JUDICIAL NOTICE

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The author briefly surveys the state of the doctrine of judicial notice in Canada. Its rationale and the numerous facets of its scope are discussed, including: Common Law, statutory law, foreign laws, adjudicative facts, authoritative sources, legislative facts and its application by the appellate courts. He reviews the Law Reform Commission proposals and concludes with recommendations which follow these proposals.

I. INTRODUCTION

The doctrine of judicial notice is an exception to the fundamental rule that matters relevant to an action must be established by formal proof. As Professor McNaughton has noted, "the one distinguishing characteristic of judicial notice is the concept that the tribunal has the right, in appropriate instances, to inform itself as to a material matter by methods in addition to the reception of formal evidence, and it is implicit that the information may be obtained by resort to sources other than those adduced by the litigating parties."[1] In essence then, judicial notice refers to the acceptance of a matter of fact or law by the court, without the necessity of formal proof in the form of evidence adduced by one of the parties.

Judicial notice has been taken of a very wide range of matters. "Familiar examples are provided by the rulings that it is unnecessary to call evidence to show that a fortnight is too short a period for human gestation; that the advancement of learning is among the purposes for which the University of Oxford exists; that cats are kept for domestic purposes; that the streets of London are full of traffic, and that a boy riding a bicycle in them runs the risk of injury; that young boys have playful habits; that criminals have unhappy lives; that the reception of television is a common feature of English domestic life enjoyed mainly for domestic purposes, and that the Riding of York is coterminous with the city of that name."[2]

This paper will attempt to review the rationale underlying the doctrine, identify the major areas in issue, and present some recommendations with the primary aim of establishing a uniformly acceptable position for the various Canadian jurisdictions.

Rationale

Judicial notice is taken of matters of both law and fact. With respect to matters of domestic law, the judge is assumed to know the law. "Knowledge of the law, or the capacity to acquire it, is part of his equipment for the office."[3] This is an essential premise to the administration of our system of justice.

With regard to matters of fact, there has existed among leading scholars in the United States a long-standing controversy as to the underlying rationale for the taking of judicial notice. Wigmore and

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1. John T. McNaughton, "Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy" (1969) 14 *Vanderbilt Law Rev.* 778 at 786.
2. *Cross on Evidence* (4th ed.), at 136.
3. Edmund M. Morgan, "Judicial Notice" (1944), 57 *Harv. L. Rev.* 269 at 270.

Thayer view judicial notice as solely a practice to save time where dispute is unlikely. Morgan, while recognizing this as an important factor, states the prime reason for judicial notice as follows:[4]

> In an adversary system such as ours, where the court is bound to know the law and the parties to make known the facts, it is particularly important that the court prevent a party from presenting a moot issue or inducing a false result by disputing what in the existing state of society is demonstrably indisputable among reasonable men.

This fundamental difference has important implications in terms of both the scope of judicial notice and its effect. Morgan's more restricted approach leads to the position that judicial notice is conclusive. The Wigmore approach is far more liberal in terms of what may be judicially noticed, and sees the doctrine as establishing only a prima facie position capable of rebuttal by the opposing party. The two approaches are clearly irreconcilable and the position adopted necessarily is key to the role that judicial notice may play. This theme will be explored more deeply at appropriate points below.

II. SCOPE OF JUDICIAL NOTICE

A. Common Law

Judges are assumed to know the law and are bound to take notice of the law. Perhaps this has been expressed best by Morgan who has described the judge's role as follows:[5]

> In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so . . . . He may reach a conclusion in accord with the overwhelming weight of available data or against it . . . . In all of this he is entitled to the assistance of the parties and their counsel, for he is acting for the sole purpose of reaching a proper solution of their controversy. But the parties do no more than to assist; they control no part of the process.

Clearly then, judicial notice of a point of law is conclusive subject only to the appellate process.

B. Statute Law

The evidence acts of Canada and the Provinces extend the common law doctrine of judicial notice to statute law. Typical is the Canada Evidence Act,[6] which provides that:

> 18. Judicial notice shall be taken of all Acts of the Parliament of Canada public or private, without being specially pleaded.
>
> 19. Every copy of any Act of the Parliament of Canada, public or private, printed by the Queen's Printer is evidence of such act and of its contents; and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed, unless the contrary is shown.

Sections 19-22 of the Canada Evidence Act deal with the issue of documentary evidence of Acts of Parliament, proclamations, etc. On first reading, these sections raise a number of questions. Do they set out procedural requirements for the taking of judicial notice, or are they intended to clarify the content of that which is judicially noticed by identifying the sources that may be used?

