Taking Notice: Judicial Notice and Practices of Judgment in Anti-Poverty Litigation

by

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M.A. University of Toronto, 2000
LL.B. University of British Columbia, 2004

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Abstract

This thesis explores the doctrine of judicial notice, particularly as it applies in the context of anti-poverty litigation. I invoke a theory of judgment which centres valid judgment on the practice of an "enlarged mentality." I argue for an interpretation of judicial notice that can assist judges to approach their task in this way. First, judicial notice should be animated by the fundamental principles of the legal system, including equality. Second, judicial notice must be attentive to the different kinds of "facts" that could be subject to notice, and the criteria for notice that are appropriate in each case. Third, judicial notice requires an active posture on behalf of judges, which finds support in legal norms about impartiality and the duty to give reasons. Finally, judicial notice requires judges to be actively attentive to the content of their own common sense.

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INTRODUCTION

The doctrine of judicial notice is a part of the law of evidence that regulates how judges take into account facts that have not been proven by the parties through admissible evidence. A judge takes judicial notice when he or she accepts the truth of a matter without requiring evidence.[1] Therefore, when a judge "notices" a fact, it enters the process of legal judgment from outside the adversarial system. Judicial notice invokes questions about the practice of judging more broadly, as well as the meaning of many

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[1] The following are examples of definitions of judicial notice from influential evidence texts:

"[Judicial notice is] where the Court is justified by general considerations in declaring the truth of the proposition without requiring evidence from the party." Wigmore, *Evidence*, Chadbourn Revision, vol. 9, 1981 at §2565.

"Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs." John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 976.

"When a court takes judicial notice of a fact…it declares that it will find that the fact exists, or direct the jury to do so, although the existence of the fact has not been established by evidence." Rupert Cross & Colin Tapper, *Cross on Evidence*, 7th ed. (London: Butterworths, 1990) at 63.

"The subject of judicial notice, then, belongs to the general topic of legal or judicial reasoning. It is, indeed, woven into the very texture of the judicial function. In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this, with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit." James Thayer, *A Selection of Cases on Evidence at the Common Law* (Massachusetts: Charles W. Server & Co., 1982) at 279-280.

"Courts will take judicial notice of the various matters enumerated below, these being so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary." M.N. Howard, Peter Crane & Daniel A. Hochberg, *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990) at §2-06.

legal principles such as the distinction between "fact" and "law," the requirements of impartiality and the adversarial system of trial.

The doctrine of judicial notice has an ambiguous relationship with practices of judgment that aim to incorporate information about the social context of the law. In some circumstances, judicial notice serves to buttress distinctions between "law" and "fact," and to lend legal authority to dominant conceptions of "truth" or common sense. In other circumstances, judicial notice allows judges to "notice" information that would not otherwise come before the court, expanding the background against which judgments are made. Judicial notice may function either to close or to open avenues for contestation and appeal. Judicial notice may enhance judges' power, and at the same time require judges to engage in critical self-reflection and intellectual humility.

This ambiguity arises from the nature of notice itself. However, there is also a great deal of disagreement about what exactly "judicial notice" describes, and what its procedural impact is in practice. For example, judges and commentators disagree about the appropriate scope of judicial notice, whether it can be implicit or explicit, whether it happens by request of the parties or on the judges' own motion, whether the judge can consult materials before deciding to take notice, and whether judicial notice is conclusive or can be rebutted with further evidence.[2]

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[2] For an overview of these issues, see John T. McNaughton, "Judicial Notice: Excerpts Relating to the Morgan-Wigmore Controversy" (1961) 14 Vanderbilt Law Review 779. For contrasting theoretical perspectives on the doctrine, see Ian Binnie, "Judicial Notice: How Much Is Too Much?" (2003) Special Lectures of the Law Society of Upper Canada 543-56; Claire L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the

The puzzle of judicial notice is nowhere more interesting, and sometimes troubling, than in the context of constitutional litigation concerning poverty. Anti-poverty litigation seeks to challenge the injustices of poverty by claiming that poverty violates constitutionally protected rights. Anti-poverty litigation operates on the premise that poverty is a human rights violation, and that constitutional rights, properly interpreted, guarantee a certain level of material security, such as adequate food and shelter.

It is well established that constitutional interpretation must be undertaken using a "contextual approach."[3] This approach is particularly significant in the adjudication of anti-poverty claims because such claims often rely on a judge's access to knowledge about such things as the extent of poverty in Canada, its disparate impact on different communities, and the kinds of experiences faced by people in poverty. At the same time, anti-poverty litigants must overcome a significant barrier in the form of stereotypes that are applied to them in daily life and by the law.[4] Thus, an adequate understanding of the

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Family Law Context" (1994) 26:3 Ottawa Law Review 551-577 [L'Heureux-Dubé, "Re-examining"]. For a range of examples of judicial notice in Canadian cases, see Appendix A.

[3] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1, ["*Law*"].

[4] See Gwen Brodsky, "Gosselin v. Québec: Autonomy with a Vengeance" (2003) 15 Canadian Journal of Women and the Law 194-214; Keene, Judith, "Claiming the Protection of the Court: Charter Litigation Arising from Government 'Restraint'" (1997) 9 National Journal of Constitutional Law 97; Mossman, Mary Jane, "Choices and Commitments for Women: Challenging the Supreme Court of Canada in the Context of Social Assistance" (2004) 42 Osgoode Hall Law Journal 615.

relevant social context may be very important to the outcome of a case concerning the constitutional rights of poor people.

However, when anti-poverty claims have come before the courts, the "contextual approach" has often not succeeded in bringing empirical realities about poverty to the centre of the analysis. In fact, the experiences of people in poverty have remained largely invisible to the courts. In this thesis, I will argue that in these cases, substantive constitutional law has been impoverished by the failure to develop a conception of judicial notice that fully engages with the requirements of the "contextual approach." In contrast, the best interpretation of judicial notice provides judges with the authority and obligation to seek out relevant social context information, and provides some guidelines for its use. This interpretation of judicial notice is grounded in the fundamental values of the legal system, applies to the full range of "facts" that may be relevant to constitutional interpretation, and invokes a critical analysis about the community for whom the fact is relevant. Without sufficient consideration of these underlying principles, judicial notice can instead function to limit judicial consideration of social context.

Gosselin v. Québec, the leading case on social and economic rights in Canada, provides an instructive example of the significant role judicial notice can play in shaping the court's treatment of social context information.[5] In *Gosselin*, the Supreme Court of Canada was called upon to decide whether parts of the social assistance regime in Québec violated constitutionally protected rights. The regulations in question set the base amount

[5] *Gosselin v. Québec (Procureur general)*, [2002] 4 S.C.R. 429, 2002 SCC 84, ["*Gosselin*"].

of welfare benefits for people between the ages of 18 and 30 at approximately one-third of the base amount available to people over 30. Adults under 30 could access the higher amount by participating in certain training programs, but access to the programs was extremely limited, and the vast majority of adults under 30 received only the lower amount. These young people were required to survive on approximately $170 per month.[6] Louise Gosselin claimed that the regulation violated her constitutional rights to equality and security of the person.

On many issues, the judges of the Supreme Court of Canada were divided in complex ways. The question of whether and how to judicially notice social context information, although rarely explicitly addressed in the various judgments, turned out to be very significant. On the issue of section 15 equality rights, Chief Justice McLachlin, writing for the majority, found that the regulation was not discriminatory. One part of her analysis involved the question of whether adults under 30 suffer from "pre-existing disadvantage" in relation to employment. She wrote:

> Both as a general matter, and based on the evidence and our understanding of society, young adults as a class simply do not seem especially vulnerable or undervalued. There is no reason to believe that individuals between ages 18 and 30 in Québec are or were particularly susceptible to negative preconceptions. *No evidence was adduced to this effect, and I am unable to take judicial notice of such a counter-intuitive proposition. Indeed, the opposite conclusion seems more plausible,* particularly as the programs participation component of the social assistance scheme was premised on a view of the greater long-term employability of under-30s, as compared to their older counterparts.[7]

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[6] *Ibid.* at para 7-8. Brodsky, *supra* note 4.

[7] *Gosselin, supra* note 5 at para. 33, (emphasis added),

In this way, McLachlin C.J.C. declined to notice the vulnerability of young adults. In addition, she followed a previous case in which the court had noticed that adults under 45 are *not* disadvantaged in relation to employment. She held:

> If anything, people under 30 appear to be advantaged over older people in finding employment. As Iacobucci J. also stated in *Law*, with respect to adults under 45 (at para. 101):
>
> > It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice.[8]

On the basis of Justice Iacobucci's judicial notice in the *Law* case, McLachlin C.J.C. concluded that:

> [T]he appellant has not established that people aged 18 to 30 have suffered historical disadvantage on the basis of their age. There is nothing to suggest that people in this age group have historically been marginalized and treated as less worthy than older people.[9]

The double-edged nature of judicial notice becomes readily apparent in these passages. On one hand, judicial notice has been invoked too comfortably and without clear justification. McLachlin C.J.C. has adopted as precedent past judicial notice of a "fact," (i.e., that it becomes increasingly difficult to find and maintain employment as one grows older) without explaining the applicability of this precedent to the present case. For example, McLachlin C.J.C. did not consider whether the different context of social insurance benefits, as opposed to an insurance-based scheme, might affect the factual

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[8] *Ibid.* at para. 34. McLachlin C.J.C. is citing from *Law*, *supra* note 3. The *Law* case concerned a challenge to age-based allocation of survivor benefits under the Canada Pension Plan, in which surviving spouses under age 45 received fewer benefits that surviving spouses over 45.

[9] *Ibid.* at para. 36.

framework needed to decide the case. Further, it is unclear what criteria were used to evaluate qualification for judicial notice in the first instance. Despite the fact that this "fact" appears to play a fairly important role in the majority's s. 15 decision, the judgment does not engage in any principled reflection on how this fact came to merit judicial notice. Commentators have pointed out that this "fact" is subject to dispute in important ways, including refutation by figures accessible from Statistics Canada.[10]

Further, as pointed out by Justice L'Heureux-Dubé in her dissenting judgment, the stated purpose of the legislative scheme was precisely to respond to high rates of unemployment among young adults, which in her view constituted a pre-existing disadvantage.[11] These criticisms speak to the dangers associated with judicial notice where it is invoked too uncritically: it can incorporate incorrect or incomplete information about social context, with no opportunity for challenge or debate.

On the other hand, these passages from the majority's decision in *Gosselin* also reflect the ways in which significant social context information can be left out when judges uncritically *decline* to notice it. In constitutional rights litigation, it may be inadequate for a judge to reject a characterization of social context because it is "counter-intuitive," without further discussion or investigation. Without inquiring into the empirical realities faced by young adults in Québec in the 1980s in relation to employment, the court may not be in a position either to "notice" or turn away from any given factual claim.

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[10] Natasha Kim & Tina Piper, "Gosselin v. Québec: Back to the Poorhouse..." (2003) 48 McGill Law Journal 749.

[11] *Gosselin, supra* note 5 at para. 137,

The uncertainty surrounding the treatment of contextual information is particularly significant for anti-poverty litigation because of the high cost of litigation. When all social context information must enter the process through the litigants, low income litigants must attempt to explain their experiences to the court, but are without the resources needed to marshal vast amounts of documentation and testimony. Judicial notice of social context information can have a large, or even determining, impact on whether anti-poverty claims are advanced before the court at all. In a context in which legal aid for civil matters is virtually nonexistent,[12] the resources required to launch a constitutional challenge must be taken into account when evaluating any proposal about judicial notice and social context information in constitutional cases.

Further, anti-poverty litigation initiates moments of great importance in the life of Canadian democracy and constitutionalism, because it requires courts to consider the relationship between economic inequality or deprivation and human rights. In this context, where courts are asked to make decisions with broad social consequences, it is especially important to articulate and understand the principles underlying judicial notice and the treatment of social context information. The *Gosselin* decision marked a very significant moment in poverty related jurisprudence, because it was a rare instance in which the laws and administration of welfare benefits were subjected to scrutiny by appellate courts. In fact, it was the first time the Supreme Court of Canada was able to

[12] For an overview of civil legal aid programs and their inadequacy for women's equality, see Lisa Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Status of Women Canada, 1998), online: http://www.swc-cfc.gc.ca/pubs/pubspr/footinthedoor/footinthedoor_e.html.

consider the relationship between constitutionally guaranteed human rights and the provision of welfare benefits. Throughout this thesis, I will return to the *Gosselin* case as an example of anti-poverty litigation, but also as a significant indicator of how legal principles and practices respond to realities of poverty in Canada.

By drawing attention to things that judges identify as outside the arena of adversarial dispute, judicial notice provokes queries about the practice of legal judgment, including: distinctions between "fact" and "law," the requirements of judicial impartiality, the impact of the large gap between the class, race and gender composition of the Canadian bench as compared with Canadians living in poverty, and the capacity of legal institutions to respond to a heterogeneous social reality. To gain a greater understanding of what is at stake in relation to the doctrine of judicial notice and anti-poverty litigation, I approach these questions by situating the doctrine of judicial notice in relation to a theoretical approach to "judgment" developed by Jennifer Nedelsky.[13]

Nedelsky argues that a central challenge to a theory of judgment is the issue of social diversity. She asks how, given the strong critiques of "objectivity" in judgment from feminist and other theorists,[14] we can move beyond these critiques to "reconstruct norms

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[13] Jennifer Nedelsky, "Embodied Diversity and Challenges to Law" (1996) 42 McGill Law Journal 91-118 [Nedelsky, "Embodied Diversity"]; Jennifer Nedelsky, "Judgment, Diversity, and Relational Autonomy" in Ronald Beiner & Jennifer Nedelsky eds., *Judgment, Imagination and Politics: Themes from Kant and Arendt* (Lanham, Maryland: Rowman & Littlefield, 2001) 103-120 [Nedelsky, "Relational Autonomy"].

[14] Nedelsky describes critiques offered by Iris Young, Elizabeth Spelman, Carol Gilligan and neurologist Antonio Damasio: Nedelsky, "Embodied Diversity," *ibid.*

of optimal decision making."[15] Nedelsky explores issues such as the relationship between judicial impartiality and the idea that the judiciary is not "representative" of broader society. In order to address these issues, Nedelsky has turned to the work of Hannah Arendt. By viewing Arendt's theory of judgment through the lens of *legal* judgment in a diverse society, Nedelsky argues that Arendt provides useful resources for thinking about judgment in general and legal judgment in particular.

Arendt's writings provide only an outline of her thought on judgment, as she did not live to write the full volume on this subject that she planned. However, there are some texts in which Arendt indicates the direction of her approach to judgment. These texts have generated debates among contemporary theorists who have explored the potential and pitfalls of Arendt's theory of judgment when applied in the context of political, aesthetic and legal judgment.[16]

Arendt grounds her ideas on judgment in Kant's theory of aesthetic judgment, and his discussion of "taste".[17] There are two important reasons for this link. First, Arendt explores how judgment relates to the condition of plurality that characterizes human existence.[18] Unlike other kinds of reasoning or the application of rules, a judgment

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[15] Nedelsky, "Relational Autonomy," *supra* note 13 at 104.

[16] See the collection of texts in Beiner & Nedelsky, *supra* note 13.

[17] Immanuel Kant, *Critique of Judgment*, trans. Werner S. Pluhar (Indianapolis: Hacket Publishing Company, 1987).

[18] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

relates to a *particular* person or thing.[19] Like aesthetic taste, judgment can only be understood as a way of evaluating something in its particularity, as opposed to formulating rules that apply universally. Ronald Beiner summarizes the meaning of Arendt's interpretation of judgment when he writes: "...this is what judgment means: to size up the unique particular that stands before one, rather than trying to subsume it under some universal scheme or interpretation of a pregiven set of categories." [20]

Second, Arendt is interested in accounting for the *subjective* nature of judgment. Judgment, like taste, involves a subjective element. Like taste, judgment is not a matter of logical deduction or induction.[21] Judgments are not wholly objective truth claims, nor are they conclusions that can be reached by logical inference alone.

Thus, like many contemporary thinkers, Arendt recognizes the irreducibly subjective element of human judging. However, having recognized subjectivity, Arendt does not leave us to the dangers of arbitrariness and mere preferences. There is a sense in which my *taste* is *completely* private and noncommunicable; I simply experience liking or

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[19] Hannah Arendt, *Lectures on Kant's Political Philosophy*, Edited and with an Interpretive Essay by Ronald Beiner (Chicago: University of Chicago Press, 1992) [Arendt, *Lectures*] at 66.

[20] Ronald Beiner, "Rereading Hannah Arendt's Kant Lectures" in Beiner & Nedelsky, *supra* note 13, 91-101 at 99.

[21] Arendt, *Lectures, supra* note 19 at 4.

disliking something. In contrast, Arendt shows how *judgment*, with its essentially subjective element, can nevertheless claim validity.[22]

The validity of a judgment is linked to a condition Arendt describes, following Kant, as an "enlarged mentality." According to Arendt, validity exists because when I judge, I practise an enlargement of mind in which I imagine justifying my judgment to others, comparing my judgment to theirs. When I make a judgment, I claim that my judgment is valid across that community of judging others.

An enlarged mentality can be understood as a way for judges to free themselves from the constraints of their subjectivity. By considering how their subjective impression could be justified to others, judges are able to gain some objective insight into their own private opinions, feelings, and idiosyncrasies. Through reflection, the judge gains a certain kind of "disinterestedness" that is necessary for impartiality.[23] In this way, the enlarged mentality allows a judge to transform a private, subjective experience into something that holds meaning for others. Arendt argues:

> [Through an enlarged mentality] one is able to abstract from private conditions and circumstances, which, as far as judgment is concerned, limit and inhibit its exercise. Private conditions condition us; imagination and reflection enable us to *liberate* ourselves from them and to attain that relative impartiality that is the specific virtue of judgment.[24]

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[22] Ronald Beiner & Jennifer Nedelsky, "Introduction" in Beiner & Nedelsky, *supra* note 13 vii-xxvi at vii and x.

