

IMMIGRATION LAW — DETERMINATION OF REFUGEE STATUS — CHARTER OF RIGHTS AND FREEDOMS, SECTION 7.—The decision of the Supreme Court of Canada in *Singh v. Minister of Employment and Immigration*<sup>1</sup> has significantly clarified the inland refugee status determination process which exists under the Immigration Act, 1976.<sup>2</sup> The process has been a continual problem since the enactment of the current legislation. It has been studied, criticized and abused for many years.<sup>3</sup> The guidance of the Supreme Court in the *Singh* case should provide the impetus for long-delayed reform in this area. On a broader scale, the decision can be viewed as an important comment on the Canadian Charter of Rights and Freedoms;<sup>4</sup> the Supreme Court has demonstrated that it will not avoid the difficult task imposed upon it by the enactment of the Charter.

So many important issues of constitutional, administrative and immigration law were canvassed in *Singh* that it is difficult to write a short but comprehensive comment. Procedural fairness and “the principles of fundamental justice” as set out in section 7 of the Charter were the main issues in the judgment. Other issues which arose in the case were hardly less significant. The role of the Canadian Bill of Rights,<sup>5</sup> the effect of international obligations, the application of the Charter to aliens, the standard of scrutiny required by section 1 of the Charter, and the appropriate remedy under the Charter were all viewed as worthy of comment by the Supreme Court.

The case involved seven unsuccessful refugee claimants whose appeals were consolidated for the Supreme Court of Canada hearing. Six of the

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<sup>1</sup> (1985), 58 N.R. 1.

<sup>2</sup> S.C. 1976-77, c.52; hereafter referred to as the Act.

<sup>3</sup> Government sponsored studies include Task Force on Immigration Practices and Procedures, *The Refugee Status Determination Process* (Nov., 1981); Ed Ratushny, Special Advisor, *A New Refugee Status Determination Process for Canada* (May, 1984); W. Gunther Plaut, Special Policy Advisor, *Refugee Determination in Canada* (April, 1985).

<sup>4</sup> Part 1, Constitution Act 1982, Schedule B to the Canada Act 1982, c.11 (U.K.); hereafter referred to as the Charter.

<sup>5</sup> R.S.C. 1970, Appendix III.

appellants were Sikhs from India and were members of the Akali Dal party in that country. One appellant was of Indian ethnic origin living in Guyana. All claimed refugee status in Canada based on persecution of a political, racial or religious nature. Although the cases proceeded through the immigration system in slightly different manners, these procedural disparities were deemed of no significance. The court was not concerned with the merits of the various claims. Rather, the decision focussed on the overall procedural fairness of the inland refugee determination process. This issue has long been a major dilemma of immigration practice. The court was aided by the intervention of the Federation of Canadian Sikh Societies and the Canadian Council of Churches.

The decision of the Supreme Court was divided equally into two concurring reasons for judgment. Beetz J. (Estey and McIntyre JJ. concurring) and Wilson J. (Dickson and Lamer JJ. concurring) both agreed that all of the appeals should be allowed.<sup>6</sup> Although reaching the same conclusion, the two judgments were based on completely different criteria. Beetz J., after counsel were requested by the court to submit written arguments concerning the Canadian Bill of Rights, preferred to allow the appeals on the basis that the immigration proceedings in issue conflicted with the Bill of Rights. He refused to comment on the application of the Charter. In contrast, Wilson J.'s clear and convincing judgment was directly concerned with the role of section 7 of the Charter. It is for this reason that her judgment is much more interesting and will be, for the most part, the subject of this comment.

This is not to say that Beetz J.'s judgment is unworthy of comment. One might ask why he chose to resurrect the *quasi*-constitutional Bill of Rights in preference to using the Charter. Given its unimpressive history, it would hardly seem appropriate to suggest that, with the enactment of the Charter, the Bill of Rights has now taken on a new status. Nevertheless, it is clear that section 26 of the Charter protects existing rights, and violations of the Bill of Rights can be remedied. However, it is somewhat ironic that little reference is made to the sterile history of the Bill of Rights by Beetz J., and that it should receive some heightened status it never achieved when it was the "only kid on the block". Yet the Supreme Court is obviously giving us a hint for the future. There are some rights in the Bill of Rights which are more widely drafted than their counterparts in the Charter.<sup>7</sup> Although this did not appear to be the case in *Singh*, the possibility of using the Bill of Rights in future cases should be canvassed as a very real option. Indeed, Beetz J. treats the Bill of Rights as if it had the same status as the Charter.

<sup>6</sup> Ritchie J. sat on the case but took no part in the judgment.

<sup>7</sup> Cf. s.2(d) of the Canadian Bill of Rights with s. 11(c) of the Canadian Charter of Rights and Freedoms respecting self-crimination and compellability.

On the whole it was Wilson J. who broke the new ground. Overcoming a muddled legislative and administrative scenario, her logically consistent judgment can hardly be criticized. No doubt it will have far reaching importance for the future.

### *The Legislative and Administrative Background*

The legislative and administrative setting of the case is quite complicated, at least for those not intimately familiar with the refugee determination process as outlined in the Act. This process has long been the subject of studies, reports and debates. It is currently undergoing continued analysis by the federal government.<sup>8</sup> It is a classic example of the refusal of government to act when they have long understood the dimensions of the problem. To some, the decision in *Singh* may have further muddied the waters, but without doubt it could be the stimulus for change. The government's refusal to deal with the critical issue of the protection of refugees in Canada, and the procedure by which applicants are screened, has been outrageous.

Simply put, any alien threatened with removal from Canada for violation of the Act may apply for protection as a refugee.<sup>9</sup> Such protection ensures that refugees may not be returned to a country where they may be persecuted.<sup>10</sup> The definition of refugee is that accepted by most of the international community and is stated as follows:<sup>11</sup>

"Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country or
- b) not having a country of nationality is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country.

In fact, eventually most refugees, so determined, will be allowed to remain in Canada as permanent residents. Although the determination of refugee status must be viewed to a certain extent as inherently political and value-laden, what has been established is an adjudicative process designed to apply law—the definition—to facts as set out by the applicant. Politics and policy ostensibly have no direct role in individual decision-making.

The system set out in the Act to make these determinations, however, is overly convoluted and complex. The reality is that most rejected applicants will never receive an oral hearing, despite the fact that most

<sup>8</sup> *Supra*, footnote 3.

<sup>9</sup> Immigration Act, 1976, *supra*, footnote 2, ss. 45-48.

<sup>10</sup> *Ibid.*, ss.4(2), 55.

<sup>11</sup> *Ibid.*, s.2(1).

claims are rejected on the basis of a lack of credibility.<sup>12</sup> Claimants provide their version of the facts in the form of an "examination under oath" presided over by a Senior Immigration Officer. This officer is not a decision-maker, but rather an administrative conduit to the decision-makers in Ottawa. The transcript of the examination under oath and additional information is forwarded to the Refugee Status Advisory Committee which makes a recommendation to the Minister of Employment and Immigration. The applicant may seek to have any negative decision of the Minister redetermined by the Immigration Appeal Board.<sup>13</sup> However, applicants for redetermination are provided with a full hearing only if they are able to show on the basis of the written documentation that it is more likely than not that they will be successful.<sup>14</sup> As a result, very few claimants whose claim is initially denied by the Minister will ultimately receive a full hearing.

Although there are many perceived problems in the various steps within the determination system, since the *Singh* case arose by way of an application under section 28 of the Federal Court Act<sup>15</sup> to "review and set aside" the judgment of the Immigration Appeal Board in refusing to allow a full hearing, the Supreme Court judgments concerned the procedural fairness at this stage alone.<sup>16</sup> The procedural fairness of the redetermination stage of the process was challenged under section 7 of the Charter, which provides:

Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Three questions were raised in Wilson J.'s judgment:

- (1) Whether refugee claimants were entitled, by virtue of their physical presence in Canada, to the protection of section 7 of the Charter;
- (2) Whether section 71(1) of the Act denied rights under section 7;
- (3) Whether section 71(1) of the Act was a reasonable limitation in terms of section 1 of the Charter on section 7 rights.

<sup>12</sup> The application of the definition is discussed in detail in C.J. Wydrzynski, *Canadian Immigration Law and Procedure* (1983), pp. 313-339.

<sup>13</sup> Immigration Act, 1976, *supra*, footnote 2, s.70.

<sup>14</sup> *Ibid.*, s.71; as construed in *Wiatkowski v. M.E.I.*, [1982] 2 S.C.R. 856. S.71(1) states:

Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention refugee.

<sup>15</sup> R.S.C. 1970, 2nd Supp., c.10.

<sup>16</sup> See, *infra* under *Remedy*.

Each of these questions was answered in an innovative and compelling fashion by Wilson J.

### *The Protection of Aliens Under the Charter*

An extremely important issue decided by Wilson J. in *Singh* concerned the general application of the Charter to aliens. The history of aliens and the protection of fundamental rights has been mixed. Aliens seem to suffer under a severe handicap when they seek to apply elements of fundamental rights to domestic law immigration processes.<sup>17</sup> Immigration and admission to Canada has been seen as a privilege to be determined by statute and regulation, and not as a matter of right. The state can determine as a question of privilege what conditions are deemed to be appropriate. The underlying presumption seemed to be that aliens had no cause for complaint if legislative rights did not measure up to objective standards offered by concepts of overriding fundamental rights. It would seem that this simplistic view of the nature of alien status in relation to immigration law has been laid to rest by the Supreme Court of Canada in *Singh* and the formalistic notion of the rights/privileges dichotomy has been discarded.

Wilson J. defined the word "everyone" in section 7 of the Charter to include "every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law".<sup>18</sup> As to the argument that aliens were essentially creatures of privilege, and thus possessed no rights in relation to their status, Wilson J. was blunt in stating that "this kind of analysis is [un]acceptable in relation to the Charter".<sup>19</sup> Refugee claimants were "entitled as a matter of law to the incidence of that status provided for in the [Immigration] Act".<sup>20</sup> Therefore, aliens were entitled to "fundamental justice in the adjudication of their status".<sup>21</sup> In a sense, aliens had statutory "rights" under the Immigration Act, 1976 (for example, a "right" under section 55 not to be removed to a country of persecution). Despite the fact that in general alien status could be viewed as a privilege, refugee claimants have significant statutory rights which can be protected by the Charter.

Whether or not this characterization can be utilized in relation to other statutory rights under the Immigration Act, 1976 was not specified, but a right not to be removed to a country of persecution was particularly important. Indeed, international law was used to interpret this particular

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<sup>17</sup> See, Wydrzynski, *op. cit.*, footnote 12, pp. 458-467. See also, P.P. Craig, *Administrative Law* (1983), pp. 287-288.

<sup>18</sup> *Supra*, footnote 1, at p. 49.

<sup>19</sup> *Ibid.*, at p. 58.

<sup>20</sup> *Ibid.*, at p. 59.

