THE ATTORNEY-GENERAL OF CANADA v. THE READER'S DIGEST ASSOCIATION (CANADA) LTD., SÉLECTION DU READER'S DIGEST (CANADA) LTÉE.

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The use of legislative history in statute interpretation has been the subject of much controversy in both doctrine and jurisprudence. In this recent decision,[1] the Supreme Court held that evidence of the budget speech of the Minister of Finance in the House of Commons is not admissible in determining the intent of the legislature. It is submitted, however, that this judgment will not be a bar to the admission of Parliamentary debates when introduced as evidence of the circumstances surrounding the enactment of a statute.

The Reader's Digest instituted proceedings attacking the validity of an amendment to the *Excise Tax Act* which imposed a 20% tax on the value of advertising material contained in special editions of non-Canadian periodicals. It was contended that the statute was an attempt to enact, in the form of a Federal taxing statute, legislation to regulate a kind of trade and commerce which fell within the class of property and civil rights reserved exclusively to provincial jurisdiction. The real object of the legislation, respondent alleged, was to benefit one sector of the publishing industry in Canada at the expense of another.

At the trial in the Quebec Superior Court, the respondent attempted to adduce evidence by the former Minister of Finance, the present Minister of Finance, the Deputy Minister of National Revenue, the Clerk of the House of Commons and a Press Gallery correspondent. Twenty-four questions were put to these witnesses to show that the Minister of Finance had declared to Parliament the "true" object of the Government in promoting the impugned legislation, and that the Government had given to the press, radio, and television communication services a statement of the avowed objects of the legislation which was published and broadcast throughout Canada. Counsel for respondent conceded that such evidence would not ordinarily be proper but argued that the well-known rule in that respect does not apply when the constitutional validity of a statute is being attacked. The appellant objected to these questions and the learned trial judge, then Associate Chief Justice Scott, maintained all the objections.

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[1]Not as yet reported.

Appeals were entered in the Quebec Court of Queen's Bench[2] against all twenty-four interlocutory judgments. A majority of three to two reversed the Superior Court decision and held that extraneous evidence referring to the budget speech in the House of Commons was admissible. The Court felt that when the constitutional validity of a statute is involved, extraneous evidence of this nature should be allowed by exception in order to ascertain the true object or intent of the legislation.

When the case came before the Supreme Court, the sole issue was as it had been in the court below; namely, whether or not to allow extrinsic evidence with respect to a budget speech. All nine learned judges of the Supreme Court chose to reverse the judgment of the Quebec Court of Appeal and to exclude such extrinsic evidence. This impressive unanimity makes it strikingly clear that Parliamentary debates are not to be used in determining the intent of the legislature. It is respectfully submitted, however, that despite this very weighty judgment extrinsic evidence in general and Parliamentary debates in particular may still be called upon in the future to play an important role in statute interpretation.

The arguments both for and against the admissibility of Parliamentary debates have been thoroughly discussed by a number of Canadian writers.[3] Jurists on both sides seem to agree that the question relates more to weight than to relevance. But the practical problem of determining the weight to be accorded to any statement made in Parliament is formidable and would require one to go outside the record, "an excursion from which everyone would recoil".[4]

This case comment does not intend to discuss whether such extraneous evidence should be admitted or not. It proposes merely to show that the *Reader's Digest* decision will not have the effect of completely excluding such evidence.

Counsel for respondent put forth a logical argument based on a statement of Lord Wright in *Assam Railways and Trading Company, Limited v. Commissioners of Inland Revenue*[5]:

> . . . It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.

It was contended that this implies that a Minister's statement in introducing a bill in Parliament would be more readily admitted than the report of a commissioner. But, respondent reasoned, since the Judicial Committee and the

[2][1961] Q.B. 118.

[3]See Kilgour, D. C., "The Rule Against the Use of Legislative History: 'Canon of Construction or Counsel of Caution'?" (1952) 30 Can. Bar Rev. 769; Davis, K. C., "Legislative History and the Wheat Board Case" (1953) 31 Can. Bar Rev. 1; Corry, J. A., "The Use of Legislative History in the Interpretation of Statutes" (1954) 32 Can. Bar Rev. 624.

[4]Corry, J. A., *Ibid.*, 636.

[5][1935] A.C. 445, at 458.

Supreme Court from time to time in questions of constitutionality have admitted in evidence the reports of commissions, *a fortiori* a Minister's statement in introducing a bill is admissible in evidence in such cases.