[23] Arendt, *Lectures, supra* note 19 at 73.

[24] Arendt, *Lectures* at 73, *supra* note 19.

An enlarged mentality also allows for impartiality by adding perspectives to the *partial* subjective knowledge of the judge. A judge is always a member of communities,[25] and it is by referring to the perspectives of the other members of those communities that valid judgment occurs. By training the imagination to "go visiting," a judge can expand the perspectives that are taken into account when forming a judgment.[26]

Thus, according to Arendt, judgment is neither wholly subjective nor wholly objective. It involves intersections and transformations between privacy and publicity, thought and feeling, particularity and abstraction, communication and imagination, individuality and community, self and other. Judgment is a unique human capacity that is essentially linked to communities. This is the vision of judgment that is adopted by Nedelsky as a model that can generate new insights into legal judgment specifically. Nedelsky argues that Arendtian judgment can serve to rearticulate the requirements of judicial impartiality in a way that broadens the practice of judging. In a passage that has been cited with approval at the Supreme Court of Canada, she writes:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an "enlargement of mind." We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective.... It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.[27]

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[25] *Ibid.* at 75.

[26] Arendt says that "[t]o think with an enlarged mentality means that one trains one's imagination to go visiting." *Ibid.* at 43.

[27] Nedelsky, "Embodied Diversity," *supra* note 13 at 107. Cited by McLachlin & L'Heureux-Dubé JJ. in *R. v. S.(D.R.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193, ("*R.D.S.*") at para. 42.

This passage highlights some of the ways the "enlarged mentality" theory of judgment may be particularly relevant in the anti-poverty context, because it focuses on the need for valid judgments to take into account a broader range of perspectives. Judgment in a diverse society must be responsive to diversity in perspectives, including perspectives arising out of economic inequality and poverty.

Arendt-inspired theories of judgment also involve significant risks. For example, how is it possible for one's judging process to become genuinely "enlarged" by a process that takes place entirely within the imagination? What are the implications of measuring the validity of judgments about justice by a standard that emerges from a theory of aesthetic taste?[28] Theorists have taken up these questions, and many others, and there is certainly no consensus on the utility of Arendt's approach.

In this paper, I leave unanswered those questions that are directed at Arendt's writings, and the interpretation of her works. Instead, I pull out the idea of judgment through enlargement of mind, inspired by Arendt and developed by Nedelsky. I engage with the idea of enlargement of mind, not by deepening the theoretical discussion of judgment but by testing its usefulness as a way to re-think judicial notice.

Understanding judgment in terms of enlargement of mind gives an important place to the doctrine of judicial notice, because the doctrine relates directly to how and when judges

[28] George Kateb, "The Judgment of Arendt" in Beiner & Nedelsky, *supra* note 13, 121-138.

can reach outside of "evidence" as they seek an enlarged mentality. It also offers a structure for guiding what judges are to do with the information and intuitions they possess as a result of their own life experiences.

In the following Chapters, I engage with different aspects of judicial notice, as it appears in Canadian law. I investigate judicial notice in relation to theoretical approaches to judgment inspired by Arendt, and evaluate the potential and the risks arising from this approach. I argue that this theoretical perspective draws our attention to the pitfalls of thinking about social context in terms of judicial notice, but it also reveals that in the context of anti-poverty litigation, judicial notice carries the potential to provide a doctrinal mechanism for practising legal judgment that is valid across a wider part of Canadian society.

In Chapter One, I focus on debates about the purpose of judicial notice. I argue that the link between the doctrine and the idea of the enlarged mentality emerges in relation to the role of judicial notice in supporting the integrity of the legal system.

In Chapter Two, I examine how the doctrine of judicial notice relates to the distinction between "law" and "fact" in practices of judgment. I argue that, when judgment is understood in terms of enlargement of mind, judicial notice can play an important role in making the theoretical and practical consequences of this distinction more transparent, and can provide judges with a useful mechanism for regulating the determination of "facts."

In Chapter Three, I turn to the concept of judicial impartiality. I argue that the idea of judgment as the practice of an enlarged mentality shifts the requirements for impartiality to require an active, inquisitive posture on the part of the judge. The doctrine of judicial notice also has the most potential to infuse legal judgment with more social context information when judicial impartiality is conceived in this way.

In Chapter Four, I investigate the role and meaning of various communities in the practice of judgment. I relate the "community sense" that is part of the enlarged mentality to the notion that judicial notice must be grounded in the "common sense" of relevant communities. Here, I address what I see as the most important pitfall of Arendtian-inspired judgment, which is its reliance on the judge's imagination in the practice of enlargement of mind. I argue that this problem can be particularly acute in relation to judicial notice, which focuses on the discretion of the judge rather than the participation of litigants and others. However, I argue that the aspect of the enlarged mentality that calls for critical self-reflection is an essential component of judgment as well. I argue that the doctrine of judicial notice, informed by the enlarged mentality, can provide a mechanism for judges to be transparent and critical about their choices in relation to social context information.

CHAPTER ONE – Purposes

The doctrine of judicial notice has been deployed in varying ways by Canadian judges. Among academic commentators, trial judges and even justices of the Supreme Court of Canada, there is considerable controversy over what sorts of things are amenable to notice as well as the theoretical function of the doctrine. Many of these debates are underscored by disagreement about the *purpose* of judicial notice. In this Chapter, I ask how claims about the purpose of judicial notice support or obstruct an approach to judgment that is centred on the practice of an enlarged mentality.

There are two influential theses on the purpose of judicial notice. The first posits that the purpose of judicial notice is maintaining the integrity of the judicial system. Judges must take judicial notice of certain facts to prevent the legal system from producing a result that is inconsistent with what is indisputably true or accessible from a source of indisputable accuracy. On the second thesis, the purpose of judicial notice is to shorten trials, and increase the efficiency of the legal system. Judges may take judicial notice of facts to remove them from the range of things that must be established at trial, relieving the parties from having to establish what "everybody knows."

In this Chapter, I will explore these two theories about the purpose of judicial notice and their implications. I will reflect on how debates about the purpose of judicial notice play out in Canadian law. Finally, I will consider the particular context of anti-poverty

litigation to determine how the question of *purpose* speaks to the capacity of judicial notice to facilitate the enlarged mentality.

Edmund Morgan: Judicial Notice to Protect the Integrity of the Legal System

The "integrity" model of judicial notice is associated with the work of the American academic Edmund M. Morgan, in particular his influential 1944 article.[29] Morgan argues that the doctrine of judicial notice should be understood within the specific institutional context of the legal system. In Morgan's view, one of the essential elements of this institutional context is a sharp distinction between "law" and "fact."

From this perspective, judges are presumed to have knowledge of the law, and may undertake investigations to gain actual knowledge of the relevant law in a given case.[30] Therefore, the concept of "judicial notice" does not apply to the processes judges undertake to determine the "law." The situation with regard to "facts" is different. The judge has no authority to undertake an independent investigation, and therefore must rely on the submissions of the parties for the information necessary to determine the facts of the case.[31] However, judges must be presumed to have at least a minimum level of knowledge in order for the process of judgment to make sense. Morgan writes:

> This assumption as to the equipment and capacity of the trier of fact may be expressed in terms of judicial notice by saying that the court, including

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[29] Edmund M. Morgan, "Judicial Notice" (1944) 57 Harvard Law Review 269-294.

[30] *Ibid.* at 271.

[31] *Ibid.*

> both judge and jury, must take judicial notice of what everyone knows and uses in the ordinary process of reasoning about everyday affairs. This phrasing expresses the truth that such an assumption is a requisite of our system of trial. Without it the office of trier of fact cannot exist in any rational system.[32]

For Morgan, the purpose of judicial notice is the maintenance of the very integrity of the legal system. Morgan argues that "that fund of general information [that judges must be assumed to possess] must be at least as great as that of all reasonably well-informed persons in the community. He cannot be assumed to be ignorant of what is so generally accepted as to be incapable of dispute among reasonable men."[33] Thus, judicial notice is tied to the integrity of the legal system because it allows judges to fulfill the presumption that they are equally knowledgeable about the world as reasonable people.

Further, judicial notice is tied to the integrity of the legal system because it prevents parties from taking issue with what is "notoriously" true. Morgan argues that if judges were unable to take judicial notice of indisputable facts, parties could dispute them, and thereby secure results that are contrary to the indisputable truth.[34] Further, the resulting law would be entirely dependent on the skill and diligence of the parties and their lawyers. Not only would this waste judicial resources by arguing moot issues, it would damage the integrity of the system as a whole.

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[32] *Ibid.* at 272.

[33] *Ibid.*

[34] *Ibid.* at 273.

Morgan's understanding of the purpose of judicial notice has significant consequences. First, the scope of things that are amenable to judicial notice is carefully limited. For Morgan, judicial notice is best understood negatively: it is an exception to the normal rules of evidence and the adversarial system, and it must be engaged only to protect the legal system from generating law that is contrary to the indisputable truth. Therefore, the range of facts that may be judicially noticed is highly circumscribed. Morgan argues that judges may take judicial notice of "that which is so notoriously true as not to be the subject of reasonable dispute, or what is capable of immediate and accurate demonstration by resort to sources of indisputable accuracy."[35]

Second, Morgan's approach requires that judicial notice is conclusive. Since the purpose of judicial notice is to prohibit parties from disputing the indisputable, once a fact is recognized as indisputable, that conclusion forecloses any future consideration of the fact.[36] Similarly, judicial notice is not discretionary but mandatory. When a judge encounters a fact that meets the requirements of the doctrine, he or she must notice that fact.

James Thayer: Judicial Notice and Efficient Ways to Recognize the Use of Background Information

The "efficiency" thesis on the purpose of judicial notice is associated with American evidence scholar James Thayer. In his treatise on evidence law, Thayer argues that

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[35] *Ibid.*

[36] *Ibid.* at 279.

judicial notice is something that pervades legal reasoning in all areas. He argues that "judicial notice" describes the ways in which judges, both explicitly and implicitly, engage with information that has not been proven. Thayer writes:

> The subject of judicial notice, then, belongs to the general topic of legal or judicial reasoning. It is, indeed, woven into the very texture of the judicial function. In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this, with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.[37]

Like Morgan, Thayer argues that we must assume that judges have a certain amount of knowledge in order to fulfill their task. In Thayer's view, "judicial notice" describes the ways in which judges make use of information that was not presented to them by the parties. However, unlike Morgan, Thayer's approach does not function to maintain a clear line between "law" and "fact," but rather acknowledges the ways in which they are intertwined. Judicial notice is part of the task of judgment, and is essentially bound up with processes of reasoning as well as the facts that must be reasoned with.

In this model, the purpose of judicial notice is to increase the efficiency of the legal system by shortening and simplifying trials. Without judicial notice, judges would be deprived of the authority to rely on all of the common sense background knowledge necessary for good judgment, and all of this background information would somehow

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[37] James Thayer, *A Selection of Cases on Evidence at the Common Law* (Massachusetts: Charles W. Server & Co., 1982) at 279-280.

have to be "proven" through evidence. Thayer argues that the failure to properly exercise judicial notice "smothers trials with technicality."[38]

Unlike Morgan, Thayer describes the scope of judicial notice positively: it describes all of the unproven background information that contributes to the legal reasoning process. Therefore, the scope of things that may be noticed is much more broad, and extends beyond what is "indisputable." In Thayer's model, judges may take judicial notice of any fact or law "necessarily or justly imputed to them, by way of general outfit for the proper discharge of the judicial function."[39] This includes all of the background information necessary for reasoning, such as language, common sense, and the "ordinary data of human experience."[40]

Further, Thayer argues that judges may take judicial notice of whatever "everybody knows."[41] Here, the open nature of adjudication in Thayer's view takes on an important role. Thayer acknowledges that what "everybody knows" cannot be determined generally and will be the subject of dispute.[42] Therefore, when a judge takes judicial notice of a fact, the matter is still open to dispute and subject to contestation by the parties.[43] When

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[38] *Ibid.* at 308.

[39] *Ibid.* at 301.

[40] *Ibid.*

[41] *Ibid.*

[42] *Ibid.* at 302.

[43] *Ibid.* at 308.

judges use their interpretation of common sense as the background to a legal decision, this background is subject to dispute. Judicial notice is never final. It is merely presumed by the judge until there is reason to think otherwise.[44] It is a prima facie recognition, which is open to debate and contestation by the parties.[45]

Similarly, since the purpose of notice is simply to facilitate efficient trials, Thayer argues that taking judicial notice is a matter of discretion: "[c]ourts may judicially notice much which they cannot be required to notice."[46] A judge has the discretion to leave any fact within the realm of dispute.

By rooting judicial decision making in common sense and shared background information, Thayer's approach to judicial notice reduces the potential for unnecessary contestation without eliminating the rights of parties to dispute that background.

The Purpose of Judicial Notice in Canadian Law

Canadian judges have engaged with judicial notice in ways that reflect both of the purposes described above. In many cases, the judgments reflect Morgan's concern that judicial notice not be permitted to violate the rights of litigants in an adversarial system,

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[44] *Ibid.* at 309.

[45] *Ibid.* at 308.

[46] *Ibid.* at 309.

and that judicial notice be carefully circumscribed. However, courts have not necessarily accepted all of the consequences that flow from Morgan's position.

A revealing example is the Ontario Court of Appeal decision in *R. v. Zundel*.[47] In that case, the accused was charged with two counts of publishing statements that he knew to be false and likely to cause mischief to the public interest in social and racial tolerance, contrary to s. 177 of the Criminal Code. One pamphlet contained the view that the death of six million Jews during the Holocaust was a myth. At trial, the Crown asked the judge to take judicial notice of the Holocaust as a historical fact. Locke D.C.J. declined, on the basis that it would have the effect, in the eyes of the public, as well as perhaps in the eyes of the jury and the accused, of not providing the accused with an opportunity to make full answer and defence.[48] Since knowledge of the falsehood of the claims was an element of the offence, finding that the Holocaust was an indisputable historical reality would create major problems for the accused's claims about his beliefs to the contrary.

In *Zundel*, the Ontario Court of Appeal relied on Thayer's statement that judicial notice is a matter of discretion.[49] At the same time, the court held that the appropriate standard for taking judicial notice is the "indisputable" standard articulated by Morgan,[50] and that

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[47] *R. v. Zundel* (1987), 35 D.L.R. (4th) 338, 31 C.C.C. (3d) 97 (Ont. C.A.), leave to appeal refused by *R. v. Zundel*, [1987] 1 S.C.R. xii ["*Zundel*"].

[48] *Ibid.* at para. 162.

[49] *Ibid.* at para 171.

[50] *Ibid.* at para 164.

once taken, judicial notice is a final finding of fact.[51] By combining the two approaches, the court left open the possibility that a judge might refuse to notice a fact that is indisputable, allowing a party to dispute that fact. Arguably, this is precisely what happened in *Zundel*.

In *Zundel,* the Court did not explicitly reference the purpose of judicial notice. However, it is clear that "efficiency" was not the central concern, as efficiency was not served by requiring the Crown to produce documentary and testimonial evidence to establish the events of the Holocaust. Rather, the Court was concerned with the substantive consequences of judicial notice for the fairness of the legal system. However, the role of the "integrity of the judicial system" in this context clearly means more than the prevention of absurdities described by Morgan. In *Zundel*, the Court was also concerned with the right to a fair trial, and the impact of this right on the practice of judicial notice.

In other cases, Canadian courts have engaged with judicial notice in a way that is closer to what Thayer had in mind. A notable example is the Supreme Court of Canada's decision in *Moge v. Moge*.[52] In that case, the court considered the objectives of spousal support legislation and held that Zofia Moge was entitled to ongoing spousal support from her ex-husband, as compensation for the economic disadvantages arising out of the marriage. Justice L'Heureux-Dubé, speaking for the Court, held that all of the objectives of spousal support must be considered, and that the objective of "self sufficiency" should

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[51] *Ibid.* at para 166.

[52] *Moge v. Moge*, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456, ["*Moge*"].

not overrule all other objectives.[53] In particular, L'Heureux-Dubé J. addressed the ways in which the focus on self-sufficiency could unfairly prejudice women, given the social context in which each spouse is attempting to become self sufficient.[54] To elucidate that social context, L'Heureux-Dubé J. canvassed studies, reports and articles describing the disproportionate instances of poverty among women and children after divorces.[55]

L'Heureux-Dubé J. held that this complex information about female poverty and the economic consequences of divorce in Canadian society can be helpful, but it is extremely difficult for individuals who are going through the divorce process to muster that evidence themselves. Therefore, L'Heureux-Dubé J. turned to the doctrine of judicial notice.

L'Heureux-Dubé J. stated: "The doctrine itself grew from a need to promote efficiency in the litigation process and may very well be applicable to spousal support."[56] Here, the Court specifically identified the purpose of judicial notice as relating to the efficiency of the legal system. Further, this purpose does inform the general approach to the doctrine in *Moge*, which does not produce closed findings of fact, but rather prima facie background facts that are subject to further findings through evidence:

> Based upon the studies which I have cited earlier in these reasons, the general economic impact of divorce on women is a phenomenon the

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[53] *Ibid.* at para 53.

[54] *Ibid.*, esp. paras. 70-72.

[55] *Ibid.* paras. 56-62.

