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Sullivan on the Construction of Statutes

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by

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THE CURRENT POSITION

Categories abolished. As the review above indicates, judicial use of legislative history in the past turned on a series of distinctions involving the type of material at issue (for example, commission reports rather than debate in *Hansard*), the nature of the problem (for example, constitutional validity rather than intended application) and the way the material was used (for example, as indirect evidence of purpose rather than direct evidence of intended meaning). The recent case law of the Supreme Court of Canada ignores and appears to have abolished these distinctions. It also ignores traditional distinctions between the handling of legislative history in civil law as opposed to common law[121] and in international law as opposed to domestic law.[122] This reflects a general tendency in the modern evolution of statutory interpretation to move from a rule-based to a principle-based approach.

In the leading case on statutory interpretation, *Re Rizzo & Rizzo Shoes Ltd.*,[123] the Supreme Court of Canada made it clear that legislative history is a legitimate source of assistance in statutory interpretation cases. To support the preferred understanding of an amendment to Ontario's *Employment Standards Act*, Iacobucci J. relied on statements made by the Minister when introducing the amendment to the legislature. To justify this reliance, he wrote:

> Although the frailties of *Hansard* evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, ... Sopinka J. stated:
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> ...until recently the courts have balked at admitting evidence of legislative debates and speeches.... The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of *Hansard* evidence, it should be admitted as relevant to both the background and the purpose of legislation.[124]

Iacobucci J. here applies the rule governing the use of legislative history in a division of powers case to a case of ordinary statutory interpretation. However, although the material is said to be relevant to "the background and the purpose" of the Act, it is relied on by the Court as direct evidence of legislative intent, thus moving beyond the rule in *Morgentaler*.

The issue in *Rizzo* was whether under Ontario's *Employment Standards Act* an employer owed employees severance pay when the termination of employ-

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121 See, for example, *Doré v. Verdun (City)*, [1997] S.C.J. No. 69, [1997] 2 S.C.R. 862, at para. 14 (S.C.C.); *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée*, [1997] S.C.J. No. 57, [1997] 2 S.C.R. 299, at 202 (S.C.C.).

122 See, for example, *Canada (Attorney General) v. Ward*, [1993] S.C.J. No. 74, [1993] 2 S.C.R. 689 (S.C.C.). See especially pp. 717, 730ff, and 752-53.

123 [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 (S.C.C.).

124 *Ibid.*, at para. 35.

ment was caused by involuntary bankruptcy. Section 40a of the *Act* required severance pay when "one or more employees have their employment terminated by an employer ...." In concluding that "terminated by an employer" was meant to apply to terminations caused by bankruptcy, Iacobucci J. relied on legislative history:

> This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA. With regard to the new severance pay provision he stated:
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> > The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.[125]

Since the *Rizzo* case was decided, the Supreme Court of Canada has come to routinely rely on a wide range of legislative history materials[126] for a wide range of purposes.

Uses of legislative history. Legislative history continues to be relied on as evidence of the external context in which legislation was made and as direct evidence of purpose. When introducing a bill to the legislature, it is customary for the Minister sponsoring the bill to explain why, in the view of the government, new legislation was needed and what the government hopes to accomplish by enacting the bill. This is the type of legislative history most often relied on by courts, and this is the use to which it is most often put, in ordinary interpretation cases as well as challenges to constitutional validity. This use reflects the often repeated pronouncement of the courts, that legislative history is admissible to show both the background and the purpose of legislation.

However, as the *Rizzo* case illustrates, legislative history is also relied on as evidence of specific legislative intent. In *Re Canada 3000 Inc.*,[127] the Supreme Court of Canada relied on legislative history materials to establish the intended meaning of a particular word. One of several issues in the case was whether the legal titleholders of aircraft were the owners of the aircraft for the purposes of the *Civil Air Navigation Services Commercialization Act* (*CANSCA*). Subsection 55(1) of the Act provided that the owners and operators of aircraft were jointly and severally liable for the payment of any service charges owing to NAV Canada. Subsection 55(2) defined "owner" as including the registered owner of the aircraft and any person in possession of the aircraft as conditional purchaser, chattel mortgagor, lessee or hiree. Although titleholders do not fall into any of these categories, they are nonetheless owners within the ordinary meaning of the word. While acknowledging this to be true, the Court ruled that the title holders were not captured by the section. Speaking for the Court, Binnie J. wrote:

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125 *Ibid.*, at para. 34.

