Feature

Cinderella at the Ball: Legislative Intent in Canadian Courts

This article explores a very specific kind of legal research - finding the intent of a legislature or parliament. Following a review of the history of legislative intent in Canadian courts, the exclusionary rule and an important Canadian case, Rizzo & Rizzo Shoes Ltd, the authors explore what developments in this area of law, statutory interpretation and, legislative intent research, might mean for parliamentary and legislative libraries in Canada. Based on research for their forthcoming Irwin Law book *Researching Legislative Intent: A Practical Guide*, this revised article was first presented to the Association of Parliamentary Libraries in Canada/ L'Association des bibliothèques parlementaires au Canada (APLIC/ABPAC) on July 4, 2013, in Ottawa, Ontario.

Susan Barker and Erica Anderson

American statutory interpretation guru William Eskridge once referred to statutory interpretration as "the Cinderella of legal scholarship. Once scorned and neglected, confined to the kitchen, it now dances in the ballroom."[1] Cited in a 1999 article by Stephen Ross, an American law professor who encourages Canadian legal scholars to devote more time to teaching statutory interpretation,[2] this quote perfectly captures the explosion of statutory interpretation scholarship that Ross sees happening in Canada. A fascinating area of legal research – which includes legislative intent – statutory interpretation also has a very important and practical use in courts. When the outcome of a case hinges on the meaning of a few words in a statute, interpreting the meaning of those few words will affect someone's life and rights, one way or another.

What is legislative intent research?

Our interest in legislative intent stems from our experience in law and legislative libraries. In our law and legislative libraries finding the intent behind a statute it is a source of many substantial research questions. Let's look at an example of a question often posed to legislative researchers:

Susan Barker is the Digital Services and Reference Librarian at the Bora Laskin Law Library, University of Toronto, Faculty of Law. Erica Anderson is a Research Librarian at the Legislative Library and Research Service, Legislative Assembly of Ontario.

Question: I would like you to search Hansard, policy papers, and committee Hansard for all discussion surrounding the Act X dating all the way back in time when the predecessor of this legislation was introduced which I believe was prior to 1900. We are interested in determining the meaning of "Y" and if it includes "A and B."

The kinds of questions that law librarians get that require researching legislative intent include: Can I have the Hansard and committee debate on this bill and the predecessor bills? What did the legislature mean by this phrase? Why and when was this section added to the statute?

These questions can be time consuming and finding the answers can be like finding a needle in a haystack. Discovering the intent of a legislature involves piecing together how the legislation evolved over time, if and how the enactment changed, and what legislators said about this change in Hansard and committee. It can also involve material that inspired the legislation such as reports from law commissions, government policy papers, or Commissions of Inquiry.

Researching legislative intent can feel like Cinderella, pre-ball – all work, confined to the stacks in the library. Paul Michel, writing about statutory interpretation in the *McGill Law Journal* in 1996, agrees; he said that "the process of statutory interpretation is the unsung workhorse of the law. All but ignored by the law

schools, lacking the high profile of constitutional interpretation, the interpretation of statutes is, nevertheless, the most common task of the courts and administrative tribunals. Common, yes; but essential, too."[3]

Parliamentary, law firm and academic law libraries all get these questions and provide the materials to help with this research. In parliamentary libraries, librarians have to be careful to find out if the question is part of a legal matter before court. In these cases we cannot assist with it, so it is often a delicate dance deciding what information we can provide. Still, even in that context we may be able to point clients in the right direction by providing bill reading dates and Hansard materials without any analysis of a particular phrase.

There are many terms used to describe this type of research and it helps to define some terms we use in researching legislative intent. Librarians, judges and lawyers all use the term legislative history, but they use it to mean different things. People also use the term "backtracking" to describe the research process. Relying on the definitions that Ruth Sullivan uses in her book, *The Construction of Statutes*, legislative evolution

> consists of successive enacted versions from inception to current formulation or to its displacement or repeal.[4]

Legislative History

> includes everything that relates to [a statute's] conception, preparation and passage… from the earliest proposals to royal assent. This includes reports of law reform commissions, …; departmental and committee studies and recommendations; proposals and memoranda submitted to Cabinet; the remarks of the minister responsible for the bill; materials tabled or otherwise brought to the attention of the legislature during the legislative process including explanatory notes; materials published by the government during the legislative process, such as explanatory papers or press releases; legislative committee hearings and reports; debates…; the records of motions to amend the bill; regulatory impact analysis statements; and more.[5]

Put simply, legislative evolution is the statute and its changes. Legislative history is everything surrounding those changes. Both evolution and history are used by lawyers and judges to determine the intent of Parliament.

