in the 2010 SCC judgments. Ironically, despite the expanding repertoire, the prevalence of Hansard use was stable over the study period.

This is counter-intuitive and rather curious to say the least. Nonetheless, this is what the study revealed. This is an issue that deserves further research.

While answering definitively that there is no "Quebec phenomenon" with respect to where decisions involving Hansard come from, there appears to be an "Alberta Trial Court phenomenon" and this too is counter-intuitive. Surely if a jurisdiction is more likely to use Hansard in judgments, this would occur at the appellate level as well. However the data set is particularly small for trial court judgments and further research would be required to confirm that there is in fact an "Alberta Trial Court phenomenon" before attempting to understand the forces behind it.

The numerical relationship between the courts with respect to the prevalence of Hansard is another finding that deserves some further inquiry. Again, a larger data set would help to add force to the findings. If the prevalence is stable over time and increases at higher courts, as this study suggests, then there is cause to study the underlying forces at work.

One issue that has not changed since 1999 is the ongoing use of materials that have questionable or doubtful weight. When considered in the context of the expanding variety of extrinsic aids that are finding their way into the *SCC* opinions over time, there is the question of whether the courts are sliding down a slippery slope. Given that testimony under oath by a municipal councillor was considered to determine the legislative intent behind a by-law,[365] and the consideration given to civil servants and lobbyists,[366] would the court consider testimony of a drafting consultant under oath years

365 *Lacombe*, *supra* note 50.

366 *Re AHRA*, *supra* note 50; *Globe & Mail*, *supra* note 50; *Németh*, *supra* note 50.

after the legislation was drafted? This question is not asked as a damning condemnation of Hansard use in 2010, but merely as a cautionary question. In general Hansard use does not appear to be out-of-control. Indeed, many of the "doubtful" Hansard excerpts likely suffer from a lack of fully fleshed out citations rather than the use of evidence to justify interpretations for which the evidence is not well-suited. Nonetheless, the direction of the evolution is troubling in some respects, and care should be taken going forward.

Despite the rather modest glimpse into judicial use of legislative history provided by this study, the insights are thought-provoking. Until now, Beaulac's study of the *SCC* judgments in 1999 was the only in-depth scholarly examination of Hansard use in Canadian Courts. With this study, Beaulac's findings have been revisited and brought up to date. As well, the *SCC* decisions can be placed in the larger context of Hansard use in Canadian Courts in general. The findings are deserving of some skepticism because of the very sparse sample from which they were drawn. However, the insight that this research provides is the essential "next step" for further insight into this area of law. Welcome to the spotlight, Hansard. After years in the darkness, we now know just a little bit more about you.

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Appendix 1: *SCC* Judgments Referring to Hansard from 2000 to 2010

2000

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Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69, [2000] 2 SCR 1120

Pacific National Investments Ltd. v Victoria (City), [2000] 2 SCR 919

Reference re Firearms Act (Can.), [2000] 1 SCR 783

R v Knoblauch, 2000 SCC 58, [2000] 2 SCR 780

R v Proulx, 2000 SCC 5, [2000] 1 SCR 61

R v Wust, 2000 SCC 18, [2000] 1 SCR 455

Will-Kare Paving & Contracting Ltd. v Canada, 2000 SCC 36, [2000] 1 SCR 915

2001

Dunmore v Ontario (Attorney General), 2001 SCC 94, [2001] 3 SCR 1016

Osoyoos Indian Band v Oliver (Town), 2001 SCC 85, [2001] 3 SCR 746

R v Sharpe, 2001 SCC 2, [2001] 1 SCR 45

R v Ulybel Enterprises Ltd., 2001 SCC 56, [2001] 2 SCR 867

United States of America v Kwok, 2001 SCC 18, [2001] 1 SCR 532

2002

Chieu v Canada (Minister of Citizenship and Immigration), 2002 SCC 3, [2002] 1 SCR 84

Gosselin v Québec (Attorney General), 2002 SCC 84, [2002] 4 SCR 429

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31

Krangle (Guardian ad litem of) v Brisco, 2002 SCC 9, [2002] 1 SCR 205

Lavoie v Canada, 2002 SCC 23, [2002] 1 SCR 769

Nova Scotia (Attorney General) v Walsh, 2002 SCC 83, [2002] 4 SCR 325.