126 The range of material that may be labeled legislative history is considered *supra* at p. 593.

127 [2006] S.C.J. No. 24, [2006] 1 S.C.R. 865 (S.C.C.).

> Though of limited weight, Hansard evidence can assist in determining the background and purpose of legislation; ... In this case, it confirms Parliament's apparent intent to exclude legal titleholders from personal liability for air navigation charges. The legislative history and the statute itself make it clear that Parliament did not intend *CANSCA* to replace or override the existing regulatory framework but rather to fit cohesively within it. In introducing *CANSCA*, the Minister of Transport stated that the *Aeronautics Act*, which establishes the essential regulatory framework to maintain safety in the aviation industry, "will always take precedence over the commercialization legislation" (*House of Commons Debates*, March 25, 1996, at p. 1154). In the Ontario Court of Appeal, Cronk J.A. highlighted a number of other instances where government spokespersons emphasized to Members of Parliament that *CANSCA* was to fit within the existing regulatory framework which generally favours the narrow meaning of "owner"; see, e.g. *House of Commons Debates*, May 15, 1996, at p. 2834; May 29, 1996, at p. 3144; June 4, 1996, at pp. 3394 and 3410; and *Debates of the Senate*, June 10, 1996, at pp. 588-89.
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> In 1985, during passage of the *Aeronautics Act*, a concern was raised in Parliament that liability under s. 4.4(5) (that Act's liability provision) could extend to legal titleholders. In response, the Government inserted the term "registered owner". The Parliamentary Secretary to the Minister of Transport specifically stated that the change was made to ensure that liability did not extend to those who had a security or other financial interest in the aircraft; *House of Commons Debates*, vol. IV, 1st Sess., 33rd Parl., June 20, 1985, pp. 6065-66.
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> In 1996, the Government considered Bill C-20 (which became *CANSCA*) as it transferred the operation of the civil navigation system from Transport Canada to NAV Canada. The Clause by Clause Analysis brief presented to the Senate Committee explained that s. 55 is based on the wording of the equivalent section of the *Aeronautics Act* which, as stated, restricts "owner" to *registered* owner; see "Clause by Clause Analysis for the *Civil Air Navigation Services Commercialization Act*", as presented to the Senate Committee on Transport and Communications, at pp. 51-52.[128]
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> [Emphasis in original]

The several materials relied on here, all of which make the same point, are quite persuasive of Parliament's intent.

Legislative history may be relied on to identify the scope of enabling powers, to determine whether legislation was meant to be retroactive or to establish that legislation implements, or only partly implements, an international obligation. In one recent case, it was relied on by the Supreme Court of Canada to establish that certain provisions in a statute were intended to re-enact rather than amend existing law. In *H.L. v. Canada (Attorney General)*,[129] the issue was whether the

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128 *Ibid.*, at paras. 57-59. See also *Tele-Mobile Co. v. Ontario*, [2008] S.C.J. No. 12 (S.C.C.) speaking for the Supreme Court of Canada, set out the legislative history of the provisions to be interpreted "in some detail" because of its critical role" in the Court's analysis.

129 [2005] S.C.J. No. 24, [2005] 1 S.C.R. 401 (S.C.C.).

Court of Appeal Act, 2000 (Saskatchewan) expanded the Saskatchewan Court's powers on an appeal from a power to review the trial judge's findings of fact for palpable error to a power to make its own findings of fact, as in a rehearing. Section 14 of the Act provided:

> 14. On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

The language of this provision could certainly be read as authorizing the appellate court to conduct a rehearing. However, a majority of the Court concluded that the powers of the Court of Appeal had not been changed. In support of this conclusion, Fish J. relied on the following legislative history:

> Hon. Mr. Axworthy: — Thank you, Mr. Speaker. I rise today to move second reading of *The Court of Appeal Act, 2000*. Mr. Speaker, *The Court of Appeal Act* was first passed when the court was created in 1915, and a number of provisions in the Act have remained unchanged since that time. Therefore, Mr. Speaker, *there's a need to update and clarify some of these provisions.*
>
> The present section of the Act relating to jurisdiction is incomprehensible to anyone other than a legal historian. *The Bill before the House doesn't change the jurisdiction of the Court of Appeal in any way, it simply restates the historical jurisdiction of the court in a way that can be understood by users of the Act.*
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> ...
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> (*Saskatchewan Hansard*, at pp. 1625-26 (emphasis added))[130]

Since the powers of the court had previously been understood as permitting a limited review of the facts, that limitation continued to apply.