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4. *Id.* at 273.
5. *Id.* at 270.
6. Canada Evidence Act, R.S.C. 1970, c. E-10.

Though normally there should be no difficulty in producing this type of documentary evidence, the wording of the Act does not make it clear whether production of this evidence is required by the party alleging the matter before judicial notice may be taken. Such a question is likely to arise when the proclamation of an Act of Parliament or the publication of a regulation in the Gazette is in issue. For example, does the Crown have an obligation to tender some evidence that the Act or regulation which is the subject of the charge was proclaimed or published? This question has been the subject of different interpretations,[7] at least with regard to the publication of regulations.

In *R.* v. *Evgenia Chanders*,[8] the Supreme Court of Canada had to determine whether evidence must be offered as proof of statutory regulations before judicial notice could be taken. The defendant was charged with discharging a pollutant contrary to the Oil Pollution Prevention Regulations made under s. 761 of the Canada Shipping Act. The charge was dismissed at trial on the ground that the regulations under which the charge was made were neither entered into evidence nor produced at trial. It was necessary to construe the meaning of section 23 of the Statutory Instruments Act which provides that: (1) "A statutory instrument that has been published in the Canada Gazette shall be judicially noticed." Subsections 23(2) and 23(3) deal with what may be accepted as proof.

The Supreme Court held that the correct meaning to be applied to the section was that it identifies a class of statutory instruments, *viz.* those published in the Canada Gazette, and that there is no requirement for evidence of any type to be offered before judicial notice may be taken.

De Grandpre J., delivering the majority opinion, construed the intention of Parliament to be "to place on the same footing the statutory instruments published in the Canada Gazette and all Acts of Canada, public or private." Thus, the position today with respect to federal statutory instruments published in the Canada Gazette is that they shall be judicially noticed without any evidentiary requirement. De Grandpre J. arrived at this position by comparing, side by side, sections of the Canada Evidence Act (s. 18, 19) and the Statutory Instruments Act (s. 23(1),(2)). He concluded that:[9]

> Under both statutes,
>
> (a) judicial notice is an obligation;
>
> (b) as a material support for that obligation, a document which otherwise would not be admissible in the Court record may be used.

This latter reference to the admission of copies of the legislation must be taken as viewing the documentary evidence provisions solely as statutory exceptions to the "best evidence" rule. At common law, copies are acceptable as secondary evidence only when the originals cannot be produced.

The situation is less clear regarding provincial regulations. It appears that only the evidence acts of Manitoba (s. 31(f)) and P.E.I. (s. 21(4))[10]

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7. *See R.* v. *Mahaffey* (1961), 36 C.R. 262 (B.C. Co.Ct.). *R.* v. *Fitzgerald* (1950), 12 C.R. 207 (N.S. Co.Ct.).
8. (1976), 12 N.B.R. (2d) 652.
9. *Id.* at 657.
10. Manitoba Evidence Act, R.S.M. 1970, c. E-150; P.E.I. Evidence Act, R.S.P.E.I. 1974, c. E-10.

explicitly state that judicial notice is to be taken of regulations. The Alberta Act requires that judicial notice be taken of any order of the Lt. Governor or the Lt. Governor in Council (s. 33). The definition of "regulation" as provided by s. 2(f) of the Regulations Act would include such orders where made under the authority of an Act of the Legislature. The Alberta position would therefore appear to be the same as above.

The approach taken by the other provinces is to describe what may be accepted as *prima facie* proof of regulations. In the absence of language parallel to that of the Statutory Instruments Act, it is difficult to see how De Grandpre J.'s reasoning in *R.* v. *Evgenia Chanders* can be applied to provincial regulations. Yet in principle, there is no reason why provincial regulations made under Acts of the Legislature should be treated differently from those made under Acts of Parliament.

Acts of Parliament or the Legislature raise a similar problem when the Act is to come into force at a date to be fixed by proclamation. That is, must the fact of proclamation be proved? Most of the provincial evidence acts provide that judicial notice shall be taken of proclamations. Significantly, the Canada Evidence Act does not, though sections 20-22 describe what evidence may be given of proclamations. Thus it appears that judicial notice of proclamations may be obligatory without evidence for provincial legislation, but not for federal legislation.