R v Noël, 2002 SCC 67, [2002] 3 SCR 433

Sarvanis v Canada, 2002 SCC 28, [2002] 1 SCR 921

Schreiber v Canada (Attorney General), 2002 SCC 62, [2002] 3 SCR 269

2003

C.U.P.E. v Ontario (Minister of Labour), 2003 SCC 29, [2003] 1 SCR 539

Ell v Alberta, 2003 SCC 35, [2003] 1 SCR 857

Figueroa v Canada (Attorney General), 2003 SCC 37, [2003] 1 SCR 912

Paul v British Columbia (Forest Appeals Commission), 2003 SCC 55, [2003] 2 SCR 585

R v Blais, 2003 SCC 44, [2003] 2 SCR 236

R v Malmo-Levine; R v Caine, 2003 SCC 74, [2003] 3 SCR 571

R v Wu, 2003 SCC 73, [2003] 3 SCR 530

Siemens v Manitoba (Attorney General), 2003 SCC 3, [2003] 1 SCR 6

2004

Alberta Union of Provincial Employees v Lethbridge Community College, 2004 SCC 28, [2004] 1 SCR 727

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Monsanto Canada Inc. v Ontario (Superintendent of Financial Services), 2004 SCC 54, [2004] 3 SCR 152

Newfoundland (Treasury Board) v N.A.P.E., 2004 SCC 66, [2004] 3 SCR 381

2005

Canada (House of Commons) v Vaid, 2005 SCC 30, [2005] 1 SCR 667

Castillo v Castillo, 2005 SCC 83, [2005] 3 SCR 870

Fédération des producteurs de volailles du Québec v Pelland, 2005 SCC 20, [2005] 1 SCR 292

H.L. v Canada (Attorney General), 2005 SCC 25, [2005] 1 SCR 401

Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, 2005 SCC 70, [2005] 3 SCR 425

R v C.D.; R v C.D.K., 2005 SCC 78, [2005] 3 SCR 668

Solski (Tutor of) v Quebec (Attorney General), 2005 SCC 14, [2005] 1 SCR 201

2006

Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), 2006 SCC 24, [2006] 1 SCR 865

D.B.S. v S.R.G.; L.J.W. v T.A.R.; Henry v Henry; Hiemstra v Hiemstra, 2006 SCC 37, [2006] 2 SCR 231

H.J. Heinz Co. of Canada Ltd. v Canada (Attorney General), 2006 SCC 13, [2006] 1 SCR 441

McDiarmid Lumber Ltd. v God's Lake First Nation, 2006 SCC 58, [2006] 2 SCR 846

Placer Dome Canada Ltd. v Ontario (Minister of Finance), [2006] 1 SCR 715, 2006 SCC 20

R v Boulanger, 2006 SCC 32, [2006] 2 SCR 49

R v Lavigne, 2006 SCC 10, [2006] 1 SCR 392

Tranchemontagne v Ontario (Director, Disability Support Program), 2006 SCC 14, [2006] 1 SCR 513

2007

A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency), 2007 SCC 42, [2007] 3 SCR 217

Bruker v Marcovitz, 2007 SCC 54, [2007] 3 SCR 607

Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3

Council of Canadians with Disabilities v VIA Rail Canada Inc., 2007 SCC 15, [2007] 1 SCR 650

Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27, [2007] 2 SCR 391

Lévis (City) v Fraternité des policiers de Lévis Inc., 2007 SCC 14, [2007] 1 SCR 591

London (City) v RSJ Holdings Inc., 2007 SCC 29, [2007] 2 SCR 588

R v Bryan, 2007 SCC 12, [2007] 1 SCR 527

2008

Confédération des syndicats nationaux v Canada (Attorney General), 2008 SCC 68, [2008] 3 SCR 511

New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc., 2008 SCC 45, [2008] 2 SCR 604

R v D.B., 2008 SCC 25, [2008] 2 SCR 3

R v S.AC, 2008 SCC 47, [2008] 2 SCR 675

Tele-Mobile Co. v Ontario, 2008 SCC 12, [2008] 1 SCR 305

2009

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567

Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12, [2009] 1 SCR 339

Chatterjee v Ontario (Attorney General) 2009 SCC 19

Ermineskin Indian Band and Nation v Canada, 2009 SCC 9, [2009] 1 SCR 222

Plourde v Wal-Mart Canada Corp 2009 SCC 54

Quebec (Revenue) v Caisse populaire Desjardins de Montmagny, 2009 SCC 49, [2009] 3 SCR 286

R v Craig, 2009 SCC 23, [2009] 1 SCR 762

R v S.J.L., 2009 SCC 14, [2009] 1 SCR 426

2010

Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62.