In considering this argument, Cartwright J., with the concurrence of Locke J., examined some jurisprudence cited by respondent. In *Ladore v. Bennett*,[6] when a Royal Commission report was tendered in evidence in the Canadian courts, it was objected to and the objection was upheld, but before the Judicial Committee the objection was withdrawn, and, by consent of both parties, the report was allowed. On the other hand, in *Home Oil Distributors Ltd. v. Attorney-General of B.C.*[7] the trial judge overruled an objection to the admission of a commission report and this ruling was upheld by a majority of the Court of Appeal. When the case reached the Supreme Court, Kerwin J. (as he then was), with whom Rinfret J. (as he then was) agreed, admitted the report "as being a recital of what was present to the mind of the legislature . . . as to what was the existing law, the evil to be abated and the suggested remedy".[8] Cartwright J. makes no comment about this remark but simply concludes that the general rule in the jurisprudence is that a commission report, if objected to, should be excluded. This conclusion destroys the basis of respondent's argument which relied on the admissibility by exception of such reports.

Ritchie J., with Martland J. concurring, agrees that the evidence in question should be excluded but proceeds to add some very interesting observations of his own. Referring to the passage from Lord Wright's decision to the effect that a commission report is of even less value as evidence of intention than a Minister's statement, Mr. Justice Ritchie states:[9]

> . . . when Lord Wright goes on to say, "the Report of Commissioners is even more removed from value as *evidence of intention* . . ." (the italics are mine), he seems to me to be limiting his observations to *direct evidence of intention*.

This is very significant, for Mr. Justice Ritchie seems to interpret Lord Wright's decision in such a way as to distinguish between direct evidence of Parliament's intention and evidence of the surrounding circumstances with regard to which Parliament has used the words in a statute. The learned judge supports this interpretation of Lord Wright's decision by showing that Lord Wright himself adopted the very same interpretation with respect to a decision of Lord Halsbury[10] to admit a report. Mr. Justice Ritchie points out that Lord Wright explained this as follows:[11]

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[6][1939] A.C. 468.

[7][1940] S.C.R. 444.

[8]*Ibid.*, at p. 447.

[9]*Supra*, unreported.

[10]*Eastman Photographic Materials Company, Limited v. Comptroller-General of Patents, Designs, and Trade-Marks* [1898] A.C. 571.

[11][1935] A.C. 445, at 458.

> . . . Lord Halsbury refers to the Report *not directly to ascertain the intention* of the words used in the Act, but because, as he says, "no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission." Lord Halsbury, it is clear, was treating the Report as extraneous matter to show what were the surrounding circumstances with reference to which the words were used . . .[12]

Mr. Justice Ritchie concludes by stating that when commission reports have been admitted by the Supreme Court and the Privy Council in cases involving constitutionality of a statute, they have been referred to "otherwise than as direct evidence of intention".[13] This distinction of using a commission report not as direct evidence of the intention of Parliament but rather as evidence of the surrounding circumstances at the time the statute was enacted is also found in *Ladore v. Bennett* where the Judicial Committee cited a report merely

> . . . as indicating the materials which the Government of the Province had before them before promoting in the Legislature the statute now impugned.[14]

It is reasonable to ask exactly what is the difference between using a report as direct evidence of Parliament's intention and using it as evidence of the circumstances surrounding the enactment of the statute. The difference is very subtle and seems to relate to the directness of the means adopted to arrive at the ultimate end which is the same in either case—to ascertain what Parliament really intended. A commission report may not be admissible as direct evidence of what Parliament intended because there is no proof that Parliament followed the recommendations of the report. It may be admissible, however, as evidence of the general environment influencing Parliament at the time the statute was enacted, and thus would help the court to decide what meaning Parliament wished the words to have. But the same problem arises once again: what proof is there that the environment, as depicted by the report, actually did exercise an influence on Parliament?

At any rate the rules of statute interpretation do permit a certain amount of recourse to extrinsic aids in determining the true object of legislation.[15] One type of extrinsic aid is evidence of surrounding circumstances. It is respectfully submitted that a judge will admit commission reports and Parliamentary debates when they enable him to reach a decision which he considers most appropriate on the basis of the facts of the case before him.[16] In such a situation, he will simply allow the debates or report as evidence of surrounding circumstances and will support this by saying that such evidence is indicative not of intention but of the materials which were before Parliament at the time the statute was enacted. Some may criticize such a distinction as lacking in substance, but it has been made in the Supreme Court and may conceivably be of great utility under certain conditions.

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[12]*Italics* added by Mr. Justice Ritchie.

