Judicial notice and treaties: excerpts from *Using International Law in Canadian Courts*, 3rd ed (forthcoming, Irwin Law)

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Summary: An upcoming appeal to the Supreme Court of Canada from the decision of the Federal Court of Appeal in *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 raises important issues about the judicial notice of international law in the context of treaty interpretation. What follows is an excerpt from my discussion of these issues in Chapter 3 of my forthcoming third edition of *Using International Law in Canadian Courts*.

Tomorrow, the Supreme Court of Canada will hear an appeal from the decision of the Federal Court of Appeal in *International Air Transport Association v Canadian Transportation Agency* 2022 FCA 211 [*IATA*]. The case raises important issues about the judicial notice of international law, in particular the inadmissibility of expert opinion evidence about the interpretation of treaties.

This is a matter I have treated at length in Chapter 3 of the forthcoming third edition of *Using International Law in Canadian Courts*, with the benefit of many cases decided since the second edition appeared in 2008. I offer here some excerpts from my updated Chapter 3.

Excerpts from G. van Ert, *Using International Law in Canadian Courts*, 3rd ed (Irwin Law, forthcoming) ch 3

3.1 Judicial notice of international law

By the doctrine of judicial notice, courts and other adjudicating bodies will accept the existence of certain matters without

requiring proof.[1] The doctrine is most often invoked in respect of facts, but courts also take judicial notice of law. This form of judicial notice has its origins in the common law but has also been declared in statutes.[2] It is also established in Quebec civil law.[3] The varieties of law which judges are bound to recognize by the doctrine of judicial notice include the principles of equity, common law precedents, and Acts of Parliament. As we will see, judicial notice is also taken of international law, though one evidentiary consequence of this rule — namely that opinion evidence on international law's requirements is generally inadmissible — has sometimes been neglected.

Judicial notice of international law is to be contrasted with the treatment of foreign law (that is, the domestic law of other states), of which judicial notice is not taken in the common law tradition. Rather, foreign law is treated as a matter of fact to be ascertained by the evidence of experts.[4] An old decision of the US Supreme Court contrasts foreign and international law directly: "Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations."[5] Lauterpacht considered that international law need not be proved in the same way as foreign law in common law courts "apparently for the reason that it is not foreign law."[6] The importance of this distinction between international law and

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1 See: S. Lederman, A. Bryant & M. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence*, 5th ed. (Markham, Ontario: LexisNexis, 2018) at § 19:16; S. L. Phipson, & H. M. Malek. *Phipson on Evidence*, 19th ed. (London: Sweet & Maxwell, 2017) at c. 3; R. Sullivan, *Sullivan on the Construction of* Statutes, 6th ed. (Markham, Ont: LexisNexis, 2014) at § 3.22.

2 The judicial notice of Acts of the federal Parliament is provided for by s. 18 of the Canada Evidence Act RSC 1985 c. C-5. The judicial notice of provincial Acts is provided for by provincial legislation; for example, Evidence Act RSBC 1996 c. 124 s. 24(2) (British Columbia), Interpretation Act RSO 1990 c I.11 s. 7 (Ontario).

3 CcQ art. 2807 provides in part, "Judicial notice shall be taken of the law in force in Québec." See generally arts. 2806–10.

4 See generally J. Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed., looseleaf (Markham, ON: LexisNexis Canada, 2005–) at ss. 7.1–7.5.

5 *The Scotia* 14 Wall 170 (US Sup Ct 1871) [*The Scotia*].

6 H. Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 Transactions of the Grotius Society 51 at 59.

foreign law goes beyond the rules of evidence to the foundation of the reception system. While foreign laws generally have no claim to our observance, except insofar as international comity may require in certain cases, international law is binding upon Canada at the international level and may (if incorporated or implemented in domestic law) be binding within Canada. The reception system acknowledges this difference by rules which receive and promote respect for international law within the domestic order — including judicial notice of international law.[7] Anglo-Canadian law is not unusual in this regard. A former president of the International Court of Justice, Dame Rosalyn Higgins, has observed, "There is not a legal system in the world where international law is treated as 'foreign law.' It is everywhere part of the law of the land; as much as contracts, labour law or administrative law."[8]

(a) Case law supporting judicial notice of international law

In 1939, Lauterpacht observed that while English judicial practice supported the proposition that international law is judicially noticed and therefore need not be specifically proved, it was nevertheless difficult "to trace any judicial pronouncement bearing directly on the matter."[9] Macdonald made the same observation about Canadian law in 1974.[10]

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[7] One commentator has argued against this approach, suggesting that both international and foreign law are "external sources of law" and that "the blurring of international law into comparative law" allows international lawyers "to develop a more complex and critical model of international law in domestic courts." See K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 NYUJ Int'l L & Pol. 501 at 520 and 525. In my view, the differences between foreign and international law are more significant than their similarities. See also S. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Can Bar Rev 534.

[8] R. Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" in *Developing Human Rights Jurisprudence*, vol. 5 (London: Commonwealth Secretariat, 1993) at 16. Quoted with approval in *Nevsun Resources Ltd. v Araya* 2020 SCC 5 [*Nevsun*] at para. 97.

[9] Instead, Lauterpacht relies on *The Scotia* above note 6 at 188. See also *The New York* 175 US 187 (1899).

[10] See R. St. J. Macdonald, "The Relationship Between Domestic Law and International Law in Canada" in R. St. J. Macdonald *et al*., eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) at 113.

Today, however, there is authority from the Supreme Court of Canada and the Federal Court of Appeal, among others.

For decades, the leading Canadian pronouncement on the judicial notice of international law was *The North*, an 1906 judgment of the Supreme Court of Canada.[11] The question was whether the seizure of an American vessel fishing illegally off the coast of British Columbia was unlawful because the poacher escaped beyond Canada's territorial waters into the high seas before being captured. The poacher relied on a Canadian statute which recognized British waters as extending to only "three marine miles of any coast."[12] Canada relied on the customary international law doctrine of hot pursuit, whereby a state pursuing a vessel within its territorial waters for a suspected violation of its laws may continue that pursuit into international waters. The doctrine is designed to ensure that such vessels do not escape punishment by fleeing to the high seas. In the court below, the admiralty judge took notice of the doctrine of hot pursuit and interpreted the statute in its light. At the Supreme Court of Canada, Davies J (MacLennan J concurring) approved this approach, declaring that "the Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations" and "The right of hot pursuit … being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge."[13]

In *The Cristina* (1938), Lord Macmillan observed that "a doctrine of public international law" is "evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions".[14] Notably, Lord Macmillan did not include expert evidence among the means of proving international law.

