Department of Justice Canada
Ministère de la Justice Canada

LITIGATION SUPPORT RESEARCH REPORT

SOME NOTES ON EXPERT (OPINION) EVIDENCE

Geoffrey S. Lester
Civil Litigation Section

1995

LR1995-1e

Research, Statistics and Evaluation Directorate/
Direction générale de la recherche,
de la statistique et de l'évaluation

Policy Sector/Secteur des politiques

Canada

LITIGATION SUPPORT RESEARCH REPORT

SOME NOTES ON EXPERT (OPINION) EVIDENCE

Geoffrey S. Lester
Civil Litigation Section

1995

LR1995-1e

The views expressed herein are solely those of the author and do not necessarily represent the views of the Department of Justice Canada.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

In this paper, the author outlines the distinction between "legislative" facts, and "adjudicative" or "constitutional" facts. In light if this dichotomy and against a background discussion of some general principles of law governing the admissibility of material into evidence, such as the rule against hearsay, the best evidence rule, and the proof of documents, the author explains the principles governing the admissibility of expert or opinion evidence in proof of legislative facts. The author then contrasts these principles with the doctrine of judicial notice and the introduction of material in proof of legislative or constitutional facts. His analysis is supported by reference to numerous cases and the recent literature dealing with these problems.

SOMMAIRE

Dans ce texte, l'auteur distingue entre les faits qu'il qualifie de relevant de l'ordre "législatif", de ceux relevant des ordres "judiciaire" ou "constitutionnel". Tenant compte de cette dichotomie, sur la toile de fond d'une analyse de certains des principes généraux de droit régissant l'admissibilité de la preuve littérale, telles la règle à l'encontre du ouï-dire et la règle de la meilleure preuve, ainsi que du mode de preuve des actes et pièces, l'auteur explique les principes qui régissent l'admissibilité des avis d'experts quand il s'agit de prouver des faits qualifiés de législatifs. L'auteur oppose alors ces principes à la théorie de la connaissance d'office de certains faits par le juge et de la production de documents dans le but d'établir des faits d'ordre législatif ou constitutionnel. Viennent soutenir son analyse l'abondante jurisprudence et la doctrine récente qui traite de ces questions auxquelles il fait référence.

1.0 INTRODUCTION[1]

The cult of the expert is with us. Several sensational miscarriages of justice in the common law world in recent years, due largely to the problems caused by scientific forensic evidence, have made the whole question of expert or opinion evidence controversial.

This paper merely scratches the surface of this vast topic, and is designed to familiarize members of the Litigation Support Co-Ordinating Committee with some of the basic principles of the law of evidence, with special reference to expert or opinion evidence. The best monographs on this subject are Freckelton, *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts* (1987), and Hodgkinson, *Expert Evidence: Law and Practice* (1990). Wigmore's *Evidence in Trials at Common Law* (Chadbourn rev. 1979) is indispensable for the practitioner. Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992) has a useful discussion and statement of the current law in Canada. The Law Reform Commission of Canada's Study Paper No. 7 (1973) and its *Report on Evidence* (1975) also repay careful reading; the Commission's proposals for reform pinpoint the controversial areas. Freckelton's work contains a superb bibliography.

The rules of expert evidence restrict the matters upon which expert witnesses may supply information to the court. These rules are:

(1) The common knowledge rule;
(2) The field of expertise rule;
(3) The ultimate issue rule; and
(4) The basis rule.

These rules give rise to two further problems:

(5) Who is regarded by the courts as an expert? and
(6) On what may she give evidence? That is, the parameters of the question.

The rationale for and operation of these rules can only be appreciated in the broader context of some general principles of evidence.

* * *

---

[1] I prepared this paper at the request of Dr. Louise Potvin and read it to the Litigation Support Co-ordinating committee at its meeting in June 1995. Thanks to Donna Charron for typing this paper. The views expressed herein are my own and not necessarily those of the Department of Justice Canada. The paper is addressed essentially to a lay audience. Practising advocates will doubtless find some principles have been inaccurately stated or applied. I am grateful to Brian Evernden for his comments on this paper while in draft form.

In any litigation there are always two issues: (1) what happened? and (2) what legal result follows from what happened? The first is always a question of fact, to be established by admissible evidence. There might be inconsistencies and contradictions in the evidence adduced by both sides, and the trier of fact must make a finding as to what facts have been proved to its satisfaction. In the adversary system, there is no search for "the truth". Instead, because the proceeding is a trial of strength and the process is in the hands of the parties to the litigation, only that material is introduced as is deemed necessary or expedient, and so all that one can hope for is an approximation of the truth. By contrast, the inquisitorial system is an inquiry, and controlled from start to finish by the judge, who is not merely an arbiter but tells the parties what he wants to know. See generally, Devlin, *The Judge* (1979), ch. 3.

The burden of proving a fact rests on the shoulders of the party asserting the existence of that fact. In a civil case, the trier must be persuaded on a "balance of probabilities"; that is, that it is more probable that the event happened than improbable. In a criminal trial, the trier of fact must be satisfied "beyond a reasonable doubt"; that is, to the point of moral certainty.

The second issue is a conclusion of law. Sometimes the law is not clear and thus open to argument. The tribunal has to make up its mind on what is the relevant law and apply it to the facts, so that the dispute can be resolved in favour of one party or the other.

Thus an ordinary trial is simply an attempt to reconstruct the events of the past, and, it may be, to establish what events are likely to happen in the future. This is done from the material put before the court by the parties, with a view to forming an opinion as to whether those events are of such a character as to entitle the party complaining of them to a particular legal remedy against the other party to the litigation.

At the end of the day the trier of fact simply comes to a conclusion -- or an opinion. It draws the necessary inferences from the evidence, and finds that a fact has been established or not established as the case may be.

1.1 Adjudicative Facts and Legislative Facts

Those facts about the parties which the court must adjudicate to determine the liability of a party are called "adjudicative facts". Thus adjudicative facts concern the immediate parties, such as who did what, where, when, how and with what motive or intent: Davis, *Administrative Law Treatise* (1958), vol. 2, par. 15.03, p. 353. Sometimes, arriving at a correct appreciation of the law requires taking into account facts that have nothing to do with the parties before the court. For instance, it may be necessary to examine facts bearing on questions of law or facts establishing the law, and establish the purpose and background of the legislation, including its social, economic and cultural context. Such facts are of a more

general nature, and are subject to less stringent admissibility requirements: *Danson* v. *Ontario (Attorney General)* [1990] 2 S.C.R. 1086 at p. 1099, per Sopinka J. per curiam, citing *Re Anti-Inflation Act* [1976] 2 S.C.R. 373 at p. 391; *Re Residential Tenancies Act,[1979],* [1981] 1 S.C.R. 714 at p. 723; and reference *Re Upper Churchill Water Rights Reversion Act* [1984] 1 S.C.R. 197 at p. 318. These facts are known as "legislative facts" or "constitutional facts".

Adjudicative facts are to be proved in the ordinary course, and are accordingly subject to the ordinary rules of proof and admissibility of evidence. Legislative or constitutional facts, on the other hand, being of a more general nature, are not subject to such stringent admissibility requirements as adjudicative facts.

The focus of this paper is on adjudicative facts. However, I do offer some comments on proving legislative facts and the doctrine of judicial notice.

2.0 PROVING ADJUDICATIVE FACTS

Adjudicative facts are usually proved by calling live witnesses, who give *viva voce* evidence as to the facts. Facts can also be proved by affidavit. *Viva voce* and affidavit evidence is given under oath or affirmation, and can be tested by cross-examination. Documents and other chattels might be tendered in evidence to prove facts.

It is a general principle underlying the whole law of evidence that a witness can only give evidence as to what she has perceived with her five senses. In practical terms, this means that the witness must have been personally present during the event; that is, to have "witnessed" the occurrence.

2.1 The Rule Against Hearsay Evidence

As a corollary of this rule, "hearsay" evidence is generally inadmissible in a court (although it is generally admissible before administrative tribunals, and its weight is a matter for the tribunal to decide; it might not be admitted, however, if its receipt would amount to a clear denial of natural justice). The rule against hearsay holds that assertions which are not made at the trial by the witness who is testifying are inadmissible as evidence of the truth of that which is asserted: Cowen and Carter, *Essays in the Law of Evidence* (1956), Essay I, p. 1.

Hearsay is essentially second-hand evidence. Hearsay can be defined generally as a written or oral statement or communicative conduct made by a person otherwise than in testimony at the proceeding in which it is offered, if tendered to prove the truth of the facts in the statement or conduct. Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), p. 156. "What the soldier said is not evidence."

When statements in a document are admitted into evidence, they are treated as testimonial, just as if the maker of the statement were a witness in the proceedings. Accordingly, all the factors that might have weighed for or against the evidence if it had in fact been given by a witness may be considered in determining the weight of the documentary statement: Brown, *Documentary Evidence in Australia* (1988), pp. 116-117.

Documentary evidence always presents a potential hearsay problem, simply because a document can only "tell" the court what the maker "told" the document. The document is therefore second-hand evidence, and the maker should ordinarily be called. This principle is of particular importance to those people working in the social sciences and statistics, who either rely on documentary sources for information or generate their own reports.

Whether or not a particular piece of evidence is actually hearsay depends on the purpose for which it is tendered. A statement might be tendered to prove either the truth of its contents, or simply the fact that it was made. If a statement is made by a person out of court and who is not called as a witness and the statement is tendered to prove the truth of the contents, it is condemned as hearsay, and is therefore usually inadmissible.

Take the statement by Alan, a witness in the witness box: "Bob told me that Charlie is a thief". If that evidence were given in a prosecution of Charlie for theft, then it is clearly hearsay because it does not directly prove that Charlie is a thief, but only shows what Bob told Alan. What Bob said, or his views on Charlie's guilt, are irrelevant. Charlie's guilt must be proved by direct evidence. If Bob actually saw Charlie steal, then Bob and not Alan must be called to prove that fact. But in an action for damages for defamation by Charlie against Bob, it would not be inadmissible hearsay but direct evidence, because it would be tendered to prove the fact that Bob made the statement (that is, published the defamatory material), which is a fact in issue in an action for defamation.

As with oral statements, so too with statements in documents. Thus a document might be tendered simply to show that a particular transaction occurred. For instance, Alice might by letter offer to buy Bertha's car for $10,000.00, which offer Bertha accepts by later letter. These two letters can be tendered in evidence in proof of the offer and acceptance. Again, Indians might surrender their lands by treaty. The treaty can be tendered in evidence in proof of the fact of surrender and of its terms.

But a document might also contain a statement as to what occurred. For instance, suppose that some Indians allege that the Crown was in breach of its fiduciary obligation because the treaty commissioners refused to let the Indians discuss the terms of a proposed surrender amongst themselves, and isolated the opponents and pressured the compliant Indians into signing a treaty. The only evidence in support of such allegations is the contemporary eye-witness account of a local missionary who was present throughout the negotiations and recorded the events in a letter to his wife. Such an account is clearly hearsay. The only reason for tendering the missionary's account is to prove the truth of the assertions contained in that letter. It is therefore prima facie inadmissible.

Hearsay evidence is thought generally to be suspect in comparison to direct evidence because when the statement was made the maker was not under oath, and (ex-hypothesi, since she has not been called to give evidence) the statement is not able to be tested by cross-examination.

There are recognized exceptions to the rule against hearsay.[2] There is also a rule peculiar to expert evidence (discussed later). The common principles uniting these exceptions are that the circumstances under which the statement was made are such as to make the statement sufficiently reliable or trustworthy that it may be safely acted upon, and that there is some special necessity for the admission of such evidence so that important evidence will not be lost and rendered unavailable.

Several classes of documents are made admissible by statute, notwithstanding that they contain hearsay evidence. Some government documents and business records are leading examples. See generally: *Canada Evidence Act*; Ewart, *Documentary Evidence in Canada* (1984).

The rule against hearsay has been considered by the Supreme Court of Canada and the Federal Court of Appeal,[3] and the law has developed to the point where one can question whether the rule itself any longer exists or whether the rule should now be formulated that evidence otherwise admissible shall not be rendered inadmissible because it is hearsay provided that there is some special necessity for the admission of such evidence, and some special guarantee of its credibility, to take the place of those conditions incidental to direct evidence (viz., the oath and cross-examination).