Where judicial notice must be taken of regulations or proclamations without any evidence, it is unclear what procedure is to be followed by a defendant who is arguing that a regulation has not been published in the Gazette or that an Act has not been proclaimed into force. This is particularly important in the former case as the Statutory Instruments Act and the Regulation Acts of the provinces specifically provide that, with limited exceptions, regulations that have not been published are not valid against a person who has not had actual notice of them.[11] Following the *Evgenia Chanders* decision, there is no burden on the Crown to prove publication. Yet, it would be contrary to the most basic principles of fairness to place a burden on the defendant to adduce negative evidence of the failure to publish. Presumably, defence council would request dismissal of the charges and the issue would be resolved by investigation by the judge before ruling on this request. In effect then, the judge would be taking judicial notice of the failure to publish. This results in the ironic situation of a judge being required by statute to judicially notice a regulation which he must subsequently judicially notice to have no effect.

The Evidence Acts of the provinces are not the sole source of legislation on judicial notice. For example, the Alberta Evidence Act[12] provides only that:

> 33. Notwithstanding any other provision of this Act every proclamation and every order made or issued by the Governor General or the Governor in Council or by the Lieutenant Governor or the Lieutenant Governor in Council, and every publication hereof in the Canada Gazette or the Alberta Gazette shall be judicially noticed.

It is necessary to look to the Alberta Interpretation Act[13] to find:

> 7. Every Act of the Legislature shall be judicially noticed by all judges, justices and others.

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11. Statutory Instruments Act, S.C. 1970-71-72, c. 38, s. 11(2); Alberta Regulations Act, R.S.A. 1970, c. 318, s. 4(5).
12. Alberta Evidence Act, R.S.A. 1970, c. 127.
13. R.S.A. 1970, c. 189.

The Interpretation Acts of Newfoundland, Nova Scotia, and Ontario similarly contain important provisions regarding judicial notice.[14] In the interests of clarity, the inclusion of all relevant provisions regarding judicial notice in a single Evidence Act would be a positive step.

It should be noted that the by-laws of municipalities are not the subject of judicial notice. These have not yet reached the status of laws or federal regulations. Perhaps this may be explained by the lack of readily available reference sources, and perhaps more significantly, the lack of any requirement for official publication that affords a measure of public awareness.

C. Foreign Law

Foreign law presents a far different situation from domestic law. The administration of our judicial system does not require that our judges know the law of other jurisdictions. With respect to statute law, two problems may arise. The necessary reference volumes to determine the wording of the statute in question may not be readily available to the judge. Moreover, a judge presented with a foreign statute may be totally unfamiliar with the approach taken to statutory interpretation in that jurisdiction and would thus be unqualified to make a proper determination of law on his own. Foreign law is to be proved by expert evidence. As stated by the House of Lords in *Lazard Brothers & Co.* v. *Midland Bank*:[15]

> [T]he court is not entitled to construe a foreign code itself: it has not "organs to know and to deal with the text of that law" (as was said by Lord Brougham in the *Sussex Peerage* case). The text of the foreign law if put in evidence by the experts may be considered, if at all only as part of the evidence and as a help to decide between conflicting expert testimony.

The same situation exists within Canada with respect to the law of another province. Professor Schiff raises the following question in his casebook:[16]

> You may question why, in litigation in one province of Canada where rules of common or statute law of another province are alleged to be applicable to the adjudicative facts, the proponent of the rules must allege them in his pleading and prove them by expert testimony. Do not Canadian judges in cases which involve no problems of "foreign" law commonly of their own motion examine the law reports and statute books of other provinces (and of England, and sometimes of other jurisdictions including the United States) in order to determine the law of the forum? What exactly is the difference between the two processes?

Perhaps the answer lies in the circumstances under which a problem of foreign law occurs. Determinations of foreign law virtually always arise in conflicts of law situations in which a court is required to apply the law of a foreign jurisdiction. In order to determine what that law is and how it is to be applied expert evidence must be relied upon. This may be contrasted with the situation of a judge surveying a wide range of authorities, including similar foreign law, in determining the application of domestic law. The foreign law in this case may provide background information to the development of our own law. This is really a matter of "legislative fact" that is being researched. The judge is not bound to apply what he learns of the foreign law in his determination. In the former situation, however, he is bound to apply what he concludes the

14. R.S. Nfld. 1970, c. 182, s. 5; R.S.N.S. 1967, c. 151, s. 2(6); R.S.O. 1970, c. 225, s.2.7.

15. [1933] A.C. 289, at 298.

16. Schiff, *Evidence in the Litigation Process: a Casebook in Law* (1977), at 873.

foreign law to be. The area of "legislative fact" will be addressed more fully below.

The Evidence Acts of five provinces[17] require that judicial notice be taken of the laws of other provinces, and indeed extend the doctrine to the laws of the nations of the British Commonwealth. At least with respect to the provinces and England, the traditional dangers associated with interpreting foreign law would not seem to apply.