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11 *The Ship "North" v The King* (1906) 37 SCR 385 [*The North*].

12 An Act respecting Fishing by Foreign Vessels RSC 1886 c. 94.

13 *The North*, above note 11 at 394. Sedgewick J concurred in the result without giving reasons. Idington J delivered concurring reasons which, while not explicitly affirming that international law was properly noticed in Canadian courts, nevertheless acknowledged and relied upon the doctrine of hot pursuit. Girouard.dissented, finding that the statute excluded reliance on the doctrine. See also *R. v Blanco* (1991) 97 Nfld & PEIR 86 at 89 (Nfld SCTD).

14 *Compania Naviera Vascongado v S.S. Cristina* [1938] AC 485 (HL) at 497.

This point was made expressly by Stephenson LJ, considering Lord Macmillan's dictum, in *Trendtex Trading Corp. v Bank of Nigeria* (1977):

> [R]ules of international law, whether they be part of our law or a source of our law, must be in some sense "proved," and they are not proved in English courts by expert evidence like foreign law; they are "proved" by taking judicial notice of "international treaties and conventions, authoritative textbooks, practice and judicial decisions" of other courts in other countries which show that they have "attained the position of general acceptance by civilised nations": *The Cristina*…[15]

Judicial notice of international law arose in the dissenting reasons of Pigeon J (Beetz and Grandpré JJ concurring) in *Capital Cities Communications Inc v Canadian Radio-Television Commission* (1978).[16] The Canadian Radio-Television Commission (CRTC) permitted a cable company to delete advertisements from US television channels it broadcasted. The American broadcasters challenged this decision, relying in part on the Inter-American Radiocommunications Convention 1937.[17] The majority found that the treaty was unimplemented in Canadian law and drew a distinction between the Canadian government (which was bound by the treaty) and the CRTC (which was not). The dissenting judges rejected the proposition that the CRTC was free to make decisions in violation of Canada's treaty obligations, observing, "It is an oversimplification to say that treaties are of no legal effect unless implemented by legislation."[18] Pigeon J concluded that

> on the appeal from the decision of the Commission, judicial notice ought to be taken that, by virtue of the Convention the appellants had a legal interest entitled to protection in the use of their assigned channels, for broadcasts in an area extending into Canada. Therefore the Commission could not validly authorize an

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15 *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529 at 554 (CA) [*Trendtex*] at 569.

16 [1978] 2 SCR 141 [*Capital Cities*].

17 [1938] CanTS no. 18.

18 *Capital Cities*, above note 16 at 188.

> interference with this interest in violation of the convention signed by Canada.[19]

As authority for this proposition, his lordship quoted at some length from *Post Office v Estuary Radio Ltd*[20] in which Diplock LJ (as he then was) held that the court must take judicial notice of a treaty concluded by the Crown which extended the UK's internal waters beyond the previous three-mile limit. While Pigeon J spoke in dissent, subsequent Supreme Court of Canada decisions have arguably weakened the authority of the majority judgment.[21] Note that the majority did not refuse to take judicial notice of the Convention itself but only found that it had no application because it was unimplemented in domestic law.

In *Pan-American World Airways Inc. v Department of Trade* (1976), the question was whether the Secretary of State had the power to insert a disputed condition into an airline's UK operating permit. The airline challenged the condition as contrary to an agreement between the UK and the US. The English Court of Appeal found that the agreement in question was not part of UK law and therefore could not restrict the Secretary's powers. Lord Justice Scarman (as he then was) nevertheless made the following observation:

> If statutory words have to be construed or a legal principle formulated in an area of law where Her Majesty has accepted international obligations, our Courts—who, of course, take notice of the acts of Her Majesty done in the exercise of her sovereign power—will have regard to the convention as part of the full content or background of that law…even though no statute expressly or impliedly incorporates it into our law.[22]

Judicial notice of international law arose in another case involving Pan-American, this time in Canada. In *Pan American World Airways Inc. v The Queen* (1979),[23] the Federal Court

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19 *Ibid* at 189.

20 [1968] 2 QB 740 (CA) [*Estuary Radio*]. See also *In re Queensland Mercantile and Agency Company* [1892] 1 Ch 219 at 226 (CA).

21 I consider this decision more fully in Chapter 9 Section 9.4(a).

22 *Pan-American World Airways Inc v Department of Trade* [1976] 1 Lloyd's Rep 257 (Eng CA) at 261 per Scarman LJ.

23 (1979) 96 DLR (3d) 267 (FCTD), aff'd (1980), 120 DLR (3d) 574 (FCA), aff'd [1981] 2 SCR 565 [*Pan American*].

(Trial Division) considered a challenge to federal aeronautics regulations said to be contrary to the terms of the Chicago Convention on International Civil Aviation 1944[24] to which Canada was a party, as well as being contrary to an alleged "fundamental principle of equity" in international law. The plaintiff tendered expert evidence on Canada's right, as a matter of international law, to levy certain airline charges on the US for air navigation and services it provided over the high seas. In dismissing the plaintiff's arguments, Mahoney J described this evidence as "wholly inadmissible," saying,

> While expert evidence as to foreign law is, of course, admissible, expert evidence as to domestic law is not. It is well established that international law has no force in Canada unless it has been adopted as domestic law. Opinion evidence as to the proper construction to be placed on the Chicago Convention was not admissible and I have not, therefore, considered [the expert's] statement as evidence but, on the assumption that plaintiff's counsel would willingly adopt it as argument, I have considered it such.[25]

The reasoning in this passage is not entirely clear,[26] but the result is clear enough. Mahoney J rejected as inadmissible expert evidence as to the meaning and requirements of international law. The decision was upheld on appeal without comment on this point.

In the proceedings against alleged Hungarian war criminal Imre Finta, the testimony of a well-known international criminal law scholar, M. Cherif Bassiouni, was admitted into evidence. Yet in a pre-trial motion, the trial judge observed, "It is not necessary to refer to the massive weight of authority produced by the Crown that demonstrates that questions of international law are questions for the judge. That principle is as old as Blackstone."[27] On that reasoning, one would expect the testimony not to be admissible at all, but it appears that the trial judge, like Mahoney J in *Pan American*, treated the evidence as argument. This supposition is supported by La

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[24] [1944] CanTS no. 36.

[25] *Pan American* (FCTD), above note 23 at 274–75.

[26] The case is considered further in G. van Ert, "The Admissibility of International Legal Evidence" (2005) 84 Can Bar Rev 31.

[27] Quoted in *R. v Finta* (1992) 92 DLR (4th) 1 (Ont CA).