---

[2] The instances of admissible hearsay evidence may be stated as follows: (1) admissions; (2) confessions; (3) declarations in course of duty; (4) declarations against interest; (5) declarations as to pedigree; (6) declarations as to public and general rights; (7) declarations as to cause of death; (8) declarations as to contents of wills; (9) evidence given in former proceedings; (10) statements in public documents: Cockle, *Cases and Statutes on the Law of Evidence*, 6th ed. (1938), pp. 169-170; and, arguably, (11) ancient documents. Ancient documents present their own special problems. In the context of proof of ancient possession, Taylor, *A Treatise on the Law of Evidence*, 11th ed. (1920), para. 658 suggests that this is an instance of an exception to the rule against hearsay, but at para. 667 he further suggests that ancient documents are receivable as evidence that the transactions to which they relate actually occurred and are admitted not as an exception to the general rule, but rather seem to be part of the *res gestae*, and admissible as original evidence. *Phipson on Evidence*, 13th ed. (1982), para. 9.63 asserts that they are not admissible as an exception to the general rule, for they are received not as proving the truth of the facts stated, but merely as presumptive evidence of possession. For examples, see *Phipson on Evidence*, 13th ed. (1982), para. 9-66 to 9-79. There is also either an important qualification to the hearsay rule or a restriction upon the operation of the basis rule. "Whenever there is an issue as to some person's state of health at a particular time, the statements of such person at that time or soon afterwards with regard to his bodily feelings and symptoms are admissible evidence": Wills, *The Law of Evidence*, 3rd ed. (1938), p. 209. Also, "Whenever the physical condition, emotions, opinions and state of mind of a person are material to be proved, his statements indicative thereof made at or about the time and question may be given in evidence. . . . Such declarations are sometimes considered to fall within the *res gesta* principle, and sometimes to form a special category of their own": *Phipson on Evidence*, 14th ed. (1990), p. 343. This "state of mind" exception could be used to make admissible the results of opinion surveys. See Freckelton, *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts* (1987), pp. 103-112.

[3] *R.* v. *Khan* [1990] 2 S.C.R. 531; *R.* v. *Smith* [1992] 2 S.C.R. 915; *Ethier* v. *Canada (R.C.M.P. Commissioner)* [1993] 2 F.C. 658 (C.A.).

For the purposes of this paper, I think it better to proceed on the assumption that in the nature of things it is unlikely that evidence called by the Crown in cases with which the Litigation Support Co-Ordinating Committee will have to deal will meet the twin criteria of necessity and reliability. Rather, the evidence itself will probably be generated within the context of litigation and to uphold the Crown's position or undermine the position of the other side. Having been brought into existence in anticipation of litigation, it simply will not bear that stamp of neutrality and disinterestedness that is necessary to mark the evidence as inherently trustworthy. The rest of this paper therefore proceeds on the basis that the rule against hearsay is alive and well, and members of the Committee should be familiar with its implications.

2.2 The Best Evidence Rule

The "best evidence" rule at common law requires that when a transaction is recorded in a document, it is not generally permissible to adduce oral evidence of its terms; instead, the document itself must be proved by a production of the original and proof of its making or execution. If the original document has been lost or destroyed or is otherwise unavailable, then under certain circumstances copies of the document or oral evidence as to its contents can be received.

2.3 The Distinction between Proof and Admissibility of a Document

It is not sufficient merely to produce a document. It must generally be proved to have been signed, sealed or otherwise executed by the person whose document it purports to be, unless due execution is admitted. One exception is that an ancient document is said to "prove itself". Where any document purporting or proved to be 30 years old is produced from any custody which the judge in the particular case considers proper, it is considered to be an ancient document and its authenticity need not be proved: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), pp. 955-956.[4] Various classes of documents can be proved in accordance with statutory provisions in that behalf. See generally: *Canada Evidence Act; Financial Administration Act*. Once the document has

---

[4] It is clear that MacEachern C.J.B.C. did not understand the distinction between proof and admissibility of ancient documents when in *Delgamuukw* v. *B.C.* (1989) 38 B.C.L.R. (2d) 165 at p. 170 he allowed ancient documents into evidence on the footing that they were free from suspicion if the maker was disinterested, and the document came into existence ante litem motam. The requirement that an ancient document be free of suspicion goes to its authenticity as a document, as distinct from the inherent trustworthiness of its contents, which is quite a different matter, and arises in the context of the rule against hearsay. Suspicion might be raised, for instance, that the document is a forgery; or interlineations or additions in a different hand might raise questions as to whose document it actually is. Thus it might be an earlier draft of a later version, which was not actually adopted by the author.

been proved, then it may be admitted into evidence provided it is otherwise admissible (that is, it is relevant, and not hearsay, or comes within an exception to the rule against hearsay).

2.4 The Importance of Relevance

The chief criterion of what facts can be admitted into evidence in proof of the case is that they must be relevant to a fact in issue or relevant or deemed relevant to the issue. This question in turn is determined by reference to the pleadings, which seek to reduce the dispute to issues of fact, which, when proved, entitle the party claiming it to the relief sought (e.g., damages). "Relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other: Stephen, *A Digest of the Law of Evidence*, 12th ed. (1936), p. 4. All that is necessary to qualify evidence for admission is that it should increase or decrease the probability of the existence of a fact in issue: Eggleston, *Evidence, Proof and Probability*, 2nd ed. (1983), p. 83.

2.5 Witnesses of Fact and Witnesses of Opinion

There are two sorts of witnesses: (1) witnesses of fact (lay witnesses), and (2) witnesses of opinion (expert witnesses).

A witness of fact is called to give evidence that tends to prove or disprove a fact in issue.

The fact that any person is of opinion that a fact in issue or relevant or deemed to be relevant to the issue, does or does not exist is generally considered to be irrelevant to the existence of such fact. An opinion is really only an inference from a fact or facts. Essentially, it is a conclusion, more or less convincing, depending on the cogency of the reasoning from the facts to the conclusion. In this sense, it is not a fact in itself.

Although a lay witness is strictly speaking restricted to giving evidence as to facts she has personally perceived, it is on the nature of the observation process that various facts cannot be stated with exact precision shorn of what is in effect an interpretation or subjective opinion as to those facts. As Thayer pointed out in 1898: "In a sense all testimony to matter of fact is opinion evidence; i.e., it is a conclusion formed from phenomena and mental impressions": *A Preliminary Treatise on Evidence at the Common Law* (1898), p. 524. Thus the relatively straightforward statement "I saw the accused shoot the victim", or "the car was travelling at about 85 kph", becomes a shorthand way of expressing a series of complex perceptions that may not be able to be unpacked into their separate parts. Even to say "the defendant drove his car through a red light" at the end of the day depends on the

physiology of the witness's observation and ability to distinguish red from green. But in all of these examples the subjective opinion is formed by the common sense and everyday experience of the witness. The witness need not have had a special course of training to make these sorts of inferences or interpretations. It is part of the common stock of knowledge.

On matters with respect to which it is practically impossible for any witness to swear positively, ordinary or "non-expert" witnesses may give evidence of their opinions. So, on questions of identification, condition, comparison or resemblance, of persons or things, a witness may speak as to his belief or opinion, when he cannot swear positively; although he has no special knowledge, skill or experience on such matters generally: *Fryer* v. *Gathercole* (1849) 13 Jur. 542 (Exch.); *Sherrard* v. *Jacob* [1965] N.I.L.R. 151 (C.A.). An example met with daily in the courts is whether a person's ability to drive has been impaired by alcohol. Non-expert evidence is admissible. Essentially, in this sort of case it may be difficult for the witness to narrate her factual observations individually. But the weight of this evidence is entirely another matter. The value of the opinion will depend on the view the trier of fact takes in all the circumstances: *Graat* v. *R.* [1982] 2 S.C.R. 819 at pp. 837-838, per Dickson J. per curiam.

As Cowen and Carter put it:

> No statement can be the mere reduction to words of data perceived, to the exclusion of all mental process by the person making the statement. A human being cannot behave as a mere "dataphone" ... [Thus] all statements partially based upon inference have never been, are not, and cannot be, excluded. The most that can be said is that *some* inferences if made by a witness are objectionable. Evidence based on an inference or inferences of this sort is for the purposes of law of evidence *called* opinion. Evidence which is not based on *such* an inference is for the purposes of the law of evidence *called* fact. The difference is a creature of the law. It does not result from philosophical analysis: *Essays on the Law of Evidence* (1956), Essay V, pp. 163, 165-166.

As Learned Hand J. stated: "The line between opinion and fact is at best only one of degree, and ought to depend solely upon practical considerations such as for example the saving of time and the mentality of the witness": *Central Railroad Co. of New Jersey* v. *Monahan*, 11 Fed. (2nd) 212 (1926).

The point can perhaps best be understood by splitting opinions two different ways. First, into the categories of impulsive and deliberate opinions; second, into the categories of commonplace and expert opinions. Thus as Maguire in *Evidence, Common Sense and Common Law* (1947) at p. 24 suggests:

A non-expert witness may not give an opinion as to matters calling for expertness, nor may any witness give a deliberate opinion as to commonplace matters which can be analyzed or broken down into rudimental factors.

2.6 The Role of the Expert Witness

Where the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it, then there is no need for the assistance of an expert who can express an opinion on what these facts amount to. The trier of fact is fully capable of forming a correct appreciation of the facts unaided: Note on *Carter* v. *Boehm* (1766), in *Smith's Leading Cases*, 13th ed. (1929), I, p. 561. Opinion evidence is therefore inadmissible as being irrelevant.

Yet whilst it is the function of the trier of fact to form a correct judgment or conclusion to be derived from those facts, there are situations due to the subject-matter of the inquiry in which inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of the opinion of witnesses possessing peculiar skill. On certain matters, such as those of science or art, upon which the court itself cannot form an opinion, special study, skill or experience being required for the purpose, "expert" witnesses may give evidence of their opinions. Accordingly, a witness of opinion is usually called for the purpose of drawing inferences from facts and expressing opinions about matters before the court.

Thus as Dickson J. explained in *R.* v. *Abbey* [1992] 2 S.C.R. 24 at p. 42:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge and jury can form their own conclusions without help, then the opinion of the expert is unnecessary". Citing *Regina* v. *Turner* (1974) 60 Crim. App. R. 80 at p. 83, per Laughton L.J.

Similarly, in *Kelliher (Village of)* v. *Smith* [1931] S.C.R. 672 at p. 684, Lamont J. (for the majority) said that to justify the admission of expert testimony, two elements must co-exist, one being that the subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.

Accordingly, the essential criterion for the admissibility of opinion evidence is that it would be helpful to the trier of fact, in the sense that it provides information which is likely to be outside its experience and knowledge. If it is not helpful opinion evidence is superfluous and its admission would only involve an unnecessary addition to the testimony placed before the jury: *R.* v. *Fisher* [1961] O.W.N. 94 (C.A.), per Aylesworth J.A.; *R.* v. *Mohan* (1994) 114 D.L.R. (4th) 419 at p. 429, per Sopinka J. per curiam. In short, the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.

This must, however, be clearly understood. It is not the inherent complexity of or unfamiliarity with the subject matter of the litigation or part of the litigation that invokes expert evidence. Instead, it is the difficulty encountered in understanding or appreciating the *facts in evidence* which calls for an expert to assist the trier of fact to form a just appreciation of the evidence. Simply because very few people have been bitten by a dog does not mean that in an action for damages against the dog owner an expert is therefore necessary to explain the significance of the evidence. The trier of fact is perfectly capable of understanding the evidence unaided. On the other hand the trier of fact might be a do-it-yourself handy man with a general knowledge of how to build things, but it might nonetheless still be necessary to call expert opinion evidence to determine whether the cause of cracks in the walls was due to inadequate footings (passed as a result of negligent inspection) or caused by abnormally temperatures the previous winter.[5]

In the end, then, expert witnesses may give in evidence statements based on their own experience or study, but they cannot be permitted to attempt to point out to the trier of fact matters which it could determine for itself or to formulate expert empirical knowledge as a universal law.