<sup>21</sup> *Ibid.*

statutory right in a favourable light. Wilson J. stated that the claimants were "entitled to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the" United Nations Convention on Refugees.<sup>22</sup> She refused to dilute this statutory right on the basis of whether the claim originally arose inland or on seeking admission. She felt that this kind of distinction could encourage evasion at the border, if refugee claimants could acquire procedural rights through an inland proceeding.<sup>23</sup>

Thus, on the whole, the decision has further clarified the constitutional rights of individuals whose status is governed by the Act. At least in certain situations they have a right to use the protections of the Charter in relation to the determination of their status under the Act. Wilson J. was careful to state that her judgment was not concerned with the general right of aliens to enter or remain in Canada. Indeed, aliens probably have no such right.<sup>24</sup> In addition, refugee claimants outside of Canada would seem to be in a different constitutional and statutory position.<sup>25</sup> Nevertheless, section 4(2) of the Act gives refugees, so determined, a right to remain "while lawfully in Canada". While there have been some interpretative difficulties with this section,<sup>26</sup> refugee claimants are entitled to assert that this statutory right not be impaired without adherence to constitutional standards.

### Section 7 of the Charter

After concluding that the Charter generally applied to the Act because the subject matter of immigration was "clearly a matter falling within the authority of Parliament under section 91(25) of the Constitution Act, 1867",<sup>27</sup> the court had to determine the specific relationship between

<sup>22</sup> *Ibid.*, at p. 39.

<sup>23</sup> *Ibid.*, at p. 60. It was noted that in the United States constitutional rights of aliens vary "on admission", and when they are physically present in the country, including even illegal aliens. Wilson J. saw no reason to make the same distinction in Canadian law; *ibid.*, at pp. 60-61.

<sup>24</sup> Oft-quoted is Lord Denning M.R. in *R. v. The Governor of the Pentonville Prison, ex parte Azam*, [1973] 2 All E.R. 741, at p. 747 (C.A.) respecting the common law position of the alien and immigration. However, the supremacy of legislation has largely made the common law position irrelevant. See Laskin C.J.C. in *Pringle v. Fraser*, [1972] S.C.R. 821, at p. 825: "There is no common law of immigration". Discretion remains, but not prerogative whim.

<sup>25</sup> See, Immigration Regulations 1978, SOR/78-172, s.7 respecting "Convention Refugees Seeking Resettlement".

<sup>26</sup> See *Boun-Leua v. M.E.I.*, [1981] 1 F.C. 259 (F.C.A.). However, cf. *Dmitrovic v. M.E.I.*, I.A.B., 80-6094, Sept. 17, 1980, C.L.I.C. No. 24.15.

<sup>27</sup> *Supra*, footnote 1, at p. 48. It should be asked why no mention was made of s.95 of the Constitution Act, 1867, which provides concurrent but paramount jurisdiction to the federal government over agriculture and immigration. Surely, this section is a more

refugee claimants and the protection of "life, liberty and the security of the person" in section 7 of the Charter. This hurdle did not prove difficult to overcome.

Although some earlier cases had held that section 7 could have no application to the refugee process because the threat to "life, liberty and the security of the person" came from *foreign governments* and not from Canada,<sup>28</sup> this illusion of causality was not a bar to the claim of constitutional rights by refugee applicants. Recognizing that the words "life, liberty and the security of the person" were capable of expansive interpretation, and after some discussion of whether this phrase involved three distinct elements or encompassed a "single right" theory, Wilson J. concluded that refugee claimants could fall within the purview of section 7. The fact that Canada was not engaging directly in deprivation of life, liberty or security of the claimant was not conclusive. By depriving claimants of constitutional rights, Canada was at least increasing the *threat* of persecution by others. There had to be acceptance of the fact that rejection of a refugee could result in death, arrest, detention, restrictions on physical liberty and physical punishment. Wilson J. concluded:<sup>29</sup>

It seems to me that even if one adopts the narrow approach advocated by counsel for the Minister, "security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. I note particularly that a Convention refugee has the right under s. 55 of the Act not to "... be removed from Canada to a country where his life or freedom would be threatened. . ." In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s.7.

The argument that Canada could simply ignore the realities of returning a refugee to a country of persecution on the basis that the violations would emanate from the foreign government and not Canada was totally without merit.

Given the potential consequences for the appellants of a denial of that [refugee] status if they are in fact persons with a "well-founded fear of persecution", it seems to me unthinkable that the *Charter* would not entitle them to fundamental justice in the adjudication of their status.<sup>30</sup>

Thus, it was almost by definition that refugee claimants were involved in a process involving the "security of the person". Any other conclusion would have ignored the whole basis of the international protection of refugees.

Having held that refugee claimants were entitled to raise constitutional issues, and that, in fact, the issue of deprivation of their "security

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direct source of federal authority than s.91(25) which refers to "naturalization and aliens"? See, Wydrzynski, *op. cit.*, footnote 12, pp. 25-38. Naturalization procedures and domestic legal treatment of aliens apart from immigration are more appropriate subjects of s.91(25).

<sup>28</sup> Notably, *Singh v. M.E.I.*, [1983] 2 F.C. 347, at p. 349 (F.C.A.), per Pratte J.

<sup>29</sup> *Supra*, footnote 1, at p. 55.

<sup>30</sup> *Ibid.*, at p. 59.

of the person” arose in the determination process, Wilson J. focussed on the central issue in the case. Could the procedures before the Immigration Appeal Board on a redetermination be viewed as a denial of “fundamental justice” as defined in section 7 of the Charter? Specifically, could the lack of an oral hearing for refugee claimants seeking a redetermination of their claims be viewed as consistent with fundamental justice?

Wilson J. commented on the relationship between the statutory process provided in the Act and the common law doctrines of natural justice and fairness. Although the Immigration Appeal Board would be acting in a *quasi*-judicial capacity if a full oral hearing were allowed, and full procedural protection would have to be provided at this stage, the court was nevertheless prevented by the Act from requiring an oral hearing on a claim for redetermination. The test established as a prerequisite for an oral hearing in section 71(1) of the Immigration Act, 1976 was difficult to reconcile with the principles of natural justice, but the section had proven too specific in terms of its statutory language to allow the courts to “read in” the requirement of an oral hearing through common law doctrine. Common law doctrines must give way to specific statutory language. It was clear, however, that the Charter and “principles of fundamental justice” were under no such limitation, being superior norms in relation to legislative enactments.

The definition of “fundamental justice” will undoubtedly continue to be cause for debate, but there has been little disagreement that it includes some notion of *procedural* fairness. While procedural fairness may vary with the circumstances, the violations of fundamental justice in the refugee redetermination process were patently obvious. Even recognizing that “. . . written submissions may be an adequate substitute for an oral hearing in appropriate circumstances”,<sup>31</sup> it was clear that to make a negative decision on the basis of a lack of credibility without the benefit of an oral hearing was violative of procedural fundamental justice. As stated by Wilson J.:<sup>32</sup>

. . . I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. . . I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

Yet, it was not the lack of an oral hearing *per se* that resulted in the deprivation of constitutional rights, but an understanding of the role of an oral hearing, given the proper characterization of the redetermination process as a whole. The lack of an oral hearing was symptomatic of a larger problem: “. . . the inadequacy of the opportunity the scheme pro-

<sup>31</sup> *Ibid.*, at p. 63.

<sup>32</sup> *Ibid.*



vides for a refugee claimant to state his case and know the case he has to meet".<sup>33</sup>

Despite the respondent's arguments to the contrary, Wilson J. was unwilling to see the redetermination before the Immigration Appeal Board as anything other than an adversarial proceeding. The claimant must demonstrate that the Minister was wrong. "Moreover, he must do this without any knowledge of the Minister's case beyond the rudimentary reasons which the Minister has decided to give him in rejecting his claim".<sup>34</sup> It could not be said that the first stage of the proceedings before the Immigration Appeal Board was merely administrative. The Minister was "waiting in the wings"<sup>35</sup> and would contest any claim that was allowed to proceed to a hearing. The system established under the Act made challenge to the Minister's decision extremely onerous. Indeed, Wilson J. went so far as to suggest that she found "it difficult to see how a successful challenge to the accuracy of the undisclosed information upon which the Minister's decision is based could ever be launched".<sup>36</sup>

As a result, given the lack of an oral hearing and the inability of the claimant to know the case he has to meet, principles of fundamental justice were ignored by the legislative scheme. Even Beetz J. was quite unequivocal in his assessment of the lack of fairness in the procedural structure: "In my opinion, nothing will pass muster short of at least one full oral hearing before adjudication on the merits".<sup>37</sup>

### *Section 1 of the Charter*

Having determined that refugee claimants were deprived of fundamental justice in the adjudication of their claims, Wilson J. next had to determine whether the legislative scheme could be saved by reference to the "reasonable limits" provision in section 1 of the Charter.<sup>38</sup> As Wilson J. recognized, the general role to be attributed to section 1 by the courts is of extreme importance:<sup>39</sup>

If too low a threshold is set, the courts run the risk of emasculating the *Charter*. If too high a threshold is set, the courts run the risk of unjustifiably restricting government action. It is not a task to be entered upon lightly.

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<sup>33</sup> *Ibid.*, at pp. 63-64.

<sup>34</sup> *Ibid.*, at p. 65.

<sup>35</sup> *Ibid.*, at p. 64.

<sup>36</sup> *Ibid.*, at p. 66.

<sup>37</sup> *Ibid.*, at p. 16.

<sup>38</sup> Section 1 is as follows:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

<sup>39</sup> *Supra*, footnote 1, at p. 67.

The standard of scrutiny used by the courts under section 1 of the Charter will ultimately determine its relevance as a dominant force in the protection of civil liberties in Canada. Unfortunately, little argument was addressed to this issue by counsel and few general propositions can be drawn from the case. Nevertheless, Wilson J. outlined some important observations concerning the nature of section 1.

Although not specifically referring to the onus requirement (which no doubt is placed upon the government), Wilson J. made clear the necessity for clear and convincing extrinsic evidence if section 1 is to be applied in a proper fashion.<sup>40</sup> It was understood that the arguments presented by the government were rather meagre due to time constraints. However, Wilson J. was unwilling to countenance the government's position as demonstrating a reasonable limit on constitutional rights. While this section of the judgment was rather brief, Wilson J. did elaborate on an important issue in terms of the "reasonable limits" clause.

The Minister of Employment and Immigration had argued that the office of the United Nations High Commissioner for Refugees had approved of the Canadian refugee system, that the Canadian system was relatively fairer than Commonwealth and Western European counterparts, and that further extension of the system to accommodate oral hearings would strain the financial resources of the Immigration Appeal Board. Perhaps because of the inadequacy of the extrinsic evidence offered, Wilson J. was not persuaded that the requirements of section 1 of the Charter had been fulfilled. Her comments concerning the balancing of constitutional rights with administrative convenience and the costs involved were especially illuminating:<sup>41</sup>

... I have considerable doubt that the type of utilitarian consideration brought forward... can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so.