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 SCR 379.

Globe and Mail v. Canada (Attorney General), 2010 SCC 41, [2010] 2 SCR 592.

Németh v. Canada (Justice), 2010 SCC 56, [2010] 3 SCR 281.

Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39.

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R v. Morelli, 2010 SCC 8, [2010] 1 SCR 253.

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Syndicat de la fonction publique du Québec v. Quebec (Attorney General), 2010 SCC 28, [2010] 2 SCR 61.

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Appendix 2: Appellate Court Judgments Referring to Hansard in 1999

Alberta

Nilsson v Alberta, 1999 ABCA 340 (CanLII)

British Columbia

Friesen v Hammell, 1999 BCCA 23 (CanLII)
Osoyoos Indian Band v Oliver (Town of), 1999 BCCA 297 (CanLII)
R v McLeod, 1999 BCCA 347 (CanLII)
R v Mills, 1999 BCCA 159 (CanLII)
R v Sharpe, 1999 BCCA 416 (CanLII)
White Spot Limited v British Columbia Labour Relations Board et al., 1999 BCCA 93 (CanLII)

Federal

Canada v Construction Bérou Inc., 1999 CanLII 9102 (FCA)
Canada v Corbett, [2000] 2 FC 81
Canada v Zelinski, 1999 CanLII 9255 (FCA)
Canadian Pacific Ltd. v Matsqui Indian Band, [2000] 1 FC 325
Lavoie v Canada, [2000] 1 FC 3
Sauvé v Canada (Chief Electoral Officer), [2000] 2 FC 117

Manitoba

R v Hoeppner, 1999 CanLII 5072 (MB CA)

Newfoundland

Ward v Canada (Attorney General), 1999 CanLII 18946 (NL CA)

Ontario

R v B.E., 1999 CanLII 3796 (Ont CA)
R v Pan, 1999 CanLII 3720 (Ont CA)

Quebec

Château, compagnie d'assurance c. Québec (Commission de la construction), 1999 CanLII 13539 (QC CA)
Gosselin c. Québec (Procureur général), 1999 CanLII 13818 (QC CA)
Hydro-Québec c. 2951-1433 Québec inc., 1999 CanLII 13482 (QC CA)
Québec (Sous-ministre du Revenu) c. Banque nationale du Canada, 1999 CanLII 13777 (QC CA)
R v Drapeau, 1999 CanLII 13182 (QC CA)

Appendix 3: Appellate Court Judgments Referring to Hansard in 2010

Alberta

Airco Aircraft Charters Ltd. v Edmonton Regional Airports Authority, 2010 ABCA 364
Alberta (Securities Commission) v Workum, 2010 ABCA 405
Maxim Power Corp. v Alberta (Utilities Commission), 2010 ABCA 213
R v Arcand, 2010 ABCA 363

British Columbia

Allard v Assessor of Area #10 – North Fraser Region, 2010 BCCA 437
Barbour v The University of British Columbia, 2010 BCCA 63
FortisBC Inc. v Shaw Cablesystems Limited, 2010 BCCA 552
Ildle-O Apartments Inc. v Charlyn Investments Ltd., 2010 BCCA 460
Ted Leroy Trucking Ltd. v Century Services Inc., 2010 BCCA 223
The Owners, Strata Plan LMS 2940 v Squamish Whistler Express and Freight, 2010 BCCA 74

Federal

Canadian National Railway Company v Canadian Transportation Agency, 2010 FCA 65
Conacher v Canada (Prime Minister), 2010 FCA 131
Gill v Canada (Attorney General), 2010 FCA 182

Manitoba

Lei v Kwan, 2010 MBCA 108
Manitoba Métis Federation Inc. v Canada (Attorney General) et al., 2010 MBCA 71

Nova Scotia

Nova Scotia (Attorney General) v Brill, 2010 NSCA 69
R v Hutchinson, 2010 NSCA 3

Ontario

1392290 Ontario Ltd. v Ajax (Town), 2010 ONCA 37
Bhajan v Bhajan, 2010 ONCA 714
Matthews v Algoma Timberlakes Corporation, 2010 ONCA 468
Ontario (Disability Support Program) v Tranchemontagne, 2010 ONCA 593
Professional Institute of the Public Service of Canada v Canada (Attorney General), 2010 ONCA 657
R v Katigbak, 2010 ONCA 411
R v Raham, 2010 ONCA 206
United States of America v Nadarajah, 2010 ONCA 859