2.7 The Essential Difference between Witnesses of Fact and Witnesses of Opinion

From the point of view of practical advocacy, I believe that the essential distinction between witnesses of fact and witnesses of opinion is simply this: an expert is called to give her opinion, and that opinion is presented as a fact. Since a witness of fact is restricted to giving evidence as to what she has perceived herself, the proponent of that evidence merely invites the tribunal to find as a fact that, say, it was raining at the time of the accident, and that the skidmark left by the defendant measured 85 ft. long. In presenting evidence of opinion, essentially the proponent wants the tribunal to accept as a fact the expert opinion

[5] Cudmore, *Civil Evidence Handbook* (1987), para. 14.3 claims that the basic test for admissability is that opinion evidence may not be given upon a subject matter within what maybe described as the common stock of knowledge. But subject to that rule expert opinion evidence will be admitted where it will be helpful to the jury in their deliberations and it will be excluded only where the jury can as easily draw the necessary inferences without it. The first part of this proposition is so plainly misleading as to be quite wrong.

that, given the weather conditions and the length of the skidmark, the defendant was travelling in excess of 150 km per hour. This excessive speed is thus the foundation for the argument that the defendant's driving amounted to negligence in law.

"For the judge or jury the expert's opinion is a question of fact which may be accepted or rejected as seen fit." Thus the opinion, even if uncontradicted, is not determinative of the issue: *R.* v. *Abbey* [1982] S.C.R. 24 at p. 43, per Dickson J. per curiam.

The problem of technique is therefore to get in expert evidence of opinion in such a way that it falls short of the expert putting from the witness box the inferences upon which the proponent's case rests. An expert witness is not to be used to argue the case from the witness box or in her report.[6] Rather, opinion is presented as a fact, and the proponent then invites the tribunal to find that fact proved.

The courts have traditionally been suspicious of, if not hostile to, expert evidence. Too often, experts are seen as guns for hire, and are not always professionally objective in their opinions but become partisans in the cause. Also, an expert who expresses an opinion cannot be prosecuted for perjury. It is feared that juries will become bamboozled by experts, or give greater weight to their evidence than it deserves. There is also a contradiction at the very heart of the notion of expert evidence. Given that expert evidence is admissible only where the trier of fact cannot form a just appreciation of the evidence for itself, the trier of fact is very often asked to assess the cogency and weight of conflicting expert opinions, which, by definition, it is not really capable of doing.

2.8 What is an Expert Witness

An expert witness therefore is merely a person who is called for the purpose of drawing inferences from given facts and expressing opinions, to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. It is for the judge to decide whether the skill of any proposed witness is sufficient to entitle her to be considered an "expert". Essentially, the judge must determine whether the field of knowledge in which the witness professes expertise is outside the ordinary experience of men and whether the witness has sufficient expertise in such field as would enable him to assist the tribunal: *Cross on Evidence, Second Australian Edition* (1978), par. 16.10.

---

[6] See Dixon C.J. in *Clark* v. *Ryan* (1960) 103 C.L.R. 486 at pp. 491, 492; MacEachern C.J.S.C. in *Sengbusch* v. *Priest* (1987) 14 B.C.L.R. (2d) 26 (S.C.) at p. 40; and MacDonald J. in *Emil Anderson* v. *B.C.R. No. 2* (1987) 17 B.C.L.R. (2d) 357 at p. 360.

2.9 Who Is an Expert

In *Rice* v. *Sockett* (1912) 27 O.L.R. 410 (Div. Ct.) at p. 413, Falconbridge C.J. said as follows:

> The term "expert" from *experti*, says Bouvier, "signifies instructed by experience."
>
> "The expert witness is one possessed of special knowledge or skill in respect of the subject upon which he is called to testify:" *Words and Phrases Judicially Defined*, vol. 3, p. 2594.
>
> Dr. John D. Lawson, in "The Law of Expert and Opinion Evidence," 2nd ed., p. 74, lays down as rule 22: "Mechanics, artisans and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible;" citing numerous authorities and illustrations.
>
> "The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly-education and skilled gunsmith:" *State* v. *Davis* (1899), 33 S.E. Repr. 449, 55 So. Car. 339, cited in *Words and Phrases Judicially Defined*, vol. 3, p. 2595.
>
> As Lord Russell C.J. said in *R.* v. *Silverlock* [1894] 2 Q.B.766 (C.C.R.) at p. 771:
>
> It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in any definite way? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence.

2.10 Qualifying the Expert

Assuming that the evidence in other respects is admissible, before admitting the opinion evidence the trier of fact has to be satisfied that the witness had sufficient skill,

knowledge, or experience in the subject-matter to entitle her to give opinion testimony.[7] It is not possible to formulate any precise rule as to when a person is sufficiently versed in a subject-matter to be considered an expert.

> In such a matter, ... there can be no precise rules. The court is expected to rule on the qualifications of an expert witness, relying partly on what the expert himself explains, and partly on what is assumed, though seldom expressed namely that there exists a general framework of discourse in which it is possible for the court, the expert and all men according to their degrees of education, to understand each other. Ex hypothesi this does not extend to the interior scope of the subject which the expert professes. But it is assumed that the judge can sufficiently grasp the nature of the expert's field of knowledge, relate it to his own general knowledge, and thus decide whether the expert has sufficient experience of a particular matter to make his evidence admissible. The process involves an exercise of personal judgment on the part of the judge, for which authority provides little help: *Milirrpum* v. *Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141 (N.T.S.C.) at p. 160, per Blackburn J.

No one should be allowed to give evidence as an expert unless her profession or course of study gives her more opportunity of judging than other people: per Vaughan Williams J. during argument in *R.* v. *Silverlock* [1894] 2 Q.B. 766 (C.C.R.) at p. 769. The words "profession or course of study" have of course a wide meaning and application: see per Lord Russell C.J. in *R.* v. *Silverlock* [1894] 2 Q.B. 766 at p. 771. So the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify: *R.* v. *Mohan* (1994) 114 D.L.R. 419 (S.C.C.) at p. 431, per Sopinka J. per curiam.

The Canadian position (as seen in *Rice* v. *Sockett* and *R.* v. *Mohan*, *supra*) appears to be fairly liberal and in accord with the English position: expertise is not restricted to those who are qualified by a special course of study or academic qualification. Thus practical experience can also confer expertise.[8]

---

[7] For technique, see Camp, "Examining an Expert in Chief", in Canadian Bar Association, *Winning Advocacy Skills*, 3rd ed. (1994).

[8] In Australia, although the authorities are not uniform, the approach appears to be more legalistic. The trend seems to be against conferring expertise on a witness who has acquired her skill through experience or observation but without study or instruction in some relevant scientific or specialized field. Such a witness may, as a result of that experience, give evidence as to a fact within the witness's experience or observation. This view apparently recognizes a new category of evidence. The Australian authorities are discussed at length by Freckelton, *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts* (1987), pp. 20-33. See, however, Young, "Practical Evidence", (1992) 66 *A.L.J.*, pp. 379-380 where he discusses "quasi-experts".

2.11 Challenging the Expert's Qualifications or Expertise

The party against whom the expert evidence is being tendered has a right to challenge, by way of cross-examination, the qualifications of the witness to give opinion evidence. This should be exercised immediately after the proponent has attempted to qualify the witness and ask the trier of fact to accept her as an expert and before the opinion evidence is received: *Baker* v. *Hutchinson* (1976) 13 O.R. (2d) 591 (C.A.) at p. 596, per Dubin J.A. per curiam. The cross-examiner can also offer evidence to establish the witness's incompetency to give expert evidence: *Preeper & Doyle* v. *The Queen* (1888) 15 S.C.R. 401 at p. 408, per Ritchie C.J. This is done on the voir dire.[9] Once the court has ruled that a person may give expert evidence, a court of appeal should be hesitant to interfere with the ruling made by the trial judge as to the admissibility of that opinion: *Bleta* v. *The Queen* [1964] S.C.R. 561 at p. 568, per Ritchie J.

2.12 What is a Field of Expertise

It is not possible to enumerate the matters which have been treated by the courts as requiring a sufficient degree of specialized knowledge to render expert evidence admissible. What is commonplace today, such as the operation of radio or the internal combustion engine, was a matter of science or art yesterday. All that can usefully be said is that the matter must be one beyond the common stock of knowledge, requiring special or peculiar knowledge that the tribunal deciding the matter does not possess in the ordinary course[10] and needs to have in order to arrive at a just appreciation of the evidence.

2.13 Categories of Expert Evidence

As we have seen, a lay witness can usually only give evidence as to fact; (she can also give opinion evidence on matters to which she cannot positively swear, although having no special skill etc.). The hallmark of expert evidence is that the expert is invited to say "in my opinion ...": *Reckitt & Colman Ltd.* v. *Borden Inc. (No. 2)* [1987] F.S.R. 407 (Ch. D.) at p. 408, per Walton J.

---

[9] As a matter of practice an expert's competence is rarely attacked for fear of accidentally puffing the expertise of the witness. Although they will tolerate it, Ontario courts seem to frown on counsel who insist on cross-examination.

[10] In many cases, the tribunal may have necessary knowledge from previous encounters with that area of expertise, and is thus more aware of matters which it would not be expected to know in the ordinary course. A judge, for example, might have acquired specialized medical knowledge when practising at the Bar. Nonetheless, the court will receive expert evidence, if only to satisfy the Court of Appeal that he heard it.

But expert evidence can be divided into several categories. This is because an expert's particular skill or training enables her not only to form an opinion and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible or unintelligible to a lay witness: *Phipson on Evidence*, 14th ed. (1990), p. 806. For example, an expert might state in evidence based on her own experience or study that there are certain broadly-marked differences in the character between the fingerprints of different people and that these can be classified, and this can be illustrated from her expert knowledge as to what those broad characteristics are. The witness can make that statement from her own experience. But so far as she attempts to point out similarities, she is not, in one sense, speaking as an expert at all, but is merely pointing out to the trier of fact matters which it could determine for itself. She is simply a convenient helper of the court. In respect of both of these matters an expert witness can be permitted to give evidence: *R.* v. *Parker* [1912] V.L.R. 152 (Full Ct.) at p. 160, per Cussen J.

Hodgkinson, *Expert Evidence: Law and Practice* (1990) at p. 9 distinguishes five categories[11] of evidence given by experts:

(i) Expert evidence of opinion, upon facts adduced before the court.

This is the ordinary or common usage of the phrase "expert evidence" or "opinion evidence".

(ii) Expert evidence to explain technical subjects or the meaning of technical words.

This category speaks for itself.

(iii) Evidence of fact, given by an expert, the observation, comprehension and description of which requires expertise.

Evidence as to fingerprints or handwriting are good examples of this category. The emphasis, however, is on evidence of fact rather than opinion. *Phipson on Evidence*, 14th ed. (1990), p. 806 gives a neat illustration:

---

[11] These categories go beyond those suggested by Reed J. in *Fraser River Pile & Dredge Ltd.* v. *Empire Tugboats & Ors.* (1995) where, in her unreported reasons for rejecting certain affidavit evidence, she opined at p. 4 that there are at least two aspects to expert evidence: (1) the adducing of facts through an expert because that individual has a particular knowledge thereof and such evidence can only realistically be obtained in this manner ((iii) below); and (2) the drawing of inferences from a defined set of facts in circumstances where the making of such inferences are difficult for a trier of fact because they depend on specialized knowledge, skill or experience ((i) below).

A microbiologist who looks through a microscope and identifies a microbe is perceiving a fact no less than the bank-clerk who sees an armed robbery committed. The only difference is that the former can use a particular instrument and can ascribe objective significance to the data he perceives. The question of subjective assessment and interpretation which is the essence of opinion evidence hardly enters into the matter at all.

This category can overlap with category (i), where, for example, the expert gives opinion evidence that the fingerprint in question is the accused's.

(iv) Evidence of fact, given by an expert, which does not require expertise for its observation, comprehension and description, but which is a necessary preliminary to the giving of evidence in the other four categories.

Hodgkinson posits that this category is not expert evidence properly so-called, but is worthy of inclusion "because it often forms an inseparable part of the evidence given by an expert, and is often included within the loose definition of "expert evidence" implied by the ordinary usage of the expression."

(v) Admissible hearsay of a specialist nature.

Typical of this sort of evidence is mathematical, statistical and financial calculations.

This taxonomy is useful, both because it assists in recognizing whether a matter calls for expert evidence at all, and also because it gives early warning of the need to comply with rules of court concerning expert evidence.

2.14 The Trier of Fact is not Bound by the Expert Evidence

The trier of fact is not bound to accept an expert's opinion, even if uncontradicted: *R.* v. *Abbey* [1982] S.C.R. 24 at p. 43, per Dickson J. per curiam.