It was clear that the government had failed to meet the onus placed upon it by section 1 to demonstrate that it was reasonable to "deprive the appellants of the right to life, liberty and the security of the person by adopting a system for the adjudication of refugee status which does not accord with the principles of fundamental justice".<sup>42</sup>

### *The Remedy*

Having determined that the appellants were entitled to relief, the nature of the remedy was discussed. As mentioned previously, the court felt confined to the review of the redetermination stage by the Immigra-

<sup>40</sup> *Ibid.*, at pp. 67-68, quoting *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at p. 384, per Estey J.

<sup>41</sup> *Ibid.*, at p. 69.

<sup>42</sup> *Ibid.*, at pp. 68-69.

tion Appeal Board. No revamping of the entire claims system was possible on these appeals, both because of the manner in which the court acquired jurisdiction, and because of the difficulty in legislating judicially. As stated by Beetz J.:<sup>43</sup>

There is probably more than one way to remedy the constitutional shortcomings of the *Immigration Act, 1976*. But it is not the function of this Court to re-write the *Act*. Nor is it within its power. If the *Constitution* requires it, this and other courts can do some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery.

In the result, the appellants were entitled to receive an oral hearing on the merits of their claims, as well as a declaration that section 71(1) of the *Immigration Act, 1976* was of no force and effect to the extent that it was inconsistent with the principles of fundamental justice.<sup>44</sup>

### Conclusion

The *Singh* case has created a distinct dilemma for the federal government. Implementation of the constitutional requirements specified by the Supreme Court will require a major revision of the existing system if an uncontrollable backlog is to be avoided. As of February, 1986 the Minister had estimated the backlog at over 20,000 cases. Some form of legislative amendments are scheduled for the spring of 1986. Whatever system finally emerges, the requirements laid down in *Singh* will have to be observed.

Although the judges in *Singh* were careful not to comment on the refugee claims system as a whole, it was clear that they were aware of the dissatisfaction expressed by many of those involved in the process.<sup>45</sup> It is unfortunate that the result in *Singh* had little universal application to the other stages of the claims system. The inadequate treatment of the role of credibility is still a widespread major flaw. The decision's impetus for change will largely stem from the fact that the current system will now be wholly unworkable and, therefore, change will be a necessity. No doubt the specifics of these reforms will be the source of future litigation.

Thus, it is the system as a whole which will be the continued subject of debate. The current procedures serve no particular interest well and are incapable of producing equitable results without significant delay. The

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<sup>43</sup> *Ibid.*, at p. 22.

<sup>44</sup> Beetz J. held that such a remedy would specifically result in the striking out of the latter portion of s.71(1). Thus, the sub-section would read as follows:

Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application.

Presumably, compliance with the court's decision will guarantee that consideration of an application includes an oral hearing, at least where credibility may be an issue. *Quaere* the position of *legal* incapacity. In such instances one would expect that the processes of disclosure and discovery with respect to the Minister's determination would have to be considerably reformed.

<sup>45</sup> See, e.g. Wilson J. *supra*, footnote 1, at pp. 69-70.

creators of the current legislative scheme attempted to satisfy too many divergent interests. Governmental, administrative, political, human rights and procedural fairness interests were all addressed by the claims system. Yet, rather than face up to the task at hand and deal directly with a claim in a fair, swift and practical manner, secrecy and fragmentation of decision-making were chosen as the legislative vehicle. The multiplicity of actors in the system undermined any possibility of equitable decision-making. Simplification, rationalization and clarification is urgently needed. Such reform, it is to be hoped, will be the legacy of *Singh* and, in future, the potential for critical mistakes will be reduced to a minimum.

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EVIDENCE—JUDICIAL NOTICE—HISTORICAL DOCUMENTS AND HISTORICAL FACTS—INDIAN TREATY RIGHTS.—Taking judicial notice of historical records and historical facts has long been a practice of the common law.<sup>1</sup> Yet, despite the venerable antiquity of the doctrine, its contours and substantive content are still ill-defined, as is implicitly suggested in the recent decision of the British Columbia Court of Appeal in *R. v. Bartleman*.<sup>2</sup> In that case the court considered a substantial volume of historical evidence relating to Indian hunting rights on Vancouver Island, and left undecided some seven questions, including the extent to which judicial notice may be taken of historical records and historical facts.<sup>3</sup> This issue was not fully argued, nor did the judgments of Lambert J.A. and Esson J.A. (Carrothers J.A. concurring) make reference to the Canadian and English cases in which judicial notice of historical facts and historical documents has been taken or the doctrine discussed.

Yet, the decision is potentially important for the law of evidence in view of the precedent-setting conduct of Lambert J.A. who states in his judgment that he examined the relevant primary archival materials at the British Columbia Provincial Archives and also consulted secondary historical writings apparently not the subject of submissions at trial or on

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<sup>1</sup> The older cases will be discussed below.

<sup>2</sup> (1984), 12 D.L.R. (4th) 73, 55 B.C.L.R. 78 (B.C.C.A.).

<sup>3</sup> *Ibid.*, at pp. 92-93 (D.L.R.), 98-99 (B.C.L.R.).

appeal, all under the rubric of taking judicial notice. In contrast Esson J.A. distanced himself from that conduct:<sup>4</sup>

I agree entirely with the reasons given by Mr. Justice Lambert for the second conclusion and, with respect to it, wish to add nothing. With respect to the first issue, I agree with his reasons subject only to the reservation that I have not seen or considered the historical material, referred [to] by Mr. Justice Lambert in the section of his reasons headed "Judicial Notice of Historical Facts", which was not included in the evidence at trial or the record before this court.

Without reference to such material, I have reached the same conclusion as Mr. Justice Lambert. The facts which lead me to that conclusion are primarily those summarized in his reasons for judgment in Part II under the heading "The Ethnological Facts", all of which are based on the evidence and admissions. That being so, I do not need to consider the question whether the doctrine of judicial notice would permit reference to other material. I express no opinion on that question.

From the reported decision, the extent of the material considered under the doctrine of judicial notice is not clear. Much of the historical material was included as evidence. Some was not. Thus Lambert J.A. states:<sup>5</sup>

Much of this material was put in evidence. But some of it was not. To that extent, and to that extent only, I have gone outside the evidence led at trial. In doing so, I have regarded myself as taking judicial notice of indisputable, relevant, historical facts by reference to a readily obtainable and authoritative source, in accordance with the ordinary principles of judicial notice. . .

To the extent that these writings deal with facts, I have relied on them only to draw my attention to facts that I was then able to verify independently by examining the letters and the written component of the treaties, and no further. For the purposes of my own independent verification, I have reached only those conclusions that I regard as being beyond rational dispute. To the extent that the writings deal with ideas, I have considered the ideas whenever I found it helpful to do so.

This admirable spirit of historical inquiry suggests three issues to which this comment will be devoted. First, the extent to which a doctrine of judicial notice should permit courts to conduct their own historical research requires consideration. Secondly, in view of the fact that the specific question of taking judicial notice of historical records and historical facts was not fully argued, it may prove instructive to examine the decisions to date to determine the common law's approach to the issue. Thirdly, an examination of the problems and pitfalls in evaluating historical materials should be made, within the context of the *Bartleman* decision, to demonstrate in a preliminary fashion the difficulties in the practice of history.

### *R. v. Bartleman*

The facts were simple. The accused, Bartleman, was a member of the Tsartlip Indian Band and a descendant of the Saanich people who

<sup>4</sup> *Ibid.*, at pp. 93 (D.L.R.), 98 (B.C.L.R.).

<sup>5</sup> *Ibid.*, at pp. 77 (D.L.R.), 82 (B.C.L.R.).

made the North Saanich treaty on February 11, 1852. Bartleman, while hunting with his cousin, a member of the Hallalt people, on land formerly owned by the Hallalt people, shot and killed a deer. He was charged with unlawfully hunting big game with a rifle using a rimfire cartridge contrary to the Wildlife Act.<sup>6</sup> Both men had hunted in the area before and Bartleman was the main hunter for his large family. The general area was about one hundred acres of uncultivated bush owned by one Groves, part of which had been logged about ten years before and over which a power line ran. The deer was shot in a clearing about a mile from the road; however, at trial there was evidence that the shots could be heard by neighbours. Apparently, Bartleman did not know the property was privately owned nor that hunting was prohibited. Groves had given his permission on several occasions to hunt on his land but only to people whom he personally knew to be reliable, and never to Bartleman, whom he apparently did not know.

Bartleman's defence was simple. He argued that he was exercising a right to hunt under the treaty so that he was exempt from the provisions of the Wildlife Act by virtue of section 88 of the Indian Act.<sup>7</sup> At trial, Giles Prov. Ct. J. found that the agreement of February 11, 1852 made between the Hudson's Bay Company and the North Saanich people was a treaty for the purposes of section 88,<sup>8</sup> so that, provided Bartleman's hunting was done pursuant to the terms of the treaty, the Wildlife Act did not apply.

The key sentence in the treaty followed a statement acknowledging the absolute relinquishment of all legal title in the land in question and read thus: "[I]t is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly". The learned trial judge found the plain meaning of the phrase "unoccupied lands" to refer solely to lands within the territory described by the treaty. Since Bartleman was not hunting within this area, he was subject to the Wildlife Act and guilty of unlawful hunting. In the alternative, the trial judge also found on the facts that the place where the deer was shot was not "unoccupied". It had been logged and was still used by Groves to supply his

<sup>6</sup> S.B.C. 1982, c. 57.

<sup>7</sup> R.S.C. 1970, c. I-6, s. 88:

Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

<sup>8</sup> In so finding the learned judge was guided by *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.); *aff'd* [1965] S.C.R. vi, (1965), 52 D.L.R. (2d) 481n: see unreported decision of March 4, 1980. The Court of Appeal agreed: see *supra*, footnote 2, per Lambert J.A. at pp. 86 (D.L.R.), 91 (B.C.L.R.).

farm with timber, and occasionally for cattle grazing. It was set aside by its owner for the preservation of game. Moreover, since the shots had been heard by neighbours who had called the police, the area was evidently sufficiently inhabited to be regarded as occupied.<sup>9</sup>

On appeal before Melvin Co.Ct. J.,<sup>10</sup> Bartleman argued that the phrase "unoccupied lands" was not restricted to the North Saanich lands sold to the Hudson's Bay Company, but included other lands, outside the treaty area, where the Saanich customarily hunted. The argument was rejected on the natural construction of the words of the treaty. Nor did the learned judge consider the second ground, that is, the meaning of "unoccupied". On appeal to the British Columbia Court of Appeal these two issues were again argued. First, was Bartleman validly hunting outside treaty land, and secondly, was the land where Bartleman was hunting "unoccupied" within the meaning of the treaty?