The Supreme Court of Canada, however, as an appellate tribunal for all of Canada, is bound to take judicial notice of the laws of all the provinces and the territories. As stated in *Logan* v. *Lee*:[18]

> This court is bound to follow the rule laid down by the House of Lords in the case of *Cooper* v. *Cooper* in 1888, and to take judicial notice of the statutory and other laws prevailing in every province and territory in Canada, *suo-motie*, even in cases where such statutes or laws may not have been proved in evidence in the courts below, and although it might happen that the views as to what the law might be as entertained by the members of this court, might be in absolute contradiction of any evidence upon those points adduced in the courts below.

D. Adjudicative Fact

The area that gives rise to the greatest controversy is that of judicial notice of fact. Whereas it is the judge's duty to know and apply the law, it is normally the duty of the parties in a litigation to present the facts of the matter before the court. The trier of fact may, of course, be a judge or a jury. Of the trier of fact's role Morgan has written:[19]

> It is not the function of the trier of fact either to know or to discover the truth, or even to discover what the truth appears to be as disclosed by all available data, but merely to find for the sole purpose of settling the dispute between the litigants, what the facts appear to be as disclosed by the materials submitted . . . . He cannot be assumed to be ignorant of what is so generally accepted as to be incapable of dispute among reasonable men . . . [t]he court, including both judge and jury, must take judicial notice of what everyone knows and uses in the ordinary process of reasoning about everyday affairs.

As noted earlier, Morgan's view of the rationale underlying the taking of judicial notice of facts is "to prevent a party from presenting a moot issue or inducing a false result by disputing what in the existing state of society is demonstrably indisputable among reasonable men." It follows from this reasoning that judicial notice of such a matter must be taken as conclusive. According to Morgan, to allow a party to admit evidence to rebut the indisputable would be contrary to the essential nature of the principle underlying judicial notice:[20]

> Resort to the basic reasons for judicial notice marks the limits of the matters noticed and of the field of application in litigation. There is no part of the process of administering justice in a rational system in which the administering agency may properly disregard *what is so widely accepted as true as not to be the subject of reasonable dispute or what can be immediately and accurately demonstrated to be true by resort to easily accessible sources of indisputable accuracy.*

Thus Morgan establishes two basic criteria for the taking of judicial notice of facts; both are founded on the notion of indisputability.

Dean Wigmore's perception of judicial notice is, of course, in direct conflict with the above:[21]

17. R.S.B.C. 1960, c. 134, s. 27; R.S.M. 1970, c. E-150, ss. 31-32; R.S.N.B. 1973, c. E-11, s. 70; R.S.P.E.I. 1974, c. E-10, s. 21; R.S.S. 1953, c. 73, s. 3.
18. (1907) 39 S.C.R. 311.
19. *Supra* n. 3 at 271.
20. *Id.* at 291.
21. Wigmore, §2567, at 535.

> That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court *assumes* that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing* the matter by evidence.

Wigmore sees the purpose of judicial notice as "intended chiefly for expedition of proof". Wigmore, quoting Thayer, would see judges boldly using judicial notice as a means to simplify and shorten trials:[22]

> It is an instrument of great capacity, in the hands of a competent judge, and it is not nearly as much used, in the region of practice and evidence, as it should be . . . . The failure to exercise it tends duly to smother trials with technicality and monstrously lengthens them out.

It should be emphasized that the disagreement between Morgan and Wigmore relates only to matters of fact which relate to the dispute between the parties; the court may use whatever information it sees fit in determining what the law is. Generally, in our adversary system, these "adjudicative facts" must be proved according to the rules of evidence in order to guarantee the sufficiency and trustworthiness of the evidence tendered. Where the matter is clearly indisputable, no unfairness can result to the parties by departing from the strict rules of evidence. Indeed this approach helps to assume that flagrant errors will be avoided.

The strongest point of criticism to be found in the Wigmore approach is that it tends to merge the doctrine of judicial notice with that of presumptions. As Professor McNaughton has pointed out:[23]

> This position reflects a justifiable impatience with the inflexibility of the exclusionary rules of evidence and the rules as to burdens of proof (including presumptions) . . . . Trial procedure might be less an object of tension if the law before now, had fully elaborated a device of this kind. But the principle has not been elaborated . . . . Until parties can know just what kind of a showing requires or permits the judge to "notice" a fact and what sort of burden this shifts into the adversary (to challenge, to produce some disputing evidence, to disprove), the conception is impracticable.