In *Doré v. Verdun (City)*, the Supreme Court of Canada relied on legislative history to resolve a conflict between two legislative provisions. Section 575 of the *Cities and Towns Act* provided for the dismissal of actions against municipalities unless prior notice had been given. Article 2930 of the *Civil Code of Québec* set out a general prescription rule. The issue was whether this general rule, which was enacted later, displaced the earlier specific rule. Normally a specific provision prevails over a general one, regardless of which comes first. In this case, however, two documents tabled by the Minister in connection with the new *Civil Code* indicated that the general rule was to prevail. Both stated that actions against municipalities could no longer be dismissed for lack of prior

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130 *Ibid.*, at paras. 105-06. For other examples, see *R. v. Lavigne*, [2006] S.C.J. No 10, [2006] 1 S.C.R. 392, at paras. 40-42 (S.C.C.); *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] S.C.J. No. 13, [2006] 1 S.C.R. 441, at para. 22 (S.C.C.); *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] S.C.J. No. 72, [2005] 3 S.C.R. 425, at para. 20 (S.C.C.).

notice. The same point was made by various members of the legislature during debate. In relying on this material, Gonthier J. pointed out:

> Parliamentary history "must be read with caution, because [it is] not always a reliable source for the legislature's intention".[131] In the case at bar, the parliamentary history makes a number of references to the scope of art. 2930 C.C.Q. and even expresses a unanimous intention on the part of the legislators.[132]

The fact that all the parties in the legislature affirmed the primacy of the Code in these circumstances lent the legislative history significant weight.

Limitations on use of legislative history. As part of the context, legislative history is admissible in every case, even if the text to be interpreted is not ambiguous on its face. In *Castillo v. Castillo*, Bastarache J. wrote:

> 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" ....[133] 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.[134]

To be admissible, then, legislative history must be relevant to the interpretation issue facing the court and it must not be inherently unreliable. Once admitted, it must not receive more weight than it deserves.

With the demise of the exclusionary rule, the courts now face the challenge of formulating principles that may be used in assessing the weight of this material. Some things are clear. For example legislative history that is itself ambiguous or inconclusive may be disregarded. In *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, LeBel J. wrote:

> Although both parties rely on Hansard evidence related to the movement of the hedging provision from the Regulation to the Act, I find that evidence to be ambiguous and of little assistance in this case. Accordingly, any analysis of the 1987 amendments must be grounded in an examination of the scheme and context of the revised Act.[135]

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131 *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée*, [1997] S.C.J. No. 57, [1997] 2 S.C.R. 299, at para. 20 (S.C.C.).

132 [1997] S.C.J. No. 69, [1997] 2 S.C.R. 862, at para. 37 (S.C.C.).

133 *Rizzo*, *supra* note 123, at para. 21

134 [2005] S.C.J. No. 68, [2005] 3 S.C.R. 870, at para. 23 (S.C.C.), citing *Reference re: Firearms Act*, [2000] S.C.J. No. 31, [2000] 1 S.C.R. 783, at para. 17 (S.C.C.). In this concurring judgment, Bastarache J. spoke for himself alone. The other judgments did not address this point.

135 [2006] S.C.J. No. 20, [2006] 1 S.C.R. 715, at para. 39 (S.C.C.).

In A.Y.S.A. *Amateur Youth Soccer Association v. Canada (Revenue Agency)*, McLachlin C.J. wrote:

> I have difficulty accepting the government's "occupied field" argument based on excerpts from *Hansard*. While *Hansard* may offer relevant evidence in some cases, comments of MPs or even Ministers may or may not reflect the parliamentary intention to be deduced from the words used in the legislation....
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> In any event, there is nothing in the passages cited by the government to indicate that the creation of the [registered Canadian amateur athletic association] RCAAA regime precluded the registration of other sports associations as charities. Parliament can be taken to have put its mind to the question of which athletic associations would qualify as RCAAAs and to have chosen nationwide organizations only. It may also be that Parliament was operating under the assumption that athletic associations were not considered charitable at common law, which explains the special provisions ensuring charity-like status for RCAAAs (*House of Commons Debates*, vol. VII, 1st Sess., 28th Parl., April 2, 1969, at p. 7423). However, neither of these propositions evince a parliamentary intent to freeze the development of the common law on charitable status or to occupy the field for all amateur sports....[136]