The first issue of treaty interpretation was approached in two ways by Lambert J.A. First, he drew certain conclusions from his private historical forays about how treaties should be approached. Secondly, he relied on the established common law rules relating to treaty interpretation. Both approaches converged. Lambert J.A.'s historical researches will be critically discussed as a discrete topic below, so it will suffice here to note the conclusions which resulted. He decided that the text of the treaty was of no significance to the Indians because the agreement was reduced to writing after it was made, the Indians did not understand English and probably did not make their marks personally. Thus, the text should not be "regarded as anything more than some evidence of what was generally agreed to".<sup>11</sup> In the light of these conclusions, and apparently on the implicit assumption that Indian treaties should normally be interpreted like contracts,<sup>12</sup> Lambert J.A. decided that the normal interpretation rules for agreements were inapplicable.<sup>13</sup> Instead, Indian treaties should be liberally construed and doubtful expressions resolved in favour of the Indians as a number of cases of great authority have held.<sup>14</sup>

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<sup>9</sup> "Unoccupied" in such cases has been considered in *R. v. Smith*, [1935] 2 W.W.R. 433 (Sask. C.A.) and *R. v. Rider* (1968), 70 D.L.R. (2d) 77, 66 W.W.R. 100 (Alta. Mag. Ct.).

<sup>10</sup> Unreported decision of 21 January 1981.

<sup>11</sup> *Supra*, footnote 2, at pp. 86 (D.L.R.), 91 (B.C.L.R.).

<sup>12</sup> It is not yet clear whether Indian treaties should be treated like contracts, legislation or international treaties and all three possibilities have been canvassed by various courts: see generally P.A. Cumming, N.H. Micklenberg (eds.), *Native Rights in Canada* (2nd ed., 1972), pp. 54-58; Bruce H. Wildsmith, *Pre-Confederation Treaties*, in Bradford W. Morse (ed.), *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (1985), ch. 4 *passim*. The best textbook discussion of the rules of contract interpretation is that in G.H. Treitel, *The Law of Contract* (6th ed., 1983), ch. 6.

<sup>13</sup> *Supra*, footnote 2, at pp. 86-87 (D.L.R.), 92 (B.C.L.R.).

<sup>14</sup> *Ibid.*, at pp. 87-89 (D.L.R.), 92-94 (B.C.L.R.). See also *R. v. White and Bob*,

Three possible interpretations of the treaty were discussed in oral argument before the Court of Appeal: (1) that Indian hunting and fishing rights were confirmed with respect to the land sold to the Hudson's Bay Company, so long as it was unoccupied, but such rights outside that area were extinguished; (2) that Indian hunting and fishing rights were confirmed with respect to the land sold to the Hudson's Bay Company, so long as it was unoccupied, but such rights outside that area were not dealt with by the treaty at all; (3) that Indian hunting and fishing rights were confirmed with respect to the land sold to the Hudson's Bay Company, so long as it was unoccupied, but also were to be confirmed generally with respect to all land where the Indians traditionally hunted and fished, so long as that land was unoccupied.

Lambert J.A. preferred the third interpretation for six reasons. The third interpretation may also be supported on two other grounds: first, it accords with the ordinary, literal meaning of the words of the treaty and certainly with any liberal interpretation; and secondly, it is on all fours with a somewhat similar case in the Ontario Court of Appeal, *R. v. Taylor and Williams*.<sup>15</sup> In contrast, of Lambert J.A.'s six reasons at least four represented in whole, or in part, the fruits of his historical researches.<sup>16</sup>

The six reasons may be summarized briefly. First, the "historical factual matrix"<sup>17</sup> suggested that the Saanich would have been permitted to hunt over neighbouring unoccupied lands because their treaty was one of eleven which constituted a continuous patchwork of a small area of the south-eastern extremity of Vancouver Island over which all of the tribes concerned were accustomed to hunt through economic necessity. Secondly, the oral traditions of the Saanich held continuously since 1852 were consistent with the right to hunt over adjoining unoccupied lands. Thirdly, since hunting rights were coupled with fishing rights and since fishing rights had to be exercised outside the treaty area because there were no waters within them, then hunting rights must also have extended outside the treaty area. This conclusion is supported by reference to correspondence<sup>18</sup> relating to the making of the agreements and by a letter

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*supra*, footnote 8; *R. v. George*, [1966] S.C.R. 267, (1966), 55 D.L.R. 386; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (Ont. C.A.); *Nowegijick v. The Queen*, [1983] 1 S.C.R. 28, (1983), 144 D.L.R. (3d) 193. The principles of treaty interpretation have been developed in a voluminous American case law; see for example: *Jones v. Meehan*, 175 U.S. 1 (1899); *Choctaw Nation v. State of Oklahoma*, 25 L. Ed. 2nd 615 (U.S.S.C., 1970), which have been cited in Canada.

<sup>15</sup> *Supra*, footnote 14.

<sup>16</sup> The third, fourth, fifth and sixth reasons refer to historical documents which were not part of the written record before the Court of Appeal and may not have been the subject of oral argument in that court.

<sup>17</sup> *Supra*, footnote 2, at pp. 89 (D.L.R.), 94 (B.C.L.R.).

<sup>18</sup> Presumably the correspondence is that between Fort Victoria and the Hudson's Bay Company offices in London between 1849 and 1852 which Lambert J.A. examined at



from Governor James Douglas to the Speaker of the Colonial Legislature in February 1859,<sup>19</sup> in which reference is made to coastal fisheries but not inland fisheries. Fourthly, the interpretation favouring hunting rights over areas adjoining the treaty area was said to be consistent with the instructions given by Archibald Barclay in London to James Douglas, the Hudson's Bay Company factor, in a letter of December, 1849.<sup>20</sup> Fifthly, this interpretation was not contrary to the words of Douglas reporting to Barclay in a letter of May, 1850,<sup>21</sup> nor to the words of the treaty.<sup>22</sup> Sixthly, Douglas' letter to the Speaker of February, 1859 stated his view that the treaties protected the original right of "hunting over *all* occupied crown land".

Once Lambert J.A. determined that "unoccupied lands" included lands adjoining the treaty area over which the Indians still had a right to hunt, it remained to determine whether the land on which the deer had been shot was "unoccupied". On appeal Bartleman argued that hunting was permitted unless the occupation of the land was such that it was inconsistent with its use for hunting, and Lambert J.A. accepted that test.<sup>23</sup> The uses of the land by Groves which persuaded the lower court judges that the land was occupied were cursorily dismissed by Lambert J.A., whose conclusion could be said to be insensitive to the fact that there are other ways of using and enjoying land in addition to continuous cultivation or actual habitation. Promiscuous hunting clearly constituted a danger to grazing cattle, occasional loggers and permitted hunters, not to mention the game which was being preserved.

### *Judicial Notice*<sup>24</sup>

The historical materials which were subjected to "independent verification" by Lambert J.A. could be found and analysed by following the

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the Provincial Archives: *supra*, footnote 2, at pp. 77 (D.L.R.), 82 (B.C.L.R.). Only some of this correspondence was part of the written record, and it is not clear from the report of the decision (at pp. 90 (D.L.R.), 95 (B.C.L.R.)) which particular letters are meant in this context.

<sup>19</sup> This letter was referred to by Lambert J.A., *supra*, footnote 2, at pp. 83-84 (D.L.R.), 88-89 (B.C.L.R.) and was part of the written record. It is found in James E. Hendrickson (ed.), *Journals of the Colonial Legislatures of Vancouver Island and British Columbia, 1851-1871*, vol. II (1980).

<sup>20</sup> This letter was part of the written record, and is reproduced in the judgment of Lambert J.A., *supra*, footnote 2, at pp. 78 (D.L.R.), 83 (B.C.L.R.).

<sup>21</sup> This letter was part of the written record and is reproduced, *supra*, footnote 2, at pp. 79-80 (D.L.R.), 83-85 (B.C.L.R.).

<sup>22</sup> Lambert J.A., *supra*, footnote 2, at pp. 91 (D.L.R.), 96 (B.C.L.R.) refers to the Land Purchase Register, presumably meaning the North Saanich treaty.

<sup>23</sup> *Supra*, footnote 2, at pp. 91 (D.L.R.), 96 (B.C.L.R.). See also at pp. 92 (D.L.R.), 97 (B.C.L.R.): "... the hunting must take place on land that is unoccupied in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier".

<sup>24</sup> See the references contained in footnotes 28, 30, *infra*.

well-documented clues in the evidence submitted by the parties. Yet, while the learned judge did not conduct an extensive historical inquiry on his own, it is possible that a judge who decides to forage in archives and history libraries to verify independently evidentiary matters will be tempted to read other materials which may influence his perception of the case. The issue, then, is whether he may be permitted to rely on his researches under the rubric of taking judicial notice. Should a doctrine of judicial notice contain and condone such conduct? To answer this question it is necessary to re-examine the doctrinal nature of judicial notice *per se*, as well as the taking of judicial notice of historical records and documents specifically.

At the outset, two preliminary points of trite learning should be recalled. First, however the doctrine of judicial notice is characterized, it goes to the heart of the judicial function and of the adversarial system.<sup>25</sup> The judicial function is not to investigate independently but to judge the merits of the positions of the parties before the court. In theory, the "scientific" investigation of the facts is for the parties themselves and the role of the court is to determine which of the competing sets of facts appear to approximate the truth and to decide the dispute accordingly. "A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants."<sup>26</sup> However cynical one may be about judicial truth-finding, the dangers of abandoning the idealistic bases of the common law system were well-stated by Lord Denning M.R. when he asserted that the scientific investigation of the facts should be left to counsel, while the judge as umpire should determine which version of the dispute was the truth as far as can be humanly ascertained:<sup>27</sup>

... a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon L.C. who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question"? see *Ex parte Lloyd* [(1822) Mont. 70,

<sup>25</sup> James B. Thayer, *Judicial Notice and the Law of Evidence* (1890), 3 Harv. L. Rev. 285, at pp. 286-288; John S. Strahorn Jr., *The Processes of Judicial Notice* (1928), 14 Virg. L. Rev. 544, at pp. 554-555; Charles T. McCormick, *Judicial Notice* (1952), 5 Vand. L. Rev. 298, at pp. 301-302; Stanley A. Schiff, *The Use of Out-of-Court Information in Fact Determination at Trial* (1963), 41 Can. Bar Rev. 335; R.J. Delisle, *Evidence, Principles and Problems* (1984), pp. 1-4.

<sup>26</sup> *Phillips v. Ford Motor Co.* (1971), 18 D.L.R. (3d) 641, at p. 661, [1971] 2 O.R. 637, at p. 657 (Ont. C.A.), per Evans J.A.

<sup>27</sup> *Jones v. National Coal Board*, [1957] 2 Q.B. 55, at pp. 63-64, [1957] 2 All E.R. 155, at p. 159 (C.A.). Lord Denning further quoted Lord Bacon L.C. to the effect that to the common law an "over-speaking Judge is no well-tuned cymbal." see pp. 64 (Q.B.), 159 (All E.R.). See also the view of Edmund M. Morgan that an impartial tribunal is ideally suited to sifting the truth from the arguments of contesting adversaries: *Some Problems of Proof Under the Anglo-American System of Litigation* (1956), p. 128.

p. 72n]. And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict": see *Yuill v. Yuill* [[1945] P. 15, p. 20; [1945] 1 All E.R. 183, p. 189].