[56] *Ibid.* at para 91.

> existence of which cannot reasonably be questioned and should be amenable to judicial notice. More extensive social science data are also appearing. Such studies are beginning to provide reasonable assessments of some of the disadvantages incurred and advantages conferred post-divorce (see, for example, the study by Kerr). While qualification will remain difficult and fact related in each particular case, judicial notice should be taken of such studies, subject to other expert evidence which may bear on them, as background information at the very least.[57]

Thus, in *Moge*, the court adopted the purpose advocated by Thayer, and generally accepted the consequences of this position.

The doctrine of judicial notice was recently given an authoritative restatement in the Supreme Court of Canada's decision in *R. v. Spence*.[58] The central issue in *Spence* concerned the possible scope of a "challenge for cause" to jury members. In that case, a black man was accused of assaulting an East Indian man. The accused argued that he should have been permitted to ask potential jurors the following question:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man charged with robbing an East Indian person?[59]

The first part of the question, dealing with the race of the accused, was accepted. Past Supreme Court of Canada judgments had taken judicial notice of the existence of anti-black racism in the criminal justice system, and had therefore allowed jurors to be

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[57] *Ibid.* at para 92.

[58] *R. v. Spence*, [2005] 3 S.C.R. 458, 2005 SCC 71, ["*Spence*"].

[59] *Ibid.* at para. 1.

questioned on their impartiality towards black accused persons.[60] However, the trial judge refused to allow the second part of the question, dealing with the race of the victim. The accused argued that this question was necessary because of the "interracial" nature of the offence, and because of the fact of racial diversity on Canadian juries. The accused argued that a person of East Indian ethnicity might have a "natural sympathy" for the victim that would interfere with their impartiality.[61] Since neither party offered evidence to support or contest this "fact," the issue had to be resolved using judicial notice.[62]

Justice Binnie, writing for the Court, declined to take judicial notice, and upheld the trial judge's decision to refuse the question. He wrote:

> Here, the respondent and the African Canadian Legal Clinic are asking the Court to make some fundamental shifts in the law's understanding of how juries function and how the selection of their members should be approached. Their submissions carry us well beyond the specific context in which *Williams* and *Parks* were decided. The facts of which they ask us to take judicial notice would be dispositive of the appeal; yet they are neither notorious nor easily verified by reference to works of "indisputable accuracy". We are urged to pile inference onto inference. To take judicial notice of such matters *for this purpose* would, in my opinion, be to take even a generous view of judicial notice a leap too far. We do not know whether a *favourable* predisposition based on race - to the extent it exists - is any more prevalent than it is for people who share the same religion, or language, or national origin, or old school. On the present state of our knowledge, I think we should decline, at least for now, to proceed by way of judicial notice down the road the African Canadian Legal Clinic has laid out for us.[63]

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[60] *R. v. Parks* (1993), 24 C.R. (4th) 81, 65 O.A.C. 122 (Ont. C.A.), leave to appeal refused by *R. v. Parks*, [1994] 1 S.C.R. x ["*Parks*"].

[61] *Spence*, *supra* note 58 at paras. 1-3.

[62] *Ibid.* at para. 4.

[63] *Ibid.* at para. 67, (emphasis in original).

In order to reach this conclusion, Binnie J. reviewed in detail the schools of thought that have guided the law on judicial notice in Canada, including Thayer and Morgan. At the core of Binnie J.'s analysis is the idea that the proper rules for determining what can be judicially noticed may change depending on the context. He wrote that:

> *...the permissible scope of judicial notice should vary according to the nature of the issue under consideration.* For example, more stringent proof may be called for of facts that are close to the center of the controversy between the parties (whether social, legislative or adjudicative) as distinguished from background facts at or near the periphery.[64]

Following from this interpretative approach, Binnie J. developed a revised test for determining appropriate judicial notice in Canada. He held that if the fact under consideration is adjudicative – that is, if it speaks directly to the disposition of the case – the "stricter" Morgan criteria must be engaged. In other cases where the fact falls somewhat further from the centre of the controversy, "a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used."[65]

In *Spence,* Binnie J. did not explicitly address the question of the *purpose* of judicial notice. However, it is clear that, in his view, the principle of a fair trial should play a major role in determining the scope and consequences of notice. Moreover, the analysis

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[64] *Ibid.* at para. 60, (emphasis in original).

[65] *Ibid.* at para. 65.

in *Spence* requires that judicial notice be more limited the more central the fact, but never places an obligation on a judge to notice something.

The Potential of "Purpose" for Anti-Poverty Litigation

Investigating the role of judicial notice in anti-poverty litigation shows the importance of understanding how "purpose" animates the doctrine. Anti-poverty claims engage with Thayer's concern that courts not be bogged down by reams of unnecessary documentation. By definition, anti-poverty claims are brought by people with extremely limited resources, and for whom the high cost of litigation is a significant consideration. Therefore, to the extent that Thayer's approach could make the litigation process more efficient as well as reduce the evidentiary burden on litigants, the efficiency approach appears to make sense in the anti-poverty context.

Thayer's approach is also appealing because it recognizes the existence of "background information" and its constant role in the process of judgment. This contributes to judicial transparency because it provides judges with a way to acknowledge and label their use of background information. However, when we focus on the question of *purpose,* I argue that the one described by Thayer (that is, the efficiency of the trial process), is insufficient to fully capture what is at stake when a judge notices, or declines to notice, a given fact. For example, in *Moge*, the Court identified efficiency as a motivating force for the use of the doctrine. However, a major factor in the Court's decision resulted from concerns that the law was being applied in a manner that was contrary to social realities

that could not be reasonably disputed. By failing to take into account this information, courts were not only inadequately interpreting the statute in question, they were producing results that were based on a faulty conception of the economic circumstances faced by women and men after divorce. In my view, "integrity" more closely captures what motivated judicial notice in that case.

In this section, I argue that the "integrity" approach to judicial notice carries the most potential to motivate an interpretation of judicial notice that is sensitive to social context information. To evaluate this argument, I turn to examples of anti-poverty litigation, and the role judicial notice has played in those cases. Consider the case of *Gosselin v. Québec*, described in the Introduction. Judicial notice played two important roles in the *Gosselin* case. First, as noted previously, the majority of the court (on the s. 15(1) issues) followed an earlier case that had taken judicial notice of the fact that younger adults are not a vulnerable group suffering from pre-existing disadvantage.[66] In the s. 15 analysis, the claimant's membership in a vulnerable group can indicate in favour of a finding of discrimination, so this fact is significant.[67] McLachlin C.J.C. did not comment on her approach to judicial notice, but the fact in question (that is, the relative advantage of young adults in relation to employment) does not meet the strict Morgan criteria. In fact, the economic *vulnerability* of younger adults is not only a reasonable proposition, it is also supported by "sources of indisputable accuracy" like Statistics Canada.[68]

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[66] *Gosselin, supra* note 5 at para. 34, McLachlin C.J.C.

[67] *Law*, *supra* note 3.

[68] Kim & Piper, *supra* note 10.

Second, in addition to noticing the fact that younger adults are not an economically vulnerable group, McLachlin C.J.C. implicitly declined to take judicial notice of many other facts about the economic context of the claim. In fact, the court held that *insufficient evidence* was a central reason that Ms. Gosselin's claim had to fail. McLachlin C.J.C. held that there was insufficient evidence to establish that younger adults are historically marginalized, that Ms. Gosselin was harmed by attempting to survive on $170 per month,[69] or that there was any person turned away from the training programs that allowed younger people to access full benefits.[70]

A second illustrative example of the use of judicial notice in constitutional litigation that has implications for poverty comes from the recent pay-equity case, *Newfoundland (Treasury) v. N.A.P.E.*[71] In that case, the Newfoundland Association of Public Employees (N.A.P.E.) and the Newfoundland government had entered into a Pay Equity Agreement in June 1988. The purpose of the Agreement was to remedy a long history of sex-based wage discrimination. The government agreed to provide pay adjustments that would incrementally achieve pay equity for employees in female-dominated job classes over a five-year period beginning in April 1988.

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[69] *Gosselin, supra* note 5 at para. 46-47, McLachlin C.J.C.

[70] *Ibid.* at para. 47, McLachlin C.J.C.

[71] *Newfoundland (Treasury Board) v. N.A.P.E.,* [2004] 3 S.C.R. 381, 2004 SCC 66 ["*N.A.P.E.*"].

However, prior to paying out the agreed-upon amounts, the government predicted a budget deficit, and introduced the 1991 *Public Sector Restraint Act*.[72] This legislation cancelled the pay adjustments owed for the period from April 1988 to March 1991, and pushed back the date for beginning any progress towards equal pay.

N.A.P.E. challenged the constitutionality of the legislation, claiming that it violated women's rights to equality under s. 15 of the *Charter*. The government of Newfoundland conceded that the legislation infringed s. 15, but claimed that it was properly saved under s. 1 because the government was facing an unprecedented fiscal crisis. This case has implications for anti-poverty litigation because it constitutes an explicit statement about the extent to which governments can rely on arguments about financial restraint to justify legislation that infringes *Charter* rights.

To support its s. 1 claim, the government offered very limited evidence of the "fiscal crisis:" a few excerpts from *Hansard* and some budget documents from that year. The Supreme Court of Canada agreed that this evidence was very limited, but rather than rejecting the legal assertion on that basis as in *Gosselin*, the Court was prepared to take judicial notice of the fact that the government of Newfoundland faced a severe fiscal crisis in the spring of 1991.[73]

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[72] *Public Sector Restraint Act*, S.N.L. 1992 c. P-41.1, online: http://www.canlii.org/nl/laws/sta/p-41.1/20051121/whole.html.

[73] *N.A.P.E., supra* note 71 at para. 58.

Writing for the court, Mr. Justice Binnie specifically referred to the purpose of judicial notice, and supported the "integrity" approach. He wrote:

> The purpose of judicial notice is not only to dispense with unnecessary proof but to avoid a situation where a court, on the evidence, reaches a factual conclusion which contradicts "readily accessible sources of indisputable accuracy", and which would therefore bring into question the accuracy of the court's own fact-finding processes. A finding on the evidence led by the parties, for example, that the Newfoundland deficit in 1988 was $5 million whereas anyone could ascertain from the public accounts that it was $120 million would create a serious anomaly.[74]

N.A.P.E. illustrates the potential for the purpose of judicial notice to play a major role in determining how the doctrine operates. That case concerned the ability of the government to justify a law that infringes on the constitutionally protected rights of disadvantaged people. Relieving the government of much of its evidentiary burden in this context can only be justified by a fairly powerful underlying philosophical principle. Had courtroom efficiency (as in *Moge*) or trial fairness (as in *Zundel* and *Spence*) been the overarching principle at work, the court would have declined to notice facts that were essentially dispositive of the constitutional challenge.

At the same time, the *N.A.P.E.* case shows how problems can arise when the consequences flowing from the underlying purpose are unclear. For example, in *N.A.P.E.*, Binnie J. held that it was the idea of "integrity" that motivated the court's resort to judicial notice. However, despite the claim that judicial notice was necessary in this case to prevent the court from producing a "serious anomaly," Binnie J. is unclear about

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[74] *Ibid.* at para. 57.

the nature of the fact he is noticing. Specifically, Binnie J. purports to take judicial notice of certain documents, rather than any fact that is contained in them.[75] Therefore, readers of the judgment are left wondering whether the Court took judicial notice of the amount of the 1991 deficit, or whether the Court also relieved the government of proving that that deficit constituted a severe fiscal crisis, or further, whether that crisis was "unprecedented" as the government asserted.[76]

Further, as in *Gosselin*, in *N.A.P.E.* the Court implicitly declined to notice other information about the economic and social context of the law that could have played an important role in the decision. For example, it is notable that by accessing the website of the government of Newfoundland, a member of the public can ascertain that a government deficit of $120 million could not reasonably be described as "unprecedented." In fact, there have been much larger deficits both before and after 1991.[77] Like the amount of the 1991 deficit, these facts are readily ascertainable, and are properly the subject of judicial notice on the integrity approach. These additional facts do not impugn Binnie J.'s decision to notice the amount of the 1991 deficit, but they do pose questions about the extent to which the Court followed through on its stated goal of preserving the integrity of the legal system.

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[75] *Ibid.* at para. 58.

[76] *Ibid.* at para. 7.

[77] See Newfoundland Public Accounts: http://www.fin.gc.ca/frt/2004/frt_e.pdf at Table 17.

These examples show that attention to purpose is indeed an important consideration when determining how judicial notice should operate. I see three ways that the integrity approach in particular may help develop a theory of judicial notice that best serves constitutional principles in Canada, including those advocated on behalf of impoverished Canadians.

First, the idea of "integrity" can provide substantive guidance on how judicial notice plays a role in the regulation of fact determination more generally. The notion of efficiency described by Thayer is largely characterized by administrative convenience and time-saving, and in my view, deeper issues of justice are at stake. Indeed, although the *Moge* case invokes "efficiency," it is clear that substantive equality and access to justice are actually foremost among the Court's considerations. The idea of integrity, in contrast, has the potential to indicate criteria for judicial notice that reflect more fundamental legal principles.

Further, the incorporation of trial fairness criteria in *Zundel* and *Spence* shows that the underlying principles for judicial notice continue to evolve. In some respects, the idea of trial fairness as the central principle for notice is distinct from the notion of preventing absurdities, as was Morgan's primary concern when he wrote about "integrity." However, trial fairness can also be understood as a component of the "integrity" of the legal system. Indeed, procedural fairness is a key component of the "principles of

fundamental justice" that play an important role in the *Canadian Charter of Rights and Freedoms.*[78]

Incorporating trial fairness into the idea of "integrity" makes it a much more complex concept. For example, in *Zundel*, although trial fairness indicated in favour of requiring evidence, the maintenance of public respect for the court's fact-finding capacity ("integrity" as Morgan intended) was also compromised by allowing a judge to pretend ignorance to one of the most important historical events of the 20th century, and permitting Ernst Zundel's claims to be considered as serious alternatives. Other major concerns that also potentially relate to the "integrity" of the legal system were not adequately addressed in that case, such as the commitment of Canada's legal system to treat all people with equal respect, and to the evolution of the law in a manner consonant with *Charter* rights and values. From this perspective, the integrity of the legal system actually requires attention to the most fundamental values of the legal system, including equality.

In their writing on fact determination, Christine Boyle and Marilyn MacCrimmon point to judicial notice as one mechanism that can help "discipline" fact determination in a manner that is consistent with the fundamental values of the legal system.[79] They identify human rights, human dignity, and equality as the fundamental values that define

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[78] *Reference re Section 94(2) of the Motor Vehicle Act (BC),* [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

[79] Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor Yearbook of Access to Justice 55 at 78.

legal reasoning. I agree with Boyle and MacCrimmon that these values are basic to our legal system, and I argue that they must be taken into account whenever the "integrity" of that system is scrutinized.

In describing the evolving link between human rights principles and fact determination, Boyle and MacCrimmon write:

> [L]aw as a discipline affects the rules which, in turn, disciplines the process of fact determination. Lawyers are becoming more self-conscious about this process, the ways that the law of evidence affects that process and that "our knowledge about 'truth' is conditioned by the culture to which we belong and our historical circumstances..." In some instances, the law is becoming more open to stories of oppression and doctrine is emerging to facilitate the incorporation of those stories into fact determination. It can no longer simply be asserted that "facts are facts." Facts are constructed and the law is beginning to discipline that construction to be egalitarian.[80]

The purpose of judicial notice can be understood as the protection of the integrity of the legal system by helping to ensure that the construction of "facts" is disciplined in an egalitarian way.

Notably, "integrity" in this broad sense will likely include many of the things described by Thayer as the concerns of "efficiency." In particular, to the extent that issues of efficiency affect access to justice and a fair distribution of evidentiary burdens, efficiency may well be a significant component of integrity. For example, in *Moge*, the Court identified efficiency as a motivating force for the use of the doctrine, identifying the difficulties faced by family law litigants, in particular women, in marshalling vast

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[80] *Ibid.* at 62.

amounts of social context information.[81] *Moge* demonstrates that when substantive equality concerns animate the use of judicial notice, effects on the efficiency and accessibility of the trial process may play a role in determining how judicial notice should operate. The role of access to justice concerns in *Moge* contrasts with their role in *N.A.P.E.*, in which it was the government that was relieved of an evidentiary burden rather than individual citizens.

Second, grounding the doctrine of judicial notice in the integrity of the legal system means that judges will have an *obligation* to notice facts when they meet the appropriate criteria. For Morgan, this obligation arose from the duty of judges to avoid producing results that were at odds with something that was indisputably the case. More broadly, this concern can be articulated as the duty to ensure that legal decisions are not radically alienated from the social realities faced by those who are bound by the law.

For example, I argue that the integrity of the legal system was compromised in the *Gosselin* case by the Court's decision to decide a constitutional rights question about poverty without sufficient information about the context and consequences of the law in question. McLachlin C.J.C. recognized that the *lack* of this information played a significant role in determining the outcome of the case. The integrity of the legal system therefore *compels* the court to take account of this information in some contexts.

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[81] *Moge, supra* note 52 at para. 88.