2.15 The Hypothetical Question

Of its nature, opinion evidence rests on two distinct subjects of testimony: (1) premises; and (2) inferences or conclusions. An opinion is only as good as the premise on which it is based, or the chain of reasoning leading to the conclusion. Since both the premises and the inferences or conclusions must be able to be tested, they should be set out separately. The essential role of the hypothetical question is to state the premises on which the opinion is based.

More often than not, an expert called to give evidence does not have first-hand knowledge of the facts in issue. (If she does, then she can give evidence as to those facts as a lay witness.) Thus the expert witness expresses her opinion or conclusion on the basis of a fact or set of facts that the expert is asked to assume to be true. Counsel calling the expert witness usually undertakes to lead evidence that will prove the assumed facts.

A hypothetical question is designed to elicit the expert's opinion, and is framed on the basis of an assumed set of facts which the expert is asked to accept as true and is then asked to express an opinion based on those facts. In schematic terms, the expert is asked:

> "Q. Assuming these facts ... to be true, are you able to express an opinion with reasonable certainty as to ...? "
>
> "Q. What is that opinion?"
>
> "Q. Why is that your opinion?"

See generally Maloney, "Expert Evidence", in Law Society of Upper Canada, *Defending a Criminal Case* (1969), p. 96.

Where it is clear on what factual premises an expert is being asked to found her conclusion, the failure of counsel to put such questions in hypothetical form does not of itself make the answers inadmissible. The acid test is whether the foundation of the expert's opinion has been clearly indicated. That factual foundation could be indicated either in the form of a hypothetical question, or on the basis of the uncontradicted evidence before the court.[12] In short, it is a problem of presentation and technique.

A problem clearly arises where the assumed facts are not ultimately proved to the satisfaction of the trier of fact. The discrepancies between the assumed facts and the proved facts can obviously range from fatal to slight. This raises the question whether the whole of the opinion evidence is rendered inadmissible, or goes only to its weight.

The test appears to be whether the hypothetical material put to the expert witnesses represents a "fair climate for the opinions they expressed". As the court explained in the Wyoming case of *Culver* v. *Sekulich* (1959) 80 Wyo. 437 at p. 458:

> From our analysis of the record it appears to us that there was some evidence to support every hypothetical question to which objection was made. Such

---

[12] As was the case in *Bleta* v. *The Queen* [1964] S.C.R. 561, where the expert psychiatrist was not asked hypothetical questions but was simply invited to express his opinion based on the evidence which he had heard at the trial. See also *M'Naughten's Case* (1813) 10 Cl. & F. 200 at p. 212; 8 E.R. 718 (H.L.).

> evidence was not always complete, was sometimes hazy as to time, distance and other vital words, but in general, furnished a fair climate for the consideration of the views of the expert witnesses.

There appears to be a degree to flexibility as to the relationship between the assumed facts and the proved facts. Thus the expert opinion need not "correspond with complete precision to the proposition on which the opinion is based": *Paric* v. *John Holland Construction Pty. Ltd.* (1985) 59 A.L.J.R. 844 at p. 846.

In *Sheen* v. *Bumpstead* (1862) 1 H. & C. 358 at p. 365; 158 E.R. 924 (Exch.), Martin B. suggested that the basis of an expert's opinion should not be established in his evidence-in-chief, but the expert can only be cross-examined as to the reasons in support of her opinion. But in *R.* v. *Turner* (1974) 60 Cr. App. R. 80 (C.A.) at p. 82 Lawton L.J. emphasized that it was the duty of counsel calling an expert to ask his witness to state the facts upon which his opinion is based. "It is wrong to leave the other side to elicit the facts by cross-examination."[13]

2.16 Extrinsic Materials

Books dealing with a particular discipline are not admissible per se, unless the court is taking judicial notice of a fact recorded in it. Therefore, a fact in issue can never be evidentially proved merely by reference to a textbook. If a landlord complained of a farmer for not properly cultivating his land, he could not refer to books in order to show in what way the land ought to be cultivated, for that must be proved before the jury: *Darby* v. *Ousley* (1856) 1 H. & N. 1; 156 E.R. 1093 (Exch.). Thus to the extent that textbooks may be employed this must be done through the agency of an expert witness: Hodgkinson, *Expert Evidence: Law and Practice* (1990), pp. 174-175.

The English Law Reform Committee succinctly states the law on this point as follows:

> Experts are entitled, in support of any opinion expressed by them, to refer to a textbook or other written material, whatever its authorship, if it is regarded as authoritative by those qualified in their specialty. Passages which are so referred to become part of the expert's testimony. But, except under these conditions, material contained in textbooks or other writings is not admissible unless, of course, the parties so agree.... A textbook or other writing is no

---

[13] This rule also requires that the expert explain her non-specific hearsay bases for her opinion. But the rule cannot be applied rigidly, because often an expert calls on wells of knowledge without being conscious of doing so: Pattenden, "Expert Opinion Evidence Based on Hearsay" [1982] *Crim. L.R.*, p. 95.

> more than the opinion of another expert who is not there to explain the application of what he has written to the relevant facts of the case, or to be cross-examined. Of his qualifications and the weight attached to his opinions by those experienced in the same field, the court itself is not in a position to judge without expert assistance: Great Britain, Law Reform Committee, *Seventeenth Report (Evidence of Opinion and Expert Evidence)* (1970), para. 20.

If the witness does not adopt the writing as being authoritative and in accord with the witness's own opinion, nothing may be read from the text, because the text is simply pure hearsay: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), p. 560.

However, there is authority for the proposition that even if the expert does not adopt the content of treatises as her own, provided the treatise appears to be trustworthy, it is admissible as prima facie proof of the facts contained in it: *Delgamuukw* v. *B.C.* (1989) 38 B.C.L.R. (2d) 176. This appears to be against principle. It appears that counsel for the plaintiffs was correct when she submitted that both the opinions stated in the treatises, etc., and the facts stated in them are admissible as prima facie proof of what they state to the extent an expert witness adopts or approves them either in evidence or in an opinion report. MacEachern C.J.B.C. at pp. 181-182 appears to have rejected this submission. It is difficult to be definite on this, because His Lordship's reasons are rambling and confusing, and no clear-cut proposition emerges from them.

But an expert can give opinion evidence about admissible documents before the court. In doing so, an expert cannot usurp the function of the court in construing written material. What a document says is for the court, but in some cases -- of which land claims litigation is a paramount example, the court stands in need of the assistance of someone who understands the context in which the document was created. Thus qualified experts may give many useful opinions, based upon inferences from the documents about recorded facts of history in order to explain matters in issue. But they may not construe a written document, or generalize upon the broad sweep of history which is so often subject to learned disagreement and revision: *Delgamuukw* v. *B.C.* (1989) 38 B.L.R. (2d) 165 at p. 175.

This sort of expert evidence appears to fall within Hodgkinson's category (ii). Note, however, that an indispensable condition to allowing evidence of this sort is that the documents are before the court.

2.17 The Problem of Ancient Documents

Ancient documents are admissible as proof of ancient possession. The precise theoretical basis of admissibility and consequent proof of the facts stated therein is not clear.[14] At any rate, the document cannot be a narrative of past events, but must purport to have formed part of the act of ownership, exercise of the right, or other transaction to which it relates: Taylor, *A Treatise on the Law of Evidence*, 11th ed. (1920), para. 658.

Ancient documents containing narratives, are, like any other documents, obviously hearsay if it is proposed to use their contents as proof of the facts asserted. They are therefore on principle inadmissible. However, in the course of hearing *Delgamuukw* v. *B.C.* MacEachern C.J.B.C. ruled, on grounds which are not at all clear, that ancient documents which qualify for admissibility are available as proof of the facts they contain including statements based on hearsay. But such evidence is not conclusive on any question, and may, under the rubric of weight, be disregarded in whole or in part if it is based entirely on hearsay, or if it is contradicted, or its value as evidence is destroyed or lessened either internally or by other admissible evidence, or by common sense. But even then, provided the author of the document is disinterested and the document came into existence ante litem motam, the court may feel impelled to act on hearsay if the document in which it is found demonstrates a circumstantial guarantee of trustworthiness and there is no other evidence: 38 B.C.L.R. (2d) 165 at p. 172.

MacEachern C.J.B.C. appears to have ultimately grounded this ruling on the general relaxation of the rule against hearsay. However, this appears to be wrong in principle, and collides with the rule that the courts may take judicial notice of the general facts of history. Provided the ancient document contains information that is indisputably accurate, it can be used as a foundation for taking judicial notice. Furthermore, there is no authority in support of the proposition that the relaxation of the rules against hearsay allows hearsay on hearsay. MacEachern C.J.B.C.'s ruling is wrong-headed in principle, muddled in its application, but obviously has far-reaching implications. Presumably, the burden is on the proponent to demonstrate through admissible evidence that the maker of the document was disinterested and that it was made ante litem motam. The first condition may well be quite onerous; in most cases, the second ought not be.

On the other hand, it might have been possible to get into evidence expert opinion testimony which in turn might provide the ground for taking judicial notice.

In the end, the expert evidence in *Delgamuukw* did not amount to all that much. The historians were largely collectors of archival historical documents, and who provided much useful information with minimal editorial comment. The documentary collections spoke

---

[14] See the remarks in footnote 2, *supra*.

largely for themselves. Each side was able to point out omissions in the collections advanced on behalf of others, but nothing turned on that: *Delgamuukw* v. *British Columbia* (1991) 79 D.L.R. (4th) 185 at p. 251.

2.18 The Problem of Hearsay Evidence

When an expert gives opinion evidence, the opinion must be her own, but she need not have first-hand knowledge of the facts on which she bases the opinion. She bases the opinion on facts which she believes to be true, and these facts can come from two sources: what she has been told of the facts specific to the case; and what she has learned in the course of acquiring her expertise and which underpins her opinion. In both cases, the sources of information are technically hearsay.

If the opinion is based on specific facts, those facts must be proved. Otherwise, the opinion has no weight: *R.* v. *Abbey* [1982] S.C.R. 24; *R.* v. *Zundel [No. 1]* (1987) 58 O.R. (2d) 129 (C.A.); (and should be inadmissible on that ground alone). For example, in *R.* v. *Abbey* [1982] S.C.R. 24, the accused pleaded that he was insane, and called psychiatric evidence to support the defence. The psychiatrist based his opinion on the accused's own statements to him as to various incidents of bizarre and unstable behaviour. These statements were obviously hearsay if recounted by the expert to the court to prove that these bizarre incidents had happened. The accused did not testify, and so there was no admissible evidence in support of the opinion. Also, coming from the accused, these statements were not in any sense able to be relied upon. The Supreme Court found that the trier of fact must have treated the expert's account of the accused's behaviour as proof of that behaviour, and since there was no admissible evidence in support of the opinion it was entitled to no weight. The Supreme Court did not hold that it was accordingly inadmissible.

This raises a problem: if evidence is entitled to no weight, it must be irrelevant and therefore inadmissible. After all, the specific facts underlying the expert opinion are the only connection between the opinion and the case. If the opinion is based solely on unproven hearsay, then there is no connection between the opinion and the facts in issue: Wardle, "*R.* v. *Abbey* and Psychiatric Opinion Evidence: Requiring the Accused to Testify" (1984), 17 *Ottawa Law Review*, pp. 116-131.

The Supreme Court of Canada confronted and attempted to resolve this problem in *R.* v. *Lavallee* [1990] 1 S.C.R. 852. The accused was charged with murdering her common-law partner. She pleaded self-defence on the ground that she "reasonably apprehended" death or grievous bodily harm and introduced evidence that she was a battered wife. A psychiatrist with extensive professional experience in the treatment of battered wives prepared a psychiatric assessment of the accused which was used in support of her defence. He explained her ongoing terror, her inability to escape the relationship despite the violence and the continuing pattern of abuse which put her life in danger. He testified that in his

opinion the accused's shooting of the deceased was the final desperate act of a woman who sincerely believed that she would be killed that night.

The expert's opinion was based on a number of sources, including interviews with the accused, an interview with her mother, a police report of the incident, and hospital records documenting several of her visits to the emergency department. Neither the accused nor her mother testified. All of these sources were hearsay (although some of this might have been evidence as to state of mind, and therefore within an exception[15]). Wilson J. also pointed out that there was substantial corroborative evidence provided at the trial, such as the emergency room doctor who testified to doubting the accused's explanation of her injuries, and eye witnesses on the night of the shooting who testified to the accused's frightened appearance, tone of voice, and conduct in dealing with the deceased. "The evidence pointed to the image of a woman who was brutally abused, who lied about the cause of her injuries, and who was incapable of leaving her abuser": [1990] 1 S.C.R. 852 at pp. 896-897. Unlike in *Abbey*, there was therefore *some* admissible evidence to support the expert's opinion, and so the expert evidence was admissible.