Forest J's consideration of Bassiouni's testimony on appeal to the Supreme Court of Canada. The learned judge (dissenting) criticized and rejected Bassiouni's testimony, effectively treating it as a question of law (to which no deference was due) rather than a finding of fact. He equated the testimony with scholarly writings, describing "the views of learned writers such as Professor Bassiouni" as "extremely useful" but emphasizing their "subsidiary character in determining what constitutes international law." La Forest J concluded that "Bassiouni does not represent the consensus of legal writers" and expressed his "complete agreement with the dissenting judges in the Court of Appeal" on the international legal issue before them.[28] The learned judge also observed that much confusion exists as to the elements of the international offences of war crimes and crimes against humanity and that such legal questions were for the trial judge, not the jury:

> It is, of course, not an answer to this complicated task [of determining the elements of the offences] to say that the contents of international offences are too difficult to distill and, therefore, that the accused cannot be found guilty; the confusion is the reality of the international law which Canada has obliged itself to observe and apply. This abandonment of international obligation, however, is likely to occur where the jury is called upon to determine the contents of the international offences. The necessary confusion could mislead the jury into believing that international norms are not really law and opens the door to manipulative lawyering. The questions of pinpointing international law, therefore, are best left in the hands of the trial judge whose training better equips him or her for the task. Not only is the judge better trained than the jury in evaluating international law, but, in fact, his or her interpretation of international law bears some force internationally (see Art. 38 of the Statute of the International Court of Justice). Again, the inquiries required are not of a kind immediately related to the accused's culpability for the domestic offence; rather, they are more legal and technical. There can, in my view, be no doubt that justice is better served by leaving the question of international law to the trial judge. I can perhaps make the point that the process bears some similarity to that of determining the content and application of common law, except that the latter, fluid and moveable as it may be, is far more precise.[29]

The admissibility of expert evidence on a point of customary international law was considered by the High Court

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28 [1994] 1 SCR 701 at 760–64 [*Finta*].

29 *Ibid* at 773–74.

of Justiciary (Scotland's final court of criminal appeal) in *Lord Advocate's Reference No. 1 of 2000.*[30] Three anti-nuclear protesters were acquitted of malicious damage to a support vessel for UK Trident submarines (which carry nuclear missiles). At their trial, which occurred before a jury, the accused raised a defence of necessity, arguing that the deployment of nuclear missiles by the UK is contrary to customary international law and therefore criminal in Scots law. Thus, the accused submitted, they were acting to prevent or obstruct a crime. To establish the applicable requirements of customary international law, the accused led expert evidence from international lawyers. The presiding judge (known as the sheriff) admitted this evidence which was presented before the jury. Upon acquittal, the government referred four legal questions to the High Court of Justiciary, including: "In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies in the United Kingdom?" The joint opinion of Lords Prosser, Kirkwood, and Penrose was that a rule of customary international law is a rule of Scots law and is therefore a matter for the judge and not for the jury. Submissions on questions of international law must be made by counsel, not by expert witnesses. Their lordships conceded, however, "that the question of whether an *opinio juris* has emerged, and won the general acceptance which is necessary to constitute a rule of customary international law, might well make recourse to expertise appropriate," though they nevertheless observed that, "having regard to the different skills and expertise of an advocate on the one hand, and some other kind of specialist on the other hand, we find it very hard to imagine any situation in which the appropriate material should be presented to the court in the form of evidence with examination and cross-examination, and perhaps counter-evidence for the other party."[31]

In *Plourde v Service aérien FBO inc. (Skyservice)* (2007),[32] an appeal from a decision refusing to certify a class

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30 2001 SLT 507, [2001] Scot J 84 (HCJ) [*Lord Advocate's Reference*], also known as *H.M. Advocate v Zelter*.

31 *Ibid* at para. 27.

32 2007 QCCA 739 at paras. 59–60.

proceeding, the Quebec Court of Appeal noted that, at the hearing of the appeal, it put questions to counsel for the appellant on the meaning of a treaty provision. Counsel declined to answer, saying instead that he intended to call the president of the international conference at which the treaty was negotiated, and that he would answer these questions in evidence. The court rejected this approach, observing that, even without pronouncing on the admissibility of such evidence, it would have no weight.

Justice Perram of the Federal Court of Australia considered at length the question of whether international law was properly the subject of expert evidence in *Australian Competition and Consumer Commission v P.T. Garuda Indonesia (No 9)* (2013).[33] The admissibility of a law professor's opinion on matters of international transportation law was challenged on several grounds. His Honour began by observing that "What little authority there is suggests that under Australian law a question of public international law is not one which involves the taking of evidence. On the other hand, under Australian law, foreign law such as Indonesian law is a fact to be proved by evidence."[34] As to why international law, when it comes to the manner of its proof, should be treated as a question of law rather than as one of fact, Perram J made the following observations of note:

> …The proliferation of international law concepts throughout modern legal systems, including Australia's, would make it inconvenient to require evidentiary proof each time one arose for consideration.…It would add a layer of expense and complexity if that discourse were required to be approached factually.
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> …domestic public law (by which I mean areas such as statutory interpretation, constitutional and administrative law) and international law are intertwined. Whilst it is true that foreign law and domestic law are also intertwined by reason of the principles relating to conflict of laws this does not occur in a way which impacts on the actual content of domestic law. A forum court may apply the law of Malta to a particular contract but this in no way effects the content of Australian law. When, on the other hand, a court construes a statute to comply with a treaty obligation this cannot be said to be

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33 [2013] FCA 323 (Federal Court of Australia) [*P.T. Garuda*].

34 *Ibid* at para. 29.

> so and in such a circumstance, international law then exerts a discernable influence on the content of local law.[35]
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> …
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> I do not think that the Professor's views are likely to add anything more in the form of evidence than they will add in the form of Mr Leeming's eventual submissions based upon them. Indeed, given the more active role of the Court during submissions it is unlikely that cross-examination of the Professor by counsel is likely to add anything which will not otherwise be obtained by cross-examination of counsel by the Court. In that circumstance, I conclude that the receipt of Professor Dempsey's views…would result in a waste of time and resources which is not justified by its likely probative effect.[36]

The admissibility of opinion evidence on international law was commented upon briefly, but importantly, by the Court of Appeal for British Columbia in *R. v Appulonappa* (2014).[37] "I agree with the respondents", said Neilson JA, "that, to the extent that both experts strayed into providing opinions on the interpretation and application of international law…their testimony was not properly admissible as these were questions of law for the court. I accordingly limit my consideration of their evidence to factual matters."