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour and prejudice, but clear to see which way lies the truth: and the less dust there is about the better.

Secondly, judicial notice<sup>28</sup> in its simplest form, and judicial notice expanded to include a variety of principles and rules related to it or confused with it, constitutes an exception to the grundnorm of evidence that a court should determine a case on the basis of the evidence before it. No proof of the matter of which judicial notice is taken is required. The rules of evidence are irrelevant; rather the court makes a conclusive determination of a question of fact or law without it being established by evidence. As such, judicial notice saves time and money; reduces possible confusion where the obvious is disputed; permits judicial control of juries; and should eliminate inconsistency between cases. Theoretically, it should be, as Thayer said, "an instrument of great capacity in the hands of a competent judge".<sup>29</sup> Precisely what that instrument is, is not unimportant.

Perusal of the standard textbooks and the scholarly literature on judicial notice indicates that the courts as well as most academic commentators favour an expansive concept of judicial notice.<sup>30</sup> However,

<sup>28</sup> Academic discussion of judicial notice has been most exhaustive in the U.S. until recently and includes the following: Thayer, *loc cit.*, footnote 25; James B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), ch. VII *passim*; Strahorn Jr., *loc cit.*, footnote 25; Edmund M. Morgan, Judicial Notice (1944), 57 Harv. L. Rev. 269; Arthur John Keeffe, William B. Landis Jr., Robert B. Shaad, Sense and Nonsense About Judicial Notice (1950), 2 Stan. L. Rev. 664; McCormick, *loc cit.*, footnote 25; Kenneth Culp Davis, Judicial Notice (1955), 55 Col. L. Rev. 945; John T. McNaughton, Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy (1961), 14 Vand. L. Rev. 779; Kenneth Culp Davis, Judicial Notice, [1969] Law and Social Order 513. Commonwealth discussions have been less extensive and uncontroversial; in addition to the standard evidence textbooks, see: Max Radin, The Conscience of the Court (1932), 48 Law. Q. Rev. 506; G.D. Nokes, The Limits of Judicial Notice (1958), 74 Law Q. Rev. 59; Richard Eggleston, Judicial Notice, Common Knowledge and Experts, in Evidence, Proof and Probability (1978); Colin Manchester, Judicial Notice and Personal Knowledge (1979), 42 Mod. L. Rev. 22; P.B. Carter, Judicial Notice: Related and Unrelated Matters, in Enid Campbell, Louis Waller (eds.), Well and Truly Tried. Essays on Evidence in Honour of Sir Richard Eggleston (1982), p. 88. And in Canada: Schiff, *loc cit.*, footnote 25; Allan R. Flanz, Judicial Notice (1980), 18 Alta. L. Rev. 471.

<sup>29</sup> *Loc. cit.*, footnote 25, at p. 310.

<sup>30</sup> This discussion will presuppose a knowledge of the cases and textbooks on the subject and will not review or recapitulate the law as presently framed. See: G.D. Nokes, An Introduction to Evidence, (4th ed., 1967), pp. 54-63; R. Cross, C. Tapper, Cross on Evidence (6th ed., 1985), pp. 62-72; Phipson and Elliott's Manual of the Law of Evidence

Carter recently has argued persuasively that many of the determinations made under the judicial notice rubric should more properly be thought to exemplify quite different principles which are frequently confused with or are less frequently possessed of a limited affinity with the original doctrine of judicial notice.<sup>31</sup> The suggestion is not entirely novel, as several previous commentators have questioned the extent to which judicial notice can accommodate much that has been done in its name,<sup>32</sup> although no previous writer has so vigorously attempted to eradicate the dense underbrush of new shoots. Academic fears that the promiscuous use of judicial notice will blur and dilute the doctrine and facilitate excessive judicial interference sufficient to undermine the adversarial foundations of common law adjudication find a related theme in the great American debate joined by the late Professor Morgan as to whether or not judicial notice is really a rebuttable presumption, as originally suggested by Thayer and Wigmore.<sup>33</sup> If a comprehensive and expanding doctrine of judicial notice is teamed with the view that judicial notice is final and irrebuttable, the legislative powers of the judiciary, if exercised, would be enormous. Thus, when judges purport to take judicial notice of their own research, it becomes important to re-examine the fundamental nature of the doctrine of judicial notice. A thorough re-examination of judicial notice is beyond the scope of this comment. However, certain themes emerging from the current discussion are immediately relevant and should be briefly re-stated for present purposes.

All commentators agree that the most rudimentary and classical statement of the doctrine of judicial notice is made by Lord Sumner in *Commonwealth Shipping Representative v. P. & O. Branch Service*,<sup>34</sup>

... [in]. . . a true case of taking judicial notice, . . . at the stage when evidence of material facts can be properly received, certain facts may be deemed to be established, although not proved by sworn testimony, or by the production, out of the proper custody, of documents, which speak for themselves. Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made himself for his own information from sources to which it is proper for him to refer.

In Canada, these categories have been restated to permit judicial notice of facts which are (a) so notorious as not to be the subject of dispute among reasonable men, or (b) capable of immediate and accurate

(11th ed., 1980), pp. 31-37; Phipson on Evidence (13th ed., 1982), 2-06 to 2-22. See also: John Sopinka, S.N. Lederman, *The Law of Evidence in Civil Cases* (1974), pp. 357-365; Delisle, *op. cit.*, footnote 25, pp. 90-101.

<sup>31</sup> *Op. cit.*, footnote 28.

<sup>32</sup> Strahorn, *loc. cit.*, footnote 25, at pp. 554-558; McCormick, *loc. cit.*, footnote 25, at pp. 318-323; Nokes, *op. cit.*, footnote 28, pp. 73-75.

<sup>33</sup> For references to various papers in the controversy, see *supra*, footnote 28.

<sup>34</sup> [1923] A.C. 191, at p. 212 (H.L.).

demonstration by resorting to readily accessible sources of indisputable accuracy.<sup>35</sup> It is trite to remark that both categories are comprised of a forest of single instances and that given the infinite variety of facts it could not be otherwise. It is also trite to remark that it is the second branch of the definition which has proved to be the growth principle for the evolution of judicial notice.

By adopting a working distinction that was made by Morgan,<sup>36</sup> it is possible to divide the various instances of judicial notice into two categories, of judicially noticing law and judicially noticing fact. It is further submitted that Carter is essentially correct in asserting that most of the instances found within each distinction are not genuine cases of taking judicial notice. Since the present argument is that judicial notice cannot be taken of historical documents researched in public archives Carter's arguments are most germane.<sup>37</sup>

Judicial notice of law is said to comprise two broad categories: first, the law of the jurisdiction whether derived from custom, the common law, statute, the various statutory instruments, or official gazettes; and secondly, certain governmental, political and administrative matters. Neither of these categories, however, are really about judicial notice; rather both derive their legal efficacy from other principles which have been confused with the doctrine of judicial notice. Thus, when a court "takes judicial notice" of the law, it could be said that two other principles are really operating, that a judge should be presumed to know the law and that the authenticity of the law of the forum should not be questionable.<sup>38</sup> That courts will take judicial notice of foreign law and municipal bylaws once proved underlines the point. Again, when a court "takes judicial notice" of governmental, administrative, political, diplomatic or international affairs the underlying principle is that courts are bound to accept the decisions of the executive branch of government. "Judicial notice" in this context is confused with curial recognition of the different constitutional roles of the executive and the judiciary.

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<sup>35</sup> Sopinka, Lederman, *op. cit.*, footnote 30, p. 357; Schiff, *loc. cit.*, footnote 25, at pp. 338-355. See also: *R. v. Aspinall* (1876), 2 Q.B.D. 48, at p. 62 (C.A.), per Brett L.J.; *R. v. Holmes* (1922), 70 D.L.R. 851, at p. 852 (Alt. S.C.), per Harvey C.J.; *Reference re Alberta Statutes* [1938] S.C.R. 100, at p. 852, per Duff C.J.C.; *R. v. Porter* (1961), 130 C.C.C. 116, at p. 118 (N.S.S.C.), per Ilsley C.J.; *R. v. Uvery* (1968), 1 D.L.R. (3d) 29, at pp. 34-35 (Sask. Q.B.), per Tucker J.

<sup>36</sup> *Loc. cit.*, footnote 28, at pp. 270-272.

<sup>37</sup> For what follows see Carter, *op. cit.*, footnote 28, *passim*.

<sup>38</sup> Particularly when "judicial notice" is enjoined by statute; see for example: Canada Evidence Act, R.S.C. 1970, c. E-10, ss. 17, 18; Evidence Act, R.S.O. 1980, c. 145, s. 36; Interpretation Act, R.S.O. 1980, c. 21, s. 7. See also Uniform Evidence Bill, Bill S-33, Nov. 18, 1982, ss. 18-21.

Facts of which judicial notice has been taken have been divided by Davis into two divisions, adjudicative facts and legislative facts.<sup>39</sup> An adjudicative fact is one which is in issue in the case or relevant to another fact in issue—who, where, what, how, *et cetera*—whereas a legislative fact is one whose knowledge assists the court in formulating policy and making law. In contrast to the American situation, the Anglo-Canadian courts have not really distinguished the two processes nor, in particular, have they explicitly considered the distinctive nature of legislative fact-finding, inhibited perhaps by the traditional legal fiction that common law judges are law-finders and not law-makers. While the American courts have considered a wide variety of social, economic, scientific and other sorts of data in law-making under the rubric of taking judicial notice,<sup>40</sup> this is really a misnomer when the evidence is presented to the court by counsel for the litigants. Courts do not in fact adopt such information, but rather sift through it to determine which factual materials will give substance to their decisions. If there is judicial notice of such writings, it means simply that the courts take notice that they are authentic sources of information sufficiently reliable to influence law-making. Legislative facts, then, are pieces of evidence to be proven and perhaps curially rejected like other evidence. Moreover, in contrast to adjudicative facts, legislative facts may found the formulation of a rule of law to which the doctrine of *stare decisis* applies, whereas taking judicial notice of an adjudicative fact is simply a substitute for proof and should no more create a binding precedent than any other fact finding based on proof.<sup>41</sup>

It would appear, then, that with the exception of adjudicative facts, the other so-called categories of judicial notice are more properly explained in other ways, so that it is questionable whether they are really categories of judicial notice unless that concept is re-defined to encompass an expanded and expanding content. These explanations raise fundamental issues of principle and policy about the concepts of parliamentary democracy, the common law and the role of the judiciary, all of which are beyond the scope of this comment, and which would be especially pressing if the Morgan thesis of the irrebuttability of taking judicial notice should attract wide support.