Quebec

Marceau c. R, 2010 QCCA 1155
Bouchard-Lebrun c. R, 2010 QCCA 402

Saskatchewan

Cebryk v Paragon Enterprises (1984) Ltd. (Armstrong's Physiotherapy Clinic), 2010 SKCA 146
Saskatchewan Federation of Labour v Saskatchewan, 2010 SKCA 27

Appendix 4: Provincial Superior Court and Federal Court Judgments Referring to Hansard in 1999

Alberta

Alberta (Attorney General) v Dawson, 1999 ABQB 518
Alberta (Minister of Public Works, Supply and Services) v Nilsson, 1999 ABQB 440
Alberta Provincial Judges' Assn. v Alberta, 1999 ABQB 57
A. (Re), 1999 ABQB 879
C. (Re), 1999 ABQB 388
D.J.N. v Alberta (Child Welfare Appeal Panel), 1999 ABQB 522
D.M.F. Estate (Re), 1999 CanLII 19072 (AB QB)
D.M.F. (Re), 1999 CanLII 19056 (AB QB)
Gruending (Re) (Trustee of), 1999 ABQB 117
Janfield v Foote, 1999 ABQB 885
Lytton v Alberta, 1999 ABQB 422
N. (D.J.) v Alberta (Child Welfare Appeal Panel), 1999 ABQB 559
W. (T.) v D. (C.), 1999 ABQB 23

British Columbia

Bell Express Vu Ltd. Partnership v Rex, 1999 CanLII 4682 (BC SC)
Longley v Canada (Minister of National Revenue), 1999 CanLII 5750 (BC SC)
Re : Stuckey, 1999 CanLII 5054 (BC SC)
R v Feeney, 1999 CanLII 5945 (BC SC)
Slocan Forest Products Ltd. v British Columbia, 1999 CanLII 6191 (BC SC)
Swan Lake Recreation Resort Ltd. v Kamloops (City, Land Title Registrar), 1999 CanLII 6678 (BC SC)
United States of America v Cheema, 1999 CanLII 6966 (BC SC)

Federal

Canada (Minister of Citizenship and Immigration) v Podins, 1999 CanLII 8402 (FC)
Collins v Canada, [2000] 2 FC 3
Crawford & Co. Ltd. v M.N.R., 1999 CanLII 352 (TCC)
Crockart v The Queen, 1999 CanLII 326 (TCC)
Haas Estate v The Queen, 1999 CanLII 305 (TCC)
Hoobanoff Logging Ltd. v M.N.R., 1999 CanLII 491 (TCC)
Pushpanathan v Canada (Minister of Citizenship and Immigration), [1999] 4 FC 465
Rajadurai v Canada (Minister of Citizenship and Immigration), 1999 CanLII 7661 (FC)

Manitoba

Driskell v Manitoba (Attorney General), 1999 CanLII 14243 (MB QB)
M.M. v Roman Catholic Church of Canada, 1999 CanLII 14508 (MB QB)
R v Boyko, 1999 CanLII 14531 (MB QB)
Unicity Area Residents' Association v Winnipeg (City), 1999 CanLII 14186 (MB QB)

Ontario

Birjasingh v Coseco Insurance Co., 1999 CanLII 14888 (ON SC)

J.P. Towing Service and Storage Ltd. v Toronto Police Service Board, 1999 CanLII 15029 (ON SC)

Minto Developments Inc. v Ottawa-Carleton (Regional Municipality), 1999 CarswellOnt 4272, 10 M.P.L.R. (3d) 248, Ont SC

R v D. K., 1999 CanLII 14910 (ON SC)

R v Serplus, 1999 CanLII 15062 (ON SC)

Wakeford v Canada, 1999 CanLII 15037 (ON SC)

Sasketchewan

Buhs v Leroy (Rural Municipality No. 339), 1999 SKQB 24

R v Spindloe, 1999 SKQB 26

White Rock Farm Ltd. v Canadian Corp. of Agricultural Financial Services (Agrifinance), 1999 SKQB 251

Appendix 5: Provincial Superior Court and Federal Court Judgments Referring to Hansard in 2010