In this context, one way to describe the "integrity" purpose is to recall a theme that is prominent in both Thayer and Morgan's work: the doctrine of judicial notice must reflect what we expect from the practice of judging. Both thinkers argue that we must be able to expect judges to possess a certain level of knowledge, wisdom and experience, as these attributes make it possible for them to make good decisions. In the words of Chief Justice Duff: "It is our duty, as judges, to take judicial notice of facts which are known to intelligent persons generally."[82]

To allow our system to operate with integrity, we assume judges know "the law" while acknowledging that they do not, in fact, possess such knowledge until after they have conducted certain research and reflected on the submissions of lawyers. In the case of "facts," we expect judges to have a level of knowledge that should at least meet the knowledge of what reasonable people in relevant communities know, and they should be permitted or indeed required to reflect on how best to meet that standard in any given case. In anti-poverty litigation, the chances are particularly high that a judge's personal experience and background knowledge will be inadequate to the task, and judicial notice can provide judges with authority and guidance in expanding the ground upon which they can make valid judgments.

In this way, the idea of integrity and the resulting obligation to seek out information are theoretically related to the enlarged mentality approach to judgment. By describing the

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[82] *Reference re Alberta Legislation*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81 at para. 90.

boundaries of what judges must know to properly perform their role, judicial notice becomes a way for judges to practise enlargement of mind.

Third, the idea of integrity means that the requirements for judicial notice will change depending on the context and the type of fact in issue. I will discuss this issue in detail in Chapter 2. However, in relation to the question of *purpose*, I suggest that a broad conception of the core values of the legal system should underlie the criteria used to circumscribe judicial notice in any context. That is, the criteria used to determine the scope of things that are properly the subject of judicial notice will not only depend on trial fairness, as in *Zundel* and *Spence*, but also other components of integrity such as equality and access to justice.

For example, in *Spence*, Binnie J. held that facts that are close to the centre of the controversy should generally be proven through evidence, and should generally not be the subject of judicial notice. This approach appeals to the importance of regulating judges' use of personal knowledge, and I agree this should be a central concern for the doctrine of judicial notice. However, in some contexts, principles like equality and access to justice may complicate the picture. For example, in anti-poverty constitutional litigation, some crucial facts are likely to be broad social scientific facts, or complex facts about the effects of legislation. Should the full burden of producing this evidence necessarily fall to an impoverished litigant in all cases? Should a claim like Ms. Gosselin's necessarily fail on that basis? These questions indicate that the approach to judicial notice outlined in *Spence* is incomplete in relation to the integrity of the legal

system. In addition, these questions reflect the importance of Morgan's concern that judges should not be completely at the mercy of the skill of counsel in the way they look at the world. Since anti-poverty litigation creates moments of great social and constitutional significance for Canadian society, judgments in this context must not be limited by the knowledge and skill of lawyers.

This discussion shows that Canadian jurisprudence is often unclear about the purpose of notice and there are mismatches between the purposes engaged and the consequences that Thayer and Morgan envisioned flowing from those purposes. However, it also shows that the question of purpose can be very important for motivating and structuring judicial notice. I have advocated for the "integrity" approach, broadly construed, because it encourages resort to substantive legal principles, it generates an obligation to notice facts in some contexts, and it allows the criteria for notice to shift depending on the kind of fact under consideration. This argument about purpose leaves unanswered certain questions about the consequences of judicial notice motivated by integrity, particularly the issues of conclusiveness and indisputability. These issues also relate to the different ways that "facts" are understood and categorized, and so I turn next to different kinds of facts, and the way judicial notice operates in relation to each kind.

CHAPTER TWO – Fact Categories

The dilemmas about the purpose of judicial notice described above reveal the wide range of things that are considered for judicial notice. Some "facts" that are offered as potential subjects of judicial notice are narrow and particular, such as whether Colonel By Drive in Ottawa was the property of the National Capital Commission.[83] Other facts are much more general in content and application, such as the relative poverty of women and children after men and women divorce.[84] Moving from the question of *why* judges take notice of things, this Chapter addresses *what* judges notice, and the relationship between judicial notice and the categorization of facts.

Edmund Morgan's theory of judicial notice relies heavily on a strong distinction between "law" and "fact." Whereas judges in an adversarial system are highly constrained as to the ways they can access facts, Morgan argues that their access to "law" is virtually unbounded.[85] Subsequent writers have questioned whether this extreme differential treatment of information on the basis of its categorization as "law" or "fact" is adequate to describe how judges actually make decisions, and whether it results in a useful analytical approach to judicial notice.

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[83] *R. v. Potts* (1982), 134 D.L.R. (3d) 227, 66 C.C.C. (2d) 219 (Ont. CA), leave to appeal refused by [1982] 1 S.C.R. xi, ["*Potts*"].

[84] *Moge, supra* note 52.

[85] Morgan, *supra* note 29 at 271.

The distinction between fact and law is important to judicial notice because it delineates the scope of what kinds of things are amenable to notice (that is, "facts"). However, the appropriate principles for guiding resort to judicial notice may shift depending on the nature of the fact being noticed. There are several ways that the category of "facts" can be broken down to reflect these differing principles. Conversely, the fact/law distinction is also significant for judicial notice because it describes what will count as "law." The traditional way to understand common law reasoning is that judges are relatively free to seek out sources for the law, regardless of the legal arguments presented by the parties. However, thinking about judicial notice and anti-poverty litigation disturbs the stability of this proposition, and the clean line between factual determination and identifying rules and values. In addition to showing how judges may be more free to incorporate background information independently, judicial notice also highlights how the fundamental principles of the legal system actually constrain judges in their search for "law."

In this Chapter, I address three issues related to the distinction between law and fact and its importance to judicial notice, particularly in relation to the use of social context information in anti-poverty litigation. First, I set out two important modifications of Morgan's approach to judicial notice that create distinctions between different kinds of facts. Second, I describe the ways in which judicial notice often deals with broad social framework facts that can operate as a kind of legal precedent, and I explore the implications of this idea in anti-poverty litigation. Third, I argue that Canadian law has yet to develop an adequate framework for judicial notice of the social and legislative facts

that are most often important in constitutional and other litigation with far-reaching social justice implications.

Facts: Legislative, Adjudicative, and Social Framework

One problem with Morgan's approach is its undifferentiated use of the concept of "facts." Subsequent modifications and elaborations on the idea of "facts" as they relate to judicial notice have attempted to provide a more detailed account of what can properly be the subject of judicial notice.

Administrative law scholar Kenneth Culp Davis introduced an influential distinction into the debates about judicial notice in a 1955 article.[86] In that article, Davis criticizes the Morgan approach for unduly restricting the scope of information that could be subject to judicial notice. Davis argues that judges do, and should, take account of unproven information, particularly in their role as lawmakers. Davis introduces a distinction between "adjudicative" and "legislative" facts. Davis explains:

> When a court or an agency finds facts concerning the immediate parties – who did what, where, when, how and with what motive or intent – the court or agency is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts.[87]

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[86] Kenneth Culp Davis, "Judicial Notice" (1955) Columbia Law Review 945.

[87] *Ibid.* at 952.

In her essay on judicial notice, Justice Claire L'Heureux-Dubé provides a gloss on Davis' typology. She writes:

> Legislative facts...aid the tribunal in determining the content of legal rules, themselves, and in exercising judgment or discretion in deciding what course of action to follow. They can include, for example, information concerning the impact of prior and proposed law, or information concerning the legislative history of a statute to assist in its interpretation.[88]

Davis argues that the strict criteria proposed by Morgan are sensibly applicable only to adjudicative facts.[89] In that context, it is appropriate that judges rely on proven evidence only, noticing only facts that are indisputable in the way Morgan describes. In contrast, when judges must evaluate policy alternatives in order to interpret legislation or the common law, they must resort to a much larger body of information.

Davis makes two important points in this regard. First, when judges are called upon to engage in the creation of law or policy, the legislative facts necessary to support this endeavour may be difficult or impossible to prove through admissible evidence.[90] Davis argues that this inherent characteristic of many legislative facts does not detract from

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[88] L'Heureux-Dubé, "Re-examining," *supra* note 2 at 554.

[89] Davis, *supra* note 86 at 952.

[90] *Ibid.* at 952-3. This type of difficulty arose in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1. In that case, one important part of the factual framework was the potential connection between tobacco addiction and advertising by tobacco companies, a connection that may be impossible to "prove". The members of the Supreme Court of Canada disagreed about the extent to which Parliament should have to establish this connection in order to justify legislation limiting tobacco advertising.

their importance in the adjudicative process; just because legislative facts are not amenable to technical proof does not mean they can simply be left out.

Second, Davis argues that "[t]he formulation of law and policy…obviously gains strength to the extent that information replaces guesswork or ignorance or intuition or general impressions."[91] He argues that judicial notice is a way for judges to transparently acknowledge their resort to extra-record sources in finding legislative facts, and encourages the role of explicit information in lieu of unexamined assumptions.[92] This is important given that legislative facts affect the rights of people beyond the parties to the dispute at hand.

This kind of thinking appears in Canadian law about judicial notice; for example, in his concurring judgment in *R. v. Edwards Books*, Mr. Justice La Forest wrote:

> …I do not accept that in dealing with broad social and economic facts such as those involved here the court is necessarily bound to rely solely on those presented by counsel. The admonition in *Oakes*, … and other cases to present evidence in *Charter* cases does not remove from the courts the power, where it deems it expedient, to take judicial notice of broad social and economic facts and to take the necessary steps to inform itself about them. *…There are, of course, dangers to judicial notice, but the alternatives in a case like this are to make an assumption without facts or to make a decision dependent on the evidence counsel has chosen to present…*[93]

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[91] *Ibid.* at 953.

[92] *Ibid.*

[93] *R. v. Edwards Books & Art Ltd.* [1986] 2 S.C.R. 7, 35 D.L.R. (4th) 1 at paras. 228-229 (emphasis added).

In this passage, La Forest J. alludes to the particular requirements of constitutional interpretation, and the need for judges to have the authority to look beyond the submissions of the parties when the rights of a much broader range of people are at stake.

Moreover, this passage from *Edwards Books* reflects the idea that judges can make better decisions when they are informed. In this vein, Davis writes:

> Judges and administrators are at their best when they are well informed; their understanding and information must be used to the full if their decisions are to be wise and sound. Fact finding, law making, and policy formulation should be guided by experience and understanding, not limited to wooden judgment predicated upon the literal words of witnesses. Above all, judges and administrative officers should make their policy choices on the basis of all relevant facts, even though the kind of facts that usually influence policy choices are often too elusive to be captured and penned up within a formal record. The wisdom we seek in judges and in administrative officers is made up of multifarious ingredients that often defy identification and usually defy separation from other ingredients – knowledge of specific facts, understanding of general facts, prior experience in trying to solve similar problems, mental processes such as logic or reasoning and mental processes such as appraising or estimating or guessing, formulation and application of notions of policy, imagination, inventiveness and intuition, emotional reactions and emotional control.[94]

For Davis, the complex nature of judicial notice requires granting broad discretionary powers to judges. In exercising their discretion to take judicial notice, judges should have regard to several factors:

> (a) whether the facts are close to the center of the controversy between the parties or whether they are background facts at or near the periphery, (b) whether they are adjudicative or legislative facts, and (c) the degree of certainty or doubt – whether the facts are certainly indisputable, probably indisputable, probably debatable or certainly debatable. [95]

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[94] Davis, *supra* note 86 at 949.

[95] *Ibid.* at 977.

Within this framework, judges must exercise their discretion and make use of judicial notice in a contextualized manner.

Laurens Walker and John Monahan have also made contributions to the literature on the nature of social context facts that have important consequences for thinking about judicial notice. Whereas Davis allows for stricter criteria in relation to adjudicative facts and generous judicial discretion for legislative facts, Walker and Monahan complicate this picture even more by creating further distinctions among non-adjudicative facts.

Walker and Monahan provide detailed proposals for understanding the relationship between social science and the law.[96] Two elements of their analysis are particularly important for judicial notice. First, Walker and Monahan introduce the category of "social frameworks."[97] In some ways, social frameworks can be understood as lying between adjudicative and legislative facts. Social frameworks are made up of the factual context in which judges must apply the law. Unlike legislative facts, they are not directly or solely about creating or changing policy. Unlike adjudicative facts, they are not limited to facts specifically about the parties and their actions. However, by providing a

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[96] Laurens Walker & John Monahan, "Social Authority: Obtaining, Evaluating and Establishing Social Science in Law" (1986) 134 University of Pennsylvania Law Review 477 [Walker & Monahan, "Social Authority"]; Laurens Walker & John Monahan, "Social Frameworks: A New Use of Social Science in Law"(1987) 73 Virginia Law Review 562 [Walker & Monahan, "Social Frameworks"]; Laurens Walker & John Monahan, "Social Facts: Scientific Methodology as Legal Precedent" (1988) 76 California Law Review 877 [Walker & Monahan, "Social Facts"].

[97] Walker & Monahan, "Social Frameworks", *ibid.*

context for the adjudicative and legislative facts, social frameworks may contribute to determining how the issue between the parties will be resolved, and can provide direction for addressing broader policy concerns. Walker and Monahan describe social frameworks as:

> general research results...used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case.[98]

Social frameworks share with legislative facts the characteristic of generality; social frameworks only apply to the parties at hand insofar as they are an example of the general fact being offered.[99] Walker and Monahan cite information about battered women as an example of a social framework.[100]

The distinction between legislative and social framework facts makes sense at the conceptual level, but in practice it is more of a spectrum than a clear distinction. However, the category of social framework facts is still very useful because it focuses attention on the empirical context of a legal debate. "Legislative fact" may be too narrow a category to capture the social background information that informs both adjudicative and policy issues.

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[98] *Ibid.* at 560.

[99] *Ibid.* at 569.

[100] *Ibid.* at 563.

The category of social framework facts is very important to anti-poverty litigation in particular. Indeed, this is the kind of information that can play a very important role in determining how a court understands the relationship between poverty and legal rights.

For example, in *Falkiner v. Ontario*[101], the Ontario Court of Appeal was faced with a constitutional challenge to the definition of "spouse" in Ontario's social assistance regime. Like all other Canadian provinces, Ontario provides social assistance on the basis of household unit. Therefore, when two people are deemed to be "spouses," this affects their entitlement to benefits. In the *Falkiner* case, a number of claimants had lost access to income assistance or disability benefits because the Ministry of Community and Social Services classified them as a "spouse." One of the claimants in the related *Thomas* appeal (which was decided in combination with *Falkiner*) was Paul Thomas, a man with a mental disability, who lived with Lucy Papizzo, a woman who he described as a friend and caregiver. When he was reclassified as a "spouse," he became ineligible for disability benefits because of Ms. Papizzo's assets.[102]

For Mr. Thomas, a key part of the legislated definition of "spouse" was that "the social and familial aspects of the relationship" should "amount to cohabitation."[103] Mr. Thomas argued that decision makers had erred in their interpretation of "cohabitation" because

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[101] *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* (2002), 212 D.L.R. (4th) 633, 59 O.R. (3d) 481 (Ont. C.A.), ["*Falkiner*"].

[102] *Ibid.* at para. 7.

[103] *Ibid.* at 15.

they failed to take into account his disability. Mr. Thomas and Ms. Papizzo agreed that they lived together, but in the particular circumstances of their lives, this arrangement did not properly count as cohabitation.

In assessing this claim, Mr. Justice Laskin agreed that the decision makers below had erred in their interpretation of "cohabitation." They had placed considerable emphasis on the amount of time that Mr. Thomas and Ms. Papizzo spent together, but without considering that this took place in the context of Mr. Thomas' disability. He wrote:

> Certainly persons with disabilities are capable of forming spousal relationships and capable of doing so with persons who are not disabled. But the Board should have considered whether Mr. Thomas' disability explained the social and familial aspects of his relationship with Ms Papizzo, aspects that in another context might well amount to cohabitation. The evidence before the Board suggested that Mr. Thomas needed a caregiver and that he could not live on his own. Either may have provided a plausible alternative explanation for why he and Ms Papizzo were together all the time. The Board never considered these alternatives. Nor did the Board consider the evidence of the parties themselves, which eloquently described not a spousal relationship but one based on friendship and need.[104]

Laskin J.A. therefore held that the decision makers below had erred, and ruled that Mr. Thomas' application for disability benefits be reconsidered, bearing in mind his findings about the importance of disability as part of the social context of Mr. Thomas' life.

This element of the *Falkiner* appeals shows that when poor and marginalized people come before the courts to claim their rights (even where such claims do not involve striking down legislation, as in Mr. Thomas' case), the courts' ability to take social

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[104] *Ibid.* at para. 36.

context into account can be determinative. Further, the kind of information that is at stake is of the nature of "social framework" as identified by Walker and Monahan: that people with disabilities may need to spend almost all their time with their caregivers.

Categorizing this kind of information as a type of "fact" that may be amenable to judicial notice is significant for the potential of the doctrine to assist judges in practising judgment through the enlarged mentality.

Social Authority and the Precedential Value of Facts

A second issue raised by Walker and Monahan that is significant for thinking about judicial notice is the idea of social science authority.[105] Walker and Monahan argue that some kinds of non-adjudicative facts should be treated in a manner analogous to legal precedent. Walker and Monahan argue that non-adjudicative facts, like legal precedent, are general in their application, and should therefore be treated in an analogous way by courts:

> Like social science, law, particularly court decisions in a common-law system, derives from specific empirical events (the facts of a case), but speaks more broadly. It is this attribute of generality that is described as the "precedential effect" or authoritative nature of a court decision. A decision takes on the mantle of legal authority in subsequent litigation precisely to the extent that the decision transcends the people, situation, and time present in the original case. Indeed, the way to deny legal authority to a court decision is to deny its generality by claiming that the decision is limited to its own facts.[106]

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[105] Walker & Monahan, "Social Authority," *supra* note 96.

[106] *Ibid.* at 491.