If Lambert J.A.'s archival researches are properly judicial notice as he asserted, then they must fall into the remaining category of taking judicial notice of adjudicative facts. They did not relate to matters of law nor matters of legislative fact since they neither effect policy changes in

<sup>39</sup> Henry Culp Davis, *An Approach to Problems of Evidence in the Administrative Process* (1942), 55 Harv. L. Rev. 364; *Judicial Notice* (1955), 55 Col. L. Rev. 945.

<sup>40</sup> See the American materials, *supra*, footnote 28 and the references therein specifically to legislative and constitutional fact-finding.

<sup>41</sup> In addition to the various categories outlined above there are, of course, simply situations in which judicial notice is inapplicable, partial or premature: Nokes, *loc cit.*, footnote 28, at pp. 73-75.

the law, nor do they found a rule of law to which the doctrine of *stare decisis* applies. Nor can it be said that the historical facts unearthed in the archives are notorious. Thus, if judicial notice has really been taken, it must be classified within the second branch of Lord Sumner's definition, of facts capable of accurate demonstration by resort to readily accessible sources of indisputable accuracy. The question, then, becomes one of whether primary historical documents stored in public or private archives could really be said to be readily accessible and of indisputable accuracy. If the test for ready accessibility is one of how reasonable it may be to expect the ordinary person to know of the resources contained in archives, then it could be argued that even documents stored in public archives are not readily accessible. Again, if ready accessibility means availability to the ordinary, reasonable person or even the public generally, it is arguable that restricted access documents are excluded. Moreover, the mere deposit of documents in an archive is no guarantee of their indisputable accuracy. Thus, it is arguable that historical materials cannot fall within the second head of Lord Sumner's definition and should be heard only as evidence, subject to the normal rules of proof. A single unargued piece of information could produce an entirely different perspective on a case.

### *Judicial Notice of Historical Facts*

If taking judicial notice of historical documents and historical facts in the manner of Lambert J.A. does not fit easily into the theory of judicial notice, it remains to inquire whether there are specific precedents for it in the earlier cases.

Certain historical facts are notorious. They constitute part of the sum of knowledge expected of all reasonable and responsible citizens who will have studied history at least until the school-leaving age: 1066, 1215, 1485, 1759, 1867, 1982. However, the topic of taking judicial notice of historical documents and facts concerns the more obscure facts, those which constitute the daily diet of professional historians but which may occasionally be required to shed light on legal questions. Such historical materials can be divided into two broad categories: primary sources which are the raw materials of the historical enterprise, and secondary sources—the monographs and articles—which constitute the finished product. Primary sources are typically found in places of which the general population is largely ignorant, archives, research libraries, museum libraries or private collections. Secondary sources are more readily accessible in public or university libraries, bookshops, or by purchase while still in print. Virtually all of the English cases relating to historical documents and facts are about secondary sources. Moreover, until recently all of the cases have viewed the introduction of such sources as exceptions to the hearsay rule but nevertheless admissible in evidence and not under the rubric of taking judicial notice. Again, the cases may be further distinguished in that without exception those which assert that judicial notice

may be taken both of primary and secondary sources are Canadian, whereas the English cases deny that possibility.

The general rule with respect to the admissibility in evidence of secondary historical materials is that they are admissible to prove facts of a public nature but not of a private or a local nature.<sup>42</sup> Thus, in *Lord Brounker v. Sir Robert Atkins*<sup>43</sup> Speed's Chronicle was heard in evidence to prove the death of Queen Isabel, the wife of Edward III. Pemberton C.J. stated "he knew not what better proof they could have".<sup>44</sup> In *Neale v. Fry*,<sup>45</sup> certain unspecified chronicles were admitted as evidence to prove the date of the succession of Philip II of Spain after the abdication of Charles V. And in a series of nineteenth century cases concerned with ecclesiastical practices, various works of ecclesiastical history and theology were admitted in evidence to prove the antiquity or propriety of certain liturgical practices.<sup>46</sup>

Conversely, there have been a number of cases in which historical works have not been admitted in evidence because they related to private or local matters. Thus, in *Stainer v. Burgesses of Droitwich*<sup>47</sup> Cambden's Britannia was refused admission on whether by custom of Droitwich salt pits could be sunk in any part of the town or in a certain place only. In *Piercy's Case*<sup>48</sup> Dugdale's Baronage of England was refused admission in evidence in relation to whether someone died without issue, and in *The Vaux Peerage*<sup>49</sup> both Stowe and Dugdale were rejected as evidence of

<sup>42</sup> *Stainer v. Burgesses of Droitwich* (1696), 1 Salk. 281, 91 E.R. 247 (K.B.): "the court held that a general history [Cambden's Britannia] might be given in evidence to prove a matter relating to the Kingdom in general, because the nature of the thing requires it, but not to prove a particular right or custom". See also: *Read v. The Bishop of Lincoln*, [1892] A.C. 644, at p. 653 (P.C.), per Lord Halsbury L.C.; *Fowke v. Berington*, [1914] 2 Ch. 308, at p. 315 (Ch.D.) per Astbury J.; *Commonwealth Shipping Representative v. P. & O. Branch Service*, *supra*, footnote 34, at p. 197, per Viscount Cave L.C.

<sup>43</sup> (1681) Skin. 14, 90 E.R. 8 (K.B.).

<sup>44</sup> *Ibid.*, at pp. 15 (Skin.), 8 (E.R.). Wallop J. also commented that in the House of Lords Speed's Chronicle "was admitted by them for good evidence in the *Lord Bridgwater's case*": pp. 15 (Skin.), 8 (E.R.). I have not been able to identify this case.

<sup>45</sup> The reference to this case is found in *Stainer v. Burgesses of Droitwich*, *supra*, footnote 42, in which it is said that *Neale* had been decided some twelve years before.

<sup>46</sup> *Attorney General v. Gould* (1860), 28 Beav. 485, 54 E.R. 452 (Ch.), which was concerned with whether a congregation of Particular Baptists could change their baptismal standards in relation to admission to Communion; *Ridsdale v. Clifton* (1876), 1 P.D. 316 (Arches Court of Canterbury), aff'd (1877), 2 P.D. 276 (P.C.); *Read v. The Bishop of Lincoln* *supra*, footnote 42, affirming [1891] P. 9 (Arches Court of Canterbury), which concerned the introduction of Anglo-Catholic liturgical practices into the Church of England.

<sup>47</sup> *Supra*, footnote 42. In *Stainer* reference was also made to an unspecified case in which Dugdale's Monasticon Anglicanum was not admitted as evidence of whether or not an abbey was an inferior abbey.

<sup>48</sup> (1683), T. Jo. 164, 84 E.R. 1198 (C.P.).

<sup>49</sup> (1837), 5 Cl. & Fin. 526, 7 E.R. 505 (H.L.).



whether a Lord Vaux took a seat by a special writ of summons in a parliament of Henry VIII. In *Evans v. Getting*<sup>50</sup> Nicholl's History of Brecknockshire was refused admission as evidence of a county boundary, Alderson B. stating:

This is a history of Brecknockshire. The writer of that history probably had the same interest in enlarging the boundaries of the county as any other inhabitant of it. It is not like a general history of Wales. I shall not receive it.

Again, in *Fowke v. Berington*<sup>51</sup> a passage from Habington's Survey of Worcestershire was rejected.

Until the First World War the distinction between public and private matters was easily drawn. Public matters included national politics, foreign and diplomatic affairs and the state of the polity of the established church. Virtually everything else fell within the category of local or private affairs. The distinction seems no longer to exist since in the modern welfare state apparently almost all human activity is subject to regulation in the "public interest". Nevertheless from these cases on the admissibility of historical secondary sources a number of observations may be made which have continuing relevance. First, whether the cases deal with public or private matters, all regard the introduction of secondary sources as a matter about admission in evidence and not of judicial notice. Secondly, in all of the cases the courts were most concerned that the sources on which they relied be the most accurate available at the time, although ironically few modern historians would unquestionably believe everything in the older chronicles, which were the products of a primitive historical technique which owed more to the enthusiasms of the antiquary than the "scientific" methods of the modern historian.<sup>52</sup> Thirdly, in the cases which related to private or local matters, the underlying reason why the historical information was not admissible in evidence was that the sources were unreliable on the points in issue because impugned for some reason such as bias in the author or doubts as to the author's sources or research. Fourthly, when secondary historical works were admitted they were used in several quite different ways: to prove facts, to elucidate the historical context in which particular disputed events took place,<sup>53</sup> and to indicate the opinions which learned men have held rele-

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<sup>50</sup> (1834), 6 Car. & P. 586, 172 E.R. 1376 (Nisi Prius.).

<sup>51</sup> *Supra*, footnote 42.

<sup>52</sup> For the growth of the scientific method in history see: T. Heyck, *The Transformation of Intellectual Life in Victorian England* (1982). For the role of antiquaries, who were usually lawyers, in chronicle writing see: Barbara J. Shapiro, *Probability and Certainty in Seventeenth Century England. A Study of the Relationships Between Natural Science, Religion, History, Law and Literature* (1983). And for the growth of history as a professional activity see: John Kenyon, *The History Men. The Historical Profession in England Since the Renaissance* (1983).

<sup>53</sup> *The Case of St. Katherine's Hospital* (1671), 1 Vent. 149, 86 E.R. 102 (K.B.) in which evidence from Speed's *Chronicles* was admitted to show that in a thirteenth century

vant to the issues in contention.<sup>54</sup> Fifthly, the sorts of historical works which were admitted in the earlier cases could in a sense be said to serve the same purpose as public documents at a time when public records were not kept, badly kept or unavailable. These chronicles and works of ecclesiastical history were often the only sources of information about the past available.

Primary historical documents that are also public records are admissible in evidence in accordance with the ordinary rules of evidence and the special rules relating to them.<sup>55</sup> They clearly do not fall within the category of judicial notice, nor apparently do other types of primary historical documents which might include diaries, correspondence, private notebooks, or certain ecclesiastical records. Thus, in *Stainer v. Burgess* of *Droitwich*<sup>56</sup> the Kings Bench opined that parish records were good evidence as to births and marriages. In *Attorney-General v. Gould*<sup>57</sup> the Chancery found that the proceedings of a Baptist Assembly were admissible and in *Ridsdale v. Clifton*,<sup>58</sup> *Read v. Bishop of Lincoln*<sup>59</sup> and *Fowke v. Berington*<sup>60</sup> a variety of historical materials were admitted in evidence, including records of episcopal visitations, episcopal letters, prayer books, liturgical guides and engravings. The criteria for admissibility was simply reliability and accuracy in relation to historical matters, and such evidence is always subject to better evidence. Thus, for example, public records of births and deaths compiled in more morally sensitive times than ours may not disclose illegitimacy or suicide, yet private diaries or correspondence may. The accuracy of primary, like secondary sources, is always a matter for the court to assess in relation to any historical issue in a case. It would appear, then, that in England courts have never taken

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case, when the court held against Queen Isabel she was, in the words of Hale C.J. at pp. 151-152 (Vent), 103 (E.R.), "under great calamity and oppression, and what was then determined against her was not so much from the right of the thing, as the iniquity of the times".