In *Canadian Planning v Libya* (2015), Braid J rejected the argument that the international law issues raised by Libya ought to be proved by expert evidence. She distinguished authorities requiring foreign law to be proved through experts, observing that in the case before her "the court must interpret Canada's international law obligations — something the Supreme Court has instructed Superior Courts to do", and added that the court "is merely interpreting Canadian law in light of international law, rather than attempting to interpret laws of other states".[38] In a subsequent ruling in the same matter, Braid J admitted (seemingly without opposition) an expert report from Prof. Toope on whether international law would preclude third parties from providing information about their financial dealings with

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35 *Ibid* at paras. 42-3.

36 *Ibid* at para. 54.

37 *R. v Appulonappa* 2014 BCCA 163 at para. 62.

38 *Canadian Planning and Design Consultants Inc. v Libya* 2015 ONSC 1638 at para. 34 [*Canadian Planning No. 1*].

Libya for the purpose of determining whether the Libyan bank accounts in issue were immune from enforcement proceedings. Notably, however, Braid J showed no deference to Toope's expertise, and indeed rejected his opinion in favour of her own assessment of the customary international legal position.[39] Rather than treating Toope's views as unrebutted evidence (there being no opposing expert report to counter them), she engaged with them as though they were submissions from a party.

In *Boily v La Reine* (2017), a Federal Court prothonotary struck out an expert report as inadmissible for expressing an opinion about international law as it applied in the case, relying in part on a discussion in the second edition of this book on the common law distinction between international law (which is a matter of judicial notice) and foreign law (which is not).[40] On appeal, Gagné J agreed that the report was inadmissible, but preferred to base her reasoning on "the inadmissibility of expertise providing legal conclusions on the issue(s) to be decided by the court, whether that law be domestic, foreign or international".[41] On the admissibility of international legal evidence, Gagné J noted that while my book argued for the orthodox view that international legal questions are questions of law, I also presented "several examples of exceptions to this rule where Canadian judges have accepted expert evidence on international law".[42] The learned judge concluded that "there is no authoritative legal position in Canada on whether or not judges are to take judicial notice of international law and consequently, on the admissibility of expertise on international law",[43] and that there is "clearly no settled position on this point".[44] Justice Gagné went so far as to say that the prothonotary's conclusion that "that expert evidence on

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39 *Canadian Planning v Libya* 2015 ONSC 3386 [*Canadian Planning No. 3*] at paras. 22-3, 44-9.

40 *Boily v Her Majesty the Queen* 2017 FC 396 at paras. 12-13.

41 *Boily v Her Majesty the Queen* 2017 FC 1021 [*Boily (appeal)*] at para. 25.

42 *Ibid* at para. 28.

43 *Ibid* at para. 27.

44 *Ibid* at para. 29.

international law is inadmissible because judges must take judicial notice of international law could be said to be a legal error" and that "[t]hat conclusion is not the law in Canada". Instead,

> Courts' taking judicial notice of international law and their acceptance of expert evidence on international law will continue to be made on a case-by-case basis going forward, until such point as a Canadian court takes a more definitive stance on this practice.[45]

Yet the learned judge went on to make statements and findings very much in keeping with the inadmissibility of expert evidence on international legal issues. She quoted approvingly the Court of Appeal for British Columbia in *Appulonappa* that the experts in that case had "strayed into providing opinions on the interpretation and application of international law and s. 117 of the IRPA", which testimony was "not properly admissible as these were questions of law for the court".[46] She also expressly declined to rely on Swinton J's use of expert evidence in *Bouzari*, noting trenchantly that "the role of the legal experts in this case seems to go beyond what Justice Swinton presents their role to be at the beginning of her judgment".[47] Ultimately, Gangé J affirmed that "in submitting an expert opinion containing a legal conclusion on international law as it applies to the facts of the case, Mr. Boily submitted inadmissible expert evidence".[48]

As if in response to Gagné J's observation that Canadian law lacks an authoritative statement of whether or not our judges take judicial notice of international law, Nadon JA for the Federal Court of Appeal went a considerable way to supplying it in *Turp v Canada (Foreign Affairs)*. The applicant sought judicial review of the federal government's decision to sell military vehicles to Saudi Arabia. Both sides relied on expert opinion on the international legal issues. In a discussion

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45 *Ibid* at para. 30.

46 *Ibid* at para. 33, quoting *R. v Appulonappa* 2014 BCCA 163 at para. 62.

47 *Ibid* at paras. 41-3, considering *Bouzari v Iran* [2002] OJ No 1624 (Ont SCJ).

48 *Ibid* at para. 49.

entitled, “Proof of international law through expertise", Nadon JA observed:

> I think it is useful to remark, without ruling on the question since the parties have not submitted any argument to this effect, that, in my opinion, the parties do not need to file experts’ reports to prove international law, because the Court can take judicial notice of said law.[49]

The learned judge proceeded to consider *The North*, *Jose Pereira E Hijos, S.A. v Canada (Attorney General)*,[50] and *Lord Advocate’s Reference*, quoting extensively from each. In particular, Nadon JA quoted with emphasis the following passage from *Lord Advocate’s Reference*: “…we find it very hard to imagine any situation in which the appropriate material should be presented to the court in the form of evidence with examination and cross-examination, and perhaps counter-evidence for the other party”. He concluded by expressing his complete agreement with the three decisions and observing:

> Consequently, I think that in a case like the one before us, the parties do not need to rely on expertise in international law. International law, being a question of law, is the prerogative of courts, which can take judicial notice of this law with the help of attorneys arguing the case.51

While Nadon JA pointedly left open the possibility of reconsidering this matter in another case (having not heard submissions on the point), this discussion is bound to be significant.

If any controversy remained after *Turp* as to whether courts take judicial notice of international law, it was surely resolved in *Nevsun Resources v Araya* (2020). This was a claim by Eritrean nationals against a BC mining company. They alleged the company was liable to them for its complicity in breaches of customary international law obligations committed against them by Eritrea. On a motion to strike the pleadings, Abella J for the majority of the Supreme Court of Canada quoted Dame Rosalyn Higgins’ observation that “there is not

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49 *Turp v Canada (Foreign Affairs)* 2018 FCA 133 [*Turp FCA*] at para. 82.

50 [1997] 2 FC 84 [*Jose Pereira*], considered at Section 3.6(a), below.

51 *Turp FCA*, above note 49 at para. 88.

'international law' and the common law. International law is part of that which comprises the common law on any given subject", affirmed that customary international law is incorporated by the common law, approved an observation of mine that Canadian courts are to treat public international law as law not fact, and held that "established norms of customary international law are law, to be judicially noticed".[52]

The question was extensively considered, in the context of treaty interpretation, by De Montigny JA (as he then was) for the Federal Court of Appeal in *International Air Transport Association v Canadian Transportation Agency* (2022).[53] That court was asked to declare invalid certain regulations adopted by the Canadian Transportation Agency. The appellants contended that the regulations violated requirements established in international civil aviation treaties. In support of this position, the appellants submitted two expert reports on the meaning of the Montreal Convention[54] and related treaties. The Attorney General of Canada objected that these reports were inadmissible.