Thinking about non-adjudicative facts as "authority" is significant for judicial notice, because it means that judges should have the authority to seek out and evaluate social science "precedent" in the same manner they do the law (that is, on their own initiative).[107] Judicial notice of these "facts" is more like identification of legal authority than it is like finding an adjudicative fact. To reflect this, Walker and Monahan describe how the principles for finding these "facts" shift accordingly. For example, just as legal cases have more authority to the extent that they have been decided by higher courts, social science has more authority to the extent that it has survived critical review by social scientists. Similarly, just as a legal authority will be more binding if it is more closely analogous to the facts of the case at hand, a social authority has more weight if it applies meaningfully to the facts before the court.[108]

The notion of social framework facts having a sort of precedential value also emerges at certain points in the cases on judicial notice. For example, following L'Heureux-Dubé J.'s judicial notice of the broad fact of the relative poverty of women and children after divorce in *Moge*, a large number of lower court decisions have relied on this fact by referencing *Moge*, rather than revisiting the research foundations of that factual assertion.[109]

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[107] *Ibid.* at 496.

[108] *Ibid.* at 499.

[109] L'Heureux-Dubé, "Re-examining," *supra* note 2.

Similarly, in *R. v. Parks*,[110] Doherty J.A. of the Ontario Court of Appeal consulted a number of studies to support his finding that anti-black racism is a part of Canadian society. As a result, Doherty J.A. found that it was a realistic possibility that racial bias could play a role in a juror's decision making, particularly given that the accused was a black man and the victim of the alleged homicide was a white man. Doherty J.A. therefore found that the accused in that case should have been permitted to question potential jurors about their ability to be objective in the face of the existence of racism in Canadian society and in Toronto society specifically.

Doherty J.A. made these findings in the absence of evidence submitted by the parties,[111] relying instead on studies and reports. Summarizing this approach and his findings, he wrote:

> The existence and the extent of racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts. Unlike claims of partiality based on pre-trial publicity, the source of the alleged racial prejudice cannot be identified. There are no specific media reports to examine, and no circulation figures to consider. There is, however, an ever growing body of studies and reports documenting the extent and intensity of racist beliefs in contemporary Canadian society. Many deal with racism in general, others with racism directed at black persons. Those materials lend support to counsel's submission that wide-spread anti-black racism is a grim reality in Canada and in particular in Metropolitan Toronto.[112]
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> [...]

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[110] *Parks, supra* note 60.

[111] *Ibid.* at para. 20 and 34. At trial, the accused did not present any evidence in support of his challenge for cause. Rather, he asserted that racism in Toronto was a notorious fact.

[112] *Ibid.* at para. 42.

> I do not pretend to essay a detailed critical analysis of the studies underlying the various reports to which I have referred. Bearing that limitation in mind, however, I must accept the broad conclusions repeatedly expressed in these materials. Racism, and in particular anti-black racism, is a part of our community's psyche.[113]

Doherty J.A.'s judicial notice of racism in this way, based on social science studies, is an example of how a social framework fact can act as social authority. Subsequent cases, including at the Supreme Court of Canada, have relied on *Parks* for the proposition that anti-black racism is a component of Canadian society that is potentially relevant for jury selection. For example, in *Spence*, Binnie J. reports:

> Almost all of the case law since *Parks* has relied on Doherty J.A.'s pioneering analysis. Little that is new in the nature of empirical studies or analysis is referred to in subsequent judgments or was adduced by the parties here. *Parks* showed that a black accused has reason to fear that some members of the Toronto community may be wrongly influenced by the colour of his or her skin. The studies relied on there do not, however, show a realistic possibility that a potential juror who could impartially judge the accused despite his being black (the question that was asked here) would lose that impartiality on realizing that the victim was East Indian (the "interracial question" that was refused). A further step or inference would be required.[114]

Thus, while Binnie J. recognized the findings in *Parks* as social authority, he also carefully reconsidered the status of that authority in relation to the case before him, and found that it did not apply; he distinguished the authority.

A contrasting approach to the precedential status of judicially noticed facts appeared in *Gosselin*. In that case, McLachlin C.J.C. relied on Iacobucci J.'s judicial notice in *Law*

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[113] *Ibid.* at para. 54.

[114] *Spence, supra* note 58 at para. 42.

(of the relative advantage of young adults in relation to employment) to notice a similar fact for the purposes of the case before her.[115] In *Law*, Iacobucci J. held: "It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice." Iacobucci J. noted the court's reliance on this idea in past cases, but there was no further discussion of the basis for judicial notice of this social framework fact. [116]

In *Gosselin*, the existence of an authoritative case noticing a similar fact may have allowed the majority of the court to "notice" the relative advantage of young adults in relation to employment without sufficiently critical consideration. Unlike the "fact" of the feminization of poverty in *Moge*, or the "fact" of anti-black racism in *Parks*, which were based on extensive reference to social science research, the "fact" of young peoples' relative advantage in *Law* and later in *Gosselin* appears to be based on the judges' common sense. Further, this statement of common sense appears to have adopted an authoritative factual status. *Gosselin* seems to say that judicial notice has created social authority, but without providing a justification of the basis for that authority.

The consequences of taking judicial notice, then, can extend beyond the case at bar; sometimes, these consequences extend to initiating a fundamental shift in an area of law. Where the basis of judicial notice of social framework facts goes unexamined, judicial notice can become a way to perpetuate disputable or even false assumptions. However,

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[115] *Gosselin, supra* note 5 at para. 34.

[116] *Law, supra* note 3 at para. 101.

the *Moge* example shows how the concept of social authority can help *dislodge* common sense assumptions that may be working in the law without factual justification. The Supreme Court of Canada's notice of women's poverty contributed to an approach to spousal support orders that was more aligned with the social realities faced by men and women following a divorce. When this "dislodging" takes the form of social authority, judicial notice can have the effect of realigning the common sense assumptions of judges in a broad range of cases, rather than re-imposing this burden on individual litigants.

Facts, Judgment and Background Information

The distinction between adjudicative, social framework, and legislative facts is related to the kinds of criteria that are used to justify judicial notice. This is an important aspect of the principles set out by the Supreme Court of Canada in *Spence* to guide judicial notice. The basic notion, exemplified by Morgan's approach, is that adjudicative facts should be noticed only according to the strictest criteria. These were restated by the Supreme Court of Canada in *R. v. Find*:

> [A] court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[117]

These criteria are also cited by evidence textbooks, including Canadian texts written by Anthony Sheppard,[118] and John Sopinka, Sidney Lederman and Alan Bryant.[119] The key

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[117] *R. v. Find*, [2001] 1 S.C.R. 863, 2001 SCC 32 at para. 48, ["*Find*"].

[118] Anthony F. Sheppard, *Evidence* (Carswell, 1996) at §1187.

principle in relation to these criteria is indisputability. There is variation in terms of what might count as an appropriate measure of indisputability, but for adjudicative facts, it is the idea of indisputability that is at work.

In contrast, where judges and commentators distinguish between adjudicative and legislative facts, the principles that should apply to the latter are rarely articulated in such detail. In articulating the distinctiveness of adjudicative facts, the main idea of Davis' argument is simply that these strict criteria do not make sense in the context of legislative facts, and that judges have more discretion to notice them.[120] Articulating a similar perspective, Peter Carter writes:

> But why should a judge, when seeking to make himself better qualified to formulate a rational and policy-oriented proposition of law, be restricted in his relevant factual investigations to consideration of facts which are either notorious or readily ascertainable? Conscientious and worthwhile research knows no such limits. An attempt to clothe legislative fact-finding in the strait-jacket which befits judicial notice of adjudicative facts is not apt.[121]

In the context of constitutional interpretation, the argument that legislative and social framework facts require a specific approach is particularly persuasive, as they are likely to be very important. [122] However, in general, the approach applied to legislative facts

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[119] John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 976.

[120] Davis, *supra* note 86.

[121] Peter Carter, "Do courts decide according to the evidence?" (1988) 22 University of British Columbia Law Review 351 at 360.

[122] Brian G. Morgan, "Proof of Facts in Charter Litigation" in Robert J. Sharpe ed., *Charter Litigation* (Toronto: Butterworths, 1987) 159-186 at 162-163.

has been to permit a very wide discretion on the part of the judge. Subsequent scholars and judges have expressed concern about this discretion. For example, in *Spence*, Binnie J. pointed out that "simply categorizing an issue as 'social fact' or 'legislative fact' does not license the court to put aside the need to examine the trustworthiness of the 'facts' sought to be judicially noticed."[123] The categorization of adjudicative and non-adjudicative facts is insufficient to structure judges' resort to notice of social frameworks and legislative facts.

No clear framework has emerged to structure judicial notice of non-adjudicative facts. In her study of how judges "absorb" social science theories in the United States, Peggy Davis writes that "[w]ith a few notable exceptions, courts and legislatures have failed or refused to regulate the process that has come to be known as judicial notice of legislative facts."[124] Davis argues that:

> [I]t is unwise either to leave judges "unrestricted" in the investigation and determination of legislative and background facts or to impose upon those processes the restraints that apply to judicial notice of ordinary, adjudicative facts...Techniques are required for evaluation of propositions that inform judicial deliberations concerning questions of law or serve as background for resolution of adjudicative facts.[125]

The absence of structures guiding the judicial notice of non-adjudicative facts is also evident in Canada. In its Report of 1982 to the Uniform Law Conference of Canada, the Federal/Provincial Task force on Uniform Rules of Evidence accepted the distinction

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[123] *Spence*, *supra* note 58 at para. 58.

[124] Peggy C. Davis, ""There is a Book Out..." An Analysis of Judicial Absorption of Legislative Facts" (1987) 100 Harvard Law Review 1539 at 1540.

[125] Davis, *supra* note 124 at 1598.

between adjudicative and legislative facts.[126] The Task Force determined that judges must be able to educate themselves about legislative facts by all available means, and that judges must not be restricted to the evidence and representations of the parties.[127] However, the Task Force declined to set out guidelines for exercising notice of non-adjudicative facts:

> The Task Force is of the unanimous view that the terminology of "legislative" fact is neither well known nor well understood. The concept relates not so much to facts that have to be proven as to the mental context in which the judge views the case. Legislative facts may be thought of as social facts which constitute the fund of knowledge the judge has and upon which he must draw in determining the case. It is part of judicial reasoning rather than of evidence. The Task Force does not make any recommendation regarding judicial notice of legislative fact.[128]

In this passage, the Task Force has identified a major issue in considering judicial notice of non-adjudicative facts, particularly in constitutional litigation, and in cases where marginalized people appear before the courts. That is, how can judges sensibly regulate their "notice" of information, even where that information does not necessarily appear to be a "fact" at all, but rather a judgment, a norm or an intellectual attitude? As noted by the Task Force and also by Thayer, social frameworks of this kind are part of legal reasoning as a whole, rather than just rules of evidence.

For example, in *N.A.P.E.,* described above, Binnie J. took judicial notice of some documents, demonstrating that the government of Newfoundland faced a financial deficit

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[126] *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982) at 44.

[127] *Ibid.* at 46.

[128] *Ibid.* at 47.

of a certain amount in 1991. However, this later shifted to notice of the "fact" that Newfoundland faced a "severe fiscal crisis" in 1991. This indicates the blurry lines around the category of "fact," as distinct from judgment more generally. Similarly, in the case *Tsawwassen Indian Band v. Delta (City)*, the British Columbia Court of Appeal disagreed with the trial judge's decision to take judicial notice of the following "facts:"

> (1) the Adams Lake reserve is located on a lake, so ground water would be available from a well and pumping system;
>
> (2) sewage can be trucked off the reserve lands until a septic system is implemented;
>
> (3) a fire hall can be built and personnel trained.[129]

The Court of Appeal challenged whether these facts could properly be described as common knowledge, and therefore held they were not proper subjects for judicial notice. However, regardless of any controversy over the disputability of these statements, it is also unclear that they are accurately characterized as "facts," narrowly construed, rather than logical predictions or assertions of common sense reasoning.[130]

These examples show that the doctrine of judicial notice needs operating principles that make sense even when the "facts" being noticed are complex and difficult to define, when the "facts" could also be described as general social frameworks, background common sense assumptions, or statements of logical reasoning based in empirical

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[129] *Tsawwassen Indian Band v. Delta (Corp.)* (1997), 149 D.L.R. (4th) 672, 37 B.C.L.R. (3d) 276 (B.C.C.A.) at para.100.

[130] For an illuminating discussion of the meaning of the fact/law distinction, see Adrian A.S. Zuckerman, "Law, Fact or Justice?" (1986) 66 Boston University Law Review 487-508.

evidence. In particular, it is important that the doctrine of judicial notice provide judges with a way to evaluate these kinds of factual propositions. The alternatives are either to allow judges to have an unregulated discretion in those matters, with no requirements for critical reflection or increasing knowledge, or to place high restrictions on judicial notice that will rarely be met for complex background knowledge, disqualifying information that is potentially crucial to understanding the social context of the law. Neither of these alternatives holds out significant promise for supporting judges in a search for enlargement of mind.

Walker and Monahan's idea of social authority provides a much more substantial basis for evaluating this complex information. Social frameworks and legislative facts are never "indisputable," but will often be appropriate subjects for judicial notice in constitutional cases. Unlike adjudicative facts that are noticed only to prevent reaching an absurd result, social frameworks and legislative facts are noticed to support the impartiality and legitimacy of a judgment, in light of the fundamental values of the legal system. Thus, the criteria for notice of non-adjudicative facts are not centred on disputability, but on the capacity of notice of that fact to support those fundamental values. Judicial notice of adjudicative facts is about distinguishing between notorious and disputable facts; judicial notice of social frameworks and legislative facts is about distinguishing between legitimate and illegitimate background knowledge.[131]

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[131] Marilyn T. MacCrimmon, "Fact Determination: Common Sense Knowledge, Judicial Notice and Social Science" in Sean Doran & John Jackson eds., *The Judicial Role in Criminal Proceedings* (Oxford: Hart Publishing, 2000).

In the context of anti-poverty litigation, this means that judicial notice will be animated by legal values including equality and security: the "integrity" of the legal system, broadly understood. In this arena, a judge will have to take into account the disparate resources of the parties, and the effects of marginalization on the capacity of impoverished individuals and communities to articulate the full context of their claims.

Further, there is no need for notice of a social framework or legislative fact to be "final" or closed to further dispute. Opening up the process of judicial notice to possible dispute can happen in two ways. First, the judge can consult materials in order to decide whether or not to notice the facts in question, and allow the parties to participate in this process. I will discuss this practice in more detail in Chapter 3. Second, judicial notice of a social framework or legislative fact can operate as a prima facie conclusion only, allowing a party to dispute the fact by introducing evidence.

Judicial notice of non-adjudicative facts does not erase the obligations of parties to present evidence, including evidence about social context, to support their claims. However, it does ensure that where examination of social frameworks may be an important part of the case, this process is embarked upon according to criteria that relate to the underlying values of the legal system, and not only according to the resources and skills of the parties and their lawyers.

CHAPTER THREE – Duty to Inquire

The doctrine of judicial notice is about how judges identify and evaluate the information that affects the outcome of their decision-making practices. As such, judicial notice is closely linked to the concept of impartiality. At the heart of dilemmas related to judicial notice is the question of whether and how judges can take account of information that has not been *proven* in evidence. The challenge is to understand how judges do this in a way that supports rather than subverts their role as impartial adjudicators.

Thinking about impartial judgment in terms of enlargement of mind provides a good way to enter this debate. If impartiality requires that a judge take into account the perspectives of others, this affects how judicial notice should be understood.

The link between impartiality and judicial notice can have a particularly important effect in the context of anti-poverty litigation because understanding the claims of impoverished litigants is very likely to call on the judge to look outside of her or his existing mental background. For example, in *Gosselin*, one important factor before the Court was whether the effects of the impugned regulation corresponded to the actual needs of young adults. This factor was significant because a distinction in law is thought to be more likely to be substantively discriminatory if it fails to correspond to the actual needs of the group in question. In essence, the Court was being asked to consider whether the consequence of the regulation – that is, Ms. Gosselin's experience of poverty – constituted a harm cognizable to the law.

Writing for the majority of the Court, McLachlin C.J.C. wrote:

> It may well be that some under-30s fell through the cracks of the system and suffered poverty. However, *absent concrete evidence, it is difficult to infer from this that the program failed to correspond to the actual needs of under-30s*. I find no basis to interfere with the trial judge's conclusion that the record here simply does not support the contention of adverse effect on younger welfare recipients.[132]

In her dissenting judgment, L'Heureux-Dubé J. wrote:

> There is no dispute that Ms. Gosselin lived at times below the government's own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was $152. The guaranteed monthly payment to young adults was $170. *I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached.* [133]

McLachlin C.J.C.'s judgment on this point reflects an interpretation of judgment in which impartiality requires judges to restrict themselves to consideration of evidence. According to this stance, information outside of legal evidence should not play a role. Extrapolating from this idea, we can say that from this perspective, for a judge to resort to other information would violate fundamental principles such as the rule of law. Without concrete evidence presented by the complainant, McLachlin C.J.C. is bound by her role as an impartial judge to deny the claim.

The judgment of L'Heureux-Dubé J., on the other hand, indicates that she views her task as a judge as requiring her to consider the facts from the perspective of the complainant. Having set out some of the facts before the Court, she says that she cannot imagine

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[132] *Gosselin*, *supra* note 5 at para 54 (emphasis added).

[133] *Ibid.* at para 130 (emphasis added).

maintaining that Ms. Gosselin was not harmed by her experience of poverty under the Québec social assistance regime. L'Heureux-Dubé J.'s idea of judgment has closer ties to impartiality achieved through engagement with other perspectives, rather than isolation from them.