Alberta

652013 B.C. Ltd. v Glenmore Inn Holdings Ltd., 2010 ABQB 291
Airco Aircraft Charters Ltd. v Edmonton Regional Airports Authority, 2010 ABQB 397
Alberta (WCB) v Alberta (Appeals Commission for AltaWC) 2010 ABQB 368
Bank of Montreal v Hoehn, 2010 ABQB 405
Dunlop v Paras, 2010 ABQB 189
East Prairie Métis Settlement v Aiken, 2010 ABQB 665
Robinson v Cragg, 2010 ABQB 743
T.L. v Alberta (Child, Youth and Family Enhancement Act, Director), 2010 ABQB 203
Zukowski v O'Bee, 2010 ABQB 421

British Columbia

Assessors of Areas #1 and #10 v University of Victoria, 2010 BCSC 133
Clements v Gordon Nelson Investments Inc., 2010 BCSC 31
Kerton v Workers' Compensation Appeal Tribunal, 2010 BCSC 644
Representative for Children and Youth v British Columbia (Children and Family Development), 2010 BCSC 697
R v Van Kessel, 2010 BCSC 257
Vander Zalm v British Columbia, 2010 BCSC 1320
W Redevelopment Group, Inc. v Allan Window Technologies Inc., 2010 BCSC 1601

Federal

Felipa v Canada (Citizenship and Immigration), 2010 FC 89
Murphy v The Queen, 2010 TCC 434
Singer v Canada (Attorney General), 2010 FC 607
Zale Canada Diamond Sourcing Inc. v Canada, 2010 FC 202

Manitoba

Bell ExpressVu Inc. v City of Winnipeg, 2010 MBQB 26
Lei v Kwan, 2010 MBQB 60

Newfoundland

Nfld & Lab (AG) v Nfld & Lab (Inf & Priv Comm), 2010 NLTD 31

Nova Scotia

Cron v Halifax (Regional Municipality), 2010 NSSC 460
Hayward Estate (Re), 2010 NSSC 6

Ontario

Bedford v Canada, 2010 ONSC 4264
Cawthorpe v Cawthorpe, 2010 ONSC 1389
McCracken v Canadian National Railway Company, 2010 ONSC 4520
Musilla v Avcan Management Inc., 2010 ONSC 5425
Ontario College of Optometrists v SHS Optical Ltd., 2010 ONSC 3786
R v Machado, 2010 ONSC 277

Quebec

Desgagné c. Québec (Ministre de l'Éducation, du Loisir et du Sport), 2010 QCCS 4838
Duval c. Tribunal des professions, 2010 QCCS 339
F.C. c. Canada (Attorney General), 2010 QCCS 622
Fonds SRS-- Établissement de détention Maison Tanguay c. Commission des lésions professionnelles, 2010 QCCS 1614
Paquet c. Québec (Procureure générale), 2010 QCCS 3185
Protection de la jeunesse — 1012, 2010 QCCS 1752

Saskatchewan

R v Medvid, 2010 SKQB 22
R v Ronald, 2010 SKQB 310
Saskatchewan (Attorney General) v Thatcher, 2010 SKQB 109

Appendix 6: Québec, Assemblée nationale. Commission permanente de la Justice. Étude du projet de loi no 50 — Loi concernant les droits et les libertés de la personne. Journal des débats: Commissions parlementaires, 3e sess., 30e lég., no 6, 22 janvier 1975

droit à la libre expression, du droit à l'instruction, du droit d'association, tout cela. Je sais que M. le ministre a mentionné, tout à l'heure, que ces droits, déjà, constituaient, à toutes fins utiles, le droit à l'information. Vous nous permettrez de ne pas être d'accord sur cette interprétation de ces droit. On pourrait, par exemple, dire que, si un citoyen du Témiscamingue ou de la Gaspésie a le droit à la libre expression, le droit de parole ou le droit d'association, il n'a pas forcément le droit à l'information, parce qu'il peut en être privé, et c'est le cas.

En faisant un survol assez général du Québec, on pourrait comme cela trouver plusieurs endroits où les gens, effectivement, n'ont pas ce droit à l'information.