It is less clear how courts should respond when the evidence of legislative intent is clear and compelling, but in the view of the court cannot be reconciled with the text. In *R. v. Daoust*, Bastarache J. wrote:

> We can conclude from the legislative history of the enactments pertaining to the laundering of proceeds of crime that Parliament's true intent was to criminalize all acts ... in relation to the proceeds of crime .... Nevertheless, the legislative intent revealed by the history must be one that could reasonably be supported by the text of the statute. Such is not the case here. Parliament did not achieve what it intended when it drafted s. 462.31.... Here, we are concerned with discovering not only the intent that Parliament was pursuing, but also the intent it expressed.[137]

When the text fails to express what the legislature clearly intended to enact, the proper inference is that a mistake in drafting has occurred. Although the courts have a jurisdiction to correct drafting mistakes, they generally decline to exercise it in the criminal law context, or in any context where rule of law concerns are acute. In *Daoust*, correcting the mistake would have entailed convicting the accused on the basis of words that did not appear in the French version of the *Criminal Code*.

In most cases, neither the inferences drawn from the legislative history nor those drawn from the text are compelling and decisive. Ordinarily the court must engage in a weighing and balancing process. The weight accorded particular materials is appropriately assessed in terms of the court's reasons for admitting them in the first place. There are two main justifications for admitting legislative history. First, when materials that explain the purpose or meaning of legislation

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136 [2007] S.C.J. No. 42, [2007] 3 S.C.R. 217, at paras. 12-13 (S.C.C.).

137 [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at para. 44 (S.C.C.).

or its intended effects are brought to the attention of the legislature, which then proceeds to enact it, an interpreter may legitimately infer that the legislature enacted the legislation on the understanding expressed in the materials. Second, although courts are the official and ultimate interpreters of legislation, they are appropriately influenced by expert opinion, whether offered by legal experts or experts in the subject dealt with in the legislation.

As suggested above,[138] the key to both justifications is authority. It is reasonable to assume that a legislature has passed legislation on the basis of materials brought to its attention only if the legislature had reason to regard those materials as authoritative. Similarly, it is reasonable to defer to another interpreter's opinion only if that interpreter expresses authoritative insights or offers authoritative information.

Assessing authority. In judging the authority of legislative history materials, there is no reason why the courts should not acknowledge the actual role played by Cabinet and government bureaucracies in the preparation of legislation. Formal and prepared statements by responsible ministers delivered to the legislature at second reading are the most frequently relied on legislative history, presumably because those statements are taken to express the government's intent. Although government intent is not the same as legislative intent, in a parliamentary system the government is most often the source of the legislative impulse and the author of the legislative text.[139] An explanation of the meaning or purpose of a text or its intended application is normally considered authoritative when it issues from the person who made the text as opposed to some third party. In addition to the remarks of the sponsoring Minister, reliance may also be placed on the explanations of the parliamentary secretary who typically speaks for the Minister at third reading and on the testimony of ministry officials before legislative committees. In the case of private member's bills, the authority of the maker would attach to the remarks of the member introducing the bill, who is assumed to be responsible for its content.

The authority of a minister or an official can be undermined, of course, if it appears that partisan politics may have distorted the accuracy of their statements to the legislature or a legislative committee. In *Ontario Teachers' Federation v. Ontario (Attorney General)* Gouge J.A. wrote:

> While the court can consider admissible extrinsic evidence of purpose, it must be careful to ensure that the evidence has an institutional quality that reflects the intention of the legislature and not just the individual motivation of a particular member of the government.
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> ...

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138 See *supra*, at p. 598.

139 Government bills typically begin with a memorandum from Cabinet which sets out the parameters of the legislation. No government bill goes forward without Cabinet approval.

> Expressions of motivation by individual government actors must be scrutinized to see that they truly reflect legislative intent, rather than simply individual concerns.[140]

Also, the views of the minister or official must be expressed to the institution during the legislative process, rather than received in testimony afterwards.[141]

The other main source of authority is expertise, whether legal expertise or expertise in a particular subject matter. This kind of authority is relied on by legislative committees in preparing legislative studies and recommendations and in considering bills. In considering a bill on aviation safety, for example, a committee might hear from witnesses with specialized knowledge about aircraft, communication systems, risk analysis and the like. The committee's report to the legislature, with or without amendments, will reflect that testimony to a greater or lesser extent. In a given case, the answer to a question proposed by a committee member might be the basis of an amendment accepted by the legislature. In such a case, a court might well assign significant weight to committee proceedings. In other circumstances, where there is nothing to link the remarks of particular witnesses to a particular understanding of the text, committee proceedings should receive only modest weight.