In these passages, neither judge is talking explicitly about judicial notice. However, in my view, the doctrine of judicial notice helps us see that impartiality, particularly in the context of constitutional law and the broad social claims of anti-poverty litigation, requires judges to "notice" things about the world, as well as to maintain a level of distance and disinterest. In this Chapter, I will argue that judicial notice should be understood as a tool to allow judges to achieve impartiality in this way. When impartiality is practised through enlargement of mind, this in turn requires that judges use notice to engage with the perspectives of others. I will demonstrate that this approach has roots in Canadian law. In particular, I will argue that the concept of impartiality and the obligation to provide reasons are legal concepts that ground legitimacy in the importance of reflecting on the perspectives of others. These legal principles suggest that when judges fulfill their duty to give reasons, and to give impartial reasons, this duty is also related to acquiring knowledge about the people who will be bound by the decision.

This approach acquires a particular urgency when judges are making constitutional decisions about poverty. These kinds of decisions have such broad, public interest implications, that the duty to consider the perspectives of others acquires the utmost importance. I will argue that the legitimacy of legal judgments about the constitutional

implications of poverty would be enhanced, indeed transformed, by a commitment to "knowledge of others" as an element of judicial legitimacy. Judicial notice provides a framework for understanding how this can be done.

Impartiality and the Perspectives of Others

The obligation to inquire about others and to notice this information is reflected in the concept of judicial impartiality. The Supreme Court of Canada addressed this idea quite directly in *R. v. S.(R.D.).*[134] In that case, the Court was asked to decide whether Judge Corrine Sparks of the Nova Scotia Provincial Court had raised a reasonable apprehension of bias through the comments she made upon acquitting the accused. The accused in that case was a black male youth, who was charged with interfering with the arrest of another black male youth in Halifax. The arresting police officer was a white man. The case turned on the credibility of the police officer and the accused youth. Judge Sparks preferred the testimony of the youth, and acquitted him.

In response to a rhetorical question from the Crown implying that a police officer would have no reason to mislead the court, Judge Sparks made several comments. She said:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who

[134] *R.D.S.*, *supra* note 27.

> overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit. [135]

The Crown appealed the young man's acquittal, and alleged that Judge Sparks' comments raised a reasonable apprehension that she was biased. Though this fact was notably absent from any discussion by most judges, many commentators have noted that Judge Sparks is also black, indeed at the time of the *R.D.S.* case, the only black female judge in Canada.[136] The case was appealed to the Supreme Court of Canada, which required the Court to consider head-on the nature of impartiality.

The Court was divided in complex ways, with a majority decision authored by Justice Cory, and a concurring judgment co-authored by Justices McLachlin and L'Heureux-Dubé. Justice Major wrote a dissenting judgment. However, the majority of the Supreme Court of Canada endorsed this description of judging in a multicultural society:

> Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.[137]

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[135] *Ibid.* at para. 4.

[136] Christine Boyle, Brenna Bhandar, Constance Backhouse, Marilyn MacCrimmon & Audrey Kobayashi, "R. v. R.D.S.: An Editor's Forum" (1998) 10 Canadian Journal of Women and the Law 159.

[137] *R.D.S., supra* note 27 at para. 95, Cory J.

This passage indicates that the court's understanding of impartiality is inherently tied to the diverse perspectives of community members. If judicial impartiality requires that the judgment appear to be fair to "Canadians of every race, religion, nationality and ethnic origin," this requires that judges have some notion of what might appear to be fair from those varied perspectives. Judges can only avoid creating a reasonable apprehension of bias if they have some knowledge of the people who will be affected by their judgment, and how they will perceive the judge's conduct.

McLachlin and L'Heureux-Dubé JJ. agreed with the description above, but also went further in their analysis of impartiality. They held:

> ...notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all parties before them.[138]

These descriptions of impartiality, particularly the one expressed by McLachlin and L'Heureux-Dubé J.J., are related to the idea of the enlarged mentality, because they tie impartial (and therefore legitimate) legal judgment to the ability to take into account the perspectives of those who come before the court. Following from this, the notion of impartiality also supports an obligation on the part of judges to *discover* the perspectives they must take into account. Judicial notice is one mechanism to facilitate and regulate this process.

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[138] *Ibid.* at para. 40, McLachlin & L'Heureux-Dubé J.J.(dissenting).

The *R.D.S.* case itself was not decided using the framework of judicial notice. Rather, the issue was whether Sparks J. had raised a reasonable apprehension that she was biased when she made reference to the racial dynamics in her community. However, another way to understand what occurred would be to describe Sparks J. as taking judicial notice of the existence of racism in Halifax. Sparks J. would have gained knowledge of this social framework fact in part through her own experience as a judge who is a member of the African Canadian community in Halifax, and the mismatch between her common sense and the common sense of other judges reviewing her decision is striking. I will say more about this kind of issue in Chapter 4, when I explore the connections between common sense and actual communities. However, in relation to impartiality, a key element of the *R.D.S.* decision of the Supreme Court is that the legitimacy of common sense knowledge must be tested against the knowledge of the reasonable and well-informed member of the relevant community; judges of all social backgrounds should *seek out* and take judicial notice of information that assists them to meet this standard.

Inquiry and the Duty to give Reasons

The obligation to notice information about others in order to support impartial judgment also arises from the law on the duty to give reasons. In the case *Baker v. Canada (Minister of Citizenship and Immigration)*,[139] the Supreme Court of Canada discussed some of the principles that link reason-giving in general with procedural fairness.

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[139] *Baker v. Canada,* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, ["*Baker*"].

Writing for the court on this issue, L'Heureux-Dubé J. wrote:

> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review…Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given…[140]

L'Heureux-Dubé also raised some concerns about courts requiring administrative decision makers to provide reasons,[141] but she concluded that there are some contexts in which fairness will require that a person have access to the reasons behind a decision that affects their fundamental interests.

The Court specifically considered the obligation of judges to provide reasons in *R. v. Sheppard*.[142] In that case, Binnie J., writing for the court, revised earlier approaches, which declined to state a general obligation on judges to provide reasons. In *Sheppard*, Binnie J. engaged in a contextual analysis similar to the one endorsed in *Baker*, to hold that the duty to provide reasons will emerge in certain circumstances, particularly where important rights and interests are at stake.[143] Binnie J. outlined a theoretical approach to this issue, in which accountability to the general public played an important role. He held

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[140] *Ibid.* at para. 39, (citations omitted).

[141] *Ibid.* at para. 40.

[142] *R. v. Sheppard*, [2002] 1 S.C.R. 869, 210 D.L.R. (4th) 608, ["*Sheppard*"].

[143] *Ibid.*

that the provision of public reasons is an inherent part of a judge's role, connected to the discharge of the responsibilities of the office.[144] He wrote:

> At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges.[145]

And at a later paragraph:

> Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be seen to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.[146]

These passages reveal that a key rationale for the duty to provide reasons is public accountability. Binnie J. is clear that a judge's *justification* for her or his decision is important for the legitimacy of that decision. This justification must be public, it must be accessible, and it must account not only to the parties before the court, but to the public at large.

The idea that reason-giving is essential for public accountability has important links to the challenge of judging in a diverse society. For example, in her work on public

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[144] *Ibid.* at para. 55.

[145] *Ibid.* at para. 5.

[146] *Ibid.* at para. 15.

deliberation in contemporary democracies, Iris Marion Young brings the idea of *inclusion* to the centre of the analysis of reasons. Inclusion means that a democratic decision will be legitimate only if all those affected by it are included in the process of deliberation.[147] Young argues that the concept of inclusion is importantly bound up with political equality. She argues that democracy means that all those affected by a decision should not only be included in deliberation, but included on equal terms.[148] She argues:

> Inclusion is thus an important principle of deliberative democracy because it expands the meaning of reciprocity and accountability in public. It is not simply that deliberators should have reasons that others can accept but that they must explicitly address the others whom they aim to persuade, and listen to their claims.[149]

The idea that legitimacy is tied to a public exchange of reasons generates an obligation on the part of citizens to get to know one another. The principles of publicity and inclusion in particular provide significant grounds for this obligation. Seyla Benhabib speaks to this obligation to inquire when she writes:

> When presenting their point of view and position to others, individuals must support them by articulating good reasons in a public context to their co-deliberators. This process of articulating good reasons in public forces the individual to think of what would count as a good reason for all others involved.[150]

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[147] Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) at 23.

[148] *Ibid.* at 23.

[149] Iris Marion Young, "Justice, Inclusion, and Deliberative Democracy" in Stephen Macedo ed., *Deliberative Politics: Essays on Democracy and Disagreement* (New York: Oxford University Press, 1999) 151-158 at 158.

[150] Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy" in Fred D'Agostino & Gerald F. Gaus eds., *Public Reason* (Aldershot, UK: Ashgate, 1998) 97-124 at 99.

Simply put, in order to fulfill the requirements of democratic deliberation, I must know enough about you to know how I might justify a decision to you. I must know enough about your perspective, priorities, etc. to think about what kinds of reasons might be acceptable to you. This interpretation of democratic deliberation places a duty on me to inquire about you, and to listen when you express yourself. Similarly, I can expect of my fellow citizens that they will listen when I express myself, and engage with my views in a way that allows us to deliberate.

When a judge is asked to interpret the scope of the constitutional rights of people in poverty, the obligation to provide reasons is linked to these ideas about deliberation in a diverse society, because such a case invokes broad concerns about social relations and the role of government institutions in a democracy. While there are important differences between democratic and judicial deliberation, in this context there are also important similarities in the rationales for the legitimacy of a decision: In fulfilling their obligations to provide good reasons, citizens and judges must both attempt to provide reasons that can be evaluated by others. In both cases, reason giving is evaluated with reference to publicity. Just as legitimate democratic decisions come about through the exchange of reasons that publicly qualify, legitimate judicial decisions are related to reasons of a quality sufficient to allow the judged to judge the judges.

To illustrate this point, I return to the *Gosselin* decision. A fundamental issue before the Court in *Gosselin* was how to characterize the impact of the regulation. As noted above, the judges writing the majority decision concluded that there was insufficient evidence

provided by Ms. Gosselin to determine that the regulation had a detrimental impact on her. But in evaluating the overall impact of the regulation, the majority also took into account that the government's aim in introducing the regulation was to provide young people with an extra incentive to become employed.

Writing for the majority of the court on this issue, McLachlin C.J.C. held:

> The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order eventually to integrate into the work force and become self-sufficient. This policy reflects the practical wisdom of the old Chinese proverb: "Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime." This was not a denial of young people's dignity; it was an affirmation of their potential.
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> Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment and its potentially devastating social and psychological consequences above and beyond the short-term loss of income.[151]

This finding played a crucial role in the majority's ultimate conclusion that the regulation was constitutionally appropriate.

In her case comment on *Gosselin*, Gwen Brodsky sums up the inadequacies of the majority's reasoning when she says:

> For an individual who is homeless or hungry, the fact that the government has decided to turn a "blind eye" because of what it thinks of as long-term emancipatory objectives is cold comfort.[152]

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[151] *Gosselin*, *supra* note 5 at paras. 42-43.

[152] Brodsky, *supra* note 6 at 213, quoting "blind eye" from the dissenting judgment of Arbour J.

Indeed, it is difficult to imagine how any person living in poverty could reasonably accept this justification. This compromises the legitimating effect of the reasons.

Recall Binnie J.'s statement that courts "can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public…" While Binnie J. was speaking in that moment about the requirement for reasons *at all*, the principle on which this argument is based also supports a more substantive meaning for accessibility and transparency, which I argue is lacking in the majority's decision in *Gosselin*. Similarly, recall the interpretation of impartiality described in *R.D.S.*, which is essentially tied to engaging with the perspectives of others. The reasons offered by the majority in *Gosselin* reflect a failure to fully achieve impartiality in that sense.

The significance of these failures is made greater in light of the role of the court in this context: Louise Gosselin and other impoverished Canadians have turned to the courts to uphold their basic rights in a political context in which they have been marginalized. This heightens the court's role as an institution of democracy, and raises the stakes for judicial deliberation.

Judicial Notice and the Obligation to Inquire

The norms of judicial impartiality as well as the duty to give reasons reflect the idea that judges do not approach their task entirely as passive recipients of information presented by the parties. Contrary to Morgan, who argued that judges and juries have no authority

or capacity to investigate facts,[153] norms of impartiality and reason-giving do add a more active and inquisitive element to practices of judging.

This picture of the judging process relates well to the idea of the enlarged mentality. When judges decide impartially, they engage with the perspectives of others. In order to do this, they need access to information that can contribute to an understanding of how the parties and larger groups in society relate to the legal question under consideration. Judicial notice provides a structure through which judges can seek out this information. Particularly if judicial notice is motivated by upholding the integrity of the legal system in the way advocated in Chapter 1, the doctrine in fact obligates judges to approach their task in this way.

This approach to judicial notice and to practices of judgment played an important role in the case *R. v. Hamilton and Mason*, and the disagreements between the trial and appellate judges.[154] *Hamilton* was a sentencing decision for two women who pled guilty to charges of importing cocaine. The women had acted as couriers or "mules," swallowing pellets of cocaine for the purpose of smuggling it from Jamaica to Canada. Both Ms. Hamilton and Ms. Mason were low income Jamaican-Canadian single mothers.[155]

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[153] Morgan, *supra* note 29 at 271.

[154] *R. v. Hamilton and Mason* (2003), 172 C.C.C. (3d) 114, 8 C.R. (6th) 215, (Ont. Sup. Ct. J.) ["*Hamilton* SCJ"]; *R. v. Hamilton and Mason* (2004), 241 D.L.R. (4th) 490, 186 C.C.C. (3d) 129 (Ont. C.A.), ["*Hamilton* CA"].

[155] *Hamilton* SCJ, *ibid.* at paras. 1-2, 53-55, 61-65.

In determining the appropriate sentences, Hill J. of the Ontario Superior Court of Justice took into account a broad range of factual materials not originally presented by either party. These included materials about the disproportionate incarceration of black women in Canada,[156] the disproportionate number of black women who were charged with cocaine importing in Brampton, Ontario,[157] and the existence of social inequalities based on race, gender and income that could affect the offenders and their role in the offences. Most of this information was based in statistical reports and studies of various kinds; however, some of it was based on his own experiences as a judge. For example, he compared the proportion of black women he saw appear before him charged with cocaine importing with the proportion of black women he saw in other parts of the community, such as in shopping malls.[158] While carefully limiting the potential use of such information,[159] he did take it into account.

In summarizing his approach to the task of sentencing, Hill J. wrote:

> [T]he purposes and principles of sentencing and the exercise of sentencing discretion in accordance with *Charter* values commands consideration of systemic factors in this case insofar as they are related to the commission of the offences for which the accused have been convicted. This is the essence of equity and individualized sentencing.[160]

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[156] *Ibid.* at paras. 87-101.

[157] *Ibid.* at paras. 102-105.

[158] *Ibid.* at para. 102.

[159] *Ibid.* at para. 104.

[160] *Ibid.* at para. 186.

At a later paragraph, Hill J. summarized his observations about the role of systemic factors in the sentencing of black, poor, female cocaine importers:

> Offenders like those before the court are subject to both the systemic economic inequality of women caring on their own for young children and the compounding disadvantage of systemic racism securing their poverty status. These individuals, almost inevitably without a prior criminal record, are in turn conscripted by the drug distribution hierarchy targetting their vulnerability. Poor, then exploited in their poverty, these women when captured and convicted have been subjected to severe sentences perpetuating their position of disadvantage while effectively orphaning their young children for a period of time.[161]

On the basis of these findings, as well as others, Hill J. held that it was appropriate to mitigate the responsibility of both women based on systemic factors. Hill J. held that the offenders' status as poor black single mothers in Ontario made them particularly vulnerable to exploitation by drug traffickers. He stated:

> In my view, systemic and background factors, identified in this case with perhaps greater clarity than the record in the *Borde* case, should logically be relevant to mitigate the penal consequences for cocaine importers conscripted as couriers.[162]

Hill J. imposed conditional sentences on both offenders.[163]

The Crown appealed this decision, and while the Ontario Court of Appeal declined to alter the sentences, Doherty J.A. strongly criticized Hill J. for his overall approach, and held that he had erred by stepping outside his proper role:

> As difficult as the determination of a fit sentence can be, that process has a

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[161] *Ibid.* at para. 198.

[162] *Ibid.* at para. 224.

[163] *Ibid.* at paras. 235-236.

> narrow focus. It aims at imposing a sentence that reflects the circumstances of the *specific* offence and the attributes of the *specific* offender. Sentencing is not based on group characteristics, but on the facts relating to the *specific* offence and *specific* offender as revealed by the evidence adduced in the proceedings. A sentencing proceeding is also not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or "make up" for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.
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> In the two sentences under appeal, the trial judge lost that narrow focus. He expanded the sentencing proceedings to include broad societal issues that were not raised by the parties. A proceeding that was intended to determine fit sentences for two *specific* offenders who committed two *specific* crimes became an inquiry by the trial judge into much broader and more complex issues. In conducting this inquiry, the trial judge stepped outside of the proper role of a judge on sentencing and ultimately imposed sentences that were inconsistent with the statutory principles of sentencing and binding authorities from this court.[164]

Thus, Doherty J.A. found that, despite having conducted the hearings with "scrupulous" fairness,[165] (including allowing the parties to make submissions on all points before he took notice of them) Hill J. had breached his duty to be an impartial adjudicator when he sought and relied on information outside of that presented by the parties to the extent that he did.

Doherty J.A. also expressed specific concern with Hill J.'s use of information about systemic racism, poverty and sexism to make decisions in this particular case. Doherty J.A. wrote:

> The second problem arising from the trial judge's approach is that it produced a fundamental disconnect between the case on sentencing presented by counsel for the respondents and the case of the paradigmatic

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[164] *Hamilton* CA, *supra* note 154 at paras. 2-3, (emphasis in original).