Justice De Montigny agreed. He considered there to be "many reasons why Canadian courts should take judicial notice of international law without the need to resort to expert opinion". First, "international law is in many respects domestic law", whether through the incorporation of custom by the common law or the implementation of treaties by statute.[55] Second, the presumption of conformity with international law and the risk that violations of international obligations "will attract international responsibility" favoured judicial notice.[56] Third, the general law concerning the admissibility of expert opinion evidence, in particular the necessity requirement; the

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52 *Nevsun*, above note 8 at paras. 95–7 (citing to the second edition of this work at pp. 62–9); see also paras. 98–100.

53 *International Air Transport Association and others v Canadian Transportation Agency and others* 2022 FCA 211 [*IATA*].

54 Convention for the Unification of Certain Rules for International Carriage by Air 1999, 2242 U.N.T.S. 309 (ratified by Canada 19 November 2002).

55 *IATA*, above note 53 at para. 48.

56 *Ibid* at para. 49.

learned judge noted that "expert opinion on a question of law can hardly be necessary, given the Court's expertise on matters of law".[57] Justice De Montigny noted that while the case law has not been consistent, "I think it is fair to say that the jurisprudence has moved towards the exclusion" of expert opinion evidence on points of international law.[58] He concluded,

> Expert evidence on international law, just like expert evidence on any issue of domestic law, should therefore not be countenanced. Counsel should make submissions on international law themselves, without resorting to the added credibility of an expert. Of course, a learned article canvassing some of the legal issues in an expert opinion could, if published, be put before the Court, along with case law and other types of legal sources. But international law should definitely not be pleaded as a fact, to be proven by way of affidavit or testimonial evidence, especially when the objective is to provide legal conclusions on the very issue that is at the core of the dispute between the parties.
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> … The normative content of international law falls within the bailiwick of the court's exclusive jurisdiction.[59]

Justice De Montigny drew a clear distinction between evidence of international law and evidence of foreign law.[60] While international law is not properly the subject of opinion evidence, foreign law is. This distinction mattered in the case before court, as both parties sought to rely not only on international civil aviation agreements but also on state practice under those agreements. Such practice was properly proved through experts reports. The opinions tendered by the parties were only impermissible to the extent that they crossed the line between describing foreign state practice and opining on the consistency of that practice with treaties to which Canada is a party—the latter being "a matter of legal argument".[61]

The decision in *International Air Transport Association* is a welcome development. Together with *Nevsun*, it ought to settle at long last the principle on which Anglo-Canadian

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57 *Ibid* at paras. 50–2.

58 *Ibid* at para. 54; see also paras. 55–8.

59 *Ibid* at paras. 65–6.

60 *Ibid* at paras. 45, 67–69.

61 *Ibid* at para. 68; see also para. 164.

reception law has proceeded, without expressly saying so, for centuries, namely that courts take judicial notice of international law. The one matter Justice De Montigny left open, because it was not strictly before him, was whether courts should also take judicial notice of treaties not implemented in federal or provincial statutes.[62] I respectfully suggest that the answer to that question is yes. As noted above, Lord Scarman in *Pan-American World Airways Inc. v Department of Trade* was of the view that courts "take notice of the acts of Her Majesty done in the exercise of her sovereign power even though no statute expressly or impliedly incorporates [a given convention] into our law".[63] This approach makes sense for, as De Montigny JA noted, the presumption of conformity with international law serves to avoid attracting international responsibility on the state through non-conformity judicial interpretations of domestic law. That responsibility can arise whether the treaty in issue is implemented or not. Furthermore (and as considered at length in chapter seven), Canadian treaty implementation practice is far from transparent; legislative provisions that do not appear to be in implementation of Canadian treaty obligations may in fact serve that function. Judicial notice of relevant treaty obligations (without expert evidence) enables courts to interpret statutory provisions in their entire context, including international law.

Alongside the decisions described above must be ranged the untold number of Canadian cases, from the nineteenth century to today, in which our courts have, in effect though without explicitly commenting upon it, taken judicial notice of applicable rules of customary and conventional international law in the course of their decision-making.[64] The

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62 *Ibid* at paras. 47, 64.

63 *Pan-American World Airways Inc v Department of Trade* [1976] 1 Lloyd's Rep 257 (Eng CA) at 261 per Scarman LJ.

64 This book is replete with examples, but some notable instances from the Supreme Court of Canada are: *Re Foreign Legations* [1943] SCR 208; *Re Armed Forces* [1943] SCR 483; *Saint John v Fraser-Brace Overseas Corp.* [1958] SCR 263; *Reference re Ownership of Offshore Mineral Rights of British Columbia* [1967] SCR 792; *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86; *R. v Crown Zellerbach Canada Ltd.* [1988] 1 SCR 401; *Slaight Communications v Davidson* [1989] 1 SCR 1038; *Re Canada Labour Code* [1992] 2 SCR 50; *Ordon Estate v Grail* [1998] 3 SCR 437; *United States of America v Burns* [2001] 1 SCR 283; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3; *R. v Malmo-Levine; R. v Caine* [2003] 3 SCR 571; *GreCon Dimter inc v J.R.*

uncertainty that has for some time clouded the orthodox rule that Canadian courts take judicial notice of international law is regrettable but should not be overstated. The actual practice of Canadian courts in numerous cases, combined with the logical necessity of the rule in order to give effect to such other reception law doctrines as the presumption of conformity, the incorporation of custom by the common law and even the sovereignty of our legislatures to violate international law, sufficiently establish the judicial notice doctrine in Canada. Those cases that run contrary to the rule (reviewed below) appear to do so out of unfamiliarity with it on the part of counsel and the court rather than out of any principled objection.