"The Cinderella of legal scholarship. Once scorned and neglected, confined to the kitchen, it now dances in the ballroom."

~ William Eskridge on statutory interpretration

It is from these questions, that we began to see a research opportunity here. We felt that these types of questions, looking for the intent of parliament, were being posed more frequently in law and legislative libraries. We also wanted to peek on the other side of these questions to see why and how legislative history materials are used in the courts. Though not trained lawyers, we would like to share some of what we have learned so far. By looking deeper into these questions we help our clients become better at answering them and, in turn, we get better ourselves. Like Cinderella we are excited to "go to the ball," as it were, and bring to light the details, processes and places for researching legislative intent to aid legal researchers.

Why researching legislative intent is important

Legislative intent questions are both frequent and important. As librarians, knowing that a judge's decision can turn on the meaning of the legislation, we must leave no stone unturned when finding out what the legislature intended.

Identifying the original meaning behind legislation was not always such a crucial matter for the courts, however. Prior to the 20th century, judges would not look at legislative intent or legislative history to interpret a statute before the court. Under the exclusionary rule, "the legislative history of an enactment was not admissible to assist in interpretation...as direct evidence of legislative intent."[6]

When this rule was lifted, first in Britain and then in Canada, it meant that, to refer back to our Cinderella quote again, legislative intent research was no longer

"scorned and neglected" by the courts. Rather, it became a legitimate research technique of growing importance.

There are, however, multiple facets of statutory interpretation including other rules and analysis. The rules, which are more like techniques, principles or approaches, include ordinary meaning, technical meaning, plausible interpretation, entire context (the Act as a whole), textual analysis, purposive analysis, and consequential analysis.[7] Judges rely on this toolkit to interpret a statute, most often when confronted by an ambiguous phrase, but not necessarily always. Employing a different rule often results in different answers for judges. Over time different rules have tended to be in favour. For instance, when the exclusionary rule was operating, judges generally preferred to use the ordinary meaning rule.

One of our key discoveries has been that the exclusionary rule has given way to Driedger's Modern Principle of Statutory Interpretation. As Driedger wrote:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[8]

This approach, while fitting into a larger body of statutory interpretation rules, was affirmed in the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd* in 1998 and is now the Canadian courts' preferred method of interpreting legislation. Researching legislative history and legislative intent are now standard practice for legal research.

The Story of the exclusionary rule

Even though this article deals with legislative intent in *Canadian* courts, we have to begin our Cinderella story with the emergence of the exclusionary rule in England wherein our judicial system has its roots.

The exclusionary rule was born out of an age in England known to some as the "Battle of the Booksellers." The case of *Millar v Taylor* was the culmination of many years of litigation all hinging on the meaning of certain provisions of the 1710 *Statute of Anne*.

Under the 1710 *Statute of Anne*, copyright expired after a period of 14 or 21 years, depending on the circumstances. Despite these explicitly defined copyright terms, London booksellers claimed that copyright was a common law right that pre-existed the statute and consequently could not be limited by legislation. On the other hand, there were a number of Scottish printers who argued that these works would be in the public domain and could be reprinted at will once the defined term of copyright expired.

The arguments were put to a legal test when London bookseller named Andrew Millar sued Scottish publisher Robert Taylor for selling cheap reprints of a work for which Millar had previously held copyright, after the period of copyright had expired. The court found in Millar's favour and the common law right of copyright in perpetuity was confirmed. This, of course, did not last long. In 1774 the common law right to copyright in perpetuity was extinguished by the Court of Appeal. What did last, however, was the far reaching and perhaps unintended consequence of one part of the judge's decision – the exclusionary rule.