[165] *Ibid.* at para. 72.

> cocaine courier constructed by the trial judge. From the time he first introduced race and gender into the proceedings, the trial judge spoke in terms of poor black single women who were "targeted" and "conscripted" by drug overseers to act as couriers. The trial judge referred to these couriers as "virtue-tested" by drug overseers and as living "in the despair of poverty". The trial judge also described these couriers as using the small compensation they received from the drug overseers to pay rent, feed children, and support a subsistence level-existence.
>
> Counsel for the respondents chose to provide next to no information about the respondents' involvement in these crimes. Ms. Hamilton indicated she acted out of financial need. Ms. Mason offered no explanation. There was no evidence that these respondents were conscripted, virtue-tested, or paid minimal compensation, nor was there evidence that such compensation was used to pay for the necessaries of life. The reasons for sentence indicate to me that the trial judge based his sentences more on his concept of the typical drug courier than on the evidence pertaining to these two individuals.[166]

These passages from Doherty J.A.'s judgment reflect concerns going beyond the question of *how* information is brought into the judging process, extending to the proper role of social context information and the meaning of factual generalizations in legal reasoning. However, these concerns relate to judicial notice because Doherty J.A. emphasized the fact that the facts noticed by Hill J. were not introduced by the parties or proven in evidence. There was "no evidence" to support Hill J.'s analysis. Doherty J.A. also specifically stated that the parties "chose" not to introduce this evidence, that if any of those facts applied to them, they "could have said so,"[167] and that placing this requirement on them worked no hardship.[168]

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[166] *Ibid.* at paras. 73-74.

[167] *Ibid.*. at para. 117.

[168] *Ibid.* at para. 118.

The description of the impartial judge provided by the Ontario Court of Appeal in *Hamilton* does not reflect the ideal of enlargement of mind. Rather than encouraging judges to embark on the struggle to become more broadly informed while still respecting the rights of adversarial parties, the judgment asks judges to refrain from exactly this kind of notice.[169]

The debate about the relationship between judicial notice and the requirements of impartiality has particular consequences in the context of legal judgments about poverty. Indeed, the disagreements between Hill J. and Doherty J.A. in *Hamilton* parallel in many respects the disagreements between L'Heureux-Dubé J. and McLachlin C.J.C. in *Gosselin*. For example, in *Hamilton*, Doherty J.A. agreed that both convicted women were poor, and that they had the responsibility of caring for their children. However, there was "no evidence" that their crimes were in any way related to their poverty.[170] In *Gosselin*, McLachlin C.J.C. recognized that the claimant lived at times on an amount of money equal to one-third of the amount the government considered suitable for subsistence. However, there was "no evidence" that this poverty constituted a detrimental affect.[171]

In both cases, the principles that animate judicial notice indicate that, insofar as these conclusions result from inadequacies in evidence, it is incumbent on the impartial judge

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[169] H. Archibald Kaiser, "Hamilton: A Regrettable Retrenchment by the Ontario Court of Appeal" (2004) 22 Criminal Reports (6th) 57.

[170] *Hamilton* CA, *supra* note 154 at para. 74.

[171] *Gosselin, supra* note 5 at paras. 46-47, 54.

to seek out information to make a fully informed decision, rather than determinedly deciding in a vacuum.

Further, after insisting that a lack of evidence prevents the Court from drawing any conclusions about the impact or consequences of poverty on the interpretation of the events and legislation in question, both Courts go on to propose alternative understandings of the impoverished individuals before the court. In *Gosselin*, McLachlin C.J.C. held, for example:

> The longer a young person stays on welfare, the more difficult it becomes to integrate into the work force at a later time. In this way, reliance on welfare can contribute to a vicious circle of inability to find work, despair, and increasingly dismal prospects.[172]

In *Hamilton*, Doherty J.A. stated:

> The respondents were in dire economic circumstances for two main reasons. First, they assumed the responsibilities of parenthood at a very early age thereby substantially limiting their economic and educational prospects. Second, at an almost equally young age, they were burdened with the full responsibility for raising young children when the fathers of their children abandoned them.[173]

These characterizations of poverty and the impoverished people before the courts (that is, that reliance on welfare can contribute to a vicious circle of unemployment, or that the women's poverty was caused by their assumption of parenting responsibilities) are not supported by evidence introduced and proven by the parties. Further, these conclusions are not supported by any information that the judges have explicitly identified through

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[172] *Ibid.* at para. 43.

[173] *Hamilton* CA., *supra* note 154 at para. 136.

the processes of judicial notice. Rather, they appear to emerge from the judges' "common sense," and are not subject to anywhere near the kind of scrutiny or burden of proof that the courts purport to impose on the litigants and offenders. This is judicial notice exercised *without* attention to the underlying values of impartiality, such as equality and the integrity of the legal system.

Constitutional values, including equality, create parameters on how judicial notice can be exercised if it is to work in the service of impartiality. This requires judges to undertake the difficult project of *seeking out* information about impoverished litigants when they come before the courts. It also requires judges to engage in careful self-reflection when some propositions about poverty seem to easily create common sense explanatory frameworks.

The duty to seek out information means that judicial notice of non-adjudicative facts must be based on something, and the judge must seek out the information upon which to base the notice, or reject it. The obligation to seek out this information is especially relevant in the context of anti-poverty litigation, which attempts to bring the perspective and experiences of marginalized people into the court's scope of vision. This obligation gains special weight in this context because of the imbalanced social relations that are manifested in the courtroom. In essence, to reject this obligation is to allow judges to indulge in the "right not to know,"[174] entrenching their privileged perspective on the law.

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[174] Bruce Feldthusen, "The Gender Wars: 'Where the Boys Are'" (1990) 4 Canadian Journal of Women and the Law 66.

Invoking judicial notice can work in the service of impartiality when attended by this kind of self-reflection. When judges notice more about the world in order to remedy their own partiality, this strengthens the legitimacy of their judgments.

CHAPTER FOUR – Community Sense

Arendt argues that an individual, subjective decision or feeling can only be transformed into a judgment if it can be communicated.[175] That is, in order to imagine how I might justify my judgment to others, I must have some sense of how I could communicate it to them, and on what terms they might understand or agree with me. These terms are called the *sensus communis*, or community sense. Arendt writes:

> This *sensus communis* is what judgment appeals to in everyone, and it is this possible appeal that gives judgments their special validity. The it-pleases-or-displeases me, which as a feeling seems so utterly private and noncommunicative, is actually rooted in this community sense and is therefore open to communication once it has been transformed by reflection, which takes all others and their feelings into account.... [O]ne can never compel anyone to agree with one's judgments...one can only "woo" or "court" the agreement of everyone else. And in this persuasive activity one actually appeals to the "community sense." In other words, when one judges, one judges as a member of a community.[176]

Thus, the community sense is the link between an individual feeling or evaluation, and a valid judgment. In Arendt's thought, the idea of the community sense is very abstract. In contrast, in the model of judgment developed by Nedelsky, the community sense, in turn, is linked to actual communities. Given that the community sense is integral to generating *validity* in Arendt's view, there are important questions about this community: Who makes up the community? Whose shared sense provides the terms for communication? How do judges refer to the multiple communities of which they are a part? How is the "sense" of those communities determined?

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[175] Arendt *Lectures*, *supra* note 19 at 69, 72.

[176] *Ibid.* at 72.

These questions about the community sense and its role in judgment relate to questions about "common sense" and its role in legal judgment. Just as the community sense forms the background against which a valid judgment can be made, the use of "common sense," personal experience and cultural context form the background against which the impartiality and legitimacy of judicial decision-making must be evaluated.[177]

The doctrine of judicial notice plays an important role in this regard, because it is one of the ways in which judges' use of common sense and context information is regulated.[178] Further, attention to the content of common sense and the communities for whom that background makes sense buttresses the public accountability dimension of reason-giving, because it allows judges to know how their reasons can best be communicated to the people affected.

In this Chapter, I will describe how the idea of the enlarged mentality as developed by Nedelsky creates a link between the validity of judgment and the communities that play some role in generating the judgment. Second, I will draw out some of the risks associated with this approach, specifically the strong reliance on the imagination of the judge. Third, I will explore how judicial notice can operate both to support and to undermine "common sense" notions held by a judge. I argue that judicial notice thereby

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[177] Beiner & Nedelsky, *supra* note 22 at xi.

[178] Marilyn T. MacCrimmon, "What is 'Common' About Common Sense: Cautionary Tales for Travelers Crossing Interdisciplinary Boundaries" (2001) 22 Cardozo Law Review 1433; Boyle & MacCrimmon, *supra* note 79.

supports a self-reflective practice of judgment that can expand the role and meaning of social context information in constitutional interpretation.

Impartiality and the Community Sense

In explaining the relevance of Arendt's theory to legal judgment, Ronald Beiner and Jennifer Nedelsky note that "the question of whose shared sense should be the reference point for judicial decision making is at the heart of the question of judicial legitimacy."[179] If, in making a judgment, I appeal to a "community sense" and imagine justifying my decision to others, it matters greatly who those others are.

Approaching judicial decision making from this perspective requires us to consider the relationship between judges, their communities, and their practices of judgment. Nedelsky states the questions in these terms:

> To understand judicial impartiality we must ask who judges are, and with whom they imagine themselves to be in conversation as they make their judgments. Whom do they imagine persuading and on whom do they make claims of agreement?[180]

It is important that, for Arendt, the community whose "sense" is referred to in judgment is co-extensive with the community for whom the judgment may be valid. Arendt writes that "claims to validity can never extend further than the others in whose place the

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[179] Beiner & Nedelsky, *supra* note 22 at xi.

[180] Nedelsky, "Embodied Diversity," *supra* note 13 at 107.

judging person has put himself for his considerations."[181] In the context of legal judgment, this creates a link between the judge's use of common sense, and the identities of the people for whom the judgment is valid.

One community to whom judges do refer in coming to conclusions is their community of judicial peers and the legal profession.[182] It makes sense that judges would consider the perspectives of others in the legal community, because they know their judgments will be scrutinized by that community. In this way, they do engage in reflection and justification as part of the judging process. Judges are in actual and imagined conversation within this community when they make decisions. This conversation is supported by institutional mechanisms like appeal structures and the doctrine of stare decisis as well as the practical ways that judges and other legal professionals interact and share mutual frameworks for debate.[183]

However, this is insufficient to achieve impartiality. The community of judging others is too homogenous to provide an adequate perspective on questions of justice. As noted by Cory, J. in *R.D.S.*, the Canadian community – that is, the community for whom judicial decisions must be valid – is distinctly *not* homogenous.

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[181] Nedelsky, "Relational Autonomy," *supra* note 13 at 116.

[182] Nedelsky, "Relational Autonomy," *supra* note 13 at 114.

[183] MacCrimmon, *supra* note 178 at 1448.

The particularity and relative uniformity of the community of judges is made very evident in the context of judgments about poverty. There is a dramatic mismatch in the class, race and gender composition of the Canadian bench, as compared with the population of Canadians in poverty.[184]

Indeed, the judiciary and the legal profession in Canada is a homogenous community relative to the population of Canada as a whole, and is disproportionately composed of certain social groups. A study in 2000 showed that approximately 20% of Canadian judges were women at that time.[185] In 1997, the Honourable Maryka Omatsu estimated that only 2% of Canadian judges were members of visible minorities, and identified herself as the first and only East Asian Canadian woman judge.[186] Assembling statistics from a 1990 study, Omatsu described just how socially homogenous the Canadian judiciary is:

> "...judges as a group are married, overwhelmingly male, of British or French ancestry, in their mid-fifties, Judeo-Christian, born into the middle or upper-middle classes, were successful lawyers, and had limited trial experience."[187]

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[184] See text accompanying notes 186-188.

[185] Richard F. Devlin, A. Wayne MacKay & Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38:3 Alberta Law Review 734 at 761.

[186] Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 Canadian Journal of Women and the Law 1 at 4.

[187] *Ibid.* at 3-4.

In addition, once they become judges, individuals by definition enjoy a relatively high income and esteemed social role, making it even more difficult to investigate the meaning of social class in judicial practices.[188]

This information about the demographics of the Canadian judiciary indicates that if judges limit their practice of "enlarged mentality" to the community sense of their fellow judges, their perspective will be narrow indeed. If the validity of a judgment is tied to the community to whom judges imaginatively justify their decisions, many judicial decisions are too partial to apply validly to people in poverty.

This argument reflects the idea that a judge's community sense should be expanded to include the perspectives of those who will be affected by the judgment. Further, judges should specifically refer to the experiences of oppressed and marginalized people. In her speech on "multiple consciousness as jurisprudential method," Mari J. Matsuda argues:

> The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed. That world is accessible to all of us. We should know it in its concrete particulars. We should know of our sister carrying buckets of water up five flights of stairs in a welfare hotel, our sister trembling at 3a.m. in a shelter for battered women, our sisters holding bloodied children in their arms in Cape Town, on the West Bank, and in Nicaragua. The jurisprudence of outsiders teaches that these details and the emotions they evoke are relevant and important as we set out on the road to justice. These details are accessible to all of us, of all genders and colors. We can choose to know the lives of others by reading, studying, listening, and venturing into different places.[189]

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[188] Joan Brockman, "Aspirations and Appointments to the Judiciary" (2003) 15 Canadian Journal of Women and the Law 138 at 163.

[189] Mari J. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rights Law Reporter 7 at 9.

Matsuda is making an argument that reaches beyond reconstructing judicial impartiality. However, the heart of Matsuda's argument is that when attempting to broaden their understanding of the world, members of the legal community should look first to the experiences of oppressed people. When building a common sense on which to base impartial judgment, we must include in the community everyone who will be affected by the judgment, with particular care to include those who are most often marginalized.

Imagination and Dialogue

In her writing on judgment, Arendt describes the process of developing an enlarged mentality as essentially dependant on the faculty of imagination. One *imagines* how one would judge from the perspectives of others. This element of the enlarged mentality has been criticized because it is not necessarily concerned with seeking out the perspectives of *actual others*.

For example, although they disagree on many points, Seyla Benhabib and Iris Young both argue that the best interpretation of the "enlarged mentality" is one in which this process is realized through actual dialogue. When discussing political morality, Benhabib writes:

> There is thus a fundamental link between a civic culture of public participation and the moral quality of enlarged thought. Enlarged thought, which morally obligates us to think from the standpoint of everyone else, politically requires the creation of institutions and practices whereby the voice and the perspective of others, often unknown to us, can become

> expressed in their own right.[190]

Young takes the requirement for actual dialogue a step further to argue that dialogue is essential because it allows people to understand collective social structures, in addition to the narratives of each individual person. Young argues:

> We must make our moral and political judgments, then, not only by taking account of one another's interests and perspectives, but also by considering the collective social processes and relationships that lie between us and which we have come to know together by discussing the world.[191]

In the context of legal judgment, the question of exactly *how* the perspectives of others should come to bear on judgment is extremely important, with direct practical consequences. It raises questions about the meaning of the law of standing, the availability of state-funded legal counsel, and the extent to which a judge has the authority or obligation to inquire beyond the submissions of counsel.

I argue with Benhabib and Young that the *actual* presence and voice of community members will be essential to enlarged thought and valid judgment. Therefore, in the context of anti-poverty litigation, making the views of impoverished litigants present to the court will be a priority.

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[190] Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Hannah Arendt's Thought" in Beiner & Nedelsky, *supra* note 13, 183-204 at 201.

[191] Iris Marion Young, "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought" in Beiner & Nedelsky, *supra* note 13, 205 at 224-225.

This actual dialogue cannot be established through judicial notice. However, prioritizing the perspectives of marginalized communities does structure judicial notice because it creates an obligation for judges to be self-reflective about their place in the community and their knowledge about the world. Judicial notice does not facilitate actual dialogue, but it may, for example, call on judges to consult empirical studies about social and economic conditions in Canada. Judicial notice might also require judges to be wary of too much certainty in "common-sense" factual assertions.

The common sense that forms the background to legal judgment is formed by similarities in training.[192] "Similarities in training" in this context could simply mean shared life experience. However, in the context of legal judgment, "training" can have a more explicit reference to the schooling and practice requirements of the legal profession. Similarities in training generate a shared common sense, but at the same time "training" is what can open up a person to self-awareness and alternative perspectives. This view is optimistic that people can *learn* to engage with an enlarged mentality when they judge.

In her application of Arendt's thought to legal judgment, Nedelsky also points to an important role for training and education in generating impartial judgment.[193] She argues that exercising an enlarged mentality requires practice and experience. For example, Nedelsky asserts that the more diverse our universities and law schools are, the more experience we will have in trying to justify our judgments to others that are not like

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[192] Susan G. Drummond, "Judicial Notice: The Very Texture of Legal Reasoning" (2000) 15:1 Canadian Journal of Law and Society 1-37.