(b) Commentators supporting judicial notice of international law

Some of the clearest statements of the rule that courts take judicial notice of international law come not from decided cases but from commentators. Writing in 1965, Castel observed of the Canadian position, "Since international law is part of the law of the land, it need not be proved in court like foreign law. Judicial notice is taken of it as of acts of Parliament or of any branch of the unwritten law."[65] Nine years later, Macdonald concluded that in Canada as in England "the standard practice has been to notice judicially international law, although, as in England, the Canadian courts have not usually seen fit to comment on this point directly".[66] More recent Canadian commentators have also approved the rule.[67]

Normand inc. [2005] 2 SCR 401; *R. v Hape* 2007 SCC 26; *Health Services and Support — Facilities Subsector Bargaining Ass'n. v British Columbia* 2007 SCC 27; *Yugraneft Corp. v Rexx Management Corp.* 2010 SCC 19; *Németh v Canada (Justice)* 2010 SCC 56; *Ezokola v Canada* 2013 SCC 40; *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68; *Thibodeau v Air Canada* 2014 SCC 67; *B010 v Canada* 2015 SCC 58; *R v Appulonappa* 2015 SCC 59; *World Bank Group v Wallace* 2016 SCC 15; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54; *Office of the Children's Lawyer v Balev* 2018 SCC 16.

65 J.-G. Castel, *International Law Chiefly as Interpreted and Applied in Canada* (Toronto: University of Toronto Press, 1965) at 44.

66 Macdonald, above note 10 at 113; see also 111-113.

67 See: G. van Ert, "The Admissibility of International Legal Evidence" (2005) 84 Can Bar Rev 31; C-E Côté, "La reception du droit international en droit canadien" (2010) 52 Sup Ct LR 483 at 560; M. Rankin, "The Admissibility of International Legal Opinion Evidence After *R v.*

These conclusions are in keeping with English and US commentary. The fourth edition of *Halsbury's Laws of England* states simply, "The courts take notice of every branch of English law, including the principles of international law . . . ."[68] Other English commentary is to the same effect.[69] Similarly, the *Restatement (Third) of the Foreign Relations Law of the United States* observes, "State courts take judicial notice of federal law and will therefore take judicial notice of international law as law of the United States."[70]

(c) Case law against judicial notice of international law

Against the proposition that Canadian courts take judicial notice of international law are cases in which international legal questions were made the subject of expert evidence and thus implicitly treated as questions of fact not law. Given the recent authorities reviewed above, these decisions can no longer be regarded as authoritative on the judicial notice point, assuming they ever were.

The trial judge in *R. v Keegstra*[71] rejected as inadmissible evidence submitted by the Crown consisting of a compilation of foreign laws as well as "articles allegedly taken from the European Convention of Human Rights, articles from the alleged International Convention of Civil and Political Rights and art. 4(a) of the alleged United Nations International Convention on the Elimination of All Forms of Racial Discrimination." The court held the foreign laws to be of "no evidentiary value because no proper basis was laid to support

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Appulonappa" (2015) 93 Can Bar Rev 327. See also F. Bachand, "The 'Proof' of Foreign Normative Facts Which Influence Domestic Rules" (2005) 43 Osgoode Hall LJ 269.

68 *Halsbury's Laws of England*, 4th ed., vol. 17 (London: Butterworths, 1973–) at para. 100; see also vol. 18 at para. 1403.

69 See I. Hunter, "Proving Foreign and International Law in the Courts of England and Wales" (1978) 19 Va. J. of Int'l L. 665 at 677-8, and F. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986) at 126.

70 American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, MN: The Institute, 1987) §113 Comment b. (A Fourth Restatement, released in 2018, did not address §113, so the Third Restatement remains (at time of writing) the American Law Institute's most recent position on this topic.

71 (1984) 19 CCC (3d) 254 at 275 (Alta QB).

their admission. In particular, proof of the existence of legislation from each of the countries named is absent and would require the testimony of an expert from each of those countries as well as proof that any English translation of the legislation was accurate."[72] This finding is consistent with the common law rule that foreign laws are matters of fact not law and must be proved in evidence. The court then added, "For the same reason no conventions or treaties to which Canada may be a signatory were properly before me." This equation of foreign law with international law is mistaken. It is notable that, in its consideration of the same case, the Supreme Court of Canada made extensive use of international legal sources, though again without comment on the propriety of doing so.[73]

International law was treated as a matter for evidence by the Nova Scotia Supreme Court in *Romania v Cheng*.[74] Seven officers of a Taiwanese registered vessel were alleged to have thrown Romanian stowaways overboard at sea during a voyage from Spain to Nova Scotia. The officers were arrested in Halifax Harbour and Romania sought their extradition. The intervenor Taiwan relied on the expert testimony of an international law professor, Stephen Toope, that "the alleged offences according to established principles of international law, were not committed within the territory of Romania" and that "Taiwan, being the flag state of the vessel had a superior jurisdictional claim over the offences than did Romania."[75] MacDonald J admitted this testimony, as well as Professor Toope's evidence on the meaning of territorial jurisdiction both in the applicable extradition treaty[76] and the federal Extradition Act. The learned judge observed the he "fully accept[ed] Professor Toope's conclusions in this regard." Clearly this decision is difficult to reconcile with the orthodox view that international legal questions are questions of law for argument

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[72] On the admissibility of evidence as to the meaning of foreign language texts of treaties, see Section 3.2(b), below.

[73] [1990] 3 SCR 697.

[74] (1997) 158 NSR (2d) 13 (SC), aff'd (1997) 162 NSR (2d) 395 (CA) [*Cheng*].

[75] *Ibid* at para. 41 (SC).

[76] Treaty Between Great Britain and Roumania for the Mutual Surrender of Fugitive Criminals [1894] UKTS no. 14.

by counsel and decision by the court. To the contrary, MacDonald J and the parties appear to have treated international law as a question of fact to be proved in evidence. Note, however, that there is nothing in the report of this case to indicate that the correctness of this manner of proceeding was considered by the court or that any objection was raised to it.

In *Bouzari v Iran*, an Iranian national sued the government of Iran in the Ontario courts for torture he suffered at the hands of Iranian authorities. Iran did not appear and was noted in default, but the Attorney General of Canada intervened to argue that the claim was barred by the State Immunity Act.[77] Both Bouzari and the Attorney General called international law professors to give evidence on the international law of state immunity and the meaning of certain Canadian treaty obligations. At first instance,[78] Swinton J clearly preferred the Attorney General's expert. While she appears to have relied on his testimony heavily at some points,[79] at others it seems she referred to his evidence only to confirm her own conclusions on the international legal questions before her.[80]

This confusion about the methodological approach to international legal issues continued into the reasons of Goudge JA in the Court of Appeal.[81] The following passage illustrates:

> [T]he more fundamental question is whether Canada has the international law obligation contended for by the appellant. After careful examination, the motion judge concluded that it does not. She analysed this first as a matter of treaty law and then of customary international law. In both contexts she relied on the expert evidence of Professor Greenwood concerning the scope of Canada's international law obligations . . . . While the motion judge's acceptance of Professor Greenwood's opinion over that of Professor Morgan is not a finding of fact by a trial judge, it is a finding based on the evidence she heard and is therefore owed a certain deference in this court. I would depart from it only if there were good

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77 RSC 1985 c. S-18.