Regulations. Until recently, the legislative history of regulations received little attention, largely because the materials that might be relied on to assist interpretation were disparate and mostly inaccessible. A sovereign legislature can delegate its authority to any person or body it thinks fit and can make the validity of delegated legislation subject to whatever formal, procedural or substantive prerequisites it thinks fit. Many regulations are made by the Governor or Lieutenant Governor in Council, but others are made by individual Ministers, government Agencies or independent bodies such as human rights commissions or self-governing professional associations. The kind and extent of consultation that precedes regulation making is highly variable.

However, in recent years at the federal level the process has become increasingly rule-governed and standardized. Before being made, most federal regulations must be justified by a regulatory impact analysis in which the reasons for legislating, possible alternatives to legislation and the costs and benefits of the proposed regulations are laid out and assessed. The resulting "regulatory impact analysis statement" (RIAS) is published along with the regulation itself in Part 2 of the *Canada Gazette*. Before reaching that stage, however, most federal regulations must be "pre-published" in the *Canada Gazette* Part 1, giving an oppor-

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140 [2000] O.J. No. 2094, 49 O.R. (3d) 257, at paras. 32-34 (Ont. C.A.). On this basis, ministerial statements or government publications of the sort relied on in the *Upper Churchill Water Reversion Act Reference*, made outside the legislature and addressed to the public at large, arguably should receive only minimal weight.

141 See *Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters*, [2001] O.J. No. 750, at paras. 12ff. But see also *Ontario (Provincial Police) v. Cornwall (Public Inquiry)*, [2008] O.J. No. 153, at paras. 34ff, where Moldaver J.A. relies on excerpts from Hansard post-dating the relevant legislation.

tunity to the public to address comments and suggested changes to the responsible department or agency. This obligatory consultation is in addition to any other consultation undertaken with "stakeholders" or the public at large. Finally, under the *Statutory Instruments Act*, supplemented by various administrative policies, regulations are reviewed for compliance with constitutional law, international law, federal statute law, federal policy on sexual and racial equality and more. After being made, regulations are reviewed by a Parliamentary committee, the Standing Joint Committee for the Scrutiny of Regulations. Its mandate is to ensure that in making regulations the government did not exceed any limitations on its delegated authority.

These aspects of regulation making and review generate enormous amounts of legislative history materials, some of which is available. The RIAS is a public document and is widely relied on in interpreting regulations. It often provides quite detailed explanations of the purpose of regulations and the intended effect of individual provisions. The reports of the Standing Joint Committee and the minutes of its meetings are published. Sponsoring departments and agencies often publish materials explaining proposed regulations, particularly on the Internet. Additional materials may be sought through access to information applications. However, much of the vast quantity of material generated by the regulation-making and review process remains confidential and privileged.

In his dissenting judgment in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*,[142] Bastarache J. illustrates a liberal use of legislative history materials in interpreting regulations. The provision to be interpreted there was an amendment to the *Patented Medicines (Notice of Compliance) Regulations*, which regulated the process under which generic drug manufacturers could get the approvals necessary to market a patented drug as soon as the patent expired. Bristol Myers held a NOC and a patent on a drug that contained an unpatented component called paclitaxel. Its competitor Biolyse sought a NOC for a different drug that also contained paclitaxel. The issue was whether the NOC sought by Biolyse was subject to s. 5(1.1) of the Regulations. This provision imposed significant burdens on a person who "filed a submission for a notice of compliance in respect of a drug that contains a medicine found in another drug...."

The majority acknowledged that Biolyse's submission was within the ordinary meaning of this language, but it narrowed the scope of the provision to bring it in line with its purpose and avoid an absurd result. Bastarache J. relied on the legislative history of s. 5(1.1) of the Regulations in concluding that the Governor in Council had intended the section to apply as written, despite its surprising results. He wrote:

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142 [2005] S.C.J. No. 26, [2005] 1 S.C.R. 533 (S.C.C.).