Quand un Etat permet une concentration indue qui débouche sur des situations de monopole, soit à l'échelle locale, régionale ou nationale, le droit à l'information est brimé parce que l'on coupe la diversité dans l'information, etc. On peut revenir là-dessus. Quand l'Etat ne permet pas le secret professionnel pour les journalistes, c'est un peu ce qui risque de se passer. Quand l'Etat permet, faute de s'être penché plus sérieusement sur le problème, la saisie de matériel journalistique par les corps policiers ou l'arrestation indue du journaliste, c'est encore le même droit qui est brimé. Quand on permet le huis clos ou un huis clos indu, c'est encore ce même droit qui est brimé. Et on pourrait continuer comme cela, par exemple, en parlant de la question du papier journal; si l'Etat permet qu'une situation assez anarchique, comme celle qu'on connait maintenant, se perpétue et que cela puisse avoir comme conséquence que certains journaux qui ont les reins moins solides que d'autres disparaissent du marché, c'est encore ce même droit qui est brimé. Quand l'Etat les retient indûment ou permet ou ne permet pas l'accessibilité aux documents publics, c'est encore ce même droit qui est brimé. Et je ne pense pas que le droit à l'expression, ou le droit de parole, ou le droit d'association soit suffisant dans un cas comme celui-là.

Le Président (M. Pilote): Avez-vous terminé? L'honorable ministre de la Justice.

M. Choquette: Voici, je n'ai rien contre l'idée du droit à l'information. Je pense que donner une information extensive et complète est sûrement un objectif désirable, et cela s'inscrit tout à fait dans un contexte démocratique, pour permettre aux citoyens de juger des affaires publiques et, le cas échéant, de prendre des positions, soit à l'occasion d'élections ou autrement. Alors, ce n'est pas que j'en ai contre l'objectif que vous visez. A ce point de vue, je vous dirais que je vous suis reconnaissant d'avoir souligné un certain nombre de législations étrangères où on a mentionné ce droit à l'information.

Mais je vous pose la question: Comment voyez-vous ce droit à l'information dans un projet de loi qui cherche, en même temps qu'il énonce des principes, à rendre ces principes concrets et à donner et conférer des droits spécifiques qui découlent de la violation de ces droits? Vous aurez noté, par exemple, que les droits qui sont mentionnés généralement dans ce projet de charte peuvent faire l'objet de sanctions par les tribunaux. Moi, je vous demande comment le droit à l'information, principe sur lequel je n'ai aucune critique à faire, pourrait faire l'objet d'une sanction par les tribunaux?

M. Mailhot: Nous le voyons dans le domaine des droits fondamentaux, dès le départ. Il n'y a absolument rien qui nous empêcherait — et d'en tenir compte dans la Charte des droits de l'homme — de circonscrire quatre ou cinq de ces droits parce qu'il faut absolument disséquer la notion de droit à l'information, qui est quand même un droit très vaste. Il n'y a rien qui nous empêcherait donc de circonscrire trois ou quatre de ces droits, de les inscrire dans la charte, évidemment à titre non limitatif, et de poursuivre, par la suite, à développer graduellement un cadre institutionnel législatif qui s'attaquerait à des problèmes aussi importants — auxquels on est confronté de plus en plus sérieusement, ailleurs, depuis deux ou trois ans — que le problème de la concentration des entreprises de presse, que la question du secret professionnel. Vous avez vous-même souligné, lors des discussions à l'Assemblée nationale sur ce projet, que vous étiez en train d'étudier d'assez près la question du secret professionnel pour les journalistes.

Alors, il faut quand même commencer quelque part. On voyait l'inscription de ce droit dans la charte comme une espèce de pierre angulaire, si vous voulez, ou de pierre d'assise sur laquelle on pourrait baser tout le reste.

M. Choquette: Vous avez parlé de décortiquer l'idée de droit à l'information en un certain nombre de droits qui pourraient être inscrits à la charte. Est-ce que vous pourriez me citer ces éléments qui pourraient être mentionnés?

M. Mailhot: Dans ceux que j'ai déjà mentionnés, il y aurait au départ, bien sûr, celui qui me paraît, dans l'immédiat, comme étant le plus urgent, peut-être pas dans l'ordre, je veux dire, pas le seul problème très important, mais le plus urgent parce qu'on vit actuellement une situation assez catastrophique dans ce domaine, c'est le problème de la concentration des entreprises de presse. Je pense que l'Etat peut assez facilement en arriver à adopter une position très claire vis-à-vis de ce problème. Cela fait quand même quatre ou cinq ans que l'on en parle au Québec, les commissions parlementaires de la liberté de la presse ont été saisies de mémoires, d'études, de faits, de chiffres par des douzaines d'organismes différents, entre autres le nôtre, et on sait très bien ce qui se passe au Québec, on a une image très précise de la situation. Il est même presque impensable de réaliser qu'en 1975, alors que l'on vit ces problèmes depuis plusieurs années, on n'a encore rien fait dans ce domaine. Cela pourrait être un droit inscrit, quand je parle d'en circonscrire trois ou quatre.