78 [2002] OTC 297 (SCJ) [*Bouzari* SCJ].

79 For example, *ibid* at paras. 52–55.

80 For example, *ibid* at paras. 72–73. As noted above, Gagné J expressly declined to follow Swinton J's approach to expert evidence in *Boily (appeal)*, above note 41.

81 (2004) 71 OR (3d) 675 (CA) [*Bouzari* CA].

> reason to do so and, having examined the transcript, I can find none. Indeed, for the reason she gave, I agree with her reliance on Professor Greenwood's evidence.[82]

This is, with respect, an unsatisfactory conclusion. Goudge JA states that Professor Greenwood's evidence, and Swinton J's "findings" based on it, are not matters of fact (which an appellate court will not disturb except in cases of palpable and overriding error).[83] Yet he nevertheless would accord the finding "a certain deference." Elsewhere in his reasons the learned judge observed there was ample evidence to support Swinton J's conclusions on international law, and that he agreed with them.[84] It is hard to know what Goudge JA means by departing only from Swinton J's international legal conclusions if there were good reason to do so. If her conclusions were wrong, would that be a good reason? The way to avoid these difficulties would have been for the motions judge either to affirm the orthodox position that common law courts take judicial notice of international law and therefore rule that the legal opinions of experts were inadmissible or (assuming she was free to do so) reject the orthodoxy and find that the requirements of international law must be proved in evidence and decided by the trier of fact.

Professors of international law gave opinion evidence in a wrongful dismissal claim against the Northwest Atlantic Fisheries Organization on the question of whether that body enjoyed immunity from the Nova Scotia courts at international law. At trial, by agreement of counsel and with the court's approval,[85] both professors were qualified as experts in international law. Both opined not only on the international law issues, however, but also on the meaning and application of s. 3(1) of the order-in-council—a question of domestic law and the very question the court was being asked to determine. No consideration of the admissibility of this supposed evidence

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82 *Ibid* at para. 68 (CA).

83 *Stein v The Ship "Kathy K"* [1976] 2 SCR 802 at 808.

84 *Bouzari* CA, above note 74 at paras. 79 and 83.

85 *Amaratunga v Northwest Atlantic Fisheries Organization* 2010 NSSC 346 at para. 16.

appears to have been given. In fact, the Court of Appeal[86] observed that the "debate was nourished greatly by two eminent international law experts". The experts' opinions are not referred to in the reasons of the Supreme Court of Canada.[87]

The cases considered under this heading would tend to undermine the claim that international law is judicially noticed in Canada were the question specifically considered in any of them. As it is, and in light of recent high authority, they must be regarded as *per incuriam*.

(d) Statutory provisions requiring judicial notice of international law

[…]

(e) Notice of international law by administrative decision-makers

[…]

3.2 Proof of treaties

Of all international law sources, treaties lend themselves most readily to judicial notice by courts and other adjudicative bodies. As positive statements of the law applicable between their parties, treaties leave less room for uncertainty than unwritten rules of customary international law on such basic questions as the existence, meaning, and scope of a particular international legal obligation. That is not to say that treaties are always easy to understand or interpret. But their content and legal status are readily ascertainable — in most cases without the need of proof.

(a) Proof of treaties generally unnecessary

Judicial notice of international law means that it should not be necessary, in most cases, to lead evidence on the content of a

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86 *Northwest Atlantic Fisheries Organization v Amaratunga* 2011 NSCA 73 at para. 12.

87 *Amaratunga v Northwest Atlantic Fisheries Organization* 2013 SCC 66.

given treaty by means of testimony or affidavit. Courts may ascertain a treaty's content by reference to official publications in which they are reproduced, just as they do with statutes, regulations, judicial decisions, and other sources of law.

Treaties to which Canada is a state party are published in the Canada Treaty Series (CanTS), a publication maintained by the Treaty Section of Global Affairs Canada. Most treaties ratified or acceded to by Canada since 1928 are published in CanTS. This was originally a print volume but since 1 April 2014 it is available only in electronic format (PDF) from a web site maintained by the Treaty Law Division.[88] CanTS and the related web site are the best place to determine Canada-specific information about a treaty such as dates of signature and consent to be bound, in force status and citation information. In the event that the sought-after information is not available from these sources, inquiries can be addressed directly to the Treaty Custodian at Global Affairs Canada.[89]

Not all Canada's treaty obligations were assumed by Canada itself. Those dating from the colonial period may be found in the United Kingdom Treaty Series, the British State Papers, and other UK government sources. In many cases these publications will indicate whether the treaty in question binds the UK only or also Canada and its other former dependencies. A tool for finding imperial treaties binding, or formerly binding, on Canada is UK Treaties Online.[90]

Litigants may sometimes wish to rely on treaties to which Canada is not a party. Such treaties are not published in CanTS, of course, yet Canadian courts have frequently taken judicial notice of their content without proof. This is particularly so in the human rights context, where the European Convention on Human Rights 1950[91] (ECHR) has frequently been considered. It seems that another type of judicial notice is at

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88 www.treaty-accord.gc.ca

89 Inquiries may be addressed to the Treaty Custodian and Administrator, Global Affairs Canada, Treaty Law Division, 125 Sussex Drive, Ottawa K1A 0G2 or by email to info.jli@international.gc.ca.

90 treaties.fco.gov.uk

91 ETS no. 5.

play here, namely judicial notice of notorious facts. The ECHR is a world-renowned human rights instrument. To require a litigant to prove its content in evidence would, in most cases, be pedantic. The same may be said of certain other international instruments, as well as such celebrated foreign laws as the US Bill of Rights. Where a litigant seeks to rely on a less well-known treaty, and cannot rely on judicial notice because Canada is not a party to it, it may be possible to satisfy the court without resort to affidavit evidence or other proof by taking a copy of the treaty from such reliable sources as the United Nations Treaty Series,[92] the European Treaty Series and Council of Europe Treaty Series,[93] leading national treaty series, or eminent publications such as the *Consolidated Treaty Series*.[94]

A litigant may wish to show, or a court may wish to know, whether a state other than Canada is a party to a treaty. This was the case in *Munyaneza v R.*, where the trial judge consulted the Red Cross web site to determine that Rwanda was a party to the Genocide Convention. On appeal, the appellant invited the Quebec Court of Appeal to criticize the trial judge for having so informed himself. The court wisely declined to do so, saying:

> …la Cour estime que le juge n'a commis aucune erreur en prenant connaissance de la liste des États parties à un traité international auquel le Canada est lui-même partie. Contrairement à ce que prétend l'appelant, la Cour suprême n'a jamais énoncé dans l'arrêt *Finta*, p. 867-868, que la signature d'une convention par un état s'établit à l'aide d'un expert; elle évoque uniquement le fait qu'il faille souvent recourir à l'expertise et à la doctrine pour interpréter le droit international, dont plusieurs principes ne sont pas codifiés.