In other words, the problem areas of the law of presumptions are carried into the doctrine of judicial notice. What is to be served by such an approach? The real issue would appear to be whether, for the sake of expedience, a judge should be able to recognize a presumption of fact where the matter is likely to be true, subject to rebuttal by evidence of the other party. That this is an important issue which should be addressed is not in dispute. But it is unclear why this issue should be addressed as a matter of judicial notice, when it appears to be one of the law of presumptions. Perhaps, it is the lack of flexibility in this latter area of law that has prompted the search for a solution under the rubric of judicial notice. However, it is submitted that the law of evidence would generally be better served by a doctrine of judicial notice that is clear in its scope and effect, and a doctrine of presumptions that may be similarly defined. To attempt reform of the latter by introducing greater uncertainty and complexity to the former would seem to be a disservice to both these areas of law. More simply, a "conditional imperative" is by definition a presumption, and should be treated as such in law.

English and Canadian case law does not present a clear picture of the position of the courts regarding the effect of judicial notice. Professor Schiff notes that "except for one *obiter dictum* they can be explained as

22. *Id.*, §2583, at 580.
23. *Supra* n. 1 at 783.

not inconsistent with the Morgan-Cross-Notes analysis."[24] What is disturbing, however, is the fact that a number of the cases analyzed use the terminology of "prima facie" evidence.[25]

It is important to draw a distinction between judicially noticed fact and inference drawn from that fact. For example, judicial notice may be taken of the occurrence of a full moon on a given night as stated in an almanac. Yet evidence of cloud cover would surely be admissible to show that there was very little light on the night in question.

Professor Schiff's analysis suggests that judicial notice may be taken of a general fact, though evidence is admissible to show that because of peculiar circumstances, the inference that such was the case in the particular instance should not be drawn. It is difficult to see how this view differs from that of the "presumption" approach. If the general fact is not really indisputable, it would appear more appropriate to view this as a situation where judicial notice should not be taken. It should be noted that a judge may not take judicial notice of a particular fact of which he has personal knowledge if that fact is not one that is generally notorious.

Perhaps Professor Schiff had in mind the type of example given above. However, the occurrence of a full moon is not a general fact. Though it may be argued that a finding that it is relatively bright when a full moon occurs is a general fact, it is submitted that such a finding is really an inference drawn from the judicially noticed fact.

E. Reference to Authoritative Sources

Professor Morgan extends the doctrine of judicial notice to matters "capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy".[26] The obvious question to be answered is: what sources are to be considered of sufficient authority to justify judicial notice. This becomes a matter to be decided by the judge. Sources may be submitted to him by either party in support of or against such a determination. The judge, in addition, is free to consult any sources on his own. At this point, the issue is whether the matter is one capable of being judicially noticed. If the judge so rules, then on the Morgan model, the issue is resolved and no evidence is admissible on the point. On the other hand, if the judge rules that the matter is not beyond dispute according to the sources investigated or that the sources are not of indisputable accuracy, the matters will be resolved according to the ordinary rules of evidence.

In *R.* v. *Quinn*,[27] the trial judge failed to take judicial notice of dictionary definitions in determining whether the Crown had proved that the animal which the accused had allowed to be wasted was Big Game as defined by the Wildlife Act. On appeal by way of stated case, McDonald J. held that dictionaries are "readily accessible sources of indisputable accuracy" from which the trial judge could determine the meaning of the words "mountain sheep". After allowing the appeal on the grounds that the trial judge declined to exercise the discretion which was open to him in law, McDonald J. went on to consider whether judicial notice must be

24. Schiff, "The Use of Out-of-Court Information In Fact Determination at Trial" (1963), 41 *Can. Bar Rev.* 335.

25. *See: Schnell* v. *B.C. Electric Ry. Co.* (1910), 15 C.B.R. 378. *R.* v. *Hillier* (1840) 4 J.P. 155.

26. *Supra* n. 3 at 286.

27. (1975), 27 C.C.C. (2d) 543 (Alta. S.C.T.D.).

taken of facts capable of verification by such sources of indisputable accuracy and concluded:[28]

> In my opinion, no universal law can be laid down that a trial Judge should or must take judicial notice of a fact which is "capable of immediate accuracy . . . ." However, where counsel have drawn the source, such as a dictionary, to the attention of the trial Judge, then it is more reasonable for an appellate Court to expect the trial Judge to have taken judicial notice by reliance upon that source. In the present case, in my opinion, the trial Judge not only may but must take judicial notice of the meaning of the words "mountain sheep": as defined in the dictionary definitions to which counsel did in fact draw the attention of the trial Judge . . . this decision must not be interpreted as a statement of a universally applicable rule that where counsel requests that judicial notice be taken and refers to a readily accessible source of indisputable accuracy, then the trial Judge must take judicial notice.