[193] Nedelsky, "Embodied Diversity," *supra* note 13.

ourselves in every way. If this diversity is supported by institutional capacity and a culture of respect, judges will become accustomed to the idea that their perspective is partial, and will develop skills in attempting to understand the perspectives of others. This argument supports measures that increase the diversity of the bench and the legal profession as a whole. Nedelsky writes:

> [I]f the faculties and student bodies of law schools, the practicing bar as well as the judiciary actually reflected the full diversity of society, then every judge would have had long experience in exercising judgment, through the process of trying to persuade (in imagination and actual dialogue) people from a variety of backgrounds and perspectives. This would better prepare judges for judging situations about which they had no first- or even second-hand knowledge. It would vastly decrease the current likelihood of a single set of very limited perspectives determining the judgment.[194]

Judicial Notice of and Against Common Sense

This discussion of how impartiality can relate to actual communities draws attention to the different ways that judicial notice can function in relation to common sense. First, judicial notice can work to uphold and reinforce common sense. Indeed, this is one way to understand what Morgan had in mind when he spoke about the integrity of the legal system – judicial notice allows judges to make sure the legal system does not produce results that are contrary to what everyone agrees is plainly the case. This kind of judicial notice is based on what is indisputable, notorious, and known in the relevant community. Second, judicial notice can operate to displace or unseat common sense, where that common sense conflicts with an indisputable fact that can be accessed from a source of accepted accuracy.

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[194] *Ibid.* at 108.

For judicial notice *of* common sense, the need to identify the relevant community is clear. This is reflected in the law on judicial notice in Canada. For example, in *R. v. Potts*, the Ontario Court of Appeal considered the appropriateness of the trial judge's notice that Colonel By Drive in the city of Ottawa was the "property of the National Capital Commission." The Court of Appeal upheld the trial judge's notice, emphasizing that community notoriety of a fact can only be known by someone actually in that community – which may or may not include the judge:

> Where judicial notice of some matter is taken by a trial court, the trier of the facts (whether judge alone or jury) may or may not share the knowledge that is said to be common knowledge in the community or in a particular class of the community. If it happens that the court does share a personal knowledge of that which is commonly known in the community, well and good. If not, however, the matter may still be judicially noticed, but the court is put on its enquiry as to whether the matter is or is not one which may properly be made part of the case before it without formal proof thereof.[195]

The Supreme Court of Canada also addressed this question in *R.D.S.* McLachlin and L'Heureux-Dubé JJ. took the importance of the community to a further level, giving specific community membership and expertise to the "reasonable person" in law:

> The reasonable person, identified by de Grandpré J. in *Committee for Justice and Liberty*, supra, is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions. These are matters of which judicial notice may be taken. [...]

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[195] *Potts, supra* note 83 at para. 21.

> The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: Royal Commission on the Donald Marshall Jr. Prosecution (1989); *R. v. Smith* reflex, (1991), 109 N.S.R. (2d) 394 (Co. Ct.). The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society.[196]

Here, McLachlin and L'Heureux-Dubé JJ. refer to the *Charter* and to the history of social relations in Canada to establish criteria for deciding what community should be the basis for judicial notice when judges take notice of notorious facts, or of the relevant community sense. In her comment on the *R.D.S.* case, Marilyn MacCrimmon points out that this judgment "provided guidelines for distinguishing between legitimate and illegitimate background knowledge by drawing on *Charter* rights and values and on the knowledge of the well-informed person in the community."[197] MacCrimmon further argues that "grounding legitimacy in the knowledge of the community also ensures that one aspect of legitimacy is that social context draws on empirical and other data available to the community."[198]

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[196] *R.D.S.*, *supra* note 27 at para. 46-47.

[197] Boyle *et al.*, *supra* note 136 at 188.

[198] *Ibid.* at 189.

This focus on empirical information also leads to the second way that judicial notice can operate in relation to the common sense of a community: judicial notice can work to displace common sense. The majority of judges in *R.D.S.* agreed that the reasonable person, against whom judicial impartiality will be measured, must be "informed."[199] This standard requires that judges too be well-informed in order to assure the impartiality of their decisions. As identified in *Potts* and *R.D.S.*, the common sense of the judge may, or may not, correspond with the common sense of the relevant community, and this obligates the judge to become informed. This process of noticing empirical information may serve to actually displace what the judge had previously assumed as part of her or his background knowledge.

Discussing this kind of phenomenon in her article on judicial notice, Justice Claire L'Heureux-Dubé writes:

> These fundamental facts comprise a prism of personal experience and understandings through which judges and jurors, as factfinders, both perceive and interpret that which is put before them. Not all factfinders, however, will perceive the same circumstances in the same way. Moreover, while the prism held by most factfinders may constitute a perfectly adequate analytical framework in most situations, in certain contexts it may not accord with reality, and may therefore impede rather than advance the quest to find facts in a way that is reflective of how people really experience the world. In cases such as these social framework evidence can play both a meaningful and a necessary role in re-aligning that prism with reality.[200]

Judicial notice of social frameworks can thus provide an important way for judges to be impartial, because it creates a method of evaluating and improving the background

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[199] *R.D.S.*, *supra* note 27.

[200] L'Heureux-Dubé, "Re-examining," *supra* note 2 at 559.

information against which decisions are made. It provides a way for judges to practise enlargement of mind.

Where, as Justice L'Heureux-Dubé describes, the prism held by the fact-finder does not accord with reality, there is a clash between "common sense" and social framework information. Another way to conceive of this clash is that there is a failure in consensus between communities. For example, in her examination of theoretical underpinnings for judicial notice, Susan Drummond argues that this lack of consensus can open up an avenue for appeal on the basis of judicial notice:

> One could argue at the appeal level that what was taken as a form of general legal reasoning was in fact a reflection of one particular legal sensibility. One could argue that a judge took something to be a universal feature of human reasoning when in fact it merely reflects a local understanding. One could argue that a judge has not determined matters in accord with the sense that is commonly held, that is, the sense of the relevant local community. One could argue that the judge took insufficient notice of the way that local history or geography or culture or common sense is in contention with his or her common sense. One could argue these and related things at the appeal level even though the judge never acknowledged – nor may indeed have been aware – that these were the background assumptions which enabled him or her to come to a determination on the foreground.[201]

Judicial notice thus calls for attention to communities, and provides an opportunity to appeal where that attention falters.

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[201] Drummond, *supra* note 192 at 11.

CONCLUSION

The Supreme Court of Canada's decision in *Gosselin* illustrates the significant rift that exists between constitutional interpretation in Canada and the empirical realities of poverty in Canada. The doctrine of judicial notice plays an interesting role in understanding this rift, as well as offering a possible way to bridge it.

Judicial notice requires judges to be actively attentive to the ways in which the basic values of the legal system structure their treatment of facts. The doctrine asks judges to reflect on the background information and common sense that they currently rely on, and to examine it critically through the lens of equality. The doctrine calls on judges to notice more about the world around them. Ultimately, the best interpretation of judicial notice requires notice of poverty.

The enlarged mentality theory of judgment helps us see why this interpretation puts judicial notice in the service of impartiality. The idea of the enlarged mentality shifts the requirements of impartiality to require an active and inquisitive posture on the part of the judge, as well as drawing attention to the importance of self-reflection in impartial judgment.

In this thesis, I have explored four facets of judicial notice that help build a model of the doctrine that is supportive of this kind of judging practice. First, the purpose of judicial notice should be understood as based in the fundamental values of the legal system. This

includes some values that do feature prominently in Canadian law on judicial notice, such as the right to a fair trial, efficiency and the need to prevent factual absurdities. However, it also includes some values that are relatively neglected in this respect, including equality and the need for the legal system to respond to a diverse social reality. These values are all implicated in upholding the integrity of the legal system, broadly understood. Judicial notice should regulate fact determination in accordance with these values. One consequence of this view is that judges will sometimes be obligated to notice things.

Second, judicial notice in the service of impartiality must be attentive to the different kinds of "facts" that could be subject to notice, and the criteria for notice that are appropriate in each case. In particular, it is important for the doctrine of judicial notice to provide meaningful guidelines for noticing non-adjudicative facts, whether they are general statistical statements describing a social phenomenon, or statements of valuation that blur the line between "facts" and norms of interpretation. Where judicial notice is understood to be a way of seeking the enlarged mentality, the principles that regulate notice of social frameworks and legislative facts cannot be the same standards of indisputability that tell judges when to notice an adjudicative fact. Rather, judges should have the authority and the obligation to do some independent investigation of social science studies, for example, to help determine the adequacy of the evidence before the court in situating the legal question, and to decide whether notice of further information is necessary.

Third, judicial notice requires an active posture on behalf of judges. The legitimacy of this posture is elaborated through the enlarged mentality theory of judgment. However, it also finds sources in other legal norms about the meaning of impartiality and the duty to give reasons. These legal principles show that in many contexts, it is necessary for judges to seek out sufficient information in order for their decisions to be non-biased and to account adequately to the public.

Finally, judicial notice requires judges to be actively attentive to the content of their own common sense, and to critically examine the source of their knowledge and intuitions. Where there is insufficient overlap between the common sense of the judges' communities and the communities that are before the court or will be affected by the judgment, judicial notice calls on judges to broaden their base of reference. Sometimes, this will require judges to decline to notice something, or to require parties to provide evidence about something that may have been taken for granted in the past. Other times, this will mean introducing information from outside the adversarial process, to supplement the materials provided by the parties.

In exploring these facets of judicial notice, I found Nedelsky's appropriation of Arendt to be a very useful resource for thinking about how notice of social context information can buttress the impartiality and legitimacy of judicial decision making. However, the enlarged mentality approach to judgment also poses significant risks for those who would put legal reasoning in the service of social justice.

For example, in an unpublished lecture on judgment, Hannah Arendt herself wrote:

> Suppose I look at a specific slum dwelling and I perceive in this particular building the general notion which it does not exhibit directly, the notion of poverty and misery. I arrive at this notion by representing to myself how I would feel if I had to live there, that is, I try to think in the place of the slum-dweller. The judgment I shall come up with will by no means necessarily be the same as that of the inhabitants, whom time and hopelessness may have dulled to the outrage of their condition, but it will become for my further judging of these matters an outstanding example to which I refer...Furthermore, while I take into account others when judging, this does not mean that I conform in my judgment to those of others, I still speak with my own voice and I do not count noses in order to arrive at what I think is right. But my judgment is no longer subjective either.[202]

Here, Arendt describes a process for incorporating the perspectives of people in poverty into the judgment process. In this passage, Arendt speaks directly to the question of how the enlarged mentality approach to judgment might work in judging poverty. Her description highlights the possibility of validity, but also raises important questions. Specifically, in this passage, Arendt explicitly allows the possibility that a poor person's views on poverty might be invalid specifically because of their experience of poverty; their poverty disqualifies them from valid judgment about their own situation.

For an anti-poverty advocate, this passage will be very troubling, and highlights the risks associated with staking so much on the imaginative capacity of judges. The idea that people in poverty cannot express valid judgments about poverty, or that the views of wealthier people are more impartial, finds echoes in the majority's decision in *Gosselin*. The doctrine of judicial notice, as I have described it in this thesis, invokes many of those

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[202] Quoted in Ronald Beiner, "Introduction," in Hannah Arendt, *Lectures on Kant's Political Philosophy*, Edited and with an Interpretive Essay by Ronald Beiner (Chicago: University of Chicago Press, 1992) at 107.

same risks by placing the judge's capacity for self-reflection so centrally in the fact determination process. The mismatch between the community knowledge of the judge and that of a person living in poverty is likely to be very large indeed. This mismatch is powerful, and while it can be useful to acknowledge the damaging effects of poverty and marginalization on a community's capacity for self-knowledge, it is not useful to overestimate the judicial capacity to comprehend the "true" meaning of other peoples' life circumstances.

However, there are three ways that the doctrine of judicial notice can move forward through these risks. First, the enlarged mentality as developed by Nedelsky requires attention to an actual community. In anti-poverty litigation, the relevant communities for evaluating facts will always include the communities of the litigants who have come to the court to assert their rights. The law of judicial notice supports this view, and provides a point of entry for reflection on how facts relate to communities. In contrast to Arendt's view that appears in the passage quoted above, Nedelsky, and the doctrine of judicial notice, orient us *towards* rather than away from the concrete communities that may be the subject of judgment.

Second, as a doctrine about how to deal with facts, judicial notice does not replace other legal mechanisms that may also support enlargement of mind, but which require the concrete presence and participation of the people affected. These would include measures such as state funded legal counsel, legal doctrines on standing, costs, and the right to introduce expert evidence. Even within the doctrine of judicial notice, decisions

about notice can be subject to appeal and can evolve over time. These factors reduce the opportunity for a judge to simply replace or discount the common sense of other people.

Finally, judicial notice, as an overarching approach to fact determination, provides a way to make this process more explicit. Judges do and will continue to rely on their own common sense and intuitions when they make decisions, and it is preferable that legal doctrines require this practice to be as transparent as possible. When judges are unaware of their resort to common sense information, it is more difficult for them to test its adequacy. Similarly, when claims by marginalized groups are rejected because of a gap in information that has not been filled by "evidence," constitutional law evolves according to things that may, or may not, be consistent with the underlying values of the legal system. When judicial notice takes its full role to facilitate enlarged mentality, the risks of judicial imagination and discretion are seen in heightened profile for debate.

This interpretation of judicial notice focuses on the ways in which judicial notice provides judges with a way to live up to the demanding standards of knowledge that are placed on their role. In order to adequately interpret the constitutional rights of poor and marginalized people in Canada, we do not expect judges to have knowledge only of relevant legal principles and rules. Impartiality does not allow judges to base their judgments on untested assumptions, stereotypes or in a vacuum of ignorance. Rather, we expect judges to grasp relevant empirical realities, and to take the steps that are necessary to avail themselves of the information that is needed to make sense of the law in context.

Appendix A: Examples of Judicial Notice in Canadian Law

Case	Subject of judicial notice	Noticed?	Quotes about judicial notice
Reference re Alberta Legislation, [1938] S.C.R. 100, 2 D.L.R. 81.	The proposed tax on banks would be prohibitive to the carrying on of banking business in Alberta. The rate in question was: "an annual rate of one-half of one per cent on the paid-up capital and one per cent upon the amount of the reserves as well as upon the amount of the undivided profits"	Yes	"In our opinion, it requires no demonstration to show that such a rate of taxation must be prohibitive in fact and must be known to the Alberta legislature to be prohibitive. It is our duty, as judges, to take judicial notice of facts which are known to intelligent persons generally; and any suggestion that the profits of banking as carried on in Canada could be such as to enable banks to pay taxes to the provinces of such magnitude, having regard to the other burdens, such as municipal rates, which are levied upon them in Canada, as well as the taxes paid in foreign countries, would be incontinently rejected by anybody possessing the most rudimentary acquaintance with affairs." (Duff, C.J.C. at para 90)
R. v. Potts (1982), 134 D.L.R. (3d) 227, 66 C.C.C. (2d) 219 (Ont. CA), leave to appeal refused by [1982] 1 S.C.R. xi.	Colonel By Drive in the city of Ottawa is the "property of the National Capital Commission."	Yes	"Where judicial notice of some matter is taken by a trial court, the trier of the facts (whether judge alone or jury) may or may not share the knowledge that is said to be common knowledge in the community or in a particular class of the community. If it happens that the court does share a personal knowledge of that which is commonly known in the community, well and good. If not, how ever, the matter may still be judicially noticed, but the court is put on its enquiry as to whether the matter is or is not one which may properly be made part of the case before it without formal proof thereof." (para. 21)
R. v. Edwards Books & Art Ltd. [1986] 2 S.C.R. 7, 35 D.L.R. (4th) 1.	Some religious groups have a weekly special day of worship that is not Saturday or Sunday.	Yes (in con-curring judgment)	"It is true that the evidence presented to the court regarding other religious groups was scanty, and that relating to Hindus unsatisfactory. But counsel during argument freely discussed other days of worship by other groups. Besides, I do not accept that in dealing with broad social and economic facts such as those involved here the court is necessarily bound to rely solely on those presented by counsel. The admonition in Oakes, supra, and other cases to present evidence in *Charter* cases does not remove from the courts the power, where it deems it expedient, to take judicial notice of broad social and

			economic facts and to take the necessary steps to inform itself about them. …There are, of course, dangers to judicial notice, but the alternatives in a case like this are to make an assumption without facts or to make a decision dependent on the evidence counsel has chosen to present." (La Forest J., concurring, at paras 228 and 229)
Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381, 2004 SCC 66.	The government of Newfoundland faced a severe fiscal crisis in the spring of 1991	Yes	"The purpose of judicial notice is not only to dispense with unnecessary proof but to avoid a situation where a court, on the evidence, reaches a factual conclusion which contradicts "readily accessible sources of indisputable accuracy", and which would therefore bring into question the accuracy of the court's own fact-finding processes. A finding on the evidence led by the parties, for example, that the Newfoundland deficit in 1988 was $5 million whereas anyone could ascertain from the public accounts that it was $120 million would create a serious anomaly." (at para. 57)
R. v. Hamilton and Mason (2004), 241 D.L.R. (4th) 490, 186 C.C.C. (3d) 129 (Ont. C.A.).	Poor black women in Ontario are victims of racism and sexism, and this makes them vulnerable to exploitation by drug dealers.	No (overturning trial judge's notice)	[from headnote] In particular, the trial judge held, based on materials he had produced and his own experience presiding in a court that dealt with many cases involving cocaine importation from Jamaica, that the respondents were the victims of systemic racial and gender bias. His conclusion that these biases contributed to the respondents' impoverished circumstances and made them particularly vulnerable to those who sought out persons to courier cocaine to Canada from Jamaica was not properly before the court, particularly as the trial judge then concluded that the systemic racial and gender bias played a role in the commission of the offences, a fact not adduced by the parties or otherwise proved.
R. v. Spence, [2005] 3 S.C.R. 458, 2005 SCC 71.	East Indian jurors might feel a "natural sympathy" for an assault victim of the same race.	No	"…the permissible scope of judicial notice should vary according to the nature of the issue under consideration. For example, more stringent proof may be called for of facts that are close to the center of the controversy between the parties (whether social, legislative or adjudicative) as distinguished from background facts at or near the periphery." (para. 60).

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