<sup>54</sup> *Darby v. Ouseley* (1856), 1 H & N. 1, at p. 8, 156 E.R. 1093, at p. 1096 (Exch.), per Pollock C.B.: "Standard authors may be referred to . . . as showing the opinions of eminent men on particular subjects, but not to prove facts". See also *Ridsdale v. Clifton*, *supra*, footnote 46, at pp. 332-333 (P.C.), per Lord Cairns L.C.: "It would in the opinion of their Lordships, be contrary to well-settled principles of law to admit private opinions to control the legal interpretation of public documents, or the legal inferences from public acts or usage; but it may not be without advantage to point out the circumstances under which the opinions of these writers appear to have been explored".

<sup>55</sup> See any of the standard textbooks on evidence, as well as in this context, *Fowke v. Berington*, *supra*, footnote 42, at pp. 308-319, per Astbury J.

<sup>56</sup> *Supra*, footnote 42.

<sup>57</sup> *Supra*, footnote 46.

<sup>58</sup> *Supra*, footnote 46.

<sup>59</sup> *Supra*, footnote 42, at pp. 652-654, per Lord Halsbury L.C.

<sup>60</sup> *Supra*, footnote 42, at pp. 314-319, per Astbury J.

judicial notice of historical documents or historical facts, other than notorious facts.

Nevertheless leading texts on the law of evidence have asserted that, in the words of one Canadian textbook, a court "may examine history texts to enable it to take judicial notice of the facts of ancient and modern history".<sup>61</sup> The author does not define "text"; however, the authorities on which he relies for the statement deal variously with primary and secondary historical materials. Reliance for this bold, simplistic statement is variously placed on *Read v. Bishop of Lincoln*,<sup>62</sup> *Calder v. Attorney-General of British Columbia*,<sup>63</sup> and the legal fiction that when judges examine historical documents they are merely refreshing their memories.<sup>64</sup> *Read* is authority for the admission of historical works in evidence, not judicial notice, and the legal fiction is precisely that and should be confined to the notorious facts known to schoolchildren but for which judges may have to consult school history texts. Reliance on *Calder* demands greater consideration, in particular because of its misconceived reliance on *Read*.

There can be no doubt that Canadian courts have, can and should hear historical evidence. The evidentiary value of historical documents and historical facts has been considered in the context of cases about Indian rights, in particular, aboriginal and treaty rights. *Calder* was such a case. In that case, Hall J., in a dissenting judgment, stated:<sup>65</sup>

Consideration of the issues involves the study of many historical documents and enactments received in evidence, particularly exs. 8 to 18 inclusive and exs. 25 and 35. The Court may take judicial notice of the facts of history whether past or contemporaneous: *Monarch Steamship Co. Ltd. v. A/B Karlshamns Oljefabriker* [[1949] A.C. 196] at p. 234, and the Court is entitled to rely on its own historical knowledge and researches: *Read v. Lincoln*, [[1892] A.C. 644], Lord Halsbury at pp. 652-4.

The second sentence in this paragraph bears a remarkable similarity to an almost identical statement of Norris J.A. in *R. v. White and Bob*,<sup>66</sup> decided nine years earlier, and is repeated in *Re Paulette et al. and Registrar of Titles*,<sup>67</sup> decided nine months later. All of these cases, like *R. v. Bartleman*, concerned considerable amounts of historical and ethnological information. There are, however, a number of problems with the view that what the courts were doing was taking judicial notice.

<sup>61</sup> Sopinka, Lederman, *op. cit.*, footnote 30, p. 360. See also Cross, Tapper, *op. cit.*, footnote 30, p. 65.

<sup>62</sup> *Supra*, footnote 42.

<sup>63</sup> [1973] S.C.R. 313, (1973), 34 D.L.R. (3d) 145.

<sup>64</sup> Phipson, Elliott, *op. cit.*, footnote 30, p. 35; Phipson, *op. cit.*, footnote 30, para. 2-22.

<sup>65</sup> *Supra*, footnote 63, at pp. 346 (S.C.R.), 169 (D.L.R.).

<sup>66</sup> *Supra*, footnote 8, at pp. 629 (D.L.R.), 210 (W.W.R.).

<sup>67</sup> (1973), 42 D.L.R. (3d) 8, at p. 19 (N.W.T.S.C.), per Morrow J.

First, it is clear that in these cases the historical information was admitted in evidence so that it has to be said that the learned judges confused evidence for judicial notice. Secondly, *Monarch Steamship v. A/B Karlshamns Oljefabriker*<sup>68</sup> is not authority for the proposition for which it is cited. That case concerned the alleged frustration of a charterparty due to the outbreak of the Second World War, which was clearly a notorious fact of history for a court sitting in 1948! *Monarch Steamship* is at the most an authority for the undoubted proposition that judicial notice may be taken of notorious facts of history. The distinction between a notorious fact and one of which judicial notice cannot be taken may be demonstrated by contrasting an earlier case, *Commonwealth Shipping Representative v. P. & O. Branch Service*,<sup>69</sup> in which the court was asked to take judicial notice of a particular military operation in 1915 in Gallipoli, which allegedly affected the interpretation of a marine risk clause in a charterparty. The House of Lords declined to do so, construing the information as specialized historical knowledge which could only be admissible as evidence. It can hardly be doubted that the historical information in the Canadian cases is specialized historical knowledge, not notorious fact.

Thirdly, while it is correct to assert that in *Read* Lord Halsbury stated that a court is entitled to rely on its own historical researches, the context in which that statement was made profoundly affected its significance. *Read* was an appeal to the Privy Council from the Court of the Archbishop of Canterbury in which the Bishop of Lincoln had been found to have committed a number of offences against ecclesiastical law while celebrating Communion. The offences all constituted the introduction of various Anglo-Catholic practices into the service prescribed by the Book of Common Prayer. In the Arches Court the assessors included the Archbishop of Canterbury, five bishops and the Vicar-General of the Province of Canterbury, and the evidence was comprised of sophisticated historical proofs of the liturgical practices in the Church of England since the Reformation. The assessors relied partly on their own knowledge and researches into the historical and theological background in reaching their decisions and in the Privy Council a preliminary objection was made that this conduct was improper.

For two reasons it is submitted that the Canadian courts have erred in considering *Read* as authority for the proposition that courts may rely on their own historical knowledge and research. First, *Read* is a case about ecclesiastical law which historically has been administered in the church courts according to its own rules of evidence separate from and distin-

<sup>68</sup> [1949] A.C. 196, [1949] 1 All E.R. 1 (H.L.).

<sup>69</sup> *Supra*, footnote 34, per Viscount Cave L.C. at p. 197; per Viscount Finlay at p. 203; per Lord Dunedin at p. 205; per Lord Atkinson at p. 206; per Lord Sumner at pp. 208-212.

guishable from the common law administered in the central courts.<sup>70</sup> The assessors have traditionally been clerics with the specialized academic training and professional authority to deal with the disciplinary cases which typically come before church courts, as was evident in the panel of assessors in the *Read* case. Significantly, Lord Halsbury L.C. commented on the "novelty of the objection"<sup>71</sup> that historical researches could not be utilized, thus underlining, perhaps, the distinctive practices of the church courts. Invocation of the common law injunction against employing personal knowledge of the factual historical matrix of such a case is futile.<sup>72</sup> Indeed, the specialized nature of the tribunal in *Read* could today be said to be analogous to certain specialized tribunals such as industrial tribunals or arbitration boards which are permitted to act on their own expertise and knowledge. The distinguishing feature of all such tribunals is that their specialization widens the scope of what is notorious.<sup>73</sup> Secondly, it should be noted that Lord Halsbury does not state his approval of judicial reliance on personal researches in the bold positive way suggested by the Canadian cases. Rather, his mode of expression is hesitant, acquiescent and restricted to ecclesiastical judges:<sup>74</sup>

Without considering further how far an ecclesiastical judge has a right to act upon his own historical learning, when it becomes important to ascertain what was the ecclesiastical practice, or what were the views entertained by eminent theologians, in remote times, it is enough to say here, dealing with the objection generally, that it is impossible to contend that if in other respects the archbishop's judgment was well-founded, it could be invalidated by his having called to his aid for this purpose his own historical researches.

### *Bartleman Revisited*<sup>75</sup>

It remains to re-examine *Bartleman*. At the outset, it should be clearly reiterated that virtually all of the historical material discussed by

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<sup>70</sup> See generally Halsbury's Laws of England (4th ed.), Vol. 14, Ecclesiastical Law, paras. 1259 ff; E. Garth Moore and Timothy Briden, *Moore's Introduction to English Canon Law* (2nd ed., 1985).

<sup>71</sup> *Supra*, footnote 42, at p. 653.

<sup>72</sup> See Phipson, *op. cit.*, footnote 30, para. 2-08; Manchester, *loc. cit.*, footnote 28.

<sup>73</sup> See Phipson, *ibid.*, paras. 2-08 and 2-21 and the cases cited therein.

<sup>74</sup> *Read v. The Bishop of London*, *supra*, footnote 42, at pp. 653-654.

<sup>75</sup> In preparing this section the author has compared the judgment rendered by Lambert J.A. with the trial transcript, appeal book, appellant's statement and respondent's statement to determine which materials were part of the written record and which were not. The author is inclined to suspect, on the basis of the statement by Esson J.A. cited *supra*, footnote 4, that the materials to which Lambert J.A. makes reference, but which were not part of the written record, may not all have been presented in oral argument before the Court of Appeal. The author wishes to emphasize that the conclusions on the basis of the comparisons may well not be entirely accurate given the incomplete information; however, in her view there is sufficient discrepancy between what was argued and what Lambert J.A. relied upon to justify the conclusion that the learned judge relied on his own research in relation to the case.

the British Columbia Court of Appeal was admitted in evidence and extensively cross-examined at trial. From the reported decision it is difficult to distinguish materials considered under the rubric of taking judicial notice from those admitted in evidence. For the purpose of showing some of the difficulties in using historical materials this comment will exploit the historical material in the reported judgments, even if most was admitted in evidence.