After reviewing Wigmore's comments on this issue and finding these unhelpful, McDonald J. further stated that:[29]

> . . . [I]f the notoriety of the fact is in doubt, the fact is not one of which judicial notice should be taken. However, if there is no doubt, then in the ordinary case it would make a mockery of the trial if the Judge declined to take judicial notice of the existence of the fact.

Two points of interest may be noted. While rejecting a universal rule, McDonald J. clearly sees that judicial notice should be taken in the "ordinary case" where counsel so requests and supplies the sources. Secondly, McDonald J.'s reference to "making a mockery of the trial" by failing to take judicial notice is remarkably similar to Morgan's rationale for the doctrine, that is, that matters which are beyond dispute should not be allowed to appear moot. Thus, it may be safely inferred that McDonald J. views judicial notice as conclusive.

The hesitation expressed regarding the adoption of a universal rule appears to be based on the notoriety of the fact in issue where readily accessible sources of indisputable accuracy are available. This issue was explored in the judgment of Campbell, C. J. in *The King* v. *Savidant*,[30] who refused to take judicial notice of the fact that fermentation would completely cease after samples of the brew in question were seized and sealed for analysis. In the absence of evidence of the alcoholic content at the time of seizure, charges of possession of an "intoxicating liquor" of more than 2.5% alcohol were dismissed.

Campbell, C. J. makes several noteworthy observations about the nature of judicial notice:[31]

> [T]he fields of expert testimony and judicial notice are on the whole, mutually exclusive, though it is frequently difficult to say where the line should be drawn.
>
> The actual knowledge of the Judge or jury is not the criterion of the limits of judicial notice in either direction. The limits are rather those of knowledge imputed by the law, and within those limits a Judge may refresh his memory or knowledge by reference to maps, dictionaries, textbooks, or evidence . . . . Knowledge so imputed tends to be general, rather than particular, and notorious, rather than obscure or technical. So that, although the scope of judicial notice is constantly enlarging, it lags very far behind the advance of expert scientific knowledge.

Approval is given to the words of McGillivray, J.A., in *Fletcher* v. *Kondratuik*:[32]

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28. *Id.* at 548.
29. *Id.* at 549.
30. (1945), 19 M.P.R. 448 (P.E.I. S.C.).
31. *Id.* at 449-450.
32. [1933] 3 D.L.R. 532, at 543 (Alta. S.C.A.D.).

> The Court . . . is entitled to take judicial notice of the course of nature only insofar as it is a notorious fact that nature follows a certain course . . . . A judge is not at liberty to found his judgment whether upon his own scientific knowledge or the evidence of experts given before him in other cases.

Thus notoriety is an ingredient in both of Morgan's criteria for judicial notice. It is insufficient for the taking of judicial notice that sources of indisputable accuracy be available, if the facts are of a nature to be known only by experts. Where the notoriety is in doubt, it is appropriate for the judge to decline to take judicial notice, and to hear expert evidence on the matter.

This appoach of dividing what is indisputable into two categories—that which is of relatively general notoriety and that which is known only to experts—is justified by practical considerations. To some extent notoriety and indisputability merge. In a real sense, a fact or an authoritative source can only be indisputable if it is recognized as such. Where a source is widely recognized as such, it makes good sense to bring it within the realm of judicial notice. On the other hand, where a high level of specialized technical knowledge is required to recognize the indisputable nature of the source, it is more appropriate for expert testimony to be given in terms that the trier of fact can understand. Of course, if experts are not in agreement, the matter clearly falls outside the scope of judicial notice.

F. Legislative Fact

Judges frequently take notice of facts which are not directly related to the matter in dispute between the parties. This is usually done in reference to determinations of the law. Statements of policy underlying the law are usually based on stated fact. Similarly, a judge may enunciate a principle based on fact that justifies the findings of several cases, and apply this to the case at bar. The application of the rules of statutory interpretation naturally involve findings of fact, such as the mischief to be addressed by the new law. All of these are examples of "legislative facts" that judges judicially notice. By their nature, these findings of fact are often outside the realm of indisputability.