How did a copyright dispute influence statutory interpretation in such significant and far reaching way?

During the court proceedings, Taylor's lawyers argued that during the process of the passage of the Copyright Bill there were a number of amendments at the committee stage, including changes to the preamble and even the title of the bill, which showed that Parliament intended to either take away or declare the absence of property in copyright at the common law. The presiding judge would not allow that argument, declaring:

> The sense and the meaning of an Act of Parliament must be collected from what it says when passed into law; and not from the history of changes it underwent in the house where it took its rise.[9]

That single and simple statement became the foundation for the exclusionary rule, profoundly influencing statutory interpretation for two centuries.

The judge's fundamental reasoning – "*This history is not known to the other house or to the sovereign*"[10] – was practical; there was no legal or reliable record of the debates at the time and no way of telling what Parliament meant when it made those changes to the bill. In the United Kingdom, up to 1771, publication of the debates in England was considered to be a breach of parliamentary privilege. It was even banned by an official resolution in 1738.

Josef Pittner / Shutterstock.com

In 1998, the exclusionary rule was dismissed, not just for Charter and Constitutional cases, but for ordinary statutory interpretation as well when the Supreme Court of Canada ruled on *Rizzo & Rizzo Shoes Ltd.*

Once the ban was lifted, reports of Parliamentary proceedings were often published in newspapers. At the beginning, reporters were prohibited from taking notes and had to produce their reports from memory but this restriction was lifted in the Commons in 1780s. In 1803 William Cobbett began publishing of the debates as a standalone volume cobbled together from newspaper reports and other sources. When Thomas Hansard took over the publication, the debates became known colloquially as Hansard – a name that has persisted even after the Commons assumed responsibility and renamed the publication the '*Official Report*'.

The history of the Parliamentary debates in Canada was less dramatic. Although there was some initial resistance to having the reports of the debates published in Upper Canada prior to Confederation, they were reported in the newspapers of the time. These were sometimes collected and published as the "*Scrapbook Hansards*." Post Confederation, in 1880, *Hansard* became an official publication of the federal government with a team of reporters responsible for accurately recording the debates in Parliament.[11]

Why was the exclusionary rule upheld for so many years after official and reliable records of the debates were being published?

The courts upheld and expanded the reasons for the Exclusionary Rule from 1769 to the mid-20th century in both England and Canada. There were a number of reasons given for supporting the Exclusionary Rule in case law and in academic commentary, some procedural and some more practical.

Since the Debates were transcripts of discussions in Parliament, the parole evidence rule maintained that to admit them into evidence would give priority to spoken evidence over that of the formal records of the legislature – that is statutes, which are considered to be "authentic beyond all matter of contradiction."[12]

Another argument against the inclusion of legislative history in case law was that it could be considered

contrary "rule of law" principles. In particular, citizens should be able to rely on the text of a statute which is readily available rather than needing to consult with additional "less accessible texts"[13] in order to understand the meaning of the law. Even with modern advances in technology, this objection seems most valid; legislative intent is hard to locate and understand even if a person is well-trained in research methods.

What changed after 200 years of the exclusionary rule?

The end of the exclusionary rule in the UK was rather sudden. In the 1992 case of *Pepper v Hart*, the House of Lords chose to admit legislative intent in cases where the text of the legislation is ambiguous.

Canada's rejection of the rule was more gradual. Canadian jurists and academics supported the Exclusionary Rule in their rulings and writing. As recently as 1961, the Supreme Court cited *Millar v Taylor* and invoked the Exclusionary Rule in order to disallow the use of extrinsic evidence in a case concerning statutory interpretation.

The trend away from the exclusionary rule in Canada began with Constitutional cases. In 1976, the Supreme Court was asked to determine whether the *Anti-Inflation Act* was *ultra vires* under the *Constitution Act of 1867*. In order to discern the answer, Chief Justice Laskin considered a variety of government documents including Hansard; in his judgment, he argued in favour of the adoption of this type of extrinsic evidence in cases when constitutional questions were on the table. Having opened the door, it was only a matter of time before other judges began to step through it. Finally with the *Morgentaler* case of 1993, Justice Sopinka explicitly stated that "*Hansard* evidence... should be admitted as relevant to both the background and the purpose of legislation in constitutional cases."[14]

Since the passage of the *Charter of Rights and Freedoms* in 1984, there have been a number of cases where legislative history and other extrinsic aids were employed to interpret the meaning of legislation within the context of the *Charter*, as well as the language of the *Charter* itself.