Of its nature all expert opinion is to some extent based on hearsay, because the expert has acquired her expertise from sources or experiences that are not before the court. There is still a question as to the other sources of information underpinning the opinion (which Pattenden calls "non-specific hearsay": "Expert Opinion Evidence Based on Hearsay" [1982] *Crim. L.R.*, p. 95). It is obviously necessary for the expert to tell the court information derived at second-hand which underpins her opinion. Also, it is desirable to allow an expert to do this otherwise the weight of her opinion cannot be assessed: Pattenden "Expert Evidence Based on Hearsay" [1982] Crim. L.R., pp. 86-87. Thus hearsay can be a component of the expert evidence both as a component of her expert knowledge, and as a component of her expert opinion.

The general rule is that where the hearsay is a component of the expert's opinion, those facts must be proved: *R.* v. *Abbey* [1982] 2 S.C.R. 24; *R.* v. *Lavallee* [1990] 1 S.C.R. 852. However, sometimes an exception to the hearsay rule can be relied upon, such as an admission or declaration by a non-witness as to his state of mind or made in the course of duty.

While the basis of the opinion must generally be proved, there are exceptions in the case of non-specific hearsay. An expert can give opinion evidence based on sources that are not produced to the court where the sources are technical material of a nature widely used in the field of expertise. They are commonly relied upon, and records and materials of that

[15] Though care must be taken even here. It is one thing to say "I have a wound", which is evidence, but another thing to add, "my husband hit me", which cannot be evidence against the husband: *R. v. William Nicholas* (1846) 2 Car. & K. 249; 175 E.R. 102 (N.P.).

kind may be the basis of evidence by one who is qualified as familiar with the business activity or calling in question: *Borowski* v. *Quayle* [1966] V.R. 322, per Gowans J. Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev., 1979), vol. vi, para. 1702, insists that this is a very narrow exception, and is restricted to certain commercial and professional lists, registers and reports.

But it is no valid objection to an opinion based on such material provided the sources relied are of a sufficiently general nature to be regarded as part of the corpus of knowledge with which the expert can be expected to be acquainted: Pattenden, "Expert Opinion Evidence Based on Hearsay" [1982] Crim. L.R., p. 93, citing Megarry J.'s illuminating remarks in *English Exporters Pty. Ltd.* v. *Eldonwall* [1973] 1 Ch. 415 at p. 420. Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev. 1979), vol. ii, para. 665 (b.) points out that no professional man can know from personal observation more than a minute fraction of the data which he must everyday treat as working truths. "Hence [there must be] a reliance on the reported data of fellow scientists learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men...".

For as Sopinka J. pointed out in *Lavallee*, there is a practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise, and evidence that an expert obtains from a party to litigation touching a matter directly in issue. His Lordship explained:

> In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of observations of colleagues, often in the form of second-or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general....
>
> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. This lack of proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight: [1990] 1 S.C.R. 852 at pp. 899-900.

An interesting application of this rule is found in *Milirrpum* v. *Nabalco Pty. Ltd.* (1971) 17 F.L.R., 141. Blackburn J. at p. 161 ruled that it was not correct to apply the hearsay rule so as to exclude evidence from an anthropologist in the form of a proposition of anthropology -- a conclusion which has significance in that field of discourse. An anthropologist could not be allowed to give evidence in the form: "Munggurrawuy told me that this was Gumatj land", as proof of the fact of who owned the land. His Honour continued:

> But in my opinion it is permissible for an anthropologist to give evidence in the form: "I have studied the social organization of these aboriginals. This study includes observing their behaviour; talking to them; reading the published work of other experts; applying principles of analysis and verification which are accepted as valid in the general field of anthropology. I express the opinion as an expert that proposition X is true of their social organization." In my opinion such evidence is not rendered inadmissible by the fact that it is based partly on statements made to the expert by the aboriginals.

Yet the rule is not a licence to rely simply on any second-hand materials. Those materials or sources must form part of the intellectual equipment or framework within which the expert, and others in the same field, routinely utilize or resort to. In *Lavallee*, Sopinka J. [1990] 1 S.C.R. 852 at p. 899 spoke of "professional judgment arrived at in accordance with sound medical practices". In *Wilband* v. *R.* [1967] S.C.R. 14 at p. 21, Fauteux J. per curiam pointed out to form an opinion according to recognized normal psychiatric procedures, the psychiatrist must consider all possible sources of information, including second-hand source of information, the reliability, accuracy and significance of which are "within the recognized scope of his professional activities, skill and training to evaluate." Hence, while ultimately his conclusion may rest, in part, on second-hand source material, "it is nonetheless an opinion formed according to recognized normal psychiatric procedures." Then in *Milirrpum*, Blackburn J. (1971) 17 F.L.R. 141 at p. 161 spoke in terms of "applying principles of analysis and verification which are accepted as valid in the general field of anthropology", and that there can be an "investigation by processes normal to his field of study, just as any other expert does". That the expert's opinion conforms with these techniques needs to be proved.[16]

---

[16] Behind this lies the problem of leading expert evidence in a field which has not acquired sufficient acceptance to be regarded as a matter of expertise. This in itself might be controversial. For example, imagine the potential for conflict between expert medical evidence and the evidence of expert chiropractors in a case where a chiropractor is sued for negligence in manipulating the spine of a two-year old, where the issue might be not whether he did it in accordance with sound chiropractic techniques, but whether he should have manipulated the spine at all.

The Ontario Court of Appeal, I think wrongly, has recently made a major extension on the application of this principle. Expert opinion evidence can apparently be given on the existence of general or specific historical facts, based on hearsay materials that are not produced to the court.

In *Zundel [No. 1]* the accused was charged with spreading false news as a result of his publication of a pamphlet denying that the Holocaust occurred. The prosecution led viva voce evidence from survivors, and also expert opinion evidence from one Dr. Hilberg. Dr. Hilberg gave his opinion concerning the systematic killing of Jews during the Second World War by the Nazi Government in Germany. Dr. Hilberg had authored a book on the Holocaust, published in 1961. He based his opinion on various sources, including interviews with witnesses, captured contemporary Nazi archival documents, transcripts of evidence from the Nuremburg war crimes trials, and secondary authorities. He had also visited various concentration camps. All of these oral and documentary sources were clearly hearsay.

The Court of Appeal held that his opinion based on these sources was nonetheless admissible, on these grounds:

> There are two exceptions to the hearsay rule which are relevant, and in the circumstances of this case, are, in our opinion, mutually supportive. The first is that events of general history may be proved by accepted historical treatises on the basis that they represent community opinion or reputation with respect to an historical event of general interest. The historical event must be one to which it would be unlikely that living witnesses could be obtained, and in addition, the matter must be one of general interest, so that it can be said that there is a high probability that the matter underwent general scrutiny as the reputation, evidenced by historical treatises, was formed....
>
> If an historical treatise is admissible to prove an historical fact of general public interest, we think it should logically follow, if the conditions for this exception to the hearsay rule are met, that an expert historian may testify as to the existence of an historical event relying upon material to which any careful and competent historian would resort. The testimony of an expert historian is, in our view, superior to the admission of an historical treatise, because the expert can be cross-examined.
>
> In our opinion the first condition for the application of the exception, namely, that the historical event must be one to which it would be unlikely that living witnesses could be obtained, was satisfied in this case.... That the events upon which Dr. Hilberg expressed an expert opinion are of general interest is self-evident. The public nature and, indeed, the interest of the world community and the events to which Dr. Hilberg's opinion related is evident from all the Nuremburg trials, which evidence a form of community opinion.

Dr. Hilberg's opinion did not, however, purport to be based upon reputation or community opinion. His opinion was primarily based on an examination and analysis of the documents which he described. Dr. Hilberg's evidence, consequently, did not fall strictly within the exception to the hearsay rule that historical events of general interest may be proved by accepted by historical treatises which may be assumed to evidence reputation or public opinion as to the historical events or to be proved....

The materials upon which Dr. Hilberg relied came into existence contemporaneously with the historical event in issue and were not created in contemplation of litigation. They are part of the source material of history to which any careful and competent historian would resort and thus satisfy the requirement of trustworthiness.

The courts have in the past been willing to expand the hearsay exceptions when the evidence sought to be introduced has met the conditions of necessity and trustworthiness....

In our view, the expert opinion of Dr. Hilberg, even though primarily based on the documentary material described by him, which was hearsay, was admissible to prove the existence of the Holocaust.

The second exception which is relevant in this case is that an expert witness may give evidence based on material of a general nature which is widely used and acknowledged as reliable by experts in that field. This exception, however, has hitherto been confined to a few narrow classes of cases such as, for example, mortality tables and a standard pharmaceutical guide....

...The material upon which Dr. Hilberg relied in forming his opinion was material to which, as we have previously indicated, any careful and competent historian would resort. Having regard to the fact that his opinion related to an historical event of international interest, and the unlikelihood of obtaining living witnesses who had first-hand knowledge of Nazi Government policy and its implementation with respect to the subject-matter of the Holocaust which lies at the foundation of the case, we are satisfied that Dr. Hilberg's opinion evidence, in the circumstances of this case, also fell within this hearsay exception and was therefore admissible on that basis: 58 O.R. (2d) 129 at pp. 175, 176, 177, 178, 179-180.

In short, Dr. Hilberg had a greater ability than the court to evaluate the reliability of background hearsay: at p. 179.

Pausing here, none of the materials Dr. Hilberg relied upon were produced to the court. There is, then, in my view a fatal objection to the court's reasoning, based on the best evidence rule: the source materials should have been produced, because Dr. Hilberg was giving nothing other than a second-hand account of the contents of the documents. Actually, he was doing more than this: he was also asserting a factual basis for his opinion by relying upon *specific facts* contained in the documents. As the Court readily recognized, the documents did not record "events of general history" and were not "accepted historical treatises" and did not "represent community opinion or reputation with respect to an historical event of general interest". It was not as if Dr. Hilberg's viva voce evidence was the simply reading aloud of historical events from an accepted historical treatise. He was asserting specific facts based on documents that were not before the court. The first ground is therefore unconvincing.

The reasoning on the second ground begs the question. To say that the sources were materials to which a reasonably competent historian would resort says nothing about the trustworthiness of those materials. Historians of Canada's role in World War II would resort to Mackenzie King's diaries and secret diplomatic despatches. Both of these sources are quite different, though the techniques of evaluating and assessing the evidence from these sources might be the same, and part of the professional equipment of a competent historian. But familiarity with the sources is merely a condition for claiming expertise. Admittedly, Dr. Hilberg might have been the most qualified person in the world to evaluate the reliability of that background hearsay, but resort to those sources does not advance the argument: it is still an open question whether the material is customarily relied upon such that there is a in-built guarantee of trustworthiness or imprimatur conferred on those sources derived from this widespread reliance by other persons knowledgeable in the field.

Thus the Court of Appeal appears to have confused the distinction between hearsay forming that portion of the expert's expertise, and hearsay as being a component of the very opinion tendered to the Court. It is the distinction, in short, between giving evidence as to a fact in the cause, and providing assistance to the Court in understanding the significance or importance of evidence led through others to assist the trier of fact in forming a just appreciation of that evidence.

Apart from the problem that Dr. Hilberg's evidence was actually led to establish the existence of an historical fact, rather than as an opinion-presented-as fact, there is an even more fundamental problem with the Court of Appeal's overall reasoning. Problems of translation to one side, what was there in the sources Dr. Hilberg relied upon that could not be understood so that the trier of fact could not form a just appreciation of the material in the sources without the assistance of an expert to point out its significance? In short, this was not a case for expert opinion "evidence" led for the purpose that it was in this case, to establish an historical fact, as distinct from explaining the significance of the documents Dr. Hilberg used as sources. However, this expert opinion testimony might provide the basis for taking judicial notice.

2.19 The Problem of Ultimate Issue

At the end of the day, litigation is designed to answer a simple question: Is the accused guilty as charged? Is the defendant liable to pay damages (and if so in what amount)? Behind this question is another question: Did the accused have the requisite intent (mens rea) or did the accused inflict the fatal wound? Was the defendant's representation in an application for insurance material? Did the defendant fall short of the standard of care required of a reasonably competent doctor? and so on.