[13]*Supra*, unreported.

[14][1939] A.C. 468, at p. 477.

[15]Odgers, Sir Charles E., editor, *Craies on Statute Law* (1952), 5th edition, London, 118 *et seq.*

[16]See Willis' comment on "mischief rule" of *Heydon's Case*. Willis, J., "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1, at p. 14.

That this is what happened in the *Home Oil* case appears from the present decision of Kerwin, C.J. when he explains,[17]

> . . . I, with the concurrence of Rinfret J., as he then was, took into consideration a report of a Commission under the circumstances there existing, but only for the purpose of showing what was present to the mind of Parliament.

The words "under the circumstances there existing" suggest that the admission of the report assisted the learned judge to arrive at a conclusion which he felt warranted on the facts of that case, while the words, "but only for the purpose of showing what was present to the mind of Parliament" serve to justify the admission of such evidence.

Parliamentary debates have also been admitted in this way. The most striking instance of this occurred in *Toronto Railway Co. v. The Queen.*[18] In that case, the learned judge explicitly rejected as inadmissible what was said in the debates or by the Minister of Finance in the House of Commons, but later in the same paragraph he reasoned as follows:[19]

> . . . In construing a statute relating to the revenue, one must, I think, have regard to the general fiscal policy of the country at the time when the statute was enacted. That may be a matter of common knowledge, or of history; and if of history, he who seeks to know the truth must go to the sources of history, and they, so far as the fiscal policy of a country is concerned, are to be found not only in Acts of Parliament but in the proceedings of Parliament and in the debates and discussions that take place there and elsewhere.

Thus the learned judge referred to Parliamentary debates as evidence of circumstances surrounding the enactment of the statute in question. It is important to note, however, that he regarded this as distinct from direct evidence of intention, for he continued:[20]

> . . . But that is a different matter from construing a particular clause or provision of a statute by reference to the intention of the mover or promoter of it, expressed while the Bill or the resolution on which it is founded was before the House. The latter course is one which under the rules governing the construction of English statutes one may not adopt.

The admission of this evidence enabled the judge to satisfy his sense of justice, for it became clear that the taxation statute in question was intended not to raise revenue but to provide a protective tariff.

The experience of the Supreme Court of the United States is very pertinent in this respect. In the nineteenth century, that court also applied the English-inspired rule against legislative history. But when in 1911 Congressional debates were admitted, the Court explained as follows:

> Although debates may not be used as a means for interpreting a statute . . . that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted.[21]

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[17][1961] S.C.R.

[18][1895] Ex. C.R. 262.

[19]*Ibid.*, at p. 270.

[20]*Ibid.*, at p. 270.

[21]*Standard Oil v. United States* (1911) 221 U.S. 1, at p. 50.

The Court still claimed to restrict its use of legislative history as late as 1935:

> While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy.[22]

In analyzing this remark, Davis goes so far as to say:

> . . . This statement, of course, is inherently contradictory, for considering the debates to find the "general purposes" is using the debates to explain the meaning of the words of the statute . . .[23]

The United States Supreme Court employed, to say the least, a very subtle refinement in these two cases, and the passages cited above from the decisions of Kerwin, C. J. and Ritchie, J. in the *Reader's Digest* case appear to prepare the way for such refinements being made in the future in the Supreme Court of Canada.[24]

This case comment has not purported to discuss whether Parliamentary debates should or should not be admitted in evidence. But an attempt has been made to show that the *Reader's Digest* case does not have the effect of completely excluding Parliamentary debates as evidence. Thus, it is respectfully submitted that the Supreme Court has closed the door to the admission of Parliamentary debates as direct evidence of intention but seems to have left open another door to the introduction of evidence of circumstances surrounding the enactment of a statute. In this way, extraneous materials including Parliamentary debates, Royal Commission reports, and any facts present to the mind of Parliament, may be admitted by a trial judge, subject, of course, to his discretionary power of self-instruction as to the probative value of such evidence.

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[22]*Humphrey's Executor v. United States* (1935) 295 U.S. 602, at p. 625.

[23]Davis, K. C., *op. cit.*, at p. 14.

[24]Congressional debates are now used extensively by the United States Supreme Court in statute interpretation. This has been justified on several grounds, *e.g.* unique nature of Congress' committee system. See Corry, J. A., *op. cit.*, at p. 633 *et seq.* The purpose of referring to the experience of the United States Supreme Court is to show how that court rationalized the admission of Congressional debates while evolving its present legislative history rule.