In 1998, the exclusionary rule was dismissed, not just for *Charter* and *Constitutional* cases, but for ordinary statutory interpretation as well. It all started with a bankruptcy. Rizzo & Rizzo Shoes was a chain of shoe stores in Ontario that filed for bankruptcy and closed in 1989. All the employees were terminated immediately and were paid all the monies owed to them as of the date of the bankruptcy. The employees argued that they were owed appropriate termination pay in addition to the pay they received. The trustees argued the employees were not entitled to any sort of severance under the *Employment Standards Act* since bankruptcy was not the same as dismissal. When the case made its way to the Supreme Court of Canada, Justice Iacobucci looked very closely at the termination provisions of the *Employment Standards Act* in finding for the employees.

To quote Justice Iacobucci:

> At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.[15]

Quoting Driedger's modern principle, he noted:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and *the intention of Parliament*.[16]

Citing Sopinka in the *Morgentaler* case as his justification, Iacobucci then went on to examine statements made by the Minister of Labour recorded in Ontario's Hansard specifically on the termination provisions of the *Employment Standards Act*.

And thus the exclusionary rule was put to bed forever. *Rizzo & Rizzo Shoes* is now the leading case on statutory interpretation in Canada, but the concept of legislative history is fluid and broad and will continue to evolve.

A Common Task

Researching the intent of parliament as an aid to statutory interpretation is a daily task for lawyers, librarians and legal researchers. Legislative history, which includes examination of white papers, policy papers, law commission reports, bills, Hansard,

committee reports, and witness submissions are used to determine the intent of a parliament. In statutory interpretation, these materials are called extrinsic aids. Aids to interpreting legislative intent can also be found in intrinsic aids, such as the preamble, marginal notes, and headings in the statute.

> *"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."*
>
> *~ Driedger's modern principle*

It is not always clear on which extrinsic or intrinsic aids the court will rely, as the courts still have yet to clarify the limits of use of each aid; nevertheless, these aids are clearly accepted and lawyers are pushing the boundaries for more aids to be accepted.

A recent article we discovered in our research, which studies the use of Hansard in 2010 Supreme Court of Canada cases, clarified that the use of Hansard has matured in courts.[17] John James Magyar found that Hansard is no longer regarded as a second class interpretive tool, and that it was often used by the court as a standalone interpretive aid even in the absence of ambiguity about a legislative provision. This same study found that litigators were making greater effort to dig into the knowledge available to them, including law reform commission and legislative committee reports. Employing a technique Magyar described as "shoehorning," Canadian lawyers are using Hansard to introduce other extrinsic aids to assist with determining legislative intent for the purposes of statutory interpretation.[18] He found that when a speech in Hansard discusses a particular report, the report is seen to have a more substantial link to the argument. This phenomenon speaks to Hansard itself having more weight as an aid to interpret legislative intent as well as a tool used to expand horizons of what may be considered a part of legislative history. With the Supreme Court now clearly accepting Hansard as an interpretive tool, this study proves that it is more important than ever to know how to research legislative intent.

Further Resources Needed

More resources and manuals are needed to help deepen and broaden people's understanding of researching legislative intent and working with statutes. Understanding the process of legislative amendments and how to build a legislative history would help law students become better lawyers. In addition, there is an expectation that the public can access all the information surrounding a statute. If researching legislative intent is accepted by the courts, it should be a known process and resource available to everyone in a democracy. This is another reason for more resources and manuals on this topic.

A recent *Canadian Law Library Review* article points out that LEGISinfo <http://www.parl.gc.ca/Default.aspx?Language=E>, the federal bills website, is an ideal source for researching legislative intent.[19] The author calls LEGISinfo the standard for legislative history information because it has all the materials surrounding the enactment of a bill: bill status, links to debates and committee and then the extra step of background materials like press releases, reports, legislative summaries and background documents. It even links to previous versions of a bill. It is a portal geared towards the legal researcher researching legislative intent that is accessible to public and specialist alike. It is clear, cleanly designed and a single point of entry for everything. The most obvious drawback is that it does not cover historical material.