It is plain that in many cases some of these questions can only be answered with the assistance of expert evidence. However, there is a risk that answering the question one way or the other will be dispositive of the case. Also, some of these questions might involve issues of law.

It is often said that a witness (be she lay or expert) cannot give an opinion on the "ultimate issue". The rule is vague in its formulation and application, but essentially refers to the very question that the trier of fact has to determine. The problem in many respects turns on characterizing just what point the expert evidence is tendered to support, which becomes a question of definition.

There are exceptions to this rule, such as cases where it is impossible to convey the opinion in any other form, or where it is impossible to get at the truth in any other way. This exception is based on necessity: Gillies, "Opinion Evidence" (1986), 60 *A.L.J.*, pp. 608-609.

R. v. *Lupien* [1970] S.C.R. 261 is often cited in support of the proposition that in Canada it is no valid objection to an expert expressing her opinion on the very question that has to be decided: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), p. 541. The opinions in that case do not go that far.[17] However, in *R.* v. *Graat* (1980) 30

---

[17] There, the accused's defence to an allegation of homosexual activity was based on a claim that he had thought his companion was a woman. He led expert evidence that he had a psychological defence mechanism which made him react violently against homosexual activity and therefore (despite appearances from the actual circumstances to the contrary) he would not have knowingly engaged in the homosexual practices which formed the subject of the charge. The Supreme Court divided 3-2 on the question of admissibility. Martland and Judson JJ. [1970] S.C.R. 263 at pp. 267, 268, 269 held the evidence inadmissible on the ground that the psychiatrist was being asked for an opinion, not as to whether the accused was mentally capable of formulating an intent, but as to whether he did, on the facts of the case, formulate such intent. Essentially, the opinion would be that, based upon the psychiatric examination, the accused's defence must be true. That came "too close to the very thing that the jury had to find". Ritchie and Spence JJ., on the other hand, at p. 278 saw the evidence going merely to capacity to form the intent. Hall J. concurring with Martland and Judson JJ. in the result held the evidence admissible essentially on the ground that it was relevant to the defence, but without explaining just how it was relevant. He did not address the question of the ultimate issue. Ritchie and Spence

O.R. (2d) 247 (C.A.) at pp. 260-261 per curiam Howland C.J.O. used very broad language to the effect that in Canada "the ultimate issue doctrine may now be regarded as having been virtually abandoned or rejected". The authorities he cites do not appear to support that conclusion.[18]

But the question becomes more complex where the opinion tendered involves what is a mixed question of law and fact or involves the application of legal standards or the exercise of legal judgment. In such cases, the trend seems to be against admitting the opinion into evidence: Freckelton, *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts*, ch. 5. At all events the problem might be avoided by properly framed questions: the focus should, for instance, be on the capacity to do an act or to conceive an intention rather than whether the act was in fact done or the intention in fact conceived. If it is put in terms of capacity, then it is a matter of inference for the trier of fact whether, given the lack of capacity, the intent was in fact formed.

2.20 Cross-Examining an Expert

Expert testimony is laid upon four foundations:

(i) The expert's qualifications, experience and standing as an expert;

(ii) The matters of fact that she has assumed to be true, or has assembled or discovered for herself, and that form the basis of her opinion;

(iii) Her knowledge and skill in the field relevant to the case, and the reasoning by which she uses that knowledge and skill to arrive at her opinions; and

(iv) The clarity and accuracy with which she expresses them.

See generally standard works on evidence, but in particular the succinct remarks in Wells, *Evidence and Advocacy* (1988), pp. 187-189.

Most knowledgeable advocates caution against attacking the qualifications as such of an expert. After all, the expert might be able to assist the cross-examiner's case through making important concessions. Yet if the expert stands condemned as unqualified, those

---

JJ.'s reasoning therefore does not support the ultimate issue doctrine, while Martland and Judson JJ.'s is dead against it, in that if in fact the accused formed the relevant intent was a matter for the jury. There was therefore no majority on the point, unless one infers a position from Hall J.'s reasoning; but even then Ritchie and Spence JJ. cannot be fielded with Hall J. to form a majority.

[18] Pace: McAlla, "Expert Evidence" (1981), 3 *Advocate's Quarterly*, pp. 83-84.

concessions will amount to nothing. Obviously, it is always a question of judgment. But generally speaking, attention should be paid to whether or not the witness is specifically qualified on the particular matter at issue. This is a more reasonable, if more limited, objective to attack. See Glissan, *Cross-Examination: Practice and Procedure. An Australian Perspective*, 2nd ed. (1991), pp. 105-106. Thus in *Baker Lake* v. *Minister of Indian Affairs and Northern Development* [1981] F.C. 518 (T.D.) the evidence of an expert called by the plaintiffs was ruled inadmissible. The expert had a doctorate in geography and substantial research experience in the North. Mahoney J. at pp. 552-553, while he accepted his competence as a geographer and to reach economic conclusions based on that competence, ruled that neither his formal training as a geographer nor his experience in and with the Arctic and Inuit qualified him to form opinions on political, sociological, behavioral, psychological and nutritional matters admissible as expert evidence.

Apart from probing whether or not the expert has the required expertise on the very point on which she is required to express an opinion, expert witnesses, and especially those from the scientific community, often can become frustrated at the clash between the legal culture and her own particular culture. These fundamental differences in intellectual outlook, method of analysis, and process of reasoning can often be exploited on cross-examination.[19]

The cross-examiner can put to the expert witness an authoritative opinion which contradicts the expert's view. But before he does so, the expert must recognize the treatise as authoritative. If she expresses ignorance of it, or denies its authority, no further use of it can be made by reading extracts from it, for that would be in effect making it evidence; but if she admits its authority, she then in a sense confirms it by her own testimony, and then may be quite properly asked for explanation of any of the apparent differences between its opinion and that stated by her: *R.* v. *Anderson* (1914) 22 C.C.C. 455 (C.A.) at pp. 459-460, per Harvey C.J. In putting the contrary authoritative opinion to the witness, that does not prove the truth of the opinion, but is a means of testing the value of the expert witness's conclusion. It is not positive evidence, but is used to undermine the witness's credibility: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), p. 562.

2.21 Rules of Court Concerning Expert Evidence

It is common to find in Rules of Court provisions which control reliance on expert evidence and the form in which it can be submitted. Essentially, the rules impose an obligation on the proponent to disclose the expert evidence that will be relied upon to his opponent, so that the opponent will not be taken by surprise. While the Rules differ in details, both as to the scope of disclosure and how the expert evidence is presented at the

---

[19] See the remarks of Dr. John Emmerson, Q.C., a leading Australian intellectual property counsel, "The Understanding of Technical Evidence" (1994), 68 *A.L.J.*, pp. 874-884.

hearing,[20] from a practical point of view these fade into the background simply because the proponent wants to put up the best and most convincing case possible, and this is usually done by carefully drafting the expert's report or affidavit. One simply wants to put one's best foot forward first.

The requirement of disclosing reports can create a problem where the facts on which their expert bases her opinion is contained in the report, but those facts themselves are in dispute. The report gives a useful insight to the opposing side as to how to frame the issue of fact, and will assist it in presenting its own evidence. This is probably a small price to pay to prevent trial by ambush.

In an address to the Trial Lawyers Association in March 1989, Madame Justice Beverly McLachlin lamented the fact that in the 1980s the courts had relaxed the rules concerning the admissibility of expert evidence, to the point where experts were allowed to testify in any subject, regardless of whether it was within the understanding and experience of the judge or jury.

> Experts were allowed to go beyond expert opinions and permitted to summarize complicated or ambiguous sets of facts. The hypothetical question was no longer to be insisted upon. And, in perhaps the most serious incursion on the traditional view, expert witnesses were to be allowed to testify and base their conclusions on what was admitted to be hearsay and inadmissible evidence subject only to the rather ineffectual admonition that care should be given to the "weight" the evidence should be given.

McLachlin called for a return to a rigorous application of the rules, and suggested that expert assessors might be appointed to aid the judge or special referees retained in complicated and technical cases. However:

> In other cases, where the facts and inferences are within the realm of common, properly instructed, understanding, there can be no better guide than that laid down in the early cases:
>
> - Where the judge and jury can understand, let them decide;

---

[20] Thus by Rule 53.03(1) of the Rules of Civil Procedure (Ontario), a party who intends to call an expert witness at trial shall, not less than ten days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony. By Rule 53.03(2) no expert witness may testify, except with the leave of the trial judge, unless subrule (1) has been complied with. Note also the provisions of s. 52 of the *Evidence Act*, R.S.O. 1990, c. E-23 regarding medical evidence. For the Rules relating to expert witnesses in the Federal Court, see Rule 482.

- Where matters go beyond the understanding of the judge and jury, let the parties call experts to enlighten them;

- In all cases, distinguish between the facts, which must be proved in the ordinary way by admissible evidence, and inferences from those facts, which may sometimes call for learned, expert opinion.

If we adhere to these rules, we cannot go far wrong: "The Role of the Expert Witness" (1990), 14 *Provincial Judges Journal* (No. 3), September 1990, pp. 27-31 at pp. 29-31.

The nub of McLachlin's complaint is simply that expert evidence is all too-often led as a method of bolstering a case that should be and can be proved in accordance with the usual rules. This abuse of expert evidence tarnishes this branch of the law, and wrongfully deprives it of its proper place in the due administration of justice. The rules are there. They need to be understood. They can be properly applied.

3.0 PROVING LEGISLATIVE FACTS

The process of legislative fact finding is quite different from that of adjudicative fact finding. As Carter states:

> The adjudicative findings of facts is a matter for the jury or trier of fact who must find "according to the evidence" -- except of course when a fact is judicially noticed on the ground that it is notorious or readily ascertainable. Findings or assumptions of legislative fact, being integral parts of judicial law-making, are made exclusively by the judge. In making these findings or assumptions of legislative fact the judge is not bound to rely upon evidence, although he is free to do so: Carter, "Judicial Notice: Related and Unrelated Matters", in Campbell and Waller, *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982), p. 93.

There are a variety of possible methods for adducing legislative or constitutional facts. One is by judicial notice which, in the area of legal policy, is said to be much broader than suggested by traditional evidence texts. A second approach is by expert evidence tendered through testimony at trial or by way of affidavit in proceedings initiated by application. This expert evidence can be tested by cross-examination. A third method is the "Brandeis brief", named after the American lawyer Louis Brandeis who later became a judge of the Supreme Court. The Brandeis brief is intended to inform the court about considerations which bear upon questions of fact underlying the validity of legislation. Material placed before the court in this manner is not in the form of sworn testimony and, therefore, is not subject to cross-examination: *Canada Post Corp.* v. *Smith* (1994) 20 O.R. (3d) 173 (Div. Court) at pp. 184-187.

3.1 Judicial Notice

Under various circumstances, the law dispenses with the need for proof of facts through evidence led by the proponent. The relevant examples here are presumptions of law, and judicial notice. Of these, only judicial notice need be discussed.[21]

The doctrine of judicial notice is stated by Thorson J.A. in *R.* v. *Potts* (1982) 36 O.R. (2d) 195 (C.A.) at pp. 225-226, where His Lordship said:

---

[21] A good introduction to the difficult topic of presumptions is found in Best, *The Principles of the Law of Evidence*, 9th ed. (1902), Book I, Part II, chap. 2. For an interesting if controversial analysis, see Denning, "Presumptions and Burdens" (1945), 61 *L.Q.R.*, pp. 379-383.

> ...Generally speaking, a Court may properly take judicial notice of any fact or matter which is so generally known and accepted that it cannot reasonably be questioned, or any fact or matter which can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned.

The crucial point is that once the court has taken judicial notice of a fact, that is a binding precedent in subsequent cases in the jurisdiction involving the same fact. Obviously, the court must be persuaded that the existence of the fact asserted cannot reasonably be questioned.