> The use of the RIAS to determine both the purpose and the intended application of a regulation has been frequent in this Court and others, and this across a wide range of interpretive settings....[143]
>
> ... the government first enacted the *NOC Regulations* in order to protect the rights of patentees by preventing generic manufacturers from marketing their drugs until the expiry of all relevant patents .... The RIAS accompanying the *NOC Regulations* explained the reasons for this new regulatory scheme:
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> > ... with the enactment of Bill C-91 the government has created an exception to patent infringement allowing generic competitors to undertake any activities necessary to work up a submission to obtain regulatory approval of a product. ...
> >
> > *These Regulations are needed to ensure this new exception to patent infringement is not abused by generic drug applicants seeking to sell their product in Canada during the term of their competitor's patent while nonetheless allowing generic competitors to undertake the regulatory approval work necessary to ensure they are in a position to market their products immediately after the expiry of any relevant patents.* [Emphasis added.]
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> (SOR/93-133, Canada Gazette Part II, vol. 127, no. 6, at p. 1369-88)[144]
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> [Emphasis in original]

After establishing the purpose of the NOC Regulations, Bastarache J. turned to the specific amendment that introduced s. 5(1.1). He pointed out that, before being made, this amendment was published in Part 1 of the *Canada Gazette* and comments were received from a wide range of interested persons and organizations. A number of them pointed out that if the amendment were passed as worded it would capture manufacturers in Biolyse's position. With knowledge of these comments, the Governor in Council proceeded to make the amendment without changing the relevant wording. On this basis Bastarache J. felt comfortable in concluding that the Governor in Council had intended the new provision to have a very broad reach.

In *RJR-MacDonald Inc. v. Canada (Attorney General)*, the Supreme Court of Canada relied on the regulatory impact analysis statement prepared as part of the regulation-making process at the federal level to confirm the purpose of impugned regulations.[145] In *Friesen v. Canada*, the Court relied on a release by the Department of Finance as well as the regulatory impact analysis statement to

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143 *Ibid.*, at para. 157. In support of the proposition in the text, Bastarache J. cites, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311, at 352-53 (S.C.C.); *Friesen v. Canada*, [1995] S.C.J. No. 71, [1995] 3 S.C.R. 103, at paras. 63-64 (S.C.C.); *Merck & Co. v. Canada (Attorney General)*, [1999] F.C.J. No. 1825, at para. 51 (T.D.); *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, [2004] F.C.J. No. 883, at para. 23 (F.C.); *Bayer Inc. v. Canada (Attorney General)*, [1999] F.C.J. No. 826, 87 C.P.R. (3d) 293, at p. 296 (F.C.A.).

144 *Bristol-Myers*, *supra* note 142, at para. 160.

145 [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311, at paras. 90-91 (S.C.C.).

confirm both the purpose and intended application of an amendment to the *Income Tax Act* Regulations.[146] In *R. v. Huovinen*,[147] the British Columbia Court of Appeal relied on a regulatory impact analysis statement as evidence of the meaning of legislative language.

SUMMARY

1. Legislative history materials that meet a threshold test of relevance and reliability are admissible to assist in the interpretation of legislation. The courts no longer automatically exclude these materials or certain categories of these materials.
2. The materials are admissible in both constitutional and non-constitutional cases.
3. The materials may be used for any purpose, including direct evidence of legislative intent.
4. The weight to be given the materials is established on a case-by-case basis. A major consideration is the extent to which the legislature would have regarded the materials as authoritative and therefore relied on them in enacting the legislation to be interpreted.

PROFESSIONAL AND SCHOLARLY PUBLICATIONS

Introduction. When it comes to technical matters outside the scope of judicial expertise, the courts require the assistance of expert testimony. With respect to matters of law or of general information, however, the courts may inform themselves by consulting scholarly or professional publications.[148] In interpretation cases the courts consult a wide variety of such publications including textbooks, monographs, studies, reports and articles.

Scholarly materials sometimes form part of the legislative history of an enactment and may be admissible as evidence of the understanding on which the enactment was passed. More often, however, these materials are admitted as evidence of external context or as persuasive opinion on the interpretive issues facing the court. Reliance on scholarly opinion is common in Charter cases and has become increasingly prevalent in ordinary statutory interpretation.

Reliance on scholarly material as evidence of external context. Courts often rely on scholarly or professional publications to help establish the background of legislation, that is, the historical, social, political, economic or institutional context in which the legislation was enacted and operates. In *Janzen v. Platy Enter-*

146 [1995] S.C.J. No. 71, [1995] 3 S.C.R. 103, at paras. 63-64 (S.C.C.).

147 [2000] B.C.J. No. 1365, 188 D.L.R. (4th) 28, at para. 27 (B.C.C.A.).

148 For discussion of matters that may be judicially noticed, see *supra*, Chapter 21, at pp. 569-71.