It may not be possible for every jurisdiction to have such portal and, technically, bringing historical information into LEGISinfo would present challenges; but, there are other legislative library projects which do fill these gaps, including the new Historical Debates of the Parliament of Canada (Library of Parliament in collaboration with Canadiana.org); scanned historical copies of Ontario debates, bills, journals, regulations, statutes in the Internet Archive; access to materials like government publications, legislative journals and a wide array of other information through the Canadian legislative library catalogs; Alberta's comprehensive "Historical Alberta Law Collection Online"; the B.C. legislature website's html conversion of historical Hansard; and online historical journals in P.E.I. and Newfoundland and Labrador.

GALLOP: Government and Legislative Libraries Online Publications Portal

Recently, the Association of Parliamentary Libraries in Canada/ L'Association des bibliothèques parlementaires au Canada (APLIC/ABPAC) collaborated to produce a portal called Government and Legislative Libraries Online Publications Portal, or "GALLOP" < http://aplicportal.ola.org >. This portal provides access to provincial and federal legislative library catalogue holdings and contains mostly full text electronic access to government policy papers, some committee reports, and news releases – all important materials for the legislative intent legal researcher. Resources like GALLOP should be applauded and supported as they aid in the research of legislative intent. We look forward to seeing them develop and expand.

Law and legislative librarians will also need to monitor the case law as future developments will likely define which parliamentary papers or background materials carry more weight and can be used in court as lawyers push the boundaries of legislative intent research.

As we investigate the state of researching legislative intent in Canada, and tell the story of how to research legislative intent to a wider audience, we hope to continue this discussion and, to use one final fairytale reference, get to our "happily ever after."

Notes

1 Eskridge, W. M. Jr. *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994) at p. 1

2 Stephen F. Ross, "Statutory Interpretation in the Courtroom, the Classroom, and Canadian Legal Literature" (1999-2000)31 Ottawa L Rev 39

3 Mitchell, Paul. "Just Do it! Eskridge's Critical Pragmatic Theory of Statutory Interpretation, Book Review of Dynamic Statutory Interpretation by William Eskridge" (1996) 41 McGill LJ 713 at p.713

4 Sullivan, Ruth. *Sullivan on the Construction of Statutes*. 5th ed. (Markham, Ont.: LexisNexis, 2008) at p.577 [*Sullivan*]

5 *Ibid* at p.593

6 *Ibid* at p.594

7 *Sullivan, supra* note 5

8 Elmer A Driedger, *The Construction of Statutes*. 2d ed. (Toronto: Butterworths) 1974 at 67.

9 *Millar v Taylor*, 9 (1769), 4 Burr 2303 at 2332, 98 ER 201 at 217.

10 *Ibid.*

11 Hansard Association of Canada. *Hansard History* online: < http://www.hansard.ca/hansardincanada.html>.

12 Jowitt, *Dictionary of English Law* (1st edn, 1959) p 1487 cited in Francis Bennion, "Hansard – Help or Hindrance? A Draftsmans View of *Pepper v Hart* and *Shrewsbury v Scott* (1859)" 6 CBNS 1 at 213.

13 Sullivan, *supra* note 4 at 597.

14 R v Morgentaler, [1993] 3 SCR 463 at 464

15 *Rizzo, supra* note 1 at p 40.

16 Driedger, *supra* note 7 at 67.

17 John James Magyar "Evolution of Hansard Use at the Supreme Court of Canada: A Comparative Study in Statutory Interpretation" (2012) 33(3) Stat.L.R. 363, and see also John James Magyar, *Hansard as an Aid to Statutory Interpretation in Canadian Courts from 1999- 2010.* Masters Thesis. University of Western Ontario, Masters of Laws 2011.

18 *Ibid* at p. 379

19 Campbell, Neil A. "Legal Research and the Exclusionary Rule" (2011) Can L Lib Rev 36:4 158