Findings of adjudicative facts must be made "according to the evidence". In taking judicial notice, proof is not only unnecessary but it is also excluded. As Carter argues:

> The doctrine is thus not a mode of proof: it narrows the scope of proof. When a judge takes judicial notice of a fact he in effect declares that he will find that fact to exist (or will direct the jury to do so) without it being established by evidence. The taking of judicial notice involves a conclusive determination by the judge of a question of fact, and therefore may be seen as constituting *pro tanto* an usurpation by him of the function of the jury or trier of fact. The judge does not make his determination "according to the evidence"; but, if the fact noticed, although capable of ascertainment, is not notorious, the judge has to acquaint himself with it. He may achieve this in any way he thinks appropriate and he may, if he wishes, inform himself in open court by a procedure which may superficially resemble that of proof. For example experts may appear and be questioned by him and by the parties. But the process is essentially different from proof in that resort to is not necessary, it is not governed by the rules of evidence, and there is no right to rebut the "evidence" tendered: Carter, "Judicial Notice: Related and Unrelated Matters", in Campbell and Waller, *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982), p. 89.

The court will judicially notice facts which must have happened according to the constant and invariable course of nature, and matters of common knowledge: *R.* v. *Luffe* (1807) 8 East 193; 9 R.R. 406 (K.B.). For instance, that Vancouver is west of the Rocky Mountains, and that Toronto is the capital of Ontario.

Also the court can take judicial notice of the facts of history and may therefore consult standard works dealing with those facts and which are incontrovertible. But such historical facts must be of general and public notoriety but cannot be used to prove particular facts.

Hall J. said in *Calder* v. *Attorney General of British Columbia* [1973] S.C.R. 313 at p. 346 that the court can take judicial notice of the facts of history, whether past or

contemporaneous, citing *Monarch Steamship Co.* v. *A/B Karlshams Oljefabriker* [1949] A.C. 196 (H.L.), and the court is entitled to rely upon its own historical researches, citing *Read* v. *Bishop of Lincoln* [1892] A.C. 644 (H.L.) at p. 653. As the Ontario Court of Appeal said in *R.* v. *Zundel [No. 1]* (1987) 58 O.R. (2d) 129 at p. 182, it is well established that the Court may take judicial notice of an historical fact. The Court may, on its own initiative, consult historical works or documents, or the Court may be referred to them.

However, the rules laid down by the authorities cited in support must be carefully understood. In *Monarch Steamship Co.* it was material to determine the likelihood of the outbreak of war in 1939. In *Read* v. *Bishop of Lincoln* the House of Lords had to deal with the practice of the Primitive Church, the ritual of the Eastern and Western Churches, the position of the Lord's table, and like questions, which are ex-hypothesi beyond the reach of living memory. The House consulted ancient authors, historical and theological works, pictures, engravings, and a variety of documents. These sources were said to be documents which undoubtedly any careful competent historian would avail himself.

But when we look at what the House of Lords did in *Read* v. *Bishop of Lincoln*, the histories and other materials consulted were in effect *primary* sources rather than secondary or interpretative sources. That is, if the assertions of fact in those sources were wrong, one would expect to find evidence of that dispute in other works of reference. Also, the sources themselves were examined.

But it is clear that the sources consulted must be of a special character. Thus in *Brounker's Case* (1682) Skin. 15; 90 E.R. 8 (K.B.) it was material to decide when Queen Isabelle died, for on that question turned the capacity to make a certain grant. Over objection, Speed's *Chronicles* was referred to in evidence to prove the death of Isabelle. The court overruled the objection and said that it did not know what better proof could have been given. Then in *St. Katherine's Hospital* (1672) 1 Vent. 149; 86 E.R. 102 (K.B.) Speed's *Chronicles* was again referred to prove a similar point. In *Stainer* v. *Burgesses of Droitwrich* (1695) 1 Salk. 281; 91 E.R. 247 (K.B) the question was whether by local custom salt pits could be sunk in any part of the town, or in certain places only? Camden's *Britannia* was ruled inadmissible, on the basis that a general history 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. Then in *Morris* v. *Harmer* 32 U.S. (7 Peters) 554 (1833) it was material to establish the boundary to certain lots in Cincinnati. Amongst other things the plaintiffs tendered in evidence (over objection) a work called a Picture of Cincinnati by one Dr. Drake. This work contained material showing the date of the survey and laying out of lots in a certain part of Cincinnati. Story J. stated at pp. 558-559 that all this sort of evidence must be considered as mere hearsay. But historical facts, of general and public notoriety, may be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence and existence; and where, from the nature of the transaction, or the remoteness of the period,

or the public and general reputation of facts, a just foundation is laid for general confidence. Story J. went on to say that the work of a living author, who is within the reach of process of the court, can hardly be deemed to be of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially of the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials; there would seem to be cogent reasons to say, that his book was not, under such circumstances, the best evidence within the reach of the parties (and the court went on to hold under the special circumstances of that case that Dr. Drake's work could be referred to).

Throughout these authorities there is a requirement for indisputable accuracy. This obviously rules out recently published secondary authorities and would almost certainly render unpublished secondary authorities unusable. But, equally, nor can unpublished primary materials be used, unless they can be brought within an exception to the rule against hearsay. Thus if these materials are to be used at all, they must be before the court, and can only be put into evidence through an expert witness. Thus, the court can take judicial notice of an opinion based on hearsay. In this context, an expert's testimony is not "evidence", and so the rule against hearsay is irrelevant: Pattenden, "Expert Opinion Based on Hearsay" [1982] *Crim. L.R.*, pp. 91, 96.

Thus Hall J.'s dictum, and the Ontario Court of Appeal's endorsement of it in *Zundel [No. 1]*, is obviously stated far too widely. It is difficult to be definite on this because Hall J. does not actually state of which facts he took judicial notice or he discovered as a result of his own historical researches, as distinct from those facts or inferences that he found or made on the evidence tendered. In *Zundel [No. 1]* the Court of Appeal did not do any research on its own.

Zundel [No. 2] offers an interesting example of the doctrine of judicial notice. In *Zundel [No. 1]* the court had refused the prosecution's request to take judicial notice of the fact of the Holocaust (as defined for the purposes of the case). Upon his retrial, the prosecution again requested the court to take judicial notice of the Holocaust. The trial judge acceded in part to that request, and took judicial notice of the Holocaust as defined as "the mass murder and extermination of Jews in Europe by the Nazi regime during the Second World War". This is an historical fact which is so notorious as not to be the subject of dispute among reasonable persons. But the trial judge refused to take judicial notice of historical facts which the Crown had to demonstrate in proving that specific statements or allegations in the pamphlet were false. The Ontario Court of Appeal upheld this position, holding that the trial judge took judicial notice of non-contentious historical facts which were background to the Crown's case: (1990) 53 C.C.C. (3d) 161 (C.A.) at p. 171.

But the basic principle is that the fact to be judicially noticed must be indisputable: if it is reasonably capable of being disputed by the opponent, then it cannot be judicially noticed. The best short discussion of this problem is Morgan, *Some Problems of Proof*

Under the Anglo-American System of Litigation (1956), pp. 37-39. Accordingly, even if the court can rely on its own historical researches it can only resort to such sources as were able to be cited by either side. The court cannot embark on its own research and gather information from sources that are not indisputably accurate. Accordingly, Lamer C.J.'s assertion in *R.* v. *Sioui* [1990] 1 S.C.R. 1025 at p. 1050 that "documents of a historical nature" which he had discovered "as a result of my personal research" is to be denounced and condemned is unacceptable departure from principle.

There must be a limitation on the court's right to indulge in its own historical research. Obviously, the test is not whether the documents are "of an historical nature". But apart from anything that can be said as to the actual nature and status of the records Lemare C.J. resorted to, at the very least, the other side should be allowed to inspect the documents and make submissions as to why they cannot be used within the context of judicial notice or for any other purpose. The rule audi alteram partem demands nothing less: *Pfizer Company Ltd. v. D.M.N.R.* [1987] 1 S.C.R. 456 at p. 463, per Pigeon J. per curiam.

If judicial notice is to be taken on the basis of documentary sources, then it is no objection that they contain hearsay. For judicial notice does not involve "admissibility" but is used in lieu of proof and so the ordinary rules of evidence do not apply. Strayer J. makes this point most effectively when in *Montana Band* v. *Canada (T.D.)* [1994] 1 F.C. 425 at p. 429 he points out that if judges can take judicial notice by relying on their own researches or their own knowledge it would not seem appropriate to treat the judge's own knowledge or researches as "admissible" evidence, in part because it would never form part of the record of the trial as would normal evidence.

3.2 The Meaning of Words in a Statute

It is apposite to mention here a more arcane aspect of judicial notice: the meaning of words in a statute. While the proper construction of a statute is a question of law, the meaning of a word in a statute is a question of fact: *Brutus v. Cozens* [1972] 2 All. E.R. 1297 (H.L). Unless there is some dispute, it is common practice for the court to inform itself in ascertaining the meaning of the word by any means that is reliable and ready to hand. For example, the court may refer to a dictionary, which may be a general dictionary or even a technical one. This is not evidence strictly so-called. All that happens is that the court is equipping itself for its task of ascertaining the meaning of the word by taking judicial notice of all such things as it ought to know in order to do its work properly: *Baldwin & Francis Ltd. v. Patents Appeal Tribunal* [1959] A.C. 663 (H.L.) at p. 691, per Lord Denning.

Thus while the meaning of words having a special meaning in a particular trade, science, industry, or other particular element of society may be the matter of evidence in connection with a contention that the words have been used in a statute, contract, or other

context in that particular meaning, the meaning of words when used in the ordinary way as part of one of the official languages is a matter for the Court with such aids to interpretation as are available to it and cannot be the subject matter of opinion evidence. Otherwise, the court would be inundated with expert testimony on every question of interpretation that arises: *Home Juice Co. v. Orange Maison Ltd.* [1968] 1 Ex. C.R. 163 at pp. 164-165, per Jackett P.

Thus where a word is used in a statute in its ordinary or popular meaning, finding that meaning as a matter of fact is in the end really a species of judicial notice. It is therefore not a matter for evidence, be it lay or expert: *Marquis Camden v. Commissioners of Inland Revenue* [1914] 1 K.B. 641 (C.A.).

3.3 Constitutional and Legislative Facts: Relaxing the Rules

A good case can be made for the view that in the context of proving legislative facts the usual constraints on the doctrine of judicial notice appropriate to proof of adjudicative facts ought not to apply. After all, as Carter argues, why should a judge, "when seeking to make himself better qualified to formulate a rational and policy-orientated proposition of law, be restricted in his relevant factual investigations to consideration of facts which are either notorious or readily ascertainable?" He continues:

> Conscientious and worthwhile research knows no such limits. Judicial notice of legislative facts is a misnomer, for it is undesirable that a judge, when surveying what may well be a wide range of facts of possible significance in the law making process, should (and indeed unrealistic to suppose that he could) draw any rigid or clear-cut distinction between facts which, were they in issue or relevant, would have to be proved and those which he would notice without proof. An attempt to clothe legislative fact-finding in the straight-jacket which befits judicial notice of adjudicative facts is not apt and is barely meaningful: Carter, "Judicial Notice: Related and Unrelated Matters", *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston*, pp. 93-94.

Although Strayer does not embrace Carter's point that it is a misnomer to speak of judicial notice of legislative facts, he argues that there should be more generous use of judicial notice in constitutional cases, in that such cases "normally transcend the interests of the immediate parties before the court and frequently involve questions of economic or social fact which either cannot readily be proven by conventional techniques of direct evidence or are sufficiently obvious that they should not have to be proven." But they are "obvious" in the sense, "not that everyone can be assumed to know them but that they can be ascertained from reliable sources which would nevertheless not likely pass the conventional admissibility tests for direct evidence." He argues:

> Because of the nature and importance of constitutional facts, it is suggested that judicial notice might be taken of facts which, even if not utterly indisputable, might be regarded as presumptively correct unless the other party, through an assured fair process, takes the opportunity to demonstrate that those facts are incorrect, partial, or misused. If such a procedure is not implemented legislatively the courts might, in the exercise of their discretion concerning the use of judicial notice, combine a requirement of notice and a right of reply with a more extended use of this technique of fact-gathering in constitutional cases: Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2nd ed. (1983), p. 256.