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92 treaties.un.org

93 Treaties opened for signature between 1949 and 2003 were published in the European Treaty Series (ETS No. 1 to 193 included). Since 2004, this Series is continued by the Council of Europe Treaty Series (CETS No. 194 and following). See www.coe.int/en/web/conventions/home

94 C. Parry, ed. *Consolidated Treaty Series* (Dobbs Ferry, NY: Oceana, 1969–1981).

> Certes le juge aurait mieux fait de consulter la source officielle, soit la Collection des traités des Nations Unies, plutôt que le site de la Croix-Rouge. Cela est toutefois sans conséquence.[95]

Official publication of a treaty in CanTS or its UK counterparts suffices to establish the treaty's content. The content is as it appears in the official publication and there should be no need to lead or accept evidence on the point. The treaty's meaning is a question of law and should not usually be the subject of expert evidence. There may nevertheless be exceptional cases where evidence concerning a treaty's content or status is warranted. Potential exceptions are considered below.

(b) Proof of foreign language texts

A partial exception to the principle that the meaning of a treaty is not a matter for evidence seems warranted where the authentic text of a treaty is recorded in a foreign language or (more commonly) where two or more authentic texts of the treaty are prepared, one in the court's own language(s) and the other or others in foreign languages.[96] In such cases, English courts have accepted expert evidence as to the meaning of the foreign language text in an effort to elucidate the treaty's true meaning. In *Fothergill v Monarch Airlines* the House of Lords was faced with English and French versions of a treaty. The French text was authentic and the English text a translation adopted by Parliament in implementing the treaty. Lord Scarman observed that the court "may receive expert evidence directed not to the questions of law which arise in interpreting the convention, but to the meaning, or possible meanings (for there will often be more than one), of the French. It will be for the court, not the expert, to choose the meaning which it considers should be given to the words in issue."[97]

(c) Proof of recondite expressions within a treaty

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[95] *Munyaneza v R.* 2014 QCCA 906 at paras. 109-110. This explanation of *R. v Finta* [1994] 1 SCR 701 is correct where what is in issue is state practice rather than the content of an international norm.

[96] This observation was approved by Brown and Rowe JJ, dissenting (but perhaps not on this point) in *Nevsun*, above note 8 at para. 181.

[97] *Fothergill v Monarch Airlines* [1981] AC 251 (HL) at 293–94.

The Court of Appeal for England and Wales permitted expert evidence on the meaning of certain treaty provisions, in a qualified way, in *Post Office v Estuary Radio Ltd*.[98] The question was whether a radio tower in the Thames estuary was within United Kingdom internal or territorial waters (in which case injunctive relief was available) or was on the high seas (in which case it was not). An order in council gave effect to the Convention on the Territorial Sea and Contiguous Zone 1958,[99] in which the expressions "internal waters" and "territorial sea" were defined.

Having observed that the court must take judicial notice of the Convention,[100] Lord Diplock noted a dispute between the parties as to the expression "the natural entrance points" of a coastal indentation, found both in the Convention and the order in council implementing it. Expert evidence on the meaning of this phrase had been led by both sides. Lord Diplock explained the conditions on which he was prepared to accede to this way of proceeding:

> Although the ultimate decision upon the meaning of the expressions used in the Order in Council must be one for the court, the subject-matter is sufficiently recondite to render admissible evidence as to what the words used would be understood to mean by persons qualified in this specialised field of claims by states to exercise jurisdiction over the coastal sea. The judge preferred on this matter the evidence of the Post Office experts, whose qualifications on this particular aspect of hydrography he considered, with justification, lent greater weight to their opinions as compared with those of the experts called for Estuary Radio Ltd. The Post Office experts were naval officers whose duty it was to advise the Crown not only upon its own claims to internal waters and the territorial sea, but upon the recognition of claims by other states. This court would be chary of differing from the view of the trial judge on a matter of assessing the weight to be given to conflicting evidence of expert witnesses whom he has seen and heard. But in addition, the Post Office experts gave convincing reasons for applying the purely cartographical test, which, according to their evidence, is that adopted by the United Kingdom and other countries in applying the Convention.[101]

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98 [1968] 2 QB 740 (CA) [*Estuary Radio*].

99 [1965] UKTS no 3.

100 *Estuary Radio*, above note 98 at 756.

101 *Ibid* at 758–9.

While the court here permitted opinion evidence on the meaning of words in a treaty, it did so in a qualified way. First, the court affirmed that it must take judicial notice of the Convention. Second, the opinion evidence was not directed at the meaning of the treaty as a whole but only (it seems) of a particular expression, "the natural entrance points". Third, the subject matter of the treaty was "sufficiently recondite" (i.e., beyond ordinary knowledge or understanding) as to justify evidence as to what specialists understand by the expression at issue. Finally, despite admitting expert evidence on the point, the court affirmed that the ultimate decision as to the treaty's meaning on this point remained with the court.

The rule we can take from *Post Office v Estuary Radio Ltd.*, I suggest, is that while a treaty's meaning and interpretation is a matter of law for the court, there may be instances where particular expressions within especially technical treaties may be helpfully elucidated through expert evidence. Taken as a whole, the case law suggests such instances are very rare.

(d) Proof of a treaty's status

Distinct from the questions of a treaty's content and meaning is the question of its legal status. Is the treaty one to which Canada is a party and, if so, is the treaty in force yet, or in force still?

When CanTS was only a print publication, it told readers whether Canada had ever been a party to a treaty but not whether Canada remained a party. This is because publication of a treaty in CanTS only occurred once Canada adhered to it. The mere presence of a treaty in that collection established that it was — or at least once was — binding on Canada. But CanTS was not updated to indicate the current status of treaties published in it.

The advent of internet treaty publishing has solved this problem—so long as the Treaty Division is conscientious about keeping its web site up to date. That site (treaty-accord.gc.ca) now indicates, for each treaty published there, its "Status for

Canada", e.g. "In Force" or "Terminated".[102] This important feature should now allow courts to take judicial notice of a treaty's legal status for Canada.

The status of a treaty for Canada has occasionally been considered in Canadian courts. […]

[102] The site also indicates a treaty's status generally, i.e., whether it is in force or not for all parties. "Status" and "Status for Canada" must not be confused.