Professor Davis seizes upon this latter point as the focus of his criticism of the Uniform Rules of Evidence (1953) which proposed a formulation of judicial notice of fact based on Professor Morgan's thinking and limited to matters which are indisputable:[33]

> The judicial notice provisions of the Model Code and of the Uniform Rules seem unsound in failing to recognize a cardinal distinction which more than any other, governs the use of extra-record facts by courts and agencies. This is the distinction between legislative and adjudicative facts . . . . When a court or an agency develops a law or policy, it is acting legislatively; the courts have created the common law through judicial legislation and the facts which inform the tribunal's legislative judgment are called legislative facts . . . . Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take.

Does Professor Davis' analysis help to clarify the doctrine of judicial notice? Adjudicative facts relate directly to the facts in issue between the parties. A particular finding of fact may be conclusive to the success or failure of one party's case. Where this fact is open to dispute, it seems only

33. Davis, "Judicial Notice" (1955), 55 *Colum. L. Rev.* 945.

fair that the parties be allowed to adduce evidence on the point before the judge makes his finding. Of course, if the matter is indisputable, court time should not be consumed by efforts to declare moot that which is not.

As Professor Davis points out, findings of legislative fact relate to determinations of law. There is no question that judges are free to take judicial notice of what the law is independently of the submissions of counsel. The whole area of legislative fact is inextricably intertwined with the process of judicial notice of law, and is really part of that process. The judge is given complete authority in matters of law within his court as the basis of our judicial system. Should not the means he uses to determine the law be similarly treated? It would appear that matters of legislative fact and law cannot reasonably be separated and that the former is implicitly included in the latter. In matters of law, counsel make submissions regarding points of law which aid the judge in his determinations, though he is not bound by them. Is there any reason why submissions regarding matters of legislative fact should not be similarly submitted and treated?

Professor Davis is certainly correct when he points out that judges frequently notice matters of legislative fact that are not indisputable. Because of the relationship between determinations of law and legislative fact, this wider scope is clearly necessary. The judge's role in determining and applying the law would be hopelessly restricted if the legislative facts that he relied upon were subject to the Morgan criteria.

This distinction between legislative and adjudicative fact was subsequently recognized and adopted by Rule 201 of both the Uniform Rules of Evidence (1974), and the Federal Rules of Evidence (1975). Rule 201, however "governs only judicial notice of adjudicative facts". No provisions are directed at legislative facts.

The Law Reform Commission of Canada's proposals also recognize the distinction between legislative and adjudicative fact, and also carry this distinction through to particular provisions.[34] Whereas judicial notice may generally be taken only of indisputable facts, any fact may be judicially noticed in determining the law or the constitutional validity of a statute.

G. Appellate Courts

An appellate court is free to take judicial notice of a matter for the first time and is not restricted by the prior proceedings. Thus, in *Bell* v. *Hutchings*,[35] the Manitoba Court of Appeal rejected a finding by the trial judge that the defendant's headlights were negligently left unlit, and that this was the reason for the plaintiff's failure to see him. Dennistoun, J. A. stated:[36]

> In this northern latitude at eight minutes after eight o'clock in the month of August, we can take judicial notice of the fact that on a fine evening it is not dark by any means . . . . There was nothing to prevent the plaintiff from seeing the defendant whether the latter had lights on or not.

Appellate courts may, of course, find that a matter should have been judicially noticed as in *R.* v. *Quinn*,[37] or conversely that a matter was not

34. S. 83(1), (2) and (3).
35. [1932] 1 W.W.R. 49.
36. *Id.* at 50.
37. *Supra* n. 27.

properly the subject of judicial notice. The English Court of Appeal, in *Yuill* v. *Yuill*,[38] disagreed with a trial judge who judicially noticed that adultery was impossible in the available space in a lorry cab. As Lord Greene, M. R., noted:[39]

> He also, I infer, thought the suggestion to be that when the respondent and co-respondent disappeared from the view of the appellant and Young they must have lain on the floor—a thing which I agree would probably have been impossible. But their disappearance from the view of these witnesses was clearly consistent with their bodies being supported in a semi-recumbent position by parts of the seat next to the driver's seat.

III. REFORM PROPOSALS

A. Law Reform Commission of Canada

Sections 82-85 of the Draft Evidence Code contain extensive provisions addressing the major issues of judicial notice. Professor Morgan's approach to judicial notice of fact is adopted, limiting the doctrine to adjudicative facts that are indisputable. As noted earlier, however, any fact, including legislative fact, may be judicially noticed in determining the law or the constitutional validity of a statute.