Critics of the Supreme Court's decisions doubt whether the Court is capable of understanding and properly evaluating the material placed before it. For instance, there were serious evidentiary and methodological shortcomings in the 1997 Badgley Report on the abortion procedure laid down in the *Criminal Code*, and its findings on various matters were ambiguous: Manfredi, *Judicial Power and the Charter Canada and the Paradox of Liberal Constitutionalism* (1993), pp. 167-169; Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989), p. 296. Yet this Report crucially influenced the reasoning in *R. v. Morgentaler* [1988] 1 S.C.R. 30. Also, given that constitutional cases are essentially driven by private litigants, the line between adjudicative facts and legislative facts may become unacceptably blurred. As Manfredi points out, *Judicial Power and the Charter*, p.170 Askov's affidavit material from his point of view did not constitute a set of legislative facts that illuminated and explained the general problem of trial delay. Instead it presented a set of adjudicative facts that demonstrated the unreasonableness of the delay in the particular case. Yet this affidavit was used to support the general conclusion that inadequate resources contributed significantly to institutional delays and that these delays offended the Charter when they exceeded a particular fixed standard of six to eight months. Thus in *Askov v. R.* [1990] 2 S.C.R. 1199 the Court "reached broad policy conclusions on the basis of social science evidence prepared and submitted by the appellants to support their own narrow adjudicative argument."

It is in the context of section 1 and section 24(1) of the Charter that the problem of proof or of judicial notice will most frequently arise. By section 1 the Charter 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". By section 24(1) a court can grant such remedy as it considers appropriate and just in the circumstances.

R. v. *Oakes* [1986] 1 S.C.R. 103 has the most comprehensive statement on what is required to successfully defend an impugned law. Amongst other things, the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified rests on the party seeking to uphold the limitation. The standard of proof is the civil standard, but the preponderance of probability test must be applied rigorously. And within the broad category of the civil standard, there exist different degrees of probability depending

on the nature of the case. Also, a court will need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. But there may be cases where certain elements of the section 1 analysis are obvious or self evident: [1986] 1 S.C.R. 103 at pp. 136-138, per Dickson C.J.

It seems to follow in principle that, if ascertainment of constitutional or legislative facts is to be treated as a sort of branch of judicial notice (notwithstanding Carter's warning), where the rules are relaxed, then there is no room for expert opinion evidence in the sense discussed in the previous section. For it is not a matter of "evidence", and the ordinary rules will not apply. There is therefore room for resort to a wide range of materials. It seems that all that can be usefully said here is that in the end the materials must be relevant, and they must be reliable. There is clearly much scope for the application of these principles, and, while the courts have not been consistent in their statements as to what materials can be relied upon, reliability must be the essential criterion. For useful discussions of how the courts have broached the problem in practice, see: Morgan, "Proof of Facts in Charter Litigation" in Sharpe (ed.), *Charter Litigation* (1987); Swinton, "What Do the Courts Want from the Social Sciences?" in Sharpe (ed.), *Charter Litigation* (1987); Charles, Cromwell and Jobson, *Evidence and the Charter of Rights and Freedoms* (1989); Department of Justice (comp. Garton), *Charter of Rights Decisions* (ongoing).

APPENDIX A

LIST OF WORKS AND CASES REFERRED TO IN THIS PAPER

LIST OF WORKS AND CASES REFERRED TO IN THIS PAPER

A. Secondary Authorities

Best, *The Principles of the Law of Evidence*, 9th ed. (1902).

Brown, *Documentary Evidence in Australia* (1988).

Camp, "Examining an Expert in Chief", in Canadian Bar Association, *Winning Advocacy Skills*, 3rd ed. (1994).

Carter, "Judicial Notice: Related and Unrelated Matters", in Campbell and Waller, *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982), pp. 88-99.

Charles, Cromwell and Jobson, *Evidence and the Charter of Rights and Freedoms* (1989).

Cockle, *Cases and Statutes on the Law of Evidence*, 6th ed. (1938).

Cowen and Carter, *Essays in the Law of Evidence* (1956).

Cross on Evidence, Second Australian Edition (1978).

Cudmore, *Civil Evidence Handbook* (1987).

Davis, *Administrative Law Treatise* (1958).

Denning, "Presumptions and Burdens" (1945), 61 *L.Q.R.*, pp. 379-383.

Department of Justice (comp. Garton), *Charter of Rights Decisions* (ongoing).

Devlin, *The Judge* (1979).

Eggleston, *Evidence, Proof and Probability*, 2nd ed. (1983).

Emmerson, "The Understanding of Technical Evidence" (1994), 68 *A.L.J.*, pp. 874-884.

Ewart, *Documentary Evidence in Canada* (1984).

Freckelton, *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts* (1987).

Gillies, "Opinion Evidence" (1986), 60 *A.L.J.*, pp. 597-612.
Glissan, *Cross-Examination: Practice and Procedure. An Australian Perspective*, 2nd ed. (1991).

Great Britain, Law Reform Committee, *Seventeenth Report (Evidence of Opinion and Expert Evidence)* (1970).

Hodgkinson, *Expert Evidence: Law and Practice*, (1990).

Law Reform Commission of Canada, *Report on Evidence* (1975).

Law Reform Commission of Canada, Study Paper No. 7 (1973).

Maguire, *Evidence. Common Sense and Common Law* (1947).

Maloney, "Expert Evidence", in Law Society of Upper Canada, *Defending a Criminal Case* (1969).

Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989)

Manfredi, *Judicial Power and the Charter: Canada and the Paradox of the Liberal Constitutionalism* (1993).

McAlla, *Expert Evidence* (1981), 3 *Advocate's Quarterly*, pp. 74-84.

McLachlin, "The Role of the Expert Witness" (1994), 14 *Provincial Judges Journal* (No. 3), September 1990, pp. 27-31.

Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (1956).

Morgan, "Proof of Facts in Charter Litigation" in Sharpe (ed.), *Charter Litigation* (1987).

Pattenden, "Expert Opinion Based on Hearsay" [1982] *Crim. L.R.*, pp. 85-96.

Phipson on Evidence, 13th ed. (1982).

Phipson on Evidence, 14th ed. (1990).

Smith's Leading Cases, 13th ed. (1929).

Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (1992).

Stephen, *A Digest of the Law of Evidence*, 12th ed. (1936).

Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3rd ed. (1988).

Swinton, "What Do the Courts Want from the Social Sciences?" in Sharpe (ed.), *Charter Litigation* (1987).

Taylor, *A Treatise on the Law of Evidence*, 11th ed. (1920).

Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898).

Wardle, "*R.* v. *Abbey* and Psychiatric Opinion Evidence: Requiring the Accused to Testify" (1984), 17 *Ottawa Law Review*, pp. 116-131.

Wells, *Evidence and Advocacy* (1988).

Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev. 1979).

Wills, *The Law of Evidence*, 3rd ed. (1938).

Young, "Practical Evidence", (1992) 66 *A.L.J.*, pp. 379-380.

B. Cases

Askov v. R. [1990] 2 S.C.R. 1199.

Baker v. *Hutchinson* (1976) 13 O.R. (2d) 591 (C.A.).

Baker Lake v. *Minister of Indian Affairs and Northern Development* [1981] F.C. 518 (T.D.).

Baldwin v. Francis [1959] A.C. 663 (H.L.).

Bleta v. *The Queen* [1964] S.C.R. 561.

Borowski v. *Quayle* [1966] V.R. 382 (S.C.).

Brounker's Case (1682) Skin. 15; 90 E.R. 8 (K.B.).

Brutus v. Cozens (1972) 2 All. E.R. 1297 (H.L.).

Calder v. *Attorney General of British Columbia* [1973] S.C.R. 313.

Canada Post Corp. v. *Smith* (1994) 20 O.R. (3d) 173 (Div. Court).

Central Railroad Co. of New Jersey v. *Monahan,* 11 Fed. (2nd) 212 (1926).

Clark v. *Ryan* (1960) 103 C.L.R. 486.

Culver v. *Sekulich* (1959) 80 Wyo. 437.

Danson v. *Ontario (Attorney General)* [1990] 2 S.C.R. 1086.

Darby v. *Ousley* (1856) 1 H. & N. 1; 156 E.R. 1093 (Exch.).

Delgamuukw v. *B.C.* (1989) 38 B.C.L.R. (2nd) 165 (S.C.).

Delgamuukw v. *B.C.* (1989) 38 B.L.C.R. (2nd) 176 (S.C.).

Delgamuukw v. *B.C.* (1991) 79 D.L.R. (4th) 185 (S.C.B.C.).

Emil Anderson v. *B.C.R. No. 2* (1987) 17 B.C.L.R. (2d) 357 (S.C.).

English Exporters Pty Ltd. v. *Eldonwall* [1973] 1 Ch. 415.

Ethier v. *Canada (R.C.M.P. Commissioner)* [1993] 2 F.C. 658 (C.A.).

Fraser River Pile & Dredge Ltd. v. *Empire Tugboats and ors.*(1995) (unreported) (F.C.T.D.).

Fryer v. *Gathercole* (1849) 13 Jur. 542 (Exch.).

Graat v. *R.* [1982] 2 S.C.R. 819.

Home Juice Co. v. Orange Maison Ltd. [1968] 1 Ex. C.R. 163.

Kelliher (Village of) v. *Smith* [1931] S.C.R. 672.

Marquis Camden v. Commissioners of Inland Revenue [1914] 1 K.B. 641 (C.A.).

Milirrpum v. *Nabalco Pty Ltd.* (1971) 17 F.L.R. 141 (N.T.S.C.).

M'Naughten's Case (1813) 10 Cl. & F.200, 8 E.R. 718 (H.L.).

*Monarch Steamship Co.*v. *A/B Karlshams Oljefabriker* [1949] A.C. 196 (H.L.).

Montana Band v. *Canada (T.D.)* [1994] 1 F.C. 425.

Morris v. *Harmer* 32 U.S. (7 Peters) 554 (1833).

Paric v. *John Holland Construction Pty. Ltd.* (1985) 59 A.L.J.R. 844.

Preeper & Doyle v. *The Queen* (1888) 15 S.C.R. 501.

R. v. *Abbey* [1992] 2 S.C.R. 24.

R. v. *Anderson* (1914) 22 C.C.C. 455 (C.A.).

R. v. *Fisher* [1961] O.W.N. 94 (C.A.).

R. v. *Graat* (1980) 30 O.R. (2d) 247 (C.A.).

R. v. *Kahn* [1990] 2 S.C.R. 531.

R. v. *Lavallee* [1990] 1 S.C.R. 852.

R. v. *Luffe* (1807) 8 East 193; 99 R.R. 406 (K.B.).

R. v. *Lupien* [1970] S.C.R. 261

R. v. *Mohan* (1994) 114 D.L.R. (4th) 419 (S.C.C.).

R. v. Morgentaler [1988] 1. S.C.R. 30.

R. v. *Oakes* [1986] 1 S.C.R. 103.

R. v. *Parker* [1912] V.L.R. 152 (Full Ct.).

R. v. *Potts* (1982) 36 O.R. (2d) 195 (C.A.).

R. v. *Silverlock* [1894] 2 Q.B. 766 (C.C.R.).

R. v. *Sioui* [1990] 1 S.C.R. 1025.

R. v. *Smith* [1992] 2 S.C.R. 915.

R. v. *Turner* (1974) 60 Crim. App. R. 80 (C.A.).

R. v. Nicholas Williams (1846) 2 Car. & K. 249; 175 E.R. 102 (N.P.).

R. v. *Zundel [No. 1]* (1987) 58 O.R. (2d) 129 (C.A.).

R. v. *Zundel [No. 2]* (1990) C.C.C. (3d) 161 (C.A.).

Re Anti-Inflation Act [1976] 2 S.C.R. 373.

Re Residential Tenancies Act 1979 [1981] 1 S.C.R. 714.

Re Upper Churchill Water Rights Reversion Act [1984] 1 S.C.R. 197.

Read v. *Bishop of Lincoln* [1892] A.C. 644 (H.L.).

Reckitt & Colman Ltd. v. *Borden Inc. (No. 2)* [1987] F.S.R. 407 (Ch. D.).

Rice v. *Socket* (1912) 27 O.L.R. 410 (Div. Ct.).

Sengbusch v. *Priest* (1987) 14 B.C.L.R. (2d) 26 (S.C.).

Sheen v. *Bumpstead* (1862) 1 H. & C. 358; 158 E.R. 924 (Exch.).

Sherrard v. *Jacob* [1965] N.I.L.R. 151(C.A.).

St. Katherine's Hospital (1672) 1 Vent. 149; 86 E.R. 102 (K.B.).

Stainer v. *Burgesses of Droitwrich* (1696) 1 Salk. 281; 91 E.R. 247 (K.B.).

Wilband v. *R.* [1967] S.C.R. 14.