The historical materials to which Lambert J.A. made reference may be divided into three categories: primary sources stored in the British Columbia Provincial Archives, secondary historical sources and secondary legal sources. The primary sources which he said he examined at the archives consisted of a notebook, "Register of Land Purchases from Indians", which contains the text of the eleven Fort Victoria treaties; a copy of the Nanaimo treaty; and the correspondence between Fort Victoria and the Hudson's Bay Company office in London between 1849 and 1852. The secondary historical sources which Lambert J.A. considered consisted of an unpublished manuscript<sup>76</sup> about the Saanich by D. Jenness, a leading anthropologist, filed at the Provincial Archives; an article by Wilson Duff specifically about the Fort Victoria treaties;<sup>77</sup> two historical texts on the British Columbia Indians;<sup>78</sup> and a collection of materials concerning the colonial legislature.<sup>79</sup> The secondary legal sources included two articles from law journals<sup>80</sup> and a legal text on aboriginal peoples.<sup>81</sup>

Of the treaties contained in the Register only the North Saanich treaty was relevant to the facts before the court and not surprisingly only that treaty was part of the written record. Nor was the Nanaimo treaty contained in the written record. Of the correspondence between Douglas and Barclay two letters, both from Douglas to Barclay (May 16, 1850 and March 18, 1852),<sup>82</sup> were part of the written record. In addition, Lambert J.A. expressly relied on a third letter, that from Barclay to Douglas in December, 1849, and may well also have been influenced by reading other correspondence in the letter book which apparently covers the period

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<sup>76</sup> The Saanich Indians of Vancouver Island.

<sup>77</sup> The Fort Victoria Treaties (1969), 3 B.C. Studies 3.

<sup>78</sup> Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa: Department of Indian Affairs, 1981); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (1977).

<sup>79</sup> Hendrickson, *op. cit.*, footnote 19.

<sup>80</sup> R.W. McInnes, *Indian Treaties and Related Disputes* (1969), 27 U. T. Fac. L. Rev. 52; K. Lysyk, *Indian Hunting Rights: Constitutional Considerations and the Role of Indian Treaties in British Columbia* (1966), 2 U.B.C. Law Rev. 401.

<sup>81</sup> A.H. Snow, *The Question of Aborigines in the Law and Practice of Nations* (1972).

<sup>82</sup> Lambert J.A. refers to a letter dated 16 March 1852 by which he is presumably referring to a letter actually dated 18 March 1852.

up to November 6, 1855.<sup>83</sup> Of the secondary historical works brief reference was made to Duff and Jenness by Dr. Lane at trial; however, they were not referred to on appeal. Douglas' letter of 1859 was referred to in the appellant's *factum*. No reference appears to have been made to the other materials.

How did Lambert J.A. perceive his own conduct? As noted earlier,<sup>84</sup> in taking judicial notice of the primary archival materials, he stated that he was dealing with "indisputable, relevant, historical facts by reference to a readily obtainable and authoritative source". In taking judicial notice of the secondary materials, he relied on them to draw his attention to facts which he could "independently verify" by examination of the primary sources. These statements suggest a number of important points in relation to the use of historical materials, whether in evidence or by taking judicial notice, of which counsel and courts should be aware.

First, documents and records stored in archives are not for that reason necessarily authoritative accounts of past events. The survival of primary historical materials is haphazard. The deposit of surviving materials is haphazard. Historical materials housed in public archives are inevitably those which, for a wild variety of reasons have never been destroyed or considered worthless or condemnatory by any one of their writers, subsequent owners or possessors or cataloguing archivists. Such records may well be the only version of the past to have survived and for that reason the "true" version of the past, but by the same token there may well be other records in other public or private collections which belie the version of the past contained in records deposited in public archives. Practising historians are constantly searching for "new" records, and counsel employing historical materials should be aware of that fact and attempt to research these materials as thoroughly as time and money permits.

Secondly, possession of apparently "authoritative" records is only one-tenth of the job. More difficult is their actual use and interpretation. A preliminary step is to detect whether the records have been fabricated or forged, and if so to ascertain the reasons, where possible. It is more important, however, to realize that each interpreter of historical records brings his own biases and background to the task of interpretation, and these will influence the interpretation process consciously and unconsciously. *Bartleman* provides a good example in that the expert witness for the defendant, Dr. Lane, a consulting anthropologist, had for many years been employed by the British Columbia Union of Indian Chiefs to compile a dossier of materials calculated to support Indian assertions of treaty rights. Dr. Lane gave evidence about a continuous oral tradition amongst the Indians that they had a right to hunt over land now owned by

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<sup>83</sup> See Duff, *loc. cit.*, footnote 77, at p. 8, note 4.

<sup>84</sup> See quotation in text, *supra*, footnote 5.

Mr. Groves. There was no clear evidence at trial that there was a continuous tradition rather than a "re-discovered" one, and Dr. Lane's employment with the Indians raises the question of whether she might interpret the documents in a manner most favourable to the accused. It is important then to state that personal, political, ideological and other spectacles are used to view and interpret historical records. It follows from this, that the interpretative bias brought to the reading of individual documents will also operate in respect to the sifting of those facts deemed to be important from those deemed to be unimportant. Finally, lawyers do not need to be reminded of the ease with which written ambiguities can be exploited.

How, then, does one "independently verify" the contents of historical documents, when the historian on whom one is relying has added, even unconsciously, his own gloss? One may verify in the sense of seeing for oneself that the documents contain the information that they are said to contain, for example that a letter was dated March 18, 1852. But can one independently verify the interpretation of a sentence? To read documents through the spectacles of an historian is to do no more than precisely that. To follow the banner of one historian may be to plunge into the heat of historians' battles blinkered to the risks of incomplete documentation, historical records of doubtful value, disputed "facts", competing ideologies and differing schools of historical interpretation. The sifting of historical evidence in the search for the "truth" is a difficult task. Indeed, there is often no such thing as an indisputable historical fact.

Examination of the historical findings of Lambert J.A. suggests, on the basis of the historical information in the reported decision, that he carefully sifted the material with much the same expertise as a professional historian. On the other hand, it is possible to take one of his findings and use the historical information which he used to reach a different conclusion simply to show how interpretatively flexible historical materials are.

Lambert J.A. concluded from his researches that the North Saanich treaty should be regarded simply as some evidence of what was generally agreed to. Arguably, the very thrust of his research was to arrive logically at that conclusion. The reason is clear: if concrete "historical facts" can be exploited to cast doubt on the otherwise reasonably plain meaning of the treaty under consideration, then greater judicial discretion may be exercised in the "interpretation" process. Thus, sifting of the evidence for "indisputable" historical facts to "clarify" the meaning of the treaty was engaged in by Lambert J.A. in relation to the two categories of primary historical documents which he examined, the letters exchanged by Douglas and Barclay<sup>85</sup> and the other Vancouver Island treaties.

<sup>85</sup> Included for consideration under this head is Douglas' letter of 1859 to the colonial legislature.



In addition to the letters cited by counsel, Lambert J.A. also referred to another letter which he read at the Provincial Archives which arguably is clearer than those cited by counsel in favour of the accused's interpretation of the treaty.<sup>86</sup> Moreover, as a result of his analysis of the other Vancouver Island treaties, Lambert J.A. draws two conclusions which he then applies to the North Saanich treaty, first that the marks made were not actually made by the individual Indians themselves, and secondly, that the text of some of the treaties was not available at the time of signing. Lambert J.A. came to the first conclusion as a result of personally examining the signatory lists and the second as a result of reading Douglas's letter to Barclay of May 16, 1850. Thus, he concludes that the precise words of the treaty were insignificant and capable of being liberally construed in the context of the historical matrix.

Are these the only possible conclusions? There was, for example, evidence given by Dr. Lane at trial and also noted in the Duff article,<sup>87</sup> that it was the usual practice when the Vancouver Island treaties were being signed for each Indian who was a signatory to touch the pen used to mark the neat rows of crosses to signify comprehension and agreement with the terms of the treaty. Thus, the observable "fact" of the neat rows need not belie voluntary consent to the treaty. Nor does it follow that because the text of the treaty was not available when signatures were gathered that the eventual wording does not reflect the true agreement. The practice of touching the pen might also belie an argument advocating the absence of agreement. In any case it may be wondered whether the text of the North Saanich treaty was unavailable when the signatures were taken on the basis of the very evidence recited by Lambert J.A. It could be argued that Douglas' letter of 1850 referred solely to the first nine treaties in the Register which all pre-dated the letter, but that two years later when the North Saanich treaty was signed the formal wording used in all the treaties had arrived from London and was available at the time of signing. In his letter Douglas asks for the text by return post which if approximately complied with would mean that the text would certainly have arrived within two years! In this regard it is interesting to note the absence from Lambert J.A.'s discussion of reference in relation to the two Saanich treaties to any pencil notations in the Register similar to those in relation to the first nine treaties whereby the land descriptions and the lists of signatories were attached. Perhaps such temporary identification was no longer necessary if the texts were already available.<sup>88</sup>

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<sup>86</sup> From the letter of December 1849 the following phrase was relied upon: "The right of fishing and hunting will be continued to them. . . ."

<sup>87</sup> *Loc. cit.*, footnote 77, at pp. 26-27.

<sup>88</sup> The author has not examined the historical materials in the Provincial Archives but drew this conclusion solely from analysis of the factual information conveyed in the judgment. See also Duff, *loc. cit.*, footnote 77, at p. 21. Lambert J.A. subsequently overstepped the evidence when he noted: "The first nine out of a total of 14 Vancouver

Thus, not only is it possible to turn the researches and conclusions of Lambert J.A. against his own conclusions, but it also must be asked whether these extra-curial perambulations to the Provincial Archives were necessary in the first place. The same legal result could have been reached without any historical evidence at all on at least two grounds: first, there was undisputed ethnological evidence that the oral traditions and hunting customs of all of the Indian tribes in the Fort Victoria area favoured the third interpretation,<sup>89</sup> and secondly, a liberal interpretation, if not plain common sense, also favoured that position. It may be that in the light of additional information about the historical matrix of *Bartleman* an indisputable historical argument could have been made in support of the third interpretation of the treaty as well. The foregoing discussion is not intended to foreclose that possibility. Rather, the point argued is simpler: whether introduced by court or counsel historical records, like historical facts such as those canvassed in the previous section, are notoriously slippery to handle and the uses to which history may be put infinite.

### Conclusion

Although the researches of Lambert J.A. in the *Bartleman* case were relatively modest and ultimately insignificant to the final outcome of the case, the precedent which he set in labelling his conduct as taking judicial notice is difficult to justify. There is no authority for it in the cases and it cannot be contained within a theory of judicial notice which restricts the scope of judicial discretion by prohibiting reliance on information not presented as proven evidence. It *may* be justifiable within the expansive American doctrine of judicial notice. On the other hand, the learned judge has underlined the need for thoroughly researched and argued cases where historical evidence is vital to the decision, as in the cases relating to Indian rights, and in his analyses of the historical documents has provided a useful example of how closely historical records should be scrutinized and assessed. Such documents, however, and the historical facts to which they attest, should not be dealt with under the rubric of judicial notice but should be admitted in evidence and subjected to the rules of evidence for their proof.

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Island treaties were made before any text was settled, and in no case was the text written out before the treaty was made." *Supra*, footnote 2, at pp. 86 (D.L.R.), 91 (B.C.L.R.). The second part of this statement is not supported by the reported information.

<sup>89</sup> *Supra*, footnote 2, at pp. 84-85 (D.L.R.), 89-90 (B.C.L.R.). See also the comments of Esson J.A. at pp. 93 (D.L.R.), 98 (B.C.L.R.).

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