Section 83 makes a distinction between those facts which must be judicially noticed and those which may be. In the former category are facts which are so generally known that they cannot be the subject of reasonable dispute. On the other hand, judicial notice may be taken of those facts which are so generally known within the territorial jurisdiction of the trial court that they cannot be the subject of reasonable dispute, and also of the facts capable of accurate and ready determination by resort to sources whose accuracy respecting such facts cannot reasonably be questioned. Legislative fact for the determination of law or the constitutional validity of a statute is also a matter of which judicial notice may, but not necessarily must, be taken.

Section 84 deals with judicial notice of law and requires that judicial notice be taken of the constitutional, statute, and decisional law of Canada or any province. Judicial notice must also be taken of any matter published in the Canada Gazette or the official gazette of any province. Section 82(2) sets out those matters which may be judicially noticed and includes the proceedings of administrative bodies and the law of other countries and their political subdivisions.

It should be noted that by virtue of section 85, where a party requests that judicial notice be taken and provides the necessary information to the judge and gives the other party notice, then judicial notice must be taken of matters that otherwise would be discretionary. Judicial notice of a matter is conclusive and the trial judge is to instruct the jury to accept as a fact any matter that is noticed.

The provisions regarding foreign law would appear to represent a major departure from the current state of the law. First of all, the judge may judicially notice the law of other countries whereas, at present, this must be proved by expert evidence. In addition, the Code provides that where the judge is unable to determine what the law of another country is, he may either apply the relevant law of Canada or the province where the court is situated, or he may dismiss the action entirely.

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38. [1945] 1 All E.R. 183.
39. *Id.* at 186.

If there is merit to the underlying principles that differentiate foreign law from domestic law when dealing with judicial notice, then it is difficult to understand why these provisions should have been included. It may be desirable to allow a judge to judicially notice the laws of another common law jurisdiction that is similar to our own, but it is quite another matter to allow him to do so when we are dealing with a regime of foreign law that may be quite different from our own, and the judge's training and practice does not lend him the ability to properly interpret this law.

A procedure is provided for the opposing party to question the propriety of taking judicial notice of any of those matters that may be judicially noticed. This includes matters where the judge has been requested to take judicial notice.

B. The American Approach

Both the Uniform Rules of Evidence and the Federal Rules of Evidence, as finally adopted, provide only for the judicial notice of adjudicative facts. Rule 201 embodies Professor Morgan's views with regard to what type of facts may be judicially noticed. The rule also provides that judicial notice shall be taken where judicial notice is requested by a party and the judge is supplied with the necessary information.

Though it is not required that the party provide notification to the adverse party as in the case of the Canadian Act, the rule does provide to the adverse party an opportunity to question the propriety of taking judicial notice after such notice has been taken. Thus in effect, at least, the Canadian and American positions would appear to be the same. The rule also states that the court shall instruct the jury to accept as conclusive any fact judicially noticed. The issue of legislative fact is not addressed.

IV. RECOMMENDATIONS

A. Adjudicative Fact

It is recommended that the approach taken by both the Law Reform Commission of Canada and the American authorities be adopted. Judicial notice should only be taken of those facts that are:

1. so generally known that they cannot be the subject of reasonable dispute or;
2. capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Judicial notice of such facts should be conclusive. An opportunity should be given to the other party to question the propriety of taking judicial notice. It would appear to introduce unnecessary delay to always require that notification be given to the other party in advance of judicial notice being taken upon request of a party; however, this should be a matter of judicial discretion decided by the circumstances of the particular case.

B. Legislative Fact

As recommended by the Law Reform Commission of Canada, judicial notice of any fact should be allowed for the determination of law or the constitutional validity of a statute.

C. Domestic Law

It is recommended that judicial notice shall be taken of both the statute and case law of Canada and of the provinces. Similarly provincial regulations or statutory instruments of the federal government should be judicially noticed. However, a procedure should be provided which allows an adverse party to question the fact of proclamation or the fact of publication in a gazette.

D. Foreign Law

With the exception of the civil law of Quebec, the law of the other provinces of Canada should not be considered as foreign law and should be capable of judicial notice. The dangers inherent in judicial notice of foreign law are not present within the Canadian framework, as all the common law provinces have been developed in a relatively similar manner. With respect to the law of foreign countries, consideration should be given to allowing judicial notice of certain common law jurisdictions such as the United Kingdom, without requiring that judicial notice of such law be taken. Regarding the law of other foreign countries, it is recommended that the current approach be retained. That is, such law must be proved by expert evidence.

E. General Considerations

It is recommended that all the provisions regarding judicial notice be consolidated under one Act for a given jurisdiction. Where these provisions are currently to be found in both the Interpretation Act and the Evidence Act, they should all appear in